THE 1994 SURVEY OF FLORIDA LAW

SURVEYS OF FLORIDA LAW

Admiralty Law

Alternative Dispute Resolution

Construction Law

Environmental Law

Evidence

Juvenile Law

Labor and Employment Law

Property Law

UCC Article 9

FEATURE ARTICLE


NOTES AND COMMENTS

Sign or Perish: Will Florida Counties Ride the Wave of the Future and Allow Computer Animations in Criminal Trials?

He Who Seeks Equity Must Find the Court Which Does Equity: The Current Intersystemic Conflict

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I. INTRODUCTION

This article surveys opinions in maritime cases decided by the United States Supreme Court, the United States Court of Appeals for the Eleventh Circuit, and state and federal courts in Florida. The survey covers the period from July 1993 through July 1994.

II. UNITED STATES SUPREME COURT DECISIONS

A. Forum Non Conveniens

In American Dredging Co. v. Miller, the Supreme Court affirmed a decision by the Supreme Court of Louisiana in which the state court ruled that the doctrine of forum non conveniens was not available as a defense or as a means of dismissing an action in lawsuits brought in Louisiana state courts pursuant to the Jones Act. The state court’s decision was based upon a Louisiana statute which disallowed the defense in all cases arising under maritime law or the Jones Act. In American Dredging, the plaintiff, a resident of Mississippi, was injured while serving as a seaman on board a tugboat operated by the defendant in the Delaware River. The plaintiff brought suit under the Jones Act against his employer in the district court for the Parish of Orleans. Both the trial court and the intermediate appellate court ruled that, notwithstanding the provisions of the Louisiana statute, the

3. LA. CIV. CODE ANN. art. 123(c) (West 1993).
maritime doctrine of *forum non conveniens* applied in the case. After establishing in its opinion that the doctrine of *forum non conveniens* has "been given its earliest and most frequent expression in admiralty cases," the Court proceeded to hold that the refusal of a state to apply the maritime doctrine in a maritime lawsuit, brought pursuant to the savings to suitors clause, does not significantly affect a fundamental feature of general maritime law.

The Court conceded that its decision would create "disuniformity," but nevertheless held that the Louisiana statute prohibiting the application of *forum non conveniens* in maritime cases does not impede or impact "the proper harmony and uniformity" of admiralty law because the doctrine is nothing more than a "supervening venue provision." Being a venue provision, *forum non conveniens* is procedural and therefore has no effect on substantive maritime law. According to the Supreme Court, the doctrine is neither a legal principle nor a rule of law upon which those involved in maritime endeavors consider or rely upon in managing their enterprises. Thus, all state courts are now free to ignore the concept of *forum non conveniens* and the jurisprudence developing that doctrine in numerous maritime cases, and instead apply local concepts of the doctrine, if such concepts exist. Due deference to the wisdom of the Supreme Court notwithstanding, it is submitted that there are many in the maritime community (shipowners, protection and indemnity clubs, and insurance companies, to name but three) who indeed give due consideration to where they may be sued in the conduct of their national and international maritime affairs. It is believed that *American Dredging* will be read with surprise and puzzlement by maritime practitioners.

B. *Settling Multi-Party Maritime Actions*

Two decisions by the United States Supreme Court will have a very significant impact upon settlements made in multi-party maritime actions. In *McDermott, Inc. v. AmClyde*, the Court held that at trial the non-settling defendants would receive a credit representing the proportionate

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7. *Id.* (citing Southern Pac. Co. v. Jensen, 244 U.S. 205, 216 (1917)).
8. *Id.* at 988.
9. *Id.* at 988-89.
fault of the settling defendants. Where there is a partial settlement, the proportional fault of the settling defendants will be determined at trial. The remaining defendants will receive a credit against the total liability. The credit will represent the proportional fault of the settling defendants and not the amount of the settlement. For example, suppose that one of two defendants settles with the plaintiff for $100,000. At trial, it is determined that the loss sustained by the plaintiff was $1,000,000, and that the settling defendant was 50% at fault for the plaintiff's damages. The remaining defendant would receive a credit of $500,000 against the total liability of $1,000,000. In this example, one would say that the plaintiff made a poor settlement. But it works the other way around. If the plaintiff had received a $500,000 settlement, and the settling defendant had been found to be 10% at fault, the remaining defendant is liable for 90% of the total liability after deducting the 10% proportional fault of the settling defendant.

In Boca Grande Club, Inc. v. Florida Power & Light Co., the Supreme Court held that a settlement by one of several defendants extinguished actions for contribution maintained by the non-settling defendants against the settling defendant. Because the remaining defendants receive a credit for the proportional fault of the settling defendant and will thus never pay more than their own share of the loss, actions for contribution against settling parties are terminated by the settlement.

It is beyond the pale of this article to discuss the conflicts that existed in maritime decisions which led to the Court accepting certiorari in McDermott and Boca Grande Club. Nor does space permit a lengthy and detailed discussion of the ramifications of the Court's ruling in these two cases. Several obvious questions arise from the Court's rulings which deserve brief comment. What if all of the defendants settle with the plaintiff? The fundamental rationale of McDermott and Boca Grande Club, that settlement extinguishes the proportional share of the liability of the settling defendant, supports the conclusion that in such a situation the settling defendants would be protected from contribution claims by other settling defendants; thus, settling defendants would be prohibited from prosecuting claims for contribution. What happens to contribution claims between non-settling defendants? This question was not addressed in either McDermott or Boca Grande Club. However, given the fact that the decisions in those cases were based upon the concept of proportional fault, and in light of the Court's holdings in United States v. Reliable Transfer.

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11.  Id. at 1471-72.
and in *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, one may reasonably conclude that contribution claims between remaining defendants remain viable. This would certainly be the case if the concept of joint and several liability remains viable.

Was joint and several liability affected by the *McDermott* and *Boca Grande Club* decisions? This issue was directly considered by the Court in *McDermott* when the Court pointed out that accepting a proportional share credit to deal with the settling defendants was not inconsistent with the application of the rule of joint and several liability as between the non-settling defendants. Thus, a plaintiff will be able to utilize the rule of joint and several liability against the non-settling defendants.

Do the principles announced in *McDermott* and *Boca Grande Club* apply in maritime cases brought in state courts? The manner in which partial settlements are treated directly affects the ultimate liability of the parties and, in this writer's view is substantive, not procedural. Therefore, the rules of *McDermott* and *Boca Grande Club* will surely apply to maritime cases brought in state court. It is entirely possible that these two decisions may not be limited to maritime actions. While the conflict resolved by the Supreme Court in *McDermott* and *Boca Grande Club* emerged from maritime cases, the question of how to deal with partial settlements is not peculiarly a maritime problem. The proportional credit rule is practical. It promotes partial settlements, and by extinguishing claims for contribution, cuts down on litigation. There is no reason the rule should not be applied in non-maritime cases.

**C. Shipowners Turnover Duty**

In *Howlett v. Birkdale Shipping Co., S.A.*, the Supreme Court granted certiorari to resolve the conflict existing in the courts of appeals with respect to the scope of a shipowner's turnover duty and obligation to warn of latent defects in the stow of cargo. The plaintiff longshoreman was injured when he slipped on a clear sheet of plastic that had been placed beneath a stow of bagged cocoa beans which he was helping discharge in Philadelphia. The sheet of plastic had been placed in the ship by the

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16. *Id*.
17. *See generally RESTATEMENT (SECOND) OF TORTS § 886A cmt. m (1990) (explaining the competing theories as to how partial settlements were previously handled).*
loading stevedore in Guayaquil, Ecuador. The lower court relied upon *Derr v. Kawasaki Kisen K.K.*, which held that a shipowner is not required to supervise a loading stevedore or inspect a loading stevedore’s work. By contrast, in *Turner v. Japan Lines, Ltd.*, the Court of Appeals for the Ninth Circuit held that a shipowner is under a duty to supervise loading operations conducted by a foreign stevedore.

The plaintiff longshoreman argued that the shipowner was under a duty to make an inspection when the loading stevedore completed his cargo operations. The inspection was for the purpose of ascertaining whether any hazards existed in the stow following the completion of loading. The Supreme Court rejected this argument. The Court held that the ship’s turnover duty to warn of latent defects in the cargo stow and the cargo area is a narrow one. The shipowner’s duty to warn of latent defects is limited to defects not known to a stevedore and which would not be “obvious to nor anticipated by a skilled stevedore in the competent performance of its work.” The Court further stated that the shipowner’s duty to exercise reasonable care does not require him or her to supervise cargo operations of a loading stevedore.

D. Emotional Distress

In a detailed opinion, the United States Supreme Court held in *Consolidated Rail Corp. v. Gottshall* that the Federal Employers’ Liability Act (“FELA”) encompasses an action for emotional distress. As the Court put it, the duty of employers to use due care to furnish a safe place for their employees to work includes the “duty under FELA to avoid subjecting its employees to negligently inflicted emotional injury.” The Court discussed at length the test or restrictions to adopt to limit the scope of this duty and concluded that the zone of danger test best reconciles the concerns of the common law with the principles underlying our FELA

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19. Id. at 2061.
21. Id. at 495.
22. 651 F.2d 1300 (9th Cir. 1981), cert. denied, 459 U.S. 967 (1982).
23. Id. at 1304.
24. Howlett, 114 S. Ct. at 2067.
25. Id.
26. Id.
29. Gottshall, 114 S. Ct. at 2399.
jurisprudence.\textsuperscript{30} Under this concept, workers who are within the zone of physical danger may recover for emotional injury without sustaining physical trauma or impact.

This decision will certainly impact maritime law inasmuch as the FELA is incorporated into the Jones Act. In \textit{Gaston v. Flowers Transportation},\textsuperscript{31} the court held that a seaman could not recover for emotional distress without physical injury.\textsuperscript{32} The court specifically rejected the zone of danger test based on the circumstances of this particular case.\textsuperscript{33} Obviously, \textit{Gaston}, as well as many other decisions, will be outdated by the decision of the Supreme Court in \textit{Gottshall}.

\textbf{III. OPINIONS OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT}

The United States Court of Appeals for the Eleventh Circuit decided few cases dealing with maritime matters during the period of this survey. Generally, such decisions applied established law.

\textbf{A. Jurisdiction—Limitation of Liability}

In \textit{Sea Vessel, Inc. v. Reyes},\textsuperscript{34} the court reversed the dismissal of a petition for limitation of liability and held that a vessel in dry dock “was in or on navigable waters at the time of the fire.”\textsuperscript{35} The district judge, based upon the recommendation of a magistrate judge, held that because the vessel was in dry dock at the time of the fire which gave rise to the injury that led to the filing of the limitation action, it was not on navigable waters and therefore, it was not within the court’s admiralty jurisdiction.\textsuperscript{36} The court of appeals ruled to the contrary and relied upon the decisions by the United States Supreme Court in \textit{The Robert W. Parsons}\textsuperscript{37} and \textit{Simmons v. The Steamship Jefferson}.\textsuperscript{38} In its opinion, the \textit{Sea Vessel} court also noted that the Limitation of Liability Act does not furnish an independent ground for

\textsuperscript{30} Id. at 2400.
\textsuperscript{31} 866 F.2d 816 (5th Cir. 1989).
\textsuperscript{32} Id. at 821.
\textsuperscript{33} Id. at 820.
\textsuperscript{34} 23 F.3d 345 (11th Cir. 1994).
\textsuperscript{35} Id. at 349.
\textsuperscript{36} Id. at 347.
\textsuperscript{37} 191 U.S. 17 (1903).
\textsuperscript{38} 215 U.S. 130 (1909).
maritime jurisdiction. The court also held, contrary to the conclusion of the district judge, that the repair of a vessel on a dry dock "is a crucial maritime activity." Thus, the court found that both the "nexus" test of *Executive Jet Aviation, Inc. v. City of Cleveland* and the "substantial relationship to traditional maritime activity" test applied by *Sisson v. Ruby* had been fulfilled.

B. Personal Jurisdiction—Minimum Contacts

In *Francosteel Corp. v. M.V. Charm*, the purchaser of a shipload of steel, a New York company, joined with the seller of the steel, a French company, to sue the carrying ship in rem, and both the vessel's owner and manager, which were Danish corporations, for the failure to deliver the steel in Savannah, Georgia. The ship sank in the Atlantic after loading the steel in France. The court upheld the dismissal of the lawsuit for lack of personal jurisdiction over the shipowner and ship manager. The plaintiffs relied upon the Georgia long arm statute which the court found conferred personal jurisdiction to constitutional limits. The plaintiff, who was the shipper of the cargo of steel, subchartered M.V. CHARM from a Dutch company that in turn had chartered the ship from the defendant shipowner. After the cargo was loaded in France, bills of lading were issued calling for delivery of the steel in Savannah, Georgia. The bills of lading were signed by the master of the ship. Both the district judge and the appellate court assumed that the bills of lading created a contract between the plaintiff shipper and the defendant shipowner for delivery of the cargo in Georgia. However, none of the arrangements which led to the shipload of steel being dispatched toward Savannah occurred in Georgia. All events giving rise to the contractual arrangements took place outside of Georgia and, as mentioned, the ship never reached Savannah. The court found the shipowner and ship manager's agreement to deliver the cargo of steel in Savannah was "an isolated and sporadic contact with Georgia . . . ."

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40. *Id.* at 351.
41. 409 U.S. 249 (1972).
43. 19 F.3d 624 (11th Cir. 1994).
44. *Id.* at 629.
45. *Id.* at 627.
46. *Id.* at 626.
47. *Id.* at 627.
Accordingly, the district court’s dismissal for lack of personal jurisdiction was affirmed. The court relied upon the Supreme Court’s decision in *Burger King Corp. v. Rudzewicz* and *United Rope Distributors, Inc. v. Seatriumph Marine Corp.* The facts in *United Rope Distributors* were basically identical to the facts in *Francosteel* with the exception of the destination of the ships.

C. Bills of Lading—Package Limitation

In *Marine Transportation Services Sea-Barge Group, Inc. v. Python High Performance Marine Corp.*, a carrier issued its bill of lading to a shipper covering the transportation of a boat mold from Miami to San Juan, Puerto Rico. The bill of lading named Python High Performance Marine Corporation as the shipper and also identified the consignee in San Juan who was to receive the mold. The bill of lading was stamped to the effect that freight was to be collected from the consignee. The boat mold never arrived in San Juan. The carrier brought suit against the shipper for nonpayment of freight earned on other goods shipped by the owner of the boat mold. The shipper, Python High Performance, counterclaimed for loss of the boat mold. The bill of lading contained a $500 package limitation identical to the limitation in *The Carriage of Goods by Sea Act* ("COGSA"). The district court awarded $40,000 to the shipper for loss of the boat mold, and held that the shipper had satisfied the bill of lading provision declaring a higher value for the goods and payment of additional freight in order to avoid the $500 package limitation. The court of appeals reversed. It pointed out that the declaration made by the shipper was not on the face of the bill of lading, as required by law. Rather, the shipper had declared a $100,000 value in the booking notice to the carrier. The shipper had paid a $50 charge for insurance and the district court held that this charge satisfied the requirement that additional freight be paid. The court of appeals disagreed. It pointed out that to comply with the requirement to pay additional freight, it is necessary to pay an additional amount.

50. 930 F.2d 532 (7th Cir. 1991).
51. 16 F.3d 1133 (11th Cir. 1994).
54. *Id.*
55. *Id.*
based upon filed tariff rates. In the case in question, the additional freight would have been $200 and not $50.

In *Marine Transportation Services*, the district court also held that the carrier was guilty of conversion when it refused to deliver other boat molds shipped by a separate bill of lading to the shipper. The shipper attempted to pay the freight to the carrier's agent in San Juan, but was told that the cargo could not be delivered until the carrier heard from the carrier's lawyer. The district court's holding that the carrier was guilty of conversion was affirmed. The conversion count was based on Florida law. The carrier argued that the district court lacked subject matter jurisdiction for such a land-based claim. The court of appeals held that the district court had ancillary jurisdiction to determine the compulsory counterclaim of the shipper.

D. Statute of Limitations—Equitable Tolling

In two decisions involving the Suits in Admiralty Act and the Public Vessels Act, the Eleventh Circuit held that the doctrine of equitable tolling did not operate to toll a statute of limitations. In *Justice v. United States*, the plaintiff filed a timely action under the Public Vessels Act and the Suits in Admiralty Act. The action was later dismissed without prejudice and the plaintiff did not appeal. Thereafter, the plaintiff started another lawsuit which in turn was subsequently dismissed because of his failure to comply with sundry pre-trial proceedings and a court order dealing with discovery. Unfortunately, since the second lawsuit was brought after the expiration of the two-year statute of limitations under the Public Vessels Act and the Suits in Admiralty Act, it was dismissed with prejudice. In its opinion, the court pointed out that the doctrine of equitable tolling "is potentially available" in cases brought under the Public Vessels Act and Suits in Admiralty Act. Nevertheless, the court held that the dismissal of the earlier lawsuit without prejudice did not permit a later action to be

56. *Id.*
57. *Id.*
58. 16 F.3d at 1140.
59. *Id.* at 1137.
60. *Id.* at 1139.
62. *Id.* §§ 781-790.
63. 6 F.3d 1474 (11th Cir. 1993).
64. *Id.* at 1477-78; 46 U.S.C. app. § 745 (1988).
65. *Justice*, 6 F.3d at 1478.
filed after the limitation period expired.\textsuperscript{66} Although the court was sympathetic to the plaintiff's plight, it noted in some detail the various avenues that were open to the plaintiff and his counsel which would have prevented the action from being time barred.\textsuperscript{67}

In the second case, \textit{Raziano v. United States},\textsuperscript{68} the parents of a pleasure boater, who died as a result of a collision between his vessel and an unlit navigational mark, brought suit under the Suits in Admiralty Act two months after the expiration of the statute of limitations. The parents had made the United States Coast Guard aware of their claim, and were negotiating with the Coast Guard prior to filing suit. The district court held that the Coast Guard had knowledge of the claim and that the statute of limitations had been equitably tolled.\textsuperscript{69} The court of appeals reversed.\textsuperscript{70} It pointed out that there is a strong public interest in limiting the period of time in which actions can be brought and negotiations prior to filing suit will not operate to toll a statute of limitations.\textsuperscript{71} Moreover, the court found nothing extraordinary in the circumstances surrounding the negotiations which would warrant application of equitable relief.\textsuperscript{72}

\section*{E. Loss of Society—Loss of Consortium}

In a per curiam opinion, the court in \textit{Lollie v. Brown Marine Service, Inc.}\textsuperscript{73} held that neither the Jones Act nor general maritime law permit recovery for loss of society or loss of consortium in personal injury cases.\textsuperscript{74} The court relied upon \textit{Michel v. Total Transportation, Inc.}\textsuperscript{75} and \textit{Murray v. Anthony J. Bertucci Construction Co.}\textsuperscript{76}

\section*{F. Jones Act—Seaman's Status}

In \textit{O'Boyle v. United States},\textsuperscript{77} the court affirmed the dismissal of a Jones Act lawsuit brought by a marine biologist serving on board a Japanese

\begin{footnotes}
\item[66] \textit{Id.} at 1478-79.
\item[67] \textit{Id.}
\item[68] 999 F.2d 1539 (11th Cir. 1993).
\item[69] \textit{Id.} at 1540.
\item[70] \textit{Id.} at 1542.
\item[71] \textit{Id.} at 1541.
\item[72] \textit{Id.} at 1541-42.
\item[73] 995 F.2d 1565 (11th Cir. 1993).
\item[74] \textit{Id.}
\item[75] 957 F.2d 186 (5th Cir. 1992).
\item[76] 958 F.2d 127 (5th Cir.), \textit{cert. denied}, 113 S. Ct. 190 (1992).
\item[77] 993 F.2d 211 (11th Cir. 1993).
\end{footnotes}
fishing vessel in international waters. The plaintiff biologist was on board the vessel pursuant to a treaty and federal law to compile information relating to drift net fishing operations. The plaintiff was not a member of the crew, had nothing to do with navigation of the fishing boat, was not paid by the boat owner, owed no duty to the vessel, and had no means of communicating with the ship's master because the plaintiff spoke English and the master spoke Japanese. The court was clearly of the opinion that the biologist was not a seaman and noted that only one who has the status of a seaman can recover under the Jones Act. The court cited its earlier decision in *Hurst v. Pilings & Structures, Inc.* and the United States Supreme Court decision in *McDermott International, Inc. v. Wilander,* and held an essential ingredient to seaman status is performance of the work of the ship. Since the biologist contributed nothing to the function of the fishing vessel, he was not a seaman.

G. *False SOS*

*United States v. James* presented an unusual fact situation. A boat owner radioed the Miami Coast Guard advising the Coast Guard that his vessel was being boarded by foreign-speaking individuals from a capsized boat. The Coast Guard dispatched a vessel and a helicopter toward the offshore position which was some 200 miles from Miami. The Coast Guard vessel monitored additional radio messages from James, the boat owner, and concluded that the boat appeared to be in the Miami area and not at sea. The Coast Guard dispatched a second vessel which also monitored the boat owner's radio transmissions by direction-finding gear and pinpointed James' position in the Miami River. At that point the Coast Guard realized it was dealing with a hoax and went into its "law enforcement" mode.

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78. *Id.* at 214.
79. *Id.* at 212. The Shima-Asselein treaty authorized the plaintiff to serve as an observer on a japanese fishing vessel, as did the Driftnet Monitoring, Assessment, and Control Act of 1987. *Id.*
80. *Id.* at 213-14.
81. 896 F.2d 504 (11th Cir. 1990).
83. *O'Boyle,* 993 F.2d at 214.
84. *Id.*
85. 986 F.2d 441 (11th Cir. 1993).
86. *Id.* at 442.
87. *Id.* at 442 n.3.
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James was arrested and convicted of sending a false distress message in violation of 14 U.S.C. § 88(c). The United States asked that the costs incurred by the Coast Guard in dispatching vessels and a helicopter, approximately $5800, be assessed against James pursuant to statute which provides that one who sends a false distress message is "liable for all costs the Coast Guard incurs. . . ." James argued that the statutory provision was contained in the statutes dealing with rescue operations, not within the statutes dealing with the law enforcement duties of the Coast Guard. Therefore, the Coast Guard could recover only its costs incurred during the rescue phase, which was far less than the total expenses. The district judge agreed and permitted recovery of only $1000. The court of appeals reversed and stated the statute meant exactly what it said, that James was liable for all of the costs incurred in responding to his false distress message. 89

H. Approved Tariff—Not Subject to Discount

In *American Transport Lines, Inc. v. Wrves*, 90 the defendant sought to avoid paying the plaintiff's bill toward shipping charges by arguing that there was an oral agreement with the plaintiff not to pay full tariff rates. The district judge found that the tariff was approved by the federal maritime commission, and the plaintiff was required to charge the full tariff rates. The court held the defendants liable for all unpaid freight charges. The court of appeals affirmed. 91 Relying upon *Gilbert Imported Hardwoods, Inc. v. 245 Packages of Guatambu Squares* 92 and *Allstate Insurance Co. v. International Shipping Corp.*, 93 the court held that irrespective of any oral agreement between the carrier and the shipper, the carrier was required to charge the full approved tariff rate. 94

I. Jones Act—Continuing Tort Theory

In *Santiago v. Lykes Bros. Steamship Co.*, 95 the plaintiff sought to avoid a statute of limitations defense to his Jones Act suit by arguing that under the theory of continuing tort, the statute of limitations did not begin

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89. *James*, 986 F.2d at 444.
90. 985 F.2d 1065 (11th Cir. 1993).
91. *Id.* at 1067.
92. 508 F.2d 1116 (5th Cir. 1975).
93. 703 F.2d 497 (11th Cir. 1983).
95. 986 F.2d 423 (11th Cir. 1993).
to run until the plaintiff ceased working in the environment involving exposure to the condition which caused his injury; in this case, loud engine room noises. It was established that the plaintiff was employed by the defendant in a vessel's engine room up until the time of trial. The district court accepted the plaintiff's argument, took the statute of limitations' defense from the jury, and charged the jury that if they awarded damages to the plaintiff, they need not be concerned when the damages occurred.\footnote{Id. at 425-26.}

On appeal, the court suggested that the continuing tort theory might apply in the Eleventh Circuit, but refused to rule on the question.\footnote{Id. at 427.} Instead of deciding the question, the court held that the jury charge was an inaccurate statement of the continuing tort theory and reversed the district court's decision because it gave an incorrect statement of law.\footnote{Id. at 427-28.} This seems to be a strange result. Since the court decided that the trial judge gave an erroneous statement to the jury as to the continuing tort theory, and reversed for that reason, why did it fail to also decide whether the theory was applicable to the case?

\section*{J. Collision—Pennsylvania Rule—Sovereign Immunity}

In \textit{Pelican Marine Carriers, Inc. v. City of Tampa,}\footnote{4 F.3d 999 (11th Cir. 1993).} the court of appeals affirmed, without opinion, the decision of a magistrate judge in a case where a seagoing ship struck a sewer cap maintained by the City of Tampa.\footnote{Pelican Marine Carriers, Inc. v. City of Tampa, 791 F. Supp. 845 (M.D. Fla. 1992), aff'd, 4 F.3d 999 (11th Cir. 1993).} The shipowner sued for the cost of repairs and incidental expenses.

The magistrate judge divided the damages seventy percent against the shipowner and thirty percent against the city. The judge applied the Pennsylvania Rule\footnote{See The Pennsylvania, 86 U.S. (19 Wall.) 125 (1873).} under which a vessel guilty of violating a statute that was intended to prevent collisions bears the burden of "showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been."\footnote{Id. at 136.} The statutory fault of the ship was excessive speed and the shipowner failed to carry its Pennsylvania Rule burden.\footnote{Pelican Marine, 791 F. Supp. at 853.}
The Pennsylvania Rule was also applied to the City of Tampa because it had violated the permit issued by the United States Corp of Army Engineers which permitted construction of the sewer cap. The court found the city failed to carry its Pennsylvania Rule burden.

The judge apportioned liability on the basis of comparative fault as required by United States v. Reliable Transfer Co., and as noted, found both the ship and the city at fault. It is very difficult to predict with any significant degree of accuracy the apportionment that a court may make in any given collision case. The reasons stated by courts for the selected allocation of fault often appear to be arbitrary. In this case, the judge said the ship was “substantially more at fault than the City...” So, in this particular case, where the allocation was 70/30, “substantially more” meant more than twice as much. However, the same facts could have supported a 50/50, 60/40 or 80/20 allocation without any real fear of being altered by an appellate court.

Another interesting feature of this case was the city’s claim that section 768.28 of the Florida Statutes barred recovery against it of any sum in excess of $100,000. The judge noted that while the statute indeed includes municipalities within its scope, the statute is not applicable because general maritime law, and not state law, must be applied to the collision case, otherwise the uniform application of maritime law would be affected.

K. Unauthorized Law Practice—Tortious Interference With Contracts

Yanakakis v. Chandris, S.A. involved the appeal of a jury verdict of approximately $3.2 million (of which $2.6 million were punitive damages) in favor of attorneys who represented an injured seaman on a contingent fee basis. The action against the defendant shipowner and its insurer was based on tortious interference with the contingent fee agreement between counsel and the seaman. The seaman signed a contingent fee
contract with an out-of-state lawyer who was residing in Florida, but was not authorized to practice in Florida. The out-of-state lawyer then entered into another fee arrangement with a Florida law firm. Defendants argued at trial that the initial fee contract between the out-of-state lawyer and the seaman was void because it constituted unauthorized practice of law in violation of section 454.23 of the Florida Statutes. Further, because the initial contract was unauthorized, it was void and could not support a later agreement with Florida lawyers. The district court held that, under Florida law, a fee agreement is not void simply because it springs from a void fee agreement. The court of appeals considered the issue to be one of first impression under Florida law. The court certified two questions to the Florida Supreme Court. First, whether an out-of-state lawyer that enters into a contingency fee agreement in Florida has engaged in the unauthorized practice of law which renders the fee agreement void, and second, if such a contract is void, will a fee agreement with a Florida law firm based thereon also be void?

IV. DECISIONS BY UNITED STATES DISTRICT COURTS IN FLORIDA

There were relatively few admiralty decisions coming from the United States District Courts in Florida during the period covered by this article. Indeed, during the first half of 1993, which precedes the starting point for this survey, there were almost as many cases decided by the district courts as in the following twelve months. Most of the district court opinions deal with maritime personal injuries.

A. Bankruptcy—Preferred Mortgages

In the bankruptcy case In re McCoy, a creditor made several loans to the owners of a fishing vessel. As collateral, the creditor took back mortgages on real estate and a preferred ship mortgage on the shrimp vessel. The debtor defaulted, and the creditor brought an admiralty action to foreclose the preferred ship mortgage in federal court. Thereafter, the debtor filed for bankruptcy and the foreclosure action was stayed. The court permitted the creditor to proceed with its foreclosure action on the

113. FLA. STAT. § 454.23 (1993).
114. Chandris, 9 F.3d at 1511.
115. Id.
116. Id. at 1513.
understanding that the action would be limited to obtaining an in rem judgment against the vessel and that the creditor could not seek an in personam judgment against the debtor. The district court proceeded to enter judgment in rem against the vessel for a sum far less than the total indebtedness. The creditor purchased the vessel at the marshall's sale, crediting its in rem judgment for the purchase price.

The creditor then filed a claim in the pending bankruptcy action for the balance of the debt. The debtor sought to dismiss the claim on the grounds of res judicata, arguing that the judgment entered in district court foreclosed the entire debt. The bankruptcy court rejected the argument. It found only three of the four elements required to establish res judicata were met; the fourth element was lacking in that there was no identity of causes of action. The bankruptcy court pointed out that the judgment in the admiralty case was limited to an in rem judgment against the shrimp boat and that the creditor had been precluded by order of the bankruptcy court from obtaining an in personam judgment in the ship mortgage foreclosure action. The bankruptcy judge further noted that even if all of the elements for applying res judicata had existed, it would not operate to defeat the claimant's claim. The court reasoned that the debtor was estopped from asserting the application of res judicata as a defense against the claim in the bankruptcy proceeding because it had taken the position in the foreclosure suit that foreclosure had to be limited to an in rem judgment against the vessel itself.

B. Joint and Several Liability—Absent Parties

In Groff v. Chandris, Inc., a passenger sued for injuries sustained during a cruise. The defendants sought to have the jury consider the

118. Id. at 208.
119. Id.
120. Id. at 210.
121. There are four requirements for a prior judgment to bar a subsequent action: 1) the prior judgment must have been rendered by a court of competent jurisdiction; 2) a final judgment on the merits must have been rendered; 3) the parties, or those in privity with them must be identical in both actions; and 4) the same cause of action must be involved in both actions. Id. (citing to Ray v. Tennessee Valley Auth., 677 F.2d 818 (11th Cir. 1982), cert. denied, 459 U.S. 1147 (1983)).
123. Id.
124. Id.
proportional fault of the Grand Cayman Port Authority, which was not a party to the action. The defendants argued that the Florida Supreme Court decision of *Fabre v. Marin* mandicated such an allocation. The district judge rejected the argument and held that in the Eleventh Circuit, a defendant is not permitted to have the trier of fact ascertain the proportional fault of an entity that is not a party to the lawsuit.

The district judge relied upon *Edmonds v. Compagnie Generale Transatlantique* and *Ebanks v. Great Lakes Dredge & Dock Co.* The court relied upon *Edmonds* for the proposition that joint tortfeasors are liable to a plaintiff jointly and severally for full damages. In *Ebanks*, the court held that it was error for a district court to allocate fault between one defendant and another company that was not a party to the lawsuit.

However, the decisions in *McDermott, Inc. v. AmClyde* and *Boca Grande Club, Inc. v. Florida Power & Light Co.* effectively overruled *Ebanks*. In *Ebanks*, seamen employed on a dredge owned by Great Lakes Dredge & Dock Company sustained injuries when that vessel was struck by a tank ship owned by Chevron Oil Company. The seamen settled their claims with the owner of the tank ship and proceeded with an action against the dredge owner. At trial, the district court found that the tank ship was 100% at fault and although there was negligence involved on the part of the dredge owner, that negligence did not contribute to the casualty. On appeal, the dredge owner sought to uphold the jury verdict by arguing that the result was sanctioned by *Leger v. Drilling Well Control, Inc.*, which held that a settlement extinguishes the proportional fault of the settling tortfeasor. To avoid *Leger*, the seamen argued that the decision in *Edmonds* reaffirmed the proposition that maritime plaintiffs enjoy the benefit of joint and several liability and, accordingly, *Edmonds* required that the judgment be reversed. The court of appeals accepted the argument and

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126. 623 So. 2d 1182 (Fla. 1993).
129. 688 F.2d 716 (11th Cir. 1982), cert. denied, 460 U.S. 1083 (1983).
135. *Id.* at 718.
136. 592 F.2d 1246 (5th Cir. 1979).
137. *Id.* at 1249-50.
held that \textit{Leger} did not apply in face of \textit{Edmonds}, stating "[w]e also agree that if the mere language of the \textit{Leger} case could be construed to authorize the proceedings conducted here by the trial court, then its effect as precedent has been weakened by \textit{Edmonds}."\footnote{139} The adverse verdict against the seaman was reversed.\footnote{140} In sum, \textit{Ebanks} has been effectively overturned by \textit{Boca Grande Club}\footnote{141} in which the Supreme Court adopted the rule in \textit{McDermott}. Thus, \textit{Ebanks} is no bar to the application of \textit{Fabre v. Marin} in a maritime case. Further, \textit{Boca Grande Club} arguably supports such application.

\section*{C. Limitation of Liability}

\textit{In re Complaint of Nobles}\footnote{142} involved a limitation of liability action that was filed by the owners and the liability insurer of a sixteen foot motor boat following a collision between the boat and a boathouse. The boat was operated by the owner's son at the time of the accident. One of the passengers of the boat died and all other occupants of the boat were injured.\footnote{143}

The district court ruled on a number of outstanding motions in the case. One of the motions granted by the court was to dismiss the boat owner's liability insurer as a limitation plaintiff. The district court pointed out that the Limitation of Liability Act\footnote{144} does not give insurers the right to limit liability.\footnote{145}

The claimants also moved to dismiss the limitation complaint on the grounds that the court lacked general maritime jurisdiction and that the limitation statutes do not extend to pleasure boats.\footnote{146} In ruling that there was maritime jurisdiction, the court relied on \textit{Keys Jet Ski, Inc. v. Kays},\footnote{147} in which the court of appeals made it clear that the owners of pleasure vessels are entitled to seek limitation.\footnote{148} However, the district court was
clearly not enamored of the rule of law which it enforced when it stated: "Allowing the owners of pleasure craft to limit their liability pursuant to the Act defies the express purpose of that statute, and provides an unintended and unjust windfall for the owner of a pleasure craft."\textsuperscript{149}

In denying the motion to dismiss for lack of maritime jurisdiction, the court also relied upon \textit{Foremost Insurance Co. v. Richardson}\textsuperscript{150} and \textit{Sisson v. Ruby}.\textsuperscript{151} The Court in \textit{Foremost} held that maritime jurisdiction is available only "when [a] . . . potential hazard to maritime commerce arises out of activity that bears a substantial relationship to traditional maritime activity. . . ."\textsuperscript{152} In \textit{Sisson}, the Court ruled that actual disruption of maritime commerce is not necessary to support admiralty jurisdiction.\textsuperscript{153} Such jurisdiction exists if the casualty in question "is likely to disrupt commercial activity."\textsuperscript{154} The district court then proceeded to apply these principles to the collision between the pleasure boat and houseboat and ruled that the operation of a pleasure boat does bear a substantial relationship to traditional maritime activity, and that the casualty in question was one that could potentially impact maritime commerce.\textsuperscript{155}

The interesting aspect of this case was the manner in which the district court treated the plaintiff's motion to strike various items in the claim filed by the parents of the passenger killed in the collision. The plaintiff sought to strike the claim for recovery of losses based on net accumulations of the expected estate of the decedent. The motion to strike was denied.\textsuperscript{156} The district court supported its denial upon \textit{Sea-land Services, Inc. v. Gaudet},\textsuperscript{157} a case which permitted a survival action for a longshoreman's lost future earnings. The court expressly rejected the case of \textit{Miles v. Apex Marine Corp.},\textsuperscript{158} in which the United States Supreme Court held that the representatives of a deceased seaman could not recover for his lost future earnings.\textsuperscript{159} The district court stated that \textit{Miles} did not apply because the

\begin{footnotesize}
\begin{enumerate}
\item[149.] \textit{Id.}
\item[150.] 457 U.S. 668 (1982).
\item[151.] 497 U.S. 358 (1990).
\item[152.] 457 U.S. at 675 n.5.
\item[153.] 497 U.S. at 363.
\item[154.] \textit{Id.}
\item[155.] \textit{Nobles}, 842 F. Supp. at 1436.
\item[156.] \textit{Id.} at 1434.
\item[157.] 414 U.S. 573 (1974).
\item[159.] \textit{Id.} at 37.
\end{enumerate}
\end{footnotesize}
claimants did not base their action on the Jones Act. In other words, the decedent in the limitation action was not a seaman.

There are two difficulties with the court's conclusion. First, in *Miles*, the Supreme Court explicitly limited its holding in *Gaudet* to the facts of that case and ruled that *Gaudet* applies only to longshoremen. Second, the rejection of *Miles* leads to the anomalous result that the representatives of a non-seaman will recover more and different benefits than will the representatives of a deceased seaman. This raises obvious questions about the uniform application of maritime law and seemingly contradicts the proposition that seamen are wards of the admiralty court. It seems strange that a seaman whose rights have been jealously protected by maritime courts for decades is now entitled to a less beneficial remedy than a passenger killed in a motor boat accident.

The district court's rejection of *Miles* conflicts with decisions by Florida courts which have held that damages can be limited in maritime wrongful death actions brought by parents of deceased recreational boaters.

D. *Carriage of Goods—Real Party in Interest*

A shipper and its cargo insurer brought an action against the carrier for damage sustained by a shipment of pears transported from Jacksonville to Santos, Brazil. In *Im Ex Trading Co. v. Vessell, Beate Oldendorff*, the court held that neither the shipper nor its insurer had standing to bring the action because they were not real parties in interest. The terms of shipment were “FAS Jacksonville.” The court stated, relying upon *York-Shipley, Inc. v. Atlantic Mutual Insurance Co.*, that title and risk

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165. *Id.* at 1153.
166. *Id.* at 1152.
167. 474 F.2d 8 (5th Cir. 1973).
of loss passed to the consignee of the pears once the shipment was delivered to the carrier in Jacksonville.\textsuperscript{168} The consignee was not a party to the lawsuit.\textsuperscript{169}

E. Release by Seaman

\textit{Antoniou v. Thiokol Corp. Group Long Term Disability Plan}\textsuperscript{170} involved the construction and effect of a release given by a seaman to settle a Jones Act lawsuit against his employer. Antoniou was employed as a cook on board a missile recovery vessel operated by Thiokol Corporation.\textsuperscript{171} He brought an action against his employer under the Jones Act, which was ultimately settled through mediation. In connection with the settlement, Antoniou executed a release in favor of the vessel, its underwriters, and his employer.\textsuperscript{172} At the time the release was given, Antoniou was receiving long-term disability benefits from the defendant, and eight months after he signed the release, those benefits were terminated.\textsuperscript{173}

Antoniou sued the disability plan (the "Plan") and the Plan moved for summary judgment, arguing that the release of Thiokol Corporation also operated to release the defendant Plan.\textsuperscript{174} The court granted summary judgment in favor of the plaintiff on the defendant’s release defense.\textsuperscript{175} The court pointed out that the defendant Plan was a separate legal entity from Antoniou’s employer and that the release made no mention whatsoever of the benefit plan.\textsuperscript{176} The court further noted that under maritime law, a seaman’s release should be construed to be effective only as to those parties intended to be released.\textsuperscript{177}

Neither the court nor the plaintiff referred to the heavy burden that rests with a party who seeks to establish a release given by a seaman. It is necessary to prove not only that the release was “executed freely” and “without deception or coercion,” but “that it was made by the seaman with

\begin{itemize}
  \item \textsuperscript{168} \textit{Im Ex Trading}, 841 F. Supp. at 1152.
  \item \textsuperscript{169} \textit{Id.}
  \item \textsuperscript{170} 849 F. Supp. 1531 (M.D. Fla. 1994).
  \item \textsuperscript{171} \textit{Id.} at 1532.
  \item \textsuperscript{172} \textit{Id.} at 1534.
  \item \textsuperscript{173} \textit{Id.} at 1532-33.
  \item \textsuperscript{174} \textit{Id.} at 1534.
  \item \textsuperscript{175} \textit{Antoniou}, 849 F. Supp. at 1535.
  \item \textsuperscript{176} \textit{Id.}
  \item \textsuperscript{177} \textit{Id.}
\end{itemize}
full understanding of his rights." It is submitted that to carry this burden, it would have been necessary for the defendant Plan to prove that at the time the release was given, Antoniou was informed that he was giving up all rights to benefits presently being received, as well as any and all future rights to benefits that he might be entitled to receive.

F. Suits in Admiralty Act—Service of Complaint

The complaint of a seaman alleging injury while serving on board a public vessel of the United States was dismissed for lack of subject matter jurisdiction in *Jayne v. United States Department of Navy, Military Sealift Command*. The court held that the plaintiff failed to serve his complaint "forthwith" as required by the Suits in Admiralty Act. The Act requires service on both the United States Attorney in the district in which the complaint is filed and upon the Attorney General of the United States. Relying upon *Libby v. United States*, the district court held that the service requirements were conditions placed by the United States upon its consent to be sued, and were therefore jurisdictional. The court also ruled that the "good cause" exception in Rule 40 of Civil Procedure, which permits a party to avoid dismissal of an action if it can show good cause as to why service was not effected within 120 days, was not relevant in determining whether the conditions of 42 U.S.C. § 742 had been met.

G. Maritime Liens—Assignment—Laches

*Galehead, Inc. v. M/V Fratzis M.* presented the ever recurring situation in which a vessel incurs liens for supplies and necessaries ordered by a charterer. The charterer goes out of business leaving the bills unpaid and the lienholders, if fortunate, are able to bring an in rem action against

178. *Garrett*, 317 U.S. at 248; see also Herbert Baer, Admiralty Law of the Supreme Court § 3-1 (3d ed. 1979).
181. *Id.* at 1010 (citing 46 U.S.C. app. § 742 (1988)).
182. *Id.*
183. 840 F.2d 818 (11th Cir. 1988).
the ship to foreclose their liens. *Galehead* presented one interesting difference. Galehead, one of the plaintiffs, sued as the assignee of several claims giving rise to maritime liens. Galehead is apparently in the business of enforcing maritime lien claims on a contingency basis. The shipowner argued that the assignment of maritime liens on a contingency basis was contrary to law and to the policy of the Federal Maritime Lien Act.\(^\text{188}\) The court quickly rejected the shipowner’s argument and pointed out that it is well established that maritime liens can be assigned and that the method of payment of the consideration for the assignment has no effect on the validity of such assignments.\(^\text{189}\)

The shipowner also argued that the doctrine of laches made it inequitable for the liens to be enforced against his ship. The basis for this claim was the fact that the owner had purchased the ship shortly after the liens were incurred and the lienholders waited for over two years to enforce the claims by an action against the ship. The court noted that the law requires the holder of a maritime lien to exercise a “high degree of diligence” in enforcing the liens against a purchaser of the vessel who has no knowledge of the liens.\(^\text{190}\)

Because the plaintiffs in fact arrested the vessel at the first opportunity following the vessel’s return to the United States after the liens were incurred, the court ruled that the plaintiffs had fulfilled their burden and rejected the laches defense.\(^\text{191}\)

H. **COGSA—Fire Statute**

In *Banana Services, Inc. v. M/V Tasman Star*,\(^\text{192}\) a shipload of bananas and plantains were delivered in a rotting condition at Port Manatee on board the motor vessel TASMAN STAR. The plaintiff, the shipper of the cargo, sued for all losses sustained as a result of the cargo being unmarketable.\(^\text{193}\) The shipowner and charterer raised the fire statute as a defense.\(^\text{194}\) The district court rejected the rule followed in the Ninth

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188. *Id.* at 1161.
189. *Id.* at 1161-62.
190. *Id.* at 1165 (quoting *Dixie Mach., Welding & Metal Works, Inc. v. M/V Andino*, 1983 A.M.C. 1166 (S.D. Fla. 1982) (citation omitted)).
191. *Id.* at 1165.
193. *Id.* at 1621.
194. 46 U.S.C. app. § 182 (1988). Section 1304(2)(b) of COGSA incorporates the fire statute which specifies that neither a vessel nor its owner is liable for damage to cargos caused by a fire on board the ship unless the fire was caused by the “actual fault or privity”
Circuit which requires a carrier to demonstrate that it exercised due diligence to provide a seaworthy vessel before it can invoke the fire statute. The court applied the cases from the Second and Fifth Circuits which permit a carrier to invoke the fire statute without an initial showing of seaworthiness. If the vessel interests establish that damage was caused by fire, the burden of proof then goes back to the cargo interests to prove that the fire was caused by the "design or neglect" of the carrier. The court found that the vessel proved that the damage was caused by fire. The plaintiff failed to prove that the fire was caused by the actual design or neglect of the vessel and carrier.

V. FLORIDA DECISIONS

Relatively few decisions involving maritime actions were reported from the Florida circuit courts during the past year. Moreover, most of the Florida cases dealt with personal injury claims brought by seamen.

A. Strict Liability—Sailboat Rentals

In Samuel Friedland Family Enterprises v. Amoroso, the Florida Supreme Court held that the concept of strict liability as set out in section 402(A) of the Restatement applied to the renting of sailboats. A hotel guest was injured as the result of the breaking of a crossbar on the sailboat she rented at a hotel. The guest brought an action in strict liability against both the hotel and its tenant who was the owner and renter of the sailboat. In its opinion, the court pointed out that the concept of strict liability as stated by section 402A of the Restatement was adopted in West v. Caterpillar Tractor Co. The court held that the doctrine applied to commercial lessors such as the hotel and its tenant. In the Amoroso opinion, no mention was made of maritime law or its applicability and the

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196. Id. at 1623-24.
197. Id. at 1622-24.
198. Id. at 1625.
199. Id.
200. 630 So. 2d 1067, 1071 (Fla. 1994).
201. Restatement (Second) of Torts § 402A (1965).
202. Amoroso, 630 So. 2d at 1067.
203. Restatement (Second) of Torts § 402A (1965).
204. 336 So. 2d 80 (Fla. 1976); Amoroso, 630 So. 2d at 1068.
205. Amoroso, 630 So. 2d at 1071.
exact nature and location of the accident giving rise to the claim was not discussed. It seems quite possible that the accident could have occurred while the guest was sailing the boat on navigable waters of the United States which could lead to the application of maritime law.

B. Jurisdiction—Insufficient Contacts

In American Overseas Marine Corp. v. Patterson, a seaman’s personal injury claim was dismissed because the seaman failed to establish sufficient contacts between the vessel, its owner, its employer, and the State of Florida to establish general jurisdiction. The plaintiff was injured while serving as a crew member on board a vessel in the harbor at Saipan. Although it is not clear from the court’s opinion, the description of the case assumes that the plaintiff was a United States citizen and probably a resident of Florida, that the vessel flew the United States flag, and that the defendant companies were United States corporations headquartered outside of Florida. Evidently, the vessel was owned by a bank and bareboat chartered. The bareboat charterer in turn entered into time charters with the United States and into an operating contract with defendant American Overseas Marine Corporation. In its opinion, the court describes what appeared to the writer to be fairly significant contacts between the defendants and the State of Florida. However, the court held that such contacts were not sufficient to establish general jurisdiction over the defendant and that it could not exercise specific jurisdiction in the case because the cause of action arose outside of the state. Although the point was not discussed, one must assume that the defendant corporation would be subject to general jurisdiction in whatever state they were headquartered and that plaintiff could pursue them in that venue.

In Waterman Oy v. Carnival Cruise Lines, Inc., the court held that there were insufficient contacts to support personal jurisdiction over a Finnish company. A crew member on one of defendant’s cruise ships was

206. A discussion of the application of products liability and the doctrine of strict liability in maritime law is beyond the scope of this article. A good starting point is the decision of the United States Supreme Court in East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986). Restatement section 402A has also been applied by a maritime court. See Goldenrod Showboat, Inc. v. Waterways Winona, Inc., 1988 A.M.C. 806 (E.D. Mo. 1986).

207. 632 So. 2d 1124 (Fla. 1st Dist. Ct. App. 1994).

208. Id. at 1125.

209. Id. at 1127-29.

injured in the Bahamas when a lifeboat on which he was working fell without warning. The lifeboat had been built and supplied by Waterman Oy, a Finnish company.\textsuperscript{211} The court rejected Carnival's argument that Waterman's advertising in European trade publications which had reached Florida, coupled with the fact that the Finnish company supplied lifeboats, rescue boats, and tenders to other passenger cruise ships operated routinely from Florida ports, sufficed to support jurisdiction.\textsuperscript{212} The fact that the Finnish company knew that its tenders were used on cruise ships operating out of Florida ports was not determinative. Citing \textit{World-Wide Volkswagen Corp. v. Woodson},\textsuperscript{213} the court pointed out that the significant question is whether the relationships the Finnish company had with Florida were such that it should reasonably anticipate being sued in Florida.\textsuperscript{214} Finding that the relationships were insufficient, the case was reversed and remanded with instructions to grant the motion to dismiss.\textsuperscript{215}

C. \textit{Jurisdiction—Sufficient Contacts}

A Delaware corporation owned and operated a pleasure yacht which it acquired in Fort Lauderdale in 1990 and which was based thereafter in Miami. The purpose of the yacht was to provide pleasure trips to guests of the parent corporation of the yacht owner. In \textit{Morley v. Lady Allison, Inc.},\textsuperscript{216} the court ruled that the yacht owner was engaged in substantial and continuous business activity in the State of Florida within the meaning of section 48.193(2) of the \textit{Florida Statutes}.\textsuperscript{217} The court held that there was jurisdiction over a claim by one of the seamen of the yacht who was injured when the vessel was in the Virgin Islands.\textsuperscript{218}

D. \textit{Jurisdiction—Foreign Seamen}

In \textit{Haave v. Tor Husfjord Shipping},\textsuperscript{219} the court had little trouble sustaining jurisdiction over a Jones Act suit brought by a foreign seaman. Although the injury to the seaman occurred in Puerto Limon, Costa Rica,
the defendant shipowner had an office in the United States and used United States ports, including ports in Florida for its business operations. The court determined that the defendant had a base of operations in Florida within the meaning of *Hellenic Lines Ltd. v. Rhoditis*, and that the multiple factors laid down by the Supreme Court in *Lauritzen v. Larsen* favored the exercise of jurisdiction by a Florida court.

E. Passengers—Breach of Contract of Carriage

In *Nadeau v. Costley*, the court dealt with an action by a passenger against Carnival Cruise Lines, and a member of its crew. The plaintiff and her roommate were assigned a small stateroom aboard the cruise ship CARNIVALE. During the night, the plaintiff was awakened by her roommate's screams. The roommate was being sexually assaulted by Costley, a crew member. When the roommate screamed, Costley ran out of the stateroom, shutting the door behind him. The women attempted to telephone for help but the phone in their room was not operating. Costley returned at intervals throughout the night and verbally assaulted the women and made efforts to gain entrance to the stateroom. The women remained in their stateroom throughout the night until they heard other passengers moving in the passageways in the morning. The incident was immediately reported to the ship's purser. From the opinion, it appears that the roommate recovered in her action against the cruise line. However, a motion to dismiss was entered against plaintiff Nadeau because she was not physically injured in any way. The trial court ruled that she could not recover compensatory damages lacking any physical injury and that she could not sue for emotional injuries without some physical impact.

The appellate court reversed and held that plaintiff had a cause of action for breach of contract based "upon a wrongful intentional act by a member of the ship's crew." The court also held that the trial court erred by dismissing the plaintiff's claim that the shipowner was vicariously

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220. *Id.* at 623-24.
222. 345 U.S. 571 (1953). The factors enunciated by the Court were: place of the wrongful act; law of the flag; allegiance or domicile of the injured; allegiance of the defendant shipowner; place of contract; inaccessibility of foreign forum; and the law of the forum. *Id.* at 582-92.
223. *Haave*, 630 So. 2d at 624.
224. 634 So. 2d 649 (Fla. 4th Dist. Ct. App. 1994).
225. *Id.* at 650.
226. *Id.* at 651.
liable for the crew member's intentional infliction of emotional distress.\textsuperscript{227} The court stated, contrary to the shipowner's argument, that physical injury is not necessary before a shipowner can be held vicariously liable for the intentional actions of a crew member.\textsuperscript{228}

F. Jones Act—Seaman's Status

\textit{Juneau Tanker Corp. v. Sims}\textsuperscript{229} involved a Jones Act suit by an unskilled laborer injured on board a tank ship in San Francisco. The plaintiff was furnished to the shipowner by a Tampa company. The court concluded that Sims met the seamen's status test established in \textit{McDermott International, Inc. v. Wilander}\textsuperscript{230} and \textit{Offshore Co. v. Robison},\textsuperscript{231} and affirmed summary judgment on the question of seaman status in favor of the plaintiff.\textsuperscript{232} In \textit{McDermott International} the Supreme Court ruled that one who is either assigned permanently to a vessel or does a significant part of his work on board a ship which contributes to the function of the ship or the fulfillment of its mission is entitled to the status of a Jones Act seaman.\textsuperscript{233} The \textit{Juneau Tanker} court noted that the evidence on the issue of seaman's status did not raise any inference from which the jury could have concluded that plaintiff was not a seaman.\textsuperscript{234}

In \textit{McCann v. SeaEscape Ltd., Inc.},\textsuperscript{235} a passenger sued claiming she was injured when the leg of a male dancer hit her in the nose. The dancer was employed by a company which contracted with the defendant to provide entertainment on board its cruise ships. The plaintiff alleged that the vessel owner was responsible for the male dancer because he was an individual working on board the ship. Summary judgment for the shipowner was affirmed by the appellate court which held that the male dancer could not be considered to be a seaman or a member of the crew, relying upon the test announced in \textit{Offshore Co. v. Robison},\textsuperscript{236} and, therefore, the shipowner was not liable for his actions.\textsuperscript{237}

\textsuperscript{227} \textit{Id.} at 653.
\textsuperscript{228} \textit{Id.}
\textsuperscript{229} 627 So. 2d 1230 (Fla. 2d Dist. Ct. App. 1993).
\textsuperscript{231} 266 F.2d 769 (5th Cir. 1959).
\textsuperscript{232} \textit{Juneau Tanker}, 627 So. 2d at 1232.
\textsuperscript{233} \textit{McDermott, Intl}, 498 U.S. at 357.
\textsuperscript{234} \textit{Juneau Tanker}, 627 So. 2d at 1231.
\textsuperscript{235} 641 So. 2d 892 (Fla. 3d Dist. Ct. App. 1994).
\textsuperscript{236} 266 F.2d 769 (5th Cir. 1959).
\textsuperscript{237} \textit{McCann}, 641 So. 2d at 873.
G. Unearned Wages—Attorney’s Fees

In Moran Towing of Florida, Inc. v. Mays, the court reversed a trial court order that had awarded a seaman in a Jones Act case unearned wages and attorney’s fees based upon the recovery of earned wages. The seaman received wages from the date of his injury through the date of termination of a collective bargaining agreement between the seaman and his employer. The appellate court found no basis in law for such an award and held that plaintiff, having been paid wages for the day on which he was injured, and having no additional obligation of service to the vessel, had no claim for further unearned wages. The attorney’s fees award was not discussed in the court’s opinion. Generally, attorney’s fees are not awarded as part of a recovery in a Jones Act case, with the exception of cases where the employer refuses to pay maintenance and cure.

Attorney’s fees were also discussed in the case of Royal Caribbean Corp. v. Modesto, although in a different context. In Modesto, the plaintiff made a demand for judgment pursuant to section 768.79 of the Florida Statutes. The defendant did not respond. At trial, the plaintiff recovered far more than the amount of the demand, but the trial court refused to award attorney’s fees. On appeal, the court held that there was no conflict between maritime law and Florida’s rules dealing with award of attorney’s fees following demands for judgment and, accordingly, reversed the trial court order denying an award of attorney’s fees.

H. Release—Negligence Per Se

A participant in a motorboat race was injured and brought suit against the race promoter. In Torres v. Offshore Professional Tour, Inc., the court noted that Florida law required that promoters of events such as races are required to obtain a permit from the United States Coast Guard. The

238. 620 So. 2d 1088 (Fla. 1st Dist. Ct. App. 1993).
239. Id. at 1092.
240. Id. In a subsequent per curiam opinion the court again reversed the attorney fee order. Moran Towing of Florida, Inc. v. Mays, 623 So. 2d 850 (Fla. 1st Dist. Ct. App. 1993).
244. Royal Caribbean, 614 So. 2d at 518.
245. Id. at 520.
246. 629 So. 2d 192, 193 n.1 (Fla. 3d Dist. Ct. App. 1993).
defendant failed to obtain such a permit and the court pointed out that such failure could be construed to be negligence per se.\textsuperscript{247} The court held that the enforcement of a release given by Torres to the promoter which relieved the promoter from liability for breach of a positive statutory duty would be against public policy.\textsuperscript{248}

I. Arbitration—Waiver of Right

In \textit{Morex Consolidators Corp. v. Industry Shipping & Commerce, Inc.},\textsuperscript{249} the plaintiff chartered a ship pursuant to a charter party that contained a typical arbitration provision. The plaintiff failed to make scheduled hire payments to the defendant shipowner. The shipowner and the plaintiff thereafter entered into a stipulation regarding the amount owed and it contained provisions for entry of judgment thereon if the charterer further defaulted in making hire payments. The charterer defaulted and the owner brought suit on the stipulation. The charterer sought to stay the action pending arbitration.\textsuperscript{250} The court held that the charterer waived its right to arbitrate by entering into the stipulation calling for resolution by litigation.\textsuperscript{251}

J. Passenger Ticket—One-Year Suit Clause

In \textit{Collins v. Dolphin Cruise Line, Inc.},\textsuperscript{252} the court affirmed the dismissal of the plaintiff's personal injury claim which was filed eighteen months after she was injured on board ship. The passenger ticket specified that actions must be commenced within one year from date of occurrence. Moreover, the ticket, on its cover, gave ample notice and warning of the fact that there were limitations on the period in which suits could be brought for injuries.\textsuperscript{253} The court also rejected the plaintiff's argument that her action should not have been time barred because the ticket was issued to her travelling companion and not to her.\textsuperscript{254} The thrust of the court's ruling

\textsuperscript{247.} \textit{Id.} at 193.
\textsuperscript{248.} \textit{Id.} at 194.
\textsuperscript{249.} 626 So. 2d 989 (Fla. 3d Dist. Ct. App. 1993).
\textsuperscript{250.} \textit{Id.} at 990.
\textsuperscript{251.} \textit{Id.} at 990-91.
\textsuperscript{252.} 625 So. 2d 1308, 1310 (Fla. 3d Dist. Ct. App. 1993).
\textsuperscript{253.} \textit{Id.} at 1309.
\textsuperscript{254.} \textit{Id.} at 1309-10.
is that a passenger who fails to read a copy of her contract of passage, either before, during, or after the trip, accepts all risk of such failure.²⁵⁵

VI. CONCLUSION

The cases surveyed in this article give rise to several questions which only future developments may answer. For example, will the principles decided by the Supreme Court in McDermott and Boca Grande Club be applied in non-maritime cases? Will the emotional distress remedy which the Supreme Court laid out in Gottshall be extended to individuals injured in a maritime environment who are not seamen? Finally, will the limitations set by the Supreme Court in McDermott International on recoveries by the estate of a deceased seaman be equally applied in cases involving the maritime wrongful deaths of non-seamen? Not surprisingly, a survey of recent developments in any area of the law gives rise to more questions than are answered.

²⁵⁵. Id.
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I. INTRODUCTION

The use of alternative dispute resolution to settle disputes outside the confines of the formal legal system is gaining increasing popularity. Although there are several forms of alternative dispute resolution now available in Florida, this article will focus on two of the more common means of dispute resolution: arbitration and mediation. In particular, this article will address recent developments in the area of commercial arbitration, which is governed by chapter 682 of the Florida Statutes, better known as the Florida Arbitration Code. Additionally, this article will address court-annexed dispute resolution in the Florida state court system which includes mediation as well as binding and nonbinding arbitration.

Unlike other procedural and substantive areas of the law, there are relatively few reported decisions addressing alternative dispute resolution mechanisms. This is a laudable result, however, since one of the principle objectives of alternative dispute resolution is the minimization of judicial intervention. If parties to arbitration or mediation were concerned that the alternative dispute resolution they had chosen (be it in the form of arbitration or mediation) was subject to unbridled judicial review, it would nullify many of the incentives which prompted them to steer away from the traditional court system in the first instance. Finally, this article will highlight significant cases in the area of alternative dispute resolution which, albeit not all occurring within the past year, nonetheless serve as the most meaningful and significant pronouncements in this area of the law.

II. COMMENCEMENT OF ARBITRATION

The Florida Arbitration Code ("FAC") is codified at chapter 682 of the Florida Statutes. ¹ The FAC applies to written agreements to arbitrate that are controlled by Florida law, unless the agreements specifically provide otherwise. Arbitration proceedings begin with a demand for arbitration. This demand serves as notice to the other party of the claimant's intent to arbitrate and a statement of the claim. Because the FAC contains no specific provisions concerning the commencement of arbitration, contract

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provisions for arbitration typically incorporate by reference a set of rules to govern the procedure. The most common reference is to the Commercial Arbitration Rules of the American Arbitration Association.\(^2\) Under rule 6 of the Commercial Arbitration Rules, the demand must contain a statement setting forth: 1) the nature of the dispute; 2) the amount involved, if any; 3) the remedy sought; and 4) the hearing locale.\(^3\) Three copies of the notice are filed with the American Arbitration Association's ("AAA") regional office, along with copies of the arbitration provisions of the contract, and the appropriate administrative fee charged by the AAA.\(^4\) The respondent may file an answer within ten days after notice from the AAA of the initial demand.\(^5\)

The demand does not have to comply with the Florida Rules of Civil Procedure. There is no provision, for instance, for a motion to dismiss or any other preliminary challenge to the legal sufficiency of the claim. The arbitrator has the right, however, to require a party to state a claim more precisely.\(^6\) The degree of detail set forth is a matter of judgment by the claimant or the claimant's attorney. If the dispute is simple, very little detail is needed. Because there are few or no pretrial proceedings, the arbitrator usually comes to the hearing with little advance information about the nature of the claim except for having reviewed the demand.

A. Determination of Right to Arbitration

The threshold issue of whether there is a right to arbitration usually arises in one of two situations: 1) when one of the parties has refused to participate and denies the right to arbitration; or 2) when a party has initiated litigation concerning a dispute which the defending party believes is subject to an enforceable arbitration agreement. This issue is governed by section 682.03 of the Florida Statutes, which provides that if a party to an agreement refuses arbitration, application may be made to the court for an order directing the party to proceed with arbitration.\(^7\) The question to be decided by the court is whether any substantial issue exists regarding the making of the arbitration agreement. If the court finds there is no issue involved in the making of the agreement, it will compel arbitration. If, 


\(^3\) See id. r. 6.

\(^4\) Id.

\(^5\) See id.

\(^6\) See id. r. 29.

\(^7\) Fla. Stat. § 682.03(1) (1993).
however, the court finds there is a substantial issue concerning the parties’ agreement to arbitrate, “it shall summarily hear and determine the issue and, according to its determination, shall grant or deny the application.” Courts will generally “resolve all doubts about the scope of an arbitration agreement as well as any questions about waivers thereof in favor of arbitration, rather than against it.”

When an arbitration proceeding has started or is about to start, the party challenging the right to arbitrate may obtain a stay by applying to the court as provided by section 682.03(4). If the arbitrators find there is a valid agreement to arbitrate, the challenging party may appeal to the circuit court, after the arbitration, to challenge the arbitration award. This procedure is not available, however, if the court has already determined the issue under section 682.03.

If the application to compel arbitration is denied, an appeal may be taken by petition for writ of certiorari. An order that grants an application to stay arbitration may also be appealed. An order that grants a motion to compel arbitration, however, is non-appealable. Thus, if the court compels arbitration of the dispute, the arbitration process must be completed. If it is later determined that the court erred and the matter was not properly the subject of an arbitration agreement, then the award is subject to being vacated under section 682.13(1)(c), which provides that “[u]pon application of a party, the court shall vacate an award when . . . [t]he arbitrators or the umpire in the course of his jurisdiction exceeded their powers.” The reason for only allowing an appeal of orders denying arbitration is that the arbitrators should have the first opportunity to determine the scope of the agreement. The court should step in only if the arbitrators have exceeded that power. To hold otherwise would present the parties with the right to appeal every order compelling arbitration, thereby clearly frustrating the purpose of arbitration.

8. Id.
The right to arbitration provided in an agreement may be waived by taking actions inconsistent with the arbitration provision. In *Breckenridge v. Farber*, the Fourth District Court of Appeal enunciated a two-prong test for determining when a party has waived its right to arbitration: 1) the party must have knowledge of an existing right to arbitrate; and 2) there must be active participation in litigation or other acts inconsistent with the right to arbitrate. Thus, a party who files an action in court for relief that would be the subject matter of an arbitration agreement waives the right to subsequent arbitration of that claim or related claims. Similarly, when a defendant answers a complaint without demanding arbitration, that party waives the right to arbitration even if the failure to arbitrate is asserted as an affirmative defense. The same applies to a defendant who files a counterclaim with the court that raises an issue that would be the subject of an arbitration agreement. A party who desires arbitration should demand it before seeking relief in court. Upon being made a defendant to a proceeding, a party wishing to enforce an arbitration clause should file a motion to compel arbitration before seeking any affirmative relief. Otherwise, that party runs the risk of having waived the right to arbitration.

B. Determination of Validity and Scope of Arbitration Agreement

As soon as a demand for arbitration is filed or a court action is commenced, arising out of a contract containing an arbitration provision, the threshold question becomes whether the arbitration agreement is valid and, if so, whether the particular dispute falls within the scope of the provision. Generally speaking, the issue of whether an arbitration agreement is valid is a matter for the court to decide. For instance, in *Thomas W. Ward & Associates, Inc. v. Spinks*, the Fourth District Court of Appeal held that the trial court erred by compelling arbitration prior to making a determination that the parties intended to be bound by the arbitration clause in their

17. Id. at 211.
20. 574 So. 2d 169 (Fla. 4th Dist. Ct. App. 1990), review denied, 583 So. 2d 1037 (Fla. 1991).
written contract after the contract had expired. The court emphatically stated that "[w]hether or not a dispute should be submitted to arbitration is a question for the court to determine from the contract of the parties."

Even assuming arguendo that there is a valid and binding agreement to arbitrate, the court must also decide whether the particular dispute at issue is properly the subject of arbitration. The parties may agree to arbitrate all disputes arising out of their contractual relationship or, alternatively, they may specify only particular disputes which may be arbitrated. In Painewebber, Inc. v. Hess, the Third District Court of Appeal refused to disturb the trial court's denial of a motion to compel arbitration on a particular issue because of the policy of not forcing a party to submit to arbitration on a question outside the scope of the arbitration agreement. More recently, in Katzin v. Mansdorf, the court reversed a trial court's order compelling arbitration of a dispute involving a promissory note where the promissory note sued upon "contain[ed] no express terms requiring the parties to arbitrate any dispute arising from the notes..."

III. PRACTICAL CONSIDERATIONS

The hallmark of the arbitration hearing is its informality. The FAC provides no specific direction as to the conduct of the hearing other than that "[t]he parties are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing." The Commercial Arbitration Rules provide in rule 29 that the complaining party must first "present evidence to support its claim" and that "[w]itnesses for each party shall submit to questions or other examination." The defending party then does likewise. Rule 29 specifically provides that the "arbitrator has the discretion to vary this procedure but shall afford full and equal opportunity to all parties for the presentation of any material and relevant evidence."
Consistent with the notion that arbitration is to be less formal than a judicial proceeding, the rules of evidence applicable to court proceedings do not apply to arbitration hearings. Therefore, hearsay evidence is admissible, leading questions may be asked, documents may be admitted without the testimony of a records custodian, and skilled witnesses may testify without being qualified as experts.30 The reasoning is twofold. First, the arbitrators may not be lawyers trained in the rules of evidence. Second, because arbitrators presumably have some special skill or background in the subject matter, they are capable of determining how much weight to give the evidence. The situation is not unlike that encountered in nonjury court proceedings. Rule 31 of the Commercial Arbitration Rules provides in part that the arbitrator “shall be the judge of the relevance and materiality of the evidence offered, and conformity to legal rules of evidence shall not be necessary.”31 The FAC contains no corresponding provision.

Evidentiary rulings by arbitrators generally are not subject to court review. Courts have expressed little empathy for parties who have agreed to submit a dispute to arbitration, only to later complain that the arbitrator disregarded evidentiary considerations. In reinstating an arbitration award that had been vacated by the trial court, the First District Court of Appeal stated:

The court may well have been correct in concluding that in a court of law the evidence presented to the arbitrator would have been insufficient to support the award. The point is that the parties were not in a court of law. When the parties agreed to arbitration, they gave up some of the safeguards which are traditionally afforded to those who go to court. One of these safeguards is the right to have the evidence weighed in accordance with legal principles.32

The FAC also contains no provisions relating to the weight to be given evidence nor does it provide any grounds for review of an arbitration decision based on issues relating to the admissibility of evidence. The arbitrator in Florida has been said to be the “sole and final judge of the evidence and the weight to be given to it.”33

30. Id. r. 31.
31. Id.
33. Id. at 1242.
IV. AWARD AND SCOPE OF RELIEF

A. Form of Award

The FAC provides that the award must be in writing and signed by the arbitrators joining in the award.34 Although an award is not required to take any particular form, it should resolve and determine all matters that have been submitted.35 Otherwise, the award will generally be considered invalid, and not eligible for confirmation.36 An exception to this rule exists "where the omitted matters are found to be severable and are sufficiently independent of the matters determined in the order [under review] . . . ."37 If the arbitration award is incomplete in the relief afforded, at a minimum, the award should contain an "objective formula" for adequately disposing of any unresolved issues.38

In keeping with the informal nature of arbitration, there is no requirement that the arbitrator's decision be supported by written findings of fact. In Affiliated Marketing, the court noted that "[t]he proceedings before an arbitrator are not generally to be examined by the court for the purpose of determining how the arbitrator arrived at his award."39 From a policy perspective, at least two considerations may be advanced for the court's rationale in Affiliated Marketing. First, although detailed findings may prove useful for future business relationships, detailed written findings may expose the award to a myriad of court challenges, thereby jeopardizing both the speed and finality of the arbitration process. Second, and more pragmatic, arbitrators, who often serve for limited pay, may be reluctant to serve as arbitrators if they are required to prepare detailed findings underlying the reasons for their decisions.

36. Id.
37. Id.
38. Id.
39. Affiliated Mktg., 340 So. 2d at 1242; see also Schmidt v. Finberg, 942 F.2d 1571, 1575 (11th Cir. 1991) (citation omitted); In re Arbitration Between Prudential-Bache Securities, Inc. & Depew, 814 F. Supp. 1081, 1082 (M.D. Fla. 1993); Annotation, Necessity that Arbitrators, in Making Award, Make Specific or Detailed Findings of Fact or Conclusions of Law, 82 A.L.R.2d 969, 971 (1962).
B. Types of Relief

The parties may contractually provide for the types of relief that the arbitrator may grant. Thus, the parties may specify that: 1) specific performance will be available; 2) the arbitrator may conduct an accounting; or 3) the arbitrator may grant any relief the parties deem appropriate under the circumstances. To the extent that the arbitration award compels affirmative action on the part of a party, the right to this relief should be spelled out in the agreement. Although the parties will be bound by their agreement, they are not bound by arbitration awards in which the arbitrators exceed the powers expressly conferred on them.

1. Specific Performance

Unless it is expressly provided for in the agreement, generally speaking, specific performance is not available as a remedy in arbitration. Notwithstanding this general prohibition, the Commercial Arbitration Rules do provide that an arbitrator may grant specific performance of a contract. This being the case, a party's incorporation by reference of the Commercial Arbitration Rules will provide the arbitrator with the authority to grant specific performance even in situations where that remedy would not necessarily have been available had the matter been litigated in court. In arbitration, therefore, the parties may provide for remedies that would extend beyond those normally available in a court proceeding.

2. Punitive Damages

In Richardson Greenshields Securities, Inc. v. McFadden, the Second District Court of Appeal, relying upon Merrill Lynch, Pierce, Fenner, & Smith, Inc. v. Melamed, implicitly held that punitive damages are available as a remedy in arbitration. Lacking in-depth analysis, the court seemed to rest its decision on the simple premise that because "[a]ctions sounding in tort are proper subjects for arbitration," punitive damages were likewise an appropriate remedy in arbitration. In Complete Interiors, Inc.

41. Commercial Arbitration Rules, supra note 2, r. 43.
42. 509 So. 2d 1212 (Fla. 2d Dist. Ct. App. 1987).
43. 453 So. 2d 858 (Fla. 4th Dist. Ct. App. 1984).
44. McFadden, 509 So. 2d at 1213.
v. Behan, however, the Fifth District Court of Appeal held that “punitive damages may not be awarded by an arbitrator absent an express provision authorizing such relief in the arbitration agreement or pursuant to a stipulated submission.”

3. Interest

Interest may be awarded by an arbitration panel in the absence of a provision to the contrary. Florida courts generally have no authority to award prejudgment interest predating an arbitration award where the arbitration award itself does not include pre-award interest, particularly where the award states it is in “full settlement of ‘all claims.’” Under such circumstances, the Fourth District Court held that “[a]ny claim . . . to interest predating the award [is] extinguished by the award.” Courts generally have the authority to add interest from the date of the award.

4. Attorney’s Fees, Costs, and Expenses

Section 682.11 provides that “[u]nless otherwise provided in the agreement or provision for arbitration, the arbitrators’ and umpire’s expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award.” In Insurance Co. of North America v. Acousti Engineering Co. of Florida, the Florida Supreme Court held that section 682.11 does not prescribe an award of attorney’s fees with arbitration; rather, it merely prohibits arbitrators from awarding such fees. Such fees may only be awarded by

45. 558 So. 2d 48 (Fla. 5th Dist. Ct. App.), review denied, 570 So. 2d 1303 (Fla. 1990).
46. Id. at 51. For a related discussion, see Karen Ruga, Note, An Argument Against the Availability of Punitive Damages in Commercial Arbitration, 62 St. John’s L. Rev. 270 (1988).
47. See Complete Interiors, 558 So. 2d at 49 n.2; see also Domke, supra note 40, § 30.03, at 447-48.
52. 579 So. 2d 77 (Fla. 1991).
53. Id. at 79-80.
the trial court upon confirmation of the award.\textsuperscript{54} An exception to this rule was carved out in \textit{Pierce v. J.W. Charles-Bush Securities, Inc.},\textsuperscript{55} wherein the Fourth District Court of Appeal held that an arbitrator may award attorney’s fees where the parties have mutually agreed to “confer jurisdiction on the arbitration panel to decide entitlement to attorney’s fees and assess the agreed fee.”\textsuperscript{56} In so holding, the court stated:

The essential reason for preferring arbitration over litigation in a court is that arbitration is faster and cheaper. Limiting the determination of attorney’s fees for arbitration to a judicial forum, however, simply adds time and expense to the chosen remedy. If the parties have expressly decided for themselves to have arbitrators determine entitlement and the amount of such fees, they have thereby manifested an intention in the clearest way possible that they desire to avoid that very additional time and expense. To deny them that savings, especially because of some now discredited notion about the inviolability of judicial turf, is—well, certainly not unambiguously required by anything in the arbitration law.\textsuperscript{57}

Finally, practitioners should be aware that where an arbitrator is presented with one or more legal theories, one or more of which would permit an award of attorney’s fees, the arbitrator should specify whether his award was based on a theory which would support an award of attorney’s fees.\textsuperscript{58} Otherwise, the trial judge has no authority upon which to award attorney’s fees.\textsuperscript{59}

By comparison, rule 49 of the Commercial Arbitration Rules provides that the expenses of witnesses must be borne by the party producing them.\textsuperscript{60} Rule 49 further provides that:

\begin{quote}
All other expenses of the arbitration, including required travel and other expenses of the arbitrator, AAA representatives, and any witness and the cost of any proof produced at the direct request of the arbitrator, shall be borne equally by the parties, unless they agree otherwise or unless
\end{quote}

\textsuperscript{54} See \textit{id.}. As in litigation, “[a]ttorney’s fees for services performed in arbitration proceedings are recoverable only when authorized by statute or by specific agreement.” \textit{Par Four, Inc. v. Gottlieb}, 602 So. 2d 689, 690 (Fla. 4th Dist. Ct. App. 1992).

\textsuperscript{55} 603 So. 2d 625 (Fla. 4th Dist. Ct. App. 1992).

\textsuperscript{56} \textit{Id.} at 631.

\textsuperscript{57} \textit{Id.} at 630.

\textsuperscript{58} \textit{Perschon}, 622 So. 2d at 76.

\textsuperscript{59} \textit{Id.}

\textsuperscript{60} See \textit{COMMERCIAL ARBITRATION RULES}, \textit{supra} note 2, r. 49.
the arbitrator in the award assesses such expenses or any part thereof against any specified party or parties.\textsuperscript{61}

The arbitrator, therefore, can allocate the expenses of the arbitration among the various parties. Fees for the parties’ attorneys generally are not considered expenses under rule 49 of the Commercial Arbitration Rules.

V. CONFIRMATION AND REVIEW OF ARBITRATION AWARDS

A. In General

One of the distinguishing features of the arbitration process is the limited review of the arbitrators’ actions. Unlike formal court proceedings where there is a right to broad appellate review of the trial court’s actions—measured against the standards of statutory and case law—in arbitration, the grounds on which an award can be challenged are much more narrowly circumscribed. Generally, absent misconduct by the arbitrator or an award outside the jurisdictional powers conferred on the arbitrator, there is little opportunity to challenge the arbitrator’s award. The FAC provides mechanisms for modification of an arbitration award by the arbitrator or the court. Additionally, the FAC contains provisions for vacating an arbitration award.\textsuperscript{62}

B. Change of Award by Arbitrator

Following the rendition of an arbitration award, section 682.10 of the Florida Statutes provides that the parties may petition the arbitrators to modify the award for the purpose of clarification.\textsuperscript{63} Alternatively, the parties may also petition the court to modify an award under certain circumstances.\textsuperscript{64}

The application for modification to the arbitrators must be made within twenty days after delivery of the award to the applicant.\textsuperscript{65} The applicant must give written notice of his application for modification to the other party to the arbitration.\textsuperscript{66} This notice shall state that the other party has ten

\begin{itemize}
  \item \textsuperscript{61} Id.
  \item \textsuperscript{62} See Fla. Stat. § 682.13 (1993).
  \item \textsuperscript{63} Id. § 682.10.
  \item \textsuperscript{64} See infra note 79 and accompanying text.
  \item \textsuperscript{65} Fla. Stat. § 682.10 (1993).
  \item \textsuperscript{66} Id.
\end{itemize}
days within which to serve any objections. There is no provision under section 682.10 for the substance of the award itself to be altered based on the merits of the controversy.

C. Court Challenge to Award

1. Vacation of Award

After an arbitration award has been rendered, the parties have ninety days in which to move the court to vacate the award. Each of the grounds upon which an award may be vacated relates either to a fundamental unfairness in the conduct of the proceedings or conduct taken by the arbitrator outside the authority granted to him. "[T]he fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award." The high degree of conclusiveness attached to arbitration awards is consistent with the notion that the parties chose "to utilize arbitration in order to avoid

67. Id.
68. Id. § 682.13. The grounds upon which an arbitration award may be vacated are as follows:

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

Id. § 682.13(1)(a)-(e). An exception to the 90-day requirement exists if the application is based upon fraud, corruption, or other undue means, in which case it "shall be made within 90 days after such grounds are known or should have been known." Fla. Stat. § 682.13(2) (1993).

69. See id. § 682.13(1).
the expense and delay of litigation." In *Fridman v. Citicorp Real Estate, Inc.*, the court held that "[i]t [was] error for a circuit court to enter an order vacating an arbitration award without directing a rehearing." Although there are several grounds upon which an arbitration award may be vacated, recent Florida cases have focused on the propriety of vacating an arbitration award where the arbitrator has exceeded his authority. It has been held that "[a]n arbitrator exceeds his or her power under section 682.13(1)(c) when he or she goes beyond the authority granted by the parties or the operative documents and decides an issue not pertinent to the resolution of the issue submitted to arbitration." Thus, in *Applewhite*, the Fourth District Court of Appeal held that an arbitrator did not exceed the authority granted him in an employment agreement by enjoining former employees from conducting business with their employer's clients where a noncompete provision in their employment agreements provided that leads and clients remained the property of the employer regardless of the reason for termination of future employment. Conversely, in *Hymowitz v. Drath*, the court held that the arbitrators exceeded the scope of their authority in a dispute over a stock purchase agreement where they treated the purchaser as a full stockholder but canceled her stock purchase obligation, thereby extinguishing the stockholder's agreement which contained the arbitration clause. The court reasoned that "where the parties arbitrate, the arbitrators exceed their powers if their award rescinds the very obligation which is the foundation of the contract from which they derive their authority."

2. Modification or Correction of Award

According to section 682.14 of the *Florida Statutes*, upon application made within ninety days after delivery of the arbitrator's award, a party may also move to correct or modify the award when:

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71. *Applewhite*, 608 So. 2d at 83 (citation omitted).
73. *Id.* at 1129 (citation omitted).
74. *Applewhite*, 608 So. 2d at 83 (citing Schnurmacher Holding, Inc. v. Noriega, 542 So. 2d 1327, 1329 (Fla. 1989)).
75. *Id.*
76. 567 So. 2d 540 (Fla. 4th Dist. Ct. App. 1990).
77. *Id.* at 542.
78. *Id.*
(a) There is an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award.

(b) The arbitrators or umpire have awarded upon a matter not submitted to them or him and the award may be corrected without affecting the merits of the decision upon the issues submitted.

(c) The award is imperfect as a matter of form, not affecting the merits of the controversy. 79

Florida courts have narrowly construed this provision. In Glen Johnson, Inc. v. Ruzicka, 80 the Second District Court of Appeal held that the trial court properly confirmed the arbitrator's award where the motion to modify or vacate the award "did not involve an alleged evident miscalculation of figures and was actually based upon the contention that the arbitrator's mathematics had been improperly affected by the consideration of certain evidence." 81

D. Procedure for Confirmation

In most cases, because the parties voluntarily comply with the arbitrator's decision, there is no need for the circuit court to confirm the award. However, if the award is not complied with, or if one or both of the parties deem it advisable to reduce the award to the form of a judgment, section 682.12 states that "[u]pon application of a party to the arbitration, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in ss. 682.13 and 682.14." 82 If the arbitration arose out of an application to the court to compel arbitration or out of a motion to stay legal proceedings and compel arbitration, confirmation should be applied for in the court that previously dealt with the dispute. 83 When there has been no pending litigation

79. FLA. STAT. § 682.14(1)(a)-(c) (1993). Section 682.14(3) of the Florida Statutes provides that "[a]n application to modify or correct an award may be joined in the alternative with an application to vacate the award." Id. § 682.14(3).
80. 517 So. 2d 762 (Fla. 2d Dist. Ct. App. 1987).
81. Id. at 763; see also Applewhite, 608 So. 2d at 83 ("Remand from this court for justification of the arbitrators' calculations when no miscalculation is evident would serve only to defeat the high degree of conclusiveness that accompanies review of an arbitration award.").
82. FLA. STAT. § 682.12 (1993).
83. Id. § 682.19.
concerning the dispute or the arbitration, a separate civil action for confirmation of the award should be filed in the circuit court.

Once an order has been entered confirming, modifying, or correcting an award, the judgment must be entered by the court in conformity with the order and may be enforced as any other judgment. 84 Section 682.16 of the Florida Statutes sets forth the method to be used by the clerk in preparing the judgment roll. 85 The clerk must include the agreement or provision for arbitration, the award, a copy of the order confirming, modifying, or correcting the award, and a copy of the judgment. 86 The judgment may then be docketed as if rendered in a civil action. 87 Once the judgment has been entered, it is enforceable regardless of the time when the arbitration award was made. 88

E. Appellate Review

In keeping with the policy of minimizing judicial intervention in the arbitration process, appellate review under the FAC is accordingly limited. An appeal may be taken from the following:

(a) An order denying an application to compel arbitration made under s. 682.03.
(b) An order granting an application to stay arbitration made under s. 682.03(2)-(4).
(c) An order confirming or denying confirmation of an award.
(d) An order modifying or correcting an award.
(e) An order vacating an award without directing a rehearing.
(f) A judgment or decree entered pursuant to the provisions of this law. 89

Furthermore, "[t]he appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action." 90 There are no provisions under the FAC for interlocutory review during the arbitration process itself.

84. Id. § 682.15.
85. Id. § 682.16(2).
86. Id. § 682.16.
87. FLA. STAT. § 682.16(2) (1993).
88. Id. § 682.18(2).
89. Id. § 682.20(1)(a)-(f).
90. Id. § 682.20(2).
VI. COURT-ANNEXED ALTERNATIVE DISPUTE RESOLUTION

In 1987, the Florida Legislature passed legislation entitled "Mediation Alternatives to Judicial Action," which was codified as sections 44.301-44.306 of the Florida Statutes, effective January 1, 1988. These sections were subsequently amended by the legislature in 1990 and renumbered as sections 44.1011-44.108. Among the procedures covered by this legislation are court-ordered mediation, court-ordered nonbinding arbitration, and voluntary binding arbitration.

A. Court-Ordered Mediation

Section 44.102 of the Florida Statutes provides for court-ordered mediation and allows a court to refer to mediation all or any part of a contested civil action filed in circuit or county court. Mediation is defined as "a process whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties." Any communications made during the course of mediation are deemed privileged. Specifically, section 44.102(3) provides that:

Each party involved in a court-ordered mediation proceeding has a privilege to refuse to disclose, and to prevent any person present at the proceeding from disclosing, communications made during such proceeding. Notwithstanding the provisions of s. 119.14 [The Public Records Act], all oral or written communications in a mediation proceeding, other than an executed settlement agreement, shall be exempt from the requirements of chapter 119 and shall be confidential and inadmissible as evidence in any subsequent legal proceeding, unless all parties agree otherwise.

The Florida Supreme Court has likewise underscored the confidentiality of mediation proceedings by mandating that "If the parties do not reach an agreement as to any matter as a result of mediation, the mediator shall report the lack of an agreement to the court without comment or recommen-

93. FLA. STAT. § 44.102(2)(a) (1993).
94. Id. § 44.1011(2).
95. See id. § 44.102(3).
96. Id.
The Florida Rules of Civil Procedure also provide that "[i]f an agreement is reached, it shall be reduced to writing and signed by the parties and their counsel, if any." In *Gordon v. Royal Caribbean Cruises, Ltd.*, the Third District Court of Appeal held that "an attorney's signature alone, albeit in the presence of the client, is wholly insufficient under [rule 1.730(b)]."

Indisputably, the aspect of mediation most zealously guarded by the courts has been the privilege of confidentiality which attaches to mediation proceedings. For instance, in *Hudson v. Hudson*, involving a dissolution of marriage proceeding, the Fourth District Court of Appeal held that the wife's presentation at trial of negotiations which occurred during mediation violated section 44.102(3) of the *Florida Statutes*. In that case, the trial court allowed the wife to testify concerning an agreement allegedly reached by her and her husband during mediation. Reasoning that this testimonial evidence violated "the spirit and letter of the mediation statute," the court held that "the well was poisoned by the admission of the . . . evidence of the 'agreement' and so infected the judgment reached that it should be vacated and the matter tried anew."

Likewise, in *Royal Caribbean Corp. v. Modesto*, the Third District Court of Appeal addressed a similar issue. At issue in *Modesto* was whether the confidentiality provisions of section 44.302(2) were preempted by the Jones Act. In *Modesto*, the plaintiff sued Royal Caribbean and other defendants for personal injuries he sustained at sea. Although the parties' attempt at mediation resulted in an impasse, the defendants moved to enforce an oral agreement which was allegedly reached during mediation, and subpoenaed the mediator to testify at a hearing on the motion. The mediator moved to quash the subpoena, invoking the confidentiality provisions codified in section 44.302 of the *Florida Statutes*. The trial court granted the mediator's motion to quash the subpoena, and did not permit the defendants to present any testimony regarding the agreement allegedly

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97. FLA. R. Civ. P. 1.730(a).
98. Id. at 1.730(b).
100. 600 So. 2d 7 (Fla. 4th Dist. Ct. App. 1992).
101. Id. at 8-9.
102. Id. at 9.
103. 614 So. 2d 517 (Fla. 3d Dist. Ct. App. 1992), review denied, 626 So. 2d 207 (Fla. 1993).
105. *Modesto*, 614 So. 2d at 518.
reached during mediation. Judgment was later entered in favor of the plaintiff.

In addressing the trial court’s decision to quash the subpoena, the Third District reasoned that states are free to “apply their own neutral procedural rules to federal claims, unless those rules are preempted by federal law.” Florida’s privilege afforded to parties in mediation proceedings, the court concluded, “contravenes no federal rule of substance or procedure and plays a central role in Florida’s mediation scheme by preserving the neutrality of the mediator.” Thus, the court held that the trial court properly quashed the subpoena directed at the mediator, and declined to take any testimony arising out of the mediation proceedings.

B. Court-Ordered Nonbinding Arbitration

A second method of alternative dispute resolution provided in chapter 44 of the Florida Statutes is court-ordered “nonbinding” arbitration. Arbitration is defined as “a process whereby a neutral third person or panel, called an arbitrator or arbitration panel, considers the facts and arguments presented by the parties and renders a decision which may be binding or nonbinding . . . .” Pursuant to rules of procedure adopted by the Florida Supreme Court, certain types of matters may not be referred to arbitration, except upon petition of all parties, including bond validation actions, condemnation actions, mortgage foreclosures, and declaratory judgment actions, to name a few. A court, pursuant to rules adopted by the supreme court, may refer any contested civil action in circuit or county court to nonbinding arbitration. Arbitrators have the power to administer oaths, issue subpoenas, and compel attendance by witnesses. The procedural rules adopted by the supreme court clearly contemplate that the arbitration hearing be conducted informally, with the presentation of testimony kept to a minimum.

106. Id.
107. Id. at 519 (quoting Howlett v. Rose, 496 U.S. 356, 372 (1990)).
108. Id. (citations omitted).
109. Id.; see also Fabber v. Wessel, 604 So. 2d 533, 554 (Fla. 4th Dist. Ct. App. 1992), review denied, 617 So. 2d 322 (Fla. 1993); Chabad House-Lubavitch of Palm Beach County, Inc. v. Banks, 602 So. 2d 670, 672 (Fla. 4th Dist. Ct. App. 1992) (holding that the trial court erred by admitting a site plan into evidence “because it was a direct product of mediation between the parties, and appellant objected to its introduction”).
110. FLA. STAT. § 44.1011(1) (1993).
111. See FLA. R. CIV. P. 1.800.
The only reported decision under section 44.103 pertains to the time within which a party must request a trial de novo if it is dissatisfied with the arbitrator's decision. Pursuant to rule 1.820(h), any party may file a request for a trial de novo within twenty days of the arbitrator's service of his decision on the parties. In *Klein v. J.L. Howard, Inc.*, the Fourth District Court of Appeal held that upon a party's failure to timely request a trial de novo, the trial court is required to enforce the arbitration award and lacks the discretion to do otherwise. In so holding, the court reasoned that "[i]t does not matter that the award itself was untimely rendered beyond the period provided by rule 1.820(g)(3), Florida Rules of Civil Procedure, because, in contrast to section 44.303(4) and rule 1.820(h), this clause is merely directory."

C. *Voluntary Binding Arbitration*

Section 44.104 of the *Florida Statutes* provides for voluntary binding arbitration and recognizes that two or more parties involved in a civil dispute may voluntarily agree in writing to submit the dispute to binding arbitration, either before or after a lawsuit has been filed, if there are no constitutional issues involved in the controversy. Unlike court-ordered nonbinding arbitration where the rules of evidence are relaxed, the Florida Evidence Code applies in voluntary binding arbitration. A decision rendered after voluntary arbitration may be appealed within thirty days after service of the arbitrators' decision on the parties and is limited to the following grounds:

(a) Any alleged failure of the arbitrators to comply with the applicable rules of procedure or evidence.

(b) Any alleged partiality or misconduct by an arbitrator prejudicing the rights of any party.

112. *Id.* at 1.820(h). This rule provides, in its entirety, as follows:

*Any party may file a motion for trial de novo. If a motion for a trial de novo is not made within 20 days of service on the parties of the decision, the decision shall be referred to the presiding judge, who shall enter such orders and judgments as may be required to carry out the terms of the decision as provided by section 44.303(4), Florida Statutes (1987).*

113. 600 So. 2d 511 (Fla. 4th Dist. Ct. App. 1992).

114. *Id.* at 512.

115. *Id.* (citations omitted).


117. *See id.* § 44.104(9).
Whether the decision reaches a result contrary to the Constitution of the United States or of the State of Florida.\footnote{18}

Appellate review is limited to the circuit court unless a constitutional issue is involved.\footnote{19} If no appeal is taken within the prescribed period, the arbitration decision shall then be “referred to the presiding judge in the case . . . who shall enter such orders and judgments as are required to carry out the terms of the decision . . . ” as provided under section 44.104(11) of the \textit{Florida Statutes}.\footnote{20} Thus far, there have been no reported decisions construing Florida’s court-ordered binding arbitration provisions.

\section*{VII. CONCLUSION}

Although its roots are of ancient lineage, alternative dispute resolution has only recently become a favored means of dispute resolution. These alternative methods of resolving conflicts offer parties a quick means of settling differences where often times they can define their own rules, procedures, and even delineate the available remedies. Alternative dispute resolution offers all of the advantages of the formal judicial process without the attendant drawbacks.

\footnotesize
\begin{itemize}
\item \footnote{18}{\textit{Id.} § 44.104(10); \textit{see also} \textit{FLA. R. CIV. P.} 1.830(3).}
\item \footnote{19}{\textit{See} \textit{FLA. STAT.} § 44.104(10) (1993).}
\item \footnote{20}{\textit{Id.} § 44.104(11).}
\end{itemize}
Construction Law: 1994 Survey of Florida Law

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I. INTRODUCTION

Although the period of July 1, 1993 through July 1, 1994 was not as eventful as the prior year in Florida construction law, there were several decisions worthy of discussion which affect construction practitioners.

II. MINORITY AND DISADVANTAGED BUSINESS ENTERPRISES

In *Advanced Barricades & Signing, Inc. v. State, Department of Transportation*, the First District Court of Appeal held that the State Department of Transportation ("DOT") has no obligation under statute or rule to ensure that contractors do not wrongfully terminate their subcontractors. Approval by DOT of a substituted subcontractor is merely a ministerial act. As long as the subcontractor is a certified disadvantaged business enterprise ("DBE") or, alternatively, that the contractor has made a good faith effort to subcontract with another DBE, the DOT must approve the substitution. Only where the subcontractor sought to prove that the DOT acted fraudulently, arbitrarily, illegally, or dishonestly, might the subcontractor have standing to seek administrative relief.

In *Charles E. Burkett & Associates, Inc. v. State, Department of Transportation*, the court upheld the validity of the DOT rules requiring a minority or a woman business owner to have "technical capability, knowledge, training, education, or experience required to make decisions in the critical areas of operation[s]" in addition to being an owner, before a business may be certified as a DBE. Given the social purpose of the

2. *id.* at 706.
3. *id.* at 705.
4. *id.*
5. *id.*
6. 637 So. 2d 47 (Fla. 5th Dist. Ct. App. 1994).
7. *id.* at 48.
program, it would seem that the minority business owner is placed at the disadvantage of being required to have the expertise, rather than being able to simply hire others with expertise. However, the rules were determined to be neither arbitrary nor capricious.\(^8\)

**III. PERMITS: DUE PROCESS—PROPERTY RIGHT**

In *Reserve, Ltd. v. Town of Longboat Key*,\(^9\) the Eleventh Circuit Court of Appeals held that it was not a violation of procedural due process for the town to revoke a building permit which was issued subject to a provision of the Longboat Key Code which stated that a permit would be revoked if no "substantial work" was accomplished in any thirty day period after construction commenced.\(^10\) The court concluded that the substantial work standard was not unconstitutionally vague.\(^11\) The court further stated that there is a constitutionally protected interest in a building permit where funds had been expended in reliance upon the permit.\(^12\)

**IV. CONSTRUCTION CONTRACT PROVISIONS**

**A. Indemnity (Hold Harmless) Clauses**

In *Winn Dixie Stores, Inc. v. D & J Construction Co.*,\(^13\) the Fourth District Court of Appeal upheld an indemnity agreement where the language of the agreement clearly covered the claim made.\(^14\) In this case, a construction company employee was injured while working on Winn Dixie's premises. The construction worker slipped and fell in a puddle caused by a leaking roof. The roof was not part of the construction company's work, and the company was not at fault for the leak. However, the construction company did have an indemnity agreement with Winn Dixie which covered:

> [A]ny claim or loss arising in any manner out of the presence or activity of [D & J] or any of our servants, agents, or employees or representatives or out of the presence of such equipment when such persons or equipment are on your premises for the purposes of

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8. *Id.*
9. 17 F.3d 1374 (11th Cir. 1994).
10. *Id.* at 1378.
11. *Id.*
12. *Id.* at 1380.
14. *Id.* at 65.
performing services . . . notwithstanding such accident or damage may 
have been caused in whole or in part [by] negligence of you [Winn 
Dixie] or any of your servants, agents or employees.\textsuperscript{15}

Based on this agreement, the court held that Winn Dixie was entitled to 
indemnification from the contractor for the loss.\textsuperscript{16}

B. \textit{Conditions Precedent}

In \textit{HRS v. E.D.S. Federal Corp.},\textsuperscript{17} the First District Court of Appeal 
held that where there is express agreement that the parties will pursue 
disputes through administrative remedy, a suit for breach of contract before 
pursuing the administrative remedy is subject to dismissal.\textsuperscript{18} The contract 
required claims to be submitted to the contracting officer for resolution. 
Absence a showing of bias on the part of the contracting officer, suit before 
submission to the contracting officer for decision was premature.\textsuperscript{19}

C. \textit{Arbitration}

In \textit{Medident Construction, Inc. v. Chappell},\textsuperscript{20} the question arose as to 
whether the validity of a contract which contained an arbitration clause was 
an arbitrable issue. The Third District Court of Appeal held that it was.\textsuperscript{21} 
A contractor and a homeowner entered into a contract which contained an 
arbitration clause providing that all disputes between the parties would be 
submitted to arbitration before the American Arbitration Association. The 
homeowner filed a complaint against the construction company seeking a 
declaration of the parties' rights under the contract, compensatory and 
punitive damages, and fees. The contractor's motion to compel arbitration, 
under the contract clause, was denied by the trial court, and the contractor 
appealed.\textsuperscript{22} The appellate court held that because an arbitration clause is 
considered separate from the rest of the contract, it must be specifically and

\begin{enumerate}
\item \textit{Id.} at 66.
\item \textit{Id.}
\item 631 So. 2d 353 (Fla. 1st Dist. Ct. App. 1994).
\item \textit{Id.} at 357.
\item \textit{See id.} at 356-57 (explaining that HRS was not biased); \textit{see also} HRS v. Maximus, 
Inc., 633 So. 2d 490 (Fla. 1st Dist. Ct. App. 1994) (granting a motion to dismiss for breach 
of contract because the contract's dispute resolution clause was the same as in \textit{E.D.S.}).
\item 632 So. 2d 194 (Fla. 3d Dist. Ct. App. 1994).
\item \textit{Id.} at 195.
\item \textit{Id.}
\end{enumerate}
exclusively attacked in order for the court to try the issue. In this case, the appellee/homeowner challenged the contract as a whole, not specifically the arbitration clause. Therefore, the relief sought fell within the scope of the arbitration clause and was determined to be arbitrable. Other cases have held that the issue of the validity of the agreement containing the arbitration clause was to be determined by the court prior to compelling arbitration. One such case is Dean Witter Reynolds, Inc. v. Clarke, where the court held that a limitation of actions defense must be arbitrated. Where the arbitration award said that it was in full settlement of all claims and counterclaims submitted, and the award did not include prejudgment interest, the court in Nitram, Inc. v. Industrial Risk Insurers would not award prejudgment interest on the arbitration award from the time of the award to the time of entry of judgment upon confirming the award.

D. Scheduling/No Damage for Delay

In a rather definitive opinion, the Eleventh Circuit Court of Appeals has determined that language in a contract allowing the contractee to modify the progress schedule at its discretion makes delay and lost efficiency claims extremely difficult for the contractor to establish. In Marriott v. Dasta Construction Co., the owner had “complete discretion to adjust the schedule as well as to demand that Dasta comply with such adjustments without additionally compensating Dasta.” In the face of such clauses as: 1) the right to adjust the schedule; 2) time is of the essence; and 3) no damage for

23. Id.
24. Id.
25. See Bardinella Designs, Inc. v. Spirit Constr., Inc., 524 So. 2d 703, 704 (Fla. 4th Dist. Ct. App. 1988) (holding that arbitration should not be compelled where a party is seeking declaratory judgment and the validity of a contract has not been determined); see also Caltagirone v School Bd. of Hernando County, 355 So. 2d 873, 875 (Fla. 2d Dist. Ct. App. 1978) (affirming a restraining order halting arbitration until the court determined the contract was valid).
27. Id. at 402; see also Wylie v. Investment Management & Research, Inc., 629 So. 2d 898 (Fla. 4th Dist. Ct. App. 1993) (holding that a statute of limitations defense should be determined by the arbitrators, not the courts).
29. Id. at D258.
31. Id. at 1066.
delay, the court doomed the contractor’s claims as being without merit under the language of the contract.\textsuperscript{32} 

In discussing the contractor’s attempt to avoid the no damage for delay clause on the basis of active interference, the court determined that the contractor’s failure to request time extensions, a right to which it was entitled under the contract, precluded the contractor’s claims for delay, impact, and lost efficiency. The court suggested that if the contractor had requested extensions which were the result of the owner’s fraud, active interference, or concealment, the contractor would have had an arguable position. Not having requested the time extensions was fatal to the contractor’s claims.\textsuperscript{33}

V. CONSTRUCTION CLAIMS

A. Licensing

In \textit{Alfred Karram III, Inc. v. Cantor},\textsuperscript{34} the Fourth District Court of Appeal held that an architect who was not licensed was not entitled to a construction lien, but could maintain an action for breach of contract due to the nature of the work performed.\textsuperscript{35} In this case, the architectural firm performed architectural and related services in designing a single-family home, although the firm did not hold a certificate of authorization required by section 481.219 of the \textit{Florida Statutes}.\textsuperscript{36} None of the principals of the firm were registered architects. The architectural firm filed a claim of lien for the amount of its fees. When the firm tried to enforce its lien and maintain a breach of contract action, the prospective home owner argued that because the firm was unlicensed it had no right to a lien nor to enforce a contract for architectural services.\textsuperscript{37}

The appellate court held that the architectural firm could maintain the breach of contract action, although it was unlicensed, because there is an exemption to the licensing requirement for the type of work performed under section 481.229(1) of the \textit{Florida Statutes}.\textsuperscript{38} No person is required to qualify as an architect in order to make plans and specifications for single

\begin{itemize}
\item \textsuperscript{32} \textit{Id.} at 1065.
\item \textsuperscript{33} \textit{Id.} at 1069.
\item \textsuperscript{34} 634 So. 2d 210 (Fla. 4th Dist. Ct. App. 1994).
\item \textsuperscript{35} \textit{Id.} at 211-12.
\item \textsuperscript{36} \textit{Id.} at 211; see \textit{FLA. STAT.} § 481.219 (1993).
\item \textsuperscript{37} \textit{Cantor}, 634 So. 2d at 211.
\item \textsuperscript{38} \textit{Id.} at 212; see \textit{FLA. STAT.} § 481.229(1) (1993).
\end{itemize}
family residences. However, with respect to the construction lien claim, the court held that section 713.03 of the Florida Statutes specifically limits the right to claim a lien to “architects” authorized under chapter 481, or general contractors who provide architectural services under design-build contracts authorized by section 481.229(3). This does not include those who perform architectural services where no professional license is required. Thus, the unlicensed architectural firm had no lien rights under the law.

In Best Pool & Spa Service Co. v. Romanik, the court held that the Fifth Amendment right against self-incrimination applies not only to criminal matters but also to administrative proceedings such as licensing. In Best Pool, a contractor was permitted to invoke the Fifth Amendment and not respond to questions about his certifying to the county that there was liability insurance. It is a crime to make false public records or certificates.

B. Measure of Damages

In Mall v. Pawelski, the buyers of a seventeen-year old house discovered, shortly after moving into the house, that the roof was leaking. They replaced the entire roof and brought an action to recover their expenses. The trial court awarded the buyers full cost of the new roof, even though the roof which was replaced was as old as the house. The sellers of the house appealed and the case came before the Fourth District Court of Appeal.

The appellate court agreed that the buyers were entitled to damages for replacing the leaky roof, but the court disagreed as to the amount of those damages. It reasoned that the buyers did not bargain for a new roof when they bought a seventeen year old house. Allowing full recovery for a new roof would unjustly enrich them. The proper measure of damages, therefore, should be the replacement cost of the roof prorated to account for

39. Cantor, 634 So. 2d at 212; see Fla. Stat. § 481.229(3) (1993).
40. Cantor, 634 So. 2d at 212.
41. 622 So. 2d 65 (Fla. 4th Dist. Ct. App. 1993).
42. Id. at 66; see also State ex rel. Vining v. Florida Real Estate Comm’n, 281 So. 2d 487, 491 (Fla. 1973) (extending the right to remain silent to administrative proceedings which “tend to degrade the individual’s professional standing, professional reputation, or livelihood”).
43. Best Pool, 622 So. 2d at 66.
45. 626 So. 2d 291 (Fla. 4th Dist. Ct. App. 1993).
46. Id. at 291-92.
the increased life expectancy of the new roof. Although this principle was applied between a home buyer and seller, it would be equally applicable in a construction defect case where a failed component was replaced after an extended period of use.

It is incredible that there are multiple cases over several years dealing with the measure of damages for recovery of a partially completed contract. In *Robinson v. Albanese*, the Fifth District Court of Appeal addressed this old issue and denied a contractor recovery based on insufficient evidence. There are two permissible measures of damages on behalf of a contractor for a partially completed contract which is breached by the owner. The contractor may recover the reasonable value of the labor performed and materials furnished, or the contractor may recover the reasonable costs incurred plus the lost profit under the contract.

In *Robinson*, there was no evidence of the reasonable value of the work when the contractor left the job. There was, likewise, no showing of costs and lost profit. Accordingly, the judgment in favor of the contractor was reversed.

C. Unjust Enrichment

In *Hillman Construction Corp. v. Wainer*, a general contractor hired by a tenant of commercial premises to make improvements sued the landlord of the rental property after the tenant failed to pay for those improvements and later filed bankruptcy. The contractor argued that by allowing the owner to reap the benefit of the improvements by renting the premises at increased rent, the owner had been unjustly enriched. The trial court ruled

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47. *Id.* at 292.
48. 636 So. 2d 831 (Fla. 5th Dist. Ct. App. 1994).
49. *Id.* at 834.
51. *Robinson*, 636 So. 2d at 834.
52. *Id.* at 835.
53. 636 So. 2d 576 (Fla. 4th Dist. Ct. App. 1994).
54. *Id.* at 577.
that the contractor did not state a cause of action for unjust enrichment. The
Fourth District Court of Appeal reversed, and opined that the complaint was
valid.55

The appellate court stated the elements of unjust enrichment as: 1) plaintiff
has conferred a benefit on the defendant, who has knowledge thereof; 2) defendant
voluntarily accepts and retains the benefit conferred; and 3) the circumstances are
such that it would be inequitable for the defendant to retain the benefit without
paying the value thereof to the plaintiff.56 In this case, the court thought that the
contractor had sufficiently pleaded a claim for unjust enrichment.57

In Maloney v. Therm Alum Industries,58 the Fourth District Court of
Appeal held that before pursuing an equitable claim against an owner with
whom the subcontractor did not have a contract, the subcontractor must first
exhaust his legal remedies against the contractor.59 This case arose out of
a construction contract which provided that construction was to be
substantially completed no later than nine months from commencement.
Due to problems with ordering and installing materials, the certificate of
occupancy was issued nearly ten months late. In addition to these delays,
the owner claimed that the material was defective and therefore refused to
make final payment. The contractor and subcontractor filed claims of lien.
The subcontractor sought to foreclose its lien and also sought damages
against the contractor. The contractor and subcontractor agreed to submit
their disputes with each other to arbitration. Meanwhile, the lender
foreclosed its mortgage and extinguished the construction liens. The
subcontractor then amended its complaint to add a claim against the owner
for equitable relief on the basis of unjust enrichment.60 A jury awarded the
subcontractor damages on its claim against the owner and the owner
appealed.61

Under these circumstances, the appellate court questioned the award of
damages to the subcontractor against the owner. The subcontractor had no
contract with the owner. The court pointed out that the subcontractor was
entitled to receive payment from the contractor for work performed.
However, because the dispute between the contractor and subcontractor was

55. Id. at 578.
56. Id. at 577.
57. Id. at 577-78.
58. 636 So. 2d 767 (Fla. 4th Dist. Ct. App. 1994).
59. Id. at 770.
60. Id.
61. Id.
in arbitration, the court could not determine whether the subcontractor would ultimately receive its payment from the contractor. Therefore, the court disapproved the award against the owner and ruled that the subcontractor could not show that there was no adequate legal remedy. Absence of an adequate legal remedy is an element of unjust enrichment against the owner.

D. Negligence/Economic Loss Rule

In Brass v. NCR Corp., the United States District Court for the Southern District of Florida held that the economic loss rule does not bar claims of fraudulent inducement and negligent misrepresentation. The court distinguished claims of fraud in the performance, which would be barred by the rule, from claims of fraud in the inducement, which would not be barred. If the law were otherwise, the economic loss rule would have the effect of abolishing the tort of fraud in the inducement altogether.

In Southland Construction, Inc. v. Richeson Corp., the Fifth District Court of Appeal had an opportunity to discuss a key exception to the economic loss rule, first discussed in A.R. Moyer, Inc. v. Graham, when the Florida Supreme Court decided Casa Clara Condominium Ass 'n v. Charley Toppino & Sons, Inc. The court retained an exception to this doctrine for instances of negligence by a supervising architect, upholding its earlier decision in A.R. Moyer.

Southland Construction sued Richeson Corporation and Thomas E. Richeson, individually, for breach of contract in the faulty design of a retaining wall and for negligence. The trial court granted summary judgment in favor of both defendants with respect to the negligence claim.

62. Id.
63. Maloney, 636 So. 2d at 770.
64. 826 F. Supp. 1427 (S.D. Fla. 1993).
65. Id. at 1428.
66. Id.
67. Id.
68. 642 So. 2d 5 ( Fla. 5th Dist. Ct. App. 1994).
69. Id. at 7.
70. 285 So. 2d 397 (Fla. 1973).
71. 620 So. 2d 1244 (Fla. 1993).
72. Id. at 1247.
73. A.R. Moyer, 285 So. 2d at 403.
based on the economic loss rule. Southland appealed this decision to the Fifth District Court of Appeal.\textsuperscript{74}

The appellate court reversed on the negligence claim, citing \textit{A.R. Moyer}.\textsuperscript{75} The court reasoned that Southland, as user of the plans, would be injured if the designs were professionally below acceptable standards, and caused damages. Richeson, as an individual professional, owed Southland a duty to perform his professional duties in a professional, competent manner. Thus, \textit{Moyer} is authority for allowing a tort suit against Richeson, individually, for professional malpractice.\textsuperscript{76}

The appellate court, in \textit{Southland}, however, did not rely only on the \textit{Moyer} exception to the economic loss rule, but noted that there was evidence that other property had been damaged by the failure of the retaining wall.\textsuperscript{77} The \textit{Moyer} exception, while valid, is narrow. The supreme court in \textit{Casa Clara} strictly limited \textit{Moyer} to the facts of a general contractor damaged by a supervising architect.\textsuperscript{78}

In \textit{Tillman v. Howell},\textsuperscript{79} the Fourth District Court of Appeal held that "one who breaches a contract is answerable only for damages that were or reasonably should have been in the contemplation of the contracting parties.” One who is liable for the tort of negligence, on the other hand, “must answer for all of the natural, direct, and proximate consequences of his tortious conduct...” These consequences generally include personal injury and property damage, but not economic loss.\textsuperscript{80}

This case arose when the purchasers of a home refused to pay the balance on a promissory note after they began to encounter problems which they attributed to construction defects. The homeowners brought a breach of contract claim after a faulty pipe caused a flood which damaged their wood floors and cabinets. Additionally, they claimed damages for further flooding when a carpenter, hired by the homeowners to repair the original flood damage, put a nail through another water pipe. Additional damages were incurred due to this flooding, and the homeowners sought compensation from the contractor. In support of this additional claim, the homeown-

\textsuperscript{74} \textit{Southland Constr. Inc.,} 642 So. 2d at 7.
\textsuperscript{75} \textit{Id.}
\textsuperscript{76} \textit{See A.R. Moyer,} 285 So. 2d at 403.
\textsuperscript{77} \textit{Southland Constr. Inc.,} 642 So. 2d at 9.
\textsuperscript{78} \textit{Id.; see Casa Clara,} 620 So. 2d at 1246 (explaining the distinction between contract law, which protects expectations, and tort law, in which the plaintiff must prove the duty owed by the other party).
\textsuperscript{79} 634 So. 2d 268 (Fla. 4th Dist. Ct. App. 1994).
\textsuperscript{80} \textit{Id.} at 270.
ers argued that the carpenter’s negligence was foreseeable and that the contractor was not absolved of liability because his conduct had set in motion the chain of events which caused the second flooding and related damage.81

The court rejected the homeowner’s arguments and reasoned that actions in negligence are unlike actions based upon breach of contract. In contract, the parties are limited to damages which “were or reasonably should have been in [their] contemplation,” at the time they made the contract.82 The second flooding occurred due to “an unforeseeable independent intervening cause,” and, therefore, damages were not recoverable under the contract for the carpenter’s negligence.83

On September 8, 1994, the Florida Supreme Court decided Murthy v. N. Sinha Corp.84 In that case, the court held that while there may be negligence of a qualifying agent under principles of common law, there is no statutory duty created by sections 489.119 or 489.1195 of the Florida Statutes which would support a private cause of action.85

E. Products Liability

In Square D Co. v. Hayson,86 the court held that in products liability cases, “[w]hen the manufacturer of an article involving an inherently dangerous instrumentality (which includes electricity) places that product in the stream of commerce, the manufacturer assumes the duty of conveying to those who might use the product a fair and adequate warning of [the products’] dangerous potentialities.”87

VI. CONSTRUCTION LITIGATION

A. Settlement Agreements

In Crosby Forrest Products, Inc. v. Byers,88 the Fifth District Court of Appeal held enforceable a stipulation agreement which provided that in the event of a default, a stipulated sum in excess of the agreed settlement

81. Id. at 269.
82. Id. at 270.
83. Id. at 269.
84. 19 Fla. L. Weekly S429 (Sept. 8, 1994).
85. Id. at S430.
86. 621 So. 2d 1373 (Fla. 1st Dist. Ct. App. 1993).
87. Id. at 1377.
88. 623 So. 2d 565 (Fla. 5th Dist. Ct. App. 1993).
would become due. While "[a] contract term which provides that a party must pay a penalty for breaching a contract is unenforceable," in this case, the parties stipulated that a settlement amount was payable, but in the event of default of payment of the settlement amount when agreed, the higher amount related to the sum originally sought in the suit would be the amount owed. The court reasoned that, where the larger amount payable upon default represents a legitimate amount, courts may consider the parties' right of freedom of contract as a basis for upholding the agreement to pay the higher sum.

A per curiam decision in Suggs v. Defranco's, Inc., held that where a settlement letter left "a number of essential terms . . . open for future negotiation[",]" there was no enforceable settlement agreement. The letter was only an agreement in concept.

B. Condominiums

The Florida Supreme Court, in Rogers & Ford Construction Corp. v. Carlandia Corp., held that "a condominium unit owner [has] standing to sue the developer or general contractor to recover damages for construction defects or deficiencies in the common elements or common areas of the condominium."

C. Attorney's Fees

The United States Supreme Court, in Fogerty v. Fantasy, Inc. considered the interpretation of the attorney's fee provision of the Copyright Act of 1976, which provides for the recovery of the prevailing party's attorney's fees. The Court settled a split among the circuits, abolishing the so-called "dual standard" of awarding fees, which treated plaintiffs and defendants differently. Chief Justice Rehnquist noted that "[p]revailing

89. Id. at 567.
90. Id.
91. Id. at 568.
92. Id.
93. 626 So. 2d 1100 (Fla. 1st Dist. Ct. App. 1993).
94. Id. at 1101.
95. Id. (citing Williams v. Ingram, 605 So. 2d 890, 894 (Fla. 1st Dist. Ct. App. 1992)).
96. 626 So. 2d 1350 (Fla. 1993).
97. Id. at 1351.
100. Fogerty, 114 S. Ct. at 1033.
plaintiffs and prevailing defendants are to be treated alike [under § 505 of the Copyright Act], and that any award of attorney’s fees is at the discretion of the court. 101

In *Heidle v. S & S Drywall & Tile, Inc.*, a contractor sued a homeowner to foreclose a construction lien for labor and materials provided in the construction of her home. Heidle, the homeowner, filed an answer and counterclaim alleging that the contractor’s lien was fraudulent, and sought damages and attorney’s fees for discharging the lien. 103

“[A] year passed [ ] with no action in the case, [and] Heidle moved to dismiss the entire case for lack of prosecution pursuant to Florida Rule of Civil Procedure 1.420(e).” 104 The complaint, answer, and counterclaim were duly dismissed by the trial court, and Heidle sought attorney’s fees under section 713.29.

The trial court denied the homeowner’s motion for attorney’s fees, citing the case of *Stockman v. Downs*, 105 which held that a claim for attorney’s fees, whether based on statute or contract, must be pled. 106 Once the pleadings were dismissed, the court reasoned, the statute no longer applied. Heidle appealed.

The appellate court reversed, and instructed the lower court to award Heidle attorney’s fees and costs. 107 The court noted that the purpose for requiring a claim for attorney’s fees to be pled is to afford the opposing party notice that attorney’s fees would be sought. 108 In this case, S & S received appropriate notice of the claim for attorney’s fees in Heidle’s answer and counterclaim. Dismissing the suit for lack of prosecution did not mean the claim was not made.

Where the statutory requirements of an offer of judgment are met under section 768.69 of the Florida Statutes, an award of attorney’s fees is mandatory, unless the offer was not made in good faith. 109

101. *Id.*
102. 639 So. 2d 1105 (Fla. 5th Dist. Ct. App. 1994).
103. *Id.* at 1105.
104. *Id.* at 1105-06; *see* FLA. R. CIV. P. 1420(e).
105. 573 So. 2d 835 (Fla. 1991).
106. *Id.* at 837.
107. *Heidle,* 639 So. 2d at 1106.
108. *Id.* (quoting *Stockman,* 573 So. 2d at 837).
D. Prejudgment Interest

In *Interamerican Engineers & Constructors Corp. v. Palm Beach County Housing Authority*, the Fourth District found no error when the trial court disallowed prejudgment interest in light of the law which holds that "prejudgment interest is not absolute and may depend upon equitable considerations."

E. Limitation of Actions

In the case of *Stokes v. Huggins Construction Co.*, a property owner built a new beach house. The house was placed on pilings. After the house was built, the adjoining property owner excavated between six and seven feet of soil from a portion of his property adjacent to the east side of the new house. Sand and soil from the beach house lot then began to shift into the excavation. The beach house contractor warned the property owner of the dangerous condition, and recommended immediate action to prevent major problems from occurring. The owner took no action. After a summer storm, the beach house fell and was destroyed. More than four years passed before the owner sued his neighbor and his neighbor's excavating contractor. The neighbor and excavating contractor contend that the claim is past the four year statute of limitations for negligence action, and should therefore be barred.

The issue for the First District Court of Appeal to decide was: when does the limitation period begin to run in an action for negligent removal of lateral support? Section 95.031 of the *Florida Statutes* states that "[a] cause of action accrues when the last element constituting the cause of action occurs." The neighbor and excavating contractor argued that the cause of action accrued when the owner was put on notice of the problem by his contractor. At that time the owner knew or should have known of the negligent acts which caused the loss of lateral support. The appellate court disagreed. It reasoned that the beach house owners "did not have knowledge of the permanency of their injury until their house fell down,

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110. 629 So. 2d 879 (Fla. 4th Dist. Ct. App. 1993).
111. *Id.* at 882 (citing Broward County v. Finlayson, 555 So. 2d 1211 (Fla. 1990)).
112. 626 So. 2d 327 (Fla. 1st Dist. Ct. App. 1993).
113. *Id.* at 328.
114. FLA. STAT. § 95.031(1) (1993).
115. *Stokes*, 626 So. 2d at 329.
even though they may have been on notice of probable or possible injury” when their contractor informed them of the serious condition.\textsuperscript{116}

In\textit{ Palm Beach County v. Savage Construction Corp.},\textsuperscript{117} the Fourth District Court of Appeal held that an error in the naming of the surety in a complaint was a misnomer which entitled the plaintiff to have its amended complaint relate back to the date of original filing, thus avoiding the statute of limitations defense.\textsuperscript{118}

In\textit{ Wylie v. Investment Management & Research, Inc.},\textsuperscript{119} the Fourth District Court of Appeal held that “[n]onclaim statutes differ from statutes of limitations in that the former are jurisdictional provisions which the parties may not ordinarily waive, while the latter are procedural bars which may be waived by the failure to plead or assert them.”\textsuperscript{120}

\textbf{F. Expert Witnesses}

There were several important decisions regarding the use of expert witness testimony, beginning with the United States Supreme Court’s decision in \textit{Daubert v. Merrell Dow Pharmaceuticals, Inc.}\textsuperscript{121} The Court held that the test for admissibility of expert scientific evidence established in \textit{Frye v. United States}\textsuperscript{122} was superseded by the adoption of the Federal Rules of Evidence.\textsuperscript{123} According to \textit{Frye}, “expert opinion based on a scientific technique is inadmissible unless the technique used is ‘generally accepted’ as reliable in the relevant scientific community.”\textsuperscript{124} However, nothing in the Federal Rules of Evidence governing expert testimony gives any indication that “general acceptance” is a prerequisite to the admissibility of scientific evidence.\textsuperscript{125} Under the rules, a trial judge, faced with a proffer of expert scientific testimony, must determine whether the expert is proposing to testify to scientific knowledge that will assist the trier of fact to understand or determine a fact in issue.\textsuperscript{126}

\begin{itemize}
  \item \textsuperscript{116} Id. at 330.
  \item \textsuperscript{117} 627 So. 2d 1332 (Fla. 4th Dist. Ct. App. 1993).
  \item \textsuperscript{118} Id. at 1333.
  \item \textsuperscript{119} 629 So. 2d 898 (Fla. 4th Dist. Ct. App. 1993).
  \item \textsuperscript{120} Id. at 902.
  \item \textsuperscript{121} 113 S. Ct. 2786 (1993).
  \item \textsuperscript{122} 293 F. 1013 (D.C. Cir. 1923).
  \item \textsuperscript{123} \textit{Daubert}, 113 S. Ct. at 2793. Specifically, Rule 702 supersedes the “\textit{Frye Test}.”
  \item \textsuperscript{124} Id. at 2792 (quoting \textit{Frye}, 293 F. at 1014).
  \item \textsuperscript{125} Id. at 2794.
  \item \textsuperscript{126} Id. at 2796.
\end{itemize}
In *Square D Co.*, the First District held it was not an error to permit the testimony of a mechanical engineer as to inadequate design, even though the witness had no specific training in labels and warnings, and in spite of the fact that he had not been qualified as an expert in electrical power distribution equipment. The court accepted the expert based on his prior design experience.

It has been determined that there must be "substantial competent evidence of the [expert] services performed and the reasonable value of those services," in order to recover expert witness fees as taxable costs in state court. In *Powell v. Barnes*, a trial attorney, who was not shown to have expertise in the same field as the expert whose fees were sought to be taxed as costs, testified as to the expert witness fee. The court determined that this was not substantial competent proof of the expert witness fee. The court stated that the expert, or another qualified expert in the same field, should provide the requisite proof.

G. **Piercing the Corporate Veil**

In *Walton v. Tomax Corp.*, the Fifth District Court of Appeal reversed a directed verdict for the president and chief executive officer of a construction corporation whom the homeowner claimed had acted as the alter ego of the corporation. The court considered the factors discussed in *Dania Jai-Alai Palace, Inc. v. Sykes* and concluded that there was enough evidence for the jury to find the construction company president depleted corporate assets for his personal benefit so that the corporate veil should be pierced.

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127. *Square D Co.*, 621 So. 2d at 1373.
128. *Id.* at 1379.
129. *Id.*
131. *Id.*
132. *Id.*
133. 632 So. 2d 178 (Fla. 5th Dist. Ct. App. 1994).
134. 450 So. 2d 1114 (Fla. 1984).
H. Class Actions

The Second District Court of Appeal in *Barton-Malow Co. v. Bauer*¹³⁶ reversed an order granting class certification to parties who claimed injury as a result of environmental problems within the Polk County Courthouse. The plaintiffs claimed to have health problems caused by the negligence of the building’s general contractor and architect. The court held that an evidentiary hearing, while not necessary in all cases, was necessary here.

When it is not clear from the pleadings that common issues predominate or that the proposed class representatives provide a superior method for the fair and efficient adjudication of the controversy . . . . If the defendants contest the plaintiff’s allegations, it will be necessary for the trial court to determine whether the facts actually support the allegations.¹³⁷

VII. BANKRUPTCY

In *In re American Ship Building Co.*,¹³⁸ a debtor sought to assume its executory contract which the Department of the Navy had terminated. The United States Bankruptcy Court of the Middle District of Florida held that the bankruptcy court was without jurisdiction to determine the issue of wrongful termination of the government contract. That issue is controlled by the Contract Disputes Act,¹³⁹ and the Bankruptcy Court should yield jurisdiction to the United States Court of Federal Claims.¹⁴⁰

VIII. LIENS

A. Lien Priorities

In *Carteret Savings Bank v. Citibank Mortgage Corp.*,¹⁴¹ the Florida Supreme Court, on a certified question from the Fourth District Court of Appeal, held “that only the portion of a mortgage loan extended for the purpose of purchasing property and existing improvements is entitled to priority as a purchase money mortgage; priority in favor of a purchase

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¹³⁶. 627 So. 2d 1233 (Fla. 2d Dist. Ct. App. 1993).
¹³⁷. *Id.* at 1235.
¹⁴¹. 632 So. 2d 599 (Fla. 1994).
money mortgage does not extend to sums advanced for the improvement of
real property."#142

B. Notice to Owner

In 1992, the Florida Supreme Court held, in the case of *Aetna Casualty
& Surety Co. v. Buck*,#143 that where a common identity exists between the
owner and the contractor, privity of contract is established. Where privity
of contract with the owner exists, service of a Notice to Owner is not
required.#144 However, whether privity exists depends on the facts of each
case. In *C.L. Whiteside & Associates Construction Co. v. Landings Joint
Venture*,#145 the Fourth District Court of Appeal addressed the issue of
whether there was common identity between an owner and an ostensible
general contractor.

In *Whiteside*, the owner of the property was a joint venturer. The
managing partner of the joint venture was a corporation whose president
also happened to be the president of the construction company which
entered into the subcontract with Whiteside. The construction company
president personally signed the subcontract. The subcontractor did not serve
a notice to the owner relying on the fact that it dealt with the president of
the managing joint venture partner. Several months later, after a dispute
occurred between the general contractor and the subcontractor, the subcon-
tractor served its Notice to Owner. The subcontractor then suspended
performance and recorded a claim of lien. The trial court concluded that
there was not enough commonality of ownership between the owner and the
general contractor and dismissed the action to enforce the lien on summary
judgment due to lack of notice to the owner. The subcontractor appealed.

The Fourth District Court of Appeal agreed with the subcontractor that
"the issue of common identity is not synonymous with common ownership,"
for purposes of determining privity.#146 It reversed the summary judgment
and remanded the case for trial, noting that questions of privity will depend
on the facts of each case. Proof of common identity can establish
privity.#147

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#142. *Id.* at 599 (emphasis omitted).
#143. 594 So. 2d 280 (Fla. 1992).
#144. *Id.* at 281.
#145. 626 So. 2d 1051 (Fla. 4th Dist. Ct. App. 1993).
#146. *Id.* at 1052.
#147. *Id.* at 1053.
The issue of when the forty-five days for serving a Notice to Owner begins to run was addressed by the Fourth District Court of Appeal in *Gazebo Landscape Design, Inc. v. Bill Free Custom Homes, Inc.* Gazebo, a landscaping contractor, sought to enforce a construction lien against a homeowner. After traveling with the homeowner to a tree supplier to choose specific trees in November and making a deposit for same, Gazebo began digging holes on the owner’s property for planting the trees on December 5, 1990. Gazebo timely served its Notice to Owner, utilizing the December 5th date, not the date of the November tree buying trip. The trial court refused to enforce the lien on the grounds that Gazebo did not serve its Notice to Owner within forty-five days after commencing to furnish service or materials.

The appellate court disagreed with this interpretation and suggested that the trial court look at all of the circumstances surrounding the particular job or transaction in determining when the furnishing of services or materials begins. While Gazebo did receive a deposit for the trees, the court determined “there were no affirmative acts taken by Gazebo which establish that Gazebo actually began to furnish materials” to the homeowner until it dug the holes on the owner’s property. Based upon the testimony of Gazebo’s representative, the Court determined it was reasonable to believe that the trip to Sarasota was merely a sales trip, and that there was no deal until “the job was in the ground.”

The court pointed out that, for purposes of determining when materials and services were furnished, the test which may be utilized is “whether the contractor had actually suffered any economic detriment, or whether he simply engaged in certain activities on a gratuitous basis, in hopes of ‘landing’ a job.”

C. Jurisdiction

Two district courts of appeal have held that proper jurisdiction for an action to enforce a lien under $15,000 is the county court. However, the Florida Supreme Court recently determined that there is concurrent jurisdiction in both the county and circuit courts for the enforcement of liens not in excess of $15,000. The court disagreed with the reasoning of the

148. 638 So. 2d 87 (Fla. 4th Dist. Ct. App. 1994).
149. Id. at 89.
Third District Court of Appeal when the lower court declared that an action to enforce a lien does not involve title and boundaries to property. 152

D. Legislative Changes

There were a few changes to the construction lien law enacted by the legislature in 1994, the most significant being a change to section 713.16, with respect to requests for sworn statements of account. 153 In order for the failure of the lienor to respond to the request to act as a complete defense to the lien, the request for sworn statement must be served on the lienor to the attention of the lienor's designee at the address specified in the Notice to Owner. The change in the law does not make clear what happens when the party serving the Notice to Owner does not designate a person or address for service of the request for sworn statement in the Notice to Owner.

The same is true for the request for sworn statement served by a contractor on a job with an exemptory payment bond. 154 In order for the failure to respond to the request to act as a defense to the bond claim, the request for sworn statement must be served on the lienor to the attention of the person designated in the preliminary notice, at the address designated.

If the owner, or the contractor on a job with a payment bond, serves a request for sworn statement of account after having received a responsive sworn statement of account, and if there has been no change in the information between the time of giving of the sworn statement and the time of the next request for sworn statement, then the failure to respond to the second request for sworn statement does not act as a defense. 155

If a request for a sworn statement served after suit is filed to enforce the lien, or after suit is filed to recover against a payment bond claim, that request for sworn statement will not act as a defense.

Failing to furnish a response, or the furnishing of a false or fraudulent statement, has always acted as a complete defense to the lien claim. After July 1, 1994, the negligent inclusion or omission of any information in the requested sworn statement will act as a defense to the extent that the owner (or contractor with the payment bond) can demonstrate prejudice from the negligent inclusion or omission.

152. Id.
154. FLA. STAT. § 713.23 (1993).
155. See ch. 94-119, § 319, 1994 Fla. Laws at 635.
The warning at the top of the request for sworn statement has been changed to add the words “signed under oath.” There has been other language added to the request which simply underscores the concept that the response to the request for sworn statement is not required to include information which is not known as to future work on the job. That was already the state of the law.

IX. LEGISLATION AFFECTING CONTRACTORS

In response to the problems encountered in the aftermath of Hurricane Andrew, the 1994 Florida Legislature created a statute dealing with restrictions on the use a contractor may make of funds received in payment for the repair, restoration, improvement, or construction of residential real property during the term of an executive order or proclamation declaring an emergency. This new law went into effect April 14, 1994.

There has been a Federal False Claims Act for many years. However, in 1994, the Florida Legislature created the Florida False Claims Act, which provides a civil cause of action, including treble damages for persons who present false claims, including any request or demand under a contract for money, property, or services against the state.

X. CONCLUSION

This year saw several significant decisions effecting the construction industry, most notably the recent Florida Supreme Court decisions in Murthy and Nachon. Although two years have passed since Hurricane Andrew, its effect on construction law continues to be felt from code changes and new legislation concerning emergency management, to increased litigation involving defective design and faulty construction. The consequences of these many changes will undoubtedly find expression in the evolving case law.

158. See Florida False Claims Act, ch. 94-316, §§ 1-17, 1994 Fla. Laws 2204, 2205-14 (to be codified at FLA. STAT. §§ 68.081-.092).

John J. Fumero

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The South Florida Water Management District is a regional natural resource management agency involved in significant ongoing programs to acquire and manage environmentally sensitive lands, regulate water resource impacts of development activities, design and construct ecosystem restoration projects, provide applied scientific research relevant to natural resources issues, and operate a regional water conveyance system for flood protection, water quality, and water supply purposes.

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I. INTRODUCTION

Florida is a place on a collision course with itself, dependent both on its unique natural resources and the pell-mell growth that is strangling those resources.¹

Over the last thirty years, Florida has experienced staggering growth. “The decades of the 1960s, 70s and 80s were times of unprecedented [economic and] population growth in South Florida, when almost 1,000 people per day moved into the area.”² Presently, more than 4.5 million people call southern Florida home. By the year 2010 it is projected that

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¹. Lieutenant Governor Buddy McKay, Remarks at the Inaugural Meeting of the Governor’s Commission for a Sustainable South Florida (Apr. 27, 1994).
South Florida’s population alone will increase another 2.5 million.\(^3\) Effective and efficient natural resource protection and management is therefore more critical now than ever before.

This article provides an overview of environmental legislation which passed during the 1993 and 1994 state legislative sessions. The primary focus is on the Florida Environmental Reorganization Act of 1993\(^4\) ("1993 Act") and the Wetlands Act of 1994\(^5\) ("1994 Act"). Taken together, these two pieces of legislation represent some of the most comprehensive and innovative environmental legislation ever to pass in Florida. This article will also touch upon related natural resource planning and regulatory developments that are mandated by other 1993-94 state legislation.

II. STREAMLINING AND CONSOLIDATION OF WETLANDS REGULATION

Wetlands and related upland resources play a critical role in Florida’s complex and delicate ecosystems. They provide year-round habitats for fish and wildlife.\(^6\) Numerous threatened and endangered animal species in the United States depend on wetlands for survival.\(^7\) Further, two-thirds of the commercial fish and shellfish harvested along the Atlantic coast and in the Gulf of Mexico depend on coastal estuaries and their wetlands for food sources, spawning grounds, or nurseries for their young.\(^8\) Wetlands also perform important water cleansing functions by holding nutrients, recycling pollutants, and preventing lake eutrophication.\(^9\) Wetlands reduce shoreline erosion and help protect water tables from saltwater intrusion and urbanized

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3. SOUTH FLA. WATER MANAGEMENT DIST., LOWER WEST COAST WATER SUPPLY PLAN 6 (1994).
4. Ch. 93-213, 1993 Fla. Laws 2129 (codified in scattered sections of FLA. STAT. chs. 253, 259, 367, 370, 373, 403 (1993)).
5. Ch. 94-122, 1994 Fla. Laws 661 (to be codified in scattered sections of FLA. STAT. chs. 193, 373, 380, 403).
7. Id. at 14.
8. Id. at 13.
9. WILLIAM J. MITSCH & JAMES GOSSELINK, WETLANDS 404-05 (1986). Eutrophication is a natural aging process accelerated by pollution; sewage, fertilizer, and other pollutants increase the nutrients entering the lake. As the growth of algae and other plants increases, oxygen levels decrease. Resulting sedimentation allows growth of aquatic plants and the lake becomes a wetland.
areas from flood. They also moderate local temperatures and maintain regional precipitation.

Under Florida's current environmental regulatory framework, a person engaging in water or land altering activity is likely required to secure separate permits from the Department of Environmental Protection ("DEP"), a Water Management District ("WMD"), and local government. Wetland impacts are regulated by these state, regional, and local entities through wetland resource, surface water management, sovereign submerged lands, coastal construction, mangrove alteration, and in some cases, city or county permitting programs. At the federal level, there is also a requirement to obtain a permit from the United States Army Corps of Engineers ("Corps") for the same development activities that impact wetlands.

10. Id. at 402. Only recently have wetlands been recognized as flood control buffers. A flood may be less destructive when marshes and swamps slow water velocity and desynchronize peaks of tributary streams as the waters flow through impeding vegetation and into the main channel.

11. Id. at 66. Wetlands have a moderating effect on temperature because water warms and cools slowly in comparison to land temperatures.

12. Id. at 72-76. Wetlands contribute to rainfall through evapotranspiration—a loss of water from soil by evaporation and from plants by transpiration. Wetland drainage can result in regional rainfall deficits.

13. See ch. 93-213, § 3, 1993 Fla. Laws at 2133 (codified at Fla. STAT. § 20.255 (1993)). Effective July 1, 1993, the Department of Environmental Regulation and the Department of Natural Resources were merged, becoming the DEP. See also discussion infra part V.


16. Id. §§ 373.413-.416 (1993).

17. Id. § 253.002.

18. Id. §§ 161.52-.58.

19. Id. § 403.931. The regulation of mangrove alteration (formerly §§ 403.931-938 of the Florida Statutes) and stormwater is also consolidated into the ERP program.

20. 33 U.S.C. § 1344 (Supp. V 1993). The § 404 permit program minimizes adverse impacts on wetlands by prohibiting discharge of solid materials into wetlands. The Corps requires a permit for the discharge of dredge or fill material unless the activity qualifies as an exemption. Dredge material is material excavated or dredged from waters of the United States. 33 C.F.R. § 323.2(c) (1993). Fill material is "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody." Id. § 323.2(e). The authority to regulate dredge or fill material controls activities affecting water quality, including deposits of material excavated from lake, river,
Given the multitude of wetlands regulatory programs, efforts began as early as 1986 to streamline the permitting process in Florida. One such effort was the creation of the Environmental Efficiency Study Commission\textsuperscript{21} to identify duplicative environmental programs, make recommendations to eliminate such duplication, and promote efficient administration of the applicable regulations. The commission’s report,\textsuperscript{22} including recommendations, was presented to the 1987 Legislature, but no statutory changes were enacted.

Criticism of the present overlapping, and often duplicative regulatory structure has been widespread in recent years,\textsuperscript{23} leading to efforts by the DEP and the three largest WMDs\textsuperscript{24} to streamline the permitting process administratively through the establishment of interagency operating agreements. These agreements distribute permitting responsibility between the DEP and the pertinent WMD based on the type of regulated activity.\textsuperscript{25}

or stream beds (dredged material) and upland soil and structures placed in waters (fill material). \textit{See United States v. Tull,} 615 F. Supp. 610, 622 (E.D. Va. 1983), aff’d, 769 F.2d 182 (4th Cir. 1989) (finding that fill material composed of sand and debris is an offending pollutant within the meaning of the Clean Water Act), \textit{and rev’d in part,} 481 U.S. 412 (1987); Avoyelles Sportsmen’s League, Inc. \textit{v. Alexander,} 473 F. Supp. 525, 532 (W.D. La. 1979) (finding that sheared trees, vegetation, scraped soil, and leaf litter from landclearing within wetlands constitutes “dredge or fill material” for purposes of § 404’s permit requirements).

The following activities, however, are exempted from compliance with § 404: 1) normal farming, forestry, and ranching activities; 2) maintaining currently serviceable structures; 3) constructing or maintaining farm or stock ponds, irrigation ditches, or maintaining drainage ditches; 4) constructing upland temporary sedimentation basins; 5) constructing or maintaining farm or forest roads, or temporary mining roads, if done in accordance with best management practices; and 6) activities regulated under a state-approved program under 33 U.S.C. § 1288(b), to control minor discharges through best management practices. 33 U.S.C. § 1344(f) (1987).


These interagency agreements increased the efficiency of the wetlands regulatory process by allowing one agency to process both wetland resource and surface water management permit applications for a given development activity. However, since two separate legislatively created permitting programs, with differing criteria and standards, remained in place, the agency had to issue two separate permits for the same activity.26

During 1992, the Partners for a Better Florida Advisory Council,27 with a renewed legislative charge in hand, considered permit streamlining issues in a series of public meetings around the state. These deliberations provided, in part, the impetus for the passage of the 1993 Act.28

In its “Declaration of Policy,” the 1993 Act succinctly embodies the guiding principles driving modern natural resource protection initiatives as follows:

(a) To develop a consistent state policy for the protection and management of the environment and natural resources.
(b) To provide efficient governmental services to the public.
(c) To protect the functions of entire ecological systems through enhanced coordination of public land acquisition, regulatory, and planning programs.
(d) To maintain and enhance the powers, duties, and responsibilities of the environmental agencies of the state in the most efficient and effective manner.

27. FLA. STAT. § 403.0612 (Supp. 1992). Partners for a Better Florida Advisory Council was established by legislation passed during the 1992 legislative session.
28. Fumero, supra note 26, at 62.
To streamline governmental services, providing for delivery of such services to the public in a timely, cost-efficient manner.\textsuperscript{29}

A. \textit{Environmental Resource Permit}

Broadly stated, the 1993 Act\textsuperscript{30} consolidates wetland resource, mangrove alteration, and surface water management permits into a single regulatory approval referred to as an "environmental resource permit" ("ERP").\textsuperscript{31} Once the rules implementing this legislation become effective,\textsuperscript{32} a single permit issued by a single agency will be required for development activities that, under the present regulatory structure, might require permits from more than one agency. This was accomplished by repealing most of the Warren S. Henderson Wetlands Protection Act,\textsuperscript{33}
while reenacting and codifying its key provisions, with some amendments, in Part IV of chapter 373 of the *Florida Statutes*. Some have referred to this legislative consolidation of wetlands regulatory programs as "vertical integration."

The most comprehensive rulemaking mandate contained in the 1993 Act required, by July 1, 1994, consolidation of the existing regulatory programs developed by the DEP, pursuant to the Warren S. Henderson Wetlands Protection Act, and the WMDs, pursuant to the Florida Water Resources Act. Setting general parameters, the 1993 Act provides that the DEP and the WMDs adopt rules to incorporate the provisions of this section [373.414], relying primarily on the existing rules of the department and the water management districts, into the rules governing the management and storage of surface waters. Such rules shall seek to achieve a statewide, coordinated and consistent permitting approach to activities regulated under this part [part IV of chapter 373].

One of the more significant provisions in the 1993 Act calls for incorporation of the seven-part public interest test and the water quality

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34. Ch. 93-213, § 45, 1993 Fla. Laws at 2157 (repealing scattered sections of FlA. Stat. ch. 403 (1993)). Repeal of those sections dealing with "landward extent of waters of the State" was affected when the wetland delineation rule was ratified by the 1994 Legislature.

35. *See supra* note 32.


37. *Id.* § 30, at 2147 (codified at FlA. Stat. § 373.414 (1993)).

38. *Id.* at 2144-45. In determining whether a project is not contrary to the public interest, or is clearly in the public interest, the DEP and the WMDs will be considering and balancing the following criteria contained in § 373.414(1)(a) of the *Florida Statutes*:

1. Whether the activity will adversely affect the public health, safety, or welfare or the property of others;
2. Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;
3. Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;
4. Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;
5. Whether the activity will be of a temporary or permanent nature;
6. Whether the activity will adversely affect or will enhance significant historical and archaeological resources under the provisions of s. 267.061; and
Currently applied by the DEP in its wetland resource regulatory program. These tests will be considered as part of the existing "harm to the water resources and objectives" of the WMD test, and applied in present surface water management regulatory programs. Thus, the above statutory tests will be concurrently applied whenever a permit is required for the construction, alteration, maintenance, operation, removal, or abandonment of a surface water management system in, on, or over wetlands or other surface waters.

Encompassing a key, yet controversial statutory criterion, the 1993 Act provides criteria for considering the cumulative impacts of a project. This statutory criterion is similar to a version previously set forth in chapter

7. The current condition and relative value of functions being performed by areas affected by the proposed activity.


40. FLA. STAT. §§ 373.413-.416 (1993). Proposed projects cannot be inconsistent with the overall objectives of a WMD or harmful to the water resources of a WMD.

41. 20 Fla. Admin. Weekly (May 6, 1994) (to be codified at FLA. ADMIN. CODE. ANN. r. 40C-4.021, 40D-4.021, 40E-4.021) (proposed May 6, 1994). A surface water management system is defined as a stormwater management system, dam, impoundment, reservoir, appurtenant work or works, or any combination thereof and includes areas of dredging or filling, as defined by §§ 373.403(13) and 373.403(14) of the Florida Statutes. See FLA. STAT. § 373.403(13)-(14) (1993).


43. The term "cumulative impacts" has actually been used to describe several distinct types of situations. However, the application that best explains the concept involves a situation in which surrounding circumstances suggest a number of permit applications for similar kinds of activities in the same geographical area will be filed. A classic example of this situation is where an agency denies an application for the dredging of an access channel adjacent to an existing dock, even though the single project would have only a small adverse impact on the water body. However, if there are many private docks in the area, and the permitting agency anticipates requests from other property owners for dredging channels or boat basins, the application can be denied on the basis of expected cumulative impacts of dredging several boat basins in the same part of the water body. See, e.g., Florida Power Corp. v. Department of Envtl. Regulation, 92 Envtl. & Land Use Admin. L. Rep. 56 (1992); J.T. McCormick v. City of Jacksonville, 12 Fla. Admin. L. Rep. 960, 980 (1990); Caloosa Property Owners' Ass'n v. Department of Envtl. Regulation, 462 So. 2d 523 (Fla. 1st Dist. Ct. App. 1985).
403 of the *Florida Statutes*, but with certain changes. The amended provision in the 1993 Act specifies that the cumulative impacts from development activities to be considered are those in the same drainage basin as the project under review, and adds that the local government comprehensive plan, or applicable land use restrictions and regulations, are to be used, at least in part, for determining reasonable expected future activities. Simply put, under a cumulative impacts analysis, a permit applicant must provide reasonable assurances that reasonably expected future permit applications with like resource impacts will not result in violations of state water quality standards or have significant adverse impacts to functions of wetlands or other surface waters. Consequently, the regulatory agency is empowered to consider not only the activity or project proposal for which the permit is being sought, but also any other projects or activities which may reasonably be anticipated to follow.

To ensure statewide consistency in the development of ERP criteria, statements in the 1993 Act like “[s]uch rules shall seek to achieve a
statewide, coordinated and consistent permitting approach" have encouraged the DEP and the WMDs to coordinate their separate rulemaking efforts to implement the 1993 Act.\(^{50}\) This is not to say, however, that all permit review criteria must be identical statewide. Natural resource concerns and the diverse ecosystems in which they occur vary widely throughout Florida. Recognizing these differences, the 1993 Act allows for variations in permitting standards and criteria in the regulatory programs administered by the DEP and individual WMDs, as long as they are based on "differing physical or natural characteristics."\(^{51}\)

Finally, as with the implementation of any new regulatory program, several provisions in both the 1993 and 1994 Acts grandfather certain projects or activities from the application of specified ERP rules\(^{52}\) as well

\(^{50}\) Ch. 93-213, § 30, 1993 Fla. Laws at 2147 (codified at FLA. STAT. § 373.414 (1993)).


\(^{52}\) Ch. 94-122, § 4, 1994 Fla. Laws at 670-74 (to be codified at FLA. STAT. § 373.414(11)). This category exempts dredge and fill activity from the new ERP rules if the dredge and fill activity was issued a wetland resource permit or was exempted from such rules, and the dredge and fill activity did not require a surface water management permit (based upon the rules existing immediately prior to the effective date of the new ERP rules). This grandfathering is also extended to any modification of the wetland resource permit as long as the modification is not considered to be a "substantial modification." Id. at 671-72 (to be codified at FLA. STAT. § 373.414(12)).

Activities which are covered by a conceptual, individual, or general surface water management permit, and which were either exempt or permitted under wetland resource permitting rules (all of which occurred prior to the effective date of ERP rules), are grandfathered from the new ERP rules. This grandfathering provision is for the "plans, terms, and conditions" approved in the surface water management permit and/or wetland resource permit and is valid for the term of such permits. This provision also applies to any modification of "the plans, terms and conditions" of a surface water management permit, including new activities that must obtain a permit, within the geographical area to which the permit applies. But this provision is not applicable if the modification would either extend the permitted time limit for consideration, or is expected to lead to "substantially different and greater water resource impacts." Id. at 672 (to be codified at FLA. STAT. § 373.414(13)). Under this category, any DEP or WMD formal wetland delineations issued in response to a petition that was filed on or before June 1, 1994, will continue to be valid for the duration of the determination. Additionally, for those projects that have received a formal wetland determination or that have a pending petition as of June 1, the existing wetland delineation methodology will continue to apply.

If a valid pre-Henderson formal wetland delineation encompasses lands that are a part of a project for which a master development order has been issued, pursuant to § 380.06(21) of the Florida Statutes, the delineation will remain valid for the "buildout period." Proof of validation must be submitted by the applicant prior to January 1995. Any jurisdictional
as conditional exemptions from specified rules for those areas used exclusively for water treatment or disposal. Due to the uncertainty

determination validated by the DEP pursuant to rule 17-301.400(8) of the Florida Administrative Code, as it existed in rule 17-4.022 of the code on April 1, 1985, will remain in effect until July 1, 1998. If the DEP wetland delineation has been revalidated by the DEP, and either a development order was issued pursuant to § 380.06(15) of the Florida Statutes, a final development order issued pursuant to § 163.3167(8) of the Florida Statutes, or a vested rights determination have been issued pursuant to § 380.06(20) of the Florida Statutes, the wetland delineation shall remain valid until “completion of the project,” if “proof of such validation and documentation” submitted to the DEP establishes that the project meets the requirements of this category. The window to take advantage of the above provision closes on January 1, 1995.

As well as vesting the wetland lines, activities proposed within valid or revalidated delineations must be reviewed under wetland resource and surface water management permitting rules in existence immediately prior to the effective date of the ERP rules. However, this grandfathering provision states that the applicant can elect to have such activities reviewed under the new ERP rules. Id. at 673 (to be codified at FLA. STAT. § 373.414(14)). Any wetland resource or surface water management permit application which is pending on June 15, 1994, or which is complete prior to the effective date of the ERP rules, will not be subject to the new ERP rules or the new statewide wetland delineation methodology. Id. (to be codified at FLA. STAT. § 373.414(15)). There is a separate provision for phosphate and attapulgite mining activities (defined by and subject to §§ 378.201-212 & 378.701-703). Ch. 94-122, § 4, 1994 Fla. Laws at 673-74 (to be codified at FLA. STAT. § 373.414(16)). Until October 1, 1997, surface water management and wetland resource permitting of sand, limerock, or limestone mines located within specified areas of Dade County must be conducted under the rules in existence prior to the effective date of the new ERP rules.

53. During the 1994 legislative session, several regulated interest groups raised serious concerns over the impact of the new ERP program on areas used exclusively for water treatment or disposal, especially with regard to the application of state water quality standards in those areas. As a result, rules 17-340.700 and 17-340.750 of the Florida Administrative Code set out the following conditional exemptions from specified review criteria for stormwater or wastewater treatment ponds, and for wetlands created by mosquito control activities.

Where there is alteration or maintenance of works constructed and operated solely for wastewater treatment or disposal, and pursuant to a valid permit or regulatory exemption, the works are exempt from the application of state water quality standards, the statutory seven-part public interest test and cumulative impacts reviews, except for authority to protect threatened and endangered species in isolated wetlands. Similarly, the alteration or maintenance of works constructed and operated solely for stormwater treatment in accordance with a valid permit or regulatory exemption, with some exceptions, is exempt from the application of state water quality standards, the public interest test, and cumulative impact reviews. As with wastewater treatment works, this exemption does not apply to protection of threatened and endangered species that may be using these areas for foraging or habitat.

There is also a conditional exemption from the specified permit review criteria for the construction, alteration, operation, removal, and abandonment for systems or works in, on,
associated with the new ERP program, regulated interest groups fought very hard for these grandfathering provisions. The intent behind the grandfathering provisions is that projects and development activities which have previously been permitted, or those with established wetland jurisdictional determinations issued by the DEP or a WMD, have relied upon such regulatory determinations and undertaken a course of action based upon such reliance. Therefore, exceptions are needed for that class of projects or activities, since changes to regulatory requirements may unreasonably and detrimentally impact them.54

B. Coastal Construction Permits and Sovereign Submerged Land Authorizations

Considered to be another implementation step in wetlands regulation streamlining and consolidation, the basic intent of chapter 94-356 of the Laws of Florida is to merge, under certain circumstances, environmental resource, sovereign submerged lands, and coastal construction permit reviews through a single agency, utilizing a combined permit application review proceeding and appeals process. Similar to that of the ERP program, the goal here is to eliminate duplicative and conflicting criteria between programs, while enhancing the effectiveness of natural resource protection. Amendments to several chapters of the Florida Statutes were made to accomplish the procedural meshing of these permitting programs.55

In terms of the sovereign submerged lands program, it is important to recognize that the governor and cabinet, sitting as the Board of Trustees of the Internal Improvement Trust Fund ("Board of Trustees"), hold title to all sovereign submerged lands within the State of Florida.56 Sovereign submerged lands consist of submerged lands up to the mean high water line

54. Interview with Janet Llewellyn, Deputy Director of the Division of Environmental Resource Permitting of the DEP, in Tallahassee, FL (July 11, 1994).
of tidal waterbodies, and up to the ordinary high water line of nontidal
waterbodies. In nontidal waterbodies which historically have experienced
declining water levels, sovereign submerged lands include any lands
waterward of the ordinary high water line, even though these lands may no
longer be "submerged."\textsuperscript{57} The Board of Trustees is charged with managing
sovereign submerged lands in a manner that will provide the greatest
combination of benefits to the people of Florida. The Division of State
Lands (formerly within the Department of Natural Resources), which falls
within the DEP, acts as the designated agent for the Board of Trustees in
this resource management role.\textsuperscript{58}

Activities on sovereign submerged lands require consent from the
Board of Trustees. The type of consent required depends upon the nature
and scope of the activity, and generally falls into one of the following five
categories: consent of uses, lease, easement, use agreement, or management
agreements.\textsuperscript{59}

Regulating some of the same development activities and projects as the
sovereign submerged lands and ERP programs, is the coastal construction
permitting program. Established pursuant to chapter 161 of the \textit{Florida
Statutes}, the coastal construction permitting program provides comprehen-
sive regulations relating to coastal construction, excavation, and beach
alteration. The major objectives of the program are the protection of the
natural environment (the beach dune or coastal system) and the protection
of human life and property. These programs establish design and siting
policy, criteria, and standards aimed at protecting the coastal system and
marine turtles from unpermitted construction or other development activities,
and ensure that certain structures survive in a high hazard zone.\textsuperscript{60}

\textsuperscript{57} \textit{Fla. Stat.} §§ 253.001-83 (1993).

\textsuperscript{58} \textit{Id.}

\textsuperscript{59} \textit{Id.} Single family docks and minor shoreline stabilization projects normally require
a consent of use. A lease is required for commercial facilities and multifamily docking
facilities located within an aquatic preserve, or which preempt more than ten square feet of
sovereign land per foot of shoreline if located outside of an aquatic preserve. A management
agreement is typically required for nonrevenue uses of sovereign land. Use agreements are
required for activities within existing easements, for geophysical testing, and for salvage
operations. Bridge and utility crossings, navigation and flushing channels, borrow and spoil
sites, and major shoreline stabilization or beach nourishment projects normally require an
easement. A more detailed description of the types of consent and associated information is
found in chapter 18-21 of the \textit{Florida Administrative Code}.

\textsuperscript{60} \textit{Id.} §§ 161.041, .053, .052 (1993). For a more detailed discussion, see David Levine
et al., \textit{Regulation of Coastal Development, in TENTH ANNUAL ENVTL. PERMITrING SHORT
COURSE 373 (1994). There are four major components of the coastal construction program:
§ 161.53 of the \textit{Florida Statutes} regulates activities from the seasonal high water line to a
By virtue of chapter 94-356\textsuperscript{61} of the \textit{Laws of Florida}, the DEP now has the authority to promulgate rules to implement joint processing of permit applications for two or more of the following permit applications: environmental resource permits issued under part IV of chapter 373 of the \textit{Florida Statutes};\textsuperscript{62} proprietary authorizations issued under chapters 253 and 258 of the \textit{Florida Statutes};\textsuperscript{63} use of sovereign submerged lands owned by the Board of Trustees; or coastal construction permits issued under chapter 161 of the \textit{Florida Statutes}.\textsuperscript{64} A major policy step established by this legislation is the authorization given the Board of Trustees to delegate action on applications to use sovereign submerged lands to the WMDs and the DEP. Upon delegation, the WMDs must review applications for lease of sovereign submerged lands when they have permitting responsibility, pursuant to the activity-based split of permitting responsibilities set forth in an interagency operating agreement.\textsuperscript{65} The delegated permitting authority remains subject to DEP supervisory authority. Delegations of authority to issue sovereign submerged lands or coastal construction permits to the DEP and the WMDs must be done by rule in order to be effective.\textsuperscript{66}

Although the WMDs will have authority to recommend issuance of permits based upon sovereign submerged lands lease applications, the DEP, the Board of Trustees, and the Department of Legal Affairs retain concurrent authority to defend title to sovereign submerged lands.\textsuperscript{67} Notably, the Act prohibits the approval of regulatory permits (ERP and coastal construction)

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\textsuperscript{61} Ch. 94-356, §§ 493, 501, 502, 1994 Fla. Laws at 2891, 2896-98, 2898-99 (to be codified at FLA. STAT. §§ 253.52, 373.427, .4275).

\textsuperscript{62} See FLA. STAT. §§ 373.403-.4596 (1993).

\textsuperscript{63} Id. chs. 253, 258.

\textsuperscript{64} Id. ch. 161.

\textsuperscript{65} Ch. 94-356, §§ 485, 501, 1994 Fla. Laws at 2885-86, 2896-98 (to be codified at FLA. STAT. §§ 161.055, 373.427). WMDs are allowed to keep chapter 253 application fees if they process the joint application. However, lease revenues are retained by the DEP. \textit{See also} discussion \textit{infra} part II.C.

\textsuperscript{66} Ch. 94-356, § 488, 1994 Fla. Laws at 2887-88 (to be codified at FLA. STAT. § 253.002). The DEP is not authorized to delegate its authority to assert or defend title to sovereign submerged lands. This means any challenge to a sovereign submerged lands decision, whether made by the DEP or WMDs, as delegates, must be handled by the DEP.

\textsuperscript{67} Id. §§ 493, 501, 502, at 2891, 2896-98, 2898-99 (to be codified at FLA. STAT. §§ 253.52, 373.427, .4275).
where proprietary authorizations to use sovereign submerged lands have been denied.\textsuperscript{68}

Implementing the joint processing and decision making provisions, chapter 94-356 spells out in some detail a consolidated process for those decisions involving sovereign submerged lands that are both retained by the Board of Trustees and delegated to either the DEP or the WMDs.\textsuperscript{69} To maintain the streamlined features for those actions retained by the Board of Trustees, the legislation requires that a consolidated notice of proposed agency action be provided within a ninety-day time frame, but extends the time frame for final agency action so that the Board of Trustees can make the decision on the sovereign submerged lands portion of the application and can direct the secretary of the DEP or the WMD Governing Board to take action.\textsuperscript{70} The Board of Trustees must consider the sovereign submerged lands issues at its next regularly scheduled meeting for which notice may be properly given.\textsuperscript{71}

In order to put into play the procedural streamlining, review for those permits to be jointly processed will include several notable features. For instance, information for all the permits will have to be submitted in order for any one of the permits to be considered complete, and for the ninety-day clock\textsuperscript{72} to begin; criteria for all permits being jointly processed must be met before any one permit can be issued; a single, consolidated order will be issued, but it will include separate findings of fact, conclusions of law, and rulings concerning each of the permit applications reviewed; and public noticing requirements for receipt of permit applications and for proposed agency action are revised to provide consistency among the different agencies and permitting programs.\textsuperscript{73}

When an ERP and a coastal construction permit are jointly processed, the permit authorization will be called a "Joint Coastal Permit."\textsuperscript{74} Again,

\begin{footnotes}
\item[68.] \textit{Id.} §§ 485, 501, 502, at 2885-86, 2896-98, 2898-99 (to be codified at FLA. STAT. §§ 161.055, 373.427, .4275).
\item[69.] \textit{See id.} §§ 495-503, at 2892-2900 (to be codified in scattered sections of FLA. STAT. chs. 253, 258, 270, 373).
\item[70.] \textit{Id.} §§ 493, 501, 502, at 2891, 2896-98, 2898-99 (to be codified at FLA. STAT. §§ 253.52, 373.427, .4755).
\item[72.] \textit{See FLA. STAT.} § 120.60 (1993) (regarding the statutory time clock for review of permit applications).
\item[73.] Ch. 94-356, §§ 501, 502, 1994 Fla. Laws at 2896-99 (to be codified at FLA. STAT. §§ 373.427, .4275).
\item[74.] \textit{Id.} § 485, at 2885-86 (to be codified at FLA. STAT. § 161.055).
\end{footnotes}
the denial of a permit under either program would now result in the denial of the Joint Coastal Permit.  

C. Activity-Based Split of Permitting Responsibilities

With the consolidation of wetlands permitting under chapter 373 of the Florida Statutes, the question turns to which regulatory agency will exercise this authority. The 1993 Act addressed this question by ratifying the activity-based division of permitting responsibilities currently established in pilot interagency operating agreements between the DEP and the WMDs.  

Affirming the division of permitting responsibilities between the DEP and the WMDs, as set forth in the existing 1992 pilot agreements, the 1993 Act recognized that further changes would be forthcoming, and therefore authorized the DEP and WMDs to modify the existing division of permitting responsibilities to achieve "greater efficiency" and to "avoid duplication."  

With certain minor changes, the new operating agreements divide the permitting responsibilities of the agencies along the lines of the existing agreements between the DEP and the WMDs. Under the new agreements, the DEP will issue environmental resource permits for the following activities: solid waste management facilities; hazardous waste facilities;  

75. Id. § 501, at 2896-98 (to be codified at Fla. Stat. § 373.427).  
78. The new operating agreements, entitled "Operating Agreement Between the Department of Environmental Protection and the South Florida Water Management District Concerning Regulation Under Part IV of Chapter 373, Florida Statutes," are available upon request from the regulation department of the South Florida Water Management District.  
80. However, permit-by-permit oversight by the DEP, previously established in the operating agreements, was legislatively rescinded. The oversight provision in essence conveyed absolute veto authority over any WMD decisions concerning wetland resource permits. Mennella et al., supra note 25, at 20.  
ties; Serious domestic wastewater treatment facilities; Serious industrial wastewater treatment facilities; Serious mining projects; Serious power plants; Serious docking facilities; Serious water management district projects; Serious public works projects; Serious

82. These are facilities required to obtain a permit pursuant to rule 17-730 of the Florida Administrative Code, unless the facilities are incidental components of certain larger projects for which a WMD has permitting responsibility under the operating agreement. Id. r. 17-730 (1994).

83. The DEP will not issue permits under certain circumstances involving irrigation with reclaimed water and facilities which are part of certain larger projects. From the standpoint of exceptions to permitting of domestic wastewater treatment facilities, the agreement provides that a WMD must review permit applications for: 1) that part of a facility which constitutes the application of reclaimed water to irrigate crops, golf courses, or other landscapes; 2) that part of a facility which constitutes the application of reclaimed water to rehydrate wetlands or to provide artificial recharge to reduce or mitigate drawdown impacts due to well withdrawals; and 3) those facilities which address any of the requirements of surface water management permitting criteria adopted pursuant to part IV of chapter 373 of the Florida Statutes, through a system or activity which is not fully contained on the domestic wastewater facility site, but which is part of a larger project for which the DEP does not review and take final action on permit applications under the agreement.

84. These are facilities required to obtain a permit pursuant to rule 17-660 or 17-670 of the Florida Administrative Code, except for facilities which are incidental components of certain larger projects or that qualify for specified general permits. FLA. ADMIN. CODE ANN. r. 17-660 (1990); id. r. 17-670 (1994). From the standpoint of exceptions to permitting of industrial wastewater treatment facilities, the agreement provides that a WMD must review permit applications for: facilities in which the industrial wastewater component is merely a heating, ventilation, and air conditioning (“HVAC”) cooling tower discharge, or other industrial wastewater treatment facility, which is merely an incidental component of a project for which the DEP does not review and take final action on permit applications under the agreement; that part of a facility which constitutes the application of treated industrial wastewater to irrigate crops or landscapes; and freshwater aquaculture facilities in which alligators are not grown or held.

85. Projects include natural gas or petroleum exploration activities and facilities, and product pipelines, except for borrow pits without on-site grading or sorting facilities.

86. Electrical distribution and transmission lines, and other facilities related to the production, transmission, or distribution of electricity which are not certified under §§ 403.501-.539 the Florida Electrical Power Plant and Transmission Line Siting Act.

87. Docking facilities involving no associated adjacent development. These are considered to be “stand alone” docking facilities. Otherwise, if associated with residential or commercial development, the WMDs will have permitting authority.

88. In order to qualify, the project must either be constructed, operated, or maintained by a water management district.

89. The state Public Works Program contains projects carried out by the Corps which must be specifically authorized by congressional resolution or act, and funded as a separable line item by Congress. All of the projects remain subject to permits required under part IV of chapter 373, and chapters 253 and 403 of the Florida Statutes. FLA. ADMIN. CODE ANN. r. 17-26.001 (1990).
coastal projects, proposed in whole or in part, seaward of the coastal construction control lines, including beach nourishment projects and artificial reefs ("joint coastal permit"); navigational dredging conducted by governmental agencies, seaports, and single family dwelling units; and "open water" projects such as ski jumps, navigational aids, boat ramps, ski slalom courses, fish attractors, marine aquaculture, communication cables and lines, temporary systems for commercial film production, high speed rail facilities, and magnetic levitation demonstration projects.

Conversely, the WMDs will conduct environmental resource permitting for all other projects, which include virtually all residential, commercial, and agricultural projects. Additionally, the WMDs are given authority to act on any petitions for variances from the provisions of rules associated with any environmental resource permitting conducted by the WMDs.

The rationale underlying the division of permitting responsibilities is simple. A project should be able to secure all necessary permits from one agency in one proceeding. Thus, rather than have one agency review a proposed marina project, and another the associated residential development, the agreements allow for one comprehensive, integrated permit review process. The rationale explains why the DEP will be permitting most industrial activities, since these activities usually require other types of permits, such as air quality or hazardous waste, that are issued by the DEP. From the standpoint of ecosystem protection, activity-based permitting allows agencies to comprehensively review the potential impact of a project.

91. These include associated works such as piers, seawalls, and docks. Ch. 93-213, § 30, 1993 Fla. Laws at 2146 (codified at FLA. STAT. § 373.414 (1993)).
92. FLA. STAT. §§ 341.321-.386, 341.401-.422 (1993); ch. 93-213, 1993 Fla. Laws at 2129 (codified in scattered sections of FLA. STAT. chs. 253, 259, 288, 367, 373, 403 (1993)).
93. Modifications to existing permits will be processed by the agency that issued the original permit. If a permit has been modified, the agency which issued the last modification will issue future modification requests. However, modifications to surface water management permits for solid waste management facilities, and for the expansion of existing mines, will be processed by DEP regardless of whether a WMD issued the original permit. Ch. 93-213, 1993 Fla. Laws at 2129 (codified in scattered sections of FLA. STAT. chs. 253, 259, 367, 370, 373, 404 (1993)).
94. Id. § 30, at 2144-49 (codified at FLA. STAT. § 373.414 (1993)). The applicable variance provisions are set forth in section 403.201 of the Florida Statutes. FLA. STAT. § 403.201 (1993).
on upland and wetland resources (contiguous and isolated), including consideration of both water quality and quantity impacts. 95

D. Local Government Delegation

Local governments, which in many instances implement their own regulatory programs, are provided an avenue in which to involve themselves in statewide efforts to avoid regulatory duplication. To set the stage, the 1993 Act directs the DEP to adopt rules by no later than December 1, 1994, to guide the participation of the counties, municipalities, and local pollution control programs in a streamlined permitting system. A principle objective of this delegation rulemaking effort is the development of procedures and standards upon which DEP or WMD ERP program delegation determinations can be made. Other matters addressed by this rulemaking effort include promulgation of provisions under which a delegated program may have stricter environmental standards than the ERP program itself, and provisions for the applicability of chapter 120 of the Florida Statutes to local regulatory programs when the ERP program is delegated. 96

Realizing that not all local governments may have the wherewithal to implement the ERP program, the 1993 Act requires codification of minimum standards concerning the financial, technical, and administrative capabilities necessary for local governments to implement the ERP program, as well as special provisions under which the ERP program may be delegated to local programs serving populations of 50,000 or less. 97

For those local governments currently implementing their own wetland regulatory program, the 1993 Act creates certain preemptive authority for the ERP program. In two statutorily defined instances, an ERP can preempt a local government permit. One instance is if mitigation required by a local government cannot be “reconciled” with that required in the ERP. In such a case, the ERP criteria will govern. Similarly, where activities for a project occur in more than one local jurisdiction, and permitting conditions or regulatory requirements imposed by a local government cannot be reconciled with that of the ERP, the ERP again controls. 98

96. Ch. 93-213, § 34, 1993 Fla. Laws at 2152 (codified at Fla. Stat. § 373.441 (1993)).
97. Id.
98. Id. § 30, at 2145 (codified at Fla. Stat. § 373.414 (1993)).
Looking to address any remaining streamlining issues between state and local agencies, the 1993 Act "demands that areas of regulatory duplication between state and local permitting programs be identified and reconciled by January 1, 1995." 99

III. STATEWIDE WETLAND DEFINITION AND DELINEATION METHODOLOGY

Viewed as a major accomplishment, the 1993 Act provides a statutory definition of wetlands to be used statewide by the DEP, WMDs, local governments, and any other state, regional, or local governmental authority needing to define wetlands or to develop a delineation methodology to implement the definition.100 Wetlands are defined by the 1993 Act as those areas that are inundated or saturated by surface water or ground water at a frequency and a duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soils. Soils present in wetlands generally are classified as hydric or alluvial, or possess characteristics that are associated with reducing soil conditions. The prevalent vegetation in wetlands generally consists of facultative or obligate hydrophytic macrophytes that are typically adapted to areas having soil conditions described above. These species, due to morphological, physiological, or reproductive adaptations, have the ability to grow, reproduce or persist in aquatic environments or anaerobic soil conditions. Florida wetlands generally include swamps, marshes, bayheads, bogs, cypress domes and strands, sloughs, wet prairies, riverine swamps and marshes, hydric seepage slopes, tidal marshes, mangrove swamps and other similar areas. Florida wetlands generally do not include longleaf or slash pine flatwoods with an understory dominated by saw palmetto.101

A. Development of the Methodology

Initially, the statutory wetland definition was used for the sole purpose of rulemaking by the Environmental Regulation Commission ("ERC")102

99. Id. § 34, at 2152-53 (codified at Fla. Stat. § 373.441 (1993)).
100. Id. § 31, at 2149-50 (codified at Fla. Stat. § 373.421 (1993)).
102. See Fla. Stat. § 20.225(7) (1993). The Environmental Regulation Commission was created as part of the DEP. The Commission is composed of seven citizens of the state,
to develop a statewide wetland delineation methodology. The delineation methodology is the process by which agency staff demarcate the limit of wetlands and other surface waters subject to regulation under the ERP program.\footnote{103} Led by a status quo principle, the intent was to neither expand nor restrict the geographic extent of surface water and wetland areas currently regulated by the DEP and the WMDs.\footnote{104}

Before passage of the 1993 and 1994 Acts, each agency involved in the business of wetlands regulation was left to its own devices in the development of a wetland definition and delineation methodology. This resulted in each of the WMDs and the DEP utilizing their own methodologies. Consequently, it was not uncommon for a piece of property under permit review to have several differing wetland boundaries staked out by agencies, depending on the agency making such determinations.\footnote{105}

Throughout 1993, the DEP and the WMDs met on numerous occasions in an attempt to develop a proposed wetland delineation rule which satisfactorily encompassed all of the existing agency wetland delineation methodologies. This interagency work product became the basis of the wetland delineation rule presented to the ERC. Regulated interest groups, operating under a newly formed coalition, proposed a comprehensive rewrite of the proposed agency draft rules. Most, but not all, of the changes proposed by the coalition were not considered or adopted by the ERC. Those rule provisions not considered or adopted by the ERC were later proposed by this same group to the legislature for its consideration.\footnote{106}

The new delineation rule, developed in cooperation with the WMDs, was adopted by the ERC on January 13, 1994. Based upon the ERC adopted rule, the House Natural Resources Committee crafted a committee bill that ultimately resulted in ratification of the rule.\footnote{107} However,
regulated interest groups exhibited concerns over the proposed delineation rule. Considerable debate ensued during the 1994 legislative session between the agencies, environmental organizations, and regulated interest groups.

Once the legislature began consideration of the bill, another series of interagency meetings ensued, and this time included representatives of the business coalition. With House Natural Resources Committee staff assistance, a “consensus” rule was ultimately adopted by the legislature.108 The 1994 Act served as the vehicle for legislative ratification of the wetland delineation methodology jointly developed by the DEP and the WMDs.109 Among other things, the 1994 Act modified, deleted, and added language to the wetland delineation methodology rule,110 which was adopted by the ERC in January 1994.111 It should be noted that future amendments to the wetland methodology rule must be referred to the legislature “for their consideration and referral to the appropriate committees.”112 Accordingly, future rule amendments will not become effective until “approval by act of the legislature.”113

B. The Rules

The ratified rule provides for five mutually exclusive methodologies or “tests” that agencies are permitted to utilize when asserting wetland jurisdiction. It also deletes or reclassifies approximately 125 plant species from the vegetative index previously utilized by the DEP.114 Failing any one of the tests will result in the land under consideration being classified as a wetland.

The first test under the 1994 Act is the application of the definition of “wetland” prescribed by rule 17-340.200(19) of the Florida Administrative Code. If the application of the definition does not determine the boundaries, then the regulating agency may use the other tests. The definition refers to characteristics which are visible without significant on-site work. It will be

111. Id.
112. Ch. 94-122, § 1, 1994 Fla. Laws at 669 (to be codified at Fla. Stat. § 373.4211).
113. Id.
helpful only where a distinct wetland/upland line is readily apparent, or if there is any dispute as to the classification.\textsuperscript{115}

The second and third tests deal with the percentage of vegetative cover constituted by certain types of listed species.\textsuperscript{116} If the appropriate mix is found, then the regulating agency need only demonstrate the presence of certain soils, or that one or more "hydrologic indicators" are present, which indicate inundation and saturation (or indications of a mechanical disturbance, where an agency can show that, but for the mixing, hydrologic indicators would have been associated with the site). Hydrologic indicators are defined by the 1994 Act as thirteen separate physical characteristics, such as elevated lichen lines or water marks, which may indicate saturation or inundation. Under this third test, agencies will be permitted to use aerial photography, remnant vegetation, topographical information, and other reliable data to assert where the wetland delineation should be made, on the presumption that the disturbance did not occur. However, wetland jurisdiction cannot be asserted where regional or site specific hydrologic alterations have occurred so as to render the property no longer subject to inundation or saturation frequencies, or duration, as required by the statutory wetland definition.\textsuperscript{117}

The fourth test provides that in areas which exhibit "undrained hydric soils,"\textsuperscript{118} and which are not pine flatwoods or improved pastures,\textsuperscript{119} the presence of certain named soil types is enough evidence to designate the


\textsuperscript{116} The tests are set out in rules 17-340.300(2) and 17-340.300(3) of the Florida Administrative Code. One test requires a finding that the areal extent of obligate species exceed that of upland species. The other requires the areal extent of obligate and facultative wet species in combination, or separately, comprise more than 80\% of all plants, excluding facultative plants altogether. The danger here is that facultative wet plants (which may be found on uplands one-third of the time) and facultative plants (which are equally likely to be found on both uplands and wetlands) may dominate an area, such as a disturbed area, resulting in an unjustified wetland classification.


\textsuperscript{118} As defined by the Soil Conservation Service, "undrained hydric soils" are all hydric soils which are not artificially drained. The definition is broad enough to include situations in which the water table has been lowered by off-site pumping.

\textsuperscript{119} "Pine flatwoods" and "improved pastures" are defined in rule 17-340.300(c)(4) of the Florida Administrative Code, by a short narrative which includes some characteristics of each type of plant community. Given the definitions, the boundaries of these communities are subject to interpretation and will be difficult to locate.
area as a wetland. The soil types are defined by the United States Department of Agriculture—Soil Conservation Service. Obviously, this is a single factor test, based solely upon soils. Soils are subject to interpretation, and may exhibit characteristics of more than one type.

The fifth test prescribes that an area is a wetland if one or more of the hydrologic indicators is present, the area has hydric soil, and "reasonable scientific judgment" indicates that inundation and saturation are present such that it meets the definition of a wetland.

The 1994 rule abandons a long time evidentiary test and creates a new standard: "reasonable scientific judgment." The new phrase is used throughout the Act as a description of the required standard of proof, but is not defined. The legislature substituted this phrase every time the ERC rule required a "preponderance of the evidence." It is unclear what new level of proof, if any, this new standard will require.

Creating preemptive powers for the methodology rule, the 1994 Act establishes that a wetland delineation, established pursuant to either a formal wetland determination or a permit (where the delineation is field-verified and specifically approved) issued by either the DEP or a WMD, "shall be binding on all other governmental entities for the duration of the formal determination or permit."

IV. MITIGATION BANKING

Concurrent with the development of wetlands regulatory programs has been the evolution of the concept of wetland mitigation. While the federal use of the term "mitigation" also includes avoiding the impact altogether, or minimizing the impact, mitigation is most commonly defined as the restoration, creation, or enhancement of wetlands to compensate for permitted wetland losses. The use of uplands as part of a comprehensive mitigation plan to offset wetland impacts, particularly impacts to

121. Id. r. 17-340.300(f).
123. Id. at 676.
previously degraded wetland systems, is a newly emerging mitigation trend.  

State agencies in Florida have issued permits requiring mitigation since 1979; however, it was not until the passage of the Warren S. Henderson Act in 1984 that mitigation became a routinely used regulatory tool. Both internal and independent evaluations of permitted mitigation within the state reveal that substantial percentages of required mitigation projects have never been constructed or are not in compliance with permit requirements. Where mitigation was implemented, reported ecological success rates for wetland creation range from 12% in freshwater systems to 45% in tidal systems. One study reported that 59% of the wetland creation projects demonstrated the potential to succeed as functioning wetlands with at least moderate wildlife value, even though less than 20% of the projects met the success criteria specified in the permit. Summaries of mitigation evaluation studies conducted elsewhere confirm that the relatively poor success rates reported in Florida are indicative of those found throughout the country.

The reasons for the frequent failure of wetland mitigation projects vary. However, some common themes have arisen. First, mitigation efforts in the past have been more art than science, with permittees attempting to recreate the landscape of a wetland rather than the ecological functions of a wetland. Permittees who are required to implement mitigation may be experts at building residential subdivisions, highways, or shopping centers, yet do not know how to successfully mitigate the wetland impacts associated with those developments. Furthermore, environmental agencies have lacked both the necessary staff and expertise to adequately monitor the design, construction,


126. FLORIDA DEP’T OF ENVTL. REGULATION, REPORT ON THE EFFECTIVENESS OF PERMITTED MITIGATION 1 (1991) [hereinafter DEP’T OF ENVTL. REGULATION REPORT].
127. KEVIN ERWIN, SOUTH FLA. WATER MANAGEMENT DIST., 1 AN EVALUATION OF WETLAND MITIGATION IN THE SOUTH FLORIDA WATER MANAGEMENT DISTRICT 3-4 (1991); ST. JOHNS RIVER WATER MANAGEMENT DIST., STATUS REPORT ON THE ASSESSMENT OF WETLAND CREATION FOR MITIGATION IN THE SJRWMD 12 (1992) [hereinafter ST. JOHNS RIVER STATUS REPORT]; DEP’T OF ENVTL. REGULATION REPORT, supra note 126, at 1-3.
129. ST. JOHNS RIVER STATUS REPORT, supra note 127, at 18-19.
and maintenance of these wetlands mitigation projects. Finally, once the mitigation project is completed by the developer, care of the project is usually turned over to a property owners association, which lacks both the technical know-how and motivation to manage and protect the wetland area.\textsuperscript{131}

Mitigation banking is an idea first developed in the early 1980s by the United States Fish and Wildlife Service as a measure to make wetland mitigation more successful, while reducing costs to the developers. Although the merits of mitigation banking are still being debated, it is increasing in popularity. In the report, \textit{Wetland Mitigation Banking}, prepared by the Environmental Law Institute, the concept behind mitigation banking is aptly described as being

based upon the possibility that it [mitigation banking] may provide greater ecological benefits than onsite, project-specific mitigation. Because banking mitigates for numerous individual wetland conversions, compensation sites are likely to be larger and more likely to be viable hydrologically and biologically. In addition, banked compensation wetlands can achieve functional success in advance of the wetland conversions for which they are to mitigate; and they can be continuously monitored and managed to assure the production of the wetland functions at issue. Wetland mitigation banking offers potential efficiencies and economies of scale, and may offer continuing professional wetland management rather than ad hoc management by the development entity.\textsuperscript{132}

Even though the concept of mitigation banking has been examined in the past, there has been no adoption of a comprehensive policy or rules on the subject in Florida.\textsuperscript{133} Needless to say, there existed no regulatory framework to ensure consistency among the agencies. Each agency handled mitigation banking proposals on a case-by-case basis.

\textsuperscript{131} \textit{Erwin}, \textit{supra} note 127, at 81; \textit{see} ch. 93-213, § 29, 1993 Fla. Laws at 2143-44 (codified at FLA. STAT. § 373.4135 (1993)).

\textsuperscript{132} \textit{Environmental L. Inst., Wetland Mitigation Banking} I (1993) [hereinafter \textit{Mitigation Banking Report}].

\textsuperscript{133} \textit{See} ch. 93-213, § 29, 1993 Fla. Laws at 2143-44 (codified at FLA. STAT. § 373.4135 (1993)). In 1990, the ERC established the Mitigation Banking Task Force to consider mitigation banking concepts and provide recommendations to the ERC to establish such a program in Florida.
A. Statutory Mandate

Responding to the call for mitigation banking, section 29 of the 1993 Act directed the DEP and the WMDs to participate in and encourage the establishment of private and public regional mitigation banks.\(^{134}\) This directive manifested itself through the promulgation of rules by the DEP and the St. Johns River, Southwest Florida, and South Florida Water Management Districts.\(^{135}\) Mitigation banking is not defined in the 1993 Act, but has been generally described as a system in which the creation, enhancement, restoration, or preservation of wetlands is recognized by a regulatory agency as generating compensation credits allowing for future development of other wetland sites.\(^{136}\)

In January 1994, the DEP and the three largest WMDs adopted final rules governing the establishment and use of mitigation banks in conformity with the statutory mandate. Among other things, the banking rules address circumstances in which mitigation banking is appropriate or desirable; a framework for determining the value of a mitigation bank through issuance of credits; measures required to ensure the long-term management and protection of mitigation banks; criteria for the withdrawal of mitigation credits by projects within or outside the regional watershed where the bank is located; and criteria governing the contribution of funds or land to an approved mitigation bank.\(^{137}\)

Envisioning both public and private entrepreneurial mitigation banks, the 1993 Act called for, and the adopted mitigation banking rule establishes, provisions concerning the establishment of mitigation banks by governmental, nonprofit, or for profit private entities. Requirements to ensure the financial responsibility of nongovernmental entities proposing to develop mitigation banks and criteria allowing the withdrawal of credits by parties other than the party creating the bank are also addressed.\(^{138}\)

\(^{134}\) See id. § 29, at 2143-44 (codified at FLA. STAT. § 373.4135 (1993)).

\(^{135}\) FLA. ADMIN. CODE ANN. r. 17-342 (1994); see also sources cited infra note 138.

\(^{136}\) MITIGATION BANKING REPORT, supra note 132, at 3.

\(^{137}\) Fumero, supra note 26, at 64 (citing ch. 93-213, § 29, 1993 Fla. Laws at 2143-44 (codified at FLA. STAT. § 373.4135 (1993))).

\(^{138}\) Ch. 93-213, § 29, 1993 Fla. Laws at 2143-44 (codified at FLA. STAT. § 373.4135 (1993)).
B. The Rules

At the outset, it is important to note that the rules provide that use of a mitigation bank is not always appropriate. Only when on-site mitigation is determined not to have comparable long-term viability and the bank itself would improve "ecological value" more than on-site mitigation, will a person be entitled to utilize a mitigation bank to satisfy regulatory mitigation requirements. These criteria are expressed in more detail in the rule with the goal of ensuring that the feasibility of using on-site mitigation is fully explored prior to use of a mitigation bank.\footnote{FLA. ADMIN. CODE ANN. r. 17-342 (1994). The mitigation banking rules adopted by the DEP and the five WMDs are substantially similar. Therefore, citation shall be to the DEP rules only. For further reference, the mitigation banking rules of the South Florida Water Management District can be found in FLA. ADMIN. CODE ANN. r. 40E-4.091 (1994) (incorporating by reference SOUTH FLA. WATER MANAGEMENT DIST., BASIS OF REVIEW FOR SURFACE WATER MANAGEMENT PERMIT APPLICATIONS 8 app. (1994)); those of the Southwest Florida Water Management District in FLA. ADMIN. CODE ANN. r. 40D-4.091 (1994) (incorporating by reference SOUTHWEST FLA. WATER MANAGEMENT DIST., BASIS OF REVIEW FOR SURFACE WATER MANAGEMENT PERMIT APPLICATIONS 6 app. (1994)); those of the St. Johns River Water Management District in FLA. ADMIN. CODE ANN. r. 40C-4.091 (1994) (incorporating by reference ST. JOHNS RIVER WATER MANAGEMENT DIST., APPLICANT'S HANDBOOK: MANAGEMENT AND STORAGE OF SURFACE WATERS § 16.1.6 (1994)); those of the Suwannee River Water Management District in FLA. ADMIN. CODE ANN. r. 40B-1.106 (1994); and those of the Northwest Water Management District in FLA. ADMIN. CODE ANN. r. 40A-1.103 (1991).}  

Two new types of permits are created by the rule: mitigation bank permits and mitigation bank conceptual approvals.\footnote{Id. r. 17-342.750.} The mitigation bank permit will authorize the construction, establishment, perpetual operation, and sale of mitigation credits by private and public entities, including the DEP and the WMDs. The mitigation bank conceptual approval, while not authorizing any construction or issuance of credits, estimates the legal and financial requirements necessary for the mitigation bank, as well as potential mitigation credits to be awarded based on a particular proposal.\footnote{Id. r. 17-342.750.}

Any person or entity proposing to establish and operate a mitigation bank in Florida must apply for a mitigation bank permit from either the DEP or the appropriate WMD. Like other regulatory permits, mitigation bank permit applications are processed in accordance with the time frames...
and procedures set forth in chapter 120 of the Florida Statutes. Criteria objectives set forth in the rule specify that a proposed mitigation bank must

(a) improve ecological conditions of the regional watershed;
(b) provide viable and sustainable ecological and hydrological functions for the proposed mitigation service area;
(c) be effectively managed in the long term;
(d) not destroy areas with high ecological value;
(e) achieve mitigation success; and
(f) be adjacent to lands which will not adversely affect the long-term viability of the Mitigation Bank due to unsuitable land uses or conditions.  

The basic informational requirements include: a description of the location of the proposed mitigation bank, including aerial photography; a description of the “ecological significance” of the mitigation bank to the regional watershed; an assessment of current site conditions, including hydrologic, topographic, and vegetative information; construction plans for the proposed restoration, enhancement or creation activities, including monitoring and long term management plans; and a detailed assessment of the anticipated improvement to ambient ecological conditions. This includes a description of anticipated fish and wildlife habitat improvement; “[e]vidence of sufficient legal or equitable interest in the property;” and documentation of financial responsibility mechanisms.

1. Mitigation Credit System

As defined by the rule, a mitigation credit is “a unit of measure which represents the increase in ecological value [of wetlands] resulting from restoration, enhancement, preservation, or creation activities.” A significant piece of the application review process involves assignment of the number of mitigation credits which can be realized through successful establishment and operation of the proposed mitigation bank. In some cases, the number of credits assigned by the permit is determinative of the financial viability of the mitigation bank. Generally, mitigation credits

142. Id. r. 17-342.450.
143. Id. r. 17-342.400.
144. Id. r. 17-342.450.
146. Id. r. 17-342.200(5).
147. Id. r. 17-342.470.
may be withdrawn prior to a mitigation bank meeting all the performance criteria specified in the permit. The number of mitigation credits which can be withdrawn at various times during the establishment and operation of the mitigation bank, along with the schedule for release of such credits, is set forth in the mitigation bank permit. It should be noted that a mitigation bank will be credited with its maximum number of mitigation credits only after meeting the mitigation success criteria specified in the permit. However, in most instances, once a conservation easement is rendered over the property, a certain percentage of credits will be able to be released at that time and thereafter sold by the banker.

If at any time the banker is not in “material compliance” with the terms and conditions of the mitigation bank permit, no mitigation credits may be withdrawn and sold to third parties. Upon compliance with the permit, mitigation credits can again be available for withdrawal and sale.

2. Mitigation Service Area

Another significant aspect of the permit review process involves the establishment of a mitigation service area (“MSA”) for the proposed mitigation bank. An MSA is the geographic area within which mitigation credits from a mitigation bank may be used to offset adverse resource impacts from activities or projects regulated by statute. Credits may only be withdrawn to offset adverse impacts in a designated MSA. For the most part, the extent of the MSA will depend on whether adverse impacts within the MSA can be “adequately” offset by the mitigation bank. The rule recognizes that the MSA of different mitigation banks may overlap, especially when such banks are in geographic proximity to each other. At times, this rule allows for competition in the sale of credits among mitigation banks.

3. Financial Responsibility

To ensure a mitigation bank is constructed and operated in conformance with the permit, the rule specifies several financial responsibility mechanisms to be provided by a banker. Financial responsibility has two

148. Id. r. 17-342.470(4).
149. Id. r. 17-342.470(5).
150. FLA. ADMIN. CODE ANN. r. 17-342.600(1) (1994).
151. FLA. STAT. §§ 373.403-.4596 (1993).
152. FLA. ADMIN. CODE ANN. r. 17-342.600(3).
distinct components. A banker must provide financial responsibility for the construction phase and the operation/long-term maintenance phase of the life of a mitigation bank. Broadly stated, financial responsibility for the construction phase of the mitigation bank may be established through “guarantee bonds, performance bonds, insurance certificates, irrevocable letters of credit, trust fund agreements, or securities.”\(^\text{154}\) For the operation phase, a banker must establish a trust fund agreement specifically geared towards long term, and in some cases, perpetual management of the mitigation bank.\(^\text{155}\)

4. DEP and WMD Mitigation Banks

The DEP or a WMD may construct, operate, manage, and maintain a mitigation bank after obtaining a mitigation bank permit. DEP mitigation banks are permitted by the appropriate WMD, while WMD mitigation banks are permitted by the DEP. Banks proposed by the DEP or a WMD must meet the same technical review criteria as any other permit applicant. However, in the areas of land acquisition and financial responsibility, the rule imposes different requirements on DEP and WMD mitigation banks for the purpose of allowing greater flexibility.\(^\text{156}\)

In order to establish a mitigation bank, the DEP or WMD must either submit a mitigation bank plan, identifying one or more parcels of land to be acquired as a mitigation site, or a plan identifying one or more parcels of land in which the DEP or WMD already has a legal or equitable interest.\(^\text{157}\) As to financial responsibility, a portion of funds contributed to a DEP or WMD mitigation bank from the sale of credits must be dedicated, in some binding fashion, for the construction and implementation of the mitigation bank itself. A portion of the funds must also be dedicated for the long-term management of the bank. Funds derived from the sale of mitigation credits, which are not necessary for the construction, establishment, and long-term management of a DEP or WMD mitigation bank, can be utilized for the establishment of other DEP or WMD mitigation banks, or for expansion of other DEP or WMD land acquisition or environmental restoration projects.\(^\text{158}\)

\(^{154}\) Id. r. 17-342.700(4)(b).
\(^{155}\) See id. r. 17-342.700.
\(^{156}\) Id.
\(^{157}\) See FLA. ADMIN. CODE ANN. r. 17-342.700 (1994).
\(^{158}\) Id.
V. MERGER OF THE FORMER DEPARTMENTS OF ENVIRONMENTAL REGULATION AND NATURAL RESOURCES

In 1975, the last major state environmental agency reorganization occurred when the Trustees of the Internal Improvement Trust Fund was dissolved as an agency and selected functions were transferred to the Department of Natural Resources ("DNR"), or to the then-new Department of Environmental Regulation ("DER"). At the time, the DER was to be the state's environmental permitting agency, while the DNR's major function would be aimed at natural resources and land management. In practice, this organizational restructuring did not create an absolute distinction between the missions of the two agencies, especially as it related to the permitting or authorization for use of wetlands and submerged lands. "Because of overlap between several program areas, [both] authorization from the DNR and a permit from the DER often were required for the same project." 159

After the 1975 reorganization, the DNR continued to operate several programs that were somewhat regulatory, or that combined various aspects of management, research, and regulation. The programs included, for example, management of sovereign submerged lands and aquatic preserves, research regarding marine resources and aquatic plant management, as well as management of protected species, such as the manatee, or of marine habitats such as for shellfish. 160

During this same period, the DER functioned as Florida's primary environmental permitting agency. With the creation and full operation of the WMDs, 161 as well as the transfer of the coastal management program to the Department of Community Affairs ("DCA"), a DEP report to the legislature found that

the DER was generally divested of management-oriented programs and was set up as primarily a regulatory agency.

Over time, however, the functional lines between [the] two agencies became increasingly blurred. DER was assigned management responsibilities, and DNR increasingly picked up regulatory functions. This blurring of the lines led to confusion on the part of [both] the

160. Id. at 7.
161. See supra note 14.
general public and regulated interests, and increased [the level of] inefficiency, due to the inherent duplication and overlapping jurisdiction between [the] agencies. This confusion has increased as program responsibilities have improved.\(^\text{162}\)

According to the report, the 1993 Act's "creation of the Department of Environmental Protection brought about a merger of all the major environmental management and permitting functions in Florida—a move that will result in . . . [improved intergovernmental] coordination and increased resource protection."\(^\text{163}\) In 1994, the legislature revisited the 1993 Act\(^\text{164}\) by establishing the organizational structure of the DEP.\(^\text{165}\) It provided for appointment by the secretary of two deputy secretaries and an executive coordinator for ecosystems management. The executive coordinator is responsible for coordinating ecosystem management policy for the DEP. The legislature further established nine divisions within the DEP: the Division of Administrative and Technical Services; the Division of Air Resource Management; the Division of Water Facilities; the Division of Law Enforcement; the Division of Marine Resources; the Division of Waste Management; the Division of Recreation and Parks; the Division of State Lands; and the Division of Environmental Resource Permitting (formerly Division of Water Management).\(^\text{166}\) The newly aligned divisions within the DEP not only mirror developing programs, such as the ERP program, but also reflect emerging priorities for the DEP. Formation of a division devoted entirely to law enforcement signals growing emphasis in Florida, and nationwide, on criminal prosecution of environmental crimes.

VI. APPEALS TO THE GOVERNOR AND CABINET

A. The Florida Land and Water Adjudicatory Commission

Unique in many respects, the governor and cabinet in Florida wear many hats. As the holder of title to all sovereign lands in Florida, the governor and cabinet sit as the Board of Trustees. Under certain circum-

\(^{162}\) DEP REPORT TO THE LEGISLATURE, supra note 159, at 7.
\(^{163}\) Id.
\(^{164}\) Ch. 93-213, 1993 Fla. Laws at 2129 (codified in scattered sections of Fla. Stat. chs. 253, 259, 367, 370, 373, 403 (1993)).
\(^{165}\) Ch. 94-356, § 1, 1994 Fla. Laws at 2625-28 (to be codified at Fla. Stat. § 20.255). The DEP encompasses six administrative districts that carry out regulatory matters of waste management, water facilities, wetlands, and air resources.
\(^{166}\) Id.
stances, the governor and cabinet sit as an appellate tribunal of sorts in reviewing appeals taken of agency action. One manifestation of this involves the governor and cabinet sitting as the Florida Land and Water Adjudicatory Commission ("FLWAC"). Recent history has shown that FLWAC can have a significant and far-reaching impact on environmental regulatory policy in Florida. At present, FLWAC has the authority to review any order, including permit decisions or rules of a WMD. DEP permit decisions, however, are not currently subject to FLWAC's review. The 1993 Act, while expanding the FLWAC jurisdiction to include DEP permit decisions, also narrows both standing to appeal and the criteria for a project to qualify for review.

To appeal a permit decision to FLWAC, one must have been a "party to the proceeding below" as defined by the 1993 Act. Simply put, under the 1993 Act, a person cannot gain standing to appeal unless he submitted testimony addressing substantive concerns to the permitting agency prior to issuance of the permit. Although this limitation is viewed as a narrowing of standing, it does not apply to the DEP if it decides to appeal a WMD decision to FLWAC. The 1993 Act limits the criteria by which a project may qualify for review by providing that four members of FLWAC must affirmatively determine that the activity authorized by the agency order would "substantially affect natural resources of statewide or regional significance." Review may also be accepted if four members of FLWAC determine that the agency order "raises issues of policy, statutory interpretation, or rule interpretation that have regional or statewide significance from the standpoint of agency precedent." With the legislative ratification of the statewide wetland delineation methodology required by the 1993 Act, FLWAC appellate jurisdiction now includes DEP and local government

169. For purposes of FLWAC review, the terms "permit" and "order" are used interchangeably.
172. Id.
173. Id.
174. Id. at 2142.
175. Id. at 2141.
permit decisions, pursuant to the ERP program. Such an expanded jurisdiction may pave the way for consistent, statewide policy setting.

B. Consolidated Appeals Process

Pursuant to chapter 94-356 of the Laws of Florida, review of consolidated orders rendered by the governor and cabinet will also be consolidated, and the standard of review will be expanded to include the legal authorities and technical requirements of all the programs being concurrently processed. For applications that include delegated sovereign submerged lands activities, the governor and cabinet review procedures, set forth in section 373.114(1) of the Florida Statutes, are broadened to include additional provisions and exceptions associated with the programs under review. In those instances where an appeal is taken of an application involving a sovereign submerged lands and, either an ERP or coastal construction authorization, the governor and cabinet sit concurrently as the FLWAC and the Board of Trustees. Review may also be initiated by the governor or any member of the cabinet, and only one member's approval is required to accept review. However, the development activity subject to review will not have to meet the regional or statewide significance criteria which currently exists in chapter 373.

The scope of remedies available to the governor and cabinet are expansive. If the governor and cabinet determine that approval to use sovereign submerged lands is not consistent with the provisions of chapters 253 or 258 of the Florida Statutes, any other permit authorization granted by the consolidated order can be rescinded or modified, or the proceeding can be remanded to the agency which reviewed the applications, for further action. For example, if a multi-use residential/marina project fails to qualify for its sovereign submerged lands authorization, such as that needed for placement of docking facilities over sovereign submerged lands, the associated upland residential portion of the project, which would require an ERP, could be denied.

176. Ch. 93-213, § 26, 1993 Fla. Laws at 2141-42 (codified at FLA. STAT. § 373.114 (1993)).
177. Ch. 94-356, § 502, 1994 Fla. Laws at 2898-99 (to be codified at FLA. STAT. § 373.4275).
178. Id.
179. Id.
180. Id.
181. Id.
VII. STATE ASSUMPTION OF FEDERAL WETLANDS PROGRAM

A. Scope of Federal Regulation

The Clean Water Act ("CWA") is a comprehensive water quality statute that represents Congress's effort to "restore and maintain the chemical, physical and biological integrity of the nation's waters." The CWA's section 404 permit program regulates the discharge of dredged or fill material into navigable waters of the United States and their adjacent wetlands. It does not regulate "nondischarge-related" activities such as draining, dredging, or clearing of vegetation unless such activities also involve the placement of fill material into navigable waters and adjacent wetlands.

The program is jointly administered and enforced by the Corps and the United States Environmental Protection Agency ("EPA"). Under this joint administration, the Corps issues permits by applying the EPA's detailed environmental criteria known as the section 404(b)(1) guidelines. Under section 404(c), the EPA may potentially exercise veto authority over "unacceptable adverse effects" on certain specified resource uses. The United States Fish and Wildlife Service, the National Marine Fisheries Service, and other federal agencies concerned with various natural resources also play significant roles in the section 404 permit program, as do the states, all of which must issue certifications that proposed discharges will not violate state water quality standards. In order to simplify the permitting process, without diminishing the level of protection, the DEP began a process in 1992 to assume the state 404 Program. The CWA spells out the process for assumption.

182. 33 U.S.C. § 1251 (1988); see also supra note 20.
185. Section 404(g)(1) of the CWA outlines the general proposition that states may assume the Section 404 program. However, this ability to assume has a significant limitation. The explicit language of Section 404(g)(1) prohibits the assumption of the program for: waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of

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B. The Next Step

The next significant step toward vertical integration of wetland permitting in Florida involves “assumption” of the federal section 404 regulatory program administered by the Corps. Assumption is the process by which the EPA reviews state programs to determine whether they meet certain minimum standards. If accepted by the EPA, assumption allows for use of the federally approved state procedures and regulations.

Through the 1994 Act, the legislature expressly found it to be in the best interests of the citizens of Florida to continue the streamlining of wetlands and surface water permitting in Florida by eliminating the duplication of the regulatory programs under Part IV of chapter 373, Florida Statutes, and s. 404 of the Clean Water Act, as amended . . . .

In keeping with this legislative finding, the 1994 Act requests that the governor, in consultation with the Florida Congressional Delegation, “pursue” assumption by the DEP and the WMDs of the section 404 federal dredge and fill permitting program. On a separate track, the DEP has been working on this project since 1992. To crystallize its efforts, the DEP

the tide shoreward to their high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto. These waters correspond to most of those in which the Corps has the authority to issue permits for structures in navigable waters pursuant to Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403) (Section 10). Section 10 waters cover three types of navigable waters: (1) waters that were historically navigable (2) waters that are currently navigable in fact and (3) waters that can be made navigable with reasonable improvement. Only the first of these is assumable by a state program.

Under Section 10, a permit is required to construct “any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures” . . . or to “excavate or fill or in any manner to alter or modify the course, location, condition or capacity of,” navigable waters of the United States. Presumably the restriction in the CWA on 404 assumption was included because the Corps will retain permitting authority for structures under Section 10. However, the exclusion of Section 10 waters presents several problems to Florida in creating a workable wetland regulatory program.

Id. at 4-5. 186. Id. at 9; supra note 23. 187. PHOENIX ENVTL. GROUP, supra note 184, at 9. 188. Ch. 94-122, § 9, 1994 Fla. Laws at 680-81.
obtained funding and retained an outside consultant to compile an “assumption application” for Florida to submit to the EPA. 189 Early on in its consideration, however, the DEP concluded that assumption is not practicable given the current federal regulations regarding the scope of section 404 assumption. Instead, a report commissioned by the DEP recommended establishment of statewide programmatic permits 190 through the Corps. 191

Turning to the federal level, the prospect for efforts to allow states to implement the federal wetlands regulatory program seem positive. The Clinton administration, in 1993, established five principles as the framework for its package of wetland reform initiatives. Principle number two, entitled Fair, Flexible, and Predictable Regulatory Programs, calls for wetlands regulatory programs to be “administered in a manner that avoids unnecessary impacts upon private property and the regulated public, and minimizes those effects that cannot be avoided, while providing effective protection for wetlands.” 192 More to the point, this wetlands reform initiative goes on to state that “[d]uplication among regulatory agencies must be avoided and the public must have a clear understanding of regulatory requirements and various agency roles . . . .” 193 This principle bodes well for enhanced cooperation by the federal agencies administering the section 404 assumption process and might set the stage for needed changes to simplify what are widely considered to be unnecessarily complex federal assumption regulations.

VIII. ECO SYSTEM MANAGEMENT INITIATIVE

As discussed earlier in this article, lawmakers merged the Departments of Natural Resources and Environmental Regulation during the 1993 legislative session to create the DEP. 194 Part of the merger legislation mandated that the DEP, with its expanded areas of responsibility, focus on managing entire ecosystems, rather than piecemeal regulation on a project-

191. PHOENIX ENVTL. GROUP, supra note 184, at 9-10.
193. Id.
194. See supra note 13.
by-project basis. Florida is the first state to make ecosystem management the cornerstone of its environmental policy.\textsuperscript{195}

Formed to develop and implement the concept of ecosystem management, the Ecosystems Management Work Group ("Work Group") is charged to review exactly how ecosystem management can be implemented. The Work Group has defined ecosystem management as "an integrated, flexible approach to management of Florida's biological and physical environments, conducted through the use of tools such as planning, land acquisition, environmental education, regulation, and pollution prevention, and designed to maintain, protect, and improve the state's natural, managed, and human communities."\textsuperscript{196}

Beginning Ecosystem Management, a report issued by the DEP, describes how the DEP intends to implement ecosystem management in Florida.\textsuperscript{197} The report summarizes the DEP's ecosystem management goals and implementation strategy. These include "better protection and management of Florida's environment; development of an agency structure and culture based on a systems approach to environmental protection and management; and [fostering] an ethic within the citizenry of shared responsibility and participation in the protection of the environment."\textsuperscript{198}

In December 1993, the Work Group submitted their recommendations to the governor, cabinet, and the legislature, and with that the DEP began the actual planning process. Twelve committees have been established to address the various ecosystem management issues. These committees will produce an Ecosystem Management Implementation Strategy ("EMIS") and draft reports containing issues analyses and recommendations by October, 1994. The committees will be responsible for analyzing the many issues relating to ecosystem management and recommending a preferred course of action.\textsuperscript{199} The committees formed include: the EMIS Committee,\textsuperscript{200} the

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\textsuperscript{195} See ch. 93-213, 1993 Fla. Laws at 2129 (codified in scattered sections of FLA. STAT. chs. 253, 259, 367, 370, 373, 403, (1993)). The preamble to this Act finds that Florida's ecological systems need to be protected and managed in their entirety.

\textsuperscript{196} FLORIDA DEP'T OF ENVTL. PROTECTION, BEGINNING ECOSYSTEM MANAGEMENT 3 (1994) [hereinafter DEP BEGINNING ECOSYSTEM MANAGEMENT].

\textsuperscript{197} Id.

\textsuperscript{198} Id.

\textsuperscript{199} Id. at 10.

\textsuperscript{200} The charge of this committee is to develop a strategy to guide ecosystem management, including the desired relationships between existing and needed DEP programs, and between DEP and other agencies, interest groups, and the general public. From the document this committee will produce, any employee,
External Steering Committee;\textsuperscript{201} the Land Acquisition/Greenways Committee;\textsuperscript{202} the Education Committee;\textsuperscript{203} the Incentive-Based Regulatory Alternatives Committee;\textsuperscript{204} the Pollution Prevention Committee;\textsuperscript{205} the

or any member of the public should be able to understand the role of DEP programs, and how those programs link to groups outside the agency in implementing ecosystem management.

\textit{Id.} at 11.

201.

A primary purpose of this committee is to obtain the thoughts, ideas, and concerns of as large a cross section of the citizenry as possible. It should be comprised of people who represent a wide range of interests, including those who manage land and run factories, citizens who do not represent any particular interest group, and ecology experts from the universities [within Florida].

DEP BEGINNING ECOSYSTEM MANAGEMENT, \textit{supra} note 196, at 14.

202. A major effort of this committee “will involve data collection and sharing between land purchasing entities and between the acquisition program and other parts of the agency. The committee will look into what improvements are needed in this regard.” The committee will inventory “existing state-owned lands, develop [ ] criteria for determining the types and location of lands needed to complete the state public lands system, and us[e] that criteria to identify specific lands which need to be acquired.” \textit{Id.} at 17.

203.

This committee will address environmental education needs within the department and develop strategies and materials to convey the ecosystem management philosophy. It will evaluate how internal and external education programs can be better coordinated. It will produce a quarterly ecosystem management newsletter to keep interested parties aware of the agency’s activities. It will also make recommendations relative to the department library. The committee will address both short and long-term education needs, and will recommend a budget to meet those needs.

\textit{Id.} at 19.

204.

The primary function of this committee is to develop the concept of net environmental benefit, incentives for its use, and criteria for its application. This is to be an alternative to the existing regulatory program. Important to this task is to identify which regulatory aspects will not be subject to the alternative regulatory approach.

\textit{Id.} at 21.

205.

This committee is charged with developing strategies to increase pollution prevention. It should look at all existing programs both inside and outside the agency for ideas, but should not be constrained by what is currently being done. Prevention is a concept that has not been implemented to its full potential. The committee should address prevention activities for government, business, industry, and the general public.

\textit{Id.} at 23.
Science and Technology Committee;\textsuperscript{206} the Public Land Management Committee;\textsuperscript{207} and the Intergovernmental Coordination Committee.\textsuperscript{208}

During 1995, these committees, made up of DEP staff, business interests, environmental leaders, other environmental agency staff, and private interests, such as land developers, will recommend ways to effectively and efficiently integrate development and conservation efforts in a "holistic manner."\textsuperscript{209}

As stated above, the DEP's initial effort in this area will be developing an EMIS. The EMIS will be the agency's principle ecosystem management guidance document and will set ecosystem management direction for the DEP. In order to gain experience in ecosystem management, the DEP, in cooperation with the WMDs, has begun implementing ecosystem management in particular areas throughout the state, including the Apalachicola River and Bay, the Suwannee, Wekiva, Lower St. Johns, and Hillsborough Rivers, and the Florida Bay/Southern Everglades.

The final step in the process of effecting a "systems approach" to management of Florida's environment will be to implement the EMIS through the development of site-specific Area Implementation Strategies

\textsuperscript{206} "This committee will evaluate all aspects of DEP's data management and technology, and recommend improvements to achieve [ecosystem management] goals. These types of evaluations are needed on a periodic basis, so the committee will make recommendations on the composition of a permanent Science and Technology Committee."

DEP BEGINNING ECOSYSTEM MANAGEMENT, \textit{supra} note 196, at 25.

\textsuperscript{207} Ecosystem management is already occurring on some public lands. For example, the Division of Recreation and Parks uses "greenlines" to map managed lands within the context of surrounding land uses. Managers use these maps to identify outside threats to park lands. Then, through coordination with other levels of government and adjacent landowners, they try to reduce those threats by encouraging land use decisions that are sensitive to the needs of the park. This committee will identify and evaluate other existing programs which embody [ecosystem management] principles, and suggest improvements, as needed, to agency land management programs.

\textit{Id.} at 28.

\textsuperscript{208} This committee is to look at how to integrate the DEP's ecosystem management program with other agency programs that are important to achieving ecosystem management goals. Of particular importance will be the WMD planning activities, the local government comprehensive planning process, and federal programs and activities. The committee will, at a minimum, have subcommittees to address these three issues.

\textit{Id.} at 33.

\textsuperscript{209} See, e.g., \textit{id.} at 35.
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("AIS"). AISs will be prepared in cooperation with local, state, and federal government agencies, environmental groups, the business community, and the general public. The AIS will guide on-the-ground management activities and will include a schedule, if needed, for establishing minimum flows and levels, and protection areas for priority water bodies. 210

IX. ENVIRONMENTALLY SENSITIVE LAND ACQUISITIONS AND MANAGEMENT

Florida has the largest environmentally sensitive land acquisition program in the nation. Since 1981, state-funded programs have acquired more than 350,000 acres of wetlands and floodplains, pine flatwoods, and xeric scrub, at an investment of $500 million. In addition, local taxpayers across the state have passed bond issues to raise an additional $650 million for land acquisition in individual counties. 211

Chapter 94-240 of the Laws of Florida streamlines the Conservation and Recreation Lands ("CARL") program land acquisitions and the state's process for acquiring lands with Preservation 2000 funds. 212 In so doing, it consolidates in chapter 259 of the Florida Statutes the statutory provisions that are currently housed in chapter 253 of the Florida Statutes. Those provisions relate specifically to the acquisition and management of lands acquired through the CARL program, and lands acquired with Preservation 2000 funds where title vests in the Board of Trustees. 213 This consolidation makes consistent, in one chapter, all statutory provisions relating to the acquisition of, and general policy considerations relating to, lands held for environmental preservation, conservation, and recreational purposes.

Current laws were also streamlined to remove obstacles to Florida's land buying program. Now, the Board of Trustees is vested with broad authority to waive most of the acquisition procedure provisions of the new section 259.041, if it is in the "public's interest." However, this waiver authority does not extend to acquisitions through condemnation, or to emergency purchases. 214

210. Id. at 38.
212. These funds were authorized by § 373.045 of the Florida Statutes and are generated by the sale of revenue bonds. See Fla. STAT. § 375.045 (1993).
214. Id.
The DEP should also benefit from more flexibility in the land acquisition process, and is directed to write new rules to implement the statutory changes. Such rules are to address, among other issues, the terms and conditions of land purchases, including procedures for determining the value of parcels which the state has an interest in acquiring.\textsuperscript{215} With an eye toward expanding intergovernmental partnerships, the Florida Game and Freshwater Fish Commission is empowered to use the Fish and Wildlife Habitat Trust Fund to acquire and manage mitigation lands in concert with other state and local entities.\textsuperscript{216}

Just as important as acquisition is how the agency thereafter manages the lands. In this regard, the impact of chapter 94-240 of the \textit{Laws of Florida} is likely to result in earlier and more focused policy and decision making. It requires the Land Acquisition Advisory Council to develop a management policy statement for each new project on the CARL list. The agency assigned management responsibility for a particular project must develop a management prospectus that includes the management goals for the land, a timetable for implementing management objectives, and an estimate of how much funding and personnel will be needed to adequately manage the property.

Moreover, agencies involved in the business of acquiring and managing lands through CARL will be required to develop comprehensive long-term land management plans. Formal management plans are due within one year after the acquisition of individual parcels or, in the case of multi-parcel projects, within a year of the acquisition of the essential parcel or parcels.\textsuperscript{217} Added to the list of items a land management plan must address are management activities necessary to restore native species habitats, methods for controlling the spread of nonnative plants and animals, and prescribed fire and other appropriate resource management activities. A specific description of how the managing agency plans to identify, locate, protect, and preserve, or otherwise use "fragile, nonrenewable natural and cultural resources" is also required by the new law.\textsuperscript{218} Once adopted, the managing agency must update the plan at least every five years.\textsuperscript{219} Finally, chapter 94-240 makes payment in lieu of taxes to small counties a direct deduction from CARL rather than a deduction from monies earmarked

\textsuperscript{215} Id.
\textsuperscript{216} Id. § 20, at 1817-18 (to be codified at FLA. STAT. § 372.074).
\textsuperscript{217} Id. § 1, at 1793-99 (to be codified at FLA. STAT. § 259.032).
\textsuperscript{218} Ch. 94-240, § 1, 1994 Fla. Laws at 1793-99 (to be codified at FLA. STAT. § 259.032).
\textsuperscript{219} Id. at 1796.
for land management, potentially providing an additional $2 million each year for land management purposes.\textsuperscript{220}

\section*{X. Governor's Land Use and Water Planning Task Force}

Chapter 93-206 of the \textit{Laws of Florida},\textsuperscript{221} relating to planning and growth management in Florida, provided that the governor establish a task force with public sector representatives, including local government officials, to formulate recommendations for legislative action on the most appropriate legal relationship between district water management plans,\textsuperscript{222} on the one hand, and the growth management portion of the state comprehensive plan,\textsuperscript{223} strategic regional policy plans, and local comprehensive plans, on the other. The task force was required to consider the future role and scope, if any, of the state water plan following legislative adoption of the growth management portion of the state comprehensive plan.\textsuperscript{224} Recommendations to senate and house leadership are to be submitted by the task force by October 1994.\textsuperscript{225}

In addition to those responsibilities initially placed on the task force in 1993, the task force is required by the 1994 Act to make a recommendation to the 1995 Legislature on "the mechanisms and procedures" for establishing state water policy ("SWP")\textsuperscript{226} in Florida. In order to allow time for the task force to carry out this initiative, recently adopted amendments to the SWP will not become effective until January 1, 1995. Providing legislative

\begin{itemize}
\item \textsuperscript{220} Id. at 1798-99.
\item \textsuperscript{221} Act of May 11, 1993, ch. 93-206, 1993 Fla. Laws 1887 (codified in scattered sections of FLA. STAT. chs. 163, 171, 186, 193, 235, 240, 253, 259, 288, 336, 380, 403, 408, 419, 704, 823 (1993)).
\item \textsuperscript{222} FLA. STAT. § 373.036 (1993).
\item \textsuperscript{223} Id. § 187.201.
\item \textsuperscript{224} Ch. 93-206, § 77, 1993 Fla. Laws at 1974. The State Water Plan is set forth in §§ 373.036 and 373.039 of the Florida Statutes, with a cross-reference contained in § 186.021 of the Florida Statutes.
\item \textsuperscript{225} Id.
\item \textsuperscript{226} Ch. 94-122, § 15, 1994 Fla. Laws at 687-88 (to be codified at FLA. STAT. § 373.019). The SWP is expressed as such waters which should be managed to conserve and protect natural resources and scenic beauty and to realize the full beneficial use of the resource. Recognizing the importance of water to the state, the legislature passed the Water Resources Act, chapter 373 of the Florida Statutes, and the Air and Water Pollution Control Act, chapter 403 of the Florida Statutes. Additionally, numerous goals and policies within the State Comprehensive Plan address water resources and natural systems protection. FLA. STAT. ch. 187 (1993); see also FLA. ADMIN. CODE ANN. r. 17-40 (1994) (containing the State Water Policy rules).
\end{itemize}
direction, the definition of SWP was amended by adding the following language:

The waters of the state are among its most basic resources. Such waters shall be managed to conserve and protect water resources and to realize the full beneficial use of these resources. . . . In order to provide for consistency between growth management policy and water management policy the task force shall make recommendations to the 1995 legislature on the mechanisms and procedures for establishing and amending [Florida's] water policy. In an attempt to consider these recommendations and receive the benefit of a review by House and Senate Natural Resource Committees, the amendments to chapter 17-40, F.A.C., [state water policy] adopted by the Environmental Regulation Commission on December 1, 1993, shall not become effective until July 1, 1995.227

Task force membership is also increased by the 1994 Act to include one member of the ERC, one representative of "environmental interests," and one representative of "regulated interests."228

Another governor-appointed body, equally important in its charge, is examining ecosystem approaches to land and water planning issues in part of the state. Established by executive order of the governor, the Commission for a Sustainable South Florida is examining the Everglades ecosystem as a whole, while also considering pertinent growth management issues.229

228. Id. § 16, at 688 (amending ch. 93-206, § 77(2), 1993 Fla. Laws at 1974).
229. Fla. Exec. Order No. 94-54 (Mar. 3, 1994). On March 3, 1994, Governor Lawton Chiles signed Executive Order 94-54, creating the Governor's Commission for a Sustainable South Florida. This Commission was created to assure a healthy Everglades ecosystem which can coexist and be mutually supportive of a sustainable South Florida economy.

Fundamental premises of the Executive Order recognize that the Everglades ecosystem is known as a unique area, both nationally and internationally, and that it is home to a significant number of threatened and endangered wildlife species. The area also contains the only living coral reef in the United States. South Floridians currently depend on this system as their major source of freshwater, and it provides the foundation for the region as an international commercial, agricultural, and tourist center.

The Executive Order further recognizes that rapid population growth, including land development, water management activities and land conversion have negatively impacted the Everglades ecosystem; its water quality has been degraded and the associated natural systems no longer adequately perform the functions they once performed. See generally id.
XI. ENVIRONMENTAL LAND MANAGEMENT STUDY COMMITTEE III

Florida began comprehensive efforts to manage its growth coincident with the increasing strength of the environmental movement in the nation and in this state. Two sets of legislative initiatives, the first in the early 1970s and the second in the mid-1980s, moved Florida to the forefront of state efforts to manage growth and associated environmental implications. The set of laws adopted in 1972 focused on giving the state and regional levels a role in land and water management. Earlier, this had been largely the domain of local governments and special districts. In 1985, the legislature adopted the Local Government Comprehensive Planning and Land Development Regulation Act, mandating that all local governments prepare a comprehensive plan. 230

Taking another significant step in 1993, the Florida Legislature substantially amended the growth management provisions. This was accomplished by amending the state and regional planning provisions of chapter 186 of the Florida Statutes 231 and the land development regulation requirements of chapter 163 of the Florida Statutes. 232 The process leading to passage of the growth management amendments began in 1991, when the Environmental Land Management Study Committee III ("ELMS III") was created. 233 ELMS III, consisting of forty members, held numerous meetings throughout the state from December 1991, through December 1992, to review the state's planning and growth management laws.

The ELMS III legislation 234 is the legislative response to the 124 recommendations in the ELMS III Final Report. Incorporating many, but not all, of the committee's recommendations, the ELMS III legislation is largely process-oriented; it establishes more than seventy-five new processes, procedures, rules, and plan amendments. The Department of Community

231. Fla. Stat. § 186.501 (1993). Regional Planning Councils were established. Each Council was required to adopt a Comprehensive Regional Policy Plan that is consistent with, and furthers, the state Comprehensive Plan.
232. Id. § 163.3161. This Act mandates the adoption of comprehensive plans by all local governments. Chapter 91 of the Florida Administrative Code establishes the time frames for the adoption of these local plans. Each plan must be consistent with the state Plan and the applicable Regional Policy Plan. Local government plans must also be both internally consistent and economically feasible.
Affairs will bear most of the initial burden for implementing these requirements. 235

The ELMS III legislation makes statewide consistency a priority by making numerous amendments to the intent section of chapter 186 of the Florida Statutes, emphasizing the need for intergovernmental coordination and the requirement that the state comprehensive plan provide basic policy direction to all levels of government regarding “the orderly social, economic, and physical growth of the State.” 236 The legislation also created a new section in chapter 186 237 which requires that the executive office of the governor amend the state comprehensive plan, a specific growth management section including, inter alia, provisions to identify areas of state and regional environmental significance, and establish strategies to protect them; establish integrated state policies for land development, air quality, transportation and water resources; recommend how to integrate the state water use plan, the state land development plan, and state transportation plans; and promote land acquisition programs. 238

Following this legislative directive, the governor’s office, through an executive order, formed the Growth Management Plan Advisory Committee (“Advisory Committee”). In October 1993, a report containing findings and recommendations was presented to the governor’s office. 239 Overall, the

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235. Id.
237. Ch. 93-206, § 31, 1993 Fla. Laws at 1921 (codified at FLA. STAT. § 186.506(4) (1993)). The legislature mandated that the governor’s office and the Department of Community Affairs, along with applicable regional and local governments and citizens cooperatively prepare a proposed growth management portion of the state comprehensive plan. The plan was required to include such provisions as the identification of metropolitan and urban growth areas; guidelines for transportation corridors, new interchanges on limited access facilities, and new airports of state or regional significance; coordinated state planning of road, rail, and waterborne transportation facilities to provide for transportation of agricultural products and supplies; establishment of priorities regarding coastal planning; establishment of statewide policy to enhance the multi-use waterfront development of existing deepwater port; policies to establish state and regional solutions to the need for affordable housing; and recommendations as to when and to what degree local plans and strategic regional policy plans must be consistent with the growth management portion of the state plan. The legislature must establish these consistency requirements. Id. §§ 31, 32, 34 at 1921-23, 1925-26.
238. Id.
report set forth broad principles, such as achieving the protection of environmentally significant natural resources through requiring that the "growth be compatible with ecosystem approaches to protection." Avoidance of duplicative governmental resource regulation, as dealt with earlier in this article, and development of a state transportation system that supports land use decisions and environmental protection are also cited in the Advisory Committee report as guiding principles.

All in all, the ELMS III legislation encourages growth management agencies to develop a vision through collaborative planning initiatives, which should assist in the realization of effective land use planning that is cognizant of impacts to the natural resources of the state. The Advisory Committee report may ultimately result in implementing legislation.

XII. CONCLUSION

Florida is at a crossroads. Activities which have historically resulted in strengthening our economy are now likely to be considered harmful to our environment if not properly managed. At the same time, it has become widely recognized by agencies and regulated interests alike, that environmental sustainability can only be reached by taking a holistic approach to natural resource protection and management, an ecosystem approach.

The legislative reforms discussed in this article provide a much needed basis for greater coordination between, and among, government and the private sector concerning natural resource planning and regulation programs. Although the actual impact of these reforms will not be known until the ambitious rulemaking and other implementation vehicles mandated by the legislation are completed, there is now a framework that should allow agencies to focus and coordinate their collective regulatory, planning, and land management efforts. This should increase the overall effectiveness and efficiency of natural resource protection and management in Florida.

240. See supra part II.
241. GROWTH MANAGEMENT PLAN, supra note 239, at 6.
Evidence: 1994 Survey of Florida Law

Dale Alan Bruschi

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I. INTRODUCTION

This year's accumulation of evidentiary cases demonstrates some of the same similarities as in previous years. Criminal evidentiary cases outnumbered civil evidentiary cases almost two to one. Relevance and hearsay issues alone outnumbered all other evidentiary issues. However, with the exception of a few cases, there were a scant number of noteworthy cases. Additionally, few legislative changes in the Florida Evidence Code1 occurred during this survey period.2

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1. FLA. STAT. ch. 90 (1993).
2. Some interesting developments occurred in the last survey period. However, they are not discussed in full here. Some of the legislative changes in the Florida Evidence Code during the last survey period included: providing interpreters for deaf jurors, changing the provisions authorizing the use of closed circuit television and videotaped testimony of child witnesses, and allowing a limited exemption from the Sunshine Act for a governmental agency to consult with the agency's attorney to discuss pending litigation.
II. Relevance

A. Character Evidence

The use of character evidence is probably one of the most widely used, yet misunderstood, sections in the Florida Evidence Code. In criminal cases, the use of similar fact evidence to prove other crimes, wrongs, or acts continues to be the leading area for appellate decisions. Although this area is a powerful tool for the prosecution of criminal defendants, its improper usage during trial almost invariably leads to reversed convictions.

During the survey period, numerous similar fact cases—commonly known as Williams rule cases by criminal law practitioners—reached the appellate courts. Very few broke any new ground in this area. However, one case does merit discussion. In Williams v. State, the Florida Supreme Court settled an apparent conflict on the issue of whether similar fact evidence is admissible to rebut a defense of consent in a sexual battery case. The prevailing case law indicates that consent is unique to the individual, and therefore, cannot be proven by evidence of other sexual encounters because the lack of consent of one person is not proof of the lack of consent of another.  

In Williams, the defendant was convicted of sexual battery, kidnapping, robbery, and possession of cocaine. At trial, the state presented the testimony of two women who stated that the defendant had attacked them under similar circumstances. The defendant objected that the testimony was intended to prove his bad character and propensity to assault women and was, therefore, inadmissible.

The attack on the victim and the attack on the two other women all occurred in the same general area in Miami. The defendant had engaged all

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4. Id. § 90.404(2).
5. Williams v. State, 110 So. 2d 654 (Fla.), cert. denied, 361 U.S. 847 (1959) (effectively codified as Fla. Stat. § 90.404(2)(a) (1993)). The supreme court held that similar fact evidence is admissible if it is relevant for the purpose of demonstrating something other than character or propensity. Id. at 663.
6. 621 So. 2d 413 (Fla. 1993). Coincidentally, the name “Williams” in the case sub judice is the same as the famous case wherein the term “Williams rule” originated.
8. Williams, 621 So. 2d at 413-14.
9. Id. at 414.
10. Id.
three women in casual conversation regarding purchasing cocaine or having sex for drugs. With each woman, the defendant followed the same pattern. The defendant grabbed them with a tight choke hold from behind and took them to a secluded spot. There, while holding the women by the neck, he masturbated with one hand prior to raping them. After having sexual intercourse with the women, he told them not to complain or he would kill them. He then calmly walked away.

The defendant was apprehended soon after the attack on the victim in this case. The defendant told the police that he had helped the victim purchase cocaine and had sex with her in exchange for the drugs. The defendant explained that the victim became angry when he refused to give her the drugs.

In analyzing the use of similar fact evidence, the Florida Supreme Court stated:

Evidence of other crimes or acts may be admissible if, because of its similarity to the charged crime, it is relevant to prove a material fact in issue. But it may also be admissible, even if not similar, if it is probative of a material fact in issue. Although similarity is not a requirement for admission of other crime evidence, when the fact to be proven is, for example, identity or common plan or scheme [sic] it is generally the similarity between the charged offense and the other crime or act that gives the evidence probative value. Thus, evidence of other crimes, whether factually similar or dissimilar to the charged crime, is admissible if the evidence is relevant to prove a matter of consequence other than bad character or propensity.

In the present case, the supreme court concluded that the testimony of the prior victims was relevant to rebut the defendant's defense that the present victim had consensual sex with the defendant in exchange for drugs. The similar fact evidence rebutted the defendant's defense by demonstrating "a common plan or scheme to seek out and isolate victims likely not to complain or to complain unsuccessfully because of the circumstances surrounding the assaults and the victims [sic] involvement with drugs."

11. Id.
12. Id. One of the witnesses stated that she lost consciousness for a moment after the defendant had grabbed her by the throat. She woke up to find her pants pulled down as the defendant was confronted by another man. Williams, 621 So. 2d at 414.
13. Id.
14. Id. (citations omitted).
15. Id. at 417.
Since this testimony was relevant to a material fact in issue and its probative value clearly outweighed any undue prejudice, its admission was permissible.16

B. Payment of Medical and Similar Expenses

In one of the few cases to arise under section 90.409 of the Florida Statutes, the First District Court of Appeal examined whether offers of payment for medical or hospital bills apply to criminal cases. In Johnson v. State,17 the defendant arrived at the victim’s home in search of several men. The defendant spotted one of the men, pulled a gun, and gave chase. During this episode, the victim exited the home and ran outside. As the defendant fired at a parked car, the bullet ricocheted and struck the victim, an eleven-year-old boy.18 The defendant was charged with possession of a firearm by a convicted felon.19 Prior to trial, the defense attempted to exclude testimony by the victim’s mother that the defendant had visited the victim and offered to pay his medical bills. The trial court denied the objection and the testimony was received into evidence.20

The district court recognized this case as one of first impression since section 90.409 of the Florida Statutes had never been applied to a criminal case to exclude an offer to pay medical bills. The district court looked to the Law Revision Council Notes for guidance. The council notes for section 90.409 state that the California Evidence Code has a similar provision which Florida law has followed.21 The issue of whether California’s analogous provision is applicable in criminal cases was squarely addressed in the California case of People v. Muniz.22 The court in Muniz indicated that California’s evidence code, like Florida’s, only speaks to “liability.” The code does not mention criminal liability.23

16. Id. The supreme court reiterated its adherence to the findings of the district courts in Hodges and Helton. It stated that because consent is unique to the individual, evidence that the victim of an unrelated assault did not consent cannot serve as evidence of nonconsent by the victim of the charged offense. However, the supreme court did not agree that similar fact evidence is never relevant to the issue of consent, and disapproved Hodges and Helton to the extent that they are read in that context. Williams, 621 So. 2d at 415-16.
17. 625 So. 2d 1297 (Fla. 1st Dist. Ct. App. 1993).
18. Id. at 1298.
19. The record does not indicate why the defendant was not charged with numerous other criminal counts.
20. Johnson, 625 So. 2d at 1298.
23. See id. at 746.
Additionally, the council notes indicate that the policy considerations underlying section 90.408 of the Florida Evidence Code are the same for section 90.409.24 Furthermore, the exclusion of compromises or offers to compromise under section 90.408 is based upon two grounds:

(1) The evidence is irrelevant, since "such an offer does not ordinarily proceed from and imply a belief that the adversary's claim is well founded, but rather that the further prosecution of the claim, whether well founded or not, would in any event cause such an annoyance as is preferably avoided by the payment of the sum offered. (2) The public policy of this state favors amicable settlement of disputes and the avoidance of litigation."25

In criminal cases, the decision to prosecute rests with the state, not the victim. Therefore, neither of the rationales stated in the council notes apply. Accordingly, the district court found that the provisions of section 90.409 should be confined to civil cases only and have no application in criminal cases.26

III. EXPERT TESTIMONY

A. Scientific Evidence

In Flanagan v. State,27 the Florida Supreme Court adhered to the Frye28 standard in determining the admissibility of sexual offender profiles.29 In Flanagan, the defendant was convicted of sexual battery on

24. FLA. STAT. ANN. § 90.409 Law Revision Council Notes—1976 (West 1988). This section concerns compromises and offers to compromise.

25. Johnson, 625 So. 2d at 1299 (quoting FLA. STAT. ANN. § 90.408 Law Revision Council Notes—1976 (West 1988) (citations omitted)).

26. Id.

27. 625 So. 2d 827 (Fla. 1993).

28. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). Under Frye, in order to introduce expert testimony regarding a scientific principle, the principle "must be sufficiently established to have gained general acceptance in the particular field in which it belongs." Id. at 1014.

29. The Florida Supreme Court specifically adhered to the Frye standard as the appropriate test for the admissibility of scientific opinions. The Florida Supreme Court explicitly rejected the United States Supreme Court's holding in Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993), where the Supreme Court construed Rule 702 of the Federal Rules of Evidence as superseding the Frye test. Flanagan, 625 So. 2d at 829 n.2; see also Stokes v. State, 548 So. 2d 188 (Fla. 1989) (rejecting the balancing test of section 90.403 of the Florida Statutes for determining the admissibility of scientific evidence
his nine-year-old daughter. At trial, a psychologist for the prosecution testified regarding both the common characteristics of the home environment where child sexual abuse occurs and the characteristics of sexual abusers.30 The psychologist also examined the nine-year-old girl. The First District Court of Appeal, sitting en banc, affirmed the conviction but certified questions to the supreme court regarding whether a child sexual offender profile is admissible at trial.31 The Florida Supreme Court examined the academic literature and case law regarding sexual offender profiles and found that these profiles are not generally accepted in the scientific community and do not meet the Frye test for admissibility.32 Therefore, under Florida law, sexual offender profiles are inadmissible.

The First District Court of Appeal had also concluded that even if the sexual offender profile did not meet the Frye test, it was admissible as background information.33 The supreme court found this position to be untenable and stated that “[i]f the evidence was not admitted as substantive evidence of guilt, then it was irrelevant.”34 However, evidence regarding an expert’s credentials or background evidence regarding relevant tests which the expert conducted is still admissible.35 In this case, the expert’s entire testimony regarding the offender profile had been considered background information by the district court.36 This was error, albeit harmless, and beyond the scope of generally admissible background information.37

and explicitly adopting the Frye test).

30. Flanagan, 625 So. 2d at 829. However, evidence of the characteristics of a child abuser violates rule 90.404(1) which excludes character evidence when it is used to show that the defendant acted in conformity with this character trait on a certain occasion. FLA. STAT. § 90.404(1) (1993).


32. Flanagan, 625 So. 2d at 829. The prosecution did not demonstrate that the profile was accepted in the scientific community. The prosecution merely elicited testimony that this type of information is generally relied on by people working in the field of child sexual abuse to determine what households may be at risk. The prosecution’s own expert testified that the profile could not be used to prove or disprove that a person is a child abuser. Id.

33. Flanagan, 586 So. 2d at 1100.

34. Flanagan, 625 So. 2d at 829.

35. Id.

36. Id.

37. The Florida Supreme Court upheld the conviction because the evidence of guilt was overwhelming and the admission of the sexual offender profile was harmless error based on the brevity and lack of emphasis placed on this testimony by the prosecution. Id. at 827.
B. Testimony by Experts

Expert testimony has been utilized in almost every aspect of trial testimony. The gamut of testimony runs from expert opinions on valuation of real property to expert opinions on grief and bereavement. During the survey period, the Third District Court of Appeal halted the plethora of expert opinions and ruled that the grief endured by a family over the loss of a loved one is within the common understanding of the jury. Therefore, expert opinions on grief and bereavement are unnecessary.

In Key v. Angrand, the plaintiff utilized an expert to explain the plaintiff’s grief and bereavement over the loss of a loved one. The district court found that the expert was properly qualified to render an expert opinion, having a doctorate in sociology and extensive additional education in the area of grief and bereavement. The Florida Evidence Code specifically states that specialized knowledge may be utilized when it will assist the trier of fact in understanding the evidence or in determining a fact in issue. However, the expert testimony must concern subjects which are beyond the common understanding of average persons. In this case, the district court found that the grief felt at the loss of a loved one is not beyond the common understanding of the jury. Therefore, the district court concluded that the expert could add nothing more than what was already in evidence by the family members and their close friends.

Additionally, expert testimony cannot be used if there is a danger of unfair prejudice outweighing its probative value. The added cumulative effect of expert testimony on an area that is easily perceived by the jury from other lay witnesses tends to give this testimony undue weight. In essence, the expert testimony bolsters and magnifies the lay witness’s

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41. Id. at 649-50. It just so happens that the expert utilized in Key for grief and bereavement was the same expert used in Holiday Inns, which was decided by the Fourth District Court of Appeal. Compare Key, 630 So. 2d at 650 (excluding expert testimony on the matter of survivor’s grief) with Holiday Inns, 576 So. 2d at 336 (allowing use of expert witness’s testimony on the subject of survivor’s grief and bereavement).
42. Additionally, the expert had coauthored five books on the subject and numerous articles and papers.
43. FLA. STAT. § 90.702 (1993).
44. See La Villarena, Inc. v. Acosta, 597 So. 2d 336, 339 (Fla. 3d Dist. Ct. App. 1992); see also FLA. STAT. § 90.403 (1993).
testimony in a very emotionally charged area. The chance of a prejudicial effect is much greater when the expert lends his credentials to an already emotional subject. Therefore, the district court disallowed the use of expert testimony to explain survivor grief to members of a jury and expressed direct conflict with the Fourth District’s holding in Holiday Inns, which allows the use of such testimony.

IV. HEARSAY

A. Statements for Purposes of Medical Diagnosis or Treatment

During the survey period, the Florida Supreme Court explicitly rejected a liberal interpretation of section 90.803(4) which would allow testimony by a sexually abused child as to the identity of her abuser. This expansion of section 90.803(4) would have used the liberal interpretation of the Federal Rules of Evidence as interpreted in the case of United States v. Renville.

In State v. Jones, the defendant was convicted of sexual battery on a child less than twelve years old. The child testified that the defendant had sex with her when she was eight years old. Additionally, the testimony of a doctor was admitted in evidence which indicated that the child had told the doctor that the defendant had sexual relations with her. The district court of appeal reversed the conviction, finding the doctor’s testimony inadmissible under section 90.803(4) as a statement for medical diagnosis or treatment. However, the district court of appeal certified conflict with Flanagan v. State, which used a line of federal cases construing the medical diagnosis exception in the Federal Rules of Evidence. This line of federal cases holds that statements of identity by child victims of sexual

45. FLA. STAT. § 90.803(4) (1993).
47. 779 F.2d 430, 439 (8th Cir. 1985) (holding that child abuse victim’s statements to physician identifying her stepfather as the perpetrator were admissible under the medical records exception to hearsay rule).
48. 625 So. 2d 821 (Fla. 1993).
49. Id. at 821.
50. Id. at 822.
51. Jones v. State, 600 So. 2d 1138 (Fla. 5th Dist. Ct. App. 1992), aff’d, 625 So. 2d 821 (Fla. 1993).
52. 586 So. 2d 1085 (Fla. 1st Dist. Ct. App. 1991) (en banc); see discussion supra part III.A.
53. Jones, 600 So. 2d at 1140.
abuse to medical personnel can be pertinent to diagnosis and are admissible under this exception. 4

The Florida Supreme Court rejected the liberal interpretation used by the federal courts regarding statements made for medical diagnosis or treatment. 5 This rejection was based in part on Florida's adoption of section 90.803(23), the Child Victim Hearsay Exception, which employs procedural safeguards in the admittance of child victim hearsay. 56 The Florida Supreme Court joined those few jurisdictions that have rejected an expansion of the medical treatment and diagnosis exception, 57 finding the rationale which underlies the exception unworkable. 58 The reliability and trustworthiness of statements under this exception should not be distorted by expanding its rationale to include the identity of an abuser when that information, in reality, is not reasonably pertinent to treatment or diagnosis.

B. Business Records

An important issue regarding the business records exception was decided by the Florida Supreme Court during the survey period. In Love v. Garcia, 59 the Florida Supreme Court held that medical records are admissible under section 90.803(6) of the Florida Evidence Code, through

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54. The leading federal case in this area is United States v. Renville, 779 F.2d 430 (8th Cir. 1985). In Renville, the trial court permitted a physician to testify regarding statements by an eleven-year-old child identifying her stepfather as her abuser. In examining whether the child's statements were reasonably pertinent to diagnosis or treatment, the court stated: "First, the declarant's motive in making the statement must be consistent with the purposes of promoting treatment; and second, the content of the statement must be such as is reasonably relied on by a physician in treatment or diagnosis." Id. at 436. However, in cases involving statements by child abuse victims, the Renville court stated that the general restraints regarding identity should not apply, and stated:

We believe that a statement by a child abuse victim that the abuser is a member of the victim's immediate household presents a sufficiently different case from that envisaged by the drafters of rule 803(4) that it should not fall under the general rule. Statements by a child abuse victim to a physician during an examination that the abuser is a member of the victim's immediate household are reasonably pertinent to treatment.

Id.

55. Jones, 625 So. 2d at 824-25.

56. Id.


58. Jones, 625 So. 2d at 825.

59. 634 So. 2d 158 (Fla. 1994).
a records custodian, unless the opponent satisfies the burden of showing the untrustworthy nature of the evidence.\textsuperscript{60}

On April 3, 1986, Ms. Garcia was struck by a passing motorist while trying to cross an intersection.\textsuperscript{61} At trial, the defense attempted to enter into evidence the results of Ms. Garcia’s two blood alcohol tests as business records.\textsuperscript{62} The plaintiff filed a motion in limine to exclude the results based on: 1) the defendant’s failure to list witnesses who could testify how the tests were performed; 2) a lack of information regarding the type of test conducted; 3) an absence of information regarding who took the samples; and 4) a lack of evidence demonstrating that the samples were the plaintiff’s.\textsuperscript{63} The trial court agreed with the plaintiff and excluded the medical reports regarding the plaintiff’s blood alcohol level.\textsuperscript{64}

Based on a fifty percent comparative negligence finding, the jury’s two million dollar verdict in favor of the plaintiff was reduced to one million

\textsuperscript{60} Id. at 160 (interpreting FLA. STAT. § 90.803(6) (1993)).

\textsuperscript{61} Id. at 159.

\textsuperscript{62} Id. The first test indicated a blood alcohol level of .23, almost three times the legal limit of .08 allowed in Florida drunk driving cases. This test was analyzed by SmithKline, an outside laboratory. The second test, taken several hours later, was analyzed by the hospital and demonstrated a blood alcohol level of .14. Id. at 159 n.1.

\textsuperscript{63} Love, 634 So. 2d at 159. The third and fourth grounds essentially address the proper chain of custody for the blood test. However, this issue is a red herring. Chain of custody issues frequently arise in criminal cases and have been settled by the Florida Supreme Court. An absence of testimony regarding the chain of custody will not exclude relevant evidence unless there is an indication of probable tampering. Peek v. State, 395 So. 2d 492 (Fla. 1981), cert. denied, 451 U.S. 964 (1981); Beck v. State, 405 So. 2d 1365 (Fla. 4th Dist. Ct. App. 1981); Frederiksen v. State, 312 So. 2d 217 (Fla. 3d Dist. Ct. App. 1975). These decisions are equally applicable to civil cases. In any event, the purpose of section 90.803(6) is to allow a party to introduce relevant records at trial without having to produce all the persons who had a part in preparing the records. See Southern Bakeries v. Florida Unemployment Appeals Comm’n, 545 So. 2d 898, 902 (Fla. 2d Dist. Ct. App. 1989). Laying an elaborate chain of custody would defeat the purpose of the rule.

\textsuperscript{64} Love, 634 So. 2d at 159. It is sometimes hard to believe that the fundamental precept of a trial is a search for the truth. The purpose of an evidence code is to guide the trial court in excluding unreliable or untrustworthy evidence from the finder of fact. What could be more enlightening than two blood tests from two different laboratories showing that the plaintiff’s faculties may have been impaired? It would seem that alcohol in a person’s bloodstream at the time of an accident would be relevant and probative on at least two grounds: 1) the issue of comparative negligence and 2) the ability of the intoxicated person to accurately relate the events occurring during the period of intoxication. See Edwards v. State, 548 So. 2d 656 (Fla. 1989) (allowing the testimony regarding the use of intoxicating substances if it is relevant to the time of the incident, the time of testimony, or the ability of the witness to observe, remember, or recount).
dollars. The defendant appealed the jury verdict and the Fourth District Court of Appeal reversed, finding the blood tests admissible. However, the appellate court, sitting en banc, withdrew this decision and affirmed the trial court’s exclusion of the blood tests.

The Florida Supreme Court subsequently quashed the district court’s en banc ruling and held that medical records are admissible under the business records exception of section 90.803(6) if a proper predicate has been laid. Once the proper predicate is laid under section 90.803(6), the burden shifts to the party opposing the introduction of the records to prove untrustworthiness of the records. If the opposing party cannot carry this burden, the records are allowed in evidence as business records. The trustworthiness of the medical record is presumed if the predicate for the business record is properly met.

The supreme court noted that trustworthiness is based on the general acceptance of the test in the medical field, and the fact that the test is relied upon in the scientific field involved. Since the entire rationale behind the business records exception is based on “the reliability of business records supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them,” untrustworthy business records should be the exception rather than the norm.

The district court’s en banc opinion misconstrued the trustworthiness aspect of the business records exception by basing its decision on whether the health care providers, administering the tests to the plaintiff in this particular case, relied on these specific blood tests. The supreme court noted that “[a]ctual reliance on the test in each course of treatment is not required.” The trustworthiness of the test is based on its general acceptance in the medical field and the fact that the test is relied on in the general scientific community involved. Blood tests are routinely used and

65. Love, 634 So. 2d at 159.
67. Love, 634 So. 2d at 159.
68. It goes without saying that if the parties agree that no records custodian is needed for any business or medical record then the record should be admitted. Once the trustworthiness of the records has been stipulated to, the predicate is presumed. Therefore, if the parties stipulate that a records custodian is not necessary, then the records are admissible as business records. Phillips v. Ficarra, 618 So. 2d 312, 314 (Fla. 4th Dist. Ct. App. 1993).
69. Love, 634 So. 2d at 160.
71. Love, 634 So. 2d at 160.
relied on by hospitals in the normal course of business. Therefore, medical records containing blood test results should be admissible even if the blood tests are not relied on in that particular case.

V. CONCLUSION

Although this year's evidentiary cases were few in number, the Florida Supreme Court resolved at least some of the more troublesome evidentiary issues. However, more evidentiary cases will need to be resolved by the Florida Supreme Court in the coming year. As always, criminal cases involving similar fact evidence will keep the supreme court's attention. Additionally, the conflict in the district courts of appeal, regarding expert testimony on grief and bereavement in personal injury cases, is sure to merit the supreme court's attention in the upcoming year.
I. INTRODUCTION

Prompted by the murder of an English tourist in North Florida in late 1993 and its longstanding unhappiness with the Department of Health and Rehabilitative Services' ("HRS") efforts to carry out its juvenile justice responsibilities, the Florida Legislature enacted a statute creating a new Department of Juvenile Justice.\(^2\) The legislature also amended chapter 39 of Florida's Juvenile Code by expanding the contempt powers of the court;\(^3\)

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\(^{2}\) All powers were transferred to the Department from HRS, effective October 1, 1994. Act effective May 18, 1994, ch. 94-209, § 1, 1994 Fla. Laws 1183, 1192-94 (to be codified at FLA. STAT. § 20.316).

\(^{3}\) See id. § 14, at 1245-47 (to be codified at FLA. STAT. § 39.0145).
expanding prehearing detention criteria; expanding the courts' power to hold parents responsible for delinquent acts of their children; lowering the age for transfer of children for prosecution as an adult; creating additional commitment programs (specifically boot camps); changing the provisions concerning publication of juvenile records; and establishing a new Juvenile Justice Advisory Board. These substantial changes follow on the heels of a massive rewriting of the Juvenile Code which went into effect in 1990.

During the Spring 1994 session, the legislature also changed several significant provisions governing child welfare. Specifically, the legislature amended part IV of chapter 39, concerning placement plans and permanency planning, to create more precise documentation for reunification or termination of parental rights.

At the same time, the supreme court and district courts of appeal were active in deciding issues in both the delinquency and child welfare areas. The appellate courts' tradition of holding the trial courts accountable for strict compliance with the provisions of chapter 39 continues unabated. The cases surveyed in this review cover the twelve month period from September 1, 1993, to August 31, 1994.

II. DEPENDENCY AND TERMINATION OF PARENTAL RIGHTS

A. Adjudicatory Issues

Since 1990, the law has required that an order adjudicating a child dependent in Florida must state the facts upon which the finding of dependency is made. Yet, the trial courts continually fail to comply with this simple provision despite the decisions of In re T.S. and Williams v. HRS, both of which were decided nearly four years ago. The same issue regarding dependency findings was before the appellate courts three times this past year, and in each case the failure of the trial court to properly

6. See, e.g., id. § 11, at 1237-40 (defining a "serious or habitual offender" as a child no less than 14 years old).
9. See id. § 4, at 1196-97.
adjudicate warranted reversal or remand. It is hard to determine why this rudimentary failure to comply with the statute continues to occur. Perhaps stronger appellate supervision is needed.

According to the Fourth District Court of Appeal, evidence of a parent's actions subsequent to a child's placement into HRS custody is admissible for various purposes. In In re A.L.O., the issue was the admissibility of evidence offered to prove dependency after the children had been placed into the custody of HRS. Upon discovering that the parent had not been informed of the right to counsel prior to an initial dependency adjudication, HRS amended its petitions for dependency and for termination of parental rights by adding the new evidence. Relying on Belflower v. HRS and HRS v. Zeigler, the court held that evidence related to the best interests of the child is admissible even if it involves action subsequent to the child's placement into HRS's custody. The courts in Belflower and Zeigler recognized that the parents' rights could be protected, although evidence of subsequent dependency behavior is admitted. Furthermore, a parent's subsequent actions may be considered evidence of continuing abandonment or neglect under Florida Rule of Juvenile Procedure 8.310. The court concluded that while parental rights may not be terminated based upon defective dependency proceedings, the child's right to a safe and healthy environment should not be put at risk for the same reasons.

Incarceration of a parent is not an uncommon problem at the adjudication stages of dependency proceedings. In re C.M raised the issue of how the courts should handle the incarceration of the parent in terms of due process rights. In C.M., a mother appealed from an order adjudicating her child dependent. The basis for the petition was that the mother failed to provide a stable environment due to her repeated incarceration. The mother was not present at the adjudicatory hearing because she was incarcerated. However, she was represented by counsel. Her lawyer orally stipulated to dependency, stating that the mother authorized the stipulations and was aware of the ramifications of a finding of dependency by the court. An

15. 578 So. 2d 827 (Fla. 5th Dist. Ct. App. 1991).
17. A.L.O., 637 So. 2d at 16.
18. Id. at 17.
order of adjudication followed. At a subsequent dispositional hearing, the mother was present, but the court did not take the opportunity to inquire whether the stipulation was knowingly and made voluntarily. The appellate court reversed, applying Florida Rule of Juvenile Procedure 8.325(c), which provides that the court shall determine whether any admission or consent to a finding of dependency is made voluntarily and with a full understanding of the nature of the allegations and the possible consequences of the admission or consent.\textsuperscript{20} Mere presence at the dispositional hearing was not enough to establish that the stipulation had been knowingly and voluntarily made.

Publicity in dependency proceedings is an ongoing problem in Florida.\textsuperscript{21} In \textit{Times Publishing Co. v. A.J.},\textsuperscript{22} the Florida Supreme Court dealt with application of the public records law in the context of a dependency proceeding. In that case, the \textit{St. Petersburg Times} filed a public records request for sheriff’s department documents related to allegations of abuse or neglect at the Church of Scientology’s Cadet School. The corporation operating the school filed an ex parte emergency motion to impose confidentiality. The motion was premised upon an exemption from public records disclosure concerning reports of child neglect or abuse under Florida law.\textsuperscript{23} The supreme court held that the non-custodian of the public records had standing to assert the statutory exception, provided the nonparty was a member of a class the exception was intended to protect.\textsuperscript{24} The court also held that the children had standing as well, and thus the court had the power to impose a permanent injunction barring release of the public records in question.\textsuperscript{25}

The Florida courts have been quite specific about who may commence dependency proceedings. Included are all “interested persons” and

\textsuperscript{20} \textit{Id.} at 1094. Florida Rule of Juvenile Procedure 8.325(c) provides:

\begin{quote}

The parent or custodian may admit or consent to a finding of dependency. The court shall determine that any admission or consent to a finding of dependency is made voluntarily and with a full understanding of the nature of the allegations and the possible consequences of such admission or consent, and that the parent or custodian has been advised of the right to be represented by counsel.
\end{quote}


\textsuperscript{22} 626 So. 2d 1314 (Fla. 1993).


\textsuperscript{24} \textit{Times Publishing Co.}, 626 So. 2d at 1315.

\textsuperscript{25} \textit{Id.}
guardians ad litem.26 Recently, however, the First District Court of Appeal was faced with the question of limitations on the right to intervene in a dependency proceeding. In In re S.S.J.,27 an organization known as Valuing our Children and Laws ("VOCAL") of Jacksonville, Inc. sought to intervene in a dependency proceeding allegedly at the request of the subject child's natural father. VOCAL asked the trial court to order the mother to submit to involuntary birth control. The appellate court held that chapter 39 provisions concerning parties to a dependency proceeding did not control intervention.28 Rather, the generic test for intervention in a civil case, as governed by Florida case law, provides that the interest must be in the matter in litigation and of such a direct and immediate character that the intervenor would either gain or lose by the legal operational effect of the judgment. The appellate court concluded that VOCAL failed to demonstrate this degree of interest in the case.29

Another ongoing issue is the power of juvenile courts to oversee HRS's handling of dependency cases. For example, the appellate courts have regularly limited the power of the trial courts to order HRS to pay for a variety of services in dependency proceedings. The appellate courts have relied upon the juvenile courts' lack of explicit legislative authority to act and the lack of any constitutional right in a party on the basis of which the juvenile court would be required to act. In HRS v. Ortiz,30 HRS appealed an order requiring it to pay the cost of a psychological evaluation of the mother of an allegedly dependant infant. The court held that in the absence of legislative authorization or a demonstration that the recipient has a constitutional right to the service, HRS cannot be required to pay for the service.31 In HRS v. Jones,32 the Fifth District Court of Appeal followed its holding in Ortiz.33 The sole distinction was that the order appealed from in Jones required HRS to pay for an intelligence evaluation of a natural mother in a dependency proceeding.34

27. 634 So. 2d 198 (Fla. 1st Dist. Ct. App. 1994).
28. Id. at 199.
29. Id.
30. 627 So. 2d 124 (Fla. 5th Dist. Ct. App. 1993).
31. Id.
32. 631 So. 2d 348 (Fla. 5th Dist. Ct. App. 1994).
33. Id. at 349.
34. Id.
B. Right to Counsel Issues

As reported in prior surveys, neither the United States Supreme Court nor the Florida Supreme Court has ever ruled that a parent has an absolute right to counsel in a dependency proceeding. In Florida, counsel is not mandatory in a dependency proceeding if the parent is indigent. However, the parent must be notified of the right to counsel in such a proceeding. Furthermore, in a limited context where termination of parental rights is subsequently likely to occur, the parent is entitled to counsel free of charge at the dependency proceeding.

The two-part rule under Florida law—that a parent is not entitled to a free lawyer in a dependency proceeding but must be notified of his or her right to counsel, and if termination is likely, that a free lawyer shall be appointed—has generated a substantial body of appellate cases which reversed trial courts for failure to comply. The solution is simply to amend the statute and provide free counsel to parents in dependency proceedings, as is done in other states.

The inadequacy of the Florida statute and the inability of the courts to comply with the current standard is best evidenced in Palmateer v. HRS. In that case, the trial court advised the parents of their right to counsel by stating that the parents had “the right to have an attorney, and the right to have an attorney appointed for you if you cannot afford one. If I see your case in that posture I will advise you. Are there any questions?” The appellate court held that this explanation violated Florida Rule of Juvenile Procedure 8.320(a). The rule unequivocally states that courts shall advise...
a parent of the right to counsel at each stage of the dependency proceeding. Upon request, the court shall appoint counsel to an insolvent parent if the parent is entitled by law. The court shall further determine whether the right to counsel is understood. The appellate court vacated the trial court’s ruling and remanded.

In In re A.L.O., the Fourth District Court of Appeal reasserted the doctrine that while a dependency adjudication may be void by failure to advise a parent of the right to counsel, it is not void ab initio. Thus, failure to appeal will leave the adjudication of dependency standing, although it is defective as a basis for termination of parental rights. Therefore, the trial court may look at the finding of dependency in making a decision to retain custody with HRS as opposed to placing the child back with the parent. In A.L.O., the appellate court made a decision that protected the child. However, if there had been an absolute statutory right to counsel at the dependency stage as this survey suggests, the entire issue would never have arisen.

The distinction between providing counsel free of charge when termination of parental rights is likely and when it is not, invites both confusion and appeal. These are further reasons why the Florida law should be changed. A recent case exemplifying the problem is In re D.F. In that case, a father appealed a trial court’s order of dependency due to “egregious emotional abuse.” The appellate court held that under Florida case law, not only must a parent be informed of the right to counsel at each stage of the dependency proceeding, but presence of counsel will be

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(2) The court may and upon request shall appoint counsel to insolvent persons who are so entitled as provided by law.

(3) The court shall ascertain whether the right to counsel is understood.

FLA. R. JUV. P. 8.320(a).

43. Id.
44. Palmateer, 625 So. 2d at 118.
45. 637 So. 2d 15 (Fla. 4th Dist. Ct. App. 1994).
46. See Belflower, 578 So. 2d at 828-29 (establishing the proposition that a dependency adjudication is not void ab initio).
47. 622 So. 2d 1102 (Fla. 1st Dist. Ct. App. 1993).
48. Section 39.464(4) of the Florida Statutes defines “egregious conduct” and provides in pertinent part:

The parent or parents have engaged in egregious conduct that endangers the life, health, or safety of the child or sibling, or the parents have had the opportunity and capability to prevent egregious conduct that threatened the life, health, or safety of the child or sibling and have knowingly failed to do so.

required where permanent termination of parental rights might result. The First District Court of Appeal recognized that Rule 8.330(a) of the Florida Rules of Juvenile Procedure provides that the court has the option of sustaining dependency by clear and convincing evidence that a parent has committed egregious abuse. Moreover, such a finding may suffice to support the termination of parental rights at the subsequent termination proceeding. Therefore, the court held that whenever egregious abuse is alleged as a basis for a petition for dependency, the parents should be specifically placed on notice that facts have been alleged which, if found by clear and convincing evidence, would serve as partial grounds for termination of parental rights. Further, the petition itself must apprise the parents of the right to counsel and, if indigent, the right to court appointed counsel.

Other recent appellate cases amplify the inadequacy of the Florida law in this area. In D.J.M. v. HRS, the trial court not only failed to adequately advise the parent of the right to counsel, but also failed to determine whether the parent fully understood the right in the first place. In In re M.J.S., there was no evidence that the parent was informed of the right to counsel at all. In Adoption Centre, Inc. v. Marshall, the trial court error was even more basic. In that case, the appellate court held that the trial court judge abused his discretion by denying one of the parties’ request for a continuance. The purpose of the continuance was to secure a lawyer to assist in the presentation of evidence and witnesses in the pending proceeding for dependency and termination of parental rights.

Thus, it seems clear that the legislature ought to simply redraft chapter 39 to provide the absolute right to counsel free of charge for indigent parents in both dependency, as well as termination of parental rights cases. There are, of course, financial considerations in enacting such a statute. For example, attorneys must be paid to represent indigent parents. However, it remains to be seen how costly a change would be, given such considerations as the appellate costs and resulting disruptions to parties’ lives under the

49. D.F., 622 So. 2d at 1105.
50. Id. at 1104.
51. Id.
52. Id. at 1104-05.
55. 627 So. 2d 589 (Fla. 5th Dist. Ct. App. 1993).
56. Id.
57. Id.
current rule, the limits already set on attorneys' fees, and the practice in some circuits of routinely appointing counsel in these cases.

However, there are instances where the statutory provision of counsel may not be enough. In In re D.M.W., the issue on appeal was whether, in a termination of parental rights case, a father's due process rights were violated by HRS's failure to notify his attorney when the department secured the father's surrender of his parental rights. Without citation to any case law, the appellate court upheld the termination, based upon the best interests of the child. The child had been living with his new adoptive parents for approximately three and one half years while both proceedings in the lower court and on appeal continued. The appellate court stated that it was deeply troubled by what HRS had done. The court recognized that the father was represented by counsel at the time he executed the surrender, but had failed to notify counsel regarding the surrender. HRS did not suggest to the father that he seek the benefit of talking to his lawyer before executing the surrender. The court held that this "resulted in a lack of meaningful assistance of counsel," but upheld the termination by stating that "HRS may not have violated the letter of the law in circumventing the statutory right to counsel by failing to file the petition for termination of parental rights until after it secured Mr. Menendez's permanent surrender of parental rights." This statement is without citation. Perhaps recognizing the inadequacy of its analysis, the court then commented that it did feel that HRS violated "the spirit of the law." However, this rationale is patently inadequate, if not completely erroneous. First, the right to counsel provision of the Florida law in termination proceedings is clear and absolute. There must be a showing to the court of a knowing and intelligent waiver of counsel. However, in this case, there was none. Second, a line of United

58. Interview with Daniella Levine, Esq., HRS Counsel, in Fort Lauderdale, FL (Mar. 15, 1994).
60. 623 So. 2d 634 (Fla. 4th Dist. Ct. App. 1993).
61. Id. at 635.
62. Id.
63. Id.
64. Id. at 636.
65. D.M.W., 623 So. 2d at 636.
66. Id.
67. Id.
States Supreme Court cases, commencing with *Stanley v. Illinois*, recognizes both the procedural and substantive due process rights of parents in dependency related proceedings. Yet, the appellate court never addressed these issues.

C. Abuse Reporting Issues

Florida, like most states, mandates the reporting of abuse and neglect. Among other things, the Florida statute provides for what shall be reported, a central abuse registry and tracking system, due process protections for alleged perpetrators, and a list of who must report.

Cases involving interpretation of the abuse reporting statute regularly come before the appellate courts. Recently, in *R.S.M. v. HRS*, a father appealed the denial of his request to expunge his name from the Central Child Abuse Registry. Under the facts of the case, the appellate court concluded that the mere presence of bruises resulting from corporal punishment is not competent, substantial evidence of the excessive corporal punishment or temporary disfigurement standards which the legislature envisioned when it passed chapter 415, the controlling statute.

D. Termination of Parental Rights Issues

Application of the language within part VI of chapter 39, which governs the grounds for terminating parental rights, has generated a substantial body of case law over the years. In the fall of 1993, the

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69. *See* REPRESENTING THE CHILD CLIENT, ¶ 4.02[2], at 4-12 (Mark I. Soler, exec. dir. 1994).
70. FLA. STAT. § 415.504 (1993).
71. *Id.* § 415.103.
73. 640 So. 2d 1126 (Fla. 2d Dist. Ct. App. 1994).
74. *Id.* at 1126-27 (relying upon B.R. v. HRS, 558 So. 2d 1027 (Fla. 2d Dist. Ct. App. 1989)).
Second District Court of Appeal recognized in *In re F.A.C.* that "[c]hapter 39 is not well written [and] it is no wonder that litigants and trial judges alike are confused in attempting to determine the requirements to terminate parental rights." Fortunately, in the spring of 1994, the legislature rewrote part VI in an effort to clarify the grounds for termination. The legislature substantially rewrote section 39.464, which governs grounds for termination of parental rights. It articulated four grounds: 1) execution of a voluntary surrender of the child; 2) when identity or location of the parent is unknown and cannot be ascertained; 3) conduct toward the child or other children which demonstrates that continued involvement of the parent threatens the life or well being of the child irrespective of the provision of services; 4) the parent is engaged in egregious conduct that endangers the life, health, or safety of the child or the child’s siblings; and 5) the parent had the opportunity and capability to prevent such egregious conduct and failed to do so. Section 39.467 of the *Florida Statutes*, governing the adjudicatory hearing in termination cases, was substantially shortened and now simply obligates the court to consider the specific elements set forth for the termination of parental rights. The court must also determine that each element is established by clear and convincing evidence before granting the petition. The clear and convincing standard is required by the United States Supreme Court decision in *Santosky v. Kramer*.

Finally, the legislature enacted section 39.4611, entitled "Elements of Petition for Termination of Parental Rights." This section requires that at least one of the four grounds set forth in section 39.464 must be met. It further requires that the parents are advised of their right to counsel at all hearings they attend; that a dispositional order adjudicating a child dependent was entered in any prior dependency proceeding relied upon in offering the parent a case plan; and that the manifest best interests of the child would be served by the granting of the petition to terminate parental

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76. 625 So. 2d 909 (Fla. 2d Dist. Ct. App. 1993), review denied, 634 So. 2d 623 (Fla. 1994).
77. *Id.* at 910.
79. *Id.*
80. *Id.* § 38, at 1009-11 (amending FLA. STAT. § 39.467 (1993)).
82. Ch. 94-164, § 30, 1994 Fla. Laws at 1003 (to be codified at FLA. STAT. § 39.4611).
83. *Id.*
The new statutory provision also provides that "a separate petition for dependency need not be filed and the department need not offer the parents a case plan with the goal of reunification, but may instead file with the court a case plan with a goal of termination of parental rights." The fact that the child was adjudicated dependent previously may be proved by the introduction of either a certified copy of the order of adjudication or the order of disposition of dependency. Similarly, the fact that the parent was notified of the right to counsel in a prior proceeding for dependency may be proved by the introduction of a certified copy of the order of adjudication or disposition. At first glance, the rewriting appears to clarify the situation and will reduce appellate supervision in this area.

III. DELINQUENCY

A. Trial Issues

The appropriate use of secure detention in delinquency cases has been before both the legislature and the state courts on numerous occasions in the past. The issue reached the Florida Supreme Court again this year in *R. W. v. Soud.* In that case, a juvenile petitioned the supreme court for a writ of habeas corpus based upon the child's placement in secure detention by the circuit court pending disposition in order that the child be available for the preparation of a predispositional report ("PDR"). The trial court concluded that the chapter 39 provisions relating to detention which prohibit detention for the purpose of insuring access to juveniles are inapplicable after a juvenile pleads guilty to an offense and the child is placed into secure detention pending the dispositional hearing. Although R.W. had been released, the supreme court issued its decision because the matter was of great importance. The supreme court ultimately ruled that the statutory requirements for secure detention contained in section 39.042 of the *Florida...*
Statutes apply to a child who is awaiting disposition. Thus, the trial court was obligated, but failed to conduct a risk assessment as required by law and made no findings.

The court also concluded that when a child is on release status and has not been previously detained, he or she may only be placed into detention after a court hearing in which the original risk assessment instrument was rescored based on newly discovered evidence or changed circumstances. There was no evidence that a risk assessment instrument was ever completed in this case. Nor was there any evidence of resoring by the judge. The court next held that Florida Rule of Juvenile Procedure 8.110(g) contemplates detention pending disposition but does not eliminate the statutory requirements that findings be made and a risk assessment be performed before the child is placed into detention.

Finally, the supreme court explicitly disapproved the earlier district court of appeal decision in H.L. v. Woolsey. The H.L. court had concluded that section 39.044(5) of the Florida Statutes provided authority to detain a juvenile pending a dispositional hearing without the statutory procedures described here. The supreme court rejected that proposition. Justices Overton and McDonald dissented, finding language in section 39.042 gave flexibility to the trial judge. The dissenting justices also found that the legislature should address the issue.

The use of closed circuit television for detention hearings in adult criminal cases has become widespread across the country. Its use has now been suggested in Florida at juvenile detention hearings. As a result of an emergency petition by Broward County Juvenile Court judges in the

91. Id. at 26-27.
92. Id. at 27.
93. Id.
94. 618 So. 2d 268 (Fla. 1st Dist. Ct. App. 1993), disapproved, R.W., 639 So. 2d at 25.
95. Id. at 269.
96. R.W., 639 So. 2d at 27.
97. Id. at 28 (Overton & McDonald, JJ., dissenting).
98. Id.
Seventeenth Judicial Circuit seeking amendment to Florida Rule of Juvenile Procedure 8.100(a), the supreme court has asked for comment.100 The court’s request for comment as a precursor to amending the Rules of Juvenile Procedure to permit electronic audiovisual detention hearings comes on the heels of the court of appeal’s decision in R.R. v. Portesy.101 In that case, the First District Court of Appeal held that video telephone detention hearings were impermissible in juvenile delinquency cases because the procedure had not been authorized by rule or statute.102 In R.R., a juvenile had petitioned for a writ of habeas corpus challenging the validity of a secure detention order which had been issued as a result of a video telephone hearing as opposed to the child’s presence in the courtroom. The court noted that the supreme court had not authorized the procedure as a pilot project. Nor had there been any critical review accorded by the supreme court’s rule making process.103

The responsibility to charge children with acts of juvenile delinquency, like charging adults with criminal offenses, rests with the prosecuting attorney. The courts are not permitted to interfere in this process. In State v. Everett,104 the appellate court held that the adult court lacked the authority to grant a motion to transfer a case back to the juvenile division under the facts of the case.105 The state had initially moved to transfer from juvenile to adult court. The juvenile division denied the motion, and thereafter the state direct-filed an information in the criminal division. The appellate court held that “[t]he state attorney is not precluded from direct-filing an information [in adult court] despite initially filing a delinquency petition.”106

Furthermore, the juvenile court may not interfere with the filing responsibilities of a prosecuting attorney by sua sponte dismissing actions. In State v. E.N.,107 the state appealed a dispositional order in a juvenile delinquency proceeding on the ground that the trial court impermissibly permitted the child to plead to an uncharged offense. The appellate court recognized that the trial court lacked jurisdiction to adjudicate a juvenile

100. See In re Amendment to Florida Rule of Juvenile Procedure 8.100(a), No. 84,021 (Fla. July 19, 1994).
101. 629 So. 2d 1059 (Fla. 1st Dist. Ct. App.), review denied, 637 So. 2d 236 (Fla. 1994).
102. Id. at 1062.
103. Id. at 1063.
104. 624 So. 2d 853 (Fla. 3d Dist. Ct. App. 1993).
105. Id. at 854.
106. Id.
107. 624 So. 2d 806 (Fla. 3d Dist. Ct. App. 1993).
delinquent based on an uncharged offense. The court explained that while the trial court has latitude and discretion in post-trial proceedings, the state attorney is solely responsible to render a pretrial decision whether to prosecute or to enter a nolle prosequi. Similarly, in State v. K.L., the court held that once the prosecutor decides that a particular case will be prosecuted, the responsibility of the trial court is to adjudicate only those issues properly placed before the court. In K.L., the trial court had dismissed the case sua sponte after a petition had been filed but no motion to dismiss had been made by the juvenile under the Florida Rule of Juvenile Procedure 8.085. The appeals court thus reversed the dismissal.

B. Dispositional Issues

Chapter 39 provides for a number of dispositional alternatives including restitution, community control, and commitment to a variety of facilities characterized at least in part by increasing degrees of deprivation of liberty. In addition, when a juvenile is tried as an adult, Florida law provides that he or she may nonetheless receive a disposition in the juvenile corrections system if the court so finds based upon a statutorily defined test.

In J.M.G. v. State, the appellate court was faced again with the issue of the proper use of the restitution statute which provides that the court may order a child to make restitution for any loss or damage caused by the child’s offense. The court held, as had other courts of appeal on various occasions, that “there must be a causal or significant relationship between the offense for which the child was adjudicated delinquent and the amount of damages or loss directed to be reimbursed to the victim.”

108. Id. at 807.
109. Id.
110. 626 So. 2d 1027 (Fla. 3d Dist. Ct. App. 1993).
111. Id.
112. Id.
113. Id.
119. J.M.G., 629 So. 2d at 1082.
Where there is no relationship between the criminal act and the damage, the restitution order is improper. If the restitution order was part of a negotiated plea, then the defendant may not argue on appeal that the order was impermissible. In the case at bar, it was not clear from the record exactly what role restitution played in the plea agreement. Therefore, the appeals court remanded for further determination.

Community control is another dispositional alternative. In a one paragraph opinion, the court in *A.W. v. State* reversed that portion of a trial court order which required the mother of the delinquent child to perform community service, finding no authority for such an order in chapter 39.

In *D.V.S. v. State*, the question before the court was whether an order placing a child on community control after a withholding of adjudication could exceed the maximum period of incarceration for an adult on the same charge. The court held that the child could be ordered to a term of community control beyond that to which an adult could be sentenced because, in the case at bar, the youngster was not an adjudicated delinquent child. The court noted that chapter 39 provides that any commitment of a delinquent child to the department may not exceed the maximum period of imprisonment for an adult. Further, a program of community control ordered by the court may not exceed the term for which a sentence could be imposed if the child were committed to HRS for the offense. However, because this latter section applies only to adjudicated delinquent children and the other provision only applies to committed children, they are inapplicable and a period beyond that which may apply for an adult is appropriate.

In *A.S. v. State*, the Fourth District Court of Appeal was faced with a bizarre order from the trial court which required the appellant’s mother to pay $2500 of the total $4986.60 restitution ordered as a result of a schoolyard fight in which the victim suffered a broken nose. Section 39.054(1)(f)

120. *Id.*
121. *Id.* at 1082-83.
122. *Id.* at 1083.
123. 634 So. 2d 1135 (Fla. 1st Dist. Ct. App. 1994).
124. *Id.* at 1136.
125. 632 So. 2d 221 (Fla. 5th Dist. Ct. App. 1994).
126. *Id.* at 222.
128. *Id.* § 39.054(1)(a)(1).
129. *D.V.S.*, 632 So. 2d at 222.
130. 627 So. 2d 1265 (Fla. 4th Dist. Ct. App. 1993).
of the *Florida Statutes* provides that the parent may be ordered to make restitution for damages caused by the child. However, liability should not exceed $2500 for any one criminal episode and the court must make a finding after a hearing that the parent failed to make diligent efforts to prevent the child from engaging in delinquent acts. Otherwise, the parent is absolved of liability for restitution. In the case at bar, the only testimony on the record was that of the mother, effectively stating that she had made diligent efforts. The court conceded that the trial court could have chosen not to believe the mother’s testimony. However, the argument on appeal by the state was that the mother “had the burden to establish a degree of effort above and beyond normal parenting tasks to establish her diligence by the greater weight of the evidence.” The court rejected this “strict liability” argument. The mother’s liability for restitution was reversed.

In addition to providing for a number of dispositional alternatives, including restitution, Florida law provides that the juvenile court may impose a fifty dollar fee in juvenile cases for the Crimes Compensation Trust Fund. In *J.A. v. State*, the court was asked to reconcile the apparent inconsistency between section 960.20 of the *Florida Statutes* which authorizes imposition of a fifty dollar fee and section 39.073 which prohibits the imposition of costs against juveniles in chapter 39 proceedings. Applying the statutory construction rule that later statutes are favored over earlier ones which are then repealed by implication, the court upheld the fifty dollar fee so long as the juvenile was adjudicated delinquent. The court struck the fee assessed against the juvenile whose adjudication was withheld.

Prior surveys have reviewed the ongoing inability of the trial courts to make specific written findings with reasons for the imposition of an adult sentence rather than a juvenile sentence provided by section 39.059(7)(b) of

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132. Id.
133. Id.
134. *A.S.*, 627 So. 2d at 1266.
135. Id.
136. Id.
137. Id.
140. Id.
141. Id. at 109.
142. Id.
the Florida Statutes. The statutory provision recently came before the supreme court in Troutman v. State. The issue was whether the trial court must consider each of the statutory criteria required under sections 39.059(7)(c) and (d) at the time of sentencing of the juvenile as an adult, and, if so, whether the resultant findings at the time of sentencing must be contemporaneously reduced to writing. In Troutman, a sixteen year old charged with kidnapping to facilitate a felony, grand theft of an automobile, and aggravated assault with a deadly weapon, pleaded nolo contendere to charges of false imprisonment and grand theft. The predisposition report recommended sentencing as a juvenile and placement on community control. The trial court found the recommended sanctions inadequate despite the fact that the youngster had no prior record. The court announced its intention to treat the juvenile as an adult, withheld adjudication of guilt, and sentenced the child to three years of probation. A written order explaining the rationale was filed three days later. The Florida Supreme Court reversed, and held that the suitability or nonsuitability for adult sanctions must be considered using the enumerated statutory criteria before the determination of disposition. This is true both in cases where the child is waived into adult court and where the direct-filing provision of Florida law applies. The court concluded that a trial court must consider each of the criteria and give an individualized evaluation of how a particular juvenile fits within the criteria. Mere conclusory language is insufficient. Furthermore, the court held that the written findings and reasons must be provided at the time of sentencing.

143. See Dale, 1993 Leading Cases and Developments, supra note 21, at 558.
145. Troutman, 630 So. 2d at 530.
146. Id.
147. Id.
148. Id.
149. Id. at 532.
150. Troutman, 630 So. 2d at 531.
151. Id.
152. Id.
153. Id. at 532; see also State v. Veach, 630 So. 2d 1096 (Fla. 1994) (required statutory findings are necessary prior to imposing adult sanctions upon a juvenile); Bryan v. State, 638 So. 2d 608 (Fla. 1st Dist. Ct. App. 1994) (holding post-Troutman, that a transcript does not satisfy requirement that the findings be in writing); McCoy v. State, 632 So. 2d 181 (Fla. 5th Dist. Ct. App. 1994) (individual evaluation according to statutory criteria is necessary before considering adult sanctions); Glidewell v. State, 630 So. 2d 1152 (Fla. 5th Dist. Ct. App.
C. Appellate Issues

In two cases, *State v. F.G.*\(^{154}\) and *State v. M.G.*,\(^{155}\) the Third District Court of Appeal was faced with the question of whether a claimed procedural error leading to the entry of a final disposition order in a juvenile delinquency case renders the disposition “illegal” for purposes of the state’s appeal under chapter 39. The appellate court held that the order was not appealable and certified the question to the supreme court.\(^{156}\) The underlying claimed error was the failure of the trial court to order a predisposition report as required by section 39.052(3) of the *Florida Statutes*. The state had argued that the trial court should have deferred ruling pending receipt of the report and should have scheduled a dispositional hearing thereafter in order to dispose of the case.\(^{157}\) Finding that the order was not illegal—the dispositions were within the authority of the trial court to make under chapter 39—the court of appeal dismissed the appeal for want of jurisdiction in both cases.\(^{158}\)

The proper role of HRS (now the Department of Juvenile Justice)\(^{159}\) in challenging illegal orders of the juvenile court recently came before the Fifth District Court of Appeal in *HRS v. B.S.*\(^{160}\) In that case, HRS sought certiorari review of an order adjudicating a minor delinquent for violating community control and detaining him pending disposition.\(^{161}\) The child’s community control terminated after a successful period of supervision but the court did not relinquish jurisdiction. The court unilaterally and without taking any evidence *sua sponte* reinstated the community control after receiving a letter from the minor’s mother. The child waived counsel and plead guilty to violating community control. HRS brought the writ, claiming that the child’s due process rights were violated by the court’s order. The appellate court did not reach the merits of the case because HRS did not represent the minor. The minor neither appealed nor sought release by habeas corpus. The court of appeal held that this case was similar to

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1993) (written findings required when imposing adult sanctions on a child).
154. 630 So. 2d 581 (Fla. 3d Dist. Ct. App. 1993), approved, 638 So. 2d 515 (Fla. 1994).
155. 630 So. 2d 584 (Fla. 3d Dist. Ct. App. 1993).
156. *F.G.*, 630 So. 2d at 583.
157. *Id.* at 582.
158. *Id.* at 583; *M.G.*, 630 So. 2d at 585.
159. See supra note 2 and accompanying text.
160. 640 So. 2d 1174 (Fla. 5th Dist. Ct. App. 1994).
161. *Id.* at 1175.
HRS v. State\textsuperscript{162} where HRS had sought certiorari review of detention orders arguing that the risk assessment instrument in each case did not call for detention.\textsuperscript{163} The B.S. court said HRS did not have standing by certiorari to challenge the orders.\textsuperscript{164} The court then distinguished another series of cases where it noted HRS's duties as legal custodian of minors committed for placement were adversely effected by the orders being appealed.\textsuperscript{165} In an interesting concurrence, Judge Thompson wrote specially to describe what the trial judge did as egregious and resulting in unlawful detention and added that a writ of prohibition would have been the proper device for HRS to employ.\textsuperscript{166} Judge Thompson noted first that there was no basis for a violation of community control.\textsuperscript{167} The court had no jurisdiction over the child. Second, the detention was ordered without a legally factual basis having been established as is required by the Florida Rules of Juvenile Procedure.\textsuperscript{168} The juvenile court was neither presented with an affidavit nor did it take sworn testimony prior to issuing the custody order.\textsuperscript{169}

What is troubling about this decision as illuminated in Judge Thompson's concurrence, is that the appellate court simply did not treat this writ as one for prohibition. The Florida courts regularly reframe appeals or writs so that they are procedurally correct.\textsuperscript{170}

IV. CONCLUSION

This past spring, the Florida Legislature made changes in the delinquency statute in an effort to get tougher on juveniles. Whether the changes, based at least in part on a notorious tourist murder in North Florida, will have the desired effect remains to be seen. In the child welfare area, the legislature made changes which, hopefully, will clarify some confusion in the appellate courts in the termination of parental rights area.

\textsuperscript{162} 599 So. 2d 123 (Fla. 5th Dist. Ct. App.), \textit{review denied}, 606 So. 2d 1165 (Fla. 1992).
\textsuperscript{163} B.S., 640 So. 2d at 1175 (citing \textit{HRS v. State}, 599 So. 2d at 127).
\textsuperscript{164} Id.
\textsuperscript{165} Id.
\textsuperscript{166} Id. at 1176 (Thompson, J., concurring).
\textsuperscript{167} Id.
\textsuperscript{168} B.S., 640 So. 2d at 1177.
\textsuperscript{169} Id.
The appellate courts have almost uniformly remained true to their tradition of applying chapter 39 as written and requiring the trial courts to do so as well. The supreme court continues to arbitrate inconsistent appellate rulings.

Clement L. Hyland

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I. INTRODUCTION

The purpose of this survey is to examine recent developments in labor and employment law in Florida. However, unlike other substantive areas surveyed in this volume, a survey of labor and employment law in the State of Florida requires a broader analysis than just Florida cases, regulations and statutes. Florida employment and labor law is a confluence of many streams including federal statutes and case law, federal and state governmental regulations, and written policies issued by various administrative agencies responsible for administering labor statutes.
A Florida employer or employee, whether public or private, faced with an employment question, must examine decisions from the United States Supreme Court, the Eleventh Circuit Court of Appeals, the Florida Supreme Court, Florida District Courts of Appeal, federal administrative agencies, such as the Equal Employment Opportunity Commission, Department of Labor, Occupational Safety and Health Administration, National Labor Relations Board, and state agencies such as Florida Department of Labor and Security, Florida Department of Unemployment Compensation, Florida Commission on Human Relations, and the Florida Division of Workers’ Compensation. Additionally, labor and employment law not only encompasses the well-known area of discrimination, but also contract and negligence actions.

Accordingly, to help the reader effectively navigate the headwaters of these many and varied streams of law, this article will first provide an overview of the law that defines what labor and employment practice is today. It will then survey the recent developments that have added new currents to the sometimes murky water within this confluence. This article begins with this overview and survey, so that the reader will gain a clearer insight into the myriad of sources that comprise the area of labor and employment law. By discussing new developments, the hope is that the waters at the point of convergence will be clearer through an understanding of the many streams that make up “Florida” labor and employment practice.

II. NAVIGATING THE STREAMS: AN OVERVIEW

A. Federal Statutes and Regulations

One of the problems faced by employers in complying with the myriad of statutes and regulations governing employer/employee relations is that some overlap, some contradict each other on their faces, and some are applicable to certain employers and not to others. The following summarizes federal statutes and regulations demonstrating the problems.

1. Age Discrimination Employment Act of 1967 (“ADEA”)¹

The ADEA prohibits age-based discrimination in various employment practices. It covers both private and governmental employers (federal and state), and affects employees or applicants for employment over forty years

of age. The statute prohibits discrimination in all employment practices including hiring, termination, terms and conditions of employment, and reductions in force. The Act also prohibits an employer from retaliating against an employee for enforcement of his or her rights under the statute.²

2. Americans with Disabilities Act of 1990 ("ADA")³

The ADA prohibits discrimination against any qualified individual with a disability with regard to any term, condition, or privilege of employment. This law sweeps very broadly. It covers both employees and applicants, and affects them in recruiting, hiring, promotion, tenure, demotion, termination, layoffs, pay rates, assignments, and other terms and conditions of employment.⁴

The Act simply is an extension of what began in 1973 with the Federal Rehabilitation Act⁵ and continued with the passage, in 1988, of Title VII of the Civil Rights Act of 1964.⁶ The ADA's purpose, like other legislation, is to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.

3. Civil Rights Act of 1866⁷

The Civil Rights Act of 1866 protects non-white citizens from discriminatory treatment. Section 1981 is part of the civil rights legislation enacted by Congress following passage of the Fourteenth Amendment to the United States Constitution and provides that all persons within the jurisdiction of the United States shall have the right to make and enforce contracts, sue, be parties, give evidence, and own property as is enjoyed by white citizens.⁸

3. 42 U.S.C. §§ 12201-12213 (1988 & Supp. IV 1992) (effective July 26, 1992). The Act initially applied to all employers in industry affecting commerce who have 25 or more employees. Id. § 12111(5)(A) (Supp. IV 1992). Effective July 26, 1994, the statute applies to all employers who have 15 or more employees. Id.
4. Id. § 12112(a).
8. Id.

Congress passed the Civil Rights Act of 1991, expanding the rights of employees and providing for additional damages that might be recovered in a discrimination lawsuit. The Act provides for a jury trial and recovery of compensatory and punitive damages. It also sets limits between $50,000 and $300,000 maximum, depending upon the size of the employer.\(^9\)

The Act also effectively overturned the Supreme Court’s rulings in *Wards Cove Packing Co. v. Atonio*,\(^11\) relating to disparate impact, and *Price Waterhouse v. Hopkins*,\(^12\) involving a mixed-motive case. Many observers felt that these cases, along with others, limited employees’ rights.

5. Federal Civil Service

Federal Civil Service employees are protected by this federal statute, which permits their removal from employment only for such cause as will promote the efficiency of the service.

6. Consolidated Omnibus Budget Reconciliation Act ("COBRA")\(^14\)

In 1985, Congress passed this Act requiring private and public employers of twenty or more people to provide employees with the opportunity to continue to receive, after the occurrence of certain events, the

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12. 490 U.S. 228 (1989). The Civil Rights Act departs from the reasoning set forth in *Price Waterhouse*, which held that a defendant could avoid liability if it was capable of demonstrating that it would have reached the same employment decision in the absence of any illegal discriminatory motives. Under section 107(b) of the Act, a defendant cannot escape liability even if demonstrated, through clear and convincing evidence, that other non-discriminatory reasons would have resulted in the adverse employment decision.
same group health coverage they received before the event.\textsuperscript{15} COBRA amended Title 1 of the Employee Retirement Income Security Act ("ERISA")\textsuperscript{16} and placed certain requirements on a plan administrator to notify each covered employee of the availability of such coverage.\textsuperscript{17}

7. Employee Retirement Income Security Act of 1974 ("ERISA")\textsuperscript{18}

ERISA applies to private employers who maintain employment benefit plans. It prohibits an employer from engaging in certain discriminatory practices against an employee when that person exercises any right to which he or she is entitled under ERISA. Covered employees generally have the right to fair and nondiscriminatory treatment under the benefit plans.

8. Equal Pay Act\textsuperscript{19}

The Equal Pay Act was enacted in 1963 to prohibit sex-based discrimination in wages paid to employees, whether male or female.

9. Executive Order 11246\textsuperscript{20}

Executive Order 11246 added certain protection for federal employees. The Order prohibits discrimination on the basis of race, color, religion, sex, or national origin and also applies to government contractors.\textsuperscript{21}

10. Fair Labor Standards Act of 1938 ("FLSA")\textsuperscript{22}

FLSA sets minimum wage, overtime pay, equal pay, record keeping, and child labor standards for employees who are covered by the Act and who are not exempt from specific provisions. Congress originally enacted

\textsuperscript{15} 29 U.S.C. § 1132(c) (Supp. IV 1992).
\textsuperscript{17} Id. § 1166.
\textsuperscript{18} Id. §§ 1001-1461 (1988 & Supp. IV 1992). Section 510 of ERISA prohibits an employer from discharging an employee because the employee makes a claim for benefits under a plan covered by title 1 of ERISA. Id. § 1140.
\textsuperscript{20} Guidelines are promulgated by the Office of Federal Contract Compliance with respect to the implementation and administration of Executive Order 11246. See Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (1965).
\textsuperscript{21} Id.
FLSA to facilitate economic recovery from the Great Depression. FLSA was designed to provide a maximum number of jobs and to ensure that all covered employees were paid a minimum, liveable wage. The Act was not intended to preempt state legislation providing additional benefits to employees.

11. Family and Medical Leave Act ("FMLA")\textsuperscript{23}

Recent Federal legislation affording protection to employees came into effect on February 5, 1993, when President Clinton signed FMLA. The law requires employers of fifty or more employees to provide up to twelve weeks of leave to eligible employees for their own serious illnesses, to care for newborn or newly adopted children, or to care for seriously ill, close family members.\textsuperscript{24}

12. Immigration Reform and Control Act\textsuperscript{25}

This Act prohibits discrimination on account of national origin or citizenship status.

13. Labor Management Relations Act\textsuperscript{26}

This Act addresses suits by and against labor organizations. Section 185(a) provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.\textsuperscript{27}


\textsuperscript{24} Id. § 102(a)(1)(A)-(D).


\textsuperscript{27} Id. § 185(a).
14. National Labor Relations Act\textsuperscript{28}

The National Labor Relations Act was passed in 1935 and is administered by the National Labor Relations Board ("NLRB"). This statute prohibits discrimination based upon union membership, union activity, or other protected concerted activity.\textsuperscript{29} Additionally, it protects employees from employer retaliation for filing charges or giving testimony under the Act.\textsuperscript{30}

15. Occupational Safety and Health Act of 1970 ("OSHA")\textsuperscript{31}

OSHA prohibits the discharge of employees in reprisal for exercising rights under the Act.

16. Older Workers Benefit Protection Act of 1990 ("OWBPA")\textsuperscript{32}

The Age Discrimination and Employment Act was amended to provide protection for older workers. OWBPA applies to all employers covered by the ADEA and protects against age discrimination for early retirement incentive programs and severance pay set-offs meeting OWBPA's requirements. It also addresses waivers and releases, affording older workers certain minimum criteria for their retirement or settlement of any claim.\textsuperscript{33}

17. Rail Safety and Improvement Act\textsuperscript{34}

This Act prohibits railroad companies from discharging employees with respect to certain employment conditions, including retaliation, for making claims, testifying, or refusing to work under conditions reasonably believed to be dangerous.

\textsuperscript{28} Id. §§ 151-169.
\textsuperscript{29} Id. § 157. Additionally, the Act prohibits employers from questioning applicants or employees concerning their union and/or concerted activity. \textit{Id}.
\textsuperscript{33} Id. § 201, 104 Stat. 983.
\textsuperscript{34} 45 U.S.C. § 441(a) (1988).
18. Rehabilitation Act of 1973

The Rehabilitation Act of 1973 prohibits federal contractors, and any program or activity receiving financial assistance, from discriminating against handicapped persons. Prior to the passage of the Americans with Disabilities Act, the Rehabilitation Act was the primary civil rights act for the disabled.

19. Title VII of the Civil Rights Act of 1964

In a comprehensive piece of legislation, Congress passed Title VII of the Civil Rights Act of 1964. This statute applies to employers with fifteen or more employees, and prohibits discrimination in all employment practices, including hiring, job reductions, terminations, and retaliations, because of race, color, religion, sex, or national origin.


The Vietnam Era Veteran’s Readjustment Assistance Act of 1974 applies to all federal contractors and subcontractors, on contracts in excess of $10,000, and prohibits discrimination in employment practices.

21. Worker Adjustment Retraining Notification Act (“WARN”)

In WARN, Congress provided certain protection for employees, with respect to plant closings and mass layoffs. It applies to employers with 100 or more employees, and requires that an employer provide sixty days advance notice, subject to certain exceptions.


39. Id. § 2102(a)-(b).
22. Federal Retaliation Statutes

In addition to the statutes above, there are a number of statutes dealing specifically with individual aspects of discrimination. Primarily, these statutes prohibit retaliation for either filing charges, testifying at proceedings, or complaining about certain working conditions.40

B. Florida Legislation

The following Florida statutes and regulations govern an employer/employee relationship and affect decision making.

1. AIDS Legislation

In 1988, Florida passed a comprehensive AIDS statute41 prohibiting employers and co-employees from harassing or discriminating against an AIDS infected employee. Employers must allow employees with AIDS, or any of its related conditions, to continue to work and to reasonably


41. FLA. STAT. § 760.50 (1993).
accommodate these employees as long as they are medically able to perform and do not pose a danger to their own health and safety, or the health and safety of others.

2. Florida Constitution Article III

Article III, paragraph 14, of the Florida Constitution authorizes the creation of local civil service law, affording public employees rights in employment.

3. Florida Civil Rights Act

In 1992, Florida passed the Civil Rights Act, expanding the state's Human Relations Act of 1977, which prohibited employment discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or marital status. The Civil Rights Act expanded the types of discriminatory practices that may be addressed by the Human Relations Act and the types of damages that can be awarded.

4. Equal Pay Act

Florida also has enacted an Equal Pay Act which is strikingly similar to the federal statute. It differs in the time frames allowed for filing claims for unpaid wages, and it is not applicable to any employer that is subject to the Federal Fair Labor Standards Act.

5. Florida Jury Service Exemption

Employees who are called for jury service are protected by Florida statutes prohibiting discharge or discrimination based upon jury service.

42. FLA. CONST. art. III, § 14.
43. FLA. STAT. §§ 760.01-.11 (1993).
44. Id. § 448.07. Section 725.07 of the Florida Statutes also prohibits discrimination on the basis of sex, marital status, or race in the areas of loaning money, granting credit, or providing equal pay for equal services performed. Id. § 725.07.
45. Id. § 448.07(4).
46. Id. § 40.271. Florida also prohibits the discharge of individuals who are called to active service in the Florida National Guard. FLA. STAT. § 250.482 (1993).
6. Public Employees Relations Act

Public employees are protected in Florida under the Public Employees Relations Act. The Act protects the right of organization and representation, creates a Public Employees Relations Commission to assist in resolving disputes, and provides remedies against public employees who interrupt the operation and functions of the government. This policy provides:

(1) Granting to public employees the right of organization and representation;
(2) Requiring the state, local governments, and other political subdivisions to negotiate with bargaining agents duly certified to represent public employees;
(3) Creating a Public Employees Relations Commission to assist in resolving disputes between public employees and public employers; and
(4) Recognizing the constitutional prohibition against strikes by public employees and providing remedies for violations of such prohibition.

7. Sickle Cell Trait Discrimination Statute

This statute prohibits any denial or refusal to employ a person solely because he or she has the sickle cell trait.

8. Florida Toxic Substances Legislation

Florida employees are also protected by statutes which prohibit discharge, discipline, or discrimination against employees who exercise their rights under the toxic substances law, including the requesting of information, testifying, planning to testify, or exercising any other right.

9. Voting Discrimination

Florida prohibits employers from discharging or threatening to discharge an employee based upon whether the individual votes or does not vote.

47. Id. § 447.201.
48. Id. § 447.201(1)-(4).
49. Id. § 448.075.
50. Id. § 442.116.
51. FLA. STAT. § 104.081 (1993).
10. Whistle-blower’s Act\textsuperscript{52}

The Florida Whistle-blower’s Act prohibits employers from taking retaliatory action against an employee who reports violations of law by prohibiting discharge, dismissal, discipline, suspension, transfer, demotion, withholding bonuses, and reduction in salary or benefits.

11. Florida Workers’ Compensation Statute\textsuperscript{53}

The Florida Workers’ Compensation Statute prohibits the discharge of or retaliation against an employee based upon a valid claim or attempt to claim workers’ compensation benefits. The Workers’ Compensation Statute was significantly amended as of January 1, 1994.

III. LABOR AND EMPLOYMENT AND THE LAW OF CONTRACTS

Historically, Florida has been known as an “at will” state. An “at will” employee is one who is employed, literally, at the will of the employer and who works without fixed employment. Absent a fixed contract for employment, an employee will not have an action for wrongful termination. However, once an employer and employee do enter into an employment contract, the issues that arise involve arbitration provisions, compensation, breaches of contract, fraud, and the applicability and enforceability of non-compete agreements.

A. Arbitrations

The United States Supreme Court, in \textit{Gilmer v. Interstate/Johnson Lane Corp.},\textsuperscript{54} upheld an employer’s right to compel arbitration of a statutory age discrimination claim where the employee had executed a security registration application requiring arbitration of employment related disputes. Since the Supreme Court’s decision in \textit{Gilmer}, various courts,\textsuperscript{55} including Florida

\begin{itemize}
\item \textsuperscript{52} FLA. STAT. §§ 112.3187-.31895 (1993). The Act was amended by the Government Efficiency Act of 1992. Subsection (3) and (4) of § 112.3187 describe the conduct which is prohibited by the Act. In the 1991 legislative session, the Whistle Blower protection was extended to private sector employees. \textit{See} Act of June 7, 1991, 91-285, §§ 1, 4, 1991 Fla. Laws 2747, 2748, 2749 (codified at FLA. STAT. § 448.101 (1993)).
\item \textsuperscript{53} FLA. STAT. § 440.205 (1993).
\item \textsuperscript{54} 500 U.S. 20 (1991).
\item \textsuperscript{55} \textit{See, e.g.}, Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305, 307 (6th Cir. 1991) (holding that a discrimination claim is subject to an arbitration agreement); Boogher v. Stifel, Nicholaus & Co., 764 F. Supp. 574, 576 (E.D. Mo. 1991) (holding that an age discrimination
\end{itemize}
courts, have continued to expand the *Gilmer* rationale to require arbitration of other causes of action such as Title VII and state law claims.\(^5\)

Following the ruling in *Gilmer*, the United States District Court for the Southern District of Florida issued an order requiring an employee to pursue arbitration based upon an agreement signed by the employee with her employer. In *Nazon v. Shearson Lehman Bros., Inc.*, a stockbroker with Shearson Lehman filed a lawsuit based upon a Florida Human Rights Act and certain state law claims. Shearson Lehman filed a Motion to Compel Arbitration relying upon an agreement the employee had signed with Shearson Lehman entitled “Uniform Application for Securities Industry Registration or Transfer.” The employee claimed that the arbitration was not applicable because Florida law claims are not subject to arbitration. The court rejected this argument and, following the Supreme Court’s decision in *Gilmer*, compelled arbitration. The Southern District was following the lead of a number of state and federal courts around the country upholding agreements that require employees to submit employment disputes to arbitration.\(^8\) Though most of the litigation in this area has been with stock brokerage firms, it would be expected that employers in other industries would start including arbitration provisions in their employment agreements.

In *Bender v. A.G. Edwards & Sons*, the Eleventh Circuit held that the state law claims were subject to arbitration in cases of battery, intentional infliction of emotional distress, and negligent retention, and that the Title VII claim was also subject to compulsory arbitration with the plaintiff’s employer (relying on *Gilmer* rationales).

In *Warrior & Gulf Navigation Co. v. United Steelworkers of America*, an employee was terminated because of the results of a drug test. The case was sent to arbitration, and the arbitrator, in response to the union grievance, found that the employee had in fact violated his contract with the employer by a second positive drug test. However, the arbitrator reduced the discipline to a suspension because of the agreement’s “just cause” provisions, which require the company to use just and equitable procedures in

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56. *Id.* at 23. *Gilmer* left several issues unresolved, including whether arbitration agreements located in documents other than security registration applications are enforceable and whether employment claims under statutes other than the ADEA are arbitrable.


59. 971 F.2d 698, 700 (11th Cir. 1992).

60. 996 F.2d 279, 280 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 1834 (1994).
termination decisions. The arbitrator found that the company had changed the rules of the game by requiring the second drug test.\(^\text{61}\) The district court and the Eleventh Circuit disagreed with the arbitrator’s finding and, based upon the clear language of the contract, found that the employer had the discretion to terminate an employee for a second positive drug test; thus, the arbitrator’s remedy contradicted the express language of the agreement.\(^\text{62}\)

At the state court level, in *Bachus & Stratton, Inc. v. Mann*,\(^\text{63}\) an employee argued that her claims against the defendant alleging sexual discrimination, assault and battery, breach of contract, and a number of other tort claims, were not subject to arbitration. The Fourth District Court of Appeal disagreed and found that both her Title VII claims and her state tort claims were subject to arbitration.\(^\text{64}\)

B. *At Will*

Under the common law rule, when a term of employment is for an indefinite period of time, either party may terminate the employment relationship for any cause, or for no cause at all, without incurring liability. While many other jurisdictions have carved out exceptions to the “at will” doctrine, Florida has essentially resisted any changes. For example, in *Ross v. Twenty-Four Collection, Inc.*,\(^\text{65}\) an employee filed an action for breach of a written contract. The court held that the breach of contract claim was not actionable as a matter of law because it was based on a contract of employment that did not provide for a definite term of employment and was, therefore, terminable at will.\(^\text{66}\)

In *Lozano v. Marriott Corp.*,\(^\text{67}\) the United States District Court for the Middle District of Florida upheld the principle that a contract for employment of indefinite duration is terminable at the will of either party and as such, an action for wrongful termination will not lie. In *Lozano*, an employee alleged that his discharge was in violation of the progressive discipline policy in the employer’s handbook.\(^\text{68}\) The court rejected this theory and dismissed the case based on applicable Florida law. It is

\(^{61}\) *Id.*

\(^{62}\) *Id.* at 281.

\(^{63}\) 639 So. 2d 35 (Fla. 4th Dist. Ct. App. 1994).

\(^{64}\) *Id.* at 37.

\(^{65}\) 617 So. 2d 428 (Fla. 3d Dist. Ct. App. 1993).

\(^{66}\) *Id.* at 428.

\(^{67}\) 844 F. Supp. 740, 742 (M.D. Fla. 1994).

\(^{68}\) *Id.*
doubtful that these attempts to make inroads into this doctrine will meet with much success in the near future. Yet, the theory in Lozano is not without merit.

C. Contract Action

In Weisfeld v. Peterseil School Corp.,\textsuperscript{69} the Third District Court of Appeal reversed a judgment entered in favor of a private school on a breach of employment contract claim brought by a former teacher. The teacher, Ms. Weisfeld, signed an employment contract and subsequently received an offer to teach in the Dade County school system. She discussed the matter with the headmaster of the private school, who, following the discussion, called the Dade County School. As a result, the Dade County job offer was withdrawn. The headmaster then interviewed and hired a replacement art teacher and fired Ms. Weisfeld. Dade County filled the position it had offered Weisfeld and, as a result, she had no job.\textsuperscript{70}

The Third District held that the headmaster, by contacting Dade County, had acted within proper grounds to protect the school’s contract. However, once the headmaster caused Dade County to withdraw its job offer, the school was obligated to allow Ms. Weisfeld to perform her original contract. Thus, because the private school was estopped from terminating Ms. Weisfeld, the school breached its contract.\textsuperscript{71}

In Warshall v. Price,\textsuperscript{72} a cardiologist, employed by a fellow doctor, brought an action against the doctor for bonuses. The doctor counterclaimed for conversion and civil theft of his patient list. The Fourth District Court of Appeal held that the doctor was denied the benefit of this confidential patient list when the cardiologist took a copy from the doctor’s computer and thus, an action for conversion was appropriate.\textsuperscript{73}

D. Fraud

Florida’s Second District Court, in Wilson v. Equitable Life Assurance Society of the United States,\textsuperscript{74} was faced with the issue of whether an em-

\textsuperscript{69} 623 So. 2d 515, 517 (Fla. 3d Dist. Ct. App. 1993).
\textsuperscript{70}  Id. at 516.
\textsuperscript{71}  Id. at 517.
\textsuperscript{72} 629 So. 2d 903, 904 (Fla. 4th Dist. Ct. App. 1993).
\textsuperscript{73}  Id. at 905. The Fourth District Court of Appeal noted that there was no applicable Florida case law and relied upon the case of Conant v. Karris, 520 N.E.2d 757 (Ill. App. Ct. 1987).  Id. at 905 n.4.
\textsuperscript{74} 622 So. 2d 25, 27 (Fla. 2d Dist. Ct. App. 1993).
ployee can allege fraud when there is a merger clause in an employment contract. An insurance agent brought suit against an insurance company and its regional manager, claiming they fraudulently induced him into resigning from his employment as a public school teacher to become an insurance agent. The trial court granted summary judgment for the defendant because it found a merger clause in the employment contract. The court reasoned that the employee could not justifiably rely on any promises because of the merger agreement.\textsuperscript{75}

The Second District reversed and remanded, finding that allegations of fraud may be introduced into evidence to prove fraud, notwithstanding the presence of a merger clause in a related contract. The court found that the case of \textit{Nobles v. Citizens Mortgage Corp.}\textsuperscript{76} was the controlling authority and that the trial court had improperly applied the case of \textit{Saunders Leasing System, Inc. v. Gulf Central Distribution Center, Inc.}\textsuperscript{77}

E. Non-Compete Agreements

One of the main issues relating to contracts between an employer and an employee that is litigated extensively in Florida is non-compete agreements. In 1953, Florida enacted section 542.33 of the \textit{Florida Statutes}, which basically prohibits an employee from engaging in a similar business or soliciting his or her own customers if the employment contract contains a specific non-compete clause.\textsuperscript{78} In 1990, the Florida Legislature amended the statute, requiring evidence of irreparable injury and made available a defense of unreasonableness in a general sense, rather than the heretofore limited defenses of unreasonableness as to time and area.\textsuperscript{79}

\textsuperscript{75} Id. at 28.

\textsuperscript{76} 479 So. 2d 822 (Fla. 2d Dist. Ct. App. 1985). In \textit{Nobles}, the court applied the rule that alleged fraudulent misrepresentations may be introduced into evidence to prove fraud notwithstanding a merger clause in a related contract. \textit{Id.} at 822.

\textsuperscript{77} 513 So. 2d 1303 (Fla. 2d Dist. Ct. App. 1987), \textit{review denied}, 520 So. 2d 584 (1988).

\textsuperscript{78} See \textit{FLA. STAT.} § 542.33 (1993). Common law contracts and restraint of trade (including non-competes) were not favored and Florida, in derogation of the common law, enacted § 542.33, entitled “Contracts in restraint of trade valid.” \textit{Id.} § 542.33(2)(a) (effective June 28, 1990). The 1990 amendment made a substantial change in the law by requiring evidence of irreparable injury. \textit{Id.}

The Fifth District Court of Appeal addressed the new amendment in *Jewett Orthopaedic Clinic, P.A. v. White*\(^\text{80}\). *Jewett Orthopaedic Clinic* appealed a final declaratory judgment that held that a covenant not to compete executed by one of its physician’s shareholders is unenforceable. The trial court apparently grounded its decision whether Dr. White’s opening a competing practice would be unfair.\(^\text{81}\)

The Fifth District reversed and held that the controlling question was not whether allowing the competing practice would be unfair, but rather, how the provisions of section 542.33 applied. The court stated that the amended statute did not prohibit all agreements restricting subsequent employment by physicians, and that the clinic had necessary legitimate business interests to be protected by enforcement of the covenant. The court reversed the trial court’s finding, and remanded the case.\(^\text{82}\)

In analyzing the 1990 amendment, the *Jewett* court found that an employer would have to offer evidence of actual harm not readily, accurately calculated or compensated by money damages. The employer would also have to establish that the covenant he or she seeks to enforce does not threaten the health, safety, or welfare of the public, and under all relevant circumstances is reasonable.

In *Coastal Computer Corp. v. Team Management Systems, Inc.*,\(^\text{83}\) the court held that an employment agreement providing that a violation of a non-compete clause could result in forfeiture of remaining settlement benefits. This, however, was not an exclusive remedy. In the absence of an exclusive, stipulated remedy set forth in the agreement, the court found a party may elect to pursue any remedy that the law affords, which includes enjoining the enforcement of a non-compete agreement.\(^\text{84}\)

**IV. EMPLOYER LIABILITY TO THIRD PARTIES**

In addition to responsibilities and resulting liabilities to its own employees, an employer may also face liability to third parties as a result of an employee’s actions or inactions. In order to find a deep pocket in terms of contract or tort actions, many attorneys file claims not only against an employee, but also against the employer. An employer may face claims by

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80. 629 So. 2d 922 (Fla. 5th Dist. Ct. App. 1993).
81. Id. at 924.
82. Id. at 925.
83. 624 So. 2d 352, 353 (Fla. 2d Dist. Ct. App. 1993).
84. Id.
both employees and third parties with respect to negligent hiring, retention, and supervision.

A. Negligent Hiring, Retention, and Supervision

An employer may face liability for injuries or damages to a third party as a result of the actions of an employee. Plaintiffs may bring claims of negligence for the hiring, retention, and supervision of an employee. Both employees and third parties are asserting negligent hiring, retention, and supervision claims in an attempt to hold employers liable for the assaults and sexual harassment by employees in the work place (i.e. finding the deep pocket).

In *Byrd v. Richardson-Greenshields Securities, Inc.*, the Florida Supreme Court recognized that a female plaintiff, who alleged repeated touching and verbal sexual advances by her supervisor, had stated a viable case for liability in negligent supervision, hiring, or retention.

In *Williams v. Feather Sound, Inc.*, the theory was that the employer knew of the particular employee's propensity to engage in conduct that could endanger co-employees and yet failed to address this conduct. The court recognized the basic rule that an employer is liable for the willful torts of his employee committed against third persons if the employer knew or should have known that the employee was a threat to others.

Likewise, in *Nuta v. Genders*, the plaintiff sued a boatyard owner for injuries he received when a security guard struck him in the head with an iron bar. The court found that there was sufficient evidence to support a jury's finding of negligent hiring or retaining of the security guard. The evidence apparently showed that the security guard had threatened the plaintiff two months earlier and had been investigated for his involvement in another earlier assault. It is clear in this case that there was sufficient evidence indicating that the employer knew of the employee's prior conduct or propensity to engage in certain actions, and the employer could therefore be held liable.

In *Spancrete, Inc. v. Ronald E. Frazier & Associates, P.A.*, a subcontractor on a community college construction project brought an action

85. 552 So. 2d 1099, 1100 (Fla. 1989).
87. Id. at 1239-40.
89. Id. at 331.
90. 630 So. 2d 1197 (Fla. 3d Dist. Ct. App. 1994).
against a consultant architect for injuries incurred as a result of negligent supervision. The court found that a supervising architect has no liability to a subcontractor and that a duty of care is only owed by a supervising architect to a general contractor.\footnote{91}

The Fifth District, in \textit{Winn Dixie Stores, Inc. v. Harris},\footnote{92} considered a claim that Winn Dixie was negligent in instructing one of its employees on how to deal with a suspected trespasser. Winn Dixie had a policy of hiring only trained police officers and the court found that it could not "be faulted for assuming such an officer would know how to detain trespassers.\footnote{93} The court also noted that there was no evidence in the case of any prior misconduct by his officer. The court said that the test is one of reasonableness, and it is simply unreasonable, as a matter of law, to require Winn-Dixie to retrain already trained police officers in the law of arrest and detention.

This author expects that employers will see more and more cases dealing with negligent hiring, retention, and supervision as attorneys are looking more and more for the deep pocket.

\textbf{B. Liability to Employees of Independent Contractors}

The Fourth District Court of Appeal, in \textit{St. Lucie Harvesting \\& Caretaking Corp. v. Cervantes},\footnote{94} considered the issue of whether or not a grove owner was liable to the employee of an independent contractor hired to harvest the grove owner's fruit. The employee was injured while allegedly using his employer's defective equipment. The plaintiff charged that the grove owners, in exercising direction and control over the manner in which they performed their job, were negligent, thus causing the injuries.

The court noted, as a general rule, that a person who hires an independent contractor is not liable for injuries sustained by employees of the independent contractor. The court cited an exception, however, in \textit{Conklin v. Cohen},\footnote{95} which held that if an "owner actively participates 'to the extent that he directly influences the manner in which the work is performed' and negligently creates or allows a dangerous condition to exist resulting in injury to the employee of the independent contractor[,]" the employer may

\footnotesize
\begin{itemize}
  \item 91. \textit{Id.} at 1198.
  \item 92. 620 So. 2d 1032 (Fla. 5th Dist. Ct. App. 1993).
  \item 93. \textit{Id.} at 1032.
  \item 94. 639 So. 2d 37 (Fla. 4th Dist. Ct. App. 1994).
  \item 95. 287 So. 2d 56, 60 (Fla. 1973).
\end{itemize}
be liable.\textsuperscript{96} In this particular case, the Fourth District did not find the employers within the \textit{Conklin} exception.

\textbf{C. Punitive Damages}

Employers constantly fear vicarious liability for an employee’s outrageous conduct since a jury could award punitive damages for that employee’s actions. In one of the more interesting and noteworthy decisions of the last year, the Fourth District in \textit{Carroll Air Systems, Inc. v. Greenbaum}\textsuperscript{97} affirmed a judgment against an employer for $85,000 in compensatory damages and $800,000 in punitive damages for the wrongful death of the plaintiff’s son, caused by the drunk driving of a Carroll Air employee.\textsuperscript{98} The court found it significant that the employee became drunk while on the job. He was at a meeting, where he paid for the drinks from an expense account. There was evidence that the employee was slurring his words while company officers were present.

The court noted there were cogent policy reasons for fixing liability on the employer for injuries to third persons in cases like \textit{Carroll Air} and noted that “[t]he law now recognizes that the entire subject of torts is a reflection of social policies which fix financial responsibility for harm done.”\textsuperscript{99} The \textit{Carroll} court further noted that “the underlying philosophy which allows a plaintiff to hold an employer liable for an employee’s negligent acts is a deeply rooted sentiment that a business enterprise should not be able to disclaim responsibility for accidents which may fairly be said to be the result of its activity.”\textsuperscript{100}

In \textit{Crown Eurocars, Inc. v. Schropp},\textsuperscript{101} a customer who was dissatisfied with his new automobile brought an action in fraud against the automobile dealer and the dealer’s employee. The Second District held that there

\textsuperscript{96.} \textit{St. Lucie}, 639 So. 2d at 39 (quoting \textit{Conklin}, 287 So. 2d at 60).
\textsuperscript{97.} 629 So. 2d 914, 917 (Fla. 4th Dist. Ct. App. 1993). The court in \textit{Carroll Air} noted that “[c]ourts across the country are divided on the issue of whether an employer is liable for injuries to third parties under similar circumstances.” \textit{Id.} at 916.
\textsuperscript{98.} \textit{Id.} at 917.
\textsuperscript{99.} \textit{Id.} at 916 (quoting \textit{Harris v. Trojan Fireworks Co.}, 174 Cal. Rptr. 452 (Ct. App. 1981)).
\textsuperscript{100.} \textit{Id.} at 916-17.
\textsuperscript{101.} 636 So. 2d 30 (Fla. 2d Dist. Ct. App. 1993). The court in \textit{Crown Eurocars} analyzed the case under \textit{Winn Dixie Stores, Inc. v. Robinson}, 472 So. 2d 722 (Fla. 1985) (discussing managing agent) and \textit{Mercury Motors Express, Inc. v. Smith}, 393 So. 2d 545 (Fla. 1981), and concluded that under any analysis there were no grounds for punitive damages against the employer. \textit{Crown Eurocars}, 636 So. 2d at 35.
was sufficient evidence to support a compensatory damage award on the fraud claim, but the dealer could not be held liable for punitive damages. The court found the exoneration of the employee from an award of punitive damages precluded the assessment of punitive damages against the employer absent any evidence that the employer itself behaved outrageously.102

V. FEDERAL STATUTES, REGULATIONS, AND CASE LAW

Federal statutes, regulations, and case law have a major impact on employer/employee relations in Florida. Cases decided by the Eleventh Circuit Court of Appeals for states other than Florida, and decisions of the United States Supreme Court may have as much impact on employer/employee relations as a decision by either a Florida state or federal court.

A. Age Discrimination in Employment Act ("ADEA")

In one of the more recent significant decisions, the United States Supreme Court in Hazen Paper Co. v. Biggins103 addressed the issue of the standard of proof in a disparate treatment case. In Hazen, the plaintiff was fired a few weeks before reaching the ten-year vesting level in a pension plan. The Court first reviewed conflicting lower court cases concerning whether firing someone to avoid a pension, to save salary costs, or because of seniority, violates the ADEA. The Court then stated:

We now clarify that there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age . . . [w]hatever the employer's decision making process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome . . . . It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age.104

102. Id. at 36.
103. 113 S. Ct. 1701, 1703 (1993). In Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1125-26 (7th Cir. 1994), the court adopted the reasoning of Hazen and found that discharging an employee solely to reduce salary cost is not age discrimination under the ADEA.
104. Hazen Paper Co., 113 S. Ct. at 1705-06. The Court noted that it did not mean to suggest that an employer could lawfully fire an employee in order to prevent his pension benefits from vesting. This would be a violation under § 510 of ERISA. Id. at 1707.
In *Hazen*, the Court also reemphasized the distinction between willful and non-willful violations of the ADEA. In order to show willfulness, there is no requirement that the conduct be outrageous. The Court stated that an employer would not be liable for liquidated damages if it incorrectly, but in good faith, believed that its age-based decision was permitted by the ADEA.

The Eleventh Circuit in *Sturniolo v. Sheaffer, Eaton, Inc.* addressed the issue of whether a complaint under the ADEA was barred as being untimely. The employee was told, at the time of the discharge, that his position was being eliminated to obtain financial savings. He later learned that it was a discharge and he was replaced by a younger person. The Eleventh Circuit held that the time period for filing an age discrimination charge with the EEOC was tolled until the terminated individual learned or should have learned of the fact that he was being replaced by a younger person. Mere suspicion of age discrimination is not sufficient to start the running of the statute.

In *Perkie v. Group Technologies, Inc.*, Judge Kovachevich of the United States District Court for the Middle District of Florida, discussed the various burdens of proof required in a reduction of force case where the plaintiffs allege age and sex discrimination. The defendant in *Perkie* claimed that the ADEA did not allow for punitive damages. Judge Kovachevich noted that the Eleventh Circuit, as well as a number of other jurisdictions, allows plaintiffs to claim appropriate punitive damages under the ADEA.

One interesting state court case also addressed issues under the ADEA. In *Bolves v. Hullinger*, Florida’s Fifth District Court of Appeal addressed a malpractice claim alleging that the plaintiff’s former attorneys negligently failed to timely file a federal age discrimination suit against the plaintiff’s former employer. The court looked at the merits of the ADEA claim to determine whether or not there was any malpractice. The jury had found that there was negligence in failing to timely file the ADEA claim, but the Fifth District Court of Appeal reversed.

The employee’s evidence showed that the violation was willful. However, it also showed that the decision to fire him was made quickly, and

105. 15 F.3d 1023 (11th Cir. 1994).
106. *Id.* at 1026.
108. *Id.* at 858; *see also* Wilson v. S & L Acquisition Co., L.P., 940 F.2d 1429 (11th Cir. 1991).
109. 629 So. 2d 198, 201 (Fla. 5th Dist. Ct. App. 1993).
110. *Id.* at 200.
one of the employers admitted that the procedures in the personnel manual for termination were not followed. Additionally, the personnel office was not contacted and neither of the employee's supervisors ever considered the ADEA when terminating the employee. The court noted the fact that the supervisor made a pure business decision, necessitated by corporate organization, was never rebutted. Citing federal case law, the Fifth District Court found that "[r]eorganization of a business and the elimination of an older employee based on the employee's poor performance relative to younger peers is a nondiscriminatory basis for discharge . . . "111 In this case, the court found that any alleged negligence in allowing the statute of limitations to expire in the federal claim did not result in damage to Hullinger.112

In Maleszewski v. United States,113 a taxpayer sued the United States seeking a refund of income taxes paid on money received in settlement of an employment discrimination lawsuit. The district court held that the settlement was not damages received on account of personal injuries and, under the Internal Revenue Code, it was not excluded from gross income. The ADEA does not redress tort-like personal injuries for purposes of exclusion. Judge Vinson, the United States district judge, noted in his decision that the result was contrary to that reached by three circuit courts of appeals.114

B. Americans with Disabilities Act ("ADA")115

The ADA is an attempt to impose an all-inclusive ban on discrimination against disabled individuals in every sector of society, including: employment, public services, public accommodations, and services operated by private entities. Title I of the ADA became effective on July 26, 1992 for employers of twenty-five or more employees and was amended on July 26, 1994 to bring employers with fifteen to twenty-four employees within its purview.116 The Equal Employment Opportunity Commission ("EEOC- ") has enacted regulations interpreting the ADA.117

111. Id. at 201.
112. Id.
114. Id. at 1557. See, e.g., Rickel v. Comm'r of Internal Revenue, 900 F.2d 655 (3d Cir. 1990) (holding that ADEA action is excusable under § 104(b)(2)); Pistillo v. Comm'r of Internal Revenue, 912 F.2d 145 (6th Cir. 1990); Redfield v. Insurance Co. of N. Am., 940 F.2d 542 (9th Cir. 1991).
116. Id. § 12111(5).
117. 29 C.F.R. § 1630.1-.16 (1993).
The EEOC recently issued an informative guide to the field of pre-employment disability related inquiries and medical examinations under the ADA.\textsuperscript{118} The guide lists common acceptable and unacceptable pre-offer inquiries and examinations.\textsuperscript{119}

In one of the more interesting decisions affecting disabled individuals, the First Circuit Court of Appeals addressed the issue of whether obesity is a disability. In \textit{Cook v. State of Rhode Island Department of Mental Health, Retardation and Hospitals},\textsuperscript{120} the court held that discrimination based on an employer's determination that the job applicant is morbidly obese violates the Rehabilitation Act. The court endorsed the view stated by the EEOC in its amicus brief that obesity qualifies as a disability if it constitutes an impairment, and if it is of such a duration that it substantially limits a life activity, or is regard as so limiting. The EEOC’s interpretive guidelines on the ADA state that excess weight may be classified as an impairment if it either falls outside the normal range (for example, morbid obesity) or falls within a normal range, but is a product of a physiological disorder. Thus, obesity could be a disability under the ADA and the Rehabilitation Act.


\textsuperscript{119} The following examples are inquiries which are not disability-related:
1. Can you perform the functions of this job (essential and/or marginal), with or without reasonable accommodation?
2. Please describe/demonstrate how you would perform these functions (essential and/or marginal).
3. Do you have a cold? Have you ever tried Tylenol for fever? How did you break your leg?
4. Can you meet the attendance requirements of this job? How many days did you take leave last year?
5. Do you illegally use drugs? Have you used illegal drugs in the last two years?
6. Do you have the required licenses to perform this job?
7. How much do you weigh? How tall are you? Do you regularly eat three meals per day?

The following examples are disability-related inquiries:
1. Do you have AIDS? Do you have asthma?
2. Do you have a disability which would interfere with your ability to perform the job?
3. How many days were you sick last year?
4. Have you ever filed for workers' compensation?
5. Have you ever been injured on the job?

\textit{See id.}

\textsuperscript{120} 10 F.3d 17, 28 (1st Cir. 1993).
In *Kelsey v. University Club of Orlando, Inc.*, Judge G. Kendall Sharp reversed a summary judgment for the plaintiff. A Florida man was fired from his job as a barber for the University Club of Orlando. Judge Sharp determined that he could not recover under the ADA because the University Club is a bona fide private club and thus exempt from the Act. The judge noted that the Orlando club did not allow guests unfettered use of its facilities, nor did the Orlando Club advertise its facilities to non-members or allow members to hold private parties during regular club hours. Judge Sharp noted that given the limited guest policy, the Orlando club is a private club.

C. *The Civil Rights Act of 1991*

In 1991, Congress passed a compromise version of the Civil Rights Act of 1964. Section 3 of the Act outlines the purposes of the new Act, including the following:

1. to provide appropriate remedies for intentional discrimination and unlawful harassment in the work place;
2. to codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, and in other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*;
3. to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under Title VII of the Civil Rights Act of 1964; and
4. to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil right statutes in order to provide adequate protection to victims of discrimination.

Prior to the enactment of the Civil Rights Act, an employer could avoid liability for intentional discrimination if he or she established that he or she would have made the same decision without taking gender into account. However, the Act reversed the Supreme Court's holding in *Price Waterhouse v. Hopkins* and now, once the complaining party demonstrates

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121. 845 F. Supp. 1526, 1531 (M.D. Fla. 1994).
122. *Id.* at 1529-30.
124. *Id.* § 3, at 1071 (citations omitted).
125. 490 U.S. 228 (1989).
that sex was a motivating factor, the employer will lose even though he or she would have taken the same action without considering the unlawful factor.

Section 105 of the Act also rejected the Supreme Court’s decision in *Wards Cove Packing Co. v. Atonio*. Under section 105(a)(i)-(ii), a plaintiff can now establish disparate impact if:

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes a demonstration . . . [of an alternative employment practice] and the respondent refuses to adopt such alternative employment practice.

The Civil Rights Act of 1991 also rejects the Supreme Court’s holding in *EEOC v. Arabian-American Oil Co.*, which held that Title VII does not apply to United States citizens employed by the United States outside the United States. Section 109 of the Act, however, specifically provides that, “[w]ith respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.”

In *West Virginia University Hospitals, Inc. v. Casey*, the United States Supreme Court considered the inclusion of expert fees within the definition of “reasonable attorney’s fees” as contained in 42 U.S.C. § 1988. The Court held that fees for services rendered by experts in civil rights litigation may not be shifted to the losing party as part of a “reasonable attorney’s fees” under § 1988, the Civil Rights Attorney’s Fees Awards Act. Under the Civil Rights Act of 1991, section 118 specifically modifies section 1988 to include expert fees within the definition of attorney’s fees in civil rights litigation.

Possibly the most important change brought by the Civil Rights Act of 1991 is an individual’s right to punitive and compensatory damages in cases of sex, religion, or disability discrimination. Section 102 of the new Act

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126. See Pub. L. No. 102-166, § 3, 105 Stat. at 1071; see also supra note 11 and accompanying text.


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entitled "Damages in Cases of Intentional Discrimination in Employment" specifically allows compensatory and punitive damages to victims of sex, religion, and disability discrimination under Title VII, the Americans with Disabilities Act, and section 501 of the 1973 Rehabilitation Act. Previously, compensatory and punitive damages were available only to victims of race, national origin, or ethnic discrimination within the parameters of § 1981.

Additionally, the Act places certain limits upon the total amount of compensatory and punitive damages. Compensatory and punitive damages are allowed only in cases of intentional discrimination under the Civil Rights Act of 1991. In addition, the Act places certain limits upon the total amount of compensatory and punitive damages an individual may recover. The limitation includes a $50,000 ceiling for employers of 100 or fewer employees; a ceiling of $100,000 for employers of more than 100 but fewer than 201 employees; a ceiling of $200,000 for employers of more than 200 but fewer than 501 employees; and a ceiling of $300,000 for employers of more than 500 employees. These caps, however, do not apply to claims of race discrimination. In addition, the Act explicitly states that courts will be unable to inform juries of the monetary limitations during their deliberations on punitive and compensatory damages. 132

In Landgraf v. USI Film Products, 133 and Rivers v. Roadway Express, Inc., 134 the United States Supreme Court ruled that sections 101 and 102 of the Act do not apply retroactively to cases based on conduct occurring before enactment on November 21, 1991. The Court noted that where Congress fails to clearly indicate whether the key provisions of the Act should be retroactive, fundamental concerns about fairness and notice to defendants dictate prospective application only.

Section 102 provides for jury trial, and compensatory and punitive damages for claims brought under Title VII of the Civil Rights Act of 1964. In Landgraf, the Court held that provisions for punitive damages are not retroactive because such damages have features that are similar to criminal statutes and, therefore, raise serious constitutional questions about applying the law retroactively. 135 Similarly, the Court found that compensatory damages should not be retroactively applied because they increase liability for past conduct and affect employers' planning. The jury trial provision, alone, might have been retroactively applied, but since it was enacted in

135. Landgraf, 114 S. Ct. at 1497.
conjunction with the new damages provisions, the Court found that it should be applied prospectively as well.\textsuperscript{136}

In Rivers, the Court also held that section 101 of the Act does not apply to cases based on conduct that occurred prior to enactment.\textsuperscript{137} Section 101 amended 42 U.S.C. § 1981 to permit plaintiffs to sue for discrimination occurring during all phases of the employment relationship, including termination. This section was added specifically to reverse the 1989 United States Supreme Court decision in Patterson v. McLean Credit Union.\textsuperscript{138} The Court rejected the argument that section 101 of the Act merely restored a long-accepted interpretation of § 1981 and, therefore, was intended to be retroactive.\textsuperscript{139}

D. \textit{The Equal Pay Act ("EPA")}\textsuperscript{140}

The EPA prohibits the payment of different wages to employees of opposite sexes when they perform equal work or hold jobs whose performance requires equal skill, effort, and responsibility and which are performed under similar working conditions.

In Meeks v. Computer Associates International,\textsuperscript{141} the Eleventh Circuit Court of Appeals addressed a claim brought under the EPA for discrimination and retaliation under Title VII. The jury found that the defendant had violated the EPA and the district court held that it was bound by that jury finding. The Eleventh Circuit, however, found that the jury’s finding of the EPA liability did not support a finding of Title VII discrimination liability absent the additional finding of intentional discrimination.\textsuperscript{142}

E. \textit{Employee Retirement Income Security Act ("ERISA")}

Seaman v. Arvida Realty Sales\textsuperscript{143} is a case which addressed whether a salesperson’s termination was actionable under ERISA in the Eleventh Circuit. In Seaman, the court held that a real estate company violated section 510 of ERISA when it terminated a salesperson in order to eliminate

\textsuperscript{136} Id. at 1483.
\textsuperscript{137} Rivers, 114 S. Ct. at 1519-20.
\textsuperscript{138} 491 U.S. 164 (1989).
\textsuperscript{139} Rivers, 114 S. Ct. at 1521-22.
\textsuperscript{141} 15 F.3d 1013 (11th Cir. 1994).
\textsuperscript{142} Id. at 1019.
\textsuperscript{143} 985 F.2d 543 (11th Cir.), cert. denied, 114 S. Ct. 308 (1993).
the cost of certain plan benefits, despite the fact that such benefits were not yet vested under the plan. In this case, Patricia Seaman was entitled to health insurance coverage and to participate in a 401(k) plan under her employment contract. She was offered a new contract which did not provide for such benefits. When she refused the offer, she was terminated. At the time of her discharge, her rights in the plan benefits had not vested. She alleged in her suit that the employer had violated section 510 of ERISA because she was terminated in order to eliminate the costs of providing health insurance coverage and contributions under the 401(k) plan.

The district court dismissed the suit, but the Eleventh Circuit found that the employer had violated section 510 of ERISA and that its determination did not depend on whether or not the benefits were vested or contingent. Instead, the court noted that the proper inquiry is the purpose of the discharge.

F. The Family and Medical Leave Act of 1993 ("FMLA")

FMLA became effective on August 5, 1993, and covers private or public employers who employ fifty or more employees within a seventy-five mile radius of the employer's facility. The Act requires covered employers to provide eligible employees with an unpaid leave of up to twelve weeks in any twelve month period for a number of circumstances. These include birth, adoption, foster care of a child, care of a spouse, son, daughter or parent of the employee with a serious health condition, and a serious health condition of the employee which prevents the employee from performing the functions of his or her position. Upon return from leave, an employee is entitled to reinstatement to his or her previous position or a position with the equivalent pay and benefits. The Act also works in conjunction with existing federal and state laws prohibiting discrimination.

One of the interesting issues raised by FMLA is its interrelationship with the ADA. There are certain differences between the two statutes, including who is a covered employer and employee. An employee may be

144. Id. at 544.
145. Id.
146. Id.
147. 29 U.S.C. § 2612 (1990). On February 5, 1993, President Clinton signed the Family and Medical Leave Act of 1993. The ADA applies to all private employees with 15 or more employees, while the FMLA applies to employers with 50 or more employees within a 75 mile radius of the work site. Florida's workers' compensation law, with limited exceptions, applies to all public and private employees. See Fla. Stat. §§ 440.01-.60 (1993).
covered by the ADA, but not by the FMLA. The Department of Labor is responsible for interpreting and enforcing FMLA, and is in the process of issuing regulations.

G. Procedural Issues

In *Griffin v. Singletary*, the court addressed the issue of the timely filing of charges of discrimination with the EEOC and held that individuals who had not filed timely charges of discrimination with the EEOC were not entitled to intervene as class representatives in a Title VII action.

H. Rehabilitation Act

Section 504 of the Rehabilitation Act of 1973 provides that a qualified handicapped employee cannot be excluded from derived benefits under any program or activity that receives federal financial assistance. The Eleventh Circuit in *Jackson v. Veteran's Administration* held that to prove discrimination under the Rehabilitation Act, the plaintiff must show that he or she: 1) is handicapped within the meaning of the Act and relevant regulations; 2) is otherwise qualified for the position in question; 3) worked for a program or activity that received federal financial assistance; and 4) was treated adversely solely because of his or her handicap. In *Jackson*, the plaintiff claimed he had a disability caused by rheumatoid arthritis. The VA hospital fired him for excessive absences. The court held that he was not otherwise qualified because he failed to satisfy the presence requirement of the job, and the VA did not have a duty to accommodate his unpredictable absences.

In *Waldrop v. Southern Co. Services, Inc.*, the Eleventh Circuit Court of Appeals held that, when requested, a jury trial is constitutionally required under the Act.

149. 17 F.3d 356, 359-61 (11th Cir. 1994).
151. 22 F.3d 277 (11th Cir. 1994).
153. *Jackson*, 22 F.3d at 278.
154. *Id*.
155. 24 F.3d 152 (11th Cir. 1994).
156. *Id.* at 156.
I. Title VII—Sexual Harassment

In one of the more significant decisions in the last year, the United States Supreme Court spoke for only the second time in ten years on the issue of sexual harassment in *Harris v. Forklift Systems, Inc.* In this case, Teresa Harris, a female employee claimed that the president of the company insulted her because of her gender and made her the target of unwanted sexual innuendos. When she complained of his behavior, he expressed surprise and apologized. Within a month after she had closed a major deal with a customer, the president asked her, in front of her co-workers, whether or not she had promised sex to close the deal. Ms. Harris quit her employment that next day.

The Supreme Court held that federal law with regard to sexual harassment does not require the establishment of any psychological harm. The Court further stated that there was no single factor that makes a working environment hostile or abusive, rather the nature of the environment must be determined by looking at all of the circumstances, including such things as the frequency of discriminatory conduct, the severity of the conduct, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee’s work performance.

The decision produced a broader standard for liability than in the past and should make it more difficult for employers to win at trial. However, the *Harris* decision left many questions unanswered, including whether the objective standard in hostile environment cases should be the reasonable person, the reasonable victim, or the reasonable woman standard. The Court used the reasonable person terminology. It is not clear what the lower courts will do with this issue, given the Court’s failure to address the question specifically. The Court also fails to specifically address if or how compensatory damages can be awarded and measured in the absence of proof of psychological injury.

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158. *Id.* at 369.
159. *Id.* at 371.
160. *Id.* at 370-71.
161. *Id.* at 371.
The Equal Employment Opportunity Commission has published a guide with respect to its interpretation and implementation of the Harris decision. The enforcement guide sent out to its field staff analyzes Harris and its effect on the Commission’s investigations of charges involving harassment.

The EEOC has taken the position that Harris reaffirmed Meritor v. Vincent and clarified, rather than altered, the elements necessary for proving hostile environment sexual harassment. The EEOC also noted that the Court’s rejection of the psychological injury requirement was consistent with the Commission’s policy. The EEOC stressed that the Court did not elaborate on the definition of a reasonable person in Harris, but advised investigators that they should continue to consider whether a reasonable person in the victim’s circumstances would have found the alleged behavior to be hostile or abusive.

In a pre-Harris decision, the United States District Court for the Southern District of Florida addressed issues involving a workplace romance. In Ayers v. American Telephone & Telegraph Co., the manager of a retail store brought a claim under the Civil Rights Act and ADEA alleging that her supervisor transferred her to a less lucrative store and transferred his paramour to a more desirable store. Gladys Ayers claimed the romantic relationship between her supervisor and her replacement was in violation of Title VII and the ADEA.

The district court held that the hiring of the supervisor’s lover did not violate Title VII. Any coercion used in placing the manager in a more desirable store where the supervisor and that manager resumed a sexual relationship did not violate Title VII. The court noted the EEOC’s policy that Title VII does not prohibit preferential treatment based upon consensual romantic relationships.

162. EEOC ENFORCEMENT GUIDANCE NO. 915002.
166. Id. at 447.
167. Id. at 443.
J. Title VII—Civil Rights Act of 1964

In *St. Mary's Honor Center v. Hicks*, the United States Supreme Court addressed the issue of whether a trier of fact must find for the plaintiff when it only rejects employer's asserted reasons for discriminatory actions. The Supreme Court overturned the Eighth Circuit's decision and found specifically that the "trier of fact's rejection of [an] employer's asserted, legitimate, non-discriminatory reasons for its actions does not entitle [an] employee to judgment as [a] matter of law under *McDonnell Douglas Corp. v. Green..." \(^{169}\)

The court reviewed its holdings on burden of proof set forth in *McDonnell Douglas* and *Texas Department of Community Affairs v. Burdine* \(^{170}\) and noted that the ultimate question is whether the plaintiff proved that the defendant intentionally discriminated against the plaintiff because of race. The Court noted that the fact finder's disbelief of the defendant's justification together with the elements of a prima facie case of discrimination, would be sufficient to show intentional discrimination. However, while mere rejection of the defendant's proffered reasons may allow the trier of fact to infer intentional discrimination, it does not compel judgment for the plaintiff. \(^{171}\)

The United States District Court for the Middle District of Florida decided *Roberts v. University of South Florida*. \(^{172}\) The trial judge deter-

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168. 113 S. Ct. 2742 (1993). In *Newton v. CBS, Inc.*, 841 F. Supp. 19 (D.D.C. 1994), the court denied a defendant's summary judgment motion in an ADEA termination case on the grounds that material facts remained in dispute as to whether the defendant's proffered explanation was protection. The plaintiff raised questions about the level of her qualifications compared to other employees and about an ambiguous comment made at the time of termination which could have been construed to be direct evidence of age animus. In *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120 (7th Cir. 1994), the Seventh Circuit Court of Appeals found that false evidence of the employer's only proffered explanation automatically raised a material issue of fact as to discriminatory intent, thus precluding summary judgment and requiring a trial. *Id.*

169. *St. Mary's*, 113 S. Ct. at 2742-43 (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1993)). Here, the Court established an allocation of the burden of production in Title VII discriminatory treatment cases. The employee makes out a prima facie case of discrimination and the employer articulates a legitimate non-discriminatory reason for the challenged action. The plaintiff then tries to discredit that reason and establish that the reason is protection. *McDonnell Douglas*, 411 U.S. at 792.


mined that in 1988 the University of South Florida improperly paid a female employee less money than a black male employee. The court considered the remedies available under Title VII, and noted it was inclined to direct that the plaintiff be granted tenure at the university relying on opinions from the Third Circuit and the Sixth Circuit. However, the trial court declined to grant tenure, indicating an opportunity remained for the plaintiff to be awarded tenure. At the time of the lawsuit, she had not yet been denied tenure.

In Patricia Thompson v. Haskell Co., the District Court held that a supervisor could not be sued individually under Title VII for alleged sex discrimination. The court noted that the relief granted under Title VII is against the employer, not individual employees who violate the Act.

In Watson v. Bally Manufacturing Corp., a number of employees brought an action against an employer under Title VII, as well as state tort law. The employer argued that the allegations of improper transfer and verbal harassment occurred more than 300 days prior to the administrative filing of the charge, and were therefore barred. The court noted that an allegedly improper transfer from Ohio to Florida is not the type of act that would appear to alert an employee to his duty to assert his rights and thus, a motion to dismiss was denied.

In Griffin v. Singletary, the court held that the pending Title VII class action tolled the need for class members to file an administrative charge, when class certification is vacated because the representative failed to timely file with the Equal Employment Opportunity Commission. However, the court further noted that the period is tolled for those class members wishing to bring individual suits, but is not tolled for members wishing to bring class action suits.

In Williams v. City of Montgomery, the court faced a number of issues including whether or not the city of Montgomery and the Montgomery City/County Personnel Board were employers for purposes of Title VII. The evidence in the case demonstrated that the Board exercised certain duties traditionally reserved to an employer, such as establishing a pay plan.

173. See Kunda v. Mullenberg College, 621 F.2d 532 (3d Cir. 1980).
178. 17 F.3d 356 (11th Cir. 1994).
179. Id. at 360.
180. 742 F.2d 586, 589 (11th Cir. 1984).
formulating minimum standards for jobs, evaluating employees, and transferring, promoting, or demoting employees. The Eleventh Circuit found that because of these actions, the Board was an agent of the city for purposes of Title VII.

Though the case of *NAACP v. Seibels*[^181] does not significantly impact more routine labor and employment issues, the court addressed litigation which began more than twenty years ago when the United States and private parties filed civil rights complaints against the city of Birmingham, the personnel board of Jefferson County, and other local governmental agencies and officials. The decision provides a fairly extensive discussion of affirmative action programs and promotion goals.[^182]

VI. SUMMARY OF FLORIDA REGULATIONS, STATUTES, AND CASE LAW

The following is a summary of a broad range of issues under Florida law involving employers and employees.

A. AIDS

Florida Statutes prohibit discrimination by an employer on the basis of Acquired Immune Deficiency Syndrome ("AIDS"), Acquired Immune Deficiency Syndrome-related complex, and Human Immunodeficiency Virus ("HIV").[^183] In *"X" Corp. v. "Y" Person*,[^184] X Corporation filed an action for declaratory relief against one of its employees alleging that it was in doubt as to its rights, duties, and responsibilities concerning the AIDS statute. X Corporation alleged that Y Person informed several employees that he had tested HIV-positive and had AIDS. The complaint further alleged that X Corporation asked Y to voluntarily transfer to another position without a loss of pay or benefits, in order to reduce the risk of transmission of HIV. Y refused.

[^181]: 20 F.3d 1489 (11th Cir.), *opinion withdrawn*, *NAACP v. Seibels*, 31 F.3d 1548 (11th Cir. 1994).


[^183]: FLA. STAT. § 760.50 (1993).

[^184]: 622 So. 2d 1098 (Fla. 2d Dist. Ct. App. 1993).
The employer argued that a failure to transfer could create a significant risk because of exposure to situations involving lacerations or cuts. The court determined that a declaratory judgment would resolve the apparently conflicting duties of X Corporation to Y under the statute, and X's duty to other employees to provide a safe working environment given a known risk.\textsuperscript{185}

B. Attorney's Fees

In \textit{Department of Education v. Rushton},\textsuperscript{186} the First District Court of Appeal refused to allow an attorney's fee award granted by the Florida Commission on Human Relations for representation in a collateral proceeding. The attorney represented the Florida Education Association, United and Florida Teaching Professors/National Education Association in an action pursuant to section 120.56 of the \textit{Florida Statutes}, challenging teachers unions. The Florida Commission on Human Relations awarded the attorney's fees pursuant to section 760.10(13) of the \textit{Florida Statutes}. The Department of Education challenged the fee award. The court reversed the award and directed that, since the attorneys did not represent the individual appellees in the rule challenge, the Florida Commission on Human Relations was to exclude from the full award, all amounts associated with the attorney's representation of the union and the separate rule challenging proceeding.\textsuperscript{187}

C. Collective Bargaining

In \textit{City of Delray Beach v. Professional Firefighters of Delray Beach},\textsuperscript{188} the City of Delray Beach Public Employees Relations Committee held that the city violated its employees' rights when it failed to continue paying individual increases during the status quo period. The Fourth District Court of Appeal, noting it was a case of first impression, affirmed the final order entered by the Committee and held that the employees had a reasonable expectation that they would continue to receive individual performance increases during the period between collective bargaining

\textsuperscript{185} Id. at 1101-02.
\textsuperscript{186} 638 So. 2d 100 (Fla. 1st Dist. Ct. App. 1994). In Fogarty v. Fantasy, Inc., 114 S. Ct. 1023 (1994), the Supreme Court considered a claim for attorney's fees under the Copyright Act. The Court reviewed its decision in Christianberg Garment, Co. v. EEOC, 434 U.S. 412 (1978), which construed attorney's fees language under Title VII.
\textsuperscript{187} Rushton, 638 So. 2d at 100.
\textsuperscript{188} 636 So. 2d 157 (Fla. 4th Dist. Ct. App. 1994).

https://nsuworks.nova.edu/nlr/vol19/iss1/1
agreements. The city knew or should have known that it was violating well-established law when it stopped paying individual performance raises.\(^{189}\)

In *Chiles v. United Faculty of Florida*,\(^ {190}\) the Florida Supreme Court held that the legislature’s unilateral modification and abrogation of a funded collective bargaining agreement violated the right to collectively bargain and constituted an impermissible impairment of contract. The Florida Legislature can reduce previously approved appropriations if it demonstrates a compelling state interest.\(^ {191}\)

D. *Florida Civil Rights Act of 1992*

Initially, Florida enacted the Human Rights Act of 1977.\(^ {192}\) This was modeled after Title VII with additional prohibitions against age, handicap, and marital status discrimination. In 1992, the Florida Legislature amended section 760.01 to rename the Florida Human Rights Act of 1977, the Florida Civil Rights Act of 1992 (“FCRA”). FCRA generally authorizes a recovery of damages by complainants in certain cases, preserves the right to a jury trial on issues involving damages, enlarges the time for filing a charge, modifies procedures for the prosecution of claims, and extends the subpoena power of the Florida Commission on Human Relations. The 1992 amendments enlarge the time within which a complaint or charge of discrimination must be filed under FCRA from 180 to 365 days from the time of the alleged violation.\(^ {193}\) The Act also provides for unlawful discrimination in the areas of education, employment, housing or public accommodation. The Florida Civil Rights Act also added two additional

\(^{189}\) *Id.* at 163.

\(^{190}\) 615 So. 2d 671 (Fla. 1993).

\(^{191}\) *Id.* at 673.

\(^{192}\) FLA. STAT. § 760.01 (1992). Section 13 of the FCRA originally provided that the amendment would apply to conduct occurring after October 1, 1992, while § 14 provided that the Act would take effect on July 1, 1992. Section 14 was amended by § 4 of chapter 92-282 to provide that the effective date of the Act shall be October 1, 1992.

\(^{193}\) FLA. STAT. § 760.11(1) (1992). Shorter time periods have also been provided for the investigation and handling of charges. The Florida Commission on Human Relations has 180 days to determine if there is reasonable cause to believe that a discriminatory practice has occurred. In cases where a reasonable cause determination has been issued, a civil action in court must be brought no later than one year after the date of the reasonable cause determination. *Id.* § 760.11(3).
exemptions. One relating to an anti-nepotism policy\textsuperscript{194} and another relating to religious corporations.\textsuperscript{195}

One of the most important modifications brought to FCRA is an expansion of the type and scope of damages available. The new Act provides that in any civil action brought pursuant to the revised chapter 760, the court may issue an order prohibiting the discriminatory practice at issue and provide affirmative relief from the effects of that practice, including back-pay. The court may also award compensatory damages, including, but not limited to, damages for mental anguish, loss of dignity, intangible injuries, and punitive damages. That section further provides that punitive damages, where allowed, shall not exceed $100,000.

E. Federal Civil Rights—State Decisions

There have been a number of state court decisions which examined an employee's claim under 42 U.S.C. § 1983. In \textit{Tookes v. City of Riviera Beach},\textsuperscript{196} a city employee brought a civil rights action against the city alleging that he was discharged in violation of his due process rights under 42 U.S.C. § 1983. The district court ruled that the trial court erred in determining that it lacked jurisdiction over the action because the plaintiff had failed to exhaust his administrative remedies prior to filing suit. The Fourth District Court of Appeal noted that the exhaustion of administrative remedies is not a prerequisite to a § 1983 action.\textsuperscript{197}

In \textit{Sublett v. District School Board of Sumter County},\textsuperscript{198} an employee brought an action against the school district alleging that his termination violated § 1983. The trial court entered summary judgment for the school board concluding that the collective bargaining agreement waived Mr. Sublett's right to a section 120.57 hearing, and that his failure to take advantage of his rights under the collective bargaining agreement was fatal to his claim. The Fifth District reversed and ordered the school board to

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{194} FLA. STAT. § 760.10(8)(d) (1992). Section 760.10(8) states as follows: Notwithstanding any other provision of this section, it is not an unlawful employment practice under §§ 760.01–.10 for an employer, employment agency, labor organization, or joint labor-management committee to: . . . (d) [t]ake or fail to take any action on the basis of marital status if that status is prohibited under its anti-nepotism policy.
\item \textit{Id.}\textsuperscript{195}. \textit{Id.} § 760.10(9) (1993).
\item \textsuperscript{196} 633 So. 2d 566, 567 (Fla. 4th Dist. Ct. App. 1994).
\item \textsuperscript{197} \textit{Id.} at 567-68.
\item \textsuperscript{198} 617 So. 2d 374, 376-77 (Fla. 5th Dist. Ct. App. 1993).
\end{itemize}
\end{footnotesize}
afford Mr. Sublett a formal hearing before a hearing officer pursuant to chapter 120 to determine whether he is subject to discharge from employment.\(^{199}\)

**F. Handicap Discrimination**

The Florida Commission on Human Relations recently found evidence of an employer's discrimination on the basis of a handicap, despite the fact that the employee's condition did not amount to a handicap under Florida law. In *Deane v. Fleet Transport Co.*,\(^{200}\) the hearing officer decided whether the petition for relief charging the respondent with illegal discrimination on the basis of a perceived handicap (a history of back surgery and mild hypertension) should be granted. The hearing officer noted that it was not clear that the petitioner's history of back injury and mild hypertension amounted to a handicap. But, the petitioner did state a prima facie case showing the respondent perceived the petitioner to be handicapped as a result of the back injury and hypertension. Thus the employer's perception of Mr. Deane's medical condition as a handicap was deemed sufficient to support a finding of liability. The Florida Commission on Human Relations adopted the hearing officer's findings of fact.\(^{201}\)

In *Hart v. Double Envelope Corp.*,\(^{202}\) Ms. Hart alleged that Double Envelope Corporation unlawfully discriminated against her on the basis of a physical handicap (left wrist impairment). The Florida Commission on Human Relations adopted the findings of the hearing officer, which found that Ms. Hart had failed to present a prima facie case of handicap discrimination.\(^{203}\) She did not establish that she was handicapped at the time that she was discharged or that the company knew she had a permanent handicap or disability at the time she was discharged. The hearing officer also noted that the employer articulated legitimate non-discriminatory reasons to terminate the petitioner. She had repeatedly left work or failed to attend when she was denied time off.

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199. *Id.* at 377.

200. 15 Fla. Admin. L. Rep. 5067 (1993). The hearing officer in his report noted that the petitioner had the burden to prove a prima facie case of illegal discrimination and decided the burdens of proof and production of the evidence as set forth in *Burdine*.

201. *Id.* at 5068.


203. *Id.* at 1665.
The First District Court of Appeal in *Brand v. Florida Power Corp.*, 204 addressed the burden of proof necessary to establish handicap discrimination. Prior to *Brand*, no state court had decided whether the *McDonnell Douglas/Burdine* test applied to a claim asserting handicap discrimination under Florida's Human Rights Act. The First District Court of Appeal concluded that the *McDonnell Douglas/Burdine* criteria was inapplicable and that the preferred criteria were those listed under section 504 of the Rehabilitation Act. 205 In a footnote the court also noted that, due to its recent enactment, the court was not clear what affect the American With Disabilities Act of 1990 would have on handicap discrimination claims prosecuted pursuant to Florida's Human Rights Act. 206 The court speculated that from the examination of certain key provisions in the ADA, paralleling § 504, Congress intended to extend protection against handicap discrimination, equal to or greater than that provided by § 504, to qualified individuals who are handicapped. The court noted that case law interpreting § 504 would be highly persuasive authority in actions brought under the ADA to the extent that the two provisions in the acts coincide. 207

G. Military Leave

The Florida Attorney General considered the question of whether section 295.09 of the *Florida Statutes* "require[d] a public employer to hold a position indefinitely for an employee who takes a leave of absence to serve on active military duty[.]" 208 The Attorney General interpreted the statute to require a "public employer to either reinstate a returning veteran to the same position held prior to the service in the armed forces or to an equivalent position, if the veteran exercises his or her reemployment rights within one year of an honorable discharge from his or her original enlistment." 209

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206. *Brand*, 633 So. 2d at 510 n.8.
207. *Id.*
209. *Id.*
H. Right to Privacy

In *Kurtz v. City of North Miami*, an applicant for a clerk/typist position with the city filed a complaint seeking to enjoin enforcement of a regulation requiring all job applicants to sign an affidavit stating that they had not used tobacco or tobacco products for at least one year immediately preceding application. The trial court entered summary judgment against the employee. The Third District Court of Appeal reversed and held that the regulation violated the individual’s right to privacy under the state constitution.

I. Public Employees

In *McKinney v. Pate*, the Eleventh Circuit stated that there is no substantive due process action available to a government employee who claims that reasons given for termination were a pretext. The decision appears to overrule prior law. *McKinney* involved a full-time and permanent employee of the Osceola County Building Division who claimed that he was fired because of personal animosity toward him by one of the Osceola County Commissioners. The claim was filed under 42 U.S.C. § 1983 and the jury awarded plaintiff $145,000. The verdict was set aside by the trial judge, and the plaintiffs appealed. The Eleventh Circuit vacated the district court’s opinion and later reheard the case en banc. Sitting en banc, the court determined that there was no substantive due process claim available to the plaintiff and that the court could not find that McKinney’s state-created property right was deserving of substantive due process protection.

J. Retaliation

In *Wiggins v. Southern Management Corp.*, Lenoria Wiggins appealed from an order dismissing her complaint. She alleged that she was
terminated because she had provided testimony adverse to her employer in an unemployment compensation hearing and, therefore, this termination violated section 92.57 of the Florida Statutes. The court noted that the statute prohibits dismissal of employees who testify in judicial proceedings in response to a subpoena, but that the statute is not applicable to an employee who testifies voluntarily and not under subpoena. The court dismissed the complaint since Ms. Wiggins had testified voluntarily. The court did state that the unemployment compensation hearings are judicial proceedings with respect to this statute.\textsuperscript{217}

K. School Board Underfunding

In two decisions, during 1994, the Florida Supreme Court denied both the Florida Education Association and Public Employee Relation petitions appealing decisions from the Second and Fourth District Courts of Appeal. In \textit{Sarasota County School District v. Sarasota Classified/Teacher's Ass'n}\textsuperscript{218} and the \textit{School Board of Martin County v. Martin County Education Ass'n}\textsuperscript{219} the Florida Supreme Court's denial of review left in place the district court's decision that school boards have the authority, pursuant to section 447.309(2) of the Florida Statutes, to underfund employee contractual salaries.

L. Statute of Limitations

Chapter 95 of the Florida Statutes establishes statutes of limitations relating to various causes of action. In \textit{Ross v. Twenty-Four Collection, Inc.}\textsuperscript{220} the court held that a cause of action for intentional infliction of emotional distress occurred no later than the date when the employee allegedly was forced to resign her employment after enduring several years of sexual harassment on the job. In \textit{Moneyhun v. Vital Industries, Inc.}\textsuperscript{221} the court held that the limitations period for an employee's quantum meruit claim began running on the date the employment ended.

\textsuperscript{217} \textit{Id.} at 1024.  
\textsuperscript{218} 614 So. 2d 1143 (Fla. 2d Dist. Ct. App. 1993), \textit{review dismissed}, 630 So. 2d 1095 (Fla. 1994).  
\textsuperscript{219} 613 So. 2d 521, 523 (Fla. 4th Dist. Ct. App. 1993), \textit{review denied}, 632 So. 2d 1027 (1994).  
\textsuperscript{220} 617 So. 2d 428, 428 (Fla. 3d Dist. Ct. App. 1993).  
\textsuperscript{221} 611 So. 2d 1316, 1322 (Fla. 1st Dist. Ct. App. 1993).
M. Unemployment Compensation

In Brown v. Unemployment Appeals Commission,222 the plaintiff was a legal assistant at an Orlando law firm where she alleged that she was sexually harassed by a male co-worker over a period of some five months. She did not report this to her employers, but when they learned of it through another employee, the firm met with Brown and placed her on paid administrative leave. They then asked her to return to work and offered to change her location to the firm’s main building where the alleged perpetrator’s wife worked.

She refused to return to work and quit her job after her leave of absence expired. The court established that an employee who voluntarily leaves her employment without a reason attributable to her employer, is not eligible to receive unemployment compensation benefits.223 The court noted, however, that this protects workers of employers who wrongfully cause their employees to leave their employment. In this case, the court determined that Ms. Brown failed to show that her voluntary departure from employment was attributable to the wrongful conduct of her employer.

In Alonso v. Arabel, Inc.,224 an employee appealed the decision of the Unemployment Appeals Commission barring his appeal as untimely. He argued that the appeal was untimely because all notices sent were in English and he did not speak, read, or write English. The court held that reasonable notice was satisfied when the notice is given in English, and that the employees had no due process right to notice in language comprehensible to him.225

The Fifth District in Spangler v. Unemployment Appeals Commission226 also addressed the issue of whether or not a worker’s resignation was a voluntary departure from work without cause attributable to the employer. In this particular case, Ms. Spangler was working at a Wal-Mart store as a night receiving stocker, and was required to work around goods that were covered with rodent droppings, blood, and urine. She developed a rash and an upper respiratory illnesses which she thought had been caused by the unsanitary conditions.

222. 633 So. 2d 36, 39 (Fla. 5th Dist. Ct. App. 1994).
223. Id. at 38; see Fla. STAT. § 443.101(1)(a) (1991).
224. 622 So. 2d 187, 188 (Fla. 3d Dist. Ct. App. 1993), review denied, 634 So. 2d 622 (Fla. 1994).
225. Id.
226. 632 So. 2d 98 (Fla. 5th Dist. Ct. App. 1994).
She eventually complained about the conditions, refused to work, and was sent home without pay. She then resigned from her job. The Unemployment Appeals Commission denied her unemployment compensation claim. The Fifth District reversed and remanded, finding that, in this case, there was nothing she could do to remedy the unsanitary and unhealthy working conditions which existed, and her employer failed to offer her any hope of a transfer or other remedy, such as using a mask and gloves.227

N. Unfair Labor Practice

In Sarasota County School District v. Sarasota Classified/Teachers Ass'n,228 the Second District Court of Appeal found that a school board did not commit an unfair labor practice by unilaterally discontinuing payment of step-pay increases to classified and instructional employees during the pendency of negotiations with the union. The court said that the school board had the right to underfund the agreements and the superintendent properly offered to negotiate the impact of that underfunding.229

O. Veteran's Preference

Section 295.09 of the Florida Statutes, as amended in 1978, provides that veteran's preference points are to be awarded on promotional exams upon the employee's first promotion after reinstatement or reemployment. The legislature repealed the amendment effective July 5, 1980 and reenacted the former version of section 295.09 that awarded preference points only to a veteran's first promotion after reinstatement or reemployment without exception.230

In Ramirez v. City of Miami,231 the Court of Appeal held that section 295.09 cannot be applied retroactively to award preference points to a veteran who took a promotional exam and was not promoted before the statutory amendment was enacted or became effective. In this case, Mr. Ramirez had been promoted to the rank of sergeant in 1981 and alleged that he was entitled to an award of veteran's preference points on the results of his 1977 promotion examination. He also argued that the City of Miami's failure to award him those points resulted in the wrongful denial of promo-
tion to sergeant until 1981. The court said that he was not entitled to veteran’s preference points under section 295.09 of the 1977 Florida Statutes, and that section 295.09, as amended in 1978, could not be applied retroactively. 232

P. Whistle-blower

In 1986, the Florida Legislature enacted a Whistle-blower’s Act which was amended in 1991. 233 The statute prohibits employers with ten or more employees from retaliating against an employee if the employee has disclosed or threatened to disclose to a governmental agency some practice or policy the company has engaged in that violates a law or regulation. In 1991, the legislature amended the statute to include private employers. 234

In Walsh v. Arrow Air, Inc., 235 a flight engineer reported a hydraulic leak on an airplane, against his employer’s wishes, and caused a flight to be grounded. The employee was discharged, and later brought an action for wrongful termination. The court determined that the statute applied retroactively, thus allowing the employee to pursue his claim for wrongful termination. The court also made some broad statements about the employment-at-will doctrine in Florida and noted that the Whistle-blower’s Act is an exception to the at-will doctrine. 236 This may be indicative of the trend in other states that the at-will doctrine is at risk in Florida.

VII. Torts

Another area of concern for employers in Florida is when an employer may be found liable for an employee’s conduct on a vicarious liability or respondeat superior theory.

A. Assault and Battery

In Caprio v. American Airlines, Inc., 237 an employee brought an action for battery, negligent retention and supervision, and violations of Title VII against an employer. The action stemmed from alleged sexual

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232. Id.
234. Id. §§ 448.101-102.
235. 629 So. 2d 144, 145-46 (Fla. 3d Dist. Ct. App. 1993), review granted, 639 So. 2d 975 (Fla. 1994).
236. Id. at 148.
harassment. Judge Kovachevich indicated that there were sufficient issues of fact to preclude summary judgment, including the employer’s alleged touching of the employee in an offensive manner. She further noted that in order to state a claim of battery against an employer, the conduct must be within the scope of employment and be activated, at least in part, by purposes to serve the employer.238

B. Defamation

In Wagner v. Flanagan,239 a construction contractor brought a defamation suit against a hospital and its law firm. The center’s lawyer sent a letter to the insurer’s lawyer commenting on a fraud committed by the construction contractor. The court, in addressing the issue of statute of limitations, stated that the cause of action for defamation accrues on publication rather than discovery, even where the defamation is private.240

Defamation suits normally involve an employee versus employer action based upon some comments made by the employer. In Jackson v. BellSouth Mobility, Inc.,241 a former employee brought an action against an employer and a manager alleging defamation. The court held that the employee stated a cause of action against both entities.242

In Tucker v. Resha,243 a taxpayer sued the executive director of the Florida Department of Revenue for defamation and invasion of their right to privacy. The court held that the statements that the executive director made to members of her staff about the taxpayer’s “alleged activity in illegal gun sales, drugs, pornography, money-laundering, and organized crime involved activities which could include nonpayment of tax or violation of reporting requirements . . . .”244 Because these disclosures were arguably within the scope of the executive director’s office, and since there is an absolute privilege accorded this individual, the taxpayer could not recover for defamation.

238. Id. at 1532.
239. 629 So. 2d 113, 114 (Fla. 1993).
240. Id. at 115.
241. 626 So. 2d 1085, 1086 (Fla. 4th Dist. Ct. App. 1993).
242. Id.
244. Id. at 758.
C. Intentional Infliction of Emotional Distress

In Food Lion, Inc. v. Clifford,245 the assistant store manager observed an employee of Food Lion consuming food products from the deli. The employee admitted taking the food, and after concluding that he had engaged in theft, the store reported the incident to the sheriff's office. Food Lion terminated the employee and filed with the state an information charging him with petty theft. The prosecutor later dropped the case and the employee sued for malicious prosecution and intentional infliction of emotional distress. The court determined that the individual's employer, though attempting both to obtain civil damages and to bring a criminal complaint against the plaintiff for alleged theft of food, did not meet the required level of outrageousness necessary to sustain an action for intentional infliction of emotional distress.246

D. Negligent Hiring and Retention

Third parties often try to bring a deep pocket into a lawsuit (i.e., an employer) by alleging that an employer is liable for the actions of their employees due to negligent hiring and/or retention. The elements of negligent hiring are:

1. [T]he employer was required to make an appropriate investigation of the employee and failed to do so;
2. [A]n appropriate investigation would have revealed the unsuitability of the employee for the particular duty to be performed or for employment in general; and
3. [I]t was unreasonable for the employer to hire the employee in light of the information he knew or should have known.247

The elements of negligent retention are:

a. The employer was required to exercise reasonable care in the retention of the employee;

245. 629 So. 2d 201, 202 (Fla. 5th Dist. Ct. App. 1993).
246. Id. at 203.
247. Garcia v. Duffy, 492 So. 2d 435, 440 (Fla. 2d Dist. Ct. App. 1986); see also Tallahassee Furniture Co. v. Harrison, 583 So. 2d 744 (Fla. 1st Dist. Ct. App. 1991). In 1993, the Florida Legislature amended section 400.141 of the Florida Statutes to require a nursing home facility to check the background of certified nursing assistance applicants.
b. The employer received actual or constructive notice of problems with the employee’s fitness for the particular duty to be performed; and
c. It was unreasonable for the employer not to investigate or take corrective action such as discharge or reassignment.²⁴⁸

The claim of negligent hiring or retention centers around the legal duty of an employer to investigate an employee’s background. This will vary from employer to employer depending upon the nature of the business and the jobs performed by the individual.

E. Negligent Investigation

Recently, a federal district court decided Vackar v. Package Machinery Co.,²⁴⁹ in which an employee claimed that the employer had been negligent in investigating the truth of allegedly defamatory statements. The court granted summary judgment and stated that the allegations of negligence were embraced by the plaintiff’s defamation claim. The plaintiff, therefore, could not sue in negligence where the real claim sounded in defamation.²⁵⁰ The court cited no existing case law relating to the tort of negligent investigation.

F. False Imprisonment

In Stockett v. Tolin,²⁵¹ a female employee brought an action against her former employer alleging sexual harassment and violation of Title VII of the Civil Rights Act of 1964. An additional claim brought by the plaintiff under Florida law was the tort of false imprisonment which is the unlawful restraint of a person against his will, the unlawful detention of a person, and deprivation of a person’s liberty. The court held that “the act of pinning the [p]laintiff against a wall and refusing to allow her to escape, even though only done for a short period of time, was false imprisonment.”²⁵²

²⁴⁸ Garcia, 492 So. 2d at 441.
²⁵⁰ Id. at 315.
²⁵² Id. at 1556. The court also noted that entering the ladies’ restroom constituted an invasion of her privacy. Id.
G. Workers' Compensation

As of January 1, 1994, the area in which the state made the most changes in employer/employee relationships, has been through the workers' compensation system. The Florida Legislature made significant changes in the workers' compensation law.

The definition of employer has been expanded to include parties in actual control of a corporation including, but not limited to, the president, officers, directors, and shareholders who directly or indirectly own a controlling interest in the corporation. The definition of employee has been amended to include aliens and minors. Additionally, this section specifically addresses independent contractors and, for all practical purposes, an independent contractor is deemed to be an employee unless he or she meets all of the nine specific separate criteria listed in the statute.

In addition to the statutory changes, there were also a number of decisions concerning workers' compensation. The Supreme Court of Florida in Zundell v. Dade County School Board reviewed the following certified question:

Whether an employer is required to prove the existence of a preexisting condition in compensation cases involving heart attacks and internal failures of the cardiovascular system as a prerequisite to the application of the test for compensability established in Victor Wine & Liquor, Inc. v. Beasley and Richard E. Mosca & Co., Inc. v. Mosca.

The court rephrased the question as follows: "Whether the rule announced in Victor Wine & Liquor, Inc. v. Beasley can ever apply to cardiovascular injuries occurring on the job when competent substantial medical evidence show no evidence of a preexisting condition relevant to the injury?"

In this case, Mr. Zundell was an algebra teacher who suffered a hemorrhage of the brain, which he asserted was a result of dealing with a disruptive student. His subsequent disability forced him into retirement.

253. FLA. STAT. § 440.02(14) (1994).
254. Id. § 440.02(13). It should be noted that the new Act creates an exception to the criteria enumerated in the statute for certain job classifications listed in the Standard Industrial Classifications Manual of 1987.
255. FLA. STAT. § 440.02(13)(a) (1994).
256. 636 So. 2d 8, 9 (Fla. 1994).
257. Id. at 9 (citations omitted).
258. Id. (citation omitted).
Zundell sought workers' compensation benefits for the incident. His petition was denied by the Judge of Compensation Claims. A divided First District Court of Appeal, sitting en banc, affirmed, but certified the question. The Supreme Court found that the condition was compensable and said that the facts were essentially indistinguishable from a work place exertion resulting in a hernia.259

In *Eller v. Shova*, the Florida Supreme Court upheld as constitutional the provision of the workers' compensation act that requires a plaintiff to establish culpable negligence on the part of the defendant in order to maintain a civil action against a supervisory or managerial level co-employee. In this case, Felecia Shova was manager of a Circle K convenience store and was killed during a robbery. Her husband filed a civil action alleging gross negligence against several management level employees of Circle K, claiming they knew the store was in a high crime area and had been robbed many times. The trial court dismissed the complaint with prejudice. The Second District Court of Appeal held that section 440.11(1) was unconstitutional, and mandatory jurisdiction was vested with the Florida Supreme Court.261 The court reasoned that the worker's compensation statute is designed to be the exclusive remedy available to an injured employee as to any negligence on the part of the employer, and quashed the district court's decision affirming the trial court's dismissal with prejudice.262

The First District Court of Appeal recently decided *Rolemco Electrical Contracting v. Sellers*.263 Mr. Sellers was involved in an automobile accident while in the course and scope of his employment with Rolemco. He had suffered back and neck injuries and an injury to his hip prior to the automobile accident. He was also suffering from a condition that was caused by his alcohol consumption but manifested no symptoms. The First District Court of Appeal reversed the workers' compensation judge's award of the cost of the employee's total hip replacement. The court held that the aggravation to the employee's pre-existing condition was not compensable under the Florida Worker's Compensation Act.264 The court noted that under the statute “accident” means only an unexpected or unusual event or result that happens suddenly, and that “[d]isability . . . due to an accidental

259. *Id.*
260. 630 So. 2d 537, 543 (Fla. 1993).
262. *Eller*, 630 So. 2d at 539.
263. 637 So. 2d 315 (Fla. 1st Dist. Ct. App. 1994).
264. *Id.* at 316.
acceleration or aggravation of a disease due to the habitual use of alcohol . . . shall be deemed not to be an injury by accident arising out of the employment.\textsuperscript{265} The court determined that since the employee’s pre-existing condition was caused by his habitual use of alcohol, the resulting hip replacement surgery was not covered under the workers’ compensation benefits.\textsuperscript{266}

VIII. MISCELLANEOUS

One issue that arises in the employment context is whether or not proceeds from a settlement or jury verdict with respect to an employment action are taxable. In 1992, the Supreme Court held that payment received in a settlement of a back-pay claim under Title VII was not excluded from gross income under section 104(a)(2).\textsuperscript{267} Revenue Ruling 93-88 addressed the applicability of section 104(a)(2) to claims arising after the amendments to title VII of the Civil Rights Act of 1991.\textsuperscript{268} The ruling states that because the amendments authorized the recovery of compensatory damages, such as emotional distress and mental anguish damages, in cases involving disparate treatment claims, back-pay, and compensatory awards, these claims were excluded from gross income. The ruling further states that awards received from disparate impact discriminations are not excluded.\textsuperscript{269}

An issue may also arise when parties enter into settlement negotiations as to the tax implications of the allocations of the settlement proceeds. In McKay v. Commissioner,\textsuperscript{270} the tax court upheld the parties’ allocation of settlement proceeds in the context of a wrongful discharge action. The claims were brought for wrongful discharge, breach of an employment contract, RICO, and punitive damages. The jury awarded $1.6 million for compensatory damages, and $12.8 million for future damages that was trebled by the defendant’s violation of RICO, and $1.25 million in punitive damages. The parties negotiated a settlement in which the former employer agreed to pay $16.7 million to settle all claims. This amount was split between the wrongful discharge tort claim, breach of contract, and

\textsuperscript{265. Id. (citing FLA. STAT. § 440.02(1) (1991)).}
\textsuperscript{266. Id.}
\textsuperscript{267. United States v. Burke, 112 S. Ct. 1867, 1874 (1992). On December 20, 1993, the Internal Revenue Service issued a revenue ruling, which addressed the applicability of section 104(a)(2) of the Internal Revenue Code to claims arising after the amendments of Title VII by the Civil Rights Act of 1991.}
\textsuperscript{268. Rev. Rul. 93-88, 1993-2 C.B. 61.}
\textsuperscript{269. Id.}
\textsuperscript{270. 102 T.C. 465 (1994).}
reimbursement of litigation claims. None of the proceeds, however, were allocated to RICO or punitive damages. The tax court upheld the allocation of proceeds in the agreement and noted that the allocations were consistent with the taxpayer’s pleadings and the verdict which reflected a lawsuit primarily in tort. Thus, it is crucial for both employers and employees to receive tax planning advice with respect to the settlement of any action and the allocation of settlement proceeds.

IX. CONCLUSION

The waters of employment law in Florida are potentially hazardous for both employees and employers. Both should be ever mindful that their actions or inactions are governed by local, state, or federal laws; decisions by local, state or federal court, and state or federal administrative agencies.

271. Id. at 487.
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I. INTRODUCTION

This survey covers decisions of the Florida courts and Florida legislation produced during the period of July 1, 1993 to June 31, 1994 which should be of interest to the real estate professional.

II. ACKNOWLEDGEMENTS

Gardner v. Weiler. Judge Farmer wrote the opinion with which Judges Gunther and Warner concurred. The seller signed a warranty deed conveying property to her lawyer. She did not know that the deed had been "fraudulently constructed" so as to effect a transaction different from the one actually agreed upon. The lawyer had the acknowledgement notarized out of the presence of the seller by a notary who was not aware of the scheme nor a party to the scheme. The lawyer then recorded it. The seller sued the notary and won a jury verdict for damages based on the theory that the notarization allowed the deed to be recorded, which was a necessary component in the buyer's fraudulent scheme, and thus, was the proximate cause of the seller's harm.

The district court disagreed and reversed. It held that the notary's conduct was not a substantial cause of the seller's loss, and consequently, it was not the proximate cause. The unstated reasoning is probably based on the court's belief that the seller would have acknowledged her signature in person to the notary, if she had been asked to do so. Thus, her negligence in taking the acknowledgement did not really further the fraudulent scheme, which was the cause of her harm.

1. 630 So. 2d 670 (Fla. 4th Dist. Ct. App. 1994).
2. Id. at 670. It is unclear from the opinion what actually happened, but footnote one reveals that a judgment was obtained rescinding the conveyance.
3. Id. at 671.
4. Id.
III. ADVERSE POSSESSION

*Wheeling Dollar Bank v. City of Delray Beach.* Judge Klein wrote the opinion with which Judges Gunther and Farmer concurred. A landowner died in 1931. His brother inherited a one-quarter interest and became a tenant in common with the other heirs. The estate was closed in 1933. The brother conveyed his interest to the City which took possession and built a municipal tennis center on this land no later than 1937.

In 1990, the City brought an action to quiet the title. The owners of the other three-quarter interest argued that the city was a co-tenant, and that the applicable rule was that one co-tenant cannot acquire title by adverse possession against another co-tenant who has not received actual notice of the adverse possession claim. The circuit and district courts rejected this argument. They interpreted the precedents as requiring either actual notice or possession which is so open and notorious as to put a co-owner on notice of the adverse claim. In this case, the operation of a municipal tennis center on the land for over fifty years was sufficient to satisfy the latter test.

The court also provided an alternative rationale for its holding. It stated that the basis for the notice requirement is that “cotenants ought to be able to repose confidence in each other.” However, the owners of the three-quarter interest were not even aware that they owned an interest during the period of adverse possession. Thus, there was no need to protect an expectation of confidence.

IV. ATTORNEY’S FEES

*Arana v. Hutchison.* Chief Judge Harris wrote the opinion with which Judges Dauksch and Thompson concurred. The buyer and sellers agreed to the sale of a house. Complying with the terms of the document which the buyer signed, the buyer put down a substantial initial deposit, two months later put down an additional deposit, and for a period of two years made monthly payments. The document also required that the buyer obtain a financing commitment within two years. However, the seller never executed a copy of the contract. Because the buyer did not have a signed copy of the

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5. 639 So. 2d 113 (Fla. 4th Dist. Ct. App. 1994).
6. *Id.* at 114-15.
7. *Id.* at 114 (citing Cook v. Rochford, 60 So. 2d 531 (Fla. 1952) and Gracy v. Fielding, 70 So. 625 (Fla. 1916)).
8. *Id.* at 115.
9. 638 So. 2d 564 (Fla. 5th Dist. Ct. App. 1994).
contract, she had difficulty obtaining a mortgage commitment. A “Contingent Approval” was obtained from a lender two days before the end of the two-year period, but notice was not sent to the sellers until two days after the period ended. Consequently, the sellers declared the contract terminated.

The buyer sued for specific performance and won, but the trial court held that each party was to bear the expense of its own attorney’s fees. The buyer appealed because the contract contained a provision that the prevailing party in litigation would be entitled to attorney’s fees. The district court agreed.\(^\text{10}\) It noted that part of the specific performance decree required the seller to execute the contract document.\(^\text{11}\) The court concluded that the trial court apparently thought the terms of the contract document were not in effect until it had been executed.\(^\text{12}\) However, the attorney’s fees provision was a term in the contract as embodied by that document, and the sellers consistently admitted that it existed.\(^\text{13}\) Specific performance of the contract was ordered. Thus, logically the attorney’s fees provision of the contract was also in force.

\textit{Diaz v. Security Union Title Insurance Co.}\(^\text{14}\) This was a per curiam opinion by Judges Hubbart, Gersten, and Goderich. A husband and wife owned a condominium as tenants in common. On the husband’s death, the wife began probate proceedings and then recorded a quitclaim deed which appeared to vest the whole title in her. The other beneficiaries intervened in the probate proceeding to contest the wife’s claim to the unit. The probate court enjoined the wife from disposing or encumbering her late husband’s interest.

The wife then sued to reform the deed, by which she and her husband had taken title, so as to create a tenancy by the entirety. The estate counterclaimed for partition and slander of title. The trial court held that the wife and her husband’s estate each owned a one-half interest, that the estate was entitled to rent, and that the estate was entitled to attorney’s fees under section 64.081 of the \textit{Florida Statutes}.\(^\text{15}\)

On appeal, the district court affirmed except as to the amount of attorney’s fees.\(^\text{16}\) The statute provided for attorney’s fees in a partition action and in litigation which benefits the partition. Proving title was

\begin{enumerate}[10.]
\item \textit{Id.} at 566.
\item \textit{Id.}
\item \textit{Id.}
\item The statute of frauds was not an issue discussed in this opinion.
\item 639 So. 2d 1004 (Fla. 3d Dist. Ct. App. 1994).
\item \textit{Id.} at 1006.
\item \textit{Id.}
\end{enumerate}
critical to the partition, thus, the attorney’s fees expended by the estate in the probate proceeding were for the benefit of the partition and could properly be awarded. However, the statute provided that fees were to be determined "on equitable principles in proportion to his interest." Therefore, since each party to the partition had a one-half interest, the estate should have been awarded only one half of its attorney’s fees.

Prosperi v. Code, Inc. Justice Grimes wrote the majority opinion with which Chief Justice Barkett and Justices Overton, McDonald, Shaw, Kogan, and Harding concurred. The opinion addressed the two following certified questions from the Fourth District Court of Appeal:

IS AN OWNER WHO PREVAILS ON A COMPLAINT BY A CONTRACTOR OR SUB-CONTRACTOR TO ENFORCE A MECHANIC’S LIEN UNDER PART I, CHAPTER 713, FLORIDA STATUTES (1989), ENTITLED TO ATTORNEY’S FEES UNDER 713.29, EVEN THOUGH, IN THE SAME SUIT, THE CONTRACTOR PREVAILED AGAINST THE OWNER ON A CLAIM FOR MONEY DAMAGES FOR BREACH OF THE CONTRACT, BOTH CLAIMS ARISING OUT OF THE SAME TRANSACTION?
DOES THE TEST OF MORITZ V. HOYT FOR DETERMINING WHO IS THE PREVAILING PARTY FOR THE PURPOSES OF AWARDING ATTORNEY’S FEES APPLY TO FEES AWARDED UNDER SECTION 713.29, FLORIDA STATUTES?

Prosperi, the owner, hired Code, a contractor, to make improvements on real property. A dispute arose over the amount Prosperi had paid to Code. Code then left the job site. Code brought suit to foreclose on a mechanic’s lien and for breach of contract against Prosperi, who counterclaimed for breach of contract. The trial court determined that $31,898.01 remained unpaid, and that $14,588.95 should be deducted for payments to another contractor to finish the job. The court denied Code’s attorney’s fees. The court also denied Prosperi attorney’s fees, because he was not the prevailing party, even though Code had filed false affidavits on mechanic’s liens. Prosperi appealed and the trial court’s decision was quashed.

17. Id.
18. Id.
19. 626 So. 2d 1360 (Fla. 1993).
20. Id. at 1361.
21. Id.
22. Id.
23. Id. at 1362-63.
The Florida Supreme Court stated that there is no unqualified answer as to the first certified question.²⁴ Had Prosperi prevailed solely on an issue of a mechanic's lien, which was brought forward with fraudulent affidavits, he would have been awarded attorney's fees. It was not the intent of the legislature to grant attorney's fees to a defendant who successfully defended against a mechanic's lien, but was still found liable for labor and materials and for breach of contract in the same case. Simply receiving a judgment does not mean that one is the prevailing party. Neither is the net judgment rule dispositive on the issue. The owner was innocent as to the lien, and as such, was entitled to attorney's fees. The contractor was not entitled to attorney's fees under the circumstances of this case. Therefore, the court answered the second certified question in the affirmative.²⁵

_Sate, Department of Transportation v. Ben Hill Griffin, Inc._²⁶ Judge Blue wrote the opinion. Acting Chief Judge Threadgill and Judge Quince concurred. The Department of Transportation brought an action to condemn property. The respondent was joined as a party because it possibly had acquired a prescriptive easement. The respondent retained an attorney and filed an answer. After it concluded that it did not have any interest in the property and agreed to be dropped from the action, the trial court granted its motion for attorney's fees.²⁷ The district court reversed.²⁸ A claim for attorney's fees must be based upon a contract or a statute. This claim was based on section 73.091 of the _Florida Statutes_ which provides: "Except as provided in s. 73.092, the petitioner shall pay all reasonable costs of the proceedings in the circuit court, including, but not limited to, a reasonable attorney's fee . . . ."²⁹ There was nothing in section 73.092 to prevent this respondent from recovering attorney's fees. However, the district court used the purpose approach to deny fees to this respondent.

The purpose of this statute was to make whole a landowner whose property has been taken. This respondent did not have any property. Therefore, the purpose of this statute would not be accomplished by allowing this respondent to recover attorney's fees. While the court was

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²⁴. _Prosperi_, 626 So. 2d at 1363.
²⁵. _Id._
²⁶. 636 So. 2d 825 (Fla. 2d Dist. Ct. App. 1994).
²⁷. _Id._ at 826.
²⁸. _Id._
²⁹. _FLA. STAT._ § 73.091 (1993).
following established precedent, the reasoning was based upon an unacceptable premise. In fact, the purpose of requiring compensation for landowners whose land has been taken by the government is to prevent public burdens of society from being unduly shifted to a narrower class. The attorney’s fees statute should further that purpose as well. In this case, the respondent had not become part of a narrower class forced to shoulder the cost of a societal need when it became obligated to pay attorney’s fees to protect whatever interest it might have had in this land.

V. BROKERS

_Baxas Howell Mobley, Inc. v. BP Oil Co._ Judge Gersten wrote the opinion for the panel which included Judges Nesbitt and Jorgenson. A broker was allegedly offered the following deal: the buyer would pay a commission if it acquired a particular property; but, the buyer would pay the commission only if the broker could not get a commission from the seller. The seller filed for bankruptcy and the buyer eventually bought the property from the bankrupt’s estate. The broker filed a claim in bankruptcy for its commission. The claim was denied because the bankruptcy court concluded the broker was not employed by the seller and was not the procuring cause of the sale.

The broker then sued the buyer in state court. The buyer raised the defenses of: 1) claim preclusion (res judicata) and 2) issue preclusion (collateral estoppel). The buyer’s theory was that the seller’s bankruptcy also had relieved it of its obligation to pay a commission, which could not be obtained from the seller. The trial court granted summary judgment for the buyer, but the district court reversed.

Claim preclusion would only apply if the two cases involved the same claim or cause of action. This action involved breach of a commission contract with the buyer. The bankruptcy claim involved breach of a commission contract with the seller. Because these were different contracts, claim preclusion was inapplicable.

Since the bankruptcy court is a federal court, the federal theory of issue preclusion was applied. For issue preclusion to apply, the issue decided in

30. _Ben Hill Griffin, Inc.,_ 636 So. 2d at 826 (citing _Shavers v. Duval County_, 73 So. 2d 684 (Fla. 1954)). The rule is that only a landowner whose land was taken may recover attorney’s fees under this statute. _See id.; see also Grieser v. State, Dep’t of Transp.,_ 371 So. 2d 164 (Fla. 2d Dist. Ct. App. 1979).

31. 630 So. 2d 207 (Fla. 3d Dist. Ct. App. 1993).

32. _Id._ at 208-09.

33. _Id._ at 210.
the first case must be the same as the issue in the later case. The issue in
this case was whether the broker had a commission contract with the buyer.
However, the issues decided in the bankruptcy court were whether the
broker was employed by the seller and whether the broker had been the
procuring cause of the sale. These issues were not the same. Thus, issue
preclusion was inapplicable.

Edelstein v. Flanagan.\textsuperscript{34} Judge Klein wrote the opinion. Chief Judge
Dell and Senior Judge Downey concurred. The sole shareholder of a
business listed it for sale with a real estate broker. A buyer was located and
a contract for the sale of the business’s assets was executed. Later, the
parties entered into a new contract for the sale of seller’s shares of stock,
rather than the business’s assets. The seller accepted promissory notes for
part of the purchase price. The buyer then defaulted on the notes.
Consequently, the seller sued.

The buyer claimed, \textit{inter alia}, that he was entitled to rescission based
upon the Florida Securities and Investor Protection Act.\textsuperscript{35} The theory was
that the transaction involved the sale of securities, the broker was not
licensed as a securities broker, and under Florida law any sale of securities
by someone not licensed is subject to rescission.\textsuperscript{36} The court rejected this
claim.\textsuperscript{37} It noted that the broker was engaged to find a buyer for the
business, which is what the broker did. Even though the transaction was
ultimately structured to be the sale of the corporate stock, it did not
transform the nature of the brokerage into securities brokerage covered by
the Securities Act.

The legislature has amended chapter 475 of the \textit{Florida Statutes}, which
regulates real estate brokers and salespeople, to deal with the responsibilities
to the buyer.\textsuperscript{38} Definitions are provided for “disclosed dual agent,” who
is the agent of both the buyer and seller and owes each a fiduciary duty, and
“transaction broker,” who is not the agent of either the buyer or the seller
but acts to facilitate the sale and owes each a duty of disclosure of known
facts.\textsuperscript{39} The broker or salesperson must disclose whether he or she is

\textsuperscript{34} 630 So. 2d 1205 (Fla. 4th Dist. Ct. App. 1994).
\textsuperscript{35} \textit{FLA. STAT.} ch. 517 (1989).
\textsuperscript{36} \textit{Id.} § 517.211(1).
\textsuperscript{37} \textit{Edelstein}, 630 So. 2d at 1206.
\textsuperscript{38} Act of July 1, 1994, ch. 94-119, § 134, 1994 Fla. Laws 233, 342. Chapter 94-119
also involves amendment to the regulations of a wide array of professions. \textit{Inter alia}, it also
modifies the procedure to recover from the Real Estate Recovery Fund. Act of Oct. 1, 1994,
ch. 94-337, § 4, 1994 Fla. Laws 2233, 2235 (to be codified at \textit{FLA. STAT.} § 475.482).
\textsuperscript{39} \textit{FLA. STAT.} § 475.01 (1991), \textit{amended by}, Act of July 1, 1994, ch. 94-119, § 134,
acting as an agent or as a transaction broker. If the broker or salesperson is going to act as a dual agent, he must get written permission to do so, and he must disclose for whom he is acting as an agent.

VI. CONDOMINIUMS

*Bisque Associates of Florida, Inc. v. Towers of Quayside No. 2 Condominium Ass’n.* 40 Judge Nesbitt wrote the opinion. Bisque Associates is the owner of a condominium at the Towers of Quayside. A series of drainage backups caused approximately $10,000 in damage. Bisque sought damages for diminution of value to the rental property. At trial, Quayside requested that the judge exclude all evidence of the diminution of value, arguing that the difficulties were temporary. Bisque argued that it could no longer rent the unit. The trial judge held for Quayside.41 The jury found damages for repairs only.42

Bisque appealed. The question was whether determination of a permanent or temporary injury to real property is a matter of law or a jury question. This was a question which had not been explicitly addressed in Florida.43 Bisque wanted to plead impairment to value because of its requirement to disclose material facts to potential buyers. Per the majority, even though the court can rule on the expertise of witnesses, it should not prevent the jury from hearing evidence because it decided the damage was not permanent.44 Therefore, the judgment as to the permanent nature of the damages was reversed.45

*Braemer Isle Condominium Ass’n v. Boca HI, Inc.* 46 In a prior settlement over construction defects, the condominium association released Hyman from all claims known or unknown. Subsequently, further defects were discovered in the same buildings which were the subjects of the previous litigation. Braemer brought suit against Hyman on these damages. Hyman was awarded a summary judgment based upon the previous settlement.47

Braemer appealed the summary judgment. The settlement which ended the previous litigation was the culmination of a two-year discovery process

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40. 639 So. 2d 997 (Fla. 3d Dist. Ct. App. 1994).
41. *Id.* at 999.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Bisque Assocs.*, 639 So. 2d at 1000.
46. 632 So. 2d 707 (Fla. 4th Dist. Ct. App. 1994).
47. *Id.* at 707.
which went to a jury trial. The settlement was entered by two parties of
equal bargaining power and was not the result of fraud, coercion, or undue
influence.\textsuperscript{48} Therefore, the court affirmed the summary judgment.\textsuperscript{49}

\textit{Brooks v. Ocean Village Condominium Ass'\textsuperscript{n}.}\textsuperscript{50} Brooks was the
owner of a condominium at Ocean Village. As a result of unpaid condo-
ominium assessments totaling $3984.44, the association sought to foreclose
a lien against Brooks. At trial, a default judgment was entered against
Brooks. The trial court denied Brooks' motion to set aside the default.\textsuperscript{51}

Brooks appealed, asserting that the trial court, a circuit court, was
without jurisdiction to enter the default judgment. County courts are now
included among the courts with competent jurisdiction to hear foreclosure
matters. The district court held that, as the amount at issue was within the
jurisdictional limit of the county court, the circuit court was without
jurisdiction to enter the default and default judgment, and therefore reversed
and remanded the case to county court.\textsuperscript{52}

\textit{Fisher v. Tanglewood at Suntree Country Club Condominium Ass'\textsuperscript{n}.}\textsuperscript{53} Fisher owns several units in the Tanglewood condominiums, all of which
are located in building 1100. Fisher refused to pay special assessments, as
none of his units were in the buildings on which the association levied the
assessments. The association filed a three count complaint seeking
foreclosure, money damages, and injunctive relief. Fisher counterclaimed
with declaratory judgment, slander of title, abuse of process, and breach of
fiduciary duty. The trial court awarded summary judgment for the
association on foreclosure, abuse of process, and breach of fiduciary duty.
The other counts were not disposed of by the trial court.\textsuperscript{54}

Count I of the complaint was a non-final judgment. Count II alleged
the same grounds, but sought a different remedy (money damages). Count
III of the counterclaim, abuse of process, was moot, as the court granted the
foreclosure. Misuse of process, after the process issues, constituted abuse
of process. Count IV was properly dismissed because the counterclaim
failed to state a cause of action in that Tanglewood was named in the action,
not the board of directors.\textsuperscript{55}

\textsuperscript{48} Id.
\textsuperscript{49} Id. at 708-09.
\textsuperscript{50} 625 So. 2d 111 (Fla. 3d Dist. Ct. App. 1993).
\textsuperscript{51} Id. at 111.
\textsuperscript{52} Id. at 112.
\textsuperscript{54} Id. at D483.
\textsuperscript{55} Id.
The trial court also required Fisher to pay $7200 during the pendency of the trial to Tanglewood. This amount reflected a compromise wherein monies were paid in lieu of the appointment of a receiver. Fisher failed to include any transcript of the record, and as such, could not prove reversible error. Therefore, the order was affirmed.

Glynn v. Siegal. This is an opinion written by Judge Stevenson with which Judges Anstead and Pariente concurred. The question before the court was whether the trial court erred in granting summary judgment of foreclosure against those unit owners who failed to pay their monthly fee on a community facilities lease.

The question arose when certain unit owners challenged the procedure used by the lessor of the facilities. The lessor devised a program by which a unit owner could purchase an undivided interest in the lease. This resulted in a warranty deed to the purchasing unit owner for that share. That unit owner would receive a monthly sum equivalent to the rent. On the books, the lessor showed the due payments as counterbalancing entries. The result was that the purchasing unit owner no longer had to mail in his or her rent under the lease. Non-purchasing unit owners asserted that the transaction resulted in a rent reduction for the purchasing unit owners. As a result, they claimed it violated the mandate that all unit owners were obligated equally for common expenses.

The appellate court affirmed the summary judgment. It reasoned that each owner still had the obligation to pay the monthly rent. The only difference was that the purchasing unit owners were to receive an equal amount in return for their investment. Thus, the court stated that eliminating double check writing did not alter the obligation to pay rent.

Islander Beach Club Condominium Ass'n of Volusia County v. Johnston. Johnston was the owner of three condominium unit weeks at Islander Beach Club. On December 5, 1992, a meeting was to be held in order to elect three directors for the Board of Administration. Proxy votes were maintained in a secure area and unopened until inspected by an independent Certified Public Accounting firm prior to election. Johnston

56. Id. at D484.
57. Id.
58. 637 So. 2d 324 (Fla. 4th Dist. Ct. App. 1994).
59. Id. at 325.
60. Id.
61. Id.
62. Id.
63. 623 So. 2d 628 (Fla. 5th Dist. Ct. App. 1993).
waged a proxy fight and demanded to see the sealed proxies. Islander refused, as it considered the proxies “non-public” until three days before the election when they would be opened. Johnston obtained an injunction to inspect the voting proxies as they were received.64

Islander appealed. The district court stated that the most logical interpretation of section 718.111 of the Florida Statutes is that voting proxies are not “official records” subject to inspection until after the election for which they were given. However, this does not mean that sealed proxies cannot be inspected as they come in. If the management has information, then such information must be made available to the membership. Nevertheless, a voting proxy has no legal effect until the vote is actually cast. As proxies are reversible until cast, they are not official records.65

Korandovitch v. Vista Plantation Condominium Ass’n.66 Judge Klein wrote the opinion with which Chief Judge Dell and Judge Anstead concurred. The front doors of the individual condominium units at Vista Plantation are on the outside of the building. The declaration of condominium prohibits unit owners from making alterations in the appearance of the exterior of the buildings.67 The problem arose when the condominium association permitted Mr. and Mrs. Korandovitch and other condominium owners to replace their screen doors with storm doors having tinted windows. The storm doors blocked the view of the units’ address numbers located on the units’ front doors. The owners, inquiring into whether the association would approve a request to permit them to install address numbers on their walls, next to the doors, received information that the board would not permit it. The unit owners installed the numbers without getting the association’s approval and the board sued to obtain a permanent injunction prohibiting the current placement of the numbers. The trial court granted, by summary judgment, a permanent injunction in favor of the board.68 The Fourth District Court of Appeal reversed.69

In determining whether it was proper for the trial court to resolve the dispute on summary judgment, the district court noted there are two categories of restrictions with regard to condominiums.70 One category involves restrictions actually located in the applicable declaration of the

64. Id. at 629.
65. Id.
66. 634 So. 2d 273 (Fla. 4th Dist. Ct. App. 1994).
67. Id. at 274.
68. Id.
69. Id. at 275.
70. Id. at 274-75.
condominium. These are more like covenants running with the land. As such, courts presume they are valid. The only bases for invalidating these types of restrictions is finding that the particular restriction is completely arbitrary as applied, that it violates public policy, or that it abrogates a fundamental constitutional right.\textsuperscript{71} Another category involves restrictions not expressly found in the declaration. These restrictions are usually made by the board at its discretion. Such restrictions are judged by a measure of reasonableness. Since the declaration in this case did not expressly address the placement of the units’ address numbers, the court determined that the restriction fell into the second category.\textsuperscript{72} In this category the board has discretion to pass rules and make decisions that are reasonably related to the unit owners’ health, happiness, and peace of mind.\textsuperscript{73}

The owners argued that there was a safety issue as the numbers could not be seen through the tinting, and as the board approved the tinted storm doors, the board should be estopped from preventing the application of the numbers. After considering these arguments and looking at the photographs included in the record, the appellate court reversed the summary judgment.\textsuperscript{74}

\textit{Pine Ridge at Haverhill Condominium Ass’n v. Hovnanian of Palm Beach II, Inc.}\textsuperscript{75} Damages were awarded to the condominium association for construction defects which included inadequate lighting and water intrusion from improperly installed windows. After the verdict was entered, the motion for prejudgment interest was denied, because the jury did not determine a date of loss.\textsuperscript{76}

The association appealed and the Fourth District Court of Appeal reversed.\textsuperscript{77} Because no date of loss was set, the damages could have been fixed at the time the property was turned over. As such, interest should be awarded from that date forward.\textsuperscript{78} The court also reversed the appellee’s award of attorney’s fees and stated that after the calculation of prejudgment interest, the amount recovered would not be over 25\% less than the offer.\textsuperscript{79}

\begin{itemize}
\item[71.] Korandovitch, 634 So. 2d at 274-75.
\item[72.] Id.
\item[73.] Id.
\item[74.] Id.
\item[75.] 629 So. 2d 151 (Fla. 4th Dist. Ct. App. 1993), \textit{review denied}, 639 So. 2d 978 (Fla. 1994).
\item[76.] Id. at 151.
\item[77.] Id.
\item[78.] Id.
\item[79.] Id. at 151-52.
\end{itemize}
Therefore, an award of fees based on a rejection of an offer would be in error.\footnote{Pine Ridge, 629 So. 2d at 152.}

\textit{Rogers & Ford Construction Corp. v. Carlandia Corp.}\footnote{626 So. 2d 1350 (Fla. 1993).} Chief Justice Barkett wrote the majority opinion and Justices McDonald, Shaw, Grimes, Kogan, and Harding joined. Justice Overton concurred with an opinion. Carlandia purchased a condominium developed by Rogers and Ford. Four years later, Carlandia brought suit for defects to the common areas, but alleged no defects to the individual unit.\footnote{Id. at 1351.} The circuit court dismissed the claim with prejudice, finding that Carlandia did not have individual standing and did not join the condominium association as an indispensable party.\footnote{Id. at 1351-52.} The Fourth District Court of Appeal reversed finding that Carlandia had standing to sue, since it possessed an individual share of the common areas.\footnote{Id. at 1352.} Nevertheless, the district court certified to the Florida Supreme Court the question “[m]ay an individual condominium unit owner maintain an action for construction defects in the common elements or common areas of the condominium?”\footnote{Rogers & Ford Constr. Corp., 626 So. 2d at 1351.}

The supreme court restated the question as two questions:

(1) Does a condominium unit owner have standing to sue the developer or general contractor to recover damages for construction defects or deficiencies in the common elements or common areas of the condominium?

(2) If so, must the interests of the other unit owners be represented in the suit for the unit owner with standing to maintain the action?\footnote{Id.}

Thereafter, it answered both questions affirmatively.\footnote{Id. at 1352.}

The supreme court reasoned that the legislature cannot determine who has standing to sue, for that is a judicial function.\footnote{Id. at 1352.} Usually, the courts look to one holding a legally protectable right or interest in jeopardy, or having an interest in some other justiciable controversy, as being one who may seek judicial determination of that issue. Such a person or entity typically is classified as a real party in interest for the purposes of Florida law.
Rule of Civil Procedure 1.210(a). The allegations in Carlandia's complaint identified a sufficient threatened interest. Carlandia's undivided share of the common elements would be affected by damages to them.

A further question was whether the legislature affected the right to sue for such defects by transferring that right to the condominium association. In looking at section 718.111(3) of the Florida Statutes, the supreme court noted that the statute does not designate the condominium association as the sole holder of the right to sue. The statute merely gives the association the capacity to bring suit. The court noted that the statute expressly reserved to the unit owners their statutory and common law rights to sue without necessarily involving the association. Those rights include the right to sue for construction defects. Therefore, the supreme court held that a condominium unit owner has standing to sue the developer or general contractor to recover damages for construction defects or deficiencies in the common elements or common areas of the condominium. However, as a matter of judicial economy to avoid "piecemeal litigation," the individual owner may bring such suits only after the owner has taken steps necessary to assure that the other unit owners' interests are represented in the immediate litigation. Finally, the Florida Supreme Court expressly stated that it did not determine whether a unit owner might proceed with an individual action against the association or its board members for failing to pursue the claims, since that question was not presented by this case.

Taylor v. Wellington Station Condominium Ass'n. The association filed a complaint that Taylor, a member of the association's Board of Directors, had breached his fiduciary duty. Taylor was also an officer of the developer and a 25% shareholder in the developer. The association alleged that Taylor failed to enforce obligations of the developer, and failed to designate expenses properly chargeable to the developer. The trial court entered partial summary judgment finding Taylor personally liable for willfully breaching his duties. The question of willfulness is properly decided by a jury. The evidence did not eliminate the factual issue as to

89. Id. at 1352-53.
90. Id. at 1353.
92. Id.
93. Id.
94. Id. at 1355 n.7.
95. 633 So. 2d 43 (Fla. 5th Dist. Ct. App. 1994).
96. Id. at 44.
whether Taylor’s conduct rose to the level required for individual liability. Therefore, the district court reversed. 97

Torres v. K-Site 500 Associates. 98 On October 22, 1989, Torres and Lueckhardt entered into a contract to purchase a condominium from K-Site 500 Associates. A deposit of $25,580 was placed on the unit, but Ms. Lueckhardt stated that she wanted the unit placed in her name only. The two buyers were not married and Torres had an inadequate financial history for a mortgage. K-Site informed the buyers that although the two names were on the agreement, Lueckhardt could finance by herself. Lueckhardt submitted the application for financing and received a thirty-year fixed mortgage at 9.625%. 99

In February of 1991, the buyers received a letter from K-Site informing them that the project was near completion and they would be receiving information about closing. Additionally, in the fifth paragraph, there was a sentence which stated that the letter constituted notification concerning paragraph three of the purchase agreement. Paragraph three stated that the buyer’s obligation to purchase was contingent upon a commitment for a mortgage, and specified a ten-day period for submission of a mortgage application. 100

The application was rejected because Torres was not on the application. 101 When resubmitted the terms were 11%. The buyers sought to recover the deposit. The trial court found for the sellers, because the application was submitted after the ten-day period. 102

According to the appellate court, although the application was not submitted within the ten-day period after receipt of the letter, the letter was not proper notification that an application was required to be submitted. Therefore, the ten-day period could be waived. It would be inequitable to allow the sellers to recover the deposit when they acquiesced in the breach. Therefore, it reversed the lower court. 103

Further, as to condominiums, an amendment to section 718.116 of the Florida Statutes became law on June 3, 1994 without the governor’s approval. 104 The amendment includes greater detail as to the liability of

97. Id. at 45.
98. 632 So. 2d 110 (Fla. 3d Dist. Ct. App. 1994).
99. Id. at 111.
100. Id.
101. Id.
102. Id.
103. Torres, 632 So. 2d at 112.
unit owners for unpaid assessments, regardless of how they acquired title to the property. Particularly, a first mortgagee which acquires title by foreclosure or by deed in lieu of foreclosure would be liable for prior assessments. However, limitations have been provided in the amendment. Of note, the amendment as to first mortgagees applies only to those first mortgagees whose mortgages were recorded after April 1, 1992. The act as amended will take effect October 1, 1994.105

VII. CONSTITUTIONAL LAW

Moorman v. Department of Community Affairs.106 Judge Gersten wrote the opinion. Judge Baskind filed a concurring opinion. Chief Judge Schwartz filed an opinion specially concurring in part and dissenting in part. The property involved was located within the Big Pine Key Area of Critical Concern in Monroe County. Some landowners had obtained permits to build fences on their land. When the Florida Land and Water Adjudicatory Commission rescinded their permits, the landowners appealed. The reason for the rescission was that Monroe County Land Development Regulations banned all fences in the area; the regulation provided there would be no exceptions.

The court pointed out that an exercise of the police power must relate to public health, safety, and welfare and that the means chosen to implement the regulation must "bear a reasonable and substantial relation to the purpose sought to be attained."107 Following a basic rule of construction, the court should try to sustain the constitutionality of a statute by indulging every reasonable doubt in favor of its constitutionality, i.e., by interpreting it, if possible, to be in harmony with the constitution. On the other hand, the Florida Constitution recognizes the importance of private property108 and the importance of minimizing government intrusion into the lives of its citizens.109 Consequently, the means chosen must be narrowly tailored to be the least restrictive means. The district court found that the record would not support a finding that the statute was unconstitutional as applied.110

105. Id. at 2357.
106. 626 So. 2d 1108 (Fla. 3d Dist. Ct. App. 1993), review granted, 639 So. 2d 977 (Fla. 1994).
109. See id. § 23.
110. Moorman, 626 So. 2d at 1111.
Thus, it proceeded to consider a facial challenge, concluding that it was unconstitutional because the statute was not narrowly tailored.111

Chief Judge Schwartz correctly, but without explanation, challenged this logic.112 The purpose of the regulation was to protect an endangered species, the Key Deer. The record revealed that only one of the four properties involved was actually in the Key Deer's natural habitat, so that fences on the other three properties would not harm the deer. In some cases, fences might actually be beneficial to the Key Deer. In addition, the fence was necessary for one landowner to protect his children from falling into the nearby canal, a serious danger. These facts could and should have been sufficient to demonstrate that the regulation was not constitutional as applied to these properties.

VIII. CONSTRUCTION

The legislature amended the State Emergency Management Act113 by adding a new statute114 to deal with contractor rip-offs during a declared emergency,115 that causes "damage to a significant number of residential structures,"116 or during the two years following enactment, in the area covered by the Hurricane Andrew emergency proclamation.117 If the contract is to make repairs or improvements to residential real property, the contractor can use deposits or advances only: a) to purchase materials related to the contract;118 b) to pay for work done under the contract; or c) to pay for governmental fees or charges, e.g., permit fees needed to perform the contract. Additionally, the contractor can only use up to 15% to pay necessary expenses and overhead connected with the contract.119

A contractor who has received over 10% of the contract price is required to apply for permits within thirty days and to begin work within

111. Id.
112. See Chief Judge Schwartz's special concurrence and dissent. Id.
113. FLA. STAT. §§ 252.31-.63 (1993).
115. An emergency can be declared by the governor. It may not continue for longer than sixty days unless renewed by the governor. It may be terminated by the governor or by a concurrent resolution of the legislature. FLA. STAT. § 252.36(2) (1993).
116. Ch. 94-110, § 1, 1994 Fla. Laws at 152.
117. Id. §2, at 152.
118. FLA. STAT. § 252.361(2) (1993).
119. Id.
ninety days after receiving the permits. A contractor is prohibited from not performing for a ninety-day period, if it is done with an intent to defraud. The statute provides an inference that intent to defraud exists if the contractor has received money for future work, and has failed to perform for thirty days after the date of receiving notice to perform. Notice to perform could be given after sixty days of nonperformance.

Violation of this statute constitutes theft. Depending on the amount, the conduct may be classed as petit theft, which is a misdemeanor, or grand theft, which may be classified as a felony of the first, second, or third degree. The penalty could be as much as thirty years imprisonment.

Castro v. Sangles. Chief Judge Schwartz wrote the opinion. Landowners hired an unlicensed contractor and then obtained a building permit by making the sworn misrepresentation that no contractor would be involved in the construction. Subsequently, the landowners sued the contractor over his alleged breach of the construction contract. The trial court dismissed the case, holding that the contract was unenforceable under section 489.128 of the Florida Statutes. The district court affirmed. The statute provided:

As a matter of public policy, contracts entered into on or after October 1, 1990, and performed in full or in part by any contractor who fails to obtain or maintain his license in accordance with this part [chapter 489, Part I] shall be unenforceable in law, and the court in its discretion may extend this provision to equitable remedies.

The district court pointed out the general rule, that no action can be maintained on an illegal contract if a person is himself guilty of a wrongdoing. Certainly that is consistent with the plain language of the statute, which

120. Id. § 252.361(3).
121. Id. § 252.361(4)(a).
122. Id. § 252.361(4)(b). The contents of the notice to perform are specified in § 252.361(4)(c) of the Florida Statutes.
124. Id. § 812.014(2).
125. Id. § 775.082(3)(b).
126. 637 So. 2d 989 (Fla. 3d Dist. Ct. App. 1994).
127. Id. at 990.
128. Id. at 992.
129. Id. at 990 n.1.
provides that the contract is "unenforceable." Next, the district court explained why the exceptions to this rule would not apply.

When a statute makes a contract illegal in order to protect a narrow class of victims, the contract's illegality may not be used to further victimize that class. Thus, if this statute was intended to protect consumers, it could not be invoked to victimize consumers. However, the purpose of this subsection is to protect the general public from a wide range of ills associated with unlicensed contractors. Therefore, this exception was not applicable.

Another exception is that a wrongdoer may not invoke the rule to the detriment of an innocent party. However, the parties here were in pari delicto. The landowners had engaged in prohibited conduct, when apparently in order to get a lower price, they had misrepresented the facts to get the permit. They claimed to have suffered from one of the anticipated harms of using an unlicensed contractor, shoddy work.

It should be noted that in 1993, the legislature moved to strengthen the statute. The 1991 version of the statute made the contract unenforceable at law. The court of equity could, in its discretion, extend that protection to equity. Now the contract is unenforceable in equity as well.

IX. COVENANTS, DEEDS, AND RESTRICTIONS

Loveland v. CSX Transportation, Inc. Judge Jorgenson, joined by Judges Ferguson and Goderich, wrote the court's opinion. The court reversed summary judgment in favor of titleholders in an action to enforce a reversionary interest in a 1926 deed.
In 1926, Redlands Sales Co. transferred property to the predecessor in interest to CSX. The warranty deed provided that in the event the property was abandoned and not used for railroad purposes, it would revert to the grantor. In 1984, 1985, and 1987, CSX sold portions of this property to purchasers who did not use their respective lots for railroad purposes. In 1990, Loveland, the successor in interest to Redlands, brought an action for declaratory relief seeking a reverter, quiet title, and ejectment against CSX and the subsequent purchasers of the property. All parties filed motions for summary judgment. The trial court granted a summary judgment against Loveland, holding that CSX had not abandoned the property, and even if it did, that the statute of limitations and laches barred any action because of earlier leases by CSX.

The district court, in reversing the summary judgment noted that, although a restriction is construed strongly against the grantor, it must be construed within the intent of the parties. If there is only one construction which gives full effect to the instrument’s words, that construction should be used. CSX contended that reverter is improper as long as the railroad operated on the property, even if there were a substantial transfer of property. The district court rejected this. The intent of the restriction was for the property to be used for railroad purposes.

Since CSX still operated a railroad on the property, the district court decided that two questions needed to be answered. The first was whether the transferred parcels were abandoned or no longer used for railroad purposes. A “railroad purpose” is one for the primary benefit of the public and not an individual. Therefore, if parcels are conveyed to those who are not using the property for railroad purposes, the restriction is violated and the reverter clause may apply. The sales in this case violated the restriction.

The second question, if the reverter clause applied, is whether there might be a reversion only as to those parcels which were no longer used for railroad purposes. The district court noted that partial reversion has

135. Id. at 1121.
136. Id.
137. Id.
138. Loveland, 622 So. 2d at 1121.
139. Id. at 1122.
140. Id.
141. Id.
142. Id.
143. Loveland, 622 So. 2d at 1122.
been appropriate where the parcels violating the restriction could equitably be separated from the main parcel.\textsuperscript{144}

The time for the triggering of the reverter clause must be considered. Some portions of the main tract were leased prior to being sold. The lease may trigger the reversion, which may then be barred as a result of the statute of limitations of laches. However, the date of sale triggers the reversion for other parcels. These questions were not answered by the record. Therefore, this was a premature summary judgment.\textsuperscript{145}

\textit{Margate Investment Corp. v. Lupowitz}.\textsuperscript{146} This is an opinion written by Judge Polen with which Judges Glickstein and Warner concurred. The question before the court was whether the grantor, under a warranty deed containing a warranty against encumbrances, would be liable for a breach of such warranty when the grantor had failed to pay 1980 real estate taxes which were not assessed until 1985.\textsuperscript{147} Noting that taxes cannot become due and give rise to a lien until they are assessed, the court found that the grantor was not liable under the subject covenant, since the taxes assessed in 1985 did not encumber the property in 1981 when the warranty deed was made and delivered.\textsuperscript{148}

\textit{Palm Point Property Owners' Ass'n v. Pisarski}.\textsuperscript{149} Justice Kogan wrote the opinion with which Chief Justice Barkett and Justices Overton, McDonald, Shaw, Grimes, and Harding concurred. The matter came to the Florida Supreme Court from the certified question:

\begin{quote}
ABSSENT A SPECIFIC RULE OF PROCEDURE, DOES A PROPERTY OWNERS' ASSOCIATION THAT IS NOT A DIRECT SUCCESSOR TO THE INTERESTS OF THE DEVELOPER AND PROVISION FOR WHICH DOES NOT APPEAR IN THE GRANTOR'S ORIGINAL SUBDIVISION SCHEME HAVE STANDING TO MAINTAIN AN ACTION TO ENFORCE RESTRICTIVE COVENANTS?\textsuperscript{150}
\end{quote}

Palm Point Property Owners' Association sought to enjoin Pisarski from violating deed restrictions regarding constructing a swimming pool, stem walls, and docks. Pisarski sought a dismissal, alleging the association

\begin{thebibliography}{9}
\bibitem{144} Id.
\bibitem{145} Id.
\bibitem{146} 638 So. 2d 143 (Fla. 4th Dist. Ct. App. 1994).
\bibitem{147} Id. at 143.
\bibitem{148} Id. at 144.
\bibitem{149} 626 So. 2d 195 (Fla. 1993).
\bibitem{150} Id. at 195.
\end{thebibliography}
had no standing because it was not a successor in interest to the developer. The trial court dismissed the complaint and the district court affirmed.\textsuperscript{151}

The supreme court noted the general rule, that a restrictive covenant can only be enforced by the party whom the covenant was intended to benefit.\textsuperscript{152} There was no intent that these covenants benefit Palm Point.\textsuperscript{153} Thus, enforcement by the association would be proper only if the association was a direct successor in interest to the developer, or the developer expressly assigned to the association the enforcement rights.\textsuperscript{154} Neither occurred here. In addition, the supreme court expressly rejected the theories of associational standing, and homeowners' associations' automatic standing to enforce covenants as representatives of the associations' members, without legislative authority.\textsuperscript{155}

\textit{Sunshine Vistas Homeowners Ass'n v. Caruana.}\textsuperscript{156} Justice Shaw wrote the opinion with which Chief Justice Barkett and Justices Overton, McDonald, Grimes, Kogan, and Harding concurred. Before the court was the certified question:

\begin{verbatim}
WHETHER THE FLORIDA MARKETABLE RECORD TITLE ACT HAS THE EFFECT OF EXTINGUISHING A PLAT RESTRICTION WHICH WAS CREATED PRIOR TO THE ROOT OF TITLE WHERE THE MUNIMENTS OF TITLE IN THE CHAIN OF TITLE DESCRIBE THE PROPERTY BY ITS LEGAL DESCRIPTION WHICH MAKES REFERENCE TO THE PLAT AND THE MUNIMENTS OF TITLE STATE THAT THE CONVEYANCE IS GIVEN SUBJECT TO COVENANTS AND RESTRICTIONS OF RECORD.\textsuperscript{157}
\end{verbatim}

Townsend Construction Corporation and Caruana purchased a parcel of land in Sunshine Vistas and began construction of a building. The association sought to enforce a setback restriction contained in a plat predating the root of title. Townsend and Caruana argued that the Marketable Record Title Act extinguished the setback restriction, because it was not specifically identified in the muniments of title beginning with the

\textsuperscript{151} Id. at 196.
\textsuperscript{152} Id.
\textsuperscript{153} Id.
\textsuperscript{154} Pisarski, 626 So. 2d at 196.
\textsuperscript{155} Id. at 197.
\textsuperscript{156} 623 So. 2d 490 (Fla. 1993).
\textsuperscript{157} Id. at 491.
The trial court agreed and granted summary judgment.\textsuperscript{159} The Third District Court of Appeal agreed.\textsuperscript{160}

The Florida Supreme Court quashed the results of the lower courts and answered the certified question in the negative.\textsuperscript{161} In doing so, the supreme court reasoned that Florida’s Marketable Record Title Act specifies that marketable record title will not affect restrictions found in muniments of title on which the current estate is based beginning with the root of title.\textsuperscript{162} However, the same statute provides an exception where there is a specific reference in the root of title, the muniments to the book and page of the recorded instrument give rise to the restriction, or a reference by name to the plat contains the restriction.\textsuperscript{163}

In this case, the root of title was a 1951 deed. This deed specifically referred to Sunshine Vistas, the name of the recorded plat containing the restriction. Likewise, subsequent deeds, muniments of title, referred to Sunshine Vistas. Therefore, the court felt that to have held otherwise would have been to ignore the words in the statute.\textsuperscript{164}

\textit{Sweeney v. Mack.}\textsuperscript{165} Judge Griffin wrote the opinion with which Chief Judge Harris and Judge Diamantis concurred. The Fifth District Court of Appeal reversed the trial court’s finding that applicable covenants and restrictions prohibited the construction in question even though the developer’s architectural review committee approved the plans.\textsuperscript{166}

The Sweeneys purchased a lot in a fly-in development in 1988 and submitted plans for the construction of their dwelling and hangar to the developer’s designated architectural review committee. The committee approved the plans and the Sweeneys began constructing their dwelling. Their neighbors, the Macks, objected to the design and the committee again reviewed and re-approved the plans. Subsequently, the Macks sought and obtained an injunction against the Sweeneys. The trial court found the covenants and restrictions to be clear and unambiguous and the design to violate the provisions.\textsuperscript{167}

\begin{itemize}
\item \textsuperscript{158} Id.
\item \textsuperscript{159} Id.
\item \textsuperscript{160} Id.
\item \textsuperscript{161} \textit{Sunshine Vistas}, 623 So. 2d at 491.
\item \textsuperscript{162} Id. at 490.
\item \textsuperscript{163} Id.
\item \textsuperscript{164} Id. at 492.
\item \textsuperscript{165} 625 So. 2d 15 (Fla. 5th Dist. Ct. App. 1993), \textit{review denied}, 634 So. 2d 625 (Fla. 1994).
\item \textsuperscript{166} Id. at 17.
\item \textsuperscript{167} Id. at 16.
\end{itemize}
The district court noted that even where a developer or an architectural review committee retains the absolute power to approve building plans, they may not act arbitrarily. However, there is no evidence in this case that the committee’s actions were arbitrary. Furthermore, even though covenants and restrictions must be construed in favor of the freer use of the property, the clear and reasonable intent of the parties will be honored. However, where the covenant or restriction is ambiguous, the construction will go against the party attempting enforcement. The district court found these provisions to be far from unambiguous, with terms such as hangar and garage being undefined.

X. EASEMENTS

Bell v. Cox. Judge Thompson wrote the majority opinion with which Judge Peterson concurred with opinion and Chief Judge Harris dissented with opinion. The question before the court was whether Florida’s statutory way of necessity easement provisions found in sections 704.01(2) and 704.04 of the Florida Statutes were unconstitutional.

The question arose from the servient land owner, Bell, who challenged an award of a statutory way of necessity to Cox for the benefit of his land. Bell argued that the statute’s referring to land “outside any municipality” denied equal protection under article I, section 2 of the Florida Constitution because it created an arbitrary distinction between property outside a municipality and property inside a municipality.

The appellate court affirmed the trial court. In so doing it determined that the statute did not abridge any fundamental right and did not affect a suspect class. Therefore, the appellate court determined that the applicable test was a rational basis standard rather than strict scrutiny. The inquiry, therefore, was whether there was any conceivable basis on which the classification bore a rational relationship to a legitimate state purpose. In reviewing the record, the appellate court found that Bell did not meet the burden of showing that there was no conceivable factual basis

168. Id. at 17.
169. Id.
170. Sweeney, 625 So. 2d at 17.
171. Id.
173. Id. at D963.
174. Id.
175. Id. at D964.
176. Id.
on which the regulation would not relate to a legitimate state purpose. Likewise, the court dismissed Bell's challenges of unconstitutionality for not defining the term "unreasonable refusal" to allow attorney's fees under section 704.04 and found that the two sections in question were not contrary to the public policy goal of protecting ecologically sensitive land pursuant to section 187.201 of the Florida Statutes.

Chicago Title Insurance v. Florida Inland Navigation District. This is a per curiam opinion with which Chief Judge Dell, Judge Klein and Senior Judge Owen concurred. The appellate court affirmed the trial court's judgment that a perpetual easement in favor of the United States was not extinguished either by a patent to Florida, not making the patent subject to the easement, or by Florida's Marketable Record Title Act.

Chicago Title sought a judicial declaration that the property, the title to which it insured, was not subject to a perpetual easement granted by Florida to the United States. Title to the subject property vested in Florida in 1850 as a result of the Swamp Lands Act. However, the title rights were inchoate until Florida requested a patent and the United States, in turn, issued one. These were not done until 1970. Prior to 1970, Florida conveyed two interests in the property: the perpetual easement to the United States in 1941, which was recorded in 1942; and in 1953 fee simple title subject to the perpetual easement to the insured's predecessor in title to said property prior to 1970.

Chicago Title argued that the 1970 patent, in not mentioning the easement, passed fee simple title and the easement to the state which title, by way of the doctrine of relation, passed to the state's subsequent grantee. The district court held that the 1970 patent was merely an administrative action providing only the record evidence of the transfer of title. It did, however, perfect the title vested in the state in 1850.

Alternatively, Chicago Title argued that the 1953 transfer constituted the root of title under Florida's Marketable Record Title Act. The court found that the Marketable Record Title Act did not apply to federal property.

177. Bell, 19 Fla. L. Weekly at D963.
178. Id. at D964.
179. 635 So. 2d 104 (Fla. 4th Dist. Ct. App. 1994).
180. Id. at 104-05.
181. Id. at 104.
182. Id. at 105.
183. Id.
184. Chicago Title, 635 So. 2d at 105.
185. Id.
interests as it would violate the Supremacy Clause extending to Congress the right to dispose of federal property rights.186

Colonial Acquisitions, Inc. v. Titus.187 This is an opinion written by Chief Judge Harris with which Judges Dauksch and Griffin concurred. It reversed the trial court’s finding of an ingress and egress easement and to remand the matter for a judgment consistent with the Fifth District Court of Appeal’s opinion.188

Since it was clear that the trial court had not found an express easement, the question was whether one existed through prescription or necessity. The use was permissive. Therefore, it was not a prescriptive easement, even though they used the property for over twenty years.189 In addition, even though the land owners closed off access from the alleged easement holder’s property to Highway 50, there was no evidence presented that there was no reasonable access to their property. Therefore, there was insufficient evidence to support an easement by necessity.190

Dance v. Tatum.191 Justice Shaw wrote the opinion with which Chief Justice Barkett and Justices Overton, McDonald, Grimes, Kogan, and Harding concurred. The Florida Supreme Court approved the district court’s decision and answered in the negative the following certified question:

WHETHER, IN LIGHT OF MOORINGS ASSOCIATION, INC. V. TURTLES ISLAND COMMUNITIES, THE STATEMENT IN ALBRECHT V. DRAKE LUMBER CO., TO THE EFFECT THAT AN IRREVOCABLE LICENSE BECOMES AN EASEMENT BASED ON EQUITABLE ESTOPPEL, MEANS THAT AN IRREVOCABLE LICENSE CAN NO LONGER EXIST IN FLORIDA.192

In 1975, Dance purchased a tract of land. Included in the deal was an architectural design by the seller for a car dealership. The paving of the tract required drainage onto an adjacent lot, also owned by the seller, even though there was no written easement to do so. In 1984, the sellers sold the adjacent lot to the respondent who sold the parcel to petitioner Dance in 1987, subject to a purchase money mortgage and note.193 Dance defaulted
on the note and a foreclosure ensued. Dance did not challenge the judgment which was entered for Tatum, but argued that he had an easement to the borrow pit on the adjacent parcel for drainage, even though no written easement was ever executed between any of the parties.\textsuperscript{194}

The trial court held that Dance had an irrevocable drainage license which survived the foreclosure.\textsuperscript{195} The district court held that the license was irrevocable but was personal to Dance and could not be transferred.\textsuperscript{196}

The Florida Supreme Court held that a license sometimes becomes irrevocable when substantial improvements have been made by the licensee. However, previous case law holding that such licenses become easements in conflict with other case law holding that an easement must be created by express grant, prescription, or implication.\textsuperscript{197} The supreme court found that the district court was correct in finding the use of the adjacent parcel to be an irrevocable license and not an easement.\textsuperscript{198}

\textit{Haight v. Hall.}\textsuperscript{199} This is a per curiam opinion with which Judges Ferguson, Jorgenson, and Levy concurred to affirm the trial court’s judgment annulling an easement deed.\textsuperscript{200} In 1982, Haight attempted to install an air conditioning unit and a gas tank on his property. Because he had to comply with setback requirements, Haight sought a perpetual easement covering a thirty-foot section on the eastern border of his neighbor Hall’s property. In consideration of the easement, Haight paid Hall ten dollars. Thereafter, he constructed a driveway on her property.\textsuperscript{201} In 1990, Hall decided to sell the property and, during a title search, the grant of an easement was discovered. Thus, the buyer refused to purchase unless the easement was extinguished. Haight refused to relinquish the easement voluntarily and Hall sought, and was granted, a declaratory judgment annulling the instrument. Haight appealed.\textsuperscript{202}

Hall testified that she granted Haight temporary use of the property. She admitted to signing a letter granting this temporary use, but claimed she was fraudulently induced into signing an easement document and that there were no witnesses or notary present when she signed the purported

\begin{footnotes}
\footnotetext{194}{Id.}
\footnotetext{195}{Id.}
\footnotetext{196}{Dance, 629 So. 2d at 128.}
\footnotetext{197}{Id.}
\footnotetext{198}{Id. at 129.}
\footnotetext{199}{625 So. 2d 1311 (Fla. 3d Dist. Ct. App. 1993).}
\footnotetext{200}{Id. at 1312.}
\footnotetext{201}{Id.}
\footnotetext{202}{Id.}
\end{footnotes}
letter. The notary could not recall the execution of the easement document and the witnesses to the deed gave conflicting testimony as to its execution and their witnessing. Furthermore, Haight's wife testified that when she saw the deed it contained no witnesses or notary. As a result, the trial court found Hall's testimony more persuasive. The Third District Court of Appeal affirmed, finding there to be substantial competent evidence to support the trial court decision.

Howell v. Miller. This opinion, written by Judge Parker with Acting Chief Judge Campbell and Judge Fulmer concurring, affirmed the trial court's awarding an injunction to remove a fence and remanded the case for further consideration of the servient estate owner's counterclaim.

The Howells and the Millers owned lots in a subdivision where all lots have a perpetual nonexclusive road right-of-way easement. Additionally some lots, including the Howells' and the Millers', had perpetual nonexclusive canal easements. The Howells constructed a fence across the road right-of-way easement on their lot, and the Millers filed their suit for injunctive relief. The trial and appellate courts found the fence an unreasonable interference with the easement. The trial court, however, failed to address the issue in the counterclaim dealing with the scope of the easement. Thus, the district court affirmed the injunction but remanded the counterclaim's issues for consideration.

Phelps v. Griffith. This is a per curiam opinion with which Acting Chief Judge Campbell and Judges Parker and Patterson concurred in reversing the trial court's judgment establishing a prescriptive easement. The Phelps were the owners of an unpaved road, known as Lemon Patch Road, running across the southernmost portion of their property to the Griffiths' property. Adjacent to that road was a fifteen-foot wide easement which was deeded to the Griffiths for ingress and egress to their property.

203. Id.
204. Haight, 625 So. 2d at 1312.
205. Id.
206. Id.
207. 638 So. 2d 544 (Fla. 2d Dist. Ct. App. 1994).
208. Id. at 545.
209. Id. at 544.
210. Id.
211. Id. at 544-45.
212. Howell, 638 So. 2d at 544-45.
213. 629 So. 2d 304 (Fla. 2d Dist. Ct. App. 1993).
214. Id. at 305.
Thus, there were two parallel dirt lanes, with Lemon Patch Road being the more improved of the two. Phelps fenced off the Lemon Patch Road, which the Griffiths preferred to use. However, there was no evidence that the use of the road adversely affected the Phelps, or their use of the property. The Griffiths brought an action for a prescriptive easement and were awarded that easement by the trial court, even though the Phelps took the position that the use was neither continuous nor adverse to their own interests, despite the continued use since 1965.

The appellate court acknowledged the rebuttable presumption that use is permissive. However, the court took the position that the real inquiry was whether the use was beneficial to the actual owner or whether it interfered with the owner’s property rights. Recognizing that the burden is on the one alleging the use to be adverse, the appellate court noted that there was implicit evidence of permissive use and a record devoid of evidence that the use of the road prevented the Phelps from using the property as they intended. Therefore, the district court reversed the judgment and remanded the matter to the trial court with instructions to enter a judgment consistent with the appellate court’s opinion.

*Water Control District of South Brevard v. Davidson.* Judge Sharp wrote the opinion with which Judges Goshorn and Peterson concurred. The court reversed part of a lower court judgment against the Water Control District (“District”). The lower court ruled that the District had failed to obtain title to uncultivated and unimproved portions of the disputed lands. Therefore, the District’s claims to the drainage and maintenance easements on those portions were invalid.

The first question addressed was whether the District had acquired title to the properties. After reviewing the establishment procedure of drainage districts in general, and analyzing the procedures followed as to this district, the court concluded that the District was properly formed and had appropriately acquired title to the properties.

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215. *Id.*
216. *Id.*
217. *Id.* at 306.
218. *Phelps*, 629 So. 2d at 306.
219. *Id.*
220. 638 So. 2d 521 (Fla. 5th Dist. Ct. App. 1994).
221. *Id.* at 521.
222. *Id.* at 523.
The next question was whether the District’s interests in the properties were properly preserved after it acquired title. Specifically, the court had to address whether the Marketable Record Title Act (“MRTA”) extinguished the District’s interests in the unused portions of the easement. Even though the root of title for some portions of the disputed lands referred to the District’s interests, the roots of title to other portions of the disputed lands did not. Therefore, the question was whether the District’s easement interests fell under other MRTA exceptions. Relying on sections 717.03(1) and (5), and 704.05(1) and (3) of the Florida Statutes, the court found that where the District’s interests were in one easement, its partially using one section of the easement preserves its rights in the entire easement. Therefore, MRTA did not extinguish the District’s drainage and maintenance easement interests.

XI. EMINENT DOMAIN

Broward County v. Patel. Justice Kogan wrote this unanimous opinion. The Florida Supreme Court had been asked the following certified question:

MAY THE GOVERNMENT SUBMIT EVIDENCE THAT THE SEVERANCE DAMAGES OF A CONDEMNEE MAY BE CURED OR LESSENED BY ALTERATIONS TO THE CONDEMNEE'S PROPERTY WHEN THOSE ALTERATIONS REQUIRE THE GRANT OF A VARIANCE FROM THE APPROPRIATE GOVERNMENTAL ENTITY HAVING JURISDICTION OVER THE PROPERTY?

The question was answered in the affirmative. The court, relying heavily upon a treatise, Nichols’ The Law of Eminent Domain, pointed out that the fact that the landowner can probably obtain rezoning of the land has long been considered relevant evidence in determining a condemnation award. There is persuasive authority that the reasonable probability of

223. Id. at 525.
224. Id.
225. Water Control Dist. of S. Brevard, 638 So. 2d at 525.
226. Id. at 526.
227. Id.
228. 641 So. 2d 40 (Fla. 1994).
229. Id. at 41.
obtaining a variance should also be considered relevant evidence.\textsuperscript{231} There is no reason why it should not be considered relevant evidence in determining severance damages. The one claiming that the variance could be obtained would have the burden of proof on the issue. Whether it is reasonably probable that the variance could be obtained would be a question of fact.

Once the reasonable probability of the variance being obtained had been determined, then the amount of damages is the question. The proper test is “the price that would be paid by a knowledgeable buyer willing but not obligated to buy, to a knowledgeable owner willing but not obliged to sell.”\textsuperscript{232} That would have the effect of properly factoring into the price the possibility, however remote, that the variance might be denied. In this case, the trial court had erred in calculating damages. It had awarded damages lower than those testified to by any of the expert witnesses, including the government’s expert witness. Thus, its decision was not supported by substantial competent evidence. Secondly, the possibility of obtaining a variance was treated as a certainty. Finally, the costs involved in adapting the property to take advantage of the variance were not included in the damages.

\textit{American Dive Center, Inc. v. State, Department of Transportation}.\textsuperscript{233} This was a per curiam opinion with which Judges Hersey, Polen, and Stevenson concurred. American Dive Center purchased another dive shop in 1989. The shop was never closed but the name was changed. In 1990, the Florida Department of Transportation (“DOT”) began the condemnation of an area which included the location of the dive shop. American Dive Center sought lost business damages but, to receive them, the business would have to be “an established business of more than 5 years’ standing.”\textsuperscript{234} The trial court granted summary judgment to the DOT on the basis that American Dive Center did not qualify.\textsuperscript{235}

The district court reversed.\textsuperscript{236} The supreme court had established that in such cases “[t]he essential inquiry . . . is whether there was ‘continuous operation of the business at the location where the business damages [were]
alleged to have been suffered.\textsuperscript{237} Whether the current owner had operated the business that was there for five years was not the issue. The trial court erred in granting summary judgment because the record did not conclusively show that a dive shop had not been operated at that site for five years.

\textit{Bolduc v. Glendale Federal Bank.}\textsuperscript{238} Judge Pariente wrote the opinion with which Chief Judge Dell and Judge Glickstein concurred. This case did not follow the normal order of proceedings for a condemnation of leased property. One tenant entered into a stipulated final judgment for its full damages. The other tenant had a jury trial to determine its total condemnation award, including business damages. Thereafter, the owner settled with the DOT. Subsequently, the tenants sought the apportionment of the owner’s award and won. The trial court granted them the “‘bonus value’ of their leasehold interests in the condemned property.”\textsuperscript{239}

The district court reversed, however.\textsuperscript{240} Had the tenants followed the normal procedure, the value of the property would have been determined first. A subsequent hearing would have been held to apportion the award according to the respective rights of the claimants. But the tenants here had taken other quicker routes to get full recovery. They were not entitled to more than that. The effect of the apportionment was to allow the tenants a double recovery. That was impermissible. This case should serve as a warning to tenants faced with condemnation.

\textit{Broward County v. Ellington.}\textsuperscript{241} Chief Judge Dell wrote the opinion. Judge Glickstein and Senior Judge Owen, William C., Jr., concurred. A consultant had been hired by the county to forecast the future needs of the Fort Lauderdale-Hollywood International Airport and had concluded that additional land should be acquired to meet the airport’s needs and to minimize noise conflicts with the surrounding communities. A second consultant was hired to determine how much additional property to acquire. Acting on these reports, the county began to buy the properties west of the airport. When one landowner would not sell, the county brought this eminent domain suit. Even though the landowner did not present any witnesses, the trial court found in his favor because it had concluded that the

\textsuperscript{237. Id. at 278 (quoting Tampa-Hillsborough County Expressway Auth. v. K.E. Morris Allignment Serv. Inc., 444 So. 2d 926, 930 (1983)).
238. 631 So. 2d 1127 (Fla. 4th Dist. Ct. App. 1994).
239. Id. at 1128.
240. Id. at 1129.
241. 622 So. 2d 1029 (Fla. 4th Dist. Ct. App. 1993).}
county had enough land for the airport's needs and that the land was not being taken for a public purpose.242

The district court reversed.243 The trial court was right in that private property may only be taken for a public purpose, but limiting uses which are incompatible with the operation of an airport is a public purpose.244 The trial court was also right in that private property may not be taken unless the taking is necessary to accomplish the public purpose. But the "necessity" requirement is of a reasonable necessity, not an absolute one. For the uninitiated, that may seem confusing. "Necessity" is an absolute term. How can it be modified to be less than absolute? The critical question is: necessary for what? As this case illustrates, that question may make necessary seem like a relative rather than an absolute term.

The Florida Supreme Court has provided a two-tier test to determine if property can be taken.245 First, the condemning authority must show it has a reasonable need for the condemnation. The Director of Planning and Development for the county's Aviation Department had testified that, in order to guarantee that commercial uses in this area would be airport related, the land must be taken by the government and subjected to the government's development scheme before being leased or sold for commercial use. The Director's conclusions were based upon studies by the consultants. The use was consistent with the county's master plan. That amounted to substantial competent evidence of the reasonable need, so it was enough to satisfy the first tier.

Once the first tier has been satisfied, the burden shifts. The second tier requires the challenger to show that the government has acted illegally, in bad faith, or has grossly abused its discretion. Here, the challenger had not submitted any evidence, so it failed to establish its affirmative defense.

City of Cocoa v. Holland Properties, Inc.246 Judge Peterson wrote the opinion with which Judges Goshorn and Thompson concurred. This case also involved the question of reasonable necessity and the Fifth District Court of Appeal relied on Ellington.247 The first tier of the two-tier test required the condemnor to show that it had a reasonable need to take the

242. Id. at 1030-31.
243. Id. at 1032.
244. See Test v. Broward County, 616 So. 2d 111 (Fla. 4th Dist. Ct. App. 1993).
245. See City of Jacksonville v. Griffin, 346 So. 2d 988 (Fla. 1977).
246. 625 So. 2d 17 (Fla. 5th Dist. Ct. App. 1993), review denied, 634 So. 2d 624 (Fla. 1994).
247. Ellington, 622 So. 2d at 1029.
property. Under *Broward County v. Steele*, the quantum of proof required to satisfy the first tier is the introduction of “some evidence showing reasonable necessity for taking.” The land was to be used for well sites and the city had obtained permits for the consumption of water to be produced from the St. Johns River Water Management District. The trial court then held a hearing to determine whether events since the issuance of the permit had eliminated the necessity, and decided that there was no necessity. The district court, however, concluded that this was an error. The issuance of the use permit was enough to satisfy the first tier. The evidence at the hearing would be relevant to the second tier, in order to determine whether the condemning authority had acted in bad faith or abused its discretion.

The legislature has revised certain procedural aspects of chapter 73 of the *Florida Statutes*. It has provided that section 73.032 shall be the “exclusive offer of judgment provisions for eminent domain actions.” It provides the time when offers of judgment must be made and the technical requirements of such offers. Sections on costs and on attorney’s fees were also modified, the most notable change being a schedule for determining the fee based on the benefit produced.

**XII. ENVIRONMENTAL LAW**

*Hughes Supply, Inc. v. Department of Environmental Regulation.* Chief Judge Harris wrote the majority opinion with which Judges Sharp and Peterson concurred. Hughes operated a fuel storage facility and paid the annual premiums to participate in the Florida Petroleum Liability Insurance and Restoration Program. Subsequently, Hughes discovered a discharge of diesel fuel coming from one of its storage tanks. Hughes reported the leak to the Florida Department of Environmental Regulation. The Department ordered the tank drained. Hughes, however, neglected to drain the tank in a timely manner. Thus, the Department denied Hughes

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248. 537 So. 2d 650 (Fla. 4th Dist. Ct. App. 1989).
249. *City of Cocoa*, 625 So. 2d at 19 (quoting *Steele*, 537 So. 2d at 651-52).
250. *Id.* at 20-21.
252. *See id.* at 565.
254. *Id.* § 73.092.
255. 622 So. 2d 1056 (Fla. 5th Dist. Ct. App. 1993).
256. *Id.* at 1057.
coverage for the restoration; as it determined that Hughes was not in substantial compliance with chapter 376 of the *Florida Statutes*.257

The Fifth District Court of Appeal upheld the Department's determination.258 The court reasoned that the owner need be knowledgeable of the rules but cannot rely on others for guidance. An instruction for drainage, while not ordered to be immediate, must, according to the rules, be accomplished within three days of discovering the leak. Hughes' actions failed to comply with the provisions required.259

*Young v. Department of Community Affairs.*260 Justice Harding wrote the majority opinion with which Justices Overton and Grimes concurred, Chief Justice Barkett concurred specially with an opinion with which Justices Shaw and Kogan concurred, and Justice Kogan concurred with an opinion with which Justice Shaw concurred in result only, and from which Justice McDonald dissented with an opinion.261 In rendering its opinion, the supreme court answered the Third District Court of Appeal's certified question by holding "that when the state land planning agency initiates a proceeding before the Florida Land and Water Adjudicatory Commission pursuant to section 380.07, *Florida Statutes* (1987), that agency carries both the ultimate burden of persuasion and the burden of going forward."262

In 1988, the Youngs applied for clearing permits on Big Pine Key. Monroe County granted the permits and transmitted copies to the Department of Community Affairs as required. The Department appealed those permits to the Florida Land and Water Adjudicatory Commission. The Youngs failed to participate at an administrative hearing because the Commission ruled that they had the burden of proof. The Commission denied the permits.263 Although the Third District Court of Appeal affirmed the Commission's denial, the supreme court quashed the decision and remanded the matter for a new hearing before a hearing officer.264 In so doing, the supreme court reasoned that the effect of the Department's purported appeal to the Commission was really a request to stay the effectiveness of an otherwise valid county order. Therefore, since it was the Department which asserted that the proposed development failed to comply

257. *Id.* at 1059.
258. *Id.* at 1061.
259. *Id.* at 1060.
260. 625 So. 2d 831 (Fla. 1994).
261. *Id.* at 831.
262. *Id.* at 835.
263. *Id.* at 832.
264. *Id.* at 835.
with chapter 380 of the *Florida Statutes*, the Department should bear the burden.265

XIII. EQUITABLE REMEDIES

*Jordan v. Boisvert.*266 Judge Joanos wrote the opinion with which Judges Miner and Kahn concurred. The parties signed an agreement for the sale of real property. The contract included a description of the property and a sketch, but provided for a survey to determine the exact legal description. Three surveys were conducted, each different due to the uncertainty as to which of several willow trees was intended to be a critical monument. When the parties could not agree on a legal description, the buyer brought this action for specific performance.

The First District Court of Appeal affirmed the denial of relief. Pointing out that the "trial court’s judgments are entitled to a presumption of correctness,"267 it added that

> [t]he fact that the surveyor performed three surveys, each of which varied the boundary lines of the property at issue, constitutes substantial evidence to support the trial court’s finding that even considering the description in the contract for sale, attached drawing, and extrinsic evidence, the description was insufficient to permit a surveyor to establish the boundaries of the property.268

Since the exact property could not be identified, there had been no meeting of the minds. Consequently, there was no contract.

The trial court had reserved jurisdiction to determine the attorney’s fees to be awarded. The district court found this to be an error because the basis for the award was the attorney’s fees provision in the contract.269 Since the contract did not exist, logically fees could not be awarded under one of its terms.

*Long v. Moore.*270 This is a per curiam decision with which Judges Smith, Kahn, and Lawrence concur. The Longs bought a home for $100,000 from the Moores. The terms were $50,000 down with the sellers taking back a $50,000 purchase money mortgage. When the Longs could

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265. Young, 625 So. 2d at 835.
266. 632 So. 2d 254 (Fla. 1st Dist. Ct. App. 1994).
267. Id. at 256.
268. Id. at 257.
269. Id.
270. 626 So. 2d 1387 (Fla. 1st Dist. Ct. App. 1993).
not make the payments, Mr. Moore took them to the courthouse where they executed a deed conveying the property back to the Moores. Apparently, the Longs were allowed to remain in possession under a lease. Subsequently, the Moores filed an action to recover unpaid rent and evict the Longs from the property. The Longs counterclaimed for rescission of both the original sale and the subsequent reconveyance, and for the imposition of an equitable lien on the property.\textsuperscript{271}

The rescission claim was based upon Mr. Long being a paranoid schizophrenic. This condition prevented him from understanding the nature and effect of this long-term real estate transaction, even though he was able to comprehend the arithmetic involved. A conveyance to or from a party under such mental disability would be voidable. However, this author cannot help but wonder who, besides Mr. Long, constituted the "Longs." Presumably, it was Mrs. Long. But there was no mention of her existence, or her mental capacity or condition. The existence of a competent co-grantee or co-grantor would certainly seem to be relevant to the issue of rescission.

A critical issue in granting rescission was whether the court would be able to return the parties to the \textit{status quo ante}. Here, it appears that the Moores were not in a position to return the down-payment to the Longs. However, the court notes that it would be sufficient to fashion an equitable remedy "which would be fair to both parties."\textsuperscript{272} An example provided is to subject the property to an equitable lien in favor of the Longs for whatever amount the trial court subsequently determines is due to them.

\textit{Zanakis v. Zanakis}.\textsuperscript{273} The opinion was written by Judge Klein and concurred with by Judge Hersey and Senior Judge Owen, William C., Jr. This case involved the imposition of a constructive trust and the clarification of the terms "resulting trust" and "constructive trust." The mother of two sons owned property. She quitclaimed the property to herself and her responsible son so they would hold it as joint tenants with the right of survivorship. The purpose of the transfer was to hold the property for the other son who had problems with drugs and alcohol.

When the problem son was killed, the responsible son abandoned his wife and moved in with his late brother's widow. They later married. A dispute arose with his mother, so the "responsible" son quitclaimed the property to his new wife. She brought this action for partition. Granting

\begin{itemize}
\item \textsuperscript{271} \textit{Id.} at 1388.
\item \textsuperscript{272} \textit{Id.} at 1389.
\item \textsuperscript{273} 629 So. 2d 181 (Fla. 4th Dist. Ct. App. 1993).
\end{itemize}
the mother’s counterclaim, the trial court “imposed a resulting trust” on the property for the benefit of the mother.

A constructive trust is a remedy imposed by the court of equity to avoid unjust enrichment, even though it is not what the parties intended. In contrast, a resulting trust arises because that is what the parties intended and equity regards the substance rather than the form of a transaction. The trial judge correctly recognized that this was a situation for a resulting trust, although to characterize it as “impos[ing] a resulting trust” would be incorrect. This resulting trust arose upon the delivery of the deed by the mother because the parties intended the title to be held for the benefit of the problem son. However, the result was correct even if the labeling was not.

The “responsible” son also argued that the parol evidence rule should have prevented the admission of evidence regarding a resulting or constructive trust. The district court correctly rejected that argument. It is, as the court stated, “well-established that constructive or resulting trusts involving real estate can be based on parol evidence.”

The parol evidence rule provides that the terms of an integrated agreement may not be contradicted by proof of a prior or contemporaneous oral agreement or an earlier tentative draft. In this resulting trust, there was no attempt to vary the terms of the deed. The legal title was vested in the grantee exactly as the deed specified. However, equity recognized that the parties intended an additional consistent term, that the “responsible” son, the legal title holder, hold that title in trust. Similarly, the parol evidence rule is inapplicable to a constructive trust. The constructive trust is not based upon a prior or contemporaneous agreement. It is not based upon any agreement. It is a remedy to prevent unjust enrichment.

XIV. HOMESTEAD

Hubert v. Hubert Judge Klein wrote the majority opinion with which Judges Anstead and Senior Judge Owen, William C., Jr., concurred. The court reversed a trial court order establishing that the appellant’s remainder interest in his deceased father’s homestead was not exempt from

274. Id. at 182.
275. Id.
276. Id. at 183.
277. Id.
279. 622 So. 2d 1049 (Fla. 4th Dist. Ct. App. 1993), review denied, 634 So. 2d 624 (Fla. 1994).
the levy of creditors because his remainder was subject to a life estate in someone other than the decedent's heirs.280

Decedent was survived by two sons, Donald and Richard. The father bequeathed to Donald the entire estate, except for a present life estate in the homestead to his father's friend or until the father's friend remarried. Richard was a judgment creditor of the estate and maintained that the remainder was not exempt. Richard's theory was that the homestead lost its exempt status when the decedent bequeathed a life estate to someone other than an heir. Donald argued that if the current life estate had been held by a surviving spouse, his interest would still be exempt. Likewise, a vested remainder interest can be granted to a lineal descendant and a life estate given to the surviving spouse, while both of them are protected. The trial court agreed with Richard.281 The district court ruled that while the homestead protection did not inure to the life estate, it did inure to the remainder interest.282

*Jacobs v. Jacobs.*283 Judge Cobb wrote the majority opinion reversing and remanding the trial court's awarding attorney's fees. Judge Dauksch concurred and Judge Griffen concurred with an opinion. In determining the attorney's fee issue, the court had to decide whether Mary Jacobs' position was frivolous. In essence, she claimed that she could waive her homestead rights after her spouse passed away and that it would have the same effect as if she had waived her homestead rights while he was alive.284

Jake and Mary Jacobs married in 1954. Jake had four children from a previous marriage and Mary had one child from a previous marriage. Jake had a piece of property titled solely in his name. In 1984, he executed a will which devised all of his property as follows: 30% to Mary and 70% to his children and stepson. However, in 1989, Jake executed a warranty deed of the property to Mary. After his death, Mary attempted to rescind the deed, stating that Jake did not have the mental capacity to execute it. The trial court denied recission and the four stepchildren demanded and received attorney's fees on the ground that the action was frivolous. Their contention was that Mary would fair the same regardless of whether the property was received through deed or by homestead.285

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280. *Id.* at 1049.
281. *Id.* at 1050.
282. *Id.* at 1051.
283. 633 So. 2d 30 (Fla. 5th Dist. Ct. App. 1994).
284. *Id.* at 31.
285. *Id.*
Mary argued that she could have taken under Jake's will, rather than accept the life estate in the homestead property under Florida law. Mary never executed a waiver of her rights to the homestead property, either before or during the marriage. Jake could not devise his property other than to a surviving spouse. The question was whether he could devise in part. According to the appellate court, there should be no impediment of a spouse choosing to accept less than 100% of the fee or the life estate. The only issue was the attorney's fees, as such, the argument was not frivolous and the award of fees was reversed.286

King v. Ellison.287 Judge Polen wrote the majority opinion with which Judge Dell and Senior Judge Walden, James H., concurred. The court affirmed the trial court's dismissing with prejudice a complaint seeking a declaratory decree that the testators became the constructive trustees of the subject property for all of the children and stepchildren named in the will.288 In so doing, the district court certified the following question:

WHETHER SECTION 732.401(1), FLORIDA STATUTES (1991), WHICH VESTS A REMAINDER INTEREST IN HOMESTEAD PROPERTY IN LINEAL DESCENDANTS, IS UNCONSTITUTIONAL WHEN APPLIED TO DEFEAT A TESTATOR'S INTENT TO DEVISE HOMESTEAD PROPERTY EQUALLY TO ADULT STEPPCHILDREN AS WELL AS ADULT LINEAL DESCENDANTS?289

King is the natural daughter of Florence Calhoun, and Ellison is the natural daughter of Hubert Calhoun. Florence and Hubert were married and executed wills devising their individual estates to all of their children and stepchildren to share and share alike. After Florence died, Hubert married Rosemarie. Two years later Hubert died, leaving Rosemarie with a life estate and the remainder in Hubert's lineal descendant, Ellison. Appellants purchased the life estate from Rosemarie. King argued that the remarriage should not cause the lineal descendants of Florence to be divested of what was their and their natural mother's home. King asked at trial for the appellees to be named as constructive trustees of the property and be given proportional credit for the purchase price of the life estate. King argued that

286. Id. at 32.
287. 622 So. 2d 598 (Fla. 4th Dist. Ct. App. 1993), review granted, 632 So. 2d 1026 (Fla. 1994).
288. Id. at 600.
289. Id.
section 732.401 of the Florida Statutes was unconstitutional as the adult children of Hubert were benefitted over the wishes contained in Florence's will. The trial court dismissed the complaint. 290

The Fifth District Court of Appeal, while finding merit in King's argument, failed to agree that the state has no legitimate interest in vesting the remainder in adult descendants. Therefore, it certified the above question to the Florida Supreme Court. 291

LaBelle v. LaBelle. 292 Judge Cobb wrote the majority opinion with which Judge Thompson and Associate Judge Hauser concurred. Dorothy LaBelle was permitted to intervene in the dissolution involving her ex-husband Rupert and his then wife Carmel without objection from either party. Rupert fraudulently used Dorothy's funds to obtain a residence which he claimed was protected from a constructive trust since it was his homestead. 293 Since the homestead protection does not apply to properties which are purchased with traceable fraudulently obtained funds, Rupert could not validly rely on the homestead protection. 294

Sigmund v. Elder. 295 Judge Smith wrote the opinion with which Judges Ervin and Allen concurred. The First District Court of Appeal affirmed the trial court's finding that a deed executed by the decedent to himself and his wife to create a tenancy by the entirety in homestead property was void ab initio under the 1885 Florida Constitution since the surviving wife did not join in the execution. 296 At trial, Ruth was found to possess a life estate with the surviving adult children possessing the remainder interest. 297

The district court rejected the surviving spouse's arguments that the Marketable Record Title Act should cure the problem and that section 689.11 of the Florida Statutes permitted such a transfer, since the constitutional requirements controlled. 298
XV. INSURANCE

State Farm Fire and Casualty Co. v. Metropolitan Dade County.\(^{299}\) This is a per curiam opinion from an appeal heard before Chief Judge Schwartz and Judges Baskin and Levy. The question before the court was whether the replacement cost homeowner’s insurance policy in question would provide coverage for the cost of complying with the county’s requirement that homeowners, after the impact of Hurricane Andrew, make structural improvements to their houses to bring them into compliance with the South Florida Building Code including, but not limited to, elevating the houses to conform to the county’s flood elevation requirements.\(^{300}\)

Noting that the construction of ambiguities in an insurance policy is a question of law, the court found that the language in question was not ambiguous and needed no construction.\(^{301}\) The policy in question was not subject to more than one interpretation. It first excluded enforcement of an ordinance or law regulating construction or repair of a structure. It provided that there would be no insurance for losses or increased costs associated with the enforcement to be in compliance with construction laws or regulations. Therefore, the appellate court held that the trial court erred in finding the policy and its exclusions ambiguous and unclear as a matter of law.\(^{302}\)

XVI. INVERSE CONDEMNATION

Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.\(^{303}\) Justice Grimes wrote the opinion in which Chief Justice Barkett and Justices Overton, Shaw, Kogan, Harding, and Senior Justice McDonald concurred. Chief Justice Barkett also wrote a brief concurrence, in which Justice Kogan concurred, to clarify that total takings and temporary takings were not the only categories of unconstitutional takings possible. Until 1990, when it was declared unconstitutional in Joint Ventures, Inc. v. State, Department of Transportation,\(^{304}\) a statute\(^{305}\) had allowed certain agencies to designate privately owned land as being reserved for road construc-

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299. 639 So. 2d 63 (Fla. 3d Dist. Ct. App. 1994).
300. id. at 64.
301. id. at 65.
302. id. at 66.
303. 640 So. 2d 54 (Fla. 1994), opinion clarified, 1994 WL 275841 (Fla. Apr. 7, 1994).
304. 563 So. 2d 622 (Fla. 1990).
tion. No building permits could be issued for new construction or for substantial renovation of nonresidential structures for at least five years on land so designated. Two landowners claimed, in inverse condemnation suits, that they were entitled to compensation because the designation of their land had amounted to a taking, a temporary taking during the period between the land's designation and decision striking down the statute which allowed the designation. In the trial court, the landowners prevailed on a motion for summary judgment and the district court affirmed, but certified the following question to the Florida Supreme Court:

WHETHER ALL LANDOWNERS WITH PROPERTY INSIDE THE BOUNDARIES OF INVALIDATED MAPS OF RESERVATION UNDER SUBSECTIONS 337.241(2) AND (3), FLORIDA STATUTES (1987), ARE LEGALLY ENTITLED TO RECEIVE PER SE DECLARATIONS OF TAKING AND JURY TRIALS TO DETERMINE JUST COMPENSATION.

The supreme court responded with a negative answer.

The crux of the problem was that the supreme court had not clearly stated the basis for its decision in Joint Ventures. If the basis for invalidating the statute had been its violation of the taking clause, then compensation would have been required and the only issue in question would have been the amount. However, if the basis had been the violation of the Due Process Clause, then no compensation would be required unless provided for by a statute.

The Florida Supreme Court concluded that Joint Ventures relied upon a due process violation because: the plaintiffs had not sought compensation for a taking; the court's analysis had focused on the method, not the effect of the statute; and the decision was to invalidate the statute, not to require the agency to choose between abandoning its action or providing compensation. Thus, the relief sought, the court's analysis, and the court's conclusion were all consistent with a due process violation.

The conclusion would not necessarily deprive the plaintiffs of relief. It merely deprived them of a head start in their litigation. Because the taking had already been established in the earlier case, on remand the

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306. Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp., 608 So. 2d 52 (Fla. 2d Dist. Ct. App. 1992), review granted, 621 So. 2d 433 (Fla. 1993), and quashed by 640 So. 2d 54 (Fla. 1994).

307. Joint Ventures, 563 So. 2d at 622.

308. Tampa-Hillsborough, 640 So. 2d at 57-58.
plaintiffs would have to prove that their land had, in fact, been taken during the period that it was designated as being reserved for road construction.

_Palm Beach County v. Wright._ Chief Justice Grimes wrote the opinion with which Senior Justice McDonald and Justices Overton, Shaw, Kogan, and Harding concurred. The Palm Beach County Comprehensive Plan ("Plan") included a section on traffic circulation. On a map, it identified transportation corridors for new roads or the expansion of existing roads. The Plan prohibited the granting of any permits for development within the corridors which would interfere with the future roadway construction. Owners of property along an existing road challenged the constitutionality of the Plan because the map showed that part of their land would be the site of possible future road widening. The constitutionality of this part of the Plan was attacked based upon the precedent of _Joint Ventures_310 in which the supreme court had declared a similar statute311 unconstitutional. The issue was presented to the supreme court in the form of the following certified question:

IS A COUNTY THOROUGHFARE MAP DESIGNATING CORRIDORS FOR FUTURE ROADWAYS, AND WHICH FORBIDS LAND USE ACTIVITY THAT WOULD IMPEDE FUTURE CONSTRUCTION OF A ROADWAY, ADOPTED INCIDENT TO A COMPREHENSIVE COUNTY LAND USE PLAN ENACTED UNDER THE LOCAL GOVERNMENT COMPREHENSIVE PLANNING AND LAND DEVELOPMENT REGULATION ACT, FACIALLY UNCONSTITUTIONAL UNDER _Joint Ventures, Inc. v. Department of Transportation_?312

The supreme court provided a negative answer. The statute in _Joint Ventures_ had been found to violate the Due Process Clause, not the taking clause.313 Consequently, it could not be used as the basis for a claim that a taking _per se_ had occurred.

Furthermore, the supreme court concluded that this ordinance did not, on its face, violate the Due Process Clause.314 Comprehensive planning for future growth protects the public and is, consequently, a proper exercise of governmental authority.

309. 641 So. 2d 50 (Fla. 1994).
310. _Joint Ventures, 563 So. 2d at 622 (Fla. 1990); see also A.G.W.S. Corp., 608 So. 2d at 52.
312. _Wright, 641 So. 2d at 51 (citation omitted).
313. Id.
314. Id. at 53.
of the police power. That planning must logically include plans to handle increased traffic. Thus, a legitimate state interest was substantially advanced. While the statute in Joint Ventures was intended only to depress the price that the public would have to pay if it eventually took the land, this ordinance was intended to ensure that future development would be compatible with the Comprehensive Plan. It provided the county flexibility in dealing with placement of the roads and issuance of permits to offset particular hardships. Moreover, most land adjacent to the corridors would increase in value, giving its owners benefits to offset any loss.

The court recognized that some landowners may suffer harm due to their particular circumstances. They would be able to claim that they had suffered from a taking. But the court went on to remind readers that: the landowner’s entire parcel would be considered in making that determination; a taking would only occur when the landowner had been deprived of substantially all economically beneficial use of the land; and such a claim would probably be premature until a landowner had been denied a development permit.

Department of Transportation v. Gefen. Chief Justice Grimes wrote the unanimous opinion. The landowner’s property fronted on a street on which there were access ramps to the interstate highway. When the access ramps were closed, the property decreased in value as a commercial site. The landowner brought this inverse condemnation action for compensation for his loss and prevailed at trial and before the district court. The supreme court reversed, answering in the negative the following certified question:

WHETHER AN OWNER OF COMMERCIAL PROPERTY HAS SUFFERED A COMPENSABLE TAKING WHERE ACCESS TO AN INTERSTATE HIGHWAY BY MEANS OF A STREET FRONTING ON APPELLEE’S PROPERTY IS CLOSED, AND SAID CLOSING RESULTS IN SUBSTANTIALLY DIMINISHED ACCESS TO THE SUBJECT PROPERTY, ALTHOUGH NO ACCESS FROM ABUTTING STREETS HAS BEEN CLOSED.

315. Id.
316. Id. at 54.
317. 636 So. 2d 1345 (Fla. 1994).
318. Id. at 1345.
The supreme court found that *Palm Beach County v. Tessler* was distinguishable from *Gefen*. In *Tessler*, the court held that an inverse condemnation action might lie for substantial loss of access even though none of the landowner’s property is appropriated. However, in this case, access to a public road was not diminished, i.e., there was no loss of access. The harm was caused by a diminution in traffic flow along the fronting road. That was not a compensable loss.

More interesting is the dicta in this case. The Department has plans to condemn a portion of this land at some time in the future. When it does happen, the Department will not be allowed to take advantage of the value reduction which resulted from its having closed the access ramps. The court held that would be like a condemning authority trying to take advantage of the decrease in property values caused by the announcement of its plans to condemn, which has long been prohibited.

*Alexander v. Town of Jupiter.* Judge Warner wrote the opinion with which Judges Anstead and Gunther concurred. Landowner applied for a permit to clear property so that a survey could be conducted. The permit was refused because zoning ordinances had not yet been adopted to conform the zoning to the comprehensive plan. It took over two years to obtain the permit. The landowner sued, *inter alia*, for temporary taking of her property. The trial court rejected the claim based upon the ripeness doctrine. It reasoned that the original denial was not a final decision on the application.

The district court disagreed and reversed. A claim of permanent taking would be precluded by the ripeness doctrine. But the claim here was for compensation for a temporary taking. It would turn on whether the delay was reasonable, i.e., merely a normal delay associated with the public land use planning process or not. As a statute required inconsistencies between zoning and the comprehensive plan be resolved within one year, the district court concluded that a temporary taking might have occurred here.

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319. 538 So. 2d 846 (Fla. 1989).
321. *See* Dade County v. Still, 377 So. 2d 689 (Fla. 1979); *State v. Chicone*, 158 So. 2d 753 (Fla. 1963).
322. 640 So. 2d 79 (Fla. 4th Dist. Ct. App. 1994).
323. *See* Glisson v. Alachua County, 558 So. 2d 1030 (Fla. 1st Dist. Ct. App.), *review denied*, 570 So. 2d 1304 (Fla. 1990) (adopting the federal ripeness doctrine).
324. *Alexander*, 640 So. 2d at 83.
325. FLA. STAT. § 163.3202 (1985).
326. *Alexander*, 640 So. 2d at 83.
Chief Judge Frank wrote the opinion with which Judges Ryder and Patterson concurred. A bald eagle nest was discovered in the 173 acres which a developer had bought. Development within 750 feet of the nest was prohibited until inspectors concluded, three years later, that the eagles had abandoned the nest. The developer sued, claiming that his land had been taken. The Second District Court of Appeal disagreed.

First, the court pointed out that the nature of the claim was that a regulatory taking had occurred. The government had not physically taken the property. One factor to be considered was "whether the regulation precludes all economically reasonable use of the property." In this case, the development was to proceed in six phases, but protection of the eagle's nest only delayed one phase. The developer "retained the desired use of the majority of its land; most of the property was developed. Because the property as a whole retained an economic life, we cannot agree that the land use restrictions are compensable."

The court went on to point out that "[t]he government neither owns nor controls the migration of the wildlife species it protects." Consequently, "[o]f the few courts that have encountered this question, most agree that the government owes no compensation for and may constitutionally protect wildlife whose unwanted occupation on private land arguably diminishes the market value of that land." It seems to be suggesting that compensation would never be required where the regulation is for the protection of wildlife. It is doubtful that such a sweeping rule should, or could, ever develop.

XVII. LANDLORD AND TENANT

The Florida Bar re Advisory Opinion-Non Lawyer Preparation of and Representation Of Landlord in Uncontested Residential Evictions. Last year, the Florida Supreme Court decided to conduct an experiment. For one year, it would allow property managers to complete, sign, and file com-

327. 636 So. 2d 761 (Fla. 2d Dist. Ct. App. 1994).
328. Id. at 764.
330. Id. at 765.
331. Id.
332. Florida Game, 636 So. 2d at 765-66.
333. 627 So. 2d 485 (Fla. 1993) [hereinafter Advisory Opinion].
plaints and motions for default using approved forms in uncontested residential evictions for nonpayment of rent. Further, in uncontested cases, property managers could also obtain final judgments and writs of possession. But the terms “property manager” and “uncontested residential eviction” had not been defined.

The supreme court, after reviewing numerous comments and suggestions, decided that, for the purpose of this experiment, a property manager would be “one who is responsible for the day-to-day management of the residential rental property, as evidenced by such factors as responsibility for renting of units, maintenance of rental property, and collection of rent.” A corporate manager could qualify under this definition. The manager must have written authorization from the landlord to perform these responsibilities.

A case would be considered contested, for the purposes of this experiment, when a hearing was scheduled. Once a hearing is scheduled in a case, the landlord will have to hire an attorney for representation or the landlord will have to go to the hearing himself.

Hillman Construction Corp. v. Wainer. Judge Farmer wrote the opinion with which Judges Glickstein and Pariente concurred. A tenant had hired a general contractor to improve the rental property. The contractor had not been paid and the tenant had filed bankruptcy. The landlord regained possession and rented the premises to a new tenant. The contractor filed an action against the landlord for unjust enrichment based upon the allegations that the improvements enhanced the value of the premises and allowed the landlord to charge the new tenant a higher rent. The trial court had dismissed for failure to state a claim, but the district court reversed.

In so doing, the district court stated:

The elements of a cause of action for unjust enrichment are: (1) plaintiff has conferred a benefit on the defendant, who has knowledge thereof; (2) defendant voluntarily accepts and retains the benefit conferred; and (3) the circumstances are such that it would be inequita-
ble for the defendant to retain the benefit without paying the value thereof to the plaintiff. 339

The facts in plaintiff's complaint sufficiently alleged these elements. The court emphasized that it was not ruling on the merits of the claim. It was only deciding that if the plaintiff managed to prove what it had alleged, then theoretically it might prevail.

The plaintiff had also made a claim for an equitable lien based upon the same facts. The trial court had also dismissed that claim and, in a footnote, the district court agreed. 340

It is interesting that the case did not involve a construction lien; 341 perhaps the contractor had not complied with the statutory requirements for obtaining one. A construction lien can attach to the landlord's interest if the improvements are made in accordance with the terms of the lease. 342 However, the landlord may protect its property from construction liens by 1) having the lease provide that construction liens will not attach to the landlord's interest and 2) recording the lease or a notice of that clause if all leases on this property include the same clause. 343 If the lease specifically provided that no construction lien could attach and the contractor had notice, even constructive notice, of that, it would seem inequitable to allow the contractor to circumvent the spirit of that agreement by recovering under the unjust enrichment theory.

Homeowner's Corp. of River Trails v. Saba. 344 Judge Altenbernd wrote the opinion with which Acting Chief Judge Ryder and Judge Patterson concurred. A homeowners/tenants association had challenged an increase in the lot rentals. When mediation failed, the association filed an action to have the rent increase declared unreasonable. Section 723.033(1) of the Florida Statutes provides:

If the court, as a matter of law, finds a mobile home lot rental amount, rent increase, or change, or any provision of the rental agreement, to be unreasonable, the court may: (a) Refuse to enforce the lot rental agreement. (b) Refuse to enforce the rent increase or change. (c) Enforce the remainder of the lot rental agreement without the unreasonable provision. (d) Limit the application of the unreasonable provision

339. Id.
340. Id. at 577 n.1.
342. Id. § 713.10.
343. Id.
344. 626 So. 2d 274 (Fla. 2d Dist. Ct. App. 1993).
so as to avoid any unreasonable result. (e) Award a refund or a reduction in future rent payments. (f) Award such other equitable relief as deemed necessary.  

The trial judge, however, entered a partial final judgment based upon a finding that the statute was unconstitutional on its face for a number of reasons, including: 1) that it violated the due process clause of the Florida Constitution; 2) that it violated the due process clause of the United States Constitution; 3) that it was an unconstitutional delegation of legislative authority; and, 4) that it was a per se taking of private property without payment of just compensation in violation of both the Florida Constitution and the United States Constitution. The district court found the conclusions to be premature. The questions involved both law and fact, but the trial court had not heard any evidence.

It also pointed out that this was not a rent control statute in the traditional sense. Such statutes require landlords to rent at below market prices and are justified by an emergency. But this statute only would prevent rent that was in excess of the market rate. Consequently, this statute could not be invalidated on the basis that there was no legislative finding of an emergency.

_Hutchinson v. Kimzay of Florida, Inc._ Judge Thompson wrote the opinion with which Judge Peterson concurred specially, without opinion. Judge Griffin concurred in part, but dissented in part. Kimzay had a long term ground lease. The ground rent would escalate when one of the following events occurred: twenty-five years had expired or Kimzay was no longer the largest subtenant. Hutchinson claimed that the latter had occurred and sent Kimzay a twenty-day notice of default because the rent payment was inadequate. When the increased payments were not made, the landlord sent a three-day notice letter demanding the rent due or possession of the property.

The tenant in this case was in an odd situation. The rent was to be adjusted according to the Commodity Price Index, which no longer existed.

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347. U. S. CONST. amend. XIV.
348. FLA. CONST. art. II, § 3; id. art. III, § 1.
349. Id. art. X, § 6.
350. _Saba_, 626 So. 2d at 275.
351. See FLA. STAT. § 723.033(4) (1993).
352. 637 So. 2d 942 (Fla. 5th Dist. Ct. App. 1994).
353. Id. at 943.
So the rent could not be determined with certainty and yet the tenant was being threatened with eviction for nonpayment of the correct amount. The tenant then filed suit for a declaratory judgment on the amount of the rent and also for an injunction to prevent the landlord pursuing the eviction until the amount had been determined. The trial court granted a temporary injunction, but the landlord counterclaimed for possession of the premises and damages.\textsuperscript{354} The tenant filed a motion to dismiss that counterclaim, alleging its filing violated the injunction. After the ensuing motions and hearings, the trial court affirmed its earlier injunction. The district court interpreted this as the granting of a second injunction.\textsuperscript{355}

The district court found that the first injunction had expired by its own terms when the tenant failed to post the required bond.\textsuperscript{356} Moreover, it concluded that the trial court had erred by granting the first injunction because the tenant had an adequate remedy at law and would not have suffered irreparable harm without the injunction.\textsuperscript{357} It could simply have raised the need to determine the rent as a defense in the eviction action.

The district court also found that the second injunction had been improperly granted because: the court had not stated the reasons for its decision; the decision was not based upon affidavits, verified pleadings, or sworn testimony; and the trial judge failed to require that a bond be posted as was required by the Rules of Civil Procedure.\textsuperscript{358}

It seems logical to allow a tenant a reasonable opportunity to have the rent determined and make the payment before the tenant can be evicted for nonpayment. If the county court could fashion that relief, then the remedy at law would be adequate. There is apparently nothing in this case to suggest that the county court could not have determined the rent and then have given the tenant a reasonable time to pay before any eviction order would take effect. But the case provides an example of why a rent escalation clause should provide not only a formula for determining the rent, but a procedure by which the rent can be determined if a planned formula fails for some reason. Arbitration or the provision of alternative formulae might be considered by the parties.

\textsuperscript{354} Id. at 944.
\textsuperscript{355} The first was issued on June 26, 1992 and the second was issued on December 18, 1992.
\textsuperscript{356} Hutchinson, 637 So. 2d at 944.
\textsuperscript{357} Id.
\textsuperscript{358} Id.; see also FLA. R. CIV. P. 1.610(b).
Meli Investment Corp. v. O.R. 359 This was a per curiam opinion in which Judges Barkdull, Nesbitt, and Goderich joined. Claiming the tenants had heldover beyond the end of the lease, a landlord sued for eviction and damages. The tenants disputed the holdover claim and counterclaimed based upon wrongful eviction, harassment and discrimination against a victim of AIDS which was, and is, prohibited by statute. 360 After the tenants prevailed, the court considered their motion for attorney's fees.

Both the Florida Residential Landlord and Tenant Act 361 and section 760.50(6)(a)(3) of the Florida Statutes provide for the recovery of reasonable attorney's fees by the prevailing party. 362 The trial court, after hearing evidence, determined that tenants' counsel had expended sixty hours on the case and were entitled to an hourly rate of $175. It then applied a risk multiplier of two to reach a total award of $21,000.

The district court vacated this decision and remanded the case with directions not to use a risk multiplier. 363 The court noted that attorney's fees cases are divided into “three basic categories: 1) public policy enforcement cases; 2) tort and contract claims; and 3) family law, eminent domain, and estate and trust matters.” 364 A risk multiplier is applicable in the public policy category only to offset a litigants facing substantial difficulties in finding legal counsel. However, there was no evidence in the record that such substantial difficulties existed in this case. The trial court erred in applying a risk multiplier to counsel's efforts in that aspect of the case. 365

The risk multiplier is applicable to tort and contract claims. The trial court would have been correct in applying it to the portion of counsel's time spent on the issue of whether the tenants had held over or whether either party had breached the terms of the lease. On remand, the trial court would have to divide counsel's time between these two categories and then recalculate the total fee.

N.E.P. International, Inc. v. Falls. 366 Judge Hersey wrote the opinion with which Judges Gunther and Warner concurred. The tenant breached the lease. The lease allowed rent acceleration in the event of the tenant's

359. 621 So. 2d 676 (Fla. 3d Dist. Ct. App. 1993).
362. See id. § 83.48.
364. Id. (citing Standard Guar. Ins. Co. v. Quanstrom, 555 So. 2d 828, 833 (Fla. 1990)).
365. Id.
366. 629 So. 2d 1019 (Fla. 4th Dist. Ct. App. 1993).
default, so the trial court awarded judgment for the full amount of the rent, including charges and real estate taxes for the full unexpired term. That was error. In awarding damages, future damages must be reduced to their present value. 367

What complicated this case further was that the property was taken by eminent domain after the breach but before the term was scheduled to end. When a landlord has been allowed to recover future rent, taxes, or other charges (even at the reduced present value), there must be a provision to credit the tenant with any rent the landlord received or any overpayment for the taxes or charges by the tenant. An accounting must eventually take place. A trial court could retain jurisdiction to perform this accounting, or simply provide that an independent action for an accounting may be brought later.

In this case, the lease had been terminated by the taking. There would be no future damages to reduce when the trial court reconsidered the case on remand. At that time, the court could also perform the accounting and then award damages along with prejudgment interest.

_Orlando Regional Center, Inc. v. Ivey Properties, Inc._ 368 Judge Peterson wrote the opinion with which Judges Dauksch and Cobb concurred. This was a declaratory judgment action brought to determine the rent due under the terms of a commercial lease. The rent included a percent of the gross annual revenues, over a base amount, and a credit for capital expenditures. The lease provided instructions for calculating these amounts in narrative form, so calculating the rent was a complicated matter, at best. The trial court’s decision was reversed because “[n]either the result proposed by the lessee nor the result proposed by the lessor and accepted by the trial court represents an end product of a logical straightforward application of the lease provisions in question.” 369

What is noteworthy about this case is the court’s suggestion for the future. “The lease does not provide an example of a computation, a common method of aiding the interpretation of narrative instructions in making mathematical calculations. An example could have avoided this litigation.” 370 The court demonstrated this by reducing the narrative to mathematical formulae 371 and then applying the formulae to the numbers

367. _Id._ at 1019.
368. 622 So. 2d 1094 (Fla. 5th Dist. Ct. App. 1993).
369. _Id._ at 1095.
370. _Id._ at 1094 n.1.
371. _Id._ at 1095.
on which the parties had agreed. Those drafting or negotiating a commercial lease would be well advised to follow the court's advice. 

*Seymour v. Adams.* Judge Griffin wrote the opinion. Chief Judge Harris and Judge Dauksch concurred. The landlords obtained an eviction judgment, including a judgment for $8600 in unpaid rent. When the sheriff executed the eviction writ, the tenant could not remove his personal property, so it remained in the landlords' possession. The tenant demanded access to the property, but the landlords refused, claiming a lien for the unpaid rent. The tenant paid the rent due and again demanded his personal property. The landlords again refused, this time based on a claim for the unpaid storage fees.

The tenant sued for conversion, property damage, civil theft, and return of the property. The trial court granted the landlords' motion for summary judgment, but the district court reversed. The lease did not give the landlord the right to retain possession of the tenant's personal property. The landlords were not entitled to retain possession for unpaid storage fees based on the "Disposition of Personal Property Landlord and Tenant Act" because they had not complied with its requirement of notice. The statutory landlord's lien for unpaid rent did not give them the right to retain possession. Furthermore, docketing the writ of execution did not give them the right to retain possession. Consequently, summary judgment should not have been granted on these claims because they were based upon the landlords' wrongful refusal to return personal property to the tenant.

*Thal v. S.G.D. Corp.* This was a per curiam opinion by Judges Jorgenson, Levy, and Gersten. One of the terms of the lease to Foljan, the tenant, required that he pay the property taxes. After the taxes fell three years in arrears, the landlord sued to terminate the lease and evict the possessors. Landlord and tenant entered into a settlement agreement, supported by consideration, under which Foljan surrendered the lease. The problem was that Foljan had subleased the premises to S.G.D., and S.G.D.
had refused to settle the case. The trial court refused to evict the subtenant. 380

The case turned on whether the settlement agreement amounted to a termination of the Foljan's lease or whether it amounted to a surrender. If the master lease is terminated, the rights of subleases are also terminated because they are based upon the master lease. However, if the master lease is voluntarily surrendered, then the landlord is the recipient of the tenant's interest encumbered by the subleases. The district court concluded that the master lease had been canceled due to the tenant's default in not paying property taxes. Thus, since the master lease fell, the sublease also fell. 381 The fact that the judgment was entered based upon an agreement of the parties did not change that characterization.

The subtenant argued that it should not be evicted because it would lose $400,000 in improvements. The district court had little sympathy for this argument. 382 It pointed out that this was a commercial sublease, entered into at arms length between sophisticated business people. The corporation knew that the sublease was no better than the lease of its mesne landlord and, therefore, it had the opportunity to protect itself. Consequently, there was nothing in the record to justify equitable relief. 383

XVIII. LIENS AND MECHANIC'S LIENS

All-Brite Aluminum, Inc. v. Desrosiers. 384 Acting Chief Judge Parker wrote the majority opinion with which Justices Altenbernd and Blue concurred. All-Brite filed this appeal challenging a lower court decision that it was not the prevailing party under section 713.29 of the Florida Statutes 385 and, therefore, was not entitled to an award of attorney's fees and costs. 386 The dispute arose from a construction contract between the Desrosiers, the owners of the real property, and a general contractor. The general contractor filed for bankruptcy after being paid in full by the Desrosiers but failed to pay All-Brite, a subcontractor. After All-Brite timely filed its claim of lien and a complaint to foreclose the construction lien, the Desrosiers advised All-Brite that some of the work was incomplete.

380. Id. at 852.
381. Id. at 853.
382. Id.
383. Id.
384. 626 So. 2d 1020 (Fla. 2d Dist. Ct. App. 1993).
386. All-Brite, 626 So. 2d at 1021.
Brown / Grohman

All-Brite completed the work requested by the Desrosiers and amended its claim of lien and complaint to reflect the additional money due for the completed work. The Desrosiers then tendered payment to All-Brite for only the moneys due under the original claim of lien and complaint. The parties stipulated to a lien amount that was fifty-four cents less than the sum claimed under the amended claim of lien and complaint. The trial court, granting a lien for the stipulated amount, held there was no prevailing party. Therefore, each party was responsible for its own costs and fees.\(^{387}\)

The appellate court found that All-Brite was the prevailing party.\(^{388}\) The court acknowledged that one must have recovered an amount exceeding that which was earlier offered in settlement of the claim in order to be a prevailing party and entitled to the award of attorney's fees. Thus, the Second District Court of Appeal reasoned that the amount offered in settlement of the claim must have been made before the lienor filed his complaint to foreclose the lien.\(^{389}\)

The Dollar Savings & Trust Co. v. Soltesiz.\(^{390}\) Judge Campbell wrote the majority opinion in this case with which Acting Chief Judge Danahy and Judge Altenbernd concurred. The question before the court arose from a consolidated appeal from two circuit court cases. The cases held that Dollar Savings' foreign judgement, which it recorded pursuant to section 55.503 of the Florida Statutes, was subordinate and inferior to Barnett Bank's mortgage, which was recorded within thirty days following Dollar's issuance of recordation of the foreign judgment. In essence, the question was one of whether a foreign judgment's lien priority arises as of the date the foreign judgment is recorded pursuant to section 55.503 of the Florida Statutes or the expiration of thirty days after the judgment creditor issues its notice of recordation.\(^{391}\)

In the instant case, Mr. and Mrs. Soltesiz executed a second mortgage in favor of Barnett three days after they received notice that Dollar had recorded its Ohio judgment in Sarasota, Florida. The second mortgage had the effect of diminishing the Soltesiz's equity in their Sarasota County, Florida condominium. Dollar did not know of Barnett's second mortgage and did not learn of it until the Soltesizs attempted to convey title to that condominium. Thereafter, Barnett filed a mortgage foreclosure action on both its first and second mortgages on the property, joining Dollar as a

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387. *Id.*
388. *Id.*
389. *Id.* at 1022.
390. 636 So. 2d 63 (Fla. 2d Dist. Ct. App. 1994).
391. *Id.* at 63.
defendant to determine lien priority. Both the court hearing the Soltesiz’s declaratory decree petition, and the court hearing the Barnett foreclosure action found Dollar’s foreign judgment subordinate to Barnett’s second mortgage.\textsuperscript{392}

The appellate court perceived the question as one of whether section 55.503 of the \textit{Florida Statutes} established a priority date for the lien, and whether that date may be different than when the lien becomes enforceable.\textsuperscript{393} Ultimately, it concluded that the priority of a foreign judgment lien is established when it is recorded pursuant to the requirements of chapter 55 and section 695.11 of the \textit{Florida Statutes}, even though the enforcement of that lien may be delayed by further statutory provisions such as sections 55.507 and 55.509.\textsuperscript{394}

\textit{Emerald Designs, Inc. v. Citibank F.S.B.}\textsuperscript{395} Judge Klein wrote the majority opinion with which Judge Glickstein and Associate Judge Gross concurred. The question before the appellate court was whether a subcontractor has the right to claim an equitable lien against the undisbursed construction loan funds in the hands of a lender, where although the construction project is completed, the lender forecloses.\textsuperscript{396}

This question arose out of a foreclosure action in which Emerald Designs, a subcontractor/defendant, filed a counterclaim to establish an equitable lien on the undisbursed construction loan funds held by Citibank. The gist of Emerald Designs’ allegations was that Citibank would be unjustly enriched if it were permitted to foreclose on the completed homes and still retain the undisbursed loan funds. Contrary to the position taken by the circuit court, the appellate court found for the subcontractor.\textsuperscript{397} It stated that, since the subcontractor was not seeking priority over a recorded mortgage, the subcontractor did not need to allege fraud or misrepresentation to establish an equitable lien on the undisbursed construction loan funds.\textsuperscript{398} Therefore, the appellate court reversed the dismissal of the subcontractor’s counterclaim for failure to state a cause of action.\textsuperscript{399}

\footnotesize
392. \textit{Id.} at 64.
393. \textit{Id.} at 65.
394. \textit{Id.} at 66.
395. 626 So. 2d 1084 (Fla. 4th Dist. Ct. App. 1993).
396. \textit{Id.} at 1084.
397. \textit{Id.} at 1085.
398. \textit{Id.}
399. \textit{Id.}
Associate Judge Ramírez wrote the majority opinion with which Judges Gunther and Stone concurred. The question before the court was whether the trial court erred in granting summary judgment in favor of a mobile home park homeowners’ association, declaring the associations’ maintenance assessment lien superior to the lien of the first mortgagee. 401

To support its claim that its lien was superior, the association relied on a declaration of covenants, which was the source of the lien rights for the association. The association was the holder of a first mortgage that was recorded after the declaration of covenants but before the association’s claim of lien. Citing “first in time is the first in right,” the appellate court reversed the summary judgment and found the first mortgage lien to be superior. 402 Nevertheless, it certified to the Florida Supreme Court the following question:

WHETHER A CLAIM OF LIEN RECORDED PURSUANT TO A DECLARATION OF COVENANTS BY A HOMEOWNER’S ASSOCIATION HAS PRIORITY OVER AN INTERVENING RECORDED MORTGAGE WHERE THE DECLARATION AUTHORIZES THE ASSOCIATION TO IMPOSE A LIEN FOR ASSESSMENTS BUT DOES NOT OTHERWISE INDICATE THAT THE LIEN RELATES BACK OR TAKES PRIORITY OVER AN INTERVENING MORTGAGE. 403

Gazebo Landscape Design, Inc. v. Bill Free Custom Homes, Inc. 404

This is an opinion written by Judge Polen with which Judges Anstead and Stone concurred. The question before the court was whether the trial court erred in refusing to enforce Gazebo’s mechanics lien against the homeowners for landscaping work done by Gazebo through a general contractor, when Gazebo had not provided notice to the owner within the forty-five day period after furnishing services or materials, as required by section 713.06(2)(a) of the Florida Statutes. 405

The gist of the question was when does a subcontractor begin to furnish services for the purpose of timely providing the required notice to the owner. In this case it was November 7, 1990, when one of Gazebo’s

400. 639 So. 2d 78 (Fla. 4th Dist. Ct. App. 1994).
401. Id. at 79.
402. Id.
403. Id. at 80.
404. 638 So. 2d 87 (Fla. 4th Dist. Ct. App. 1994).
405. Id. at 88.
representatives traveled with the property owners to meet with the tree collector so that the property owners could select the trees. On December 5, 1990, Gazebo's employees dug the holes in preparation for the trees, and December 7, when they planted the trees. On January 15, Gazebo sent notice to the owner as required. However, the notice was returned unclaimed. Therefore, on January 18, 1991, Gazebo posted a notice to the owner on the gate of the homeowner's residence. 406

Noting that when a motion for an involuntary dismissal is made, the trial court should consider all facts in evidence in the light most favorable to the plaintiff, 407 the appellate court held that the facts at bar determined that the subcontractor did not begin to furnish its services until the work was actually performed at the job site. 408 Therefore, the trial court should look at all circumstances surrounding the particular job or transaction to determine when the time begins to run. 409 It also certified the following question to the supreme court:

DOES A SUBCONTRACTOR BEGIN TO FURNISH SERVICES, FOR THE PURPOSE OF TIMELY PROVIDING A NOTICE TO OWNER IN ACCORDANCE WITH SECTION 713.06(2)(a), FLORIDA STATUTES (1991), WHEN, WITHOUT ANY BINDING CONTRACTUAL OBLIGATION TO DO SO, HE OR SHE BEGINS TO SELECT MATERIALS AT SOME LOCATION OFF THE JOB SITE, FOR FUTURE INSTALLATION ON THE JOB SITE? 410

Lehmann Development Corp. v. Nirenblatt. 411 This is a per curiam opinion by Acting Chief Judge Threadgill, Judge Blue, and Associate Judge Reese. The only question before the court was whether the time computations found in Florida Rule of Civil Procedure 1.090(a) control the time period within which one must commence an action to enforce a construction lien pursuant to section 713.22(1) of the Florida Statutes. Recognizing that those computations apply to calculating the time within which to serve a notice to owner under section 713.06(2)(a), the appellate court held that they would to the period within which an action to enforce a construction lien must be commenced under section 713.22(1). 412

406. Id.
407. Id. at 89.
408. Id.
409. Gazebo, 638 So. 2d at 89.
410. Id.
411. 629 So. 2d 1098 (Fla. 2d Dist. Ct. App. 1994).
412. Id. at 1099.
Prosperi v. Code, Inc. This is an opinion written by Justice Grimes with which Chief Justice Barkett and Justices Overton, McDonald, Shaw, Kogan, and Harding concurred. The Florida Supreme Court gave an ambivalent answer to the question of whether an owner, who prevails on a complaint filed to foreclose a mechanic’s lien, would be entitled to attorney’s fees even though the same suit resulted in a judgment in favor of the mechanic against the owner on a count for breach of contract for the same transaction. In so doing, the court reasoned that a claimant’s obtaining a net judgment is merely a significant factor, but not necessarily a controlling factor, in determining the status of a prevailing party under section 713.29 of the Florida Statutes. Thus, the trial judge is permitted discretion to balance the equities in determining which party in fact prevailed on the primary issues.

Roger Homes Corp. v. Persant Construction Co. Judge Jorgenson wrote the majority opinion with which Judges Barkdoll and Goderich concurred. The question before the court was whether there was a sufficient lien interest to support a lis pendens, where there was no duly recorded instrument or mechanic’s lien claim to support the lien interest.

The question arose out of a contract between Roger Homes and Persant for the construction of roads and a water, sewage, and drainage system. When Persant did not get paid for some of its work, it filed a mechanic’s lien. Roger Homes then signed an unsecured promissory note for the balance due under the contract. Ultimately, Roger Homes failed to pay the full amount of the note. Persant sued on the promissory note and attempted to establish an equitable lien on Roger Homes’ real estate on which Persant had made the improvements. Consistent with this, it filed a lis pendens on the property.

Noting that an equitable lien might be sufficient to support a lis pendens, the appellate court opined that, based on section 48.23 of the Florida Statutes, such would have to be based on a duly recorded instrument or on a mechanic’s lien. The court also noted that an allegation that Roger Homes was insolvent would support a claim by the contractor that
there would be no adequate remedy at law.\textsuperscript{420} Therefore, it would be entitled to an equitable lien for which a lis pendens could be recorded.\textsuperscript{421} However, this is not shown in the record for Persant did not allege that Roger Homes was insolvent. Therefore, the lis pendens was improper in this case.\textsuperscript{422}

\textit{C.L. Whiteside & Associates Construction Co. v. Landings Joint Venture.}\textsuperscript{423} Judge Farmer wrote the majority opinion with which Judge Anstead and Senior Judge Walden concurred. The primary question before the court was whether the trial court erred in entering summary judgment dismissing a subcontractor's mechanic's lien claim, where the subcontractor had not filed formal notice to the owner.\textsuperscript{424}

The Landings Joint Venture owned the property in question. RV Landings, Inc. and Virginias at Delray, Ltd. were equal partners in that joint venture. The joint venture, through its managing venture, RV Landings, entered into a construction contract with Ragland Construction as the general contractor. The same individual served as president of both RV Landings and Ragland Construction. In addition, he was the principal shareholder of RV Landings and the sole shareholder of Ragland, although he had no ownership interest and performed no functions for Virginias.\textsuperscript{425} That same individual signed the construction contract on behalf of the joint venture, signed the notice of commencement for the joint venture, and was the person to receive notice for the owner.\textsuperscript{426} Although an employee signed the construction contract on behalf of Ragland, the president of Ragland signed the contract with Whiteside for the structural shell work on the project. Knowing of the common relationships between the owner and the general contractor and having dealt with their president on prior occasions, Whiteside sent no notice to the owner, believing it was unnecessary.\textsuperscript{427} It was not until a dispute arose that Whiteside sent its notice to the owner, and subsequently, filed its claim of lien.\textsuperscript{428}

\textsuperscript{420} \textit{Id.} at 7.
\textsuperscript{421} \textit{Roger Homes}, 637 So. 2d at 7.
\textsuperscript{422} \textit{Id.}
\textsuperscript{423} 626 So. 2d 1051 (Fla. 4th Dist. Ct. App. 1993).
\textsuperscript{424} \textit{Id.} at 1051.
\textsuperscript{425} \textit{Id.} at 1052.
\textsuperscript{426} \textit{Id.}
\textsuperscript{427} \textit{Id.}
\textsuperscript{428} \textit{C.L. Whiteside}, 626 So. 2d at 1052.
Referring to the Florida Supreme Court's decision in *Aetna Casualty v. Buck*, the court stressed that the purpose of serving a notice to the owner was to inform the property owner that those not in privity of contract with the owner were providing improvements to the property, and that they would look to the property in the event they were not paid for their services and materials. Thus the owner would be protected from possibly paying the owner's contractor money which ought to go to an unpaid subcontractor. Hence, the notice to owner provisions of section 713.06 of the *Florida Statutes* are excused when a subcontractor establishes privity with the property owner. To establish privity, the owner must have knowledge that a particular subcontractor is supplying services or materials and the owner either expressly or impliedly assumed the contractual obligation to pay those services. Therefore, the subcontractor may also establish privity where the owner and general contractor share a common identity. In this case, the appellate court held that there was a sufficient question as to whether there was an established relationship between the owner and general contractor so as to establish privity, thereby rendering the notice to owner unnecessary.

**XIX. MARKETABLE RECORD TITLE ACT**

*Sunshine Vistas Homeowners Ass'n v. Caruana.* Justice Shaw wrote the opinion in which Chief Justice Barkett and Justices Overton, McDonald, Grimes, Kogan, and Harding concurred. The question was whether a setback restriction was extinguished by Florida's Marketable Record Title Act ("MRTA"). The restriction was contained in a plat filed in 1925. A developer purchased two lots in the area in 1990. When building began, the homeowners' association sought a declaratory judgment that the developer was violating the setback restriction. The developer's root of title, by the time of this litigation, was a warranty deed dated October 6, 1951. That deed referred to the plat by book and page in the

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429. 594 So. 2d 280 (Fla. 1992), *appeal after remand sub nom.* Pappalardo Constr. Co. v. Buck, 630 So. 2d 682 (Fla. 4th Dist. Ct. App.), *and review denied,* 639 So. 2d 976 (Fla. 1994).

430. *C.L. Whiteside,* 626 So. 2d at 1052.

431. *Id.* at 1053.

432. *Id.*

433. *Id.*

434. 623 So. 2d 490 (Fla. 1993).

435. *FLA. STAT. §§* 712.01-.10 (1989). The relevant portions of this chapter have not been changed to date.
public records and also stated that the conveyance was subject to covenants and restrictions of record. The trial court and the district concluded that the restriction had been extinguished, but the Third District Court of Appeal, with Chief Judge Schwartz dissenting only on the certification issue, certified as being of great public importance, the following question:

WHETHER THE FLORIDA MARKETABLE RECORD TITLE ACT HAS THE EFFECT OF EXTINGUISHING A PLAT RESTRICTION WHICH WAS CREATED PRIOR TO THE ROOT OF TITLE WHERE THE MUNIMENTS OF TITLE IN THE CHAIN OF TITLE DESCRIBE THE PROPERTY BY ITS LEGAL DESCRIPTION WHICH MAKES REFERENCE TO THE PLAT AND THE MUNIMENTS OF TITLE STATE THAT THE CONVEYANCE IS GIVEN SUBJECT TO COVENANTS AND RESTRICTIONS OF RECORD.

MRTA would, in effect, extinguish any restriction or title defect which was in the record prior to the root of title. However, there is an exception for “[e]states or interests, easements and use restrictions disclosed by and defects inherent in the muniments of title on which said estate is based beginning with the root of title. . . .” But “a general reference . . . shall not be sufficient to preserve them unless specific identification by reference to book and page of record or by name of recorded plat be made therein . . . .” The district court found that the reference in this case was too general to satisfy the statutory requirement, but the supreme court unanimously disagreed because the deed referred to “Sunshine Vistas,” the name of the recorded plat that imposed the restriction.

436. Sunshine, 623 So. 2d at 492.
437. Id. at 491.
438. Sunshine Vistas Homeowners Ass’n v. Caruana, 597 So. 2d 809, 811 (Fla. 3d Dist. Ct. App. 1992), review granted, 618 So. 2d 211 (Fla. 1992), and decision quashed by 623 So. 2d 490 (Fla. 1993). Judge Schwartz stated that “the issue involved here—while perhaps interesting and certainly arguable—is of no concern, let alone of great importance, to anyone but the litigants and an abstractor or two. The public as a whole could not care less.” Id.
439. Sunshine, 623 So. 2d at 491.
440. See FLA. STAT. § 712.02 (1989).
441. Id. § 712.03(1).
442. Id.
443. Sunshine, 623 So. 2d at 492.
444. Id.
445. Id.
The supreme court used very traditional logic. The court stated that as a rule of statutory interpretation, every word or phrase included by the legislature must have been intended to have meaning. Why else would it have been included? Here, the statutory language “unless specific identification by reference to . . . name of recorded plat be made therein . . .” would be rendered meaningless by the district court’s interpretation. Therefore, the court concluded that the reference in this deed satisfies the plain meaning of the statute.

That conclusion is bolstered by another line of logic. Reference in a deed description to a plat generally has the effect of incorporating the plat’s terms into the deed. It is therefore consistent that such incorporation by reference would be specific enough to satisfy the requirements of MRTA for saving those terms, e.g., use restrictions, from being extinguished.

*Water Control District of South Brevard v. Davidson.* Judge Sharp wrote the opinion with which Judges Goshorn and Peterson concurred. Landowners claimed that the Water Control District (“District”) did not have an easement for drainage and maintenance along the sides of a canal. The district court concluded that the District had sustained its burden of proof that it had acquired the easement by a 1922 decree which had not been lost by reason of MRTA.

The right of way on one side of the canal was being used. That placed the easement within one of the statute’s exceptions. The exception still applied to the right of way on the other side of the canal even though it was not in use. The two sides were part of one reservation. Use of a part of the reserved easement was sufficient to place the entire easement within the statutory exception to MRTA. This result was reinforced by invoking the policy that “MRTA should be broadly construed to protect these rights [for the use and benefit of the public] to the extent possible under the law.”

**XX. MOBILE HOME PARKS**

*Aspen-Tarpon Springs Ltd. Partnership v. Stuart.* Judge Barfield wrote the opinion with which Judges Wilfe and Mickle concurred. Owners
of mobile home parks sought a declaration that two provisions of the Florida Mobile Home Act were invalid. They first challenged section 723.033 of the Florida Statutes. This section enables a court to grant relief to park tenants upon a finding that the rent or a rental increase is unreasonable as a matter of law. It also provides that "a lot rental amount that is in excess of market rent shall be considered unreasonable." The owners challenged this section as violating due process, but the trial court disagreed.

The court concluded that the statute satisfied the rational basis test because it was rationally related to a legitimate state interest, the protection of a class of tenants who are in a uniquely vulnerable situation because they only rent the lots on which the mobile homes are placed. The tenants own the mobile homes which are "mobile" only in theory. Thus, it is not economically feasible to move them because the moving expense may approach, or even exceed, the home's value. Therefore, the tenants are at a tremendous disadvantage in dealing with the landlord.

The trial court also rejected the claim that the legislature failed to provide the Department of Business Regulation and the courts with sufficient standards to guide the application of the statute. The statutory test was whether the rent or rental increase was "reasonable." The controlling principal is that a statute should be interpreted to avoid constitutional defects whenever it is reasonably possible. By reading subsections (3), (4), (5), and (6) in pari materia, the trial court was able to interpret the statement in subsection (3) that "a lot rental amount that is
in excess of the market rent shall be considered unreasonable” to be “directory, rather than as mandatory and conclusive.” The court could also have pointed out that relief was not mandatory, but within the court’s discretion. Whether a court of equity should exercise its discretion is a standard which has a long evolution.

The district court agreed with the trial court’s reasoning and conclusion. It pointed out that this was not a traditional rent control statute. Rather, it was intended “to balance the interests of mobile home owners and park owners in the context of their unique economic relationship.” Section 723.061(2) of the Florida Statutes did not fare as well. This section requires a mobile park owner who wishes to change his land use, either to pay to have the tenants moved to another comparable park within fifty miles, or to purchase the mobile homes and appurtenances from the tenants at a statutorily determined value. The trial court held section 723.061(2) to be unconstitutional and the district court affirmed. Both concluded that its enforcement would cause an unconstitutional taking of the landlord’s private property without compensation. The district court pointed out that “neither the ‘buyout’ option nor the ‘relocation’ option is even economically feasible. Therefore, as a practical matter, the challenged statute authorizes a permanent physical occupation of the park owner’s property and effectively extinguishes a fundamental attribute of ownership, the right to physically occupy one’s land.” Thus, it would amount to a physical taking of the land. Moreover, it “singles out mobile home park owners to bear an unfair burden, and therefore constitutes an unconstitutional regulatory taking of their property.”

The district court also stated that section 723.061(2) did “not substantially advance a legitimate state interest.” That was unnecessary to its logic, and seems to this author, to be inconsistent with what the court said about the previous section. Protection of this group of tenants is a legitimate state interest. Requiring the landlord to buy them out or relocate them before changing the land use is a substantial increase in their level of protection. The legislature cannot accomplish that by superimposing that

460. Aspen, 635 So. 2d at 63.
461. Id. at 67.
462. Id.
463. FLA. STAT. § 723.061(2) (1993).
464. Aspen, 635 So. 2d at 67.
465. Id. at 68.
466. Id.
467. Id.
requirement upon existing landlord-tenant relationships. However, whether that could be made a prospective requirement on future mobile home park lot rentals is still an interesting question.

XXI. MORTGAGES

Batchin v. Barnett Bank of Southwest Florida. This is an opinion written by Acting Chief Judge Ryder with which Judges Parker and Lazzara concurred. The question before the court was whether, in a foreclosure action, where the lender’s attorney had factual information in his file showing the defendant’s address and phone number, service by publication was proper.

In finding that service by publication was improper under the circumstances, the appellate court noted that chapter forty-nine of the Florida Statutes permits service by publication only where personal service cannot be effected and that strict compliance with these statutory procedures for serving a defendant by publication is required. The one attempting to serve by publication must affirm under oath that the plaintiff reasonably employed the knowledge he had available and made an honest and conscientious effort to acquire the information necessary to effect personal service. The court stated that a diligent search would require an attorney to review his own law firm’s files. Thus, failing to look in one’s own files does not meet this test.

Carteret Savings Bank v. Citibank Mortgage Corp. This is an opinion written by Justice Overton with which Chief Justice Barkett and Justices McDonald, Shaw, Grimes, Kogan, and Harding concurred. This opinion addressed a certified question from the Fourth District Court of Appeal as follows:

WHERE A THIRD PARTY MORTGAGE LOAN IS USED NOT ONLY FOR THE PURPOSE OF PURCHASING PROPERTY, BUT IN ADDITION, FOR CONSTRUCTING IMPROVEMENTS ON THE PROPERTY, IS THE ENTIRE AMOUNT OF THE MORTGAGE ENTITLED TO PRIORITY AS A PURCHASE MONEY MORTGAGE

469. Id. at D852.
470. Id.
471. Id.
472. 632 So. 2d 599 (Fla. 1994).
OVER A GENERAL JUDGMENT CREDITOR OF THE MORTGAGOR? 473

Although the parties reached settlement prior to the rendering of the supreme court's opinion, the court felt it was necessary to answer this question of first impression in Florida since it was a question likely to arise in the future, and other courts which had addressed the definition of a purchase money mortgage under these circumstances have not ruled consistently.474 Therefore, the supreme court answered the certified question in the negative. In so doing, it held that only the portion of a mortgage loan that extended to purchase the property and existing improvements would be entitled to priority as a purchase money mortgage.475

*City of Jacksonville v. Nashid Properties, Inc.*476 This is a majority opinion written by Judge Kahn with which Chief Judge Zehmer and Judge Benton concurred. The question before the court was whether the city was exempt from having its mortgage lien extinguished by a tax deed issued pursuant to section 197.552 of the *Florida Statutes*.477

The question arose when the city received an assignment of mortgage from Fidelity Federal Savings and Loan Association of Jacksonville prior to the issuance of the tax deed to Nashid. Nashid's position was that the statutory reference to a "lien of record" did not apply to a mortgage held by the city, but applied to governmental liens arising from taxes or other governmental services. The appellate court rejected Nashid's position, finding the statute clear on its face.478

*CSB Realty, Inc. v. Eurobuilding Corp.*479 This is a per curiam opinion from an appeal heard before Judges Nesbitt, Baskin, and Gersten. The question before the court was whether the trial court erred in allowing the mortgagor to redeem the property foreclosed upon at the foreclosure sale price, rather than for the amount of the judgment. The appellate court held that to redeem the property, the mortgagor must pay the mortgage debt.480

473. *Id.* at 599.
474. *Id.*
475. *Id.*
476. 636 So. 2d 875 (Fla. 1st Dist. Ct. App. 1994).
477. *Id.* at 875.
478. *Id.* at 876.
479. 625 So. 2d 1275 (Fla. 3d Dist. Ct. App. 1993).
480. *Id.* at 1275-76.
In so doing, it must pay the judgment amount when the foreclosure price is less than the judgment obligation. 481

*FDIC v. Diamond C Nurseries, Inc.* 482 This is an opinion written by Judge Klein with which Judges Gunther and Polen concurred. The question presented to the court was whether an unrecorded satisfaction of mortgage which secured a loan from a lender, subsequently taken over by the FDIC, barred foreclosure by the FDIC. 483

Diamond C Nurseries allowed Republic Bank For Savings to place a mortgage lien on Diamond C's fifty-three acre nursery in Palm Beach County, Florida, as collateral for loans from the lender to business associates of Diamond C's controlling shareholder. When the loan went into default, Republic Bank filed its foreclosure action. Diamond C raised satisfaction of the lien as an affirmative defense. It appears that the satisfaction was signed by a Republic’s president one month after the parties executed the note and mortgage and one month before Republic recorded the mortgage. However, the satisfaction was not recorded until almost two months after the foreclosure action began. Subsequently, FDIC, as manager of the FSLIC resolution fund, was substituted as plaintiff. 484

Referring to both the *D'Oench* doctrine and 12 U.S.C. § 1823(e), the court held that the unrecorded satisfaction did not preclude the foreclosure action in question. 485 The court recognized that D'Oench established a federal policy to protect the FDIC from misrepresentations as to lenders’ assets and liabilities in their portfolios, where the FDIC insured those lenders or made loans to those lenders. 486 The court also acknowledged that § 1823(e) was enacted so that bank examiners could rely on a bank’s records to evaluate the institution’s assets and to judge adequately the loan transactions in which those banks were involved. Therefore, no agreement which would reduce the FDIC’s interests in any asset acquired by it in taking over a lending institution would be valid against the FDIC, unless the agreement: 1) was in writing, 2) was executed by both the depository institution and anyone claiming an adverse interest under it, 3) was approved by the institution’s board of directors or its loan committee (reflected in the

481. *Id.*
482. 629 So. 2d 157 (Fla. 4th Dist. Ct. App. 1993), *review denied*, 637 So. 2d 234 (Fla. 1994).
483. *Id.* at 158.
484. *Id.*
485. *Id.*
486. *Id.*
minutes of said board or committee), and 4) appeared continuously, after its execution, as an official record of a depository institution.487

In the present case, the lender’s president responded to the examiner’s criticism of its dealings with the parties, by showing that the property in question had been appraised at over one million dollars and that the lender had obtained a mortgagee title insurance policy insuring the lien in question. This occurred one year after the loan had taken place. Two years after the loan had taken place another examination revealed that the property was still the primary asset securing that loan.488 Therefore, the affirmative defense was defeated both by the D’Oench doctrine and by § 1823(e).489

**Frohman v. Bar-Or.**490 This is a per curiam opinion by Judges Anstead and Hersey, and Senior Judge Mager. The question was whether the trial court erred in dismissing a petition for a deficiency decree solely because it was filed more than one year after the final judgment of foreclosure was entered.491 In affirming the dismissal, the court certified the following question to the Florida Supreme Court:

**DOES FLORIDA RULE OF CIVIL PROCEDURE 1.420(e) APPLY TO A POST-TRIAL PROCEEDING SUCH AS A MOTION FOR A DEFICIENCY JUDGMENT IN A MORTGAGE FORECLOSURE SUIT?**492

**Mederos v. Selph (L.T.), Inc.**493 This is an opinion written by Chief Judge Harris with which Judges Dauksch and Cobb concurred. The question presented to the court was whether a reformed mortgage, correcting the identification of the mortgagor, had priority over the liens of judgment creditors which were recorded between the recording of the original mortgage and the recording of the reformed mortgage ultimately identifying the correct mortgagor.494

Mederos loaned money to Selph’s corporation. In return, Selph put up two parcels of real estate as collateral. Originally, the mortgage reflected the corporation as the owner and mortgagor for both parcels of property. In reality Selph individually owned one parcel as a tenant in common with

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487. *Diamond C Nurseries*, 629 So. 2d at 159.
488. Id. at 160.
489. Id. at 160-61.
490. 637 So. 2d 369 (Fla. 4th Dist. Ct. App. 1994).
491. Id. at 370.
492. Id.
493. 625 So. 2d 894 (Fla. 5th Dist. Ct. App. 1993).
494. Id. at 894.
his former wife. After the mortgage was originally recorded, Selph’s former wife and another judgment creditor properly recorded their judgments against Selph individually. Thereafter, Mederos filed an action to reform the mortgage. The trial court permitted the reformation but ruled that the reformed mortgage was subject to the judgment creditors as to Selph’s 50% interest in the property held with his ex-wife as tenants in common. In affirming the trial court, the appellate court reasoned that a recorded mortgage from one who is not the owner of record creates no mortgage lien on the property and provides no notice to anyone subsequently acquiring an interest in that property.

Orlando Hyatt Associates, Ltd. v. FDIC. This is an opinion written by Chief Judge Harris with which Judges Sharp and Thompson concurred. The question before the court was whether the trial court committed error when it permitted a mortgagee to apply the income from the subject premises encumbered by the mortgage lien, against any debt owed to the mortgagee while the foreclosure proceedings were still in progress.

Orlando Hyatt borrowed money from Dollar Dry Dock Savings Bank, and secured the loan with a second mortgage on the Orlando Hyatt Hotel. Subsequently, the parties executed a mortgage modification agreement, a consolidated note replacing the original one, and an amended and restated second mortgage and security agreement. In addition, Orlando Hyatt secured the modified loan with a Present Assignment of Owner’s Remittance Amount, assigning absolutely all of its right, title, and interest in any remittance due it under the management agreement with the Hyatt Corporation, the corporation which managed the hotel.

Once the loan went into default, the FDIC, as successor mortgagee, filed its foreclosure action. In response to the FDIC’s motion seeking the appointment of a receiver and motion to compel the deposit of rents, the trial court ordered that the FDIC was to receive the hotel’s revenues directly and after paying the first mortgagee, apply them to its second mortgage which was involved in the foreclosure action.

495. Id.
496. Id.
497. 629 So. 2d 975 (Fla. 5th Dist. Ct. App. 1994).
498. Id. at 975.
499. Id.
500. Id. at 976.
The court reasoned that since section 697.07 of the Florida Statutes applies only to rents, it did not apply to hotel revenues. Therefore, the court and the parties would have to look to other statutory and case law. Citing numerous Florida cases, the court ruled that although a mortgagor may pledge rents and profits from realty, such a pledge does not become binding until the trial court either appoints a receiver, or the mortgagee goes into actual possession. Therefore, even if the assignment is absolute and unconditional, it does not give the mortgagee a right to the funds before the trial court has made a determination on the merits of the foreclosure action.

Ormond Beach Associates Ltd. Partnership v. Citation Mortgage, Ltd. This is an opinion written by Judge Griffin with which Chief Judge Harris and Judge Thompson concurred. The question presented to the court was whether section 697.07 of the Florida Statutes permitted the assignment of rents in the possession of the mortgagor at the time of the mortgagee’s written demand as well as to those collected after the demand.

Prior to the enactment of section 697.07, Florida’s lien theory provided for no transfer of ownership in rents until there was a change of the ownership in the underlying property. Although the 1991 version of section 697.07 apparently intended to permit the mortgagee to reach even those rents in the mortgagor’s possession at the time of demand, the courts were not clear on the subject. However, this court found that the 1993 revision to that statute clarified the intent and permitted the mortgagee to sequester both categories of rent.

Padron v. Plantada. This is an opinion written by Judge Levy. The question before the court was whether a mortgage broker performed as required under the contract with the prospective mortgagors, thereby entitling him to a broker’s fee.

The prospective borrowers and the broker entered into an agreement for the payment of a broker’s commission, if the broker were to procure a loan

501. Id.
502. Orlando Hyatt, 629 So. 2d at 976-77.
503. Id. at 977.
504. 634 So. 2d 1091 (Fla. 5th Dist. Ct. App. 1994).
505. Id. at 1092.
506. Id.
507. Id.
508. 632 So. 2d 113 (Fla. 3d Dist. Ct. App.), review denied, 639 So. 2d 980 (Fla. 1994).
509. Id. at 113.
commitment at a fixed interest rate for thirty years. Instead, the broker procured a commitment in the required principal amount with a floating rate for thirty years. The borrowers immediately rejected the commitment. Ultimately the prospective borrowers acquired a mortgage through another broker and through another lender. When the broker sued for his commission, the trial court entered judgment in the broker’s favor. The appellate court, however, held that the offered commitment with a floating interest rate did not comply with the contract requirement of a 10% fixed interest rate, since the floating interest rate was subject to increase anytime before closing. Therefore, the broker was not entitled to his commission. 510

Parker v. Heilpern. 511 This is a per curiam opinion from an appeal heard by Judges Anstead, Glickstein, and Farmer. The question was whether the defendant in a mortgage foreclosure proceeding, who had not yet been successfully served with process, waived her objection to jurisdiction when she objected to a co-defendant’s motion for sharing in the proceeds of any sale. The appellate court found that such a waiver had not occurred since the defendant sought no affirmative relief. 512

Pici v. First Union National Bank of Florida. 513 This is an opinion written by Judge Frank with which Acting Chief Judge Ryder and Judge Blue concurred. The question before the court was whether the trial court erred in issuing a prejudgment writ of replevin. 514

Pici defaulted on his note with First Union by failing to make the September and October 1992 payments. When First Union notified Pici of the default and demanded that the account be brought current on October 26, 1992, Pici paid all sums, including late charges on November 1992 to a teller at one of First Union’s branches. After its default notice of October 26, and before Pici’s payment on November 9, First Union, without notice to Pici, decided to accelerate the balance of the note. First Union filed its complaint on November 13, 1992 and sought an ex parte prejudgment writ of replevin, posted its bond, and seized the collateral. On November 16, 1992, Pici made the November payment to First Union. Subsequently, he moved the trial court for a dismissal of the writ of replevin. From the denial of that motion, Pici took this appeal. 515

510. Id. at 113-14.
511. 637 So. 2d 295 (Fla. 4th Dist. Ct. App. 1994).
512. Id. at 296.
513. 621 So. 2d 732 (Fla. 2d Dist. Ct. App.), reviewedenied, 629 So. 2d 132 (Fla. 1993).
514. Id. at 733.
515. Id.
In reversing the trial court, the appellate court noted that Florida law identifies equitable grounds for denying foreclosure on an accelerated basis. These grounds include circumstances where the mortgagor has tendered payment after default but before the notice of the mortgagee's accelerating the obligation has been given to the mortgagor. Noting that the key term is "tender," the court emphasized that it is not necessary for the mortgagee to accept the tender for this equitable principle to apply. Actual acceleration cannot be accomplished without notice to the debtor. Once the debtor tenders all sums due, his account is current and a prejudgment writ of replevin would not be sustained.

Republic National Bank v. Manzini & Associates, P.A. This is a per curiam opinion from an appeal held before Chief Judge Schwartz and Judges Nesbitt and Cope. The question presented to the court was whether the holder of a note and mortgage was estopped from asserting its mortgage on the ground that the FDIC gave mistaken information as to the mortgagee's satisfaction.

Manzini and Associates took a quitclaim deed to a condominium in place of receiving payment for legal services. At the time it knew that there was a mortgage on the subject property. Subsequently, the FDIC advised the firm that the mortgage was satisfied. Therefore, although this information was incorrect, the law firm took the position that the lender should be estopped from asserting its mortgage.

In reviewing this case, the district court noted that a satisfaction or release of the mortgage given as the result of a mistake will not benefit any person or entity who acquires an interest in the property so long as they did not rely on or advance any consideration on the faith of such representation. In this case, the law firm neither relied on nor advanced any consideration on the basis of the incorrect information. Therefore, Republic was not estopped from asserting its mortgage.

Sand Point Village, Ltd. v. Highlands Insurance Co. This is an opinion arising out of an appeal heard before Judges Baskin, Jorgenson, and

516. Id. at 734.
517. Id. at 733-34.
518. 621 So. 2d 709 (Fla. 3d Dist. Ct. App. 1993), review denied, 634 So. 2d 625 (Fla. 1994).
519. Id. at 710.
520. Id.
521. Id.
522. Id.
523. 634 So. 2d 311 (Fla. 3d Dist. Ct. App. 1994).
Levy. The question was whether the trial court erred in enforcing a settlement stipulation between an insurance company and property owner. The settlement provided for insurance payments to the first mortgagee, but not to the second mortgagee. The second mortgagee also challenged the dismissal of the action with a discharge of the insurance company's further liability relating to the fire in question.524

The Third District Court of Appeal reversed the trial court.525 In so doing, it reasoned that the second mortgagee had not been given adequate time to explore the ramifications of the settlement agreement. In addition, the court noted that the second mortgagee was not a party to the settlement. Therefore, since its rights are materially affected by the decision as to whether or not it receives proceeds from the insurance company and as to the amount of insurance paid to the first mortgagee, resulting in a reduction in the principal owed to the first mortgagee, the trial court erred in discharging the insurance company prior to the second mortgagee's being afforded the opportunity to conduct the necessary discovery to ascertain the ramifications of the settlement agreement.526

Sciandra v. First Union National Bank.527 This is a per curiam opinion from an appeal heard before Acting Chief Judge Hall and Judges Blue and Altenbernd. Judge Altenbernd concurred specially with an opinion. The question was whether the trial court erred in awarding interest on the amount found due as pre-judgment interest. The Second District Court of Appeal found that the trial court did err, and therefore, reversed that portion of the judgment.528

Judge Altenbernd's concurring opinion raises the doctrine of merger, i.e., that the cause of action and the damages recoverable as a result of it, merge into the judgment entered on that cause of action.529 Judge Altenbernd noted that the judgment's aggregate amount includes many elements of damages, including, but not limited to the interest in question. Once the judgment is entered it does not bear interest as a cause of action or as an element of damage but, rather, as a single judgment. Therefore, there would not be a compounding of interest. The concurring opinion

524. Id. at 312.
525. Id.
526. Id.
527. 638 So. 2d 1009 (Fla. 2d Dist. Ct. App. 1994).
528. Id. at 1009.
529. Id. at 1010.
suggests that it would be more appropriate to regard pre-judgment interest as an early award of judgment interest to solve the problem. \(530\)

Also, effective October 1, 1994 is Senate Bill No. 204 of chapter 94-288 of the Florida Statutes. \(531\) As of that date it will be unlawful for any person, with the intent to defraud the owner of real property, to engage in such activities as purchasing defined real estate subject to loans that either are in default at the time of purchase, or which go into default within one year after the purchase, where such loan is secured by a mortgage or deed of trust, and there is a failure to make the mortgage payments and the purchaser uses the income from such properties for his own use. These acts will constitute a third degree felony and will be punished as provided in sections 775.082, 775.083, and 755.084 of the Florida Statutes. \(532\)

XXII. OPTIONS

Drost v. Hill. \(533\) This is an opinion written by Judge Cope with which Judges Nesbitt and Levy concurred. A six month lease included a term option to extend the lease for a five year term. If the five year option would have been exercised, then the tenants would also have had the option to purchase the property. But neither a purchase price nor a method of determining a purchase price were specified. The price was to be established at some time in the future.

The tenant notified the landlord that it was exercising the five-year extension option, but the parties were unable to agree to the terms. The tenant sued for specific performance, which the trial court awarded, ordering the landlord to provide that the option purchase price would be the property’s fair market value. The district court reversed. It held that the lack of terms and the ongoing negotiations established there had been no meeting of the minds on a material term, i.e., the price. Consequently, the option was illusory and an illusory contract cannot be enforced. \(534\)

XXIII. TAXES

Florida Hotel and Motel Ass’n v. State. \(535\) This is an opinion written by Judge Webster with which Judges Booth and Allen concurred. The

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530. Id.
532. See id.
533. 639 So. 2d 105 (Fla. 3d Dist. Ct. App. 1994).
534. Id. at 106.
535. 635 So. 2d 1044 (Fla. 1st Dist. Ct. App. 1994).
question before the court was whether the tangible personal property that hotels and motels purchase and use in guest rooms, incident to their business, is purchased for "resale," and thereby prohibited from a tax exemption on that ground. The court also considered whether imposing a sales tax or use tax on the purchase of that property and upon the rental of guest rooms constituted duplicate taxation.\(^{536}\)

The subject questions arose from a petition for a declaratory statement filed with the Department of Revenue by Florida Hotel and Motel Association, Inc. and Naples Golf and Beach Club, Inc. When the department rejected their claims, they took the subject appeal. Recognizing that hotels and motels are in the business of furnishing services and entertainment, the appellate court noted that hotels and motels are simply not in the business of buying and reselling or leasing guest room furniture, furnishings, and consumables.\(^{537}\) Therefore, they were not entitled to the exemption provided by section 212.05(1)(a)1.a of the Florida Statutes.\(^{538}\)

*Fuchs v. Wilkinson.*\(^{539}\) This is an opinion written by Justice Overton with which Chief Justice Barkett and Justices McDonald, Shaw, Grimes, Kogan, and Harding concurred. The question presented to the court was whether the trial court erred in holding that the limitations on the assessed value of homestead property contained in an amendment to article VII, section 4, of the Florida Constitution, were to become effective January 1, 1994, rather than January 1, 1995, thereby making 1993 the base year for the limitations' application. The question came before the Florida Supreme Court as one certified from the Second District Court of Appeal.\(^{540}\)

The Florida Supreme Court held that the amendment's clear language indicated January 1, 1994 as the first "just value" assessment date.\(^{541}\) Because of this, the operative date for the limitations contained in the amendment to establish the "tax value" of homestead property would be January 1, 1995.\(^{542}\)

The difficulty arising in this case came from the amendment's lack of an effective date provision. Where an amendment fails to establish an effective date, the Florida Constitution provides that the amendment shall become effective on the first Tuesday after the first Monday in January

\(^{536}\) *Id.* at 1045.

\(^{537}\) *Id.* at 1047.

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

\(^{539}\) 630 So. 2d 1044 (Fla. 1994).

\(^{540}\) *Id.* at 1044.

\(^{541}\) *Id.* at 1045-46.

\(^{542}\) *Id.* at 1046.
following the date of the election in which the voters adopted the amendment.\textsuperscript{543} The amendment in this case was adopted November 3, 1992, and thus became effective on January 5, 1993. Therefore, the year following the effective date of the amendment is 1994 and, pursuant to the express language of the statute, January 1, 1994 became the date for assessing the property at just value. As a result, January 1, 1995 became the first tax year date where the limitations in the amendment would be used to calculate the "tax value" of the homestead property.\textsuperscript{544}

\textit{Margate Investment Corp. v. Lupowitz.}\textsuperscript{545} This opinion was written by Judge Polen with which Judges Glickstein and Warner concurred. The question before the court was whether the grantor, under a general warranty deed executed in 1981, breached its covenant against encumbrances by failing to pay those real property taxes levied for 1980, but were not assessed until 1985.\textsuperscript{546} Relying on section 197.056(1) of the \textit{Florida Statutes}, the court opined that real estate taxes are liens as of the year the taxes are levied. Therefore, if they in fact encumber the property when the grantor makes the warranty, the grantor has not breached the warranty against encumbrances.\textsuperscript{547}

\textit{Santana v. Metropolitan Dade County.}\textsuperscript{548} This is an opinion written by Judge Cope. The sole question before the court was whether one who was looking to redeem a tax deed had to pay not only what was due on the tax deed but, in addition, any other delinquent taxes that remained unpaid even if they had not yet been reduced to tax deeds.\textsuperscript{549} The Third District Court of Appeal answered the question in the affirmative.\textsuperscript{550}

\textit{Sarasota County v. Sarasota Church of Christ, Inc.}\textsuperscript{551} This is a per curiam opinion with which Acting Chief Judge Campbell and Judge Threadgill concurred, and with which Judge Schoonover concurred in result only. The question was whether churches, which are exempt from taxation, would also be exempt from the payment of special assessments. The appellate court affirmed the trial court in finding that fire and rescue

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543. FLA. CONST. art. XI, § 5(c).
544. \textit{Fuchs}, 630 So. 2d at 1046.
545. 638 So. 2d 143 (Fla. 4th Dist. Ct. App. 1994).
546. \textit{id.} at 143.
547. \textit{id.}
548. 641 So. 2d 117 (Fla. 3d Dist. Ct. App. 1994).
549. \textit{id.} at 118.
550. \textit{id.} at 119.
\end{flushleft}
services were valid special assessments for which churches would be liable, but that stormwater management services would not be.\footnote{552}

\textit{Section 3 Property Corp. v. Robbins.}\footnote{553} This is an opinion written by Justice McDonald with which Justices Overton, Shaw, Grimes, Kogan, and Harding concurred, and with which Chief Justice Barkett concurred in the result only. The question before the court was presented as a certified question:

Is there a right to a jury trial under Article I, Section 22 of the Florida Constitution (1968), in a tax action to challenge a Property Appraiser's grant of an agricultural exemption?\footnote{554}

The Florida Supreme Court answered the question in the negative.\footnote{555} The court reasoned that controversies surrounding the taxation of real property were typically found in equity, not in law.\footnote{556} The majority looked to section 194.171 of the \textit{Florida Statutes} to ascertain whether the legislature had provided for an alternative approach. Finding that it had not, the court determined that, although it would require some factual determination to answer the question, the analysis was more like determining an interest in realty, thereby invoking the court's equitable jurisdiction.\footnote{557}

\textit{SEC v. Elliott.}\footnote{558} This is an opinion written by Justice Shaw with which Justices Overton, Kogan, and Harding concurred. However, Chief Justice Barkett dissented with an opinion with which Justices McDonald and Grimes concurred. The question presented to the court was a question certified by the Eleventh Circuit Court of Appeal as follows:

Does a Florida tax certificate represent an interest in land for purposes of the Florida Uniform Commercial Code, so that Article 9 does not govern the creation of a security interest therein by virtue of § 679.104(10) [\textit{, Florida Statutes (1991)}]?\footnote{559}

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\footnote{552} Id. at 901.  
\footnote{553} 632 So. 2d 596 (Fla. 1993).  
\footnote{554} Id. at 596.  
\footnote{555} Id.  
\footnote{556} Id.  
\footnote{557} Id.  
\footnote{558} 620 So. 2d 159 (Fla. 1993). The Eleventh Circuit answered the certified question in the affirmative. See 998 F.2d 922 (11th Cir. 1993).  
\footnote{559} Id. at 159.  

https://nsuworks.nova.edu/nlr/vol19/iss1/1
The question arose from Elliott's use of Florida tax certificates as collateral for a loan. When his assets ended up in equitable receivership, the creditors attempted to collect the taxes paid on the subject properties. However, the district court's order froze those assets. The district court concluded that those certificates were intangible personal property when used as collateral, i.e., general intangibles, and that the only way to protect a security interest in those assets would have been by filing a UCC financing statement with the secretary of state. Because the creditors had failed to do so, they were unsecured. The Florida Supreme Court answered the certified question in the affirmative, thereby finding that the UCC filing was unnecessary.

The majority opinion based its conclusion on the analysis of three statutes. The first was section 197.102. This statute defines a tax certificate as a legal document representing unpaid delinquent real property taxes which becomes a first lien on the subject property. The second statute was section 679.104(10). This statute provided that chapter 679 would not apply except to provide for fixtures, to the creation of or the transfer of interests in or liens upon real estate, including leases or rents. The third statute was section 679.102(2). This statute provided that chapter 679 would not apply to statutory liens. The court reasoned that because a tax certificate was a lien on real property and a statutory lien, the language of sections 197.02(3), 679.104(10), and 679.102(2) clearly excludes tax certificates from chapter 679. The majority felt that the primary question was whether the tax certificate itself was exempt from chapter 679.

On the other hand, Chief Justice Barkett and Justices McDonald and Grimes differed on that question. Chief Justice Barkett's dissenting opinion pointedly criticized the majority opinion. The dissent agreed that one's holding of a tax certificate creates an interest that is not subject to chapter 679. However, it pointed out that the question here was whether the transfer of an interest in those certificates as collateral for a loan would be subject to chapter 679. To support their position, the dissenters pointed to the UCC's official comment to section 679.102(3). The gist of the official comment is that the UCC does not apply to the creation of a

560. Id. at 159-60.
561. Id. at 159.
563. Id. § 679.104(10).
564. Id. § 679.102(2).
565. Elliott, 620 So. 2d at 160.
566. Id. at 161.
mortgage. In addition, it will not apply to the sale of the note by the mortgagee. On the other hand, if the mortgagee pledges the note to secure the mortgagee’s separate indebtedness to a third person, the UCC would apply to that security interest. The dissenters felt that the circumstances involved in the instant case were analogous to the last scenario in the official comment.  

XXIV. TITLE INSURANCE

Sommers v. Smith and Berman, P.A. 678 This is an opinion written by Judge Klein with which Chief Judge Dell and Senior Judge Owen concurred. The question before the court was whether a title insurance company was liable to the purchasers of real estate for the purported negligence of the attorney who handled the closing and issued the title insurance policy through the underwriter. 679

The purchasers and the sellers of the real estate in question entered into a contract. However, the contract refers to the property only by street address. Because of representations made by the seller and the real estate broker, the purchasers thought that the property was larger than it actually was. The lawyer who represented the buyers at closing and who issued the title insurance policy through the underwriter was aware of a survey that obtained a legal description fitting the buyers’ expectations but which was different from the legal description in the deed and the title insurance policy. The appellate court held that, since one can be an agent of the insurance company for one purpose and an agent of the insured for other purposes, there would be no liability on the part of the underwriter where the title insurer did not conduct the closing as a “closing agent.” 671

XXV. VENDOR AND PURCHASER UNDER CONTRACT OF PURCHASE AND SALE

Bird Lakes Development Corp. v. Meruelo. 671 This is an opinion written by Judge Ferguson. The buyer bought thirty-five acres of undeveloped land after the seller orally represented that there were sewer lines. On discovering that not to true, the buyer sued for specific performance and

567. Id.
568. 637 So. 2d 60 (Fla. 4th Dist. Ct. App. 1994).
569. Id. at 61.
570. Id. at 61-62.
571. 626 So. 2d 234 (Fla. 3d Dist. Ct. App. 1993), review denied, 637 So. 2d 233 (Fla. 1994).
damages. The judgment for the buyer was affirmed. The trial court did not err when it concluded that the parties entered into an oral contract to construct the sewers. The oral contract did not involve the transfer of any interest in land, e.g., an easement, so it was not required to be in writing by the Statute of Frauds. Furthermore, the contract to construct the sewers was collateral to, but independent of, the contract of sale. Consequently, the merger clause in the contract of sale would not be applicable to the sewer construction contract.

Citicorp Real Estate, Inc. v. Ameripalms 6B GP, Inc. This was a per curiam opinion from Judges Hubbart, Gersten, and Goderich. This case involved contract interpretation and the parol evidence rule. The buyer and seller began negotiating the purchase and sale of two properties, parcels 6 and 6B. The transaction was eventually structured as two separate contracts of sale. The terms of the first contract, which covered parcel 6B, required the buyer to give a $25,000 deposit, and to pay $2 million in cash, and to deliver a $675,000 promissory note at closing.

The draft note provided that the note would be payable when the buyer and seller "close, or are obligated to close, on the sale of Unit 6 . . . ." However, the note they executed provided that it would only be payable when the city accepted their application for processing for development approval. When the city accepted the application for processing, the buyer paid the note. The seller used the money to satisfy some of its mortgage debt owed to Citicorp Real Estate.

But something went awry. There was never a closing on parcel 6. Consequently, the buyer sued for the return of its $675,000 from the seller and Citicorp Real Estate on the theories of conversion, money had and received, and unjust enrichment. The trial court granted summary judgment for the buyer and the Third District Court of Appeal affirmed.

The trial court apparently relied upon the contract to reach its conclusion that the money should be returned. It stated that "[t]he law is well established that two or more documents executed by the same parties, at or near the same time, and concerning the same transaction or subject matter are generally construed together as a single contract." The note

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572. Id. at 236.
573. Id. at 238.
574. 633 So. 2d 47 (Fla. 3d Dist. Ct. App. 1994).
575. Id. at 48.
576. Id.
577. Id. at 48-49.
578. Id. at 49.
and the contract were not executed at the same time, but they were executed by the same parties and the contemporaneous requirement was satisfied by their having grown out of the same transaction. The contract provided the only evidence of the parties’ intent to treat the two sales as one transaction, so summary judgment was appropriate.\textsuperscript{579}

\textit{Cruise v. Graham.}\textsuperscript{580} This is an opinion written by Judge Hersey with which Judges Gunther and Stone concurred. As part of a real estate transaction, the seller agreed to take back a second mortgage for part of the purchase price. The agreement provided that the buyer would obtain the rest of the purchase price from another lender who would have a first mortgage, but the first mortgage debt could not exceed $35,950. When it was foreclosed, the seller and his attorney discovered that the first mortgage debt was $45,000.\textsuperscript{581}

The seller had $35,950 in reserve to redeem the property from the first mortgage in the event of default. However, the seller apparently was not allowed to redeem for that amount and the foreclosure sale extinguished his security interest. As a result, the seller brought this suit for fraudulent misrepresentation against the mortgage broker and its employee, Ray Cruise. The seller prevailed in the trial court and the Fourth District Court of Appeal affirmed.\textsuperscript{582}

The first defense raised was that the defendants’ representations had been made to plaintiff’s attorney and not directly to the plaintiff. The appellate court had little difficulty in disposing with this argument. Generally, an attorney is an agent of his or her client. The acts of an agent are the acts of the principal. Therefore, misrepresentations made to the agent are, in effect, misrepresentations made to the client.

Another defense raised was that the seller, or seller’s attorney, was negligent or at fault for not properly examining the documents prior to or at the closing. But this was an action based on fraud. Fraud is an intentional tort. Consequently, the seller’s comparative fault or negligence was not a defense.

Finally, the defendants argued that punitive damages should not have been awarded since there was no evidence introduced that the defendants’ conduct was outrageous or reprehensible. The district court rejected the argument.\textsuperscript{583} It is now an accepted rule in Florida that punitive damages

\textsuperscript{579} \textit{Citicorp Real Estate}, 633 So. 2d at 49.
\textsuperscript{580} 622 So. 2d 37 (Fla. 4th Dist. Ct. App. 1993).
\textsuperscript{581} \textit{Id.} at 38.
\textsuperscript{582} \textit{Id.} at 39-40.
\textsuperscript{583} \textit{Id.} at 41.
can be awarded based upon a claim of fraud if there is sufficient evidence to support an award of compensatory damages. In this case there was sufficient evidence that: 1) the representations had been made, even if that had occurred in a telephone conversation two months before the closing, 2) the defendants had justifiably relied upon them, and 3) the plaintiff had been harmed.

*Edelberg v. Monogram Building & Design.* This is an opinion written by Judge Hersey with which Judge Pariente and Senior Judge Walden, James H., concurred. Section 501.1375 of the *Florida Statutes* concerns contracts to purchase one or two-family homes from building contractors or developers. The statute requires deposits of up to 10% of the purchase price be put in interest bearing escrow accounts. According to the statute, that money can be released without the signature of both the buyer and seller in only five situations: 1) the posting of a surety bond; 2) the existence of a master security bond; 3) the buyer properly terminates the contract; 4) the buyer defaults; or 5) at closing, if the funds have not been previously disbursed. The Fourth District Court of Appeal interpreted the language of the fourth situation.

The escrow money had been in a law firm’s trust account. The buyers allegedly tried to withdraw from the transaction due to their financial reverses. The developer considered this to be a default which would entitle it to withdraw the money. As required by the statute, it gave the buyer notice of its intention to make the withdrawal, after a seventy-two hour wait, based upon the default. The buyers claimed that they were not in default because the contract was conditioned on their ability to get financing. They sought, but were refused, a temporary injunction. So the developer completed the statutory procedure and withdrew the money.

The trial court refused to issue the injunction because it involved only a dispute over money. The district court rejected the trial court’s logic. First, it pointed out that the statute allowed disbursal in the event of a buyer’s default, not in the event the developer certifies that the buyer is in

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584. *Id.*
586. 630 So. 2d 1227 (Fla. 4th Dist. Ct. App. 1994).
588. *Id.*
589. *Edelberg*, 630 So. 2d at 1228-29.
590. *Id.* at 1228.
default. There had been no determination here that the buyer was in default.\textsuperscript{591}

Furthermore, the statute was intended to be a consumer protection device. Both the spirit of the statute and procedural due process\textsuperscript{592} require that the buyer receive a full and fair hearing on a disputed issue at a meaningful time. Consequently, the trial court should not have denied the injunction. There would have to be a judicial determination whether buyer had defaulted before the funds could be disbursed.

The district court, however, refused to speculate on the whether the act provided this escrow agent immunity. The act does provide immunity for the escrow agent who complies with the statutory procedure following default.\textsuperscript{593} But in this case, a trial court would first have to determine if there had been a default.\textsuperscript{594}

\textit{Green Acres, Inc. v. First Union National Bank.}\textsuperscript{595} This is an opinion written by Judge Pariente with which Judges Polen and Farmer concurred. The buyers sued for damages, alleging that the sellers knew, but intentionally failed to disclose, that the land contained an Indian burial site which would interfere with their development plans. The trial court dismissed the complaint for failure to state a claim. The district court reversed, holding that the buyers should have been given the opportunity to amend the complaint to include the claim that the sellers had breached a contractual duty to disclose those facts.\textsuperscript{596} The court reasoned that this claim could be based upon certain language in the documents.\textsuperscript{597}

The court declined to expand \textit{Johnson v. Davis},\textsuperscript{598} which had abolished \textit{caveat emptor} in residential real estate sales, to include commercial real estate transactions.\textsuperscript{599} The First District Court of Appeal had taken that step,\textsuperscript{600} but the Second and Third District Courts of Appeal had expressly refused to do so.\textsuperscript{601} This court, however, left open the possibili-
ty that it might conclude, at a later time, that commercial real estate sellers might have a duty to disclose material facts under particular circumstances. It is obviously time for the supreme court, or the legislature, to clarify the obligations of the commercial real estate seller.

_Mall v. Pawelski._ This was a per curiam opinion in which Judges Gunther and Pariente, and Senior Judge Downey concurred. The buyer had purchased a house with a seventeen-year-old roof which began to leak shortly after the home was purchased. The buyers eventually replaced the roof, sued for the replacement cost, and won in the circuit court. While agreeing that the seller was liable, the Fourth District Court of Appeal reversed on the issue of damages.

The buyers had bargained for a seventeen-year-old roof. To allow them to recover for the full cost of a new roof with a far greater life expectancy would give them far more than they had bargained for, unjustly enriching them at the seller's expense. The buyers were entitled only to recover for the roof's replacement, "prorated to account for the increased life expectancy of the new roof."

_Walton v. Runck._ This is an opinion written by Judge Hall with which Chief Judge Frank and Judge Parker concurred. This case involved a contract to exchange a parcel of North Dakota land for some Florida land. A dispute arose, which resulted in this suit. The trial court concluded that the parties had abandoned the contract. Then, exercising its broad equity powers, the trial court divided the equity in the Florida land and ordered it sold even though neither party had asked for that relief. The district court concluded that, under established law, the trial court did not have jurisdiction to grant such relief without a request for it from one of the parties.

**XXVI. WATER AND WATER COURSES**

_Chiles v. Floridian Sports Club, Inc._ This is an opinion written by Chief Judge Harris with which Judges Sharp and Thompson concurred. The question before the court was whether the trial court erred in holding, as a
matter of law, that the waters of the St. Johns River in Welaka (Putnam County) were non-tidal waters.\textsuperscript{609}

Through a series of mesne conveyances, Floridian acquired title to real property abutting the St. Johns River, at which time a lease was in effect that required the abutting landowner to make annual rental payments to the state for the submerged land underlying the landowner's boathouse and docks. However, when the state demanded the required lease payments, Floridian filed a declaratory judgment action to determine whether it was exempted from having to make such rental payments. Floridian's argument in favor of such exemption was that, since prior cases have found that the St. Johns River waters were non-tidal in Welaka, the affidavits in opposition to Floridian's motion for summary judgment, purportedly factually establishing that the waters in that area were tidally influenced, were ineffective for the purposes of defeating a motion for summary judgment.\textsuperscript{610} To gain the protection of the Butler Act and to show that the state had no title to the submerged lands, Floridian needed to show that the waters were either non-tidal or that, if they were tidal waters, the improvements were completed prior to May 29, 1951 when the Butler Act was repealed as to submerged land in tidal waters.\textsuperscript{611}

The Florida Supreme Court reversed and remanded to the trial court for further proceedings since the supreme court took the position that, notwithstanding prior case law, the affidavits presented by the state in this case created genuine issues of material fact.\textsuperscript{612}

\textit{Concerned Citizens of Putnam County for Responsible Government, Inc. v. St. Johns River Water Management District.}\textsuperscript{613} This is an opinion written by Judge Peterson with which Judges Goshorn and Thompson concurred. The question before the court was whether the trial court erred in dismissing Citizens' complaint for injunctive relief with prejudice. Citizens' goals were that the St. Johns River Management District be required to establish minimum water flow levels; to refrain, until that time, from issuing consumptive water permits as to those areas of the district having critical water shortage problems; and, to cut back the water consumption volume in those critical areas until the region recovered sufficiently.\textsuperscript{614}

\begin{itemize}
  \item \textsuperscript{609} Id. at 50.
  \item \textsuperscript{610} Id.
  \item \textsuperscript{611} Id. at 51.
  \item \textsuperscript{612} Id. at 52-53.
  \item \textsuperscript{613} 622 So. 2d 520 (Fla. 5th Dist. Ct. App. 1993).
  \item \textsuperscript{614} Id. at 521.
\end{itemize}
Citizens' complaint sought to require the district to comply with the Florida Water Resources Act of 1972, chapter 373 of the Florida Statutes, particularly section 373.042 which requires each district to establish minimum flows and levels.\textsuperscript{615} The district had taken the position that, although the statute states that each district "shall" establish such minimums, the use of the word "shall" in this section is a directory word, rather than a mandatory one.\textsuperscript{616}

The Fifth District Court of Appeal pointed out that the usual meaning of "shall" is mandatory. Therefore, the question was whether there was anything in the particular statute to evidence that there was a legislative intent that it was merely directory. Finding that nothing existed to give the language that effect, the court held that the complaint was sufficient to require a response by the district.\textsuperscript{617} Therefore, the trial court erred. The appellate court vacated the lower court ruling and remanded for further proceedings.\textsuperscript{618}

\textit{Royal Palm Square Ass'n v. Sevco Land Corp.}\textsuperscript{619} This is an opinion written by Chief Judge Frank with which Judges Ryder and Campbell concurred. The question presented to the court was whether the South Florida Water Management District ("District") erred in entering a final agency action resulting in the dismissal with prejudice of Royal Palm's amended petition for an administrative hearing in opposition to Sevco's application for modification of an off-site surface water system permit.\textsuperscript{620}

The question arose when Sevco entered into a contract to purchase unsettled land next to Royal Palm's property. To determine whether it could develop the area, Sevco applied to the District to modify the permit for an off-site surface water system so that Sevco could also run its waters into that system. To permit this, the District required the creation of an association between Sevco and Royal Palm to manage the entire water system. In response, Sevco produced what was entitled a final operation and maintenance agreement which supposedly showed the association between Sevco and Royal Palm. However, Royal Palm had not reached such an agreement with Sevco.\textsuperscript{621}

\textsuperscript{615} Id. at 522.
\textsuperscript{616} Id.
\textsuperscript{617} Id. at 523.
\textsuperscript{618} Concerned Citizens, 622 So. 2d at 525.
\textsuperscript{619} 623 So. 2d 533 (Fla. 2d Dist. Ct. App. 1993), review dismissed, 639 So. 2d 981 (Fla. 1994).
\textsuperscript{620} Id. at 534.
\textsuperscript{621} Id.
Believing that there was such an agreement between the two entities, the District approved the modification of the permit, provided that the association was given sufficient ownership of the system so that it had control over the entire water management facility. Royal Palm amended its petition challenging the modification because Sevco did not have any ownership interest in the water management system as required by the District. After an informal hearing, the Water Management District’s governing board granted the amended petition. However, because Sevco subsequently agreed to assume the sole and comprehensive responsibility for the maintenance of that system, the District never had a formal hearing and dismissed Royal Palm’s amended petition with prejudice. 622

In deciding to reverse the District and remand the matter with direction to initiate appropriate formal hearings, the appellate court found that Royal Palm had met its burden. First, it had to demonstrate that it had a substantial interest that would suffer immediate injury by the modification. Royal Palm met this requirement since it was a property owner possessed of legal right to drain into the system, and its rights could be diminished dramatically by the introduction of additional surface waters. 623 Second, it had to show that the injury suffered was the type for which such formal hearings were designed to protect. With respect to the second requirement, Royal Palm alleged in its amended petition that Sevco’s application failed to satisfy the prerequisite that there was an entity with sufficient ownership for a proprietary control over the system. 624

XXVII. ZONING

Board of County Commissioners of Brevard County v. Snyder. 625 This is an opinion written by Justice Grimes with which Chief Justice Barkett and Justices Overton, McDonald, Kogan, and Harding concurred. Justice Shaw dissented without an opinion. Landowners sought rezoning of a one half acre parcel. The planning and zoning staff concluded that the rezoning would be consistent with the comprehensive plan except for the fact that it was located in the flood plain. After discovering the flood plain problem could be eliminated by raising the elevation with fill, the planning and zoning board approved the rezoning request. The application then went

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622. Id. at 534-35.
623. Id.
624. Royal Palm Square, 623 So. 2d at 535.
to the county commission. A number of citizens appeared to oppose rezoning, expressing fears of increased traffic. Without stating a reason, the county commission denied the rezoning. From there, the case went to the circuit court, where the landowners were unsuccessful, and subsequently to the district court of appeal, where their degree of success was amazing.\textsuperscript{626} However, that success was short lived. The Florida Supreme Court quashed the district court's opinion.\textsuperscript{627}

The enactment of an original zoning ordinance is legislative in character. However, rezoning may be quasi-legislative or quasi-judicial. Legislative action "results in the formulation of a general rule of policy, whereas judicial action results in the application of a general rule of policy."\textsuperscript{628} Therefore, "comprehensive rezonings affecting a large portion of the public are legislative in nature."\textsuperscript{629} Conversely, rezonings which affect a limited number or properties or property owners are judicial in nature. In this case, the rezoning decision of an area of one-half acre owned by one person was clearly quasi-judicial.\textsuperscript{630}

Such decisions are reviewable by the courts by writs of certiorari. The standard of review is strict scrutiny, but not in the way that the term is used in describing review in constitutional cases. The review is to determine if the rezoning is in strict compliance with the comprehensive plan. Rezoning that is inconsistent with the comprehensive plan would be reversed. However, that does not mean that an application for rezoning consistent with the comprehensive plan must be granted. The purpose of planning is to deal with the future as well as the present. The government must be given leeway to conduct that planning. If the government's decision to deny the rezoning is based upon substantial, competent evidence, then the court should defer to that decision.

Accordingly, a landowner who seeks to rezone a particular property is involved in a quasi-judicial proceeding. He or she has the burden of proving that the proposal is consistent with the comprehensive plan and complies with the procedural requirements of the zoning ordinance. Then the burden of proof shifts to the government. The government must demonstrate that the denial accomplishes a legitimate public purpose, i.e.,

\begin{itemize}
  \item 626. Snyder v. Board of County Comm'rs of Brevard County, 595 So. 2d 65 (Fla. 5th Dist. Ct. App. 1991), \textit{jurisdiction accepted}, 605 So. 2d 1262 (Fla. 1992), \textit{and quashed by} 627 So. 2d 469 (Fla. 1993).
  \item 627. Snyder, 627 So. 2d at 476.
  \item 628. \textit{Id.} at 474.
  \item 629. \textit{Id.}
  \item 630. \textit{Id.}
\end{itemize}
that the refusal to rezone is not arbitrary, discriminatory, or unreasonable. Having failed to obtain the rezoning, the landowner might claim that the denial effects a taking of his or her property and seek compensation by an action for inverse condemnation.

Parker v. Leon County. 632 This is an opinion written by Justice Grimes with which Chief Justice Barkett and Justices Overton, McDonald, Kogan, and Harding concurred. Justice Shaw dissented without a written opinion. In Parker, two cases were consolidated for review by the Florida Supreme Court. 633 In both cases, developers had applied for approval of preliminary subdivision plats and met with denials from the County Planning Commission and the Board of County Commissioners on the theory that the proposed subdivisions were inconsistent with the comprehensive plan. Each developer filed a petition for a writ of certiorari with the circuit court which held in favor of the developers. 634 The First District Court of Appeal reversed. 635

The district court reasoned that the developers’ sole route to circuit court review of the County Commission decision was via section 163.3215 of the Florida Statutes. 636 However, the filing of a verified complaint with the local government within thirty days of its “inconsistent action” is a condition precedent to relief under this section. 637 Consequently, on remand the circuit court dismissed the developers’ actions. 638 The district court affirmed and certified the following question to the supreme court:

WHETHER THE RIGHT TO PETITION FOR COMMON LAW CERTIORARI IN THE CIRCUIT COURTS OF THE STATE IS STILL AVAILABLE TO A LANDOWNER/PETITIONER WHO SEEKS APPELLATE REVIEW OF A LOCAL GOVERNMENT DEVELOPMENT ORDER FINDING COMPREHENSIVE PLAN

631. Id.
632. 627 So. 2d 476 (Fla. 1993).
633. Emerald Acres Investments, Inc. v. Board of County Comm’rs of Leon County, 601 So. 2d 577 (Fla. 1st Dist. Ct. App. 1992), quashed by Parker v. Leon County, 627 So. 2d 476 (Fla. 1993); Parker v. Leon County, 601 So. 2d 1223 (Fla. 1st Dist. Ct. App. 1992), quashed by 627 So. 2d 476 (Fla. 1993).
634. Parker, 627 So. 2d at 477.
636. Id. at 1316.
637. Inconsistent action refers to governmental action inconsistent with the comprehensive plan. See FLA. STAT. § 163.3215(4) (1989).
638. Parker, 627 So. 2d at 478.
INCONSISTENCY, NOTWITHSTANDING SECTION 163.3215, FLORIDA STATUTES (1989)\textsuperscript{639}

The supreme court answered the question in the affirmative and quashed the district court opinion. The court used the traditional tools of statutory interpretation to reach its conclusion that section 163.3215 applied to intervenors,\textsuperscript{640} not to the unsuccessful applicant for a permit or approval.\textsuperscript{641}

XXVIII. CONCLUSION

The foregoing survey of cases and legislation evidences the continuing evolution of Florida property law. It does not seem to be developing in a manner inconsistent with the mainstream of real estate law in the United States. However, it is critical that the property practitioner remain current, despite the large number of judicial opinions and legislative enactments, to avoid the complications and pitfalls which befell some of the litigants discussed in the cases above.

\begin{itemize}
\item \textsuperscript{639} Id. at 477.
\item \textsuperscript{640} See Board of Trustees of the Internal Improvement Trust Fund v. Seminole County Board of County Comm'rs, 623 So. 2d 593 (Fla. 5th Dist. Ct. App. 1993), review denied, 634 So. 2d 622 (Fla. 1994). The Fifth District Court of Appeal held in this case that the Department of Natural Resources and the Board of Trustees of the Internal Improvement Trust Fund, claiming that the county's development order was inconsistent with the comprehensive plan, were limited to relief under § 163.3215 of the Florida Statutes. Id. at 596.
\item \textsuperscript{641} Parker, 627 So. 2d at 479-80.
\end{itemize}
I. INTRODUCTION

Florida’s version of the Uniform Commercial Code is found in chapters 670-680 of the Florida Statutes. This survey covers the substantive changes in Florida’s Uniform Commercial Code (“UCC” or “Code”) and the cases interpreting the Code during the period of July 1, 1993 to July 15, 1994. During the past year, there were only a few cases with written opinions that
II. LEGISLATIVE ENACTMENTS

The only substantive change to the UCC during the survey period was the repeal of chapter 676 of the Florida Statutes, relating to bulk transfers. At least two events prompted the formation of a subcommittee to review the status of chapter 676. First, the National Conference of Commissioners on Uniform State Laws and the American Law Institute had recommended repeal, or at least significant revision, of the UCC article on bulk transfers. Second, many members of the Florida Bar had expressed concern that chapter 676 was serving no useful purpose in its present form.

The subcommittee, formed by both the Financial Institutions and the Bankruptcy/UCC Committees to study and report on the status of chapter 676, recommended the chapter’s repeal and advised against any further bulk sales legislation. The subcommittee found that compliance with chapter 676 substantially decreased due to the cost and delay involved when the provision was followed. The subcommittee also reported that chapter 676 often gave little relief to aggrieved creditors and that the chapter’s remedy, nullifying the transfer, was not practical in today’s transactions. The Florida Legislature followed the subcommittee’s recommendation and the repeal of chapter 676 of the Florida Statutes became effective on July 1, 1993.

III. CASES INTERPRETING FLORIDA’S UNIFORM COMMERCIAL CODE

A. Lease as a Security Interest

In In re Howell, the Bankruptcy Court for the Northern District of Florida determined to what extent a particular lease constituted a financing interest.

3. Id.
4. Id.
5. Id.
6. Id.
arrangement making any security interest created by the lease avoidable by
the trustee in bankruptcy pursuant to 11 U.S.C. § 544. In Howell, the
debtor entered into an agreement with the defendant to purchase the good
will and parts inventory of the defendant’s auto repair business. In a
separate agreement, the debtor agreed to lease from the defendant all the
furniture, equipment, and tools for use in the business. The debtor
operated the auto repair business until he filed a Chapter 7 bankruptcy
petition. The plaintiff, who was the bankruptcy trustee, sought a
declaratory judgment that the lease was really a financing arrangement rather
than a true lease, making any interest avoidable by the trustee due to the
defendant’s failure to file a UCC-1 financing statement.

To determine the character of the agreement, the court looked to
section 671.201(37) of the Florida Statutes for the definition of “security
interest,” and noted that subsection (a) of the statute would require a finding
that there was a security interest if the lease contained a nontermination
clause along with one of the other enumerated items. Because the lease
in question did not have a nontermination clause, the court then looked to
subsection (b) of the statute, which states that a transaction does not create
a security interest merely because one of the listed items is present.

The court held that any relevant factor or circumstance may be
considered when determining whether the transaction created a security
interest or a true lease. The court explained that the statute merely
precluded the finding of a security interest based on any single factor listed
in subsection (b). After reviewing the circumstances surrounding the
lease, the court listed nine factors that indicated that the lease created a
security interest. The court concluded that it was left with “an unmistak-

9. Id. at 287.
10. Id.
11. Id.
12. Id.
14. Id. at 287-88.
15. Id. at 288.
16. Id. at 289.
17. Id. at 288.
18. Howell, 161 B.R. at 289. The nine factors set out by the court are:
   1) Lessee is responsible for insuring the leased property;
   2) Lessee bears the risk of loss or damage to the subject property, and bore
      risk of any liability arising from its use;
   3) Lessee is responsible for the payment of all taxes associated the [sic]
      leased property;
able impression that the lease was entered to effectuate a security interest in the leased property.  

B. Florida’s Blood Shield Statute

In *Walls v. Armour Pharmaceutical Co.*, 20 a personal representative of the estate of a hemophiliac brought a products liability wrongful death action against the manufacturer of plasma products which allegedly led to the hemophiliac’s death from Acquired Immune Deficiency Syndrome (“AIDS”). 21 One of the issues decided in *Walls* by the United States District Court for the Middle District of Florida was whether Florida’s “blood-shield” statute 22 precluded failure-to-warn products liability claims against a seller of blood or blood products. 23 This issue was raised when the defendant argued that the plaintiff’s claim was time-barred because the applicable statute of limitations was Florida’s four year negligence statute of limitations rather than the limitations on products liability actions. 24

The defendant relied on *Silva v. Southwest Florida Blood Bank, Inc.*, 25 a recent decision by the Supreme Court of Florida, in support of its argument that Florida’s “blood-shield” statute essentially turned the plaintiff’s claim into a pure negligence action. 26 The defendant contended

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4) Lessee is responsible for all maintenance and repairs of the leased property;
5) Default provisions of the lease are similar to those found in a typical financing arrangement;
6) The lease contains a remedy provision which is similar to those found in financing arrangements;
7) The lease specifically excluded any warranties;
8) The term of the lease is equal to or greater than the remaining economic life of the leased property; and
9) The lessee has the right to purchase the leased property at the end of the lease term for nominal additional consideration.

*Id.* (footnotes omitted).

19. *Id.* at 290.
21. *Id.* at 1469.
24. *Id.* at 1471.
25. 601 So. 2d 1184 (Fla. 1992).
that the statute precluded a products liability claim against it. Upon careful review of Silva, the Walls court held that Silva did not support the defendant's position. The court noted that the Silva court stated that Florida's "blood-shield" statute "was enacted to eliminate actions for strict liability against blood banks and to limit U.C.C. warranties in the context of the sale of blood by blood banks." The Walls court pointed out that section 672.316(5) by its own terms, only applies to allegations of breach of the implied warranties of merchantability and fitness for a particular purpose.

The court stated that the plaintiff's claim was "not a claim for breach of an implied warranty of fitness or merchantability" and refused to extend the statute's reach to failure-to-warn actions. The court concluded that the statute did not limit the plaintiff's ability to bring a failure-to-warn action against a manufacturer of blood products or convert the claim into a pure negligence action. Consequently, the court held that the products liability statute of limitation applied to the instant case.

C. Negotiable Instruments

The only decision rendered by the Supreme Court of Florida relating to the UCC during the last year is State v. Family Bank of Hallandale. The issue before the court was whether state warrants were negotiable instruments under the UCC. The comptroller had placed a stop payment order on a warrant when it was discovered that the original warrant had been mailed to the wrong company. Several months after the Federal Reserve Bank of Miami returned the original warrant to the respondent due to the stop payment order, the respondent filed suit against the State of Florida. The respondent argued that it was a "holder in due course"
under the theory that state warrants were negotiable instruments, and thus it was entitled to reimbursement by the State.\textsuperscript{39}

In a unanimous decision, overruling the First District Court of Appeal, the court held that state warrants were not negotiable instruments.\textsuperscript{40} In support of its conclusion, the court noted that the Florida Legislature amended section 673.1041 of the \textit{Florida Statutes} as a direct response to the trial court’s decision in the case.\textsuperscript{41} The substance of this amendment is now found at section 673.1041(11) of the \textit{Florida Statutes} and provides that “[a] warrant of this state is not a negotiable instrument governed by this chapter.”\textsuperscript{42} Consequently, the court held that the respondent was not a holder in due course and that it took the warrant subject to the State’s defense that it had issued a valid stop payment order.\textsuperscript{43}

D. Bank Deposits and Collections

The Fifth District Court of Appeal determined in \textit{Sun Bank, N.A. v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.}\textsuperscript{44} whether a bank may charge back a customer’s account for a check with a forged or unauthorized signature once the account had received final settlement and payment.\textsuperscript{45} In \textit{Sun Bank}, a check drawn on an account at Citizens and Southern National Bank (“C & S Bank”) payable to Physician’s Computer Systems (“PCS”) was endorsed by a PCS employee as PCS’s chief operating officer.\textsuperscript{46} The check was then delivered to Cosmopolitan Lady Spa, Inc./Cosmopolitan Fitness Corporation (“Cosmopolitan”) where it was endorsed and deposited into its account at Merrill Lynch.\textsuperscript{47} Merrill Lynch in turn deposited the check into its account with Sun Bank and later received final settlement and payment.\textsuperscript{48}

\textsuperscript{39.} \textit{Id.} at 475-76.
\textsuperscript{40.} \textit{Family Bank}, 623 So. 2d at 477-78.
\textsuperscript{41.} \textit{Id.} at 478-79. The court referred to chapter 91-216, section 1, 1991 Florida Laws 2065, which added subsection (4) to section 673.1041 of the \textit{Florida Statutes}.
\textsuperscript{43.} \textit{Family Bank}, 623 So. 2d at 479.
\textsuperscript{44.} 637 So. 2d 279 (Fla. 5th Dist. Ct. App. 1994).
\textsuperscript{45.} \textit{Id.} at 280.
\textsuperscript{46.} \textit{Id.}
\textsuperscript{47.} \textit{Id.}
\textsuperscript{48.} \textit{Id.}
More than one year later, C & S Bank notified Sun Bank that the endorsement by the PCS employee was unauthorized.\textsuperscript{49} An affidavit from PCS's president stated that the person who endorsed the check was no longer employed by PCS at the time the check was signed.\textsuperscript{50} Even though Merrill Lynch denied liability, Sun Bank debited the amount of the check from Merrill Lynch's account without notifying it.\textsuperscript{51} Consequently, Merrill Lynch filed suit against Sun Bank for wrongfully debiting its account.\textsuperscript{52}

The appellate court affirmed the trial court's decision to grant Merrill Lynch's motion for summary judgment and held that "Sun Bank's right to charge back Merrill Lynch's account was limited to the midnight deadline or within a longer reasonable time prior to final settlement" as specified by section 674.212 of the \textit{Florida Statutes}.\textsuperscript{53} The court refused to recognize an exception to the final settlement deadline just because an unauthorized endorsement was involved.\textsuperscript{54} The court also rejected the argument that section 674.406 of the \textit{Florida Statutes}, relating to the customer's duty to discover and report an unauthorized signature or alteration, authorized Sun Bank's actions.\textsuperscript{55} The court reasoned that section 674.406 allows a claim to be made upon a drawee bank, but it does not authorize the collecting bank to remove funds unilaterally from a customer's account.\textsuperscript{56}

The court pointed out that even though Sun Bank was precluded from charging back, it could still assert a breach of transfer warranty claim under section 674.207 of the \textit{Florida Statutes}.\textsuperscript{57} Concluding that summary judgment was properly granted, the court stated that "while questions regarding the unauthorized endorsement may be material to a suit on a warranty claim, they are not material to the issue of whether Sun Bank could, unilaterally and without notice, charge back Merrill Lynch's account."\textsuperscript{58}

\textsuperscript{49} \textit{Sun Bank}, 637 So. 2d at 280.
\textsuperscript{50} \textit{Id.}
\textsuperscript{51} \textit{Id.}
\textsuperscript{52} \textit{Id.}
\textsuperscript{53} \textit{Id.} at 281 (emphasis added).
\textsuperscript{54} \textit{Sun Bank}, 637 So. 2d at 282.
\textsuperscript{55} \textit{Id.} at 283.
\textsuperscript{56} \textit{Id.}
\textsuperscript{57} \textit{Id.} at 282-83.
\textsuperscript{58} \textit{Id.} at 283.
E. Letters of Credit

The First District Court of Appeal held that although a creditor can perfect a security interest in a letter of credit by possession, the creditor may not have a right to draw directly against proceeds from the letter of credit. Furthermore, the creditor's security interest may be diminished by set-offs against the letter of credit beneficiary by the person for whom the letter of credit was issued. In Futch, a bank loaned a borrower monies secured by the proceeds of a $110,000 letter of credit which was issued to secure a judgment in favor of the borrower. Subsequent to the bank's accepting assignments of the expected letter of credit proceeds as collateral for the loans, the borrower and the judgment debtor agreed that the judgment debtor would offset approximately $68,000 against the judgment amount as settlement for another lawsuit. When the borrower filed a petition in bankruptcy, the creditor sought an adjudication as to its priority to proceeds from the letter of credit.

The Futch court held that the creditor had properly perfected its interest in the letter of credit by taking possession as required by section 679.305 of the Florida Statutes. However, since the letter of credit was not expressly assignable, the creditor did not have a right to draw directly against the proceeds of the letter of credit because only the borrower or the trustee in bankruptcy maintained the right to execute a draw. Moreover, the judgment debtor's set-off was held permissible and the amount of proceeds available to the creditor under the letter of credit was effectively reduced. Thus, creditors should be careful when lending monies secured by proceeds in letters of credit that are not expressly assignable since they will not have the right to make direct draws on such letters of credit. Additionally, such creditors should be aware that the value of their security interest may be reduced by subsequent agreement between the borrower and the person for whom the letter of credit was issued.

60. Id.
61. Id. at D693.
62. Id.
63. Id. at D696.
64. Futch, 19 Fla. L. Weekly at D696.
65. Id. at D695.
F. Investment Securities

In First Bank of Immokalee v. Rogers NK Seed Co., the Second District Court of Appeal addressed whether the appellant’s security interest in stock owned by Precision Agricultural Products, Inc. (“Precision”) was superior to appellee’s judgment lien. Precision had signed a security agreement listing several shares of stock as collateral for a loan from the appellant. Because the stock was in the possession of Precision’s broker, the appellant notified the broker by mail that Precision had assigned the stock as collateral for a loan. The broker responded by refusing to “hold the securities in trust for anyone other than our client,” but offering to assist in a physical transfer of stock certification if that was the desire of Precision. However, the appellant took no further action at that time.

About a year and a half later, the appellee obtained a judgment against Precision. Subsequently, the appellee discovered the existence of the stocks and attempted to sell them to satisfy the judgment. This action prompted the appellant to intervene “to establish the priority of its security interest.” In reversing the trial court’s decision, the court held that the appellant’s security interest had priority over the appellee’s judgment lien. First, the Immokalee court pointed out that according to section 678.321(1) of the Florida Statutes, a security interest in stock is perfected when it “is ‘transferred’ to the secured party or its designee pursuant to a provision of section 678.313(1).” Next, the court stated that Precision’s broker was a “financial intermediary” as defined in section 678.313(4) and that according to section 678.313(1)(h), a transfer occurred when written notification was received by the “financial intermediary on whose books the interest of the transferor in the security appears . . . .” Finally, the court concluded that the letter received by Precision’s broker, notifying it that Precision had assigned the stock to appellant, constituted a “transfer” of the

67. Id.
68. Id. at 12.
69. Id.
70. Id.
71. Immokalee, 637 So. 2d at 12.
72. Id.
73. Id.
74. Id.
75. Id. at 13.
76. Immokalee, 637 So. 2d at 12.
77. Id.
stock pursuant to these provisions. The court noted that Precision's broker "had no ability to decline or prevent the transfer that resulted from its receipt of the notification."

G. Secured Transactions

1. Chattel Paper

In Blazer Financial Services, Inc. v. Harbor Federal Savings & Loan Ass'n, the Fourth District Court of Appeal addressed the issue of whether a purchaser of chattel paper was entitled to take the paper free and clear of a prior security interest to the full extent of the paper's face value. In Blazer, the appellee held a perfected security interest in a jewelry company's "existing or acquired collateral, including its accounts and chattel paper, at three of its retail locations." Later, the appellant agreed to purchase from the retail jewelry company 1100 sales contracts which consisted of retail installment sales contracts, security agreements, and accounts receivable. Over half of these contracts were subject to the security interest held by the appellee and were purchased by the appellant at a discounted price. Later the same year, the jewelry company filed for bankruptcy. Subsequently, the appellee filed suit alleging that the appellant converted its collateral. The appellant claimed that it had priority over the appellee's security interest under section 679.308 of the Florida Statutes.

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78. Id.
79. Id.
81. Id. at 582.
82. Id. at 581.
83. Id.
84. Id.
85. Blazer, 623 So. 2d at 581.
86. Id. Section 679.308 of the Florida Statutes provides:

A purchaser of chattel paper or an instrument who gives new value and takes possession of it in the ordinary course of his business has priority over a security interest in the chattel paper or instrument:

1. Which is perfected under s. 679.304 . . . or under 679.306 . . . if he acts without knowledge that the specific paper or instrument is subject to a security interest; or
2. Which is claimed merely as proceeds of inventory subject to a security interest (s. 679.306) even though he knows that the specific paper or instrument is subject to the security interest.

The Fourth District Court of Appeal agreed with the trial court's finding that the appellant had purchased the chattel paper in its ordinary course of business and without knowledge of the prior security interest according to section 679.308. However, reversing the decision of the trial court, the appellate court held that the protection provided by section 679.308 extended to the full face value of the paper, irrespective of the amount paid by the purchaser of the paper. The court reasoned that "[m]odern commercial practices make it impracticable for a retail lender purchasing chattel paper in the ordinary course of its business to inquire into the factual circumstances surrounding the transactions on which the paper is based[,]" while a money lender is in a better position to protect itself against the borrower's actions. The court also pointed out that its holding was consistent with the UCC's official comment to section 679.308 of the Florida Statutes.

2. Security Agreements

Reversing the trial court, the Fifth District Court of Appeal held in *Cook v. Theme Park Ventures, Inc.* that there was a genuine issue of material fact as to whether certain documents constituted a written security agreement. In *Cook*, the debtor brought an action for declaratory judgment against a storage company to enjoin the company from selling a certain painting stored by the debtor to cover storage fees. An assignee of the creditor intervened, claiming that he had a security interest in the painting, and because the debtor had defaulted on its loan, the assignee was entitled to possession of the painting. The court stated two or more documents together may evidence a security agreement. The court noted that whether a security agreement existed was important due to section 679.203 of the Florida Statutes which provides: a "security interest is not enforceable against the debtor and does not attach to the property unless the

87. *Blazer*, 623 So. 2d at 582.
88. *Id.* at 583.
89. *Id.* (quoting Borg-Warner Acceptance Corp. v. Massey-Ferguson, Inc., 713 S.W.2d 351 (Tex. Ct. App. 1985)).
90. *Id.*
91. 633 So. 2d 468 (Fla. 5th Dist. Ct. App. 1994).
92. *Id.* at 471.
93. *Id.* at 469.
94. *Id.*
95. *Id.* at 470.
collateral is in the possession of the secured party pursuant to an agreement or the debtor has signed a security agreement . . . . 96

The court reviewed documents sent from debtor’s predecessor in interest to the creditor regarding the use of the painting as collateral for a new loan. The documents included a security agreement, a UCC financing statement, and a letter, signed by debtor’s predecessor, specifically referencing the security agreement covering the painting and the UCC financing statement.97 The letter stated that “if the documents appear to be in order, then the funds could be sent by check or wire . . . .”98 It was undisputed that debtor’s predecessor wired the funds a few days later.99 The Cook court concluded that the documents, taken together, were “sufficient to create an issue of fact regarding the existence of a security agreement covering the painting.”100 The court pointed out that the comment to section 679.203 states that the writing requirement of the section is in the nature of that required for the statute of frauds.101 Under this standard, only one of the documents being considered to satisfy the writing requirement must be signed by the debtor, provided that the signed writing refers to the other necessary documents.102 Thus, the court concluded that the letter signed by the debtor’s predecessor along with the security agreement and UCC financing statement were enough to create an issue of fact even though the other documents were unsigned.103

3. Certificates of Deposits

In Bank of Winter Park v. Resolution Trust Corp.,104 the Fifth District Court of Appeal determined the respective rights of two parties who had competing interests in a certificate of deposit (“CD”).105 Specifically, the court addressed the issue of whether a bank was prevented from asserting its set-off rights against a party who had a perfected security interest under article 9.106 The appellant, Winter Park, had loaned $300,000 to three

96. Cook, 633 So. 2d at 470 (citing FLA. STAT. §§ 679.203(1)-203(1)(a) (1993)).
97. Id.
98. Id.
99. Id.
100. Id. at 471.
101. Cook, 633 So. 2d at 471.
102. Id.
103. Id.
104. 633 So. 2d 53 (Fla. 5th Dist. Ct. App. 1994).
105. Id. at 54.
106. Id. at 54-55.
officers of American Pioneer Federal Savings Bank ("American Pioneer"). Although the loan was supposed to be unsecured, the appellant insisted that one of the officers maintain an account with the appellant bank. As a result, one of the officers deposited $100,000 in an account and the appellant issued a CD to him in that amount. The CD contained provisions prohibiting transfer without the appellant’s consent and granting the appellant certain set-off rights. A short time later, the officer used the CD as collateral for a loan from American Pioneer without the appellant’s knowledge or consent.

About a year later, the appellant notified the officer that he was in default on the loan. The next day, American Pioneer informed the appellant that it planned to redeem the CD when the CD matured later the same month. Subsequently, the appellant told American Pioneer of its intention to exercise its contractual right of set-off against the CD proceeds. The appellee, as receiver for American Pioneer, sued the appellant to recover the proceeds of the CD.

The court began its discussion by stating that the decision in this case would be governed by the Florida Supreme Court’s ruling in *Citizens National Bank of Orlando v. Bornstein*. Under the reasoning of *Bornstein*, the nonnegotiable CD at issue in the instant case was an "instrument" as defined in section 679.105(1)(i) of the *Florida Statutes*. Thus the officer’s assignment to American Pioneer "was 'a transfer entitled to secured transaction treatment under article 9."" However, the *Winter Park* court noted that the Florida Supreme Court, in *Bornstein*, further construed section 679.104(9) of the *Florida Statutes* to mean that a bank does not need to comply with the provisions of article 9 in order to preserve its set-off rights. Thus, the instant court concluded that the appellant had the right of set-off, as long as its right accrued prior to receiving notice of the assignment of the CD to American Pioneer.

Reversing the decision of the trial court, the appellate court held that the appellant’s interest in the CD was superior to the appellee’s because the

107. *Id.* at 54.
108. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
114. *Winter Park*, 633 So. 2d at 54 (citing *Bornstein*, 374 So. 2d at 6).
115. *Id.* at 55.
116. *Id.*
appellant had declared the officer in default on the loan before it was notified of the CD’s assignment to American Pioneer. Moreover, the court gave an alternative ground for reversal. The court stated that the Bornstein court specifically held that section 679.318(4) of the Florida Statutes did not invalidate the CD’s restrictions on assignment. Therefore, the court concluded that the appellant should have prevailed because American Pioneer took assignment of the CD subject to its provision requiring the appellant’s prior written consent.

The court acknowledged that its interpretation of Bornstein was directly contrary to two federal court decisions. Bornstein reached the Supreme Court of Florida upon certified questions from the United States Court of Appeals for the Fifth Circuit. However, applying the Florida Supreme Court’s answers to the certified questions in Bornstein, the Winter Park court awarded the CD proceeds to the secured creditor. Likewise, the United States Court of Appeals for the Eleventh Circuit has interpreted Bornstein to mean that the priority provisions in article 9 govern even though the dispute involves a bank with set-off rights.

IV. CONCLUSION

The UCC in Florida has not undergone remarkable change in the past year. During the survey period, there was little revision of the Florida Statutes which constitute the UCC, other than the repeal of chapter 676, which deals with bulk transfers. Although recent case law reveals no particular trend in the courts’ interpretation of the UCC in any specific area, the cases reviewed herein should help further clarify the rights of those conducting commercial transactions in Florida.

117. Id. at 56.
118. Id.
119. Winter Park, 633 So. 2d at 56.
120. See id. at 55.
121. See Bornstein, 374 So. 2d at 6.
122. Winter Park, 633 So. 2d at 54.
123. Id. at 55.
The Eleventh Circuit’s First Decade
Contribution to the Law of the Nation, 1981-1991*

Thomas E. Baker**

** This article is adapted from a chapter written by Professor Baker in The First Decade: The U.S. Court of Appeals for the Eleventh Circuit, 1981-1991, which was coauthored by J. Ralph Beaird and Sharon Kennedy.

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I. INTRODUCTION

The court,¹ readers, and authors must be aware of the contemporary reality that the United States Courts of Appeals sit in most cases both as the

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¹ The generic reference “the court” will be used throughout this chapter. “The court” is the appropriate reference both to an entire court of appeals and to a particular division or panel. See Western Pac. R.R. Corp. v. Western Pac. R.R., 345 U.S. 247, 250, cert. denied sub nom. Metzger v. Western Pac. R.R., 346 U.S. 910 (1953). When relevant, the distinction will be made explicit between a three-judge panel and an en banc court.
appeal of right and as the final court of review. Justice Byron White made the point:

The Supreme Court of the United States reviews only a small percentage of all judgments issued by the twelve courts of appeals. Each of the courts of appeals, therefore, is for all practical purposes the final expositor of the federal law within its geographical jurisdiction. This crucial fact makes each of those courts a tremendously important influence in the development of the federal law, both constitutional and statutory. Hence, it is an obviously useful and significant service to keep close track of and to publicize, particularly for the benefit of lawyers and judges, the work of the circuits.2

Thus, the decisions of the courts of appeals have become, if not less fallible, more final in all areas of federal law.3 The Eleventh Circuit’s decisions, like the decisions of the other courts of appeals, have great effects on the legal life of our Nation. Consequently, the commentator’s task becomes more important.

Likewise, the task of commentary is difficult. The period covered here—the first decade of the Eleventh Circuit—represents, quite literally and figuratively, the formative era of the court. Indeed, the volume of decisions and their variety are qualities that ought to humble, if not intimidate, most commentators. Justice Holmes once observed that a common law court could be expected to replicate the entire corpus juris in the space of a single generation.4 The Eleventh Circuit did this consciously between 1981 and 1991. In Bonner v. City of Prichard,5 the inaugural en banc court held that the new court—just cleaved from the former Fifth Circuit—would deem itself bound by the precedents of the old court.6 Of course, any transfused

3. Cf Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) (“We are not final because we are infallible, but we are infallible only because we are final.”).
4. Oliver W. Holmes, The Path of the Law, 10 HARV. L. REV. 457 (1897). The reports of a given jurisdiction in the course of a generation take up pretty much the whole body of the law, and restate it from the present point of view. We could reconstruct the corpus from them if all that went before were burned. The use of the earlier reports is mainly historical . . . .
5. 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).
6. Id. at 1207. See generally BAKER, supra note 2, at 52-73. For a detailed elaboration of the legislative and political history of the statute creating the Eleventh Circuit and the
precedent of the Fifth Circuit or any subsequent decision of the new Eleventh Circuit is subject to reconsideration by the en banc court.

A second reason for the difficulty in developing commentary on the Eleventh Circuit is the large volume of the court's decisions. One is reminded of Douglas Freeman's famous entreaty that a historian—presumably even lawyer/amateur court historians—"should never undertake to report the thinking of his subjects without written evidence or reliable autoptic proof." The problem facing the court historian, however, is the sheer volume of the writings that describe the thinking of the circuit judges as they go about deciding so many appeals. In the first decade of the Eleventh Circuit, Federal Reporter, Second Series increased by almost 300 volumes, from 661 to 950 volumes. This is the principal resource for the story of the Eleventh Circuit's first decade. The statistics have an almost astronomical order of magnitude to them. Although too much is too often made of the "crisis of volume" in the United States Courts of Appeals; a decade worth of comparison is instructive for present purposes. Let us compare these standard quantitative measures: the gross number of appeals filed; appeals filed per three-judge panel; appeals terminated; terminations per panel; and pending backlog of appeals.

In its first year, the 1981 court year, with twelve active judges, Eleventh Circuit figures were: appeals filed—2,433; appeals filed per


The docket of the Eleventh Circuit is large compared to most other regional courts of appeals. In 1991, the Eleventh Circuit ranked third in appeals filed and terminated and second in cases pending. The Eleventh Circuit handles approximately ten percent of all the federal appeals filed nationwide. Only the undivided Ninth Circuit and the new Fifth Circuit have larger dockets, and both of those courts have many more judgeships than the Eleventh Circuit.

The geography and demography of the Eleventh Circuit are unique and difficult to capture in a two dimensional account. Already, in its first decade, the new Eleventh Circuit has developed its own legal culture, a complex of people and places, representative of the legal issues of the day and inclusive of those perennial questions of federal court jurisdiction that have defined the republic. To select the “leading cases” is at once very difficult and highly arbitrary. No doubt many important decisions are left out of this account. Certainly, other chroniclers would choose differently. There are as many methodologies of court history as there are historians of courts.

As a practical matter, it would be impossible to conduct an in-depth review of all the decisions made by the Eleventh Circuit during the court’s first decade. The Mercer Law Review, however, does perform that task in an annual symposium. The eleven issues covering the relevant period total over 3500 pages of analysis by more than ninety professional authors who are experts in their fields. The approach taken in this article is more selective; it ventures into, at least, some preliminary impressions about the contributions of the Eleventh Circuit bench to the national law. The focus

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11. Id.
here is on the cases decided by the Supreme Court from 1981 to 1991 which arose in the Eleventh Circuit. Only the Supreme Court has a national perspective on the federal law. The perspective from the Supreme Court thus provides some basis for identifying important cases and for venturing first decade impressions on the Eleventh Circuit.

While the vantage of this article is from the *United States Reports,* it bears emphasis that the purpose of this article is to begin to understand how the Eleventh Circuit’s decisions have contributed to the national law. While there are many more assessments of the Supreme Court than there are writings about the United States Courts of Appeals, an effort was made to sample the secondary literature on the intermediate court as well. The substantive discussion and citations here reflect the careful reporting and analysis provided during the surveyed period by the seventeen law reviews in the three states of the Eleventh Circuit.

It also should be made explicit that the high reversal rate of the surveyed decisions does not reflect poorly on the Eleventh Circuit. The “decided propensity” of the Supreme Court, statistically speaking, is to grant a writ of certiorari in cases it intends to reverse. The Eleventh Circuit’s experience in this regard is consistent with the treatment afforded to all the other courts of appeals. Often, the Supreme Court is called on to pick and choose between conflicting approaches taken by different courts of appeals, to resolve intercircuit conflicts. In these cases, the opinions in conflict—both the one preferred and the one rejected—contribute to the High Court’s analysis. Whether the Supreme Court eventually agrees or disagrees with the Eleventh Circuit, therefore, is not as important as an appreciation


for the contribution by the Eleventh Circuit to the Supreme Court’s decisions. The United States Court of Appeals for the Eleventh Circuit plays the important role of error correction and law development in every appeal decided.\textsuperscript{19} The Supreme Court could not perform its essential role otherwise.

II. BACKGROUND AND CONTEXT

This article is a juridical account of the first decade of a court, and for the reasons just described, the discussion centers on the most visible evidence of the intermediate court: appellate decisions. There admittedly is much missing from this account. It is appropriate to spend at least a few paragraphs, before proceeding with the case commentary, to highlight what has happened in the Eleventh Circuit that does not appear in the pages of \textit{Federal Reporter, Second Series}. Fortunately, that account has already been written by John C. Godbold, Senior Circuit Judge. His account may be relied on for background and context.\textsuperscript{20}

Judge Godbold is the only person to have ever served as chief judge of two regional courts of appeals (the old Fifth Circuit, at the time of division, and the new Eleventh Circuit).\textsuperscript{21} He was thus a witness to this history. In his recommended article, Judge Godbold describes many of the behind-the-scenes events of establishing a new court of appeals: renovating the Elbert P. Tuttle Courthouse in Atlanta; building up a library; hiring support staff; organizing a clerk’s office; recruiting staff attorneys; establishing the Historical Society; continuing the federal judicial tradition of public service; and performing other tasks essential to the smooth operation of the institution.

Judge Godbold’s extracurricular history identifies how some early traditions have already formed in the Eleventh Circuit. Following its parent circuit, the court of appeals has consciously “choo[n] to be not a mere recipient of documents but a proactive participant in assuring the prompt and orderly progress of appeals.”\textsuperscript{22} Its local rules and internal operating procedures are designed with this goal in mind. Personnel in the clerk’s office and staff attorneys share the judges’ commitment to differentiated case management. Improving relations between the state and federal courts

\footnotesize{19. See White, \textit{supra} note 2, at x; see also BAKER, \textit{supra} note 2, at 17-21.}
\footnotesize{20. See Godbold, \textit{supra} note 10.}
\footnotesize{21. Harvey Couch, \textit{A Brief History of the Fifth Circuit Court of Appeals}, 56 \textit{TUL. L. REV.} 948, 958 (1982).}
\footnotesize{22. Godbold, \textit{supra} note 10, at 967.
in the Eleventh Circuit has been one of the new court’s highest priorities. Generally, “[h]abeas corpus cases are an especially sensitive area,” but the most “difficult and demanding” appeals are those brought by state prisoners sentenced to death. Death sentence cases account for forty to fifty appeals each year, and almost every appeal continues through the system to the Supreme Court’s docket. The Eleventh Circuit has contributed much more than its share of these difficult cases. By Judge Godbold’s count, nearly half of the Supreme Court’s leading death penalty decisions of the last decade have involved Eleventh Circuit appeals.

The most disagreeable extracurricular episode of the first decade may have been the investigation and impeachment of District Judge Alcee Hastings. Hastings was indicted in 1981 on criminal charges of bribery, conspiracy, and obstruction of justice, allegedly involving a bribe by an attorney to give lenient sentences to the attorney’s clients. At separate trials, the attorney was convicted, but Hastings was acquitted. Elaborate proceedings were conducted by the Eleventh Circuit, which eventually recommended that the matter be referred to the House of Representatives. The House voted to impeach and the Senate convicted Hastings and removed him from judicial office. The episode lasted more than six years and was characterized by the most serious of charges and countercharges: by claims of racism made by Hastings which were ultimately rejected, by accompanying litigation that raised issues of constitutional dimension, and by the inevitable distraction and turmoil endemic to such serious proceedings. In the end, the Eleventh Circuit performed this difficult and distasteful task most admirably. Judge Godbold concludes:

These lengthy and difficult proceedings reached beyond the confines of charges against Hastings. They established important principles, and a methodology, for handling within the judiciary serious misconduct charges against judicial officers. Hastings was the first federal judge to be impeached after acquittal on underlying criminal charges. The proceedings demonstrated that in a judicial conduct matter the federal judiciary had the capacity to investigate and to act in the most difficult of circumstances.

23. Id. at 977.
24. Id. at 974.
25. Id. at 974, 976.
26. Id. at 976; see infra text accompanying notes 236-65.
The most tragic event of the first decade was the assassination of Circuit Judge Robert S. Vance in 1989. The heartfelt sense of loss described by Judge Godbold on behalf of himself and his colleagues is a fitting testimonial to Judge Vance, but it also underscores and further justifies the high regard the Nation continues to show its federal appellate courts. The men and women who have served on the Eleventh Circuit have carried on the grand tradition of Article III of the Constitution. They have served above and beyond the call of judicial duty, often under difficult and challenging circumstances. In this regard, the Eleventh Circuit is not a court apart from the larger whole, spanning only two decades. Rather, it is part of a larger whole, with a history that spans two centuries.

III. ORGANIZATION

The United States Court of Appeals for the Eleventh Circuit, like the other courts of appeals, is best described as a “case-deciding court.” This is to say that the Eleventh Circuit’s “day-to-day work is decisional in the common law tradition.”

It considers and decides discrete controversies and, where appropriate, records in an opinion its decision and its reasoning process. A decision may do no more than decide the dispute. Or it may add by accretion to the body of law, a bit here, an explanation there. Occasionally a decision may extend the law to new territory. But ordinarily extension of the law is a consequence of decision-making, not a pursuit of law-making.

The organization followed here is to collect Supreme Court decisions between 1981-1991 in which the Supreme Court granted a writ of certiorari to the Eleventh Circuit and sort them into the following common law subject areas for discussion: Administrative Law; Antitrust; Civil Procedure and Federal Jurisdiction; Constitutional Law; Criminal Law and Procedure; Evidence; Labor Law; and Taxation.

28. Godbold, supra note 10, at 983-84.
29. Id. at 984.
30. Id.
31. Id.; see BAKER, supra note 2, at 14-17; see also POSNER, supra note 15, at 294-315.
IV. ADMINISTRATIVE LAW

It may seem odd to begin a survey of a court’s contribution to the national law with what may be described as “agency law,” but the average citizen likely will only see the inside of a courtroom, especially a federal courtroom, when called to jury duty. The reality is that most “Americans usually deal with their government through the administrative process.”

Administrative law, broadly defined, describes the legal structure of the executive branch, especially the quasi-independent agencies, along with the procedural restraints, especially judicial review, with which the government is administered. At the constitutional level, administrative law includes concerns for procedural due process and separation of powers, but the most important constraints on the federal agencies are at the level of statutory law. The first federal judicial task always is to assure that the agency is being faithful to the congressional intent in the legislation creating the particular program. Second, other more general statutes, like the Administrative Procedures Act, oblige the federal courts to act as a kind of watch-dog over the agencies. Since the Roosevelt era, these agencies have grown in size, importance, and responsibility; consequently, the judicial tasks have grown apace.

The generic drug industry lost an important federal regulation decision in United States v. Generix Drug Corp. A unanimous Supreme Court held that new “drugs,” as the term is used in the Federal Food, Drug, and Cosmetic Act, included generic drug products and, therefore, such products were subject to prior FDA approval, even though the active ingredients had been separately approved. The drug manufacturer made a number of arguments based on legislative history and administrative practice as applied to the generic marketing of prescription and over-the-counter drugs, but to no avail. That was not the plain meaning of the term, at least the meaning

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36. Id. at 461.
plain to the Supreme Court, which reversed the court of appeals. The three-judge panel of the Eleventh Circuit had sided with the manufacturer to reach the common sense conclusion that the term "new drug" referred only to the active ingredient, and not to the inactive "excipients," such as coatings, binders, and capsules.37

_Sullivan v. Hudson_38 was an important ruling to the millions of retired persons residing within the geographical jurisdiction of the Eleventh Circuit, as well as in the rest of the country.39 After the Department of Health and Human Services denied the claimant’s application for Social Security disability benefits, she sought federal court review. The district court affirmed the agency’s decision, but the Eleventh Circuit reversed because the Secretary had not followed applicable regulations.40 On remand, the claimant was awarded benefits, and subsequently sought attorneys’ fees under the Equal Access to Justice Act.41 The district court denied the fees and the claimant brought an appeal to the Eleventh Circuit, which held in her favor and directed that attorneys’ fees be awarded.42 The Supreme Court agreed with the conclusion of the Eleventh Circuit and held that it was within the district court’s power under the Act to award a Social Security claimant attorneys’ fees for representation provided during the administrative proceedings which were held pursuant to the district court’s order remanding the action to the Secretary.43

The same Act was involved in a second decision in an otherwise unrelated area of administrative law that was decided differently. The Eleventh Circuit held that the Equal Access to Justice Act did not apply to deportation proceedings.44 The Supreme Court affirmed the Eleventh Circuit decision, which held that the administrative proceedings were not

42. _Hudson v. Secretary of Health and Human Servs._, 839 F.2d 1453, 1460 n.9 (11th Cir. 1988) (Johnson, J., for Clark & Dumbauld, JJ.).
43. _Sullivan_, 490 U.S. at 892.
44. _Ardestani v. United States Dep’t of Justice, INS_, 904 F.2d 1505, 1515 (11th Cir. 1990) (Fay, J., for Roney, J.; Pittman, J., dissenting).
adversary adjudications for which the government had waived sovereign immunity, and authorized the award of attorneys’ fees and costs.\(^{45}\)

One piece of the difficult issue of political asylum found its way through the Eleventh Circuit in a case involving Haitians. In *Ray v. United States Department of Justice, INS*,\(^{46}\) some Haitians sought the names of other Haitian nationals who had been returned to Haiti, relying on the Freedom of Information Act.\(^{47}\) The district court ordered the State Department to disclose the information which had been redacted from the requested documents and the Eleventh Circuit affirmed.\(^{48}\) The Supreme Court, however, reversed and held that the disclosure would violate the subjects’ weighty interests in privacy.\(^{49}\) According to the majority, the interests of the public and those making the request were not sufficient to justify the disclosure.

The issue in *King v. St. Vincent’s Hospital*\(^{50}\) was whether the Veterans’ Reemployment Rights Act\(^{51}\) implicitly limits the length of military service after which a member of the Armed Services retains a right to civilian reemployment. The Eleventh Circuit had determined that the employee’s request for a three-year leave of absence, so the employee could perform a tour of duty in the National Guard, was per se unreasonable under the Act.\(^{52}\) Reading the statute as a whole, considering the Act alongside related legislation, and with an eye on the underlying congressional purpose, the Supreme Court reversed, inferring that the reemployment guarantee was unqualified and absolute.\(^{53}\)

Even this small sampling of the administrative law decisions demonstrates how more and more areas of life have become “federalized” under national legislation and why the Congress has assigned the critical function of agency oversight to the courts of appeals in the administrative scheme.


\(^{48}\) Ray, 908 F.2d at 1561.


\(^{50}\) 112 S. Ct. 570 (1991).


\(^{52}\) St. Vincent’s Hosp. v. King, 901 F.2d 1068, 1072 (11th Cir. 1990) (Tuttle, J., for Roney & Hill, JJ.).

\(^{53}\) King, 112 S. Ct. at 575.
V. ANTITRUST LAW

Antitrust law is comprised of a body of statutes, judicial decisions, administrative regulations, and enforcement activities designed to regulate market structure and competitive behavior in the national economy. The core principles of antitrust law reflect a fundamental belief in the market mechanism, i.e., the belief that economic policies are best determined by disaggregated, independent, profit seeking firms striving to satisfy consumers who themselves are seeking to maximize satisfaction through individual market choices. Beyond purely economic considerations, there is a background of political mistrust for any concentration of power in a democracy. Whether these assumptions are still valid within the modern regulatory state and how they might be transformed by the reality of a global marketplace are questions beyond the Supreme Court and this discussion.

When two rival bar review companies agreed that one of them would withdraw from the Georgia market, some former law students did what they had been taught to do; they brought suit, alleging a violation of the Sherman Act.\footnote{54} In \textit{Palmer v. BRG of Georgia, Inc.},\footnote{55} the Supreme Court had little trouble concluding that the students’ theory of the case was sound. A market allocation agreement between competitors, who had previously competed in the Georgia market, could be an illegal restraint of trade of the state market even though the arrangement was that one company would take the Georgia market and the other would have the whole rest of the country. It only took a short per curiam opinion to explain this to the Eleventh Circuit. The three-judge panel had struggled with several procedural issues surrounding the antitrust claim and had divided on the substantive issue.\footnote{56} On appeal, the court of appeals majority seemed disposed to defer to the district court, while the dissenting circuit judge seemed less willing to do so.\footnote{57} Agreeing with the panel dissenter that there was enough to the case to get beyond summary judgment, the Supreme Court reversed.\footnote{58}

A perennial issue of antitrust law is whether the alleged bad actors are private entities subject to the antitrust laws or whether they are state actors

\footnote{55} 498 U.S. 46 (1990).
\footnote{56} Palmer v. BRG of Georgia, Inc., 874 F.2d 1417 (11th Cir. 1989).
\footnote{57} Compare id. at 1422-28 (Hatchett, J., for Fitzpatrick, J.) with id. at 1430-41 (Clark, J., dissenting).
\footnote{58} Palmer, 498 U.S. at 49.
and entitled to an immunity by virtue of the so-called "state action" doctrine. The Supreme Court, as is the fashion these days, has developed a two-prong test: The challenged restraint must be one clearly articulated and affirmatively expressed as a state policy, and the state must actively supervise any private anti-competitive conduct. The Supreme Court determined that this test was satisfied in Southern Motor Carriers Rate Conference, Inc. v. United States. Thus, the United States could not bring suit against two rate bureaus composed of motor common carriers operating in four states which were expressly permitted to submit collective rate proposals to the public service commissions in each state. The case had rolled around in the court of appeals for a three-judge hearing and an en banc rehearing. Once again, the court of appeals dissenters had it right, at least according to the Supreme Court majority who concluded that the rate making had been expressly permitted by virtue of the state's clear intent to displace price competition. The otherwise private action need not be compelled by the state to trigger immunity under the case law.

In ICC v. American Trucking Ass'ns, the Supreme Court was called on to reconcile the Motor Carrier Act of 1980 with the powers of the Interstate Commerce Commission ("ICC"). Ever since the Reed-Bulwinkle Act of 1948, motor carriers have enjoyed immunity from antitrust laws to enter into rate bureaus of the kind described in Southern Motor Carriers Rate Conference, Inc. To receive this immunity, the rate bureaus themselves must make an application with the ICC describing their rate making procedures. In 1981, the ICC announced it was going to implement the Motor Carrier Act of 1980 by fashioning a new remedy for rate-bureau violations: a tariff submitted in substantial violation of a rate-bureau

63. United States v. Southern Motor Carriers Rate Conference, Inc., 702 F.2d 532 (5th Cir. Unit B 1983) (en banc).
68. See supra notes 58-63 and accompanying text.
agreement would be rejected automatically and retroactively. The Eleventh Circuit held that the ICC lacked this authority. Over dissent, the Supreme Court reversed and ruled that the ICC’s newly announced policy was allowed under the agency’s discretionary power to elaborate upon express statutory remedies when necessary to achieve specified statutory goals.

While the Eleventh Circuit’s rulings were not used as vehicles for any profound rethinking of the antitrust law, the decisions described above did contribute interstitially to the maintenance and operation of the federal law on the subject. This occurred even though the beginning decade of the Eleventh Circuit overlapped with a relatively inactive period in antitrust law history.

VI. CIVIL PROCEDURE AND FEDERAL JURISDICTION

The threshold “principle of first importance [is] that the federal courts are courts of limited jurisdiction.” Thus, technically speaking, every federal court decision is a decision about federal jurisdiction. Ever since the beginning of the federal courts, the jurisdictional inquiry has always been two-dimensional. The scope of federal judicial power is determined first, by examining Article III of the Constitution and second, by interpreting some enabling statute of the Congress. Limits on judicial power apply to exercises over the persons of the litigants as well as over the subject matter of the litigation. Once a case or controversy is deemed to belong in federal court, the suit must follow an elaborate trial routine of procedural rules and practices toward some remedy, followed by at least one appeal of right. Eleventh Circuit decisions about each of these phases found their way onto the Supreme Court’s docket.

70. American Trucking Ass'ns, 467 U.S. at 371.
73. See, e.g., Sheldon v. Sill, 49 U.S. (8 How.) 441, 442 (1850); Hodgson & Thompson v. Bowerbank, 9 U.S. (5 Cranch) 303, 304 (1809); Ex parte Bollman, 8 U.S. (4 Cranch) 75, 93 (1807).
The mootness doctrine focuses judicial attention on “the sequence of litigation events out of a traditional and constitutional concern for the very existence of a ‘case or controversy’ itself.”74 If a matter earlier in controversy is somehow resolved, the judgment of the federal court has nothing to accomplish. The lack of a judicial task ends the Article III power. Justiciability must be actual and present, not merely speculative or historical. Legislation can overtake the litigation and render it moot. For example, in Lewis v. Continental Bank Corp.,75 the Supreme Court declared the case moot due to amendments to a federal statute that were enacted while the case was pending. Thus, the Eleventh Circuit’s judicial handiwork, analyzing rather arcane issues of federal banking law, was rendered a nullity.76

Alternatively, the postfiling conduct of third party nonlitigants may eliminate the need for federal court intervention, as happened in Iron Arrow Honor Society v. Heckler.77 In that case, an all male honorary organization had brought suit against the Secretary of Health and Human Services, seeking injunctive and declaratory relief to prohibit the Secretary from interpreting a federal regulation to require that a private university ban the organization from campus. When the president of the university voluntarily banned the organization for as long as it continued its all male membership policy, the Supreme Court announced that the federal case was closed.78 The majority drew an important distinction between voluntary discontinuance by a party defendant—which does not moot the controversy for the practical reason that there would be nothing to stop the defendant from going right back to the offending behavior—and the situation before the Court, which involved a voluntary, unilateral, and unequivocal action by a third party nonlitigant.79 This brought an end to a lengthy proceeding that had gone up and down the federal courts for several years, to the relief of at least some of the Eleventh Circuit judges.80

76. Continental Illinois Corp. v. Lewis, 827 F.2d 1517 (11th Cir. 1987) (per curiam) (Fay, Clark, & Henderson, JJ.), opinion clarified, 838 F.2d 457 (11th Cir. 1988) (per curiam), and vacated, 494 U.S. 472 (1990).
78. Id. at 73.
79. Id. at 71-72.
80. See Iron Arrow Honor Soc’y v. Heckler, 702 F.2d 549 (5th Cir. Unit B 1983) (Tuttle, J., for Anderson, J.); id. at 565 (Roney, J., dissenting).
The most important decision arising in the Eleventh Circuit in the area of civil procedure and federal jurisdiction was *Burger King Corp. v. Rudzewicz*, decided by the Supreme Court in 1985. The issue was at once important and difficult, witnessed by the fact that the Supreme Court was revisiting the issue for the umpteenth time in the *Rudzewicz* decision itself, and since then has returned to the issue in later cases, in an as yet unsuccessful effort to "get it right."

The issue before the Supreme Court was whether the district court's exercise of jurisdiction pursuant to the Florida "long-arm statute" violated the Due Process Clause of the Fourteenth Amendment. A divided panel of the Eleventh Circuit concluded that "[j]urisdiction under the[] circumstances would offend the fundamental fairness which is the touchstone of due process." The Supreme Court majority thought otherwise. In a rather metaphysical discussion of the so-called "minimum contacts" line of cases, the Supreme Court basically told the Burger King Corporation to ""have it your way' . . . by allowing its Florida diversity action to proceed against a Michigan franchisee who refused to vacate the restaurant's premises after termination of his franchise." An earlier decision had made it clear that a nonresident defendant is not subject to specific jurisdiction unless he has directed acts toward the forum. Thus, the *Burger King* holding clarified that not all of the defendant's contacts related to the controversy must be with the forum. In fact, the defendant-franchisee had far more controversy related contacts with Michigan than with Florida and had never actually visited Florida. The Supreme Court explained that an individual's contract with an out-of-state party, without more, does not automatically establish sufficient minimum contacts in the other party's home forum. Instead, a proper due process analysis should take into account the prior negotiations and contemplated future consequences, along with the terms of the contract and both parties' course of dealings, to answer the question whether the defendant has purposely established minimum contacts with the forum and, therefore, is

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82. *Burger King Corp. v. Macshara*, 724 F.2d 1505, 1513 (11th Cir. 1984) (Vance, J., for Pittman, J.; Johnson, J., dissenting).
subject to suit there. On the facts, the majority found a substantial and continuing relationship between the Michigan defendant-franchisee and the plaintiff's Miami headquarters. In its totality of the circumstances analysis, the High Court also made something of the fact that the defendant was an experienced and sophisticated businessman, represented by counsel, who could not point to any other factors establishing the unconstitutionality of the assertion of personal jurisdiction.

The Supreme Court's decision seems to be something of an effort to find some theoretical accommodation between the metaphysics of due process and the contemporary business reality that controversy related contacts often occur in multiple states, each of which may have a police power regulatory interest in applying its own contract law: "[t]o recognize specific jurisdiction only in a place which is the exclusive source of related contacts would often deny [alternative] forum[ states] the legitimate expression of their regulatory interests."87 This is the underlying principle justifying jurisdiction in these cases: the forum state's traditional police power to regulate commercial activities occurring within the state.88

During the 1980s, the federal courts' workload reflected the fact that the Nation's economy was sputtering. Bankruptcy filing increased, and so there were more bankruptcy appeals in the pipeline. Bankruptcy jurisdiction is exclusively federal, of course, and it can be a source of federal friction with the state courts. Owen v. Owen89 dealt with one such friction. In Owen, the Supreme Court held that a judicial lien may be avoided under the bankruptcy statute,90 as impairing a debtor's state law exemptions, even though the state has defined exempt property in such a way as specifically to exclude property encumbered by such liens.91 This reversed the Eleventh Circuit's reconciliation of the federal provision with the state law.92

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87. GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE § 17[C], at 73 (1989).
91. 500 U.S. at 313-14.
92. In re Owen, 877 F.2d 44, 47 (11th Cir. 1989) (Roney, C.J., for Powell & Tjoflat, JJ.).
Under the *Feres*\(^{93}\) doctrine, the United States Government has no Federal Tort Claims Act\(^{94}\) liability for injuries to members of the armed services when those injuries arise out of or in the course of military service.\(^{95}\) The issue was analyzed at great length by the Eleventh Circuit, first by a three-judge panel\(^{96}\) and then, by the divided en banc court on rehearing.\(^{97}\) The Supreme Court relied on the circuit judges' debate to conclude that a service member killed during activity incident to military service could not recover under the Act.\(^{98}\) More particularly, the majority ruled that the death of a Coast Guard helicopter pilot during a rescue mission at sea was activity incident to military service and his widow could not bring an action against the government under the Act.\(^{99}\)

When a federal law creates a duty without expressly providing a remedy, a federal court may imply a remedy under the law. The importance of this implication is that it automatically and necessarily creates federal jurisdiction over the newly created cause of action.\(^{100}\) The remedy can be implied directly under the Constitution. In *United States v. Stanley*,\(^{101}\) a divided Supreme Court rejected the claim of a former serviceman against military officers and civilian researchers to recover for injuries he sustained as a result of a secret Army experiment in which LSD was administered to him.\(^{102}\) The majority found support for this conclusion in its precedents cautioning against routinely implying a cause of action under the Constitution, as well as in the unique disciplinary structure found in the military, to


\(^{95}\) *Feres*, 340 U.S. at 146.

\(^{96}\) *Johnson v. United States*, 749 F.2d 1530 (11th Cir. 1985) (Fay, J., for Vance & MacMahon, JJ.).

\(^{97}\) *Johnson v. United States*, 779 F.2d 1492 (11th Cir. 1986) (per curiam) (en banc) (Johnson, Roney, Tjoflat, & Hill, JJ., dissenting).


\(^{99}\) *Id.*


\(^{102}\) *Id.* at 686.
which Congress had acquiesced in various statutes. This part of the Eleventh Circuit decision was reversed.

In a second decision, *Bush v. Lucas*, the Supreme Court again disallowed a remedy directly under the Constitution, this time under the First Amendment. Suit was brought against the government by an employee alleging a retaliatory demotion and defamation in response to his public criticism of the agency for which he worked. Because the claims arose out of an employment relationship which was governed by comprehensive procedural and substantive provisions affording meaningful remedies against the United States, the majority concluded that implying a cause of action under the Free Speech Clause was unnecessary and would be inappropriate. This result and reasoning followed the Fifth Circuit Court of Appeals' treatment of the case.

The implied remedy can be based on some regulatory statute as well. In *Franklin v. Gwinnett County Public Schools*, a decision reversing the Eleventh Circuit, the Supreme Court permitted a high school student, who alleged that she was subjected to sexual harassment and abuse by her coach/teacher, to seek monetary damages in addition to other equitable relief. The Court held that an individual’s damage action was implied under Title IX, which prohibits gender discrimination in any program receiving federal funds.

The only decision of note under the *Erie* doctrine involved a choice of forum clause in a freely negotiated commercial contract. In *Stewart Organization, Inc. v. Ricoh Corp.*, the Supreme Court affirmed the Eleventh Circuit decision and held that federal law and not state law controlled whether to grant a motion to transfer the case to the venue

103. *Id.* at 679 (citation omitted).
104. United States v. Stanley, 786 F.2d 1490 (11th Cir. 1986) (Hatchett, J., for Henderson & Allgood, JJ.).
107. *Id.* at 388-89.
108. 647 F.2d 573 (5th Cir. Unit B June 1981) (Roney, J., for Godbold & Simpson, JJ.).
110. 911 F.2d 617 (11th Cir. 1990) (Henley, J., for Hill, J.; Johnson, J., concurring).
111. 112 S. Ct. at 1038.
113. *Franklin*, 112 S. Ct. at 1036.
approved in the written contract. According to the majority, the general federal transfer of venue statute—which applies to transfers for the convenience of the parties and witnesses in the interest of justice—was controlling, as that statute was annotated in federal court interpretations.

Pursuant to the Seventh Amendment, ratified in 1791, federal litigants enjoy the right to trial by jury, although the right is textually limited to “suits at common law.” Consequently, a court deciding whether a party has a right to a jury trial must act as a historian of eighteenth century English civil procedure. In Granfinanciera, S.A. v. Nordberg, a majority of the historians on the Supreme Court rejected the conclusions of the Eleventh Circuit historians. The majority concluded that the Seventh Amendment entitles a litigant who has not submitted a claim against a bankruptcy estate to a jury trial when that party is sued by the bankruptcy trustee to recover an allegedly fraudulent money transfer.

Issues involving remedies figured in several Supreme Court reviews of Eleventh Circuit decisions. In the first, Eastern Airlines, Inc. v. Floyd, the High Court reversed the Eleventh Circuit and held that the Warsaw Convention, which sets forth conditions under which an international air carrier can be held liable for injuries to passengers, does not allow for the recovery of damages for mental or psychic injuries unaccompanied by some manifestation of physical injury. In the second, INS v. Jean, the Supreme Court affirmed the Eleventh Circuit’s understanding that the Equal Access to Justice Act allowed for an award of fees against the

116. Id. at 32.
119. U.S. CONST. amend. VII.
121. Id. at 64-65, rev’g sub nom. by an equally divided Court, In re Chase & Sanborn Corp., 835 F.2d 1341 (11th Cir. 1988) (Morgan, J., for Fay & Hatchett, JJ.).
122. Id. at 64.
government in the fee litigation stage of a proceeding without a second finding that the fee was substantially justified.\textsuperscript{129} In a third remedies decision, the Supreme Court affirmed an Eleventh Circuit holding that conduct by federal officials must be discretionary in nature, as well as within the scope of their employment, before the conduct can be deemed to be absolutely immune from state-law tort liability.\textsuperscript{130}

A fourth case involving the law of remedies resulted in a reversal of the Eleventh Circuit.\textsuperscript{131} In \textit{Parsons Steel, Inc. v. First Alabama Bank},\textsuperscript{132} the Supreme Court held that the Eleventh Circuit Court of Appeals had erred by refusing to consider the possible preclusive effect, under state law, of a state court judgment which had rejected a res judicata claim based on a previous federal judgment.\textsuperscript{133} The unanimous Court was loathe to allow the highly intrusive remedy of a federal court injunction against enforcement of the state court judgment. Instead, the Court ruled that the Full Faith and Credit Clause requires that the federal court give the state court judgment, including the resolution of the res judicata issue, the same preclusive effect it would have in another court of the same state.\textsuperscript{134}

The last remedies decision of the period returned the Supreme Court's attention to the procedural puzzles of affirmative action or reverse discrimination.\textsuperscript{135} White firefighters brought suit alleging that they were being denied promotions in favor of less qualified blacks under a consent decree that had been entered in a previous employment discrimination lawsuit between black firefighters and the county. The Eleventh Circuit allowed the plaintiffs to challenge the consent decree.\textsuperscript{136} Even though they had failed to intervene in the earlier employment discrimination lawsuit, in \textit{Martin v.}
Wilks, the Supreme Court allowed plaintiffs to challenge the employment decisions taken pursuant to the consent decree.

Finally, the Supreme Court reached two decisions on the subject of appellate procedures of a rather technical nature. In one, the Supreme Court vindicated the authority of a United States court of appeals to award damages to an appellee upon determining that the underlying appeal is frivolous. In the other, the Court reconciled Federal Rule of Civil Procedure 59(e) with Federal Rule of Appellate Procedure 4(a)(4) to hold that a postjudgment motion for discretionary prejudgment interest constituted a motion to alter or amend the judgment, which had the effect of nullifying a notice of appeal filed before the district court ruled on the motion.

It should be neither surprising nor unexpected that the Eleventh Circuit’s procedural and jurisdictional decisions are so numerous and that the Court of Appeals has already made such a telling contribution to the national law on these subjects. The main role of the intermediate courts of appeals is to supervise the district courts. District courts in the Eleventh Circuit have large and diverse caseloads. Consequently, the appeals of right that are generated can be expected to present novel and difficult issues.

VII. CONSTITUTIONAL LAW

American Constitutionalism represents an original contribution to political thought. Constitutional law describes the relationship between the

individual and the government. In this relationship, there are explicit as well as implicit limitations on the power of government which guarantee individual rights. In the peculiar American version of this social compact, the judicial branch of government explicates these rights and is often called on to play the role of the guarantor of civil rights and civil liberties. The Supreme Court, of course, takes the lead in this regard, but the United States Courts of Appeals perform the role of supporting actor in this drama of democracy. The Eleventh Circuit struggled with the often difficult accommodations between government power and individual liberty in important areas of constitutional law: Preemption; Procedural Due Process; Takings; Race Discrimination; Voting Rights; Privacy; Free Speech and Press; and Free Exercise of Religion.

While it is a familiar and well-established principle that the Supremacy Clause of the United States Constitution invalidates all state laws that interfere with or are contrary to federal law, the course of application of that principle has taken some strange turns. In the exercise of its Commerce Clause power, Congress can expressly preempt a specific form of state regulation or preclude state regulation of the subject. Alternatively, the courts often find an implied congressional intent to preempt a particular area or even a whole field in which the federal interest is dominant. Two Eleventh Circuit cases "went up" to the Supreme Court under preemption holdings. In *Hillsborough County v. Automated Medical Laboratories, Inc.*, the Supreme Court reversed and held that federal regulation governing collection of blood plasma from paid donors did not preempt the local ordinances which the Eleventh Circuit had thrown out. In *Adams Fruit Co. v. Barrett*, the High Court affirmed the Eleventh Circuit

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145. U.S. CONST. art. VI, cl. 2.

146. Id. art. I, § 8, cl. 3.


149. Id.

holding that the exclusivity provisions in state workers’ compensation laws did not bar migrant workers from bringing a private action under the federal Migrant and Seasonal Agricultural Worker Protection Act\(^{151}\) for intentional violations of the Act.\(^\text{152}\)

The constitutional command of procedural due process obliges the government to afford a person adequate notice and a meaningful opportunity to be heard whenever the government deprives the person of property or liberty.\(^{153}\) In *Lyng v. Payne*,\(^{154}\) the Court approved the notice published by the Secretary of Agriculture in the Federal Register which set out details and conditions of the particular loan program and which followed the agency’s regulations. The Eleventh Circuit struggled with the issue and had thought worse of the Secretary’s efforts.\(^{155}\) In a second case, *Davis v. Scherer*,\(^{156}\) the Supreme Court assumed, for the purposes of its decision, that a discharged state highway patrol officer had been afforded fundamentally fair process, even though the full hearing would not take place until after his termination. This decision changed the result the Eleventh Circuit had reached and consequently changed the outcome on the controlling issue of qualified immunity for state officials.\(^{157}\)

The predeprivation procedure versus postdeprivation procedure distinction, and the property versus liberty distinction both came up again in *Zinermon v. Burch*,\(^{158}\) when the Supreme Court affirmed the Eleventh Circuit’s en banc decision.\(^{159}\) This important precedent for patients’ rights reasoned that when a state can feasibly provide a predeprivation hearing before taking property, it generally must do so, regardless of the adequacy of a postdeprivation state court tort remedy.\(^{160}\) Postdeprivation hearings

\(^{151}\) 29 U.S.C. §§ 1831-1872 (1988); see also supra notes 83-90 and accompanying text.

\(^{152}\) *Adams Fruit Co.*, 494 U.S. at 650-51.


\(^{154}\) 476 U.S. 926 (1986).

\(^{155}\) Payne v. Block, 714 F.2d 1510 (11th Cir.) (Clark, J., for Godbold & Henderson, JJ.), modified, 721 F.2d 741 (11th Cir. 1984), and vacated, 469 U.S. 807 (1984) (mem.).


\(^{158}\) 494 U.S. 113 (1990).

\(^{159}\) *Burch v. Apalachee Community Mental Health Servs., Inc.*, 840 F.2d 797 (11th Cir. 1988) (en banc).

\(^{160}\) *Zinermon*, 494 U.S. at 138-39.
may be sufficient in situations when a predeprivation hearing would be unduly burdensome in proportion to the liberty interest at stake if the state is genuinely unable to prevent a random deprivation of some liberty interest. In Zinermon, the Supreme Court held that a mental patient's allegation that employees at the state institution had admitted him "voluntarily," without taking any steps to ascertain whether he was competent to consent to his own admission, stated a good cause of action for deprivation of procedural due process, even though state tort remedies were available after the fact.161

While the issue of takings has troubled the Supreme Court for the last decade or more, and shows no signs of receding,162 the Eleventh Circuit contributed only one important holding during its first decade in this area.163 In FCC v. Florida Power Corp.,164 the Supreme Court reversed the Eleventh Circuit165 and held that the Federal Pole Attachments Act,166 which authorized the FCC to determine just and reasonable rates that utility companies could charge cable television systems for stringing cable television, does not give the cable companies any right to use the utility poles. As to the taking issue, the Court concluded that when the FCC set the rates, in the absence of parallel state regulations, the lower rates set by the FCC were not confiscatory and did not effectuate a taking of the property of the utilities under the Fifth Amendment.167 Having thus reasoned, the Court did not reach the Eleventh Circuit's theory of the case that the Act was an unconstitutional constraint on the judicial power to determine just compensation.

Issues of race have resonated as issues of constitutional law for as long as the Republic has existed under the Constitution of 1787. Constitutional

161. Id.; see Heller v. Doe, 113 S. Ct. 2637 (1993) (holding that mentally retarded patients can be "voluntarily" admitted by family members under a lower threshold showing than is applied in the same state's laws for the mentally ill).
165. 772 F.2d 1537 (11th Cir. 1985) (per curiam) (Roney, Fay, & Dumbauld, JJ.).
167. Florida Power Corp., 480 U.S. at 254; see U.S. CONST. amend. V.
compromise gave in to slavery and then gave way to apartheid and Jim Crow which later gave way, at least formally, to the civil rights movement. Four decades after Brown v. Board of Education, issues of race continue to resonate in constitutional cases. In 1985, the Supreme Court affirmed, in the strongest terms, a holding of the Eleventh Circuit that a provision in the Alabama State Constitution disenfranchising those convicted of crimes of moral turpitude was unconstitutional because it denied the plaintiffs their right to vote on the basis of race. The unanimous opinion in Hunter v. Underwood found that the 1901 enactment, although neutral on its face, was motivated by an original intent and desire to discriminate against African-Americans and had effectuated that discriminatory impact ever since.

Issues about remedies for past racial discrimination have polarized the Supreme Court in numerous cases for decades. It thus comes as no surprise that two of the most important equal protection decisions arising in the first decade of the Eleventh Circuit were about remedies. In the first, a fractured Supreme Court upheld a requirement that fifty percent of the promotions in the state Department of Public Safety be awarded to African-Americans until approximately twenty-five percent of the rank was comprised of members of that race. The plurality opinion in United States v. Paradise upheld this remedial decree first by invoking a compelling state interest to eradicate the past discriminatory exclusion and second by concluding this was a narrowly tailored solution. This decision was one of several civil rights cases Congress later overruled, in effect, with the Civil Rights Act of 1991.

The second equal protection remedy decision was Freeman v. Pitts. As one of the twin successors of the former Fifth Circuit, the Eleventh Circuit was called on to provide guidance to district courts contemplating how and when to end supervision of public school districts still operating under remedial injunctions for de jure segregation. The three-judge panel

171. ALA. CONST. of 1901, art. VIII, § 182.  
read Supreme Court and Eleventh Circuit precedent to require the district court to retain jurisdiction in these cases until the school district attained unitary status in six identified administrative areas for an extended period.\textsuperscript{176} The Supreme Court was of another mind, however, and held that the district court need not retain active control over every aspect of the school district until all aspects were unified.\textsuperscript{177} Rather, the district court had jurisdiction and discretion to relinquish control in incremental stages before full compliance was achieved in every area of school administration. Considered alongside some other contemporaneous holdings, the Supreme Court seemed to be signalling that federal district courts could not continue indefinitely to administer local public schools, even school systems that had been guilty of invidious racial segregation in the past.\textsuperscript{178}

One of the most controversial constitutional decisions of the Eleventh Circuit's first decade involved the issue whether a state sodomy statute violated the fundamental rights of homosexuals. The \textit{Bowers v. Hardwick}\textsuperscript{179} case was decided by the narrowest possible margin in the Supreme Court and by a two to one vote in the Eleventh Circuit.\textsuperscript{180} The Supreme Court concluded, over an intense dissent, that the Constitution did not protect homosexual relations, even by consenting adults, in the privacy of their own home. The case and its implications continue to swirl around the High Court and beyond, without sign of any lessening of the controversy.

In \textit{Butterworth v. Smith},\textsuperscript{181} a reporter who had testified before a grand jury challenged a state statute that proscribed any disclosure of the witness's own testimony. The Eleventh Circuit held that the statute was unconstitutional and the Supreme Court agreed.\textsuperscript{182} The statute violated the First Amendment rights of free speech and free press without sufficient justification, especially with regard to the truthful disclosure of the witness's own testimony after the grand jury's term ended.

\begin{footnotes}
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\item[177.]
\textit{Freeman}, 112 S. Ct. at 1450.
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\item[181.]
494 U.S. 624 (1990), \textit{aff'd} 866 F.2d 1318 (11th Cir. 1989) (Vance, J., for Kravitch & Henderson, JJ.).
\item[182.]
\textit{Id.} at 636.
\end{footnotes}
First Amendment rights of another kind were involved in Forsyth County v. Nationalist Movement.\(^{183}\) An organization brought suit to challenge a county ordinance that authorized an administrator to vary the fee charged for assembling and parading to reflect estimated costs for any public expenses for police and for clean up. The Eleventh Circuit, sitting en banc, held in favor of the challengers.\(^{184}\) The Supreme Court granted review and affirmed, holding that the ordinance was facially invalid under established case law.\(^{185}\) Aside from the legal issues, which were relatively straightforward and simple, there was a great deal of emotion in the underlying facts of this case. The county had been the site of the largest nationally publicized civil rights rally since the 1960s, where an affiliate of the Ku Klux Klan (the Nationalist Movement) held a counter-demonstration. Shortly thereafter, the county enacted the challenged ordinance. Two and one-half years later, the ordinance was constitutionally challenged by the Nationalist Movement which sought to hold a demonstration opposing the federal holiday honoring Martin Luther King, Jr.

The last considered decision arising from the Eleventh Circuit is a reminder of the region's tradition as the "Bible belt."\(^{186}\) Parents of public school children complained about a state statute that authorized a daily period of silence during the school day for meditation or silent prayer.\(^{187}\) The district court dismissed the parents' challenge. The Eleventh Circuit reversed in part and affirmed in part.\(^{188}\) In Wallace v. Jaffree,\(^{189}\) the Supreme Court adhered to past precedents and affirmed the Eleventh Circuit's decision. It voided the statute because the measure served as an endorsement of religion and lacked any secular purpose and, therefore, it violated the Establishment Clause principle that government must pursue a

\(^{183}\) Forsyth County v. Nationalist Movement, 934 F.2d 1482 (11th Cir. 1991) (en banc), aff'g 913 F.2d 885 (11th Cir. 1990).

\(^{184}\) Forsyth, 112 S. Ct. at 2405.

\(^{185}\) Forsyth, 112 S. Ct. at 2395 (1992).


course of complete neutrality in matters of religion. The decision marked one of the most controversial battles over church and state jurisprudence in recent years.

These decisions from the first decade of the Eleventh Circuit fully and fairly represent the constitutional law issues of the day. These are the questions that required answering for our Republic to function as a representative democracy. In these accommodations of government power and individual right, the Eleventh Circuit contributed to the Supreme Court's continuing effort to respond, for this generation of Americans, to what might be called the Madisonian dilemma: empowering the government sufficiently for its tasks, yet at the same time limiting it from overreaching the individual. The "Father of the Constitution" and the drafter and chief sponsor of the Bill of Rights once explained this perpetual dilemma:

> It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

VIII. CRIMINAL LAW AND PROCEDURE

Federal criminal law and criminal procedure are inextricably intertwined. The adjectival rules of procedure describe the process by which the substantive criminal law is enforced. For the Eleventh Circuit, as well as for the Supreme Court, substance and procedure have a duality of policy

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190. Id. at 55-56.
and constitutionality. A federal criminal law first must be interpreted and then tested for constitutional validity. A federal procedure must square with the constitutional rights found in the Bill of Rights. Federal procedure, for the most part, is constitutional procedure; of the twenty-three individual rights identified in the first eight amendments, twelve concern criminal procedure. Federalism makes matters more complicated when a state criminal conviction is being challenged in a collateral preceding in the nature of habeas corpus in federal court. A state substantive law must be interpreted in federal court in the same way a state court would interpret it, but then the federal constitutional overlay must be applied. A state has no police power to violate the Constitution of the United States. State procedures, likewise, must afford at least the minimum federal procedural due process found in the Fourteenth Amendment incorporated liberties.

The Eleventh Circuit's decisions considered such perennial issues as interpretation of federal criminal statutes, self-incrimination, right to counsel, speedy trial, jury, due process, double jeopardy, and the right to appeal. Issues about death penalty procedures and procedures on federal habeas corpus review also were much in evidence and proved particularly difficult.

The Eleventh Circuit functioned as a common law court to interpret the Federal Bank Robbery Act. In United States v. Bell, a three-judge

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panel had reversed, but a divided en banc court affirmed the conviction.\textsuperscript{201} A Supreme Court majority settled the issue (on which the circuits had divided much like the en banc court had) and ruled that the statute was not limited to common law larceny but also included the defendant's crime of obtaining money under false pretenses.\textsuperscript{202}

The Supreme Court resolved another circuit conflict in Garcia v. United States,\textsuperscript{203} and again sided with the Eleventh Circuit's approach,\textsuperscript{204} to hold that the statute proscribing assault and robbery of any custodian of "mail matter or of any money or other property" of the United States\textsuperscript{205} covered "flash money" being used by an undercover secret service agent to buy counterfeit currency. A third decision involved an interpretive issue under the Hobbs Act,\textsuperscript{206} about which the circuits were in conflict. Again, the Supreme Court agreed with the Eleventh Circuit\textsuperscript{207} and concluded that the affirmative act of inducement by a public official was not a necessary element of the offense of extortion under color of official right in a case styled Evans v. United States.\textsuperscript{208}

Few Supreme Court decisions have had as much sustained controversy to them as has Miranda v. Arizona.\textsuperscript{209} One testament to the complexity of that doctrine is that nearly thirty years later there are still difficult issues and applications which continue to divide the courts of appeals and the Supreme Court. Wainwright v. Greenfield\textsuperscript{210} is one example. The majority affirmed the Eleventh Circuit decision\textsuperscript{211} that the use of a defendant's post-arrest, post-Miranda warnings silence as evidence of his sanity violated due process.

The right to counsel is recognized as being central to the adversarial system of justice. First decade decisions touched on three critical questions.

\begin{itemize}
\item \textsuperscript{201} United States v. Bell, 678 F.2d 547 (5th Cir. Unit B 1982) (en banc) (opinions filed by Vance, Anderson, & Tjoflat, JJ).
\item \textsuperscript{202} Bell v. United States, 462 U.S. 356 (1983).
\item \textsuperscript{203} 469 U.S. 70 (1984).
\item \textsuperscript{204} United States v. Garcia, 718 F.2d 1528 (11th Cir. 1983) (Atkins, J., for Fay & Kravitch, JJ.).
\item \textsuperscript{205} 18 U.S.C. § 2114 (1988).
\item \textsuperscript{206} \textit{Id.} § 1951 (1988).
\item \textsuperscript{207} United States v. Evans, 910 F.2d 790 (11th Cir. 1990) (Kravitch, J. for Cox & Dyer, JJ.).
\item \textsuperscript{208} 112 S. Ct. 1881 (1992).
\item \textsuperscript{209} 384 U.S. 436 (1966).
\item \textsuperscript{210} 474 U.S. 284 (1986).
\item \textsuperscript{211} Greenfield v. Wainwright, 741 F.2d 329 (11th Cir. 1984) (Tjoflat, J., for Godbold & Henderson, JJ.).
\end{itemize}
In *Wainwright v. Torna*, the Supreme Court reversed the court of appeals and held that since the petitioner had no constitutional right to counsel to pursue a discretionary review in the state supreme court, he was not deprived of effective assistance of counsel as a result of his retained counsel’s failure to timely file the application for review.

The Supreme Court granted review of a fractured en banc decision and announced the proper standard for the effective assistance of counsel in *Strickland v. Washington*. The Sixth Amendment/Due Process right to counsel is the right to the effective assistance of counsel, and the benchmark for judging any allegation of ineffectiveness must be whether, considering all the circumstances, the defense attorney’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on to have produced a just result. The defendant, in order to raise a successful challenge, must show that there is a reasonable probability that the result of the proceeding would have been different, but for the defense counsel’s unprofessional errors.

Reversals under a reasonableness standard reflect the reviewing court’s perception of the average defense attorney, and from the run of decisions rejecting right to counsel claims, the members of the federal bench seem to have a rather low opinion of the average criminal defense attorney. In *Burger v. Kemp*, for example, the Supreme Court held that the defense attorney’s professional partnership with the attorney representing his client’s codefendant in a separate prosecution did not so infect the attorney’s representation as to constitute active representation of a competing interest. The Court upheld the Eleventh Circuit’s outcome and went on to conclude that there was some reasonable basis for the defense attorney’s

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212. 455 U.S. 586 (1982).
213. 649 F.2d 290 (5th Cir. Unit B June 1981) (per curiam) (Miller, Johnson, & Clark, JJ.).
215. 693 F.2d 1243 (5th Cir. Unit B 1982) (opinions filed by Vance, Tjoflat, Clark, Johnson, Roney, & Hill, JJ.).
217. *Id.* at 694.
failure to develop and present evidence of the defendant’s troubled family background at the penalty stage of his capital prosecution.221

In a 1990 decision, Doggett v. United States,222 the Supreme Court agreed with the Eleventh Circuit’s summary of the proper analysis for a speedy trial claim,223 but disagreed with the intermediate court’s application of the rules to the facts. In a relatively rare holding, the Supreme Court concluded that the defendant was denied his Sixth Amendment right to a speedy trial by the eight-and-one-half year delay between his indictment and his arrest.224

The central right to a competent and unimpaired jury was involved in Tanner v. United States.225 Responding to the defendants’ allegations and offers of proof, the Supreme Court affirmed the Eleventh Circuit226 and held that an evidentiary hearing was barred under Federal Rule of Evidence 606(b)’s general prohibition of juror impeachment.227 The Court also concluded that no hearing was necessary to resolve the particular allegations of juror abuse of alcohol and drugs since there were sufficient other bases to reject the claims. The right to an impartial jury composed of jurors who are competent and unimpaired could be adequately protected by other trial procedures, such as voir dire, in-court observations by counsel, court, and other trial participants, and by the procedure, allowed by the trial court here, to conduct a post-trial evidentiary hearing to impeach the verdict by non-juror evidence of the alleged misconduct.

The Due Process Clause protects an accused against a conviction except upon proof beyond and to the exclusion of every reasonable doubt. The Supreme Court was called on to apply settled rules about burden-shifting inferences and presumptions in jury instructions in Francis v. Franklin.228 The Eleventh Circuit concluded that the trial judge’s instruction to the jury had impermissibly shifted the burden of proof on the issue of intent and that

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221. Burger, 483 U.S. at 776.
223. United States v. Doggett, 906 F.2d 573 (11th Cir. 1990) (Kravitch, J., for Atkins, J.; Clark, J., dissenting).
224. Doggett, 112 S. Ct. at 2686.
the error was not harmless.\textsuperscript{229} The Supreme Court majority agreed that there was reversible error in the charge.\textsuperscript{230}

Double jeopardy complications arose in \textit{Garrett v. United States}.\textsuperscript{231} The defendant was convicted of a continuing criminal enterprise, conspiracy to possess marijuana with intent to distribute, and using a telephone to facilitate illegal drug activities. The Eleventh Circuit affirmed the conviction.\textsuperscript{232} The Supreme Court looked first to the intent of Congress and then to the limits of the Fifth Amendment to hold: 1) Congress intended that the continuing criminal enterprise offense be a separate offense and authorized prosecution for both the predicate offense and the enterprise offense; 2) the prosecution for the continuing criminal enterprise offense after the earlier prosecution for marijuana importation did not offend principles of double jeopardy; 3) the Fifth Amendment did not bar cumulative punishments for the enterprise offense and the underlying predicate importation offense.\textsuperscript{233}

The right to appeal was the subject of \textit{Wasman v. United States}.\textsuperscript{234} Following an appellate reversal of his earlier conviction, the defendant was retried and again convicted. The Supreme Court affirmed the Eleventh Circuit’s second handling of the case\textsuperscript{235} and held that after retrial and reconviction, following a successful appeal, a trial court may justify an increased sentence by affirmatively identifying relevant conduct or events that occurred after the first sentencing. Any presumption of vindictiveness was rebutted by the trial judge’s careful explanation that the second sentence was greater because of an intervening conviction; therefore, the longer second sentence was manifestly legitimate.

Every judge on the Eleventh Circuit will admit that the most difficult of all appeals, in terms of their toll on the judicial psyche, are death penalty appeals. The facts are difficult. The law is difficult. Additionally, these difficulties are made worse by the weight of responsibility for the outcome.

\textsuperscript{229} Franklin v. Francis, 720 F.2d 1206, 1212 (11th Cir. 1983) (Tjoflat, J., for Hill & Simpson, JJ).

\textsuperscript{230} Francis, 471 U.S. at 326; see also Burger, 483 U.S. at 781-83 (holding a similar claim of error harmless).

\textsuperscript{231} 471 U.S. 773 (1985).


\textsuperscript{233} Garrett, 471 U.S. at 773.

\textsuperscript{234} 468 U.S. 559 (1984).

\textsuperscript{235} United States v. Wasman, 700 F.2d 663 (11th Cir. 1983) (Markey, J., for Fay & Clark, JJ).
McCleskey v. Kemp, a 1987 decision, was understood at the time to represent the last, best challenge against the death penalty. The case was reviewed en banc in the Eleventh Circuit on the issue of whether proof of disparate racial impact could be the basis for a holding that a state’s death penalty was unconstitutional. The en banc judges debated among themselves in lengthy opinions, but the majority concluded that the statistical showing had not been sufficient. An African-American defendant was convicted in a Georgia trial court of armed robbery and the murder of a white police officer. He was tried and sentenced under state procedures which the Supreme Court had upheld in 1976. To support his claim in federal court, the defendant-petitioner proffered a statistical study (the Baldus study) that purported to show a disparity in the imposition of the death sentence in Georgia based on the murder victim’s race and, to a lesser extent, on the defendant’s race. The exhaustive and comprehensive study of all the murder prosecutions in the state revealed that African-American defendants whose victims were white have a statistically significant greater likelihood of receiving the death penalty. The Supreme Court of the United States, by a five to four vote, rejected this argument under the incorporated Eighth Amendment and under the Equal Protection Clause of the Fourteenth Amendment.

The second substantive death penalty holding came down in Ford v. Wainwright. The Supreme Court majority reversed and remanded the Eleventh Circuit panel decision. The High Court interpreted the Eighth Amendment to prohibit a state from inflicting the penalty of death upon a prisoner who is insane. The Court held that state procedures for determining the sanity of the death row inmate were not adequate to assure a full and fair hearing on the critical issue, and therefore the petitioner was entitled to an evidentiary hearing on the question in the collateral federal trial court.

241. Ford v. Wainwright, 752 F.2d 526 (11th Cir. 1985) (per curiam) (Vance & Stafford, JJ.; Clark, J., dissenting).
Jury selection in death cases must be sensitive to the constitutional interests of both the accused and the state.\textsuperscript{243} The Supreme Court used the case of \textit{Wainwright v. Witt}\textsuperscript{244} to caution courts of appeals about their proper role when reviewing the factual issue of whether a prospective juror was sufficiently biased as to be excludable. The Eleventh Circuit\textsuperscript{245} erred, according to the Supreme Court, in the panel’s willingness to second guess the district court’s assessment of what had happened in the state trial court. In \textit{Darden v. Wainwright},\textsuperscript{246} the en banc court in the Eleventh Circuit ruled in favor of the state prisoner.\textsuperscript{247} The Supreme Court subsequently vacated and remanded the Eleventh Circuit decision based on \textit{Wainwright v. Witt}.\textsuperscript{248} However, on remand, the en banc court denied relief.\textsuperscript{249} The second time the case came before the Supreme Court, the majority definitively held that under the circumstances the particular juror had been properly excluded for indicating that he had moral, religious, or conscientious principles in opposition to the death penalty that were so strong that he would be unable to recommend a death penalty regardless of the evidence.\textsuperscript{250}

Procedures and events at the penalty phase of capital prosecutions routinely serve as the focus of later federal habeas corpus challenges. In \textit{Wainwright v. Goode},\textsuperscript{251} the Supreme Court ruled that the Eleventh Circuit\textsuperscript{252} erred in substituting its own view for the view of the state supreme court on the issue of whether the state trial court relied on an impermissive aggravating factor.\textsuperscript{253} The majority went on to opine that, even if the state trial judge relied on the problematic factor, the state trial did not produce a sentence so arbitrary as to violate the Constitution. In \textit{Hitchcock v. Dugger},\textsuperscript{254} the Supreme Court reversed the Eleventh Circuit,

\begin{itemize}
  \item \textsuperscript{243} See Witherspoon v. Illinois, 391 U.S. 510 (1968).
  \item \textsuperscript{244} 469 U.S. 412 (1985).
  \item \textsuperscript{245} Witt v. Wainwright, 714 F.2d 1069 (11th Cir. 1983) (Tuttle, J., for Kravitch, J.; Roney, J., specially concurring).
  \item \textsuperscript{246} 477 U.S. 168 (1986).
  \item \textsuperscript{247} Darden v. Wainwright, 725 F.2d 1526 (11th Cir. 1984) (en banc) (opinions filed by Johnson, Tjoflat, Hill, & Fay, JJ.).
  \item \textsuperscript{248} Wainright v. Darden, 469 U.S. 1202 (1985).
  \item \textsuperscript{249} Darden v. Wainwright, 767 F.2d 752 (11th Cir. 1985) (en banc).
  \item \textsuperscript{250} \textit{Darden}, 477 U.S. at 178.
  \item \textsuperscript{251} 464 U.S. 78 (1983).
  \item \textsuperscript{252} Goode v. Wainwright, 704 F.2d 593 (11th Cir. 1983) (Anderson, J., for Godbold & Hoffman, JJ.).
  \item \textsuperscript{253} See \textit{Goode}, 464 U.S. at 83-84.
  \item \textsuperscript{254} 481 U.S. 393 (1987).
\end{itemize}
sitting en banc, and held that the advisory jury in the state trial court had been unconstitutionally "instructed not to consider, and the sentencing judge [had improperly] refused to consider, evidence of nonstatutory mitigating circumstances . . . ." that should have been considered.

In Parker v. Dugger, the Supreme Court held that the state supreme court had incorrectly determined that the state trial had found no mitigating circumstances in pronouncing sentence and, consequently, had failed to follow constitutional procedures required for weighing aggravating and mitigating factors.

The surveyed decisions of the Eleventh Circuit also provide a window on the arcane and convoluted procedures in federal habeas corpus proceedings. The procedural rules in these actions are more easily stated than applied, as the Eleventh Circuit learned in two decisions. In Amadeo v. Zant, the Supreme Court reversed the Eleventh Circuit and determined that the district court's finding that the petitioner had established cause for his state court procedural default was not clearly erroneous and should have been affirmed under settled principles. On the other hand, in Dugger v. Adams, the Supreme Court did not find cause excusing the petitioner's default under the relevant case law and reversed the Eleventh Circuit.

The most important first decade habeas holding came in McCleskey v. Zant. It involved the issue of abuse of the writ, an issue that in death penalty cases can make the difference between a last minute stay or execution. Again, the Supreme Court used an Eleventh Circuit decision as a vehicle for national lawmaking. The majority held that when a state prisoner files a second or subsequent petition the state bears the

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255. Hitchcock v. Wainwright, 770 F.2d 1514 (11th Cir. 1985) (en banc) (Roney, J., for the majority; Johnson, J., dissenting).
258. Id. at 320-22.
burden of pleading abuse of the writ; the burden is satisfied if the state
describes prior petitions and identifies the issue raised for the first time; then
the procedural burden shifts to the petitioner to show cause and actual
prejudice or, alternatively, a fundamental miscarriage of justice. With this
elaboration, the Supreme Court effectively narrowed the possibility that a
state prisoner could succeed on any petition that followed the first federal
collateral review.

Collectively, these criminal law and criminal procedure decisions
demonstrate that the Eleventh Circuit has taken its place alongside the other
United States Courts of Appeals. It is one of the main pipelines of these
cases to the Supreme Court, but the influence flows in both directions. The
court of appeals is directed toward the responsibility of correcting errors in
the nine district courts under its supervision. But it has a national
orientation at the same time. In Alabama, Georgia, and Florida, the
Eleventh Circuit is the judicial institution that has the primary federalizing
responsibility for implementing the national policy on crime and, at the
same time, for guaranteeing the promise of the Bill of Rights to citizens
accused of crime.

What is most evident, perhaps, in the death penalty and habeas corpus
decisions, is the constitutional abstraction of federalism. The three
sovereign states in the Eleventh Circuit have made the criminal justice
policy decision to rely on the death penalty. Consequently, the Eleventh
Circuit has the macabre responsibility of being something of a death court,
or more accurately, a constitutional court in these capital cases. According
to one expert, of the forty-three habeas death penalty cases decided by the
Supreme Court during the period being studied, nearly half of them
originated in the Eleventh Circuit. Many of these, as demonstrated
above, have had national significance for this area of criminal law and
constitutional procedure. It is safe to predict that the incorporated Eighth
Amendment will continue to demand the attention of the Eleventh Circuit
bench for the foreseeable future.

Finally, it should be noted that the court of appeals’ frequent reliance
on the en banc mechanism to deal with these issues suggests a prudent
exercise of collegial decision-making. These full-court efforts help assure

267. Godbold, supra note 10, at 976; see also Enmund v. Florida, 458 U.S. 782, 797
(1982) (holding that application of the death penalty to a defendant who was not a principal,
but only an aider and abetter, was unconstitutional).
268. See generally Timothy W. Floyd, Criminal Procedure, 22 TEX. TECH L. REV. 493
that the law of the circuit will be uniform and will express the judicial philosophy of the majority of the circuit judges. Through en banc hearings past panels are rehabilitated and future panels are informed. Even more important, the Supreme Court benefits from the fuller and more diverse expressions of judicial views contained in the multiple opinions that issue from full-court review.

IX. EVIDENCE LAW

The Federal Rules of Evidence have, as their express objective, "to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." On three occasions, the Supreme Court used Eleventh Circuit appeals as a vehicle to address the law of evidence.

In Amadeo v. Zant, a state prisoner was convicted of murder and sentenced to death. He was in federal court on a collateral challenge based on alleged equal protection violations in the selection of his petit jury. The issue before the Supreme Court dealt with the relationship between a district court and a court of appeals when reviewing findings of fact. On the record, the Supreme Court concluded that the factual findings upon which the district court had based its conclusion—that the petitioner had established cause for his procedural default of not objecting to the jury selection at the state criminal trial—were not clearly erroneous; therefore, the court of appeals should not have set aside the district court's grant of relief. If there are two permissible views of the same evidence, the view of the trier of fact cannot be deemed clearly erroneous. The appellate court cannot engage in fact-finding.

The Supreme Court gave the district judge a lesson in evidence law in Beech Aircraft Corp. v. Rainey. The spouses of deceased Navy pilots brought an action against the aircraft manufacturer and the service company. The district court entered a judgment on a jury verdict in favor of the defendants and the Eleventh Circuit reversed after a rehearing en banc. Having determined that a Navy investigative report was sufficiently

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271. See supra text accompanying notes 259-61.
trustworthy to be admissible, the district court also admitted, over plaintiffs' objections, most of the report's "opinions," including a statement suggesting that pilot error was most probably the cause of the crash. The Supreme Court affirmed the district court's admission of these "opinions," under Federal Rule of Evidence 803(8)(C), and agreed that the material was not excludable as hearsay.\textsuperscript{275} Factually based conclusions or opinions are not excludable, according to the Court's interpretation of the rule and the Advisory Committee Notes, when they appear in a public record or report, so long as the record or report otherwise satisfies the trustworthiness criterion making it admissible in the first place.

In a rather rare alternative holding, the Supreme Court held that the district court had abused its discretion in restricting the scope of cross-examination of a witness.\textsuperscript{276} However, the Court remanded for further proceedings consistent with Federal Rule of Evidence 106. The witness, a Navy flight instructor, had testified on direct examination as an adverse witness that he had made certain statements, arguably supporting the theory of pilot error, in a detailed letter in which he also took issue with some of the other findings in the previously mentioned report. The Supreme Court held that he should have been permitted to testify on cross-examination that his letter also included statements that he believed that the crash was due to power failure, so that the jury would be presented with a complete account of his letter.\textsuperscript{277} The Supreme Court reasoned that when one party has made use of a portion of a document and a distortion or misunderstanding can only be averted through the presentation of another portion of the document, the additional material required to be presented for the sake of completeness is ipso facto relevant and admissible.\textsuperscript{278}

Federal Rule of Evidence 606(b) codifies the long-accepted common law rule, which the federal courts have always followed, that a jury verdict cannot be impeached with a juror's testimony as "to the effect of anything upon [his] or any other juror's mind or emotions . . . except that . . . [such testimony is admissible on the question of] whether any outside influence was improperly brought to bear upon any juror."\textsuperscript{279} In \textit{Tanner v. United

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\textsuperscript{276} \textit{Rainey}, 488 U.S. at 153. \\
\textsuperscript{277} \textit{id.} \\
\textsuperscript{278} \textit{See Fed. R. Evid. 401, 402.} \\
\textsuperscript{279} \textit{id. 606(b).}
\end{flushright}
States, the Supreme Court affirmed an Eleventh Circuit decision that allegations of substance abuse by the jurors did not fall within the exception and, therefore, an evidentiary hearing was not required. This result was dictated by the text of the rule, the legislative history, and the strong public policy of ensuring full and free deliberations, in order to protect jurors from harassment by the losing party, and to preserve the community’s trust in the jury system. As if to cover all bases, the majority went on, in dicta, to say that affidavits and testimony noting that jurors had consumed alcoholic beverages at lunch and that several had fallen asleep in the afternoon did not form an adequate basis for placing any mistrust on the jury verdict.

These evidence law decisions highlight several important themes. The law of evidence is the domain of trial lawyers and trial judges: those who apply it and make it. The law in this area is rule-based, but the Federal Rules of Evidence are codifications and restatements of common law principles. Therefore, the rules are best understood against that background of understanding. Finally, the Eleventh Circuit seems to be respectful of the district court’s role in the court system. The trial is supposed to be the main drama, while the appeal is merely the critic’s review. It is at the trial where the adversarial processes work to approximate truth. The main role of the appellate court is to help insure that the trial proceeds in a fair and efficient manner as an asymptote of what happened and who did what to whom and why.

X. LABOR LAW

The history of labor law in the United States contains more social history and class conflict than legal theory. The legal response to the labor
movement and the opposing movement against labor organization has largely been statutory. The primary developments have occurred in the halls of Congress, not in federal courtrooms. Nevertheless, the federal courts have had the important responsibilities of interpreting and applying the edicts of the legislative branch. The first legislative goal is to ensure "industrial peace" among the employers, the labor organizations and the individual employees. In more recent years, Congress has constructed an elaborate statutory framework for protecting the rights of workers from a host of marketplace discriminations. The federal courts, including the courts of appeals, provide a forum for keeping the labor peace and for policing the labor place.

The Supreme Court affirmed the Eleventh Circuit's decision in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council.* The National Labor Relations Board ("NLRB") issued an order instructing the union to stop distributing handbills, at a construction site, which urged mall customers not to shop at any of the mall's stores until the mall owner guaranteed that the building contractors would pay fair wages. The Supreme Court first held that the NLRB interpretation of the National Labor Relations Act ("NLRA") was not entitled to judicial deference, particularly when the NLRB interpretation would raise serious First Amendment problems. Instead, the Court rejected the argument that the union's peaceful distribution of handbills at the mall entrances violated the NLRA provision, making it an unfair labor practice to "threaten, coerce, or restrain any person" to cease doing business.

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with another.290 Such handbilling and appeals to consumers did not fall within the scope of the congressional meaning and intent.

The Supreme Court reversed the Eleventh Circuit291 in *Hechler v. International Brotherhood of Electrical Workers Local 759*.292 The case required the High Court to interpret and apply the Labor Management Relations Act of 1947293 ("LMRA"). An electrical apprentice brought suit against her union, alleging that the union had breached its duty to ascertain that she possessed essential training and skill before being assigned to perform a job at which she was injured. After the lawsuit was removed, the district court dismissed it for failure to comply with the federal statute of limitations. The Eleventh Circuit ruled in favor of the employee. However, the Supreme Court disagreed and held that the claim fell within the preemptive effect of section 301 of the LMRA. This conclusion was reinforced by the policy behind the statute to provide a uniform meaning to contract terms in collective bargaining agreements, since the lawsuit depended on the meaning to be given to the relevant agreement between the parties. Therefore, the federal, and not the state, limitations period applied. Accordingly, the only question left on remand was whether the claim was based on the union’s duty of fair representation, in which case the brief federal six-month period applied, or whether the claim amounted to a third-party beneficiary suit based on the collective bargaining agreement, in which case a longer federal statute of limitations period would apply.

In a very important decision to the region’s migrant workers, the Supreme Court affirmed the Eleventh Circuit,294 holding that exclusivity provisions in state workers’ compensation laws do not bar migrant workers from bringing private actions under the Federal Migrant and Seasonal Agricultural Worker Protection Act.295 The decision in *Adams Fruit Co. v. Barrett*296 relied on the actual language of the federal statute and depended on the Congressional history of the measure in analyzing preemption.

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291. *Hechler v. International Bhd. of Elec. Workers Local 759, 772 F.2d 788 (11th Cir. 1985) (Clark, J., for Henderson & Tuttle, JJ).*
296. *Id.; see also supra* text accompanying notes 145-47.
The Supreme Court was called on to interpret and apply the Federal Service Labor Management Relations Statute\textsuperscript{297} in \textit{Fort Stewart Schools v. Federal Labor Relations Authority}.\textsuperscript{298} The Federal Labor Relations Authority ("FLRA") had ruled that the Army was required to negotiate with a union representing employees of two elementary schools located in the Fort. The Supreme Court agreed with the Eleventh Circuit\textsuperscript{299} that the FLRA should be upheld. The union's proposals, relating to mileage reimbursements, various types of paid leave, and salary increases, fell within the statute's coverage of "conditions of employment," at least in the interpretation of the FLRA.\textsuperscript{300} The Supreme Court found no reason to reject the agency's interpretation.

What was probably the most important Supreme Court labor law decision to come out of the Eleventh Circuit in its first decade was \textit{Hishon v. King & Spalding}.\textsuperscript{301} A female attorney sued one of the oldest and most prestigious law firms in the circuit. She alleged that the firm's decision not to promote her from associate to partner constituted sex-based discrimination under Title VII of the Civil Rights Act of 1964.\textsuperscript{302} A divided panel of the Eleventh Circuit held that the Act did not apply to such partnership decision-making.\textsuperscript{303} The Supreme Court reversed and ruled that the plaintiff had stated a cognizable claim and was entitled to her day in court. Partnership consideration was part and parcel of the employment relationship, even though making partner was not automatic or guaranteed. Partnership consideration could not be based on any of the factors prohibited by Title VII: race, color, religion, sex, or national origin. Application of the Civil Rights Act did not infringe on the firm or members' constitutional rights of expression or free association.\textsuperscript{304}

\begin{itemize}
  \item \textsuperscript{297} 5 U.S.C. §§ 7101-7135 (1988).
  \item \textsuperscript{298} 495 U.S. 641 (1990).
  \item \textsuperscript{299} Fort Stewart Schs. v. Federal Labor Relations Auth., 860 F.2d 396 (11th Cir. 1988) (Hatchett, J., for Vance & Nesbitt, JJ.).
  \item \textsuperscript{300} See \textit{Fort Stewart Schs.}, 495 U.S. at 644-50.
  \item \textsuperscript{301} 467 U.S. 69 (1984); see also Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) (employing sexual harassment analysis relied on by Supreme Court in Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986)).
  \item \textsuperscript{303} Hishon v. King & Spalding, 678 F.2d 1022, 1030 (11th Cir. 1982) (Fay, J., for Young, J.; Tjoflat, J., dissenting).
  \item \textsuperscript{304} Hishon, 467 U.S. at 73-79; see also Martha E. Waters, Recent Decision, \textit{Title VII: Relief for Sexual Harassment in the Eleventh Circuit}, 35 ALA. L. REV. 193 (1984).
\end{itemize}
The Supreme Court had occasion to reverse another Eleventh Circuit holding,\(^{305}\) under Title VII, in *Florida v. Long.*\(^{306}\) State employees brought a class action alleging that the State of Florida's pension plan system for state employees discriminated on the basis of sex. Specifically, the Supreme Court was asked to decide the date upon which pension funds covered by Title VII were required to offer benefit structures that did not discriminate on the basis of sex, and whether persons who, in fact, retired before that date were entitled to adjusted benefits to eliminate any sex discrimination for all future benefits. This called for an interpretation of the statute and some reconciliation of earlier decisions.\(^{307}\) Choosing the date of the later of its two decisions, the majority reasoned that the Court's first decision, which invalidated discriminatory pension plan contributions, did not put the state on notice that its optional pension plan, that offered sex-based benefits, was in violation of the federal law. Therefore, liability could not be imposed for Florida's conduct before the second Supreme Court decision that explicitly prohibited such discriminatory benefits. Furthermore, the legislative purposes behind Title VII would not be advanced by an inequitable award of retroactive damages against the states and local governments.

The last mentioned labor law decision to arise in the Eleventh Circuit was *School Board of Nassau County v. Arline.*\(^{308}\) This case dealt with the Rehabilitation Act of 1973.\(^{309}\) A school teacher, who alleged that she was fired from her job solely for the reason that she had a history and susceptibility to tuberculosis, argued that the statute protected her as a "handicapped individual" who was "otherwise qualified to teach . . . ."\(^{310}\) The Eleventh Circuit held that the contagious disease constituted a statutory handicap.\(^{311}\) The Supreme Court affirmed and held that the statute prohibited the school system, as a federally funded state program, from discriminating against her solely by reason of her handicap. The case was remanded for further

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310. *Arline,* 480 U.S. at 275.
311. *Arline* v. School Bd. of Nassau County, 772 F.2d 759, 764 (11th Cir. 1985) (Vance, J., for Anderson & Henley, JJ).
proceedings to determine whether the teacher, in fact, was otherwise qualified to teach, and therefore, fired improperly.

These labor law decisions demonstrate the essential "federalness" of employment law, once the issues go beyond traditional state contract law and workers' compensation statutes. Federal law is based on statute. The limited role of the judicial branch, consequently, is to divine the legislative intent and be true to the Congressional scheme. The flow of influence goes both ways: national policies are implemented in the local community through federal court enforcement and the Eleventh Circuit produces the case vehicles for deciding issues with nationally binding effects.

X. TAXATION

It has been said that "[t]he technical laws Congress has devised tend to make the comprehension of the income tax system all too absorbing in time and energy." Mercifully for the author, the Eleventh Circuit has not developed a reputation as a leading tax court. Only two decisions during the first decade had to do with tax law and neither is absorbing.

In the first tax decision, Holywell Corp. v. Smith, a bankruptcy trustee, who had been appointed under a confirmed plan to liquidate and distribute the debtors' property after the property was transferred to a trust created by the plan, sought a declaratory judgment on the question of the trustee's obligation to file income tax returns and to pay taxes upon the gain realized from the sale of real estate. The plan was silent on this issue. The Bankruptcy Court decided that the trustee did not have to file or pay and the Eleventh Circuit affirmed. The Supreme Court, however, disagreed. Since the trustee was an assignee of all or substantially all of the property of the corporate debtors, the trustee would have to file returns and pay taxes as if there had been no plan. As a fiduciary, the trustee had to file returns and pay the taxes due on income attributable to the individual debtor's property. The unanimous Court held that the United States' earlier failure to object to the plan, which was silent about taxes, did not preclude the government from seeking payment of taxes from the trustee.

315. In re Holywell Corp., 911 F.2d 1539 (11th Cir. 1990) (Hatchett, J., for Henderson, J.; Cox, J., dissenting).
316. Holywell, 112 S. Ct. at 1021.
The only other tax case was *Dickman v. Commissioner.* The Eleventh Circuit reversed a determination by the United States Tax Court which had concluded that intrafamily, interest-free demand loans did not result in taxable gifts. The Supreme Court sided with the Commissioner and determined that the loans were taxable gifts of the reasonable value of the use of the money being loaned. This result resolved a conflict among the circuits in favor of the approach the Eleventh Circuit had taken on direct appeal. The issue was of obvious importance to the proper functioning of the tax system.

Two decisions do not constitute a sufficient sample to reach any conclusion about the status of tax law in the Eleventh Circuit. Any assessment is left for some future evaluation.

**XII. CONCLUSION**

It has been difficult even to attempt to account for ten years of decisions in so many different areas of the law. It is even more difficult, if not impossible, to summarize the overall significance of the Eleventh Circuit's contributions to the law of the Nation. Nevertheless, even an arbitrary selection process, as was used here, allows one to begin to appreciate the responsibility of decision-making borne by the judges of the intermediate federal court.

Federal judicial history was made with the creation of the United States Court of Appeals for the Eleventh Circuit. The judicial and legal history made in turn by the Eleventh Circuit, during its first decade, has been true to its judicial parent, the former Fifth Circuit, which aptly deserved the title of a "great court." The priority of the first decade circuit judges was "characterized by the goal of achieving stability as an institution."

Obviously, by any account, that goal has been achieved. This newest of regional courts of appeals has already struggled with many of the most difficult issues of the day. It has sought to accommodate history and precedent with the felt needs of the present.

This first decade of the Eleventh Circuit is merely its prologue. The Eleventh Circuit Court of Appeals has established its own identity, taken its place alongside its twin, the new Fifth Circuit, and has found its own voice among the other regional courts of appeals that comprise the intermediate tier of the federal court system. It has performed thus far with a high-minded purpose and in the best traditions of the Article III judiciary.

What, in the end, are the distinctive characteristics of the Eleventh Circuit’s jurisprudence? Perhaps the best conclusion is that it is too soon to answer that question, after only one completed decade. Such a postdiction must be attempted from the appropriate posture of intellectual modesty and should be understood to be fraught with the same uncertainty that characterizes predictions of the future. What the future will bring for the Eleventh Circuit one can only wait and see. For example, before World War II, who could have predicted what the civil rights cases would mean to the old Fifth Circuit, and vice versa?

What can be said with great confidence is that the Eleventh Circuit will continue to decide difficult and complex appeals in the best common law tradition. The Supreme Court will continue to look to the Eleventh Circuit for issues of national importance and for guidance on how they should be decided. In this way, the United States Court of Appeals for the Eleventh Circuit will continue to perform its assigned role of establishing precedent and administering justice under the Constitution for the citizens living within its boundary and for the rest of the Nation.323

State v. Pierce: Will Florida Courts Ride the Wave of the Future and Allow Computer Animations in Criminal Trials?

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I. INTRODUCTION

The use of computers has revolutionized many aspects of society, including the practice of law.1 Despite an initial hesitation by legal professionals in taking advantage of computer technology, computers have become commonplace in most law offices for word processing, research, and billing. One analyst noted that the use of computers “has set the stage for the most significant technological revolution to affect the practice of law

since the invention of the photocopy machine. In the past few years, computer technology has found its way into the courtroom. Litigators are now turning to computers to generate graphic evidence that will help them educate and persuade the judge or jury to find in their favor.

The use of computer generated evidence has become commonplace in civil litigation. However, in criminal cases its use has developed more slowly. This lag has been due in part to the expense of creating computer generated evidence. The high cost of creating an animation has not kept it from being used in civil cases because it often leads to settlements, which are more cost effective than trials. Because recent advances in technology have significantly decreased the production costs of computer generated evidence, it is now being used more frequently in criminal trials. While only one reported decision deals with the use of computer animation or simulation in a criminal case, a handful of trial courts around the country have admitted such evidence. Recently, in State v. Pierce, the Seven-
teenth Circuit Court, in Broward County, Florida, admitted in evidence a computer animation proffered by the prosecution to show how an accident, in which a truck struck three children, occurred.\(^1\) Despite objections made by the defense that the computer animation was not accurate, the judge admitted the animation as demonstrative evidence.\(^2\) The defendant was convicted of vehicular homicide and was sentenced to sixty years in prison.\(^3\) The defense claimed that the trial court erred in admitting the animation, and appealed to the Fourth District.\(^4\) The issue of whether a computer animation should be admitted in evidence presents an issue of first impression in this state. Consequently, the Fourth District Court of Appeal's ruling may dictate the way Florida courts respond in the future to the proffering of computer animations and simulations in criminal trials.

This comment will consider computer animations and simulations, and their possible effects on criminal trials. Part II presents an overview of computer animations and contains a brief discussion of the history and preparation process. Part III reviews the standards for admissibility in Florida. Part IV discusses the advantages and disadvantages of allowing such evidence. Part V discusses \textit{State v. Pierce}, the main focus of this comment. The discussion includes an in-depth analysis of the case and its possible ramifications.

\section*{II. AN OVERVIEW OF COMPUTER ANIMATION}

Computers were initially used in litigation to create visual data, such as charts, diagrams, and graphs.\(^5\) The next significant occurrence involving the use of computers in the courtroom was the development of computer animations and simulations.
animations. First used in 1979 in aviation litigation, computer animations and simulations have since been used in a variety of civil cases, ranging from automobile accident cases to patent infringement cases. Among these are instances in which animations or simulations were offered to reconstruct an accident; to demonstrate a company's reliance on the patented technology of another; to reconstruct how physical damage to a home occurred from a hurricane; to demonstrate in a breach of contract case how a product performed as intended; and to demonstrate how a product could be perfected. Most recently, however, computer animations and simulations have infiltrated the area of criminal law. According

16. *Id.*
17. Sherman, *supra* note 6, at 32. According to Alan Trebitz, a representative of one of the larger established computer animation companies, computer animation was first used in a 1979 airplane crash case. *Id.*
18. David W. Muir, *Debunking the Myths About Computer Animation, in Securities Litigation* 1992, at 591, 596–97 (PLI Litig. & Admin. Practice Course Handbook Series No. 444, 1992). "Computer animations ... have been used for reconstructing, or reenacting, accidents, including automotive and truck accidents, aircraft collisions, ... and construction equipment accidents." *Id.* Computer animation is useful in patent litigation, where technical differences are difficult to distinguish, as well as in industrial accidents involving alleged faulty machinery, because the machine's operation can easily be depicted. *Id.*
22. Holland v. Dick Youngberg Chevrolet-Buick, Inc., 348 N.W.2d 770 (Minn. Ct. App. 1984) (using computer simulated test to show that truck purchased from dealer was not impaired and could achieve speed of 55 miles per hour with a full load).
24. See *McHugh*, 476 N.Y.S.2d at 721. At trial, the defendant proffered a reenactment of an automobile accident which caused the death of four friends. *Id.* The trial court admitted the reenactment into evidence and defendant was acquitted. *Id.*; see also Sherman, *supra* note 6, at 32 (citing *Phillips*, No. 87-365 (using animation to prove that an entrance
to some commentators, computer animation and simulation are the “wave of the future,” and they predict that this type of evidence will be used with increasing frequency in criminal trials.\footnote{25}

**A. Definitions, Terms, and the Preparation Process**

A computer animation is a type of motion picture created with the help of a computer.\footnote{26} It consists of a series of computer generated still images, which are then recorded in rapid succession onto a videotape to create the illusion of movement.\footnote{27} A computer simulation differs significantly from an animation. In a simulation, the computer program is used to reconstruct an event by analyzing data and producing conclusions based on information contained in the software program being used.\footnote{28} Hence, in a simulation, the computer actually supplies missing data by making calculations based on the laws of physics.\footnote{29} Once the simulation is complete, it can be transformed into an animation.\footnote{30} The animation is then used to illustrate the conclusions drawn by the simulation.\footnote{31}

Computer animations are prepared using a six-step process.\footnote{32} The first step involves the collection of data, including police or accident reports, testimony of eyewitnesses, calculations made by experts, photographs, drawings, and all other relevant information.\footnote{33} Next, the experts meet to decide what movement will be visually portrayed in the animation.\footnote{34} For

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\footnote{25} Sherman, \textit{supra} note 6, at 32 (quoting John M. Dedman, Director of Training at the National College of District Attorneys, and Peter Barnett, a criminologist with Forensic Science Associates).

\footnote{26} James W. Dabney, \textit{Animation Is Invading Courtrooms}, N.Y. L.J., Apr. 6, 1993, at 4 (discussing computer animation in general, its various uses, and specifically its presentation at trial).

\footnote{27} O'Connor, \textit{supra} note 1, at 22 (citing Barry Sullivan, \textit{Computer-Generated Reenactments as Evidence in Accident Cases}, 3 HIGH TECH L.J. 193 (1989)).

\footnote{28} Id.

\footnote{29} Id. (citing Ian S. Jones et al., \textit{Computer Animation—Admissibility in the Courtroom}, SAE #910366, 143, 147 (published by the Society of Automotive Engineers (“SAE”), 400 Commonwealth Drive, Warrendale, PA 15096-0001)).


\footnote{31} Id.

\footnote{32} Muir, \textit{supra} note 18, at 598.

\footnote{33} Id.

\footnote{34} Id.
instance, in an animation of an automobile accident, the experts must decide if both cars should be in motion, or if only one should move. In the third step, data is loaded into the computer and the actual computer models of the objects or scene are created.\textsuperscript{35} The fourth step involves entering additional data regarding the position of an object with respect to time.\textsuperscript{36} This step controls the portrayal of how and where an object will move throughout the animation.\textsuperscript{37} During the fifth step, the computer analyzes all the input data and generates still frames of the image.\textsuperscript{38} Once the computer has rendered all the still frames, the images or frames are recorded in succession onto a videotape in order to create the illusion of movement.\textsuperscript{39}

**B. Uses of Computer Animation at Trial**

Animations can be used three ways at trial: 1) as a tutorial to explain complex scientific concepts; 2) as an illustration (similar to a sketch pad) to show an expert's opinion of how an event occurred or to show facts presented by witnesses; or 3) as a simulation, whereby an event is recreated by the computer, and the recreation then forms the basis of an expert opinion as to how the event occurred.\textsuperscript{40} For instance, in a medical malpractice case, an animation could be used as a tutorial to show jurors a complete view of the circulatory system of the human body. It could then take jurors on a voyage through skin and tissues to show them the circulatory system from the perspective of being inside the veins or arteries. An example of how an animation could be used as an illustration would be to recreate an automobile accident in which all relevant information regarding the accident is known. The animation would then be used by an expert to demonstrate his or her opinion of how the accident occurred, just as if he or she were drawing on a chalkboard. A simulation, on the other hand, might be used in a multi-vehicle collision where the sequence of impacts is unknown. In that situation, a computer simulation could calculate the missing data using the known data, together with the laws of physics,
and show how the initial accident and the resultant chain of accidents occurred. From this recreation, the expert would formulate his or her opinion of how the accident took place. With its many applications, computer animation may become a vital tool for all parties in the courtroom. Nevertheless, the standard for admissibility of such evidence will vary.

III. ADMISSIBILITY STANDARDS IN FLORIDA

The evidentiary standard for admissibility of a computer animation depends on whether the animation is proffered as demonstrative evidence or scientific evidence. Generally, when an animation is used as a tutorial or illustration, it is being offered as demonstrative evidence. Demonstrative evidence is "evidence addressed directly to the senses without intervention of testimony." This type of evidence usually consists of objects which illustrate verbal testimony, such as maps, diagrams, photographs, models, or charts.

Virtually no case law in Florida discusses the standards of admissibility for computer animations. Therefore, the general rules regarding demonstrative evidence enunciated in the Florida Statutes should be followed. In Florida, all relevant evidence is admissible unless its probative value is substantially outweighed by the danger of unfair prejudice. Relevant evidence is defined as "evidence tending to prove or disprove a material fact." Hence, in order to have a computer animation admitted in evidence, an attorney must first prove that the animation is relevant and that it will assist the trier of fact. The attorney must also prove that its probative value outweighs its prejudicial effect. To prove relevance and probative value, the attorney must show that the animation is what its proponent claims: it must accurately and fairly depict the testimony.

42. O'Connor, supra note 1, at 22.
44. O'Connor, supra note 1, at 24.
45. Id., see also FLA. STAT. §§ 90.402-.403 (1993).
46. Id. § 90.401.
47. O'Connor, supra note 1, at 24.
presented. If the attorney can prove that the expert's testimony meets these guidelines, and that the animation is merely an illustration of the expert's testimony, there should be little trouble in admitting the animation in evidence.

On the other hand, when a simulation is proffered as scientific evidence, the standard for admissibility is much higher. In a simulation, the computer performs calculations and supplies missing data, and is considered to be more than an illustration of an expert's testimony. Consequently, a simulation is subject to the standard of admissibility for novel scientific evidence. Under this standard, a simulation must meet either the Daubert or Frye test for admissibility, depending on the jurisdiction. Although the United States Supreme Court rejected the Frye test in federal cases, Florida courts require conformity to the Frye standard in cases in which a new scientific technique is used. To have a simulation admitted in evidence in Florida, an attorney must be able to prove that the scientific principle is "sufficiently established to have gained general acceptance in the field in which it belongs."

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51. O'Connor, supra note 1, at 24 (citing Fla. Stat. § 90.901 (1993)).
52. Id.
53. Id.
54. Id.
55. Id.
56. Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993). In Daubert, the Court held that many considerations bear on the inquiry of whether a method is scientifically valid. Id. at 2796-97. The Court listed several considerations. These include: 1) whether the theory or technique can be (or has been) tested; 2) whether the theory or technique has been subject to peer review and publication; 3) the known or potential error rate; 4) the existence and maintenance of standards controlling its operation and; 5) whether the theory or technique has attracted widespread acceptance within the relevant scientific community. Id.
57. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). In Frye, the court held that expert testimony can be admitted when "the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." Id. at 1014.
58. Daubert, 113 S. Ct. at 2799.
59. Flanagan v. State, 625 So. 2d 827, 828 (Fla. 1993). In a case involving pedophile profile evidence, the court evaluated the admissibility of expert scientific testimony and stated that it was not admissible in Florida unless it met the test for novel scientific evidence established in Frye. Id. In note 2 of the court's opinion, the court further explained that although the United States Supreme Court recently construed Rule 702 of the Federal Rules of Evidence as superseding the Frye test, Florida continues to adhere to the Frye test for the admissibility of scientific opinions. Id. at 829 n.2.
60. O'Connor, supra note 1, at 25.
must be qualified and must testify that the computer program used to create the simulation has achieved general acceptance within the relevant scientific community.\textsuperscript{61} If the simulation utilizes theories recognized by the laws of physics, it should be admitted.\textsuperscript{62} This standard is based on the fact that the theories recognized by the laws of physics have long been recognized by the scientific community.\textsuperscript{63}

In addition to meeting the \textit{Frye} standard, the proponent of a computer simulation must also show that the simulation is relevant and that it will assist the trier of fact.\textsuperscript{64} In order to meet these standards, the attorney will have to: 1) qualify the computer animator as an expert; 2) establish that the computer hardware and software are accepted within the relevant scientific community; 3) show the accuracy of the data input into the computer; 4) qualify the accuracy of the animation calculations; and 5) establish the accuracy of the media on which the animation will be presented, thus verifying that minimal distortion occurred in the process of videotaping.\textsuperscript{65} Overcoming these hurdles can prove difficult. First, the attorney must show that the computer animator has the proper credentials and experience to qualify as an expert.\textsuperscript{66} Second, the attorney must demonstrate that the computer hardware is commercially available and that its use has gained acceptance by practitioners in the particular field.\textsuperscript{67} Third, the attorney must show that the computer software is commercially available and that its use has gained acceptance by practitioners in the particular field.\textsuperscript{68} Fourth, the attorney must show the source and accuracy of the data entered into the computer.\textsuperscript{69} This fourth step is the most important because the basis of a simulation rests on the quality of the data entered, and also because most challenges to animations and simulations are based on the accuracy of the input data.\textsuperscript{70} Fifth, the attorney must prove the accuracy of the calculations

\begin{thebibliography}{9}
\bibitem{61} Id. (citing Chaney, \textit{supra} note 4, at 744).
\bibitem{62} Id. (citing Chaney, \textit{supra} note 4, at 748).
\bibitem{64} O'Connor, \textit{supra} note 1, at 26.
\bibitem{65} Id. (citing Jones et al., \textit{supra} note 29, at 149-50).
\bibitem{66} Id. (citing Jones et al., \textit{supra} note 29, at 149).
\bibitem{67} Id.
\bibitem{68} Id.
\bibitem{69} Id. (citing Jones et al., \textit{supra} note 30, at 149).
\bibitem{70} See id. (citing Howard Nations, a Houston-based plaintiff's attorney).
\end{thebibliography}
performed by the computer. To demonstrate their accuracy, the calculations should be checked against hand calculations or benchmark tests. Finally, the attorney must be able to show that the videotaping process did not create distortion. Because the process is detailed and complex, the proponent of computer simulation will find the standards for admissibility of such evidence to be exacting.

IV. ADVANTAGES AND DISADVANTAGES OF COMPUTER ANIMATION

Our society has become a visual society; most people seldom read, but watch television for hours every day. Indeed, one commentator has noted that “the average American will have watched over 25,000 hours of television by the age of 18.” As a result, people in today’s society rely on visual sources for the majority of their information. What better way to communicate with a jury than with the use of graphics presented in a manner similar to television?

Graphics are a wonderful way to communicate complex issues to a jury. The cliché, “a picture is worth a thousand words,” captures the advantages of using computer animations. Oftentimes, animations can help clarify and simplify complex or technical evidence. One of the biggest advantages of using an animation is that the event can be observed from almost any angle or position. An animation can show views from the front, the inside, the outside, or even from overhead.

71. O’Connor, supra note 1, at 26 (citing Jones et al., supra note 30, at 149).
72. Id. Benchmark tests are tests where the results are known.
73. Id. (citing Jones et al., supra note 29, at 150).
74. Dilworth, supra note 7, at 26.
76. Dilworth, supra note 7, at 26 (quoting Dan Luczak, Chief Executive Officer of Forensic Technologies International).
77. Vanyo, supra note 75, at 411-12.
78. Muir, supra note 18, at 593.
80. Dabney, supra note 26, at 4.
81. O’Connor, supra note 1, at 20 (citing Kathlynn G. Fadely, Use of Computer-Generated Visual Evidence in Aviation Litigation: Interactive Video Comes to Court, 55 J.
place the jury in the driver's seat of an automobile involved in a collision, in the cockpit of an airplane about to crash, or in the position of an eyewitness to a crime.\textsuperscript{82} Hence, jurors can be mentally transported to the scene of the actual event.\textsuperscript{83} Another advantage is that visual obstructions can be eliminated, thereby allowing the jury to view the inside of a machine or a component which might otherwise be impossible to photograph with a regular camera.\textsuperscript{84}

In addition to displaying various perspectives of an event, animations can be shown in slow motion\textsuperscript{85} or can detail a particular part of an event to help focus the jury's attention on it.\textsuperscript{86} Furthermore, an animation can be extremely beneficial when an event is too dangerous or too expensive to reenact.\textsuperscript{87} For example, in a collision involving multiple vehicles, an animation could be used to show how the accident occurred without going through the trouble or expense of physically reenacting it, and without endangering lives. However, the most significant advantage of using a computer animation is that jurors retain more and understand the information better when it is presented visually.\textsuperscript{88} Indeed, one commentator has stated that "motion pictures are a memorable and attention-getting event during a trial."\textsuperscript{89} When a computer animation is used, it is likely that jurors will pay close attention to what they are viewing.\textsuperscript{90}

Like all types of evidence, a computer animation has disadvantages as well. One of the biggest disadvantages is that the animation is only as good as the data entered into the computer,\textsuperscript{91} and, as computer mavens say, "garbage in, garbage out."\textsuperscript{92} In short, if the data entered into the computer is not accurate, the depiction of the event in the animation will not be

\begin{footnotesize}
\begin{enumerate}
\item AIR L. & COM. 839, 849 (1989)).
\item Id.
\item Sherman, supra note 6, at 1.
\item Dabney, supra note 26, at 4.
\item Weinberg, supra note 79, at 5B.
\item Id.
\item O'Connor, supra note 1, at 20.
\item Dilworth, supra note 7, at 26 (quoting Dan Luczak, Chief Executive Officer of Forensic Technologies International).
\item Dabney, supra note 26, at 4.
\item Id.
\item See generally Jerome J. Roberts, A Practitioner's Primer on Computer-Generated Evidence, 41 U. CHI. L. REV. 254, 255 (1973-74) (providing a basic understanding of the principles of computerization and an outline for examining the worth of computer-generated evidence).
\end{enumerate}
\end{footnotesize}
accurate. Another disadvantage is that technology can distort an issue as easily as it can clarify one. Facts could be misrepresented to present a scenario other than what took place. This misrepresentation is most likely to occur when the stakes in the litigation are high. In addition, animations are made to be continuous, and oftentimes gaps are filled with speculation, not fact. Therefore, attorneys and their experts should carefully review animations for technical accuracy.

Some additional drawbacks of computer animations are that they are still relatively expensive and therefore, as some people claim, cater to the rich. Moreover, they take time to produce, and once produced, are not easily altered. One of the biggest obstacles for an opponent of an animation to overcome is that jurors tend to place more weight on what they see and less weight on what they hear or read. Often, jurors think that evidence produced by a computer is more accurate or reliable. Thus, an attorney opposing a computer animation must inform the jury that the information presented is only as good as the data entered into the computer to create the animation. In addition, the attorney must review the data for errors because a computer can only process the data that is entered into it. If an error is made in data entry, or incorrect data is used, the animation will not accurately reflect the event. Furthermore, the computer only processes data it is instructed to process and it can only process the information in the way it has been so instructed. Therefore, an attorney opposing admission of an animation must employ an expert to review the

95. Id. at 2.
96. Id.
97. Sherman, supra note 6, at 33 (quoting Peter R. DeForest, a forensic scientist).
98. Id. at 32.
100. Id.
101. Vanyo, supra note 75, at 411.
102. Murphy, supra note 63, at 146 ("When people receive information from the television they take it as the truth. . . . Thus, when evidence is presented in this format, it becomes 'not only believable, but virtually unassailable.'") (citing Lynn Feinerman, New Season for Video Law, 16 BARRISTER 15, 16 (1989)).
103. Roberts, supra note 91, at 263.
104. Id.
data, to vouch for its accuracy and completeness, and to review the computer program for deficiencies or flaws.\textsuperscript{105}

The use of computer animation in criminal trials raises additional issues. Some commentators believe that even with the decreased cost of preparing an animation, the cost favors the prosecution.\textsuperscript{106} These critics feel that defendants with limited resources cannot combat this type of evidence.\textsuperscript{107} Indeed, Michael Kennedy, counsel for the defense in \textit{People v. Mitchell}, has called the animation proffered in that case "a slick, sophisticated commercial promoting the prosecutors' product: murder conviction at all costs."\textsuperscript{108} In \textit{Mitchell}, an animation was proffered in a murder trial involving the shooting death of the defendant's younger brother, Artie Mitchell.\textsuperscript{109} The prosecution used the animation to prove that the killing was deliberate and premeditated.\textsuperscript{110} The judge admitted the animation in evidence and the jury found the defendant guilty of voluntary manslaughter.\textsuperscript{111} The defense has appealed the verdict, contending that the body movements of the figure representing Artie Mitchell, as portrayed in the animation, violate the California law prohibiting an expert witness from speculating.\textsuperscript{112}

The animation used in the \textit{Mitchell} case was created by a ballistics specialist.\textsuperscript{113} The ballistics specialist used photographs of the scene, information from the autopsy, laboratory reports, and physical data based on examination of the scene by one of the prosecution's experts to create the animation.\textsuperscript{114} The degree of speculation used to create the video, if any, is unknown.

Other commentators argue that allowing computer animations into criminal trials is extremely prejudicial because human gestures, essential for a jury to determine intent, motive, and malice, cannot be recreated accurately.\textsuperscript{115} These opponents, however, do not object to animations depicting machines, such as cars and airplanes, because machines, unlike

\begin{thebibliography}{11}
\bibitem{105} Id.
\bibitem{106} Dilworth, \textit{supra} note 7, at 26.
\bibitem{107} Id. (citing Michael Kennedy, \textit{Videos Pose Danger as Insidious Form of Hypnotic TV}, CAL. ST. B. BULL., Mar. 1992, at 1).
\bibitem{108} Dilworth, \textit{supra} note 7, at 26 (citing \textit{Mitchell}, No. 12,462).
\bibitem{109} Id. (citing \textit{Mitchell}, No. 12,462).
\bibitem{110} Sherman, \textit{supra} note 6, at 32.
\bibitem{111} Id.
\bibitem{112} Dilworth, \textit{supra} note 7, at 26.
\bibitem{113} Id.
\bibitem{114} Id.
\bibitem{115} Sherman, \textit{supra} note 6, at 32.
\end{thebibliography}
humans, move in predictable and measurable ways. Thus, computer animations, like all forms of evidence, have both advantages and disadvantages.

V. AN ANALYSIS OF STATE V. PIERCE

On June 23, 1992, at approximately 9:00 p.m., a truck collided with three children in a residential neighborhood of Dania, Florida. As a result, one child died and the others were seriously injured. According to witnesses, minutes earlier the same vehicle that struck the children collided with a trash can on the same street. The vehicle fled both scenes without stopping to provide information or render aid. Eyewitnesses to both accidents stated that the truck veered off the road. Approximately seven minutes after striking the garbage can, additional witnesses observed a truck of the same description strike the group of children who were walking home. Six-year-old Nicole Walker, who later died as a result of head trauma, was being carried by one of the older children.

The police discovered a portion of an automobile grille at the scene. From this discovery, they were able to deduce that the vehicle involved was a 1980 Chevrolet Silverado truck. Paint fragments recovered from the children's clothing indicated that the truck was blue. In addition, the autopsy showed that Nicole suffered head injuries, thus indicating that the truck might have a dent on it from the impact of Nicole's head. This evidence, coupled with statements from various witnesses and anonymous tips, directed police to a truck driven by Mr. Kenneth Pierce. After extensive investigation regarding the truck, Mr. Pierce was arrested and charged with vehicular homicide and four additional counts. The other charges included leaving the scene of an accident, driving while having a

116. Id.
117. No. 92-19316CF10A (Fla. 17th Cir. Ct., 1992), appeal docketed, No. 93-01302 (Fla. 4th Dist. Ct. App., Apr. 4, 1993). While there were several issues appealed, the focus of the discussion of this case will be on whether the computer animation proffered by the State was admissible.
118. Notice of Intent to Offer Computer-Animated Diagram Evidence at 1, State v. Pierce, No. 92-19316CF10A (Fla. 17th Cir. Ct. 1992) [hereinafter Notice of Intent]; Record at 2218.
119. Notice of Intent at 1, Pierce (No. 92-19316CF10A); Record at 2218.
120. Appellant's Brief at 4, Pierce (No. 93-01302).
121. Notice of Intent at 2, Pierce (No. 92-19316CF10A); Record at 2219.
122. Appellant's Brief at 6, Pierce (No. 93-01302).
123. Id. at 7.
124. Id. at 2, 7-9.
suspended or revoked license, and two counts of tampering with physical
evidence.  

On November 20, 1992, the state attorney's office, in accordance with
section 90.956 of the Florida Statutes, informed the court of its intent to use
a computer animation to reenact the accident. In addition, on December
4, 1992, the State filed a Notice of Intent to Offer Computer-Animated
Diagram Evidence. On January 8, 1993, a pretrial hearing was held
whereby expert witnesses for the State testified regarding the preparation of
the computer animation. On February 5, 1993, another pretrial hearing
was held and the defense called one of the State's expert witnesses to testify
regarding the computer animation. On March 31, 1993, Judge Speiser
entered an order allowing the State to present the computer animation as
demonstrative evidence. The order analogized the computer animation
to a chart or diagram and found that it was sufficiently explanatory and
illustrative of relevant testimony.

Mr. Pierce was tried by jury on March 9, 1993. During the trial,
the computer animation proffered by the State was admitted in evidence and
published to the jury. The animation was used to help the jury visualize
and comprehend the testimony of Detective Bruce Babcock, a traffic
homicide investigator with the Broward County Sheriff's Office, and the
lead investigator assigned to the case. The jury returned a guilty verdict
on each offense charged. Judge Speiser entered judgment in accordance
with the verdict. Mr. Pierce was sentenced to sixty years in prison on
all counts. Thirty years of the total sentence related to the vehicular
homicide count.

125. Id. at 2.
126. Notice Pursuant to Florida Statute 90.956 at 1, State v. Pierce, No. 92-19316CF10A
(Fla. 17th Cir. Ct. 1992) [hereinafter Notice 90.956]; Record at 2216.
127. Notice of Intent at 8, Pierce (No. 92-19316CF10A); Record at 2325.
128. Supplemental Record on Appeal at 3, State v. Pierce, No. 92-19316CF10A (Fla.
17th Cir. Ct. 1992), appeal docketed, No 93-01302 (Fla. 4th Dist. Ct. App. Apr. 4, 1993)
[hereinafter Supplemental Record].
129. Id. at 176-267.
130. Order on Computer Animation at 6, Pierce (No. 92-19316CF10A); Record at 2342.
131. Order on Computer Animation at 4, Pierce (No. 92-19316CF10A); Record at 2340.
132. Appellant's Brief at 2, Pierce (No. 93-01302).
133. Id. at 10.
134. Id.
135. Id. at 2.
136. Id. at 3.
137. Appellant's Brief at 3, Pierce (No. 93-01302).
tence was filed on April 22, 1993, and the case is presently pending before the Fourth District Court of Appeal of the State of Florida.

**A. The State's Arguments for Allowing the Computer Animation**

On December 4, 1992, the State filed a Notice of Intent to Offer Computer-Animated Diagram Evidence. At that time, it also filed a memorandum of law to assist the court in determining the admissibility of the animation. The State argued that the animation would provide a visualization of Detective Babcock’s testimony regarding the accident. The State proffered that the detective was a qualified accident reconstruction expert. Moreover, the State declared that the factual basis for the testimony was physical evidence found at the scene, physical evidence from the defendant’s truck, physical evidence found during the autopsy of Nicole Walker, and evidence gathered from testimony of the witnesses and the victims.

In addition to the State’s argument that the computer animation was a visualization of Detective Babcock’s testimony, the State also attempted to proffer the computer animation as real evidence. In its memorandum of law, the State cited the case of *Straight v. State* to support its contention that a photograph may be admissible as illustrating the testimony of a witness, or as having independent value. In *Straight*, the state introduced photographs depicting the victim’s body recovered from a river twenty days after the victim was stabbed to death. The trial judge admitted the photographs over defendant’s objections that they were not

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138. *Id.*
139. Notice of Appeal at 1, *Pierce* (No. 92-19316CF10A); Record at 2390.
140. Notice of Intent at 1-2, *Pierce* (No. 92-19316CF10A); Record at 2218-19.
141. Notice of Intent at 3-8, *Pierce* (No. 92-19316CF10A); Record at 2220-25. The State proffered an animation, not a simulation. Because the State offered the animation as demonstrative evidence, in order to have the animation admitted into evidence, the State had to show that the animation was relevant, that it would assist the trier of fact, and that it was not unfairly prejudicial. See *Fla. Stat.* §§ 90.401-.403 (1993).
142. Notice of Intent at 2, 6-7, *Pierce* (No. 92-19316CF10A); Record at 2219, 2223-24.
143. Notice of Intent at 2, 6-7, *Pierce* (No. 92-19316CF10A); Record at 2219, 2223-24.
144. Notice of Intent at 7, *Pierce* (No. 92-19316CF10A); Record at 2224.
145. Notice of Intent at 3, *Pierce* (No. 92-19316CF10A); Record at 2220 (citing *Straight v. State*, 397 So. 2d 903, 907 (Fla.) (holding photographs admissible when relevant either independently or as corroborative of the testimony of witnesses)), cert. denied, 454 U.S. 1022 (1981)).
146. Notice of Intent at 3, *Pierce* (No. 92-19316CF10A); Record at 2220.
147. *Straight*, 397 So. 2d at 906-07.
relevant and were too gruesome because of decomposition of the body. The Florida Supreme Court held that the photographs were relevant, either independently or as corroboration of the testimony of witnesses, and therefore were properly admitted.

In further support of its proposition that the animation could be admitted as both demonstrative and substantive evidence, the State cited Hanne\text{w}acker v. City of Jacksonville Beach. The State used Hanne\text{w}acker to analogize the computer animation to photographs, so that the animation could be admitted to illustrate the testimony of a witness, or be admitted as having independent value. In Hanne\text{w}acker, the Florida Supreme Court delineated two separate theories concerning the admissibility and use of photographs as evidence: the pictorial testimony theory and the silent witness theory. The court stated that under the pictorial testimony theory, a photograph is admissible as a way of expressing a witness’s testimony. Under the silent witness theory, the court stated that once a photograph was properly authenticated, it could have independent evidentiary value and could speak for itself. The Hanne\text{w}acker court stated that “because of present technology, photographs can often demonstrate, preserve, and transmit a message far better than any human witness.... Admissibility, however, is a question for the trial judge.”

The State then presented the case of Adams v. State to show that Florida courts have admitted a map, diagram, or picture in evidence, provided it is verified as a true representation of the subject of the witness’s testimony. The State also presented a series of cases to support its contention that since Adams, Florida courts have traditionally admitted new

148. Id.
149. Id. at 907.
150. Notice of Intent at 3-4, Pierce (No. 92-19316CF10A); Record at 2220-21 (citing Hanne\text{w}acker v. City of Jacksonville Beach, 419 So. 2d 308, 310 (Fla. 1982) (stating photographs can be admitted into evidence either under pictorial testimony theory or under silent witness theory)). The State incorrectly referred to this case as Hanne\text{w}acker v. State.
151. Notice of Intent at 3-4, Pierce (No. 92-19316CF10A); Record at 2220-21.
152. Hanne\text{w}acker, 419 So. 2d at 310.
153. Id.
154. Id.
155. Id. at 311.
156. Notice of Intent at 4, Pierce (No. 92-19316CF10A); Record at 2221 (citing Adams v. State, 10 So. 106, 113 (Fla. 1891) (holding a map, diagram, or picture, verified as a correct representation, is admissible into evidence to assist a witness in explaining the case to the jury)).
157. Notice of Intent at 4, Pierce (No. 92-19316CF10A); Record at 2221.
ideas and techniques in evidence.\textsuperscript{158} The most persuasive among these were Grant v. State\textsuperscript{159} and Baker v. State.\textsuperscript{160} 

In Grant, Daniel Grant was charged with murder for the strangulation of his former employer.\textsuperscript{161} During an interview with police officers, Grant confessed and allowed pictures to be taken of his reenactment of the crime.\textsuperscript{162} He was convicted by a jury and sentenced to death.\textsuperscript{163} On appeal, the defendant sought reversal, claiming, among other things, that it was error to admit a color motion picture film and several still photographs portraying a reenactment of the murder.\textsuperscript{164} The defense conceded that the motion picture and photographs were admissible if they tended to illustrate or explain the testimony of a witness.\textsuperscript{165} However, the defense claimed that this evidence was merely cumulative and added nothing to the confession.\textsuperscript{166} The Supreme Court of Florida stated that the admissibility of a motion picture showing a reenactment of a crime was a case of first impression.\textsuperscript{167} The court held that the motion picture was admissible to supplement and explain the defendant's confession.\textsuperscript{168} The court reasoned that posed photographs were previously held admissible in criminal trials, the use of motion pictures in civil controversies had been approved, and the same rules regarding the admissibility of photographs apply to the admissibility of motion pictures.\textsuperscript{169} The court stated where a motion picture involves a reenactment, it is subject to objection on the basis of its accuracy.\textsuperscript{170} Because the defendant had voluntarily acted out the crime at

\textsuperscript{158} Notice of Intent at 4, Pierce (No. 92-19316CF10A); Record at 2221 (citing e.g., Johnson v. State, 442 So. 2d 193 (Fla. 1983), cert. denied, 466 U.S. 963 (1984), and aff'd on other grounds, 593 So. 2d 206 (Fla.), and cert. denied, 113 S. Ct. 119 (1992); Baker v. State, 241 So. 2d 683 (Fla. 1970); Grant v. State, 171 So. 2d 361 (Fla. 1965), cert. denied, 384 U.S. 1014 (1966)).

\textsuperscript{159} Notice of Intent at 4, Pierce (No. 92-19316CF10A); Record at 2221 (citing Grant, 171 So. 2d at 365 (holding a motion picture reenactment was admissible)).

\textsuperscript{160} Notice of Intent at 4, Pierce (No. 92-19316CF10A); Record at 2221 (citing Baker, 241 So. 2d at 686 (finding a motion picture reenactment admissible as demonstrative evidence)).

\textsuperscript{161} Grant, 171 So. 2d at 361-62.

\textsuperscript{162} Id. at 362.

\textsuperscript{163} Id. at 361.

\textsuperscript{164} Id. at 363.

\textsuperscript{165} Id.

\textsuperscript{166} Grant, 171 So. 2d at 363.

\textsuperscript{167} Id.

\textsuperscript{168} Id. at 363.

\textsuperscript{169} Id.

\textsuperscript{170} Id. at 364.
the scene, the danger of inaccuracy was minimized, and the court allowed
the motion picture.\textsuperscript{171}

The State also cited \textit{Baker v. State}\textsuperscript{172} in its memorandum of law. In
\textit{Baker}, the Florida Supreme Court affirmed the murder conviction of
Bernard Baker, who robbed and beat an elderly man to death with a
hammer.\textsuperscript{173} The court held that it was not reversible error to admit a
filmed reenactment of the crime that was published to the jury but not given
to them after they retired for deliberations.\textsuperscript{174} Using this case law, the
State in \textit{Pierce} persuasively showed the admissibility of motion picture
reenactments in Florida courts.\textsuperscript{175}

In addition, the State cited several cases which showed that Florida
courts have traditionally admitted unique scientific evidence to aid the trier
of fact.\textsuperscript{176} Among these were \textit{Correll v. State}\textsuperscript{177} and \textit{Andrews v.
State}.\textsuperscript{178} In \textit{Correll}, the jury convicted the defendant of four counts
of first degree murder.\textsuperscript{179} The defendant appealed the conviction on numer-
ous grounds, one of which was an attack on the testimony of a forensic
serology expert.\textsuperscript{180} At the trial, the expert opined that, based on the
results of blood electrophoresis, certain blood found at the murder scene
could have been that of the defendant.\textsuperscript{181} The expert also stated that the
blood could not have been from any of the victims or other suspects.\textsuperscript{182}
The defendant contended that it was error to admit the results of the blood
tests because the general scientific reliability of electrophoresis had not been
proven by the state.\textsuperscript{183} The court stated that the electrophoresis process

\begin{enumerate}
\item[\textsuperscript{171}]	extit{Grant}, 171 So. 2d at 364.
\item[\textsuperscript{172}]	extit{Baker}, 241 So. 2d 683 (Fla. 1970).
\item[\textsuperscript{173}]	extit{Id.} at 685-86.
\item[\textsuperscript{174}]	extit{Id.} at 686.
\item[\textsuperscript{175}]	extit{Order on Computer Animation at 3, Pierce} (No. 92-19316CF10A); Record at 2339.
\item[\textsuperscript{176}]	extit{Notice of Intent at 4, Pierce} (No. 92-19316CF10A); Record at 2221 (citing e.g.,
denied sub nom. Correll v. Dugger}, 588 So. 2d 422 (Fla. 1990); \textit{Baker}, 241 So. 2d at 683;
\textit{Grant}, 171 So. 2d at 361).
\item[\textsuperscript{177}]	extit{Notice of Intent at 4, Pierce} (No. 92-19316CF10A); Record at 2221 (citing \textit{Correll},
523 So. 2d at 566-67 (holding results of blood electrophoresis testing admissible)).
\item[\textsuperscript{178}]	extit{Notice of Intent at 4, Pierce} (No. 92-19316CF10A); Record at 2221 (citing \textit{Andrews v.
State}, 533 So. 2d 841, 850-51 (Fla. 5th Dist. Ct. App. 1988) (finding DNA
"genetic fingerprinting" evidence admissible)).
\item[\textsuperscript{179}]	extit{Correll}, 523 So. 2d at 564.
\item[\textsuperscript{180}]	extit{Id.} at 566.
\item[\textsuperscript{181}]	extit{Id.}
\item[\textsuperscript{182}]	extit{Id.}
\item[\textsuperscript{183}]	extit{Id.}
\end{enumerate}
was not a new method of testing blood and similar testimony had been admitted throughout the state. It concluded that it was not error to admit the expert's testimony.\textsuperscript{184}

In \textit{Andrews}, the Fifth District Court of Appeal addressed the admissibility of a new scientific technique.\textsuperscript{185} The defendant was convicted of aggravated battery, sexual battery, and armed burglary of a dwelling.\textsuperscript{186} Samples of the victim's blood, the defendant's blood, and semen found in the victim's vagina were analyzed and compared for their DNA composition.\textsuperscript{187} The trial court admitted the DNA identification evidence which linked the defendant to the crime and ultimately led to his conviction.\textsuperscript{188} On appeal, the defense claimed that the trial court erred in admitting this evidence because the tests were unreliable.\textsuperscript{189} The appellate court reviewed the novel procedure using the \textit{Frye} approach and decided that the DNA evidence was based on accepted scientific principles.\textsuperscript{190} In addition, it determined that the evidence would be helpful to the jury, and that its probative value outweighed its potential prejudicial effects.\textsuperscript{191} Accordingly, the court held that the DNA-test results were admissible.\textsuperscript{192}

In further support of its position that the animation should be admitted as demonstrative evidence in \textit{Pierce}, the State cited \textit{Wade v. State}.\textsuperscript{193} In \textit{Wade}, the court admitted a master brake cylinder in evidence that was similar to, but not the same as, the one used to commit a murder.\textsuperscript{194} Restating the supreme court's holding in \textit{Alston v. Shriver},\textsuperscript{195} the court held demonstrative evidence is admissible when it is relevant and when it is a reasonably exact replica of the object involved.\textsuperscript{196} Therefore, the trial

\begin{itemize}
  \item \textsuperscript{184} Correll, 523 So. 2d at 566-67.
  \item \textsuperscript{185} Andrews, 533 So. 2d at 843.
  \item \textsuperscript{186} Id. at 842.
  \item \textsuperscript{187} Id. at 843.
  \item \textsuperscript{188} Id.
  \item \textsuperscript{189} Id. at 849.
  \item \textsuperscript{190} Andrews, 533 So. 2d at 843-51.
  \item \textsuperscript{191} Id. at 849.
  \item \textsuperscript{192} Id. at 850.
  \item \textsuperscript{193} Notice of Intent at 5, \textit{Pierce} (No. 92-19316CF10A); Record at 2222 (citing \textit{Wade v. State}, 204 So. 2d 235, 239 (Fla. 2d Dist. Ct. App. 1967) (admitting master brake cylinder even though it was not the identical one used in the perpetration of the crime)).
  \item \textsuperscript{194} \textit{Wade}, 204 So. 2d at 238-39.
  \item \textsuperscript{195} 105 So. 2d 785, 791 (Fla. 1958) (holding demonstrative evidence admissible when it is relevant and when it is a reasonably accurate replica of the object used during the commission of the crime).
  \item \textsuperscript{196} \textit{Wade}, 204 So. 2d at 239 (citing \textit{Alston}, 105 So. 2d at 791).
\end{itemize}
court did not err in admitting the brake cylinder as demonstrative evidence.197

To lend additional support, the State cited the more recent case of Brown v. State,198 in which the First District Court of Appeal admitted a styrofoam head and knife as demonstrative evidence.199 In Brown, the styrofoam head and knife were used during the victim’s testimony and also by the prosecutor during closing argument to demonstrate how the defendant stabbed the victim three times in the head.200 The jury acquitted the defendant of the attempted murder charge and convicted him of aggravated battery.201 The court concluded that the knife and the styrofoam head were admissible as demonstrative evidence because both were sufficiently accurate replicas and were relevant to the issues in the case.202 Thus, the court affirmed the conviction, finding no reversible error by the trial court.203

To strengthen its contention that the computer animation be admitted against Pierce, the State brought the case of Davis v. State to the court’s attention.204 In that case, the State used a videotape during a medical examiner’s testimony to depict the victim’s wounds, to explain how the wounds were inflicted, and to show that two different knives were used.205 The tape was also used to refute the defendant’s claim of self-defense.206 The Florida Supreme Court determined that the videotape was relevant and thus was admissible.207 Based on the aforementioned case law, the State in Pierce presented a persuasive argument, predicated on prior Florida case

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197. Id.
198. Notice of Intent at 5, Pierce (No. 92-19316CF10A); Record at 2222 (citing Brown v. State, 550 So. 2d 527, 528-29 (Fla. 1st Dist. Ct. App. 1989) (allowing use of a styrofoam head and knife used by the victim and the prosecutor during closing argument to demonstrate how the defendant stabbed the victim in the head)), review denied, 560 So. 2d 232 (Fla. 1990).
199. Brown, 550 So. 2d at 528.
200. Id.
201. Id. at 529.
202. Id. at 528-29.
203. Id. at 529.
204. Notice of Intent at 5, Pierce (No. 92-19316CF10A); Record at 2222 (citing Davis v. State, 586 So. 2d 1038, 1041 (Fla. 1991) (allowing a videotape showing the murder victim’s wounds and the crime scene to show how two different types of knives were used and to disprove the defendant’s claim of self defense), vacated, 112 S. Ct. 3021 (1992), and cert. denied, 114 S. Ct. 1205 (1994).
205. Davis, 586 So. 2d at 1041.
206. Id.
207. Id.
law, to show that the courts have allowed new ideas and techniques in evidence in order to aid the trier of fact in the decision making process. Nevertheless, the State persisted in its attempt to convince the court that the animation was an indispensable piece of evidence—one that the court should admit.

In order to further persuade the court to admit the animation in evidence, the State cited cases from other jurisdictions that have admitted such evidence. In *Starr v. Campos*, an Arizona case, the plaintiff’s son was killed when his car collided with a truck which had crossed into his path. The trial court admitted a computer simulation proffered by the defendant, which showed how the accident occurred. It entered judgment in favor of the truck driver and plaintiffs appealed, contending that it was error to admit the computerized analysis of the accident. Although the court of appeals reversed the case on other grounds, it determined that, should the procedure achieve general acceptance among scientists in the relevant fields, the simulation would be admitted.

The State in *Pierce* also presented the highly persuasive case of *People v. McHugh*. In *McHugh*, a New York court approved the use of a computer reenactment of a fatal car crash proffered by the defendant. The court stated that “[w]hile this appears to be the first time such a graphic computer presentation has been offered at a criminal trial, every new development is eligible for a first day in court.” The court determined that the one and one-half minute graphic presentation was admissible because it was more akin to a chart or diagram than to a scientific device. The *McHugh* court went on to say that:

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208. Notice of Intent at 5-6, *Pierce* (No. 92-19316CF10A); Record at 2222-23.
209. 655 P.2d 794 (Ariz. 2d Ct. App. 1982). The court stated computer simulation could be admitted “if it is derived from principles and procedures that have achieved general acceptance in the scientific field to which they belong.” *Id.* at 797.
210. *Id.* at 795.
211. *Id.* at 796-97.
212. *Id.* at 795-96.
214. Notice of Intent at 6, *Pierce* (No. 92-19316CF10A); Record at 2223 (citing *McHugh*, 476 N.Y.S.2d at 722 (holding computer animation proffered by the defense admissible in criminal trial for vehicular homicide)). Although the record stated the case as *People v. New York*, the correct name of the case is *People v. McHugh*.
216. *Id.* at 722.
217. *Id.*
A computer is not a gimmick and the court should not be shy about its use, when proper. Computers are simply mechanical tools—receiving information and acting on instructions at lightning speed. When the results are useful, they should be accepted, when confusing, they should be rejected. What is important is that the presentation be relevant to a possible defense, that it fairly and accurately reflect the oral testimony offered and that it be an aid to the jury’s understanding of the issue.  

Thus, based on Florida case law and case law from other jurisdictions, the State in Pierce argued that the animation should be admitted as evidence. Even though the State proffered the animation as a visualization of Detective Babcock’s verbal testimony, it contended that the computer animation should also be admitted as real evidence, as was the motion picture in Grant. In addition, the State explained that the animation was clearly relevant to the issues in the case and argued that its use should not be barred simply because a computer animation had not been offered in previous Florida criminal cases.

B. The Pretrial Hearings

At an extensive pretrial hearing, the State presented several witnesses who testified regarding the collection and the input of data used to prepare the animation, as well as the computer program used to create the animation. Among the witnesses who testified on January 8, 1993, was Deputy Deborah Bjorndalen-Hull. The court declared Deputy Bjorndalen-Hull an expert in accident reconstruction. She testified that she created a geographic diagram of the homicide scene on a computer using the AutoCAD (computer-aided design) program. The deputy testified that the AutoCAD program is accepted in the engineering and scientific fields.

218. Id. at 722-23.
219. Notice of Intent at 5-6, Pierce (No. 92-19316CF10A); Record at 2222-23.
220. Notice of Intent at 7, Pierce (No. 92-19316CF10A); Record at 2224.
221. Notice of Intent at 7, Pierce (No. 92-19316CF10A); Record at 2224; see also Grant, 171 So. 2d at 364-65.
222. Notice of Intent at 7, Pierce (No. 92-19316CF10A); Record at 7.
223. Notice of Intent at 7, Pierce (No. 92-19316CF10A); Record at 2224.
224. See generally Supplemental Record, Pierce (No. 93-01302).
225. Id. at 16.
226. Id. at 19.
227. Id. at 21-26.
as one of the leading computer-aided design programs in the world. \textsuperscript{228} She took all measurements used to create the diagram according to methods accepted by accident reconstructionists in the field. \textsuperscript{229} The only information she used that was not of her own personal knowledge was the position of the victims and the location of physical evidence collected by Detective Babcock. \textsuperscript{230} When her measurements were transferred to the firm that prepared the animation, they were transferred from computer to computer. \textsuperscript{231} Since no data was entered into the computer by humans, there was no possibility of data entry error. \textsuperscript{232} Moreover, in her opinion, the animation presented an accurate representation of the geographic area and was a fair and accurate depiction of the scene. \textsuperscript{233}

Detective Babcock, the lead investigator in the case, also testified. \textsuperscript{234} He, too, was declared an expert in accident reconstruction. \textsuperscript{235} He testified that he responded to the scene of the accident, and while there, he collected evidence and interviewed witnesses. \textsuperscript{236} In addition, Detective Babcock collected information about the victims and the vehicle involved in the accident. \textsuperscript{237} He submitted all the information gathered to the animation firm. \textsuperscript{238} Detective Babcock stated that he supervised and oversaw every aspect of the production of the animation. \textsuperscript{239} He further testified that the animation fairly and accurately reflected his opinions as to how the accident occurred, \textsuperscript{240} and that it was a visualization that would aid in explaining his opinion to the jury. \textsuperscript{241} During the hearing, Detective Babcock was questioned regarding the color of the vehicle. \textsuperscript{242} He admitted that the color of the vehicle depicted in the animation was not completely identical to that of Mr. Pierce's truck. \textsuperscript{243} He elaborated further, stating that while

\begin{itemize}
\item \textsuperscript{228} Id. at 26.
\item \textsuperscript{229} Supplemental Record at 23-24, \textit{Pierce} (No. 93-01302).
\item \textsuperscript{230} Id. at 36-38.
\item \textsuperscript{231} Id. at 27.
\item \textsuperscript{232} Id. at 27-28.
\item \textsuperscript{233} Id. at 25-26, 30-31.
\item \textsuperscript{234} Supplemental Record at 63, \textit{Pierce} (No. 93-01302).
\item \textsuperscript{235} Id. at 67.
\item \textsuperscript{236} Id. at 68-71.
\item \textsuperscript{237} Id. at 78-80.
\item \textsuperscript{238} Id. at 79.
\item \textsuperscript{239} Supplemental Record at 81, \textit{Pierce} (No. 93-01302).
\item \textsuperscript{240} Id. at 82, 135-36.
\item \textsuperscript{241} Id. at 82-84, 135-36.
\item \textsuperscript{242} Id. at 103, 110-12, 119-21, 140-41.
\item \textsuperscript{243} Id. at 103.
\end{itemize}
it was not identical, the color of the truck depicted in the animation was
accurate.244 In addition, Detective Babcock stated that the animation did
not contain every minute detail because its purpose was to show how the
accident occurred.245 Detective Babcock was also questioned about how
the speed of the vehicle was calculated.246 He testified that in creating the
animation, the posted speed limit of thirty miles per hour was used.247 In
addition, he stated that this was consistent with witness testimony and might
be a bit conservative.248 Detective Babcock also responded to numerous
questions regarding the size of the puddle depicted in the animation and
whether it extended into the street.249 He stated that he had interviewed
numerous witnesses and had used their testimony to calculate the dimensions
of the puddle depicted in the animation.250 As to the position of the
bodies,251 Detective Babcock stated that after the accident, the children
were lying face down in the puddle and witnesses had moved them to
prevent them from drowning.252 He used the testimony of numerous
witnesses to calculate the position of the children at the time of the
impact.253

The State also presented testimony from John Suchocki, the president
of the firm used to prepare the animation.254 Mr. Suchocki was declared
an expert in forensic animation.255 He testified regarding the computer
hardware and software used by his company in preparing the animation,256
and stated that the software used was one of the most accurate avail-
able.257 He also testified as to the input of the geographic diagram created
by Deputy Hull258 and to the source of all other data used to create the
animation.259 He stated that the data and information used to prepare the

244. Supplemental Record at 103-06, Pierce (No. 93-01302).
245. Id. at 103-04.
246. Id. at 86-87, 106-07.
247. Id. at 87, 106-07.
248. Id. at 87, 107.
249. Supplemental Record at 116-18, Pierce (No. 93-01302).
250. Id. at 116-17.
251. Id. at 98-100, 123-24, 134-35.
252. Id. at 185.
253. Id. at 123-24, 136-37.
254. Supplemental Record at 148, Pierce (No. 93-01302).
255. Id. at 149.
256. Id. at 152-54.
257. Id. at 153.
258. Id. at 156-59.
259. Supplemental Record at 159-63, Pierce (No. 93-01302).
animation was the type of information that was relied upon by experts in the field of forensic animation. Mr. Suchocki testified that the animation was a fair and accurate representation and that the animation was extremely accurate.

At the pretrial hearing on February 5, 1993, the defense did not present expert testimony, but instead chose to question Detective Babcock, one of the State's experts. During the questioning, the defense examined Detective Babcock on the issue of whether the size of the puddle depicted in the animation was accurate and whether the puddle extended into the street. Detective Babcock restated that the dimensions of the puddle shown in the animation were based on testimony taken from witnesses. Asked how the vehicle left the roadway and struck the children, as well as how the point of impact was calculated, he testified that he had interviewed numerous witnesses regarding these issues. In his opinion, the animation fairly and accurately depicted the manner in which the vehicle struck the children as well as the position of the bodies at the time of the impact. Moreover, Detective Babcock testified that several of the eyewitnesses who viewed the animation felt it was a fair and accurate depiction of what happened that night. Detective Babcock was also questioned regarding the lighting and weather conditions at the time of the accident. He stated that there was disagreement among the witnesses as to the lighting conditions at the time of the accident. Although the accident occurred at approximately 9:00 p.m. in mid-June, just as it began to get dark, the animation portrayed lighted conditions so that the jury would be able to see it.

At the conclusion of testimony, the State presented its arguments for admitting the animation in evidence. Counsel argued that the animation

260. Id. at 163.
261. Id. at 165.
262. Id. at 165.
263. Id. at 206, 209-15, 223-25.
264. Supplemental Record at 206, 223-24, Pierce (No. 93-01302).
265. Id. at 212-14, 216, 225.
266. Id. at 185, 212-17, 225.
267. Id. at 216-17.
268. Id.
269. Supplemental Record at 192-93, 219, Pierce (No. 93-01302).
270. Id. at 183-84, 200.
271. Id. at 218-19.
272. Id. at 244.
should be admitted both as demonstrative evidence and real evidence.\textsuperscript{273} The State's primary arguments for admitting the animation as demonstrative evidence were that it visually portrayed the opinion of an expert (Detective Babcock)\textsuperscript{274} and that it would aid the trier of fact in understanding the expert's testimony.\textsuperscript{275} In arguing that the animation should be admitted as real evidence, the State analogized the animation to a series of compiled photographs.\textsuperscript{276} The State argued that a photograph can be admitted as real evidence if an expert testifies that it fairly and accurately depicts something of relevance.\textsuperscript{277} Moreover, the State argued that the tape should be admitted as real evidence because it was a non-verbal mode of expressing Detective Babcock's opinion.\textsuperscript{278} In anticipation of an objection, the State stressed that the discrepancies regarding the accuracy of the animation, such as the lighting and weather conditions, are directed to the weight of the evidence, not the admissibility.\textsuperscript{279} The State asked that the court admit the animation and allow the jury to determine its credibility.\textsuperscript{280} In addition, based on section 90.956 of the Florida Statutes,\textsuperscript{281} the State argued that because the case involved voluminous writings, recordings, and photographs, the case could be presented in the form of a chart, summary, or calculation.\textsuperscript{282} In support of this contention, the State explained that it had provided notice of this method to the defense\textsuperscript{283} and had made available to them all information used to create the animation.\textsuperscript{284}

The defense argued that the animation was inaccurate, misleading, and therefore should not be admitted in evidence.\textsuperscript{285} The defense cited the

\textsuperscript{273.} Id. 227-29.
\textsuperscript{274.} Supplemental Record at 227-29, 238, Pierce (No. 93-01302).
\textsuperscript{275.} Id. at 229.
\textsuperscript{276.} Id. at 230, 232-33.
\textsuperscript{277.} Id. at 229.
\textsuperscript{278.} Id. at 240.
\textsuperscript{279.} Supplemental Record at 227-28, 236, 243-44, Pierce (No. 93-01302).
\textsuperscript{280.} Id. at 227-28, 243-44.
\textsuperscript{281.} FLA. STAT. § 90.956 (1993). "When it is not convenient to examine in court the contents of voluminous writings, recordings, or photographs, a party may present them in the form of a chart, summary, or calculation by calling a qualified witness." Id. A party who intends to do this must give timely notice in writing of his intention and must make the summary and its supporting data available to the court and to the other parties. Id.
\textsuperscript{282.} Supplemental Record at 230-31, Pierce (No. 93-01302).
\textsuperscript{283.} Id. at 231.
\textsuperscript{284.} Id. at 231-32.
\textsuperscript{285.} Id. at 247-48, 254-55.
case of *Manning v. Lake Superior* to support its contention that reconstruction attempts must be excluded from evidence based on relevance, unless they are sufficiently similar to the accident. Counsel for the defense stated that if the facts are not similar, the relevance, not the weight of the evidence is affected; if the evidence is not relevant, it should not be admitted. The defense stated that the animation proffered by the prosecution was inaccurate in the depiction of the puddle size and shape, the location of the bodies, the lighting conditions, the weather conditions, and the color of the truck. The defense attacked the animation as being so misleading that it did not accurately portray what occurred and argued that it should be excluded.

C. The Court's Ruling

On February 9, 1993, Judge Speiser issued a verbal opinion regarding the admissibility of the computer animation. The court issued an Order on the Use of Computer Animation Evidence at Trial on March 31, 1993, which was filed on April 12, 1993. In the order, Judge Speiser stated that since there were no reported decisions involving the use of computer animation in the State of Florida, the court must consider decisions from other states that have addressed this issue. He cited the case of *People v. McHugh,* and stated that this was the only reported opinion involving the use of computer animation in a criminal case. Judge Speiser noted that in *McHugh,* the court allowed the computer animation as substantive

286. Id. at 245 (citing *Manning v. Lake Superior & Ishpeming R.R.*, 144 N.W.2d 831, 833 (Mich. 3d Ct. App. 1966) (holding that film showing reenactment of railroad accident was inadmissible because it depicted conditions substantially different than those present at the time of the accident)).


288. Id.

289. Id. at 246-48.

290. Id. at 247.

291. Id. at 248-50.


293. Id. at 251-54.

294. Id. at 254. The defense could have argued that the animation was flawed because eyewitness testimony is flawed, and the animation was based on eyewitness testimony.

295. Id. at 268-84.

296. Order on Computer Animation at 1, *Pierce* (No. 92-19316CF10A); Record at 2337.

evidence. Next, the judge referred to several articles discussing unpublished trial decisions. Among those discussed were *People v. Mitchell*, *Arizona v. Phillips*, and *State v. Spath*. In addition, Judge Speiser referred to several Florida cases involving similarly unique evidentiary issues: *Baker v. State*, *Johnson v. State*, and *Brown v. State*.

Judge Speiser further stated that the computer animation was simply a new method of expressing the conclusions and opinions of an expert. He analogized the relevancy of such evidence to that of a chart or a diagram and stated that it should not be rejected because of its novelty. He announced that the original source data upon which the animation was based was reasonably trustworthy and reliable. Judge Speiser also stated that the accuracy of additional data used by the experts to prepare the animation had been verified by their testimony. The court found the animation sufficiently explanatory and illustrative of relevant testimony, and the subject matter of the tape relevant to the case. Hence, Judge Speiser concluded that the animation could be used by the State as demonstrative evidence, but not as substantive evidence. The court found the animation was not scientific or experimental in nature and therefore distinguished it from DNA test results or blood spattering analysis. Thus, the animation was not subject to the test outlined in *Frye v. United States*.

Despite strenuous objection by the defense, the computer animation was introduced as evidence and was shown to the jury. The jury
returned its verdicts, finding Mr. Pierce guilty of each offense charged.\textsuperscript{312} Mr. Pierce was adjudged guilty in accordance with the verdicts and was sentenced to a total of sixty years in prison.\textsuperscript{313} His sentence for the vehicular homicide count was thirty years.\textsuperscript{314} The defense filed its Notice of Appeal from the Judgment and Sentence on April 22, 1993.\textsuperscript{315}

D. Pierce's Arguments on Appeal

On appeal, Mr. Pierce contends that the computer animation was improperly admitted because the State never established that the procedure utilized to create the animation was accepted in the scientific community.\textsuperscript{316} In addition, he contends that the animation was misleading because the facts underlying the depiction were not consistent with the witnesses' testimony.\textsuperscript{317} Consequently, the animation represented the State's theory of what occurred, not what actually did occur.\textsuperscript{318} Furthermore, Mr. Pierce argues that the animation was inadmissible hearsay because it illustrated statements made by witnesses who did not testify at trial.\textsuperscript{319}

Mr. Pierce first argues that the trial court erred in admitting the animation because the State failed to establish that the procedures used to prepare the animation were accepted in the scientific community.\textsuperscript{320} He contends that the State presented no testimony as to the scientific reliability of the computer program or of its general acceptance in the scientific community.\textsuperscript{321} Moreover, he asserts that such evidence is required in Florida in order to conform with the test outlined in \textit{Frye}\textsuperscript{322} and the admission of the animation in evidence was therefore improper.\textsuperscript{323}

In his second argument, Mr. Pierce asserts that the information used to prepare the animation was not consistent with the testimony of the witnesses.\textsuperscript{324} In particular, he asserts that the size of the puddle, the color

\begin{enumerate}
\item[312.] \textit{Id.} at 2.
\item[313.] \textit{Id.} at 2-3.
\item[314.] \textit{Id.}
\item[315.] Appellant's Brief at 3, \textit{Pierce} (No. 93-01302).
\item[316.] \textit{Id.} at 12, 15, 16.
\item[317.] \textit{Id.} at 12, 16-23.
\item[318.] \textit{Id.} at 12, 19.
\item[319.] \textit{Id.}
\item[320.] Appellant's Brief at 12, 19, \textit{Pierce} (No. 93-01302).
\item[321.] \textit{Id.} at 15.
\item[322.] \textit{Id.} at 15-16 (citing \textit{Frye}, 293 F. at 1013); \textit{Flanagan}, 625 So. 2d at 828.
\item[323.] Appellant's Brief at 12, 16, \textit{Pierce} (No. 93-01302).
\item[324.] \textit{Id.} at 12, 16-23.
\end{enumerate}
of the truck, and the lighting and weather conditions portrayed in the animation were inconsistent with the testimony of witnesses. Mr. Pierce argues, based on *Brown v. State*, that demonstrative exhibits can only be admitted in evidence when they are accurate and reasonable reproductions. He contends that the inaccurate depiction of the size of the puddle and of the lighting and weather conditions precluded the jury from considering his defenses that the vehicle involved was not his, or alternatively, that the vehicle was not operated in a reckless manner. Mr. Pierce thus contends it was error to admit the animation given the above discrepancies.

Regarding the puddle, Mr. Pierce asserts that the shape of the puddle and its dimensions were not accurately depicted in the animation. The basis of this argument is that the puddle depicted in the animation did not coincide with the photographs taken the night of the accident, nor with diagrams drawn by the police shortly after the accident. Mr. Pierce states that both the photographs and the diagrams showed that the puddle extended at least partially into the street. In support of this contention, he relies on the testimony of one witness who viewed the animation and stated the puddle was slightly bigger than that depicted, and the fact that Detective Babcock did not interview the witnesses regarding the size of the puddle until approximately six months after the accident. Mr. Pierce’s secondary defense is that the puddle extended into the street, and the accident was the unavoidable result of a sudden loss of control upon entering the puddle.

Mr. Pierce also argues that the color of the truck shown in the animation was not consistent with the testimony of the witnesses. He states that all witnesses testified that the truck was green or dark, but the truck shown in the animation was blue. Therefore, he believes that the image

325. *Id.* at 17-23.
326. *Id.* at 17 (citing *Brown*, 550 So. 2d at 527).
327. *Id.*
329. *Id.* at 12, 16-23.
330. *Id.* at 17-19, 22-23.
331. *Id.*
332. *Id.*
333. Appellant’s Brief at 18, *Pierce* (No. 93-01302)
334. *Id.* at 18, 22.
335. *Id.* at 22.
336. *Id.* at 18-19.
337. *Id.* at 18.
of the truck used in the animation was drawn to conform to the truck the police took into custody. He contends that his primary defense, that he was not the driver and that his was not the truck involved in the accident, was debunked by the graphic depiction of his exact vehicle in the animation.

Next, Mr. Pierce argues that the lighting and weather conditions were not accurately reflected in the animation. He contends that both were enhanced so that the jury could see the animation more clearly, and thus the animation was not consistent with witness testimony. In addition, he asserts that the lighting and weather conditions on the night of the accident were dark and rainy. He argues that under such inclement conditions, the children would have been invisible to all until a vehicle was right upon them, a fact that would have been relevant in determining whether the truck was operated recklessly. Therefore, Mr. Pierce contends that the jury was shown a portrayal of the accident from a better perspective than he had, and his defense against the element of recklessness was not given due consideration.

Mr. Pierce’s third argument is grounded upon the hearsay rule. He contends that the animation was created using the testimony of seven witnesses. However, only two of those individuals testified at trial. Hence, he contends that allowing the jury to see the illustration of what other witnesses described to the police amounted to hearsay. Moreover, he claims that this denied him the opportunity to cross-examine these witnesses, a fundamental Sixth Amendment right. Mr. Pierce argues that the animation should have been excluded on this ground.

338. Appellant's Brief at 18-19, Pierce (No. 93-01302).
339. Id. at 21-22.
340. Id. at 19.
341. Id.
342. Id. at 22.
343. Appellant's Brief at 22, Pierce (No. 93-01302).
344. Id. at 22.
345. Id. at 22-23.
346. Id. at 24.
347. Id.
348. Appellant's Brief at 24, Pierce (No. 93-01302).
349. Id. at 24.
350. Id. at 12, 24.
E. Appellee's Arguments

In response to Appellant's Initial Brief, Appellee filed its Answer Brief on July 27, 1994. Appellee first argues that the trial court did not abuse its discretion by admitting the animation because the State established that the procedures used to create the animation were accepted in the scientific community. Appellee states that Mr. Pierce did not preserve his argument that the procedure utilized to create the animation was not accepted in the scientific community. Appellee bases its argument on the fact that Mr. Pierce never objected to the animation on this ground. However, Appellee also argues that because the tape was used to illustrate an expert's opinion of how the incident occurred, Frye was not applicable. To support its contention, Appellee cites McHugh to show that another court previously determined that an animation is more like a chart or diagram, rather than a scientific device. In addition, Appellee cites various other Florida cases in support of its position. Nevertheless, Appellee contends that the State did meet the Frye test because all of the experts testified that the methods utilized were of the type reasonably relied upon by experts in the field and were reliable. Therefore, even if there was error, it was harmless error.

Appellee's second argument in response is that the information in the animation was consistent with the testimony of the witnesses and the physical evidence. Appellee contends that the animation was used to illustrate Detective Babcock's opinion of how the accident occurred and that

352. Id. at 27.
353. Id.
354. Id.
355. Id. at 27.
357. Appellee's Brief at 27-28, Pierce (No. 93-01302).
358. Id. In his Brief, Appellee cites Bundy v. State, 455 So. 2d 330 (Fla. 1984), cert. denied, 476 U.S. 1109 (1986), Baker, 241 So. 2d at 683, and Grant, 171 So. 2d at 361, to suggest that Frye is inapplicable to the Pierce case and that the motion picture reenactment should be admissible since it explains the testimony of a witness. Appellee's Brief at 27-28, Pierce (No. 93-01302).
359. Id.
360. Id.
361. Id. at 29.
Mr. Pierce was allowed full cross-examination of Detective Babcock. Mr. Pierce had ample opportunity to challenge the accuracy of Detective Babcock’s opinion. Appellee argues that the puddle portrayed in the animation was accurate because several of the witnesses who were present at the scene viewed the animation and attested to the accuracy of the size and shape of the puddle depicted. Appellee further argues that the photographs depicting the puddle, which were taken after the accident, did not accurately depict the size and shape of the puddle because there was a hard rain shortly after the accident. Moreover, Appellee argues that Mr. Pierce provided no evidence to support his argument that the puddle depicted in the animation was different from the sketch prepared by the police. This sketch was prepared by a road patrol officer and not by an accident reconstructionist. Furthermore, Appellee notes that the size and shape of the puddle changed because of additional rain and the fact that people present at the scene were walking through it.

Appellee’s next argument is that the color of the truck portrayed in the animation was accurate. Appellee contends that the artificial yellow light at the scene made the blue truck appear green. In addition, the six layer paint fragments recovered from the clothing of one of the injured children matched the paint chips taken from Mr. Pierce’s truck. Appellee argues that the damage to Mr. Pierce’s truck was fresh, that the dent in the truck’s hood was consistent with Nicole’s head injury, and that the plastic fragments found at the scene matched the factory installed turn signal lens still intact on the left side of the truck. Appellee also notes that a piece of the front grille found at the scene was from the same make and model as Mr. Pierce’s truck, and Mr. Pierce had the grille of his truck replaced after the accident. Thus, Appellee contends there is no doubt that Mr. Pierce’s truck was the truck involved in the accident.

362. Appellee’s Brief at 29, Pierce (No. 93-01302).
363. Id.
364. Id. at 29.
365. Id. at 30.
366. Id. at 31.
367. Appellee’s Brief at 31, Pierce (No. 93-01302).
368. Id.
369. Id.
370. Id.
371. Id. at 31-32.
372. Appellee’s Brief at 32, Pierce (No. 93-01302).
373. Id.
Appellee also notes that the State informed the jury that the video did not attempt to reconstruct the lighting conditions at the time of the accident. Appellee contends that if the court accepted Mr. Pierce’s argument that the animation was inadmissible because the lighting was not accurately portrayed, photographs of an incident that occurred at night would never be admissible. Hence, Appellee argues, based on United States v. Clayton, that the deficiencies in lighting should go to the weight of the evidence, not the admissibility.

Next, Appellee addresses Mr. Pierce’s argument that the video was misleading because it contained an overhead view, providing the jury with a better perspective than Mr. Pierce had at the time of the collision. Appellee contends that Mr. Pierce did not preserve this claim because he made no objection regarding the different perspectives. In addition, Appellee notes that the State used aerial photographs at trial to describe the scene and the path of the truck without objection from Mr. Pierce. Furthermore, the animation was not misleading because it offered three different perspectives of the accident, none of which were misleading.

Appellee rebuts Mr. Pierce’s secondary defense, that the accident was caused by a sudden loss of control upon entering the puddle, by pointing out that Mr. Pierce did not provide evidence to support his defense. The testimony presented showed the truck left the road completely before entering the puddle and hitting the children and thus, Appellee contends that the animation accurately portrayed the events.

374. Id.
375. Id.
376. Id. at 32-33.
377. 643 F.2d 1071, 1074 (5th Cir. 1981) (stating that deficiencies in measurements and lighting in photographs depicting a model wearing the defendant’s clothes went to weight, not admissibility).
378. Appellee’s Brief at 33, Pierce (No. 93-01302).
379. Id.
380. Id. at 33-34.
381. Id. at 33.
382. The State offered one view from overhead, one from Pierce’s perspective, and one from the children’s perspective. Id. at 33-34.
383. Appellee’s Brief at 34, Pierce (No. 93-01302).
384. Id.
385. Id.
Appellee also notes that the animation did not include things that could have prejudiced the jury because it did not contain sound, did not show any blood, and used mannequins to portray the children.\(^{386}\) Likewise, the animation depicted Mr. Pierce's vehicle traveling at the posted speed limit, even though testimony from witnesses showed that he was traveling up to twice the speed limit.\(^{387}\) Moreover, a gap or blank space was intentionally included in the animation because of a lack of testimony to show what Mr. Pierce was doing at that time.\(^{388}\) Hence, Appellee contends that the animation was supported by testimony and physical evidence, and was thus not misleading.\(^{389}\)

Appellee points out that the trial court has wide discretion concerning the admissibility of evidence, and that deficiencies go to the weight of the evidence, not to the admissibility.\(^{390}\) Therefore, Appellee contends that even if there was error, it was harmless.\(^{391}\)

Appellee's final argument concerning admissibility is that the animation is not hearsay.\(^{392}\) The animation was offered as demonstrative evidence to illustrate Detective Babcock's opinion of how the accident occurred.\(^{393}\) Because the animation was not offered to prove the truth of the matter asserted, it was not hearsay.\(^{394}\)

Among the cases cited by Appellee in support of its position was *Bender v. State*.\(^{395}\) Appellee notes the *Bender* court's finding that if an expert bases his opinion on facts or data that are of the type experts in the field would reasonably rely upon, then the facts or data do not have to be admitted as evidence.\(^{396}\) Because the expert testimony was based in part on records, data, and opinions of others, and was the type of evidence reasonably relied upon by experts in the field, Appellee contends that the hearsay rule poses no obstacle to the animation.\(^{397}\)

\(^{386}\) Id.

\(^{387}\) Id.

\(^{388}\) Appellee's Brief at 34, *Pierce* (No. 93-01302).

\(^{389}\) Id. at 35.

\(^{390}\) Id.

\(^{391}\) Id.

\(^{392}\) Id. at 36.

\(^{393}\) Appellee's Brief at 36, *Pierce* (No. 93-01302).

\(^{394}\) Id. at 36.

\(^{395}\) 472 So. 2d 1370 (Fla. 3d Dist. Ct. App. 1985).

\(^{396}\) Appellee's Brief at 36, *Pierce* (No. 93-01302).

\(^{397}\) Id.
F. Appellant’s Reply

In response to Appellee’s Answer Brief, Mr. Pierce filed his Reply Brief on September 26, 1994. Mr. Pierce reiterated his argument that the State failed to establish that the procedures used to prepare the animation were accepted in the scientific community. In addition, he argues that the animation was not an accurate reflection of what actually occurred; he states that it conformed to the State’s theory of the case. Mr. Pierce argues that depicting the truck as blue was inaccurate because none of the witnesses testified that it was blue. He contends that Appellee’s Answer Brief cites only to testimony that supports its arguments and discounts testimony that contradicts them. He further argues that the multiple perspectives used in the animation, especially the view of what the children saw, were misleading. Mr. Pierce contends that none of the children saw the grille of the truck as shown in the video. Thus, he contends that the perspective depicting what the children saw was false.

Mr. Pierce rebuts Appellee’s argument that there was no evidence presented to support his defense of loss of control of the vehicle. He claims evidence presented by the State showed the truck was traveling down the middle of the road, or on the wrong side of the road just prior to the accident. This evidence, he contends, was consistent with his secondary defense that he hit the puddle and lost control of the vehicle as he was returning to the right side of the road.

Mr. Pierce also rebuts Appellee’s argument that the animation was not hearsay. He argues that if witness testimony is the type of evidence reasonably relied upon by experts, then a police officer qualified as an expert could testify regarding any reports given to him, even witness testimonies.

399. Id. at 3.
400. Id. at 4.
401. Id. at 3.
402. Id.
403. Reply Brief at 4, Pierce (No. 93-01302).
404. Id. at 4.
405. Id. at 5.
406. Id.
407. Id. at 6.
Mr. Pierce distinguished the cases cited by Appellee to show the animation was not hearsay, by stating that the underlying data used in those cases was of a scientific or a record keeping nature, and was the kind of evidence reasonably relied upon by experts in the field. He states that because the animation was based on statements of non-testifying witnesses, the jury should have determined the credibility of the witnesses, not the police. Mr. Pierce concludes that it was error to admit the animation because it was inadmissible hearsay.

G. Comments

Mr. Pierce is correct in stating that in order to have evidence admitted as substantive evidence in Florida, there must be testimony as to the general acceptance in the scientific community. However, in accordance with Judge Speiser’s order, the computer animation in this case was admitted solely as demonstrative evidence. The animation was used to visualize Detective Babcock’s testimony and aid the trier of fact in understanding his opinion of how the accident occurred. Indeed, Mr. Pierce’s second argument in his Initial Brief refers to the fact that the animation served as an illustration of Detective Babcock’s testimony. Mr. Pierce’s argument is thus weak. The animation was used solely as demonstrative evidence. There was no need to present testimony as to the scientific reliability of the computer program or its general acceptance within the scientific community. It follows that Mr. Pierce’s first argument should fail because it lacks merit. Assuming arguendo that the animation had been used as substantive evidence, the testimony offered by the State’s three expert witnesses, Deputy Bjordalen-Hull, Detective Babcock, and John Suchocki, would have met the requirements for admission of substantive evidence in Florida, as outlined in Frye. To meet the general acceptance criteria, the State would have had to show that the computer program utilized to create the animation had achieved general acceptance within the relevant scientific community. Mr. Suchocki, the computer animator, was declared by the court to be an

408. Reply Brief at 6, Pierce (No. 93-01302).
409. Id. at 7-8.
410. Id. at 8.
411. Id. at 6.
412. Frye, 293 F. at 1014.
413. Order on Computer Animation at 6, Pierce (No. 92-19316CF10A); Record at 2342.
414. Frye, 293 F. at 1014.
415. See id.
expert in forensic animation. His testimony included an authentication of the computer hardware and software. In addition, Mr. Suchocki testified as to the accuracy and reliability of the computer program utilized to create the animation. Moreover, all three of the State’s experts verified the accuracy of the input data. Thus, Mr. Suchocki’s testimony, in conjunction with that of Detective Babcock and Deputy Bjordalen-Hull, would have overcome the hurdles set out in Frye.416

Mr. Pierce’s second argument, that the animation did not accurately portray various aspects of the scene, also lacks merit. While this argument may be his most persuasive, it does not support the contention that it was error for the trial court to admit the animation. First, it must be recognized that the animation was offered as demonstrative evidence to illustrate the opinion of Detective Babcock, an expert in accident reconstruction. Indeed, Detective Babcock testified that the animation fairly and accurately represented his opinion of how the accident occurred. Second, three separate experts testified as to how the input data was collected and entered into the computer. The data was entered from computer to computer, with no human contact, and the chance for human error in data entry was therefore eliminated. In addition, it must be acknowledged that Mr. Suchocki, the State’s expert in forensic animation, testified as to the accuracy of the computer program used to create the animation. Therefore, it could be deduced that the animation accurately depicted the testimony presented and fairly represented the scene in question. Demonstrative evidence is admissible if it is relevant and will assist the trier of fact.417 In order for a court to exclude relevant evidence, its prejudicial effects must outweigh its probative value.418 Variations in testimony or questions of accuracy go to the weight of the evidence, not its admissibility. Thus, because the animation was relevant and would assist the trier of fact in understanding Detective Babcock’s testimony, Judge Speiser correctly admitted it as demonstrative evidence and allowed the jury to decide its credibility.

Although Mr. Pierce contended that the color of the truck was not consistent with witness testimony, the State’s evidence contradicted his contention. The State presented scientific evidence, via a paint expert, to prove that the paint fragments recovered from the injured child’s clothing were composed of six distinct layers. The expert proved that the six layers of paint matched the paint on the defendant’s truck. Even though many of

416. Id.
418. Id. § 90.403.
the witnesses were only able to testify that the color of the vehicle that hit the children was dark, the expert testimony of the paint expert shows that Mr. Pierce's truck was involved in the accident. As Appellee argued, the yellow light at the scene would make a blue vehicle appear green. It follows that it was not error to depict the truck as blue in the animation. Furthermore, the color of the truck depicted in the animation is almost irrelevant. The purpose of the animation was to illustrate Detective Babcock's opinion of how the accident occurred, not to display every minute detail of the scene.

Mr. Pierce's argument that the lighting and weather conditions were not presented accurately requires consideration of the reason for showing the jury the animation in the first place. The animation was used to illustrate the expert opinion of Detective Babcock. Hence, if the animation had been made dark, its purpose would have been defeated; the jury would not have been able to see it. Although the animation may have presented the jury with a slightly better perspective than Mr. Pierce had the night of the accident, Judge Speiser did not view the animation as being prejudicial. He allowed the jury to hear testimony from the defense regarding the discrepancies in lighting and weather conditions. Consequently, Judge Speiser correctly admitted the animation and let the jury decide its credibility.

In response to Mr. Pierce's argument that the puddle was not accurately depicted in the animation, it must be recognized that the depiction of the size and shape of the puddle in the animation was based upon testimony from witnesses who were present at the scene of the accident before rescue personnel arrived. Even though this information was not collected until approximately six months after the accident, there is no indication that it was not accurate. Indeed, several witnesses who were present at the scene of the accident viewed the animation and testified that it was a fair and accurate representation of the scene and of what occurred. Mr. Pierce's argument is based in part on the testimony of one witness who viewed the video and stated that the puddle was larger than that shown. This kind of variation in testimony would go to the weight of the evidence, rather than its admissibility. Therefore the animation was properly admitted.

Mr. Pierce's argument is also based on the fact that the size and shape of the puddle shown in the animation conflicts with the puddle as depicted in a rough sketch made by a police officer who was present at the scene of the accident. However, on the night of the accident, there were numerous rescue and police vehicles present. Between the time of the accident and the time the police officer made the sketch, the size and shape of the puddle could have been altered if any vehicles drove through it, or if people walked through it. In addition, on the night of the accident, it rained off and on.
Therefore, depending on the time the sketch was made, the size and shape of the puddle could have been altered for a variety of reasons.

Mr. Pierce’s third argument, that the animation was created using the testimony of witnesses that did not testify at trial and thus constituted hearsay, can be negated by looking at Florida’s definition of hearsay. According to section 90.801(1)(c) of the Florida Statutes, hearsay is “[a] statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” 419 Demonstrative evidence does not qualify as hearsay because it is not offered to prove the truth of the matter asserted. Its function is to illustrate expert testimony. It follows that because the computer animation was used solely as demonstrative evidence (to illustrate the testimony of Detective Babcock), it is not subject to the hearsay rule.

If the animation had been admitted as substantive evidence, Appellant’s argument might have some merit. However, based on section 90.704 of the Florida Statutes, when an expert bases his opinion on facts or data which are of a type reasonably relied upon by experts in the field to support such an opinion, the facts or data need not be admitted in evidence. 420 Because all three of the State’s expert witnesses testified that the data they used to create the animation was the type that would be reasonably relied upon by experts in the field, the hearsay problem probably would have been avoided.

VI. CONCLUSION

We live in a visual society, where graphics are rapidly becoming the modern way to communicate. This is evidenced by the growth of both television and video, and can be seen in everyday life in such things as pictorial informational signs in public places. The use of computers is another growing trend. Computer technology has revolutionized many professions, from banking to the medical field. Every day new advances in the computer industry are made. Computer technology is clearly the “wave of the future.” Even though some are hesitant and fearful of accepting the computer and its capabilities, the trend is growing so rapidly that those who are unfamiliar with its capabilities and uses will be unprepared to cope with the future. The judicial system is experiencing this growth first-hand. Courts all over the country are being forced to determine whether evidence generated by a computer is admissible. Although the movement of

419. FLA. STAT. § 90.801(1)(c) (1993).
420. Id. § 90.704.
computer technology into the courtroom has primarily been in civil litigation, it has now infiltrated the criminal courtroom.

Florida courts have not previously decided the issue of whether computer animations are admissible in criminal cases. Authority from other jurisdictions is not overwhelming, but does support the admission of such evidence. For example in McHugh, a criminal case, a New York court admitted a computer animation of a car accident proffered by the defense, analogizing it to a chart or diagram. The McHugh court established criteria for the admission of the animation as demonstrative evidence. The criteria stated that the animation had to be relevant to the case, had to fairly and accurately reflect the testimony, and had to assist the trier of fact in understanding the issues. In essence, this is the same criteria required by the Florida Statutes for the admission of all demonstrative evidence. Indeed, it appears to be the criteria that Judge Speiser applied in deciding to allow the animation in Pierce as demonstrative evidence.

If the Fourth District Court of Appeal agrees with this criteria, it most likely will decide that it was not reversible error for the trial court to allow the animation as evidence. Affirming Pierce on this ground will provide Florida jurors with a more meaningful tool with which to decide cases. In addition, attorneys will enjoy the benefit of having the jurors remember and understand more of the information presented.

Deleterious results may occur nevertheless. First and foremost, the evidence being presented could be erroneous, misleading, or unreliable. Second, indigent defendants or those defendants with limited resources may not be able to fight against such evidence. Thus, a balance must be struck between the positive and potentially negative effects of admitting such evidence. This balance can be achieved through imposing and enforcing strict standards regarding the foundation that must be laid for the admission of such evidence.

This issue is squarely before the Fourth District Court of Appeal at this time. The court’s ruling will create a precedent that may control how such evidence will be treated in the future. Until the Supreme Court of Florida or the Florida Legislature speaks on this issue, the Fourth District’s ruling will be the leading authority. By affirming Pierce, Florida may pave the way for computer animations to become the legal tool of the next decade.

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421. McHugh, 476 N.Y.S.2d at 721.
422. Id. at 722.
423. Id. at 723.
424. Id.
Florida courts and computer technology can then march hand in hand toward the future.

Jennifer Robinson Boyle
He Who Seeks Equity Must Find the Court Which Does Equity—The Current Jurisdictional Conflict

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I. INTRODUCTION

The Florida Constitution, through article V, vests the circuit courts with exclusive original jurisdiction over proceedings in equity.¹ This exclusive

¹ Article V is the judiciary article of the Constitution of the State of Florida, as revised in 1968; it replaced article V of the Constitution of 1885. Section 20(c)(3) provides: Circuit courts shall have jurisdiction of appeals from county courts and municipal courts, except those appeals which may be taken directly to the supreme court; and they shall have exclusive original jurisdiction in all actions at law not cognizable by the county courts; of proceedings relating to the settlement of the
grant of jurisdiction to the circuit courts is also codified in section 26.012 of the Florida Statutes, which states that the circuit courts have “exclusive original jurisdiction . . . in all cases in equity.” Section 26.012 also contains a provision granting the circuit courts exclusive original jurisdiction in all actions “involving the title and boundaries of real property.” Foreclosure actions have been considered to be within the exclusive jurisdiction of the circuit courts because they are in equity and involve title to real property.\(^5\)


_\(^{3}\)_ Id. § 26.012(2)(g).

_\(^{4}\)_ See FLA. STAT. § 702.01 (1993) (entitled, “Foreclosure of Mortgages, Agreements for Deeds, and Statutory Liens,” providing that all such actions shall be in equity); see also 22 FLA. JUR. 2D Equity § 9 (1992).

_\(^{5}\)_ Foreclosure is an action in equity because it involves the title to property. See 22 FLA. JUR. 2D Equity § 31 (1992). Although a lien by itself is only a claim or charge on property, an action to foreclose a lien seeks to collect on that claim or charge by judicial sale of the subject property, which results in the debtor losing his title to the property. Black’s Law Dictionary defines foreclosure as follows:

> The process by which a mortgagor of real or personal property, or other owner of property subject to a lien, is deprived of his interest therein. A proceeding in equity whereby a mortgagee either takes title to or forces the sale of the mortgagor’s property in satisfaction of a debt.


Foreclosure of liens derives from the historical evolution of title theory mortgages in which the lender took title to the borrower’s property, in fee simple subject to condition subsequent, as collateral for a loan. The borrower kept a right of re-entry. The condition subsequent was paying off the loan by a specified date, called “law day.” If the loan was not paid off by law day, then the condition subsequent would not be satisfied and the borrower would lose his right of re-entry. Because it was inequitable for a borrower to lose his rights
In 1990, however, the Florida Legislature amended section 34.01 of the Florida Statutes to vest the county courts with increased subject matter jurisdiction. The amendment provided for an increase in the monetary jurisdiction of the county courts to $15,000 after July 1, 1992. In addition, pursuant to the amended version of section 34.01, the county courts now "may hear all matters in equity involved in any case within the jurisdictional amount of the county court, except as otherwise restricted by the State Constitution or the laws of Florida." The legislature failed to simultaneously amend section 26.012, as well as several other statutory sections, to reflect the changes in section 34.01. As a result, section 34.01 is seemingly in conflict with the jurisdictional provisions in article V of the Florida Constitution, as well as with section 26.012.

The apparent conflict between circuit court and county court subject matter jurisdiction in equity created great uncertainty among Florida practitioners, particularly in the foreclosure area. Any judgment resulting from an action filed in a court lacking subject matter jurisdiction is void.

Lack of subject matter jurisdiction is a defense which can be raised at any
to the land by failing to meet the law day deadline even when the borrower had a good excuse, the court of equity afforded borrowers the equity of redemption. Borrowers could attempt to redeem their property after law day by paying the entire amount of the loan. Because lenders needed to dispose of the collateral property in order to recuperate their loan, equity afforded lenders the right to foreclose the borrower's equity of redemption. Thus, foreclosure involves title to property, and the action has persisted, from its application in title theory mortgages to its adaptation in lien theory mortgages, and consequently to liens in general. See JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 669-72 (3d ed. 1993).

8. Id. § 34.01(4).
9. See, e.g., Fla. Stat. § 55.10(8) (1993) (providing that a party claiming an interest in property with a lien can seek equitable relief in the circuit court to protect his or her interest); id. § 702.07 (providing that circuit courts have jurisdiction to rescind, vacate, and set aside foreclosure decrees); id. § 713.31(1) (providing that circuit courts have jurisdiction in chancery to issue injunctions and grant other relief in cases of fraud or collusion involving liens); id. § 222.09 (providing that the circuit court in equity can enjoin sales of property protected by homestead rights).
10. See Fla. Const. art. V, § 20(c)(3).
11. See Fla. Stat. § 26.012(2)(c) (1993) (stating that the circuit courts have exclusive original jurisdiction in all cases in equity). Therefore, § 34.01(4), which grants the county courts original jurisdiction in equity, directly conflicts with the above mentioned provisions.
12. Interview with Louis Nicholas, Counsel, Ocean Bank Legal Department, in Miami, FL (May 20, 1994).
time in litigation; it can even be raised for the first time on appeal.\textsuperscript{14} Attorneys began to use the jurisdictional conflict as a defense to challenge the validity of foreclosures of liens, including mortgages.\textsuperscript{15} Courts dismissed several cases on these grounds, resulting in delays in determining in which court to file.\textsuperscript{16} The validity of foreclosures under $15,000, decided since 1990, was questioned, resulting in obvious instability of land titles. The uncertainty was so great that most prudent title insurers issued notices, advising their clients that they would not insure titles obtained through foreclosures involving less than $15,000, the current jurisdictional amount limit for county courts.\textsuperscript{17}

A few lien foreclosure cases dealing with this issue were decided on questionable grounds in the district courts of appeal.\textsuperscript{18} Two of these cases were appealed to the Florida Supreme Court.\textsuperscript{19} In \textit{Nachon Enterprises Inc. v. Alexdex Corp.},\textsuperscript{20} the Third District Court of Appeal held that the county courts were courts of competent jurisdiction to decide lien foreclosures involving $15,000 or less.\textsuperscript{21} In \textit{Blackton, Inc. v. Young},\textsuperscript{22} the Fifth District Court of Appeal held that the amended section 34.01 superseded the state constitution,\textsuperscript{23} a surprising statement at first glance.\textsuperscript{24} Both cases held not only that county courts had jurisdiction to hear foreclosures within their jurisdictional amount, but further that the circuit courts did not have jurisdiction.\textsuperscript{25} On September 1, 1994, the Florida Supreme Court released its decision in the \textit{Nachon} case, ruling that the county and circuit courts have concurrent jurisdiction in equity for cases within the county courts'
monetary limits. However, the court’s reasoning is questionable, and leaves important issues unresolved, which may produce further litigation on the question of jurisdiction with respect to mortgage foreclosures.

The legislature proposed several bills to resolve the problem in various ways, the most drastic of which called for the abolition of the county courts altogether. All of the proposed changes died in the judiciary committee, apparently due to the passage of the bill creating the Article Five Task Force, which is conducting a complete review of the Florida Judiciary and will recommend the necessary changes in a report to be submitted by December 1, 1994. One of the alternatives that the task force will study is the creation of a single tier trial level court.

The purpose of this note is to inform Florida practitioners of the conflict which currently exists regarding equitable subject matter jurisdiction between the county and circuit courts. Following this Introduction, Part II will discuss the legislative evolution of equity jurisdiction in Florida’s trial level courts, and the changes made to section 34.01 of the Florida Statutes to grant increased subject matter jurisdiction to the county courts. Part III will discuss the courts’ recent decisions applying and interpreting the county and circuit court jurisdictional statutes and the arguments for and against equitable subject matter jurisdiction in the county courts. Part IV will discuss the impact that the uncertainty regarding which court has equity jurisdiction has had on the practice of real estate law. Part V will discuss the various alternatives proposed by the litigants, the Bar, and the legislature for resolving the conflict as well as the Florida Supreme Court’s decision in Nachon, holding that the two courts have concurrent jurisdiction.

II. TRADITIONAL EQUITY JURISDICTION IN FLORIDA’S TRIAL COURTS

A. Florida’s Current Court System

The 1973 revision of the judiciary article of the Florida Constitution provides that the judicial power of the state is vested in the supreme court,

27. See Fla. S.J. Res. 422, 13th Leg., 2d Sess. (1994) (proposed amendments to FLA. Const. art V, §§ 1, 2, 5-8, 10-12, 16, 20); see also infra part V.C.
28. FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1994 REGULAR SESSION, HISTORY OF SENATE BILLS at 38, SB 78; id. at 47, SB 218; id. at 61, S.J. Res. 422; id., HISTORY OF HOUSE BILLS at 242, HB 409; id. at 381, HB 2547.
30. Id. at 868.
district courts of appeal, circuit courts, and county courts. No other courts may be established by the state, by any political subdivision, or by any municipality. The Florida judicial system, in which all courts are created by the constitution, is distinguishable from the federal system, in that all federal courts are statutory, except the United States Supreme Court. This distinction is important because the Florida Legislature does not have the power to create or abolish any of the constitutionally mandated courts without amending the constitution. This greater separation of powers between the legislature and the judiciary in Florida implies that the legislature cannot tinker with the courts' jurisdiction in a way that would effectively strip any of these courts of their power. Because of this principle, the granting of jurisdiction in equity to the county courts, for actions within their jurisdictional amounts, may be unconstitutional because it strips the circuit courts of their exclusive jurisdiction in equity.

The jurisdiction of each of the courts created in article V is stated within the article, and is codified in the Florida Statutes. Florida currently operates under a two-tier trial court system which is comprised of county and circuit courts. Article V, section 6 of the Florida Constitution provides that "county courts shall exercise the jurisdiction prescribed by general law" which "shall be uniform throughout the state." Additionally, article V, section 20(4) states that the county courts have original jurisdiction in the following areas:

31. FLA. CONST. art. V, § 1.
32. Id. See generally 13 FLA. JUR. 2D Courts and Judges §§ 8, 71-76 (1992) (discussing prior existence of inferior courts, which were abolished).
36. See id.
37. See FLA. CONST. art. V, § 20 (prescribing each court's subject matter jurisdiction).
38. See FLA. STAT. §§ 26.012, 34.01 (1993) (codifying circuit court and county court jurisdiction, respectively); cf. 13 id. §§ 26, 28 (discussing the necessity of jurisdiction). See generally 13 FLA. JUR. 2D Courts and Judges § 22 (1992) (defining jurisdiction as "the power conferred on a court by the sovereign, vis-a-vis constitutional or statutory provisions, to take cognizance of the subject matter of a litigation and the parties brought before it and to hear and determine the issues and render judgment upon the issues joined").
39. This was not always the case. See 13 FLA. JUR. 2D Courts and Judges §§ 71-76 (1992) (discussing the former County Judges' Courts, Civil Claims Courts, Small Claims Courts, Small Claims Magistrates' Courts, Magistrates' Courts, Justice of the Peace Courts, and courts of chartered counties).
40. FLA. CONST. art. V, § 6(2)(b).
[A]ll criminal misdemeanor cases not cognizable by the circuit courts, of all violations of municipal and county ordinances, and of all actions at law in which the matter in controversy does not exceed the sum of two thousand five hundred dollars ($2,500.00) exclusive of interest and costs, except those within the exclusive jurisdiction of the circuit courts. 41

Similarly, article V, section 5, states that the circuit courts have "original jurisdiction not vested in the county courts," 42 and article V, section 20(3) provides that the circuit courts have exclusive original jurisdiction "in all cases in equity including all cases relating to juveniles." 43 As explicitly stated above, the Florida Constitution, as revised in 1968, states that the circuit court is the trial court empowered to act in equity. 44

At this point it should be recalled that equity was historically separate from law; there was a separate court of equity, also known as the chancery court, in which a petitioner could seek relief if he had clean hands and no

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41. Id. § 20(4); see also Amended Brief of Amicus Curiae for the Real Property, Probate and Trust Law Section of the Florida Bar at 6, Alexdex Corp. v. Nachon Enters., Inc., 641 So. 2d 858 (Fla. 1994) (No. 81,765) [hereinafter Amended Brief of Amicus Curiae (Florida Bar)] (explaining the usage of article V, § 20).

Section 20 was included in the 1968 revised Constitution of Florida as a jurisdictional schedule and temporary transition provision for governance of jurisdiction until the legislature changed the statutes regarding jurisdiction of circuit courts and county courts. Since then, §§ 26.012 and 34.01 have been enacted, which basically are the statutory counterparts to § 20. Section 34.01 prescribes county court subject matter jurisdiction and § 26.012 prescribes circuit court subject matter jurisdiction. Amended Brief of Amicus Curiae (Florida Bar) at 6, Alexdex (No. 81,765).

The jurisdictional amount of the county courts increased in 1980 from $2500 to $5000. See Act of July 1, 1980, ch. 80-165, § 1, 1980 Fla. Laws 533, 533 (codified as amended at Fla. Stat. § 34.01(1) (1980)).

42. Fla. Const. art. V, § 5(b). Section 5(b) also states:

The circuit courts shall have . . . jurisdiction of appeals when provided by general law. They shall have the power to issue writs of mandamus, quo warranto, certiorari, prohibition and habeas corpus, and all writs necessary or proper to the complete exercise of their jurisdiction. Jurisdiction of the circuit court shall be uniform throughout the state. They shall have the power of direct review of administrative action prescribed by general law.

Id.

43. Id.

44. Id.
adequate remedy at law. With the advent of the rules of civil procedure, equity and law merged, although the distinction between the two forms of relief still exists and is important to maintain. "Strictly speaking, there is no such tribunal in the judicial system of Florida known as the 'chancery court,' though the circuit court of the state, when exercising its equity jurisdiction, is frequently spoken of as a chancery court."

46. See FLA. R. CIV. P. 1.040; see also 22 FLA. JUR. 2D Equity § 3 (1992).
47. For example, the distinction still exists when determining if there is a right to a jury trial. See 22 FLA. JUR. 2D Equity §§ 4-5 (1992).
48. See 13 id. Courts and Judges § 8 (1992) (citing Beebe v. Richardson, 23 So. 2d 718 (Fla. 1945)).

Jurisdiction is different from the inherent powers of the courts in that "jurisdiction is conferred by constitutional and statutory authorization, whereas inherent powers do not depend upon express constitutional grant or on legislative will." 13 id. § 14 (1992). A court's power to act in equity has sometimes been regarded as inherent. See 22 id. Equity § 7. Nevertheless, equity does have a subject matter jurisdictional component because in some cases only courts of general jurisdiction have inherent powers. 13 id. Courts and Judges § 15. For example, the power to appoint a receiver, or to relieve a tenant from the forfeiture of his estate for failing to pay rent as required by his lease, although usually considered to be within the realm of equity, are inherent powers of a court unless otherwise controlled by statute. 13 FLA. JUR. 2D Courts and Judges § 15 (1992).

[However,] prior to the 1972 amendment of the Florida Constitution changing the jurisdiction of the County Courts, and the statutory changes effectuating this amendment, it was held that County Courts did not have inherent power to relieve a tenant from the forfeiture of his estate for failure to pay rent as required by his lease.

13 id. (footnote omitted). Courts of general jurisdiction are usually the ones considered to have certain inherent powers, which include equitable powers. 13 id. Following the tautology, the circuit courts, as courts of general jurisdiction, have inherent powers. The power to grant equitable relief is sometimes considered an inherent power. 22 id. Equity § 7. Therefore, the circuit courts are the courts with the power to grant equitable relief. See 22 id.

As the Florida trial level courts, the circuit and county courts are sometimes distinguished as courts of general and specific jurisdiction; the circuit court is the court of general jurisdiction, with powers that may not be curtailed by the legislature. 13 FLA. JUR. 2D Courts and Judges § 63 (1992); see also 13 id. § 29 (stating that a presumption may be invoked in favor of the jurisdiction of a court of general jurisdiction; on the other hand, presumptions as to jurisdiction may not be invoked with regard to courts of limited jurisdiction). The facts on which jurisdiction for courts of limited jurisdiction rest must appear in the record.

The jurisdiction of the Circuit Court is general in that it has original jurisdiction of cases in equity and at law not cognizable by an inferior court. In other words, its jurisdiction is 'primarily residual. The jurisdiction of the courts
The legislature has codified the county courts' subject matter jurisdiction in section 34.01 of the Florida Statutes, in accordance with the constitution. The subject matter jurisdiction of the circuit courts is inferior to it is carved out of that given to the Circuit Court, so that its original jurisdiction is limited only at lower levels, and remains otherwise general and unlimited.

The circuit courts, as courts of general jurisdiction, are the highest trial courts in the State.

The fact that a court is one of general jurisdiction does not necessarily mean that it cannot be made a court of special and limited jurisdiction in certain cases. On the contrary, a court of general jurisdiction may have additional powers conferred on it by statute. In the exercise of such statutory powers, a court of general jurisdiction will be regarded and treated as a court of limited and special jurisdiction.

13 id. § 63 (footnotes omitted).
49. FLA. STAT. § 34.01 (1993). The statute provides, in relevant part:

(1) County courts shall have original jurisdiction:
(a) In all misdemeanor cases not cognizable by the circuit courts;
(b) Of all violations of municipal and county ordinances; and
(c) As to causes of action accruing:
1. Before July 1, 1980, of all actions at law in which the matter in controversy does not exceed the sum of $2,500, exclusive of interest, costs, and attorney's fees, except those within the exclusive jurisdiction of the circuit courts.
2. On or after July 1, 1980, of all actions at law in which the matter in controversy does not exceed the sum of $5,000, exclusive of interest, costs, and attorney's fees, except those within the exclusive jurisdiction of the circuit courts.
3. On or after July 1, 1990, of actions at law in which the matter in controversy does not exceed the sum of $10,000, exclusive of interest, costs, and attorney's fees, except those within the exclusive jurisdiction of the circuit courts.
4. On or after July 1, 1992, of actions at law in which the matter in controversy does not exceed the sum of $15,000, exclusive of interest, costs, and attorney's fees, except those within the exclusive jurisdiction of the circuit courts.

(2) The county courts shall have jurisdiction previously exercised by county judges' courts other than that vested in the circuit court by s. 26.012, except that county court judges may hear matters involving dissolution of marriage under the simplified dissolution procedure pursuant to Rule 1.611(c), Florida Rules of Civil Procedure or may issue a final order for dissolution in cases where the matter is uncontested, and the jurisdiction previously exercised by county courts, the claims court, small claims courts, small claims magistrates courts, magistrates courts, justice of the peace courts, municipal courts, and courts of chartered counties, including but not limited to the countries referred to in ss 9, 10, 11, and 24 of Art. VIII of the State Constitution, 1885.
similarly codified in section 26.012. Because of this exclusive original jurisdiction in equity, all foreclosures, large and small, whether involving mortgages or other liens, were brought in circuit court. This exclusive grant of jurisdiction in equity also meant that a county court case, in which a party raised an equitable defense, had to be transferred to the circuit court, resulting in delays. This problem was dealt with in 1980 when the

(3) Judges of county courts shall be committing magistrates. Judges of county courts shall be coroners unless otherwise provided by law or by rule of the Supreme Court.

(4) Judges of county courts may hear all matters in equity involved in any case within the jurisdictional amount of the county court, except as otherwise restricted by the State Constitution or the laws of Florida.

Id.; see also id. § 34.011 (1993) (stating that county courts "have concurrent [jurisdiction] with the circuit court to consider landlord and tenant cases involving claims in amounts which are within its jurisdictional limitations," including the power to issue injunctions, and that the county courts have exclusive jurisdiction within their monetary limits in cases involving possession of real property).

50. Id. § 26.012. The statute provides, in relevant part:

(1) Circuit courts shall have jurisdiction of appeals from county courts except appeals of county court orders or judgments declaring invalid a state statute or a provision of the State Constitution and except orders of judgments of a county court which are certified by the county court to the district court of appeal to be of great public importance and which are accepted by the district court of appeal for review. Circuit courts shall have jurisdiction of appeals from final administrative orders of local government code enforcement boards.

(2) They shall have exclusive original jurisdiction:

(a) In all actions at law not cognizable by the county courts;

(b) Of proceedings relating to the settlement of the estates of decedents and minors, the granting of letters testamentary, guardianship, involuntary hospitalization, the determination of incompetency, and other jurisdiction usually pertaining to courts of probate;

(c) In all cases in equity including all cases relating to juveniles except traffic offenses as provided in chapters 39 and 316;

(d) Of all felonies and of all misdemeanors arising out of the same circumstances as a felony which is also charged;

(e) In all cases involving the legality of any tax assessment or toll or denial of refund, except as provided in s. 72.011;

(f) In actions of ejectment; and

(g) In all actions involving the title and boundaries of real property.

Id.

51. See 22 FLA. JUR. 2D Equity § 7 (1992).

52. See Hollywood Food Ct., Inc. v. Hollowell, 588 So. 2d 243, 243 (Fla. 4th Dist. Ct. App. 1991) (per curiam) (involving Rule 1.170(j) of the Florida Rules of Civil Procedure, which requires transfer from county court to circuit court if any counterclaims or cross-claims to an action are outside the county court’s jurisdiction). But see Kugeares v. Casino, Inc.,
Valcarcel

legislature amended section 34.01(1)(c)(2) to permit the county courts to hear equitable defenses raised in cases at law within their jurisdiction. In 1990, the legislature made further changes in the jurisdiction of county courts.

B. The 1990 Legislative Changes to County Court Jurisdiction

In 1990, the Florida Legislature enacted law 90-269, which greatly expanded the subject matter jurisdiction of the county courts. This law, which became effective on October 1, 1990, increased the monetary jurisdiction of the county courts to the present limit of $15,000. In addition, the law provided that "judges of county courts may hear all matters in equity involved in any case within the jurisdictional amount of the county court, except as otherwise restricted by the State Constitution or the laws of Florida." Law 90-269 also deleted the sentence from section 34.01(1)-(c)(2) which stated, "[a]ll equitable defenses in a case properly before a county court may be tried in the same proceeding." This deletion is crucial in attempting to understand what the legislature intended to accomplish through Law 90-269. The Staff Analysis and Economic Impact Report on 90-269 of the House of Representatives Committee on the Judiciary makes the following comment:

Arguably, small damage suits would move more quickly in the county court system resulting in time savings for the litigants. In addition, cases involving small amounts of damages that also involve equitable claims, defenses or remedies would now be able to remain in the county court rather than being transferred to circuit court which would appear to be a more efficient way to handle these cases. . . . There is a question as to whether granting jurisdiction to the county court to hear all matters in equity would require a constitutional amendment,

372 So. 2d 1132, 1134 (Fla. 2d Dist. Ct. App. 1979) (holding that county court had jurisdiction to consider equity defenses in suits in which the landlord seeks to regain possession of leased premises).

55. Id. at 1972 (codified at FLA. STAT. §§ 34.01(1)(c)(4) (1993)).
56. Id. at 1973. Note also that chapter 90-269 amended § 86.011 to authorize county courts to render declaratory judgments. Id. § 3, 1990 Fla. Laws at 1973. The precise wording of the law seems to evidence the legislature's intent, and will later be shown to support the argument that there is actually no conflict, and that the law may have been misinterpreted.
57. Id. at 1972.
however, the Florida Constitution provides that county courts “shall exercise jurisdiction as prescribed by general law...” (Art. V, s. 6., Fla. Const.), and that circuit courts “shall have original jurisdiction not vested in the county courts...”(Art. V, s. 5., Fla. Const.).

The Staff Analysis Report also explains that section 86.011 of the Florida Statutes, relating to the issuance of declaratory judgments, was amended to conform with the provision in the law “that grants equity jurisdiction to the county court,” and that the grant of equity jurisdiction does not apply to divorce cases.

The question is whether the legislature intended to expand or limit the county courts’ powers in equity when it replaced the provision that “all equitable defenses in a case properly before a county court may be tried in the same proceeding” with “[j]udges of county courts may hear all matters in equity involved in any case within the jurisdictional amount of the county court, except as otherwise restricted by the State Constitution or the laws of Florida.” The county courts were already able to decide equitable defenses raised in actions clearly within their jurisdiction without having to transfer such cases to the circuit court. The new phrase, “all matters in equity involved in any case within the jurisdictional amount of the county court” seems to be merely a rephrasing of the prior provision, with “matters” implying not only equitable defenses, but also equitable counterclaims and other equitable remedies which are not defenses. The new phrasing still states, however, that the county court “may” hear such equitable matters which are “involved in any case within the jurisdictional amount of the county court.” This seems to imply that the equitable matters which can be considered must be within a legal “case,” and that the “case” itself cannot be purely equitable. In other words, if a legal case clearly within the jurisdiction of the county court raises an issue in equity, the county court can decide that issue, but this does not mean that a county court can hear a purely equitable matter not involved within a legal case. This interpretation is entirely consistent with the Judiciary Committee’s Staff Analysis Report, which states that “cases involving small amounts of

58. Staff of Fla. H.R. Comm. on the Judiciary, CS for HB 1061 (1990) Staff Analysis 3-4 (1990) [hereinafter Staff Analysis] (on file with comm.).
59. Id.
60. Ch. 80-165, § 1, 1980 Fla. Laws at 533.
62. See ch. 80-165, § 1, 1980 Fla. Laws at 533.
63. Ch. 90-269, § 1, 1990 Fla. Laws at 1973 (emphasis added).
64. Id.
damages that also involve equitable claims, defenses or remedies would now be able to remain in the county court rather than being transferred to circuit court which would appear to be a more efficient way to handle these cases.\(^6^5\) Clearly an action for money damages is an action at law, and there is no broad grant of equitable jurisdiction without the above mentioned qualifications in either the actual law or the Staff Analysis Report.\(^6^6\) The preamble of chapter 90-269, however, does seem to imply a broader grant of equitable jurisdiction; it states that the Act provides “a county court may hear all matters in equity that are within jurisdictional amount.”\(^6^7\) However, the new provision granting equitable power to county courts is expressly restricted by the phrase “except as otherwise restricted by the State Constitution or the laws of Florida.”\(^6^8\) This exception seems to refer to section 26.012(2)(c) which grants the circuit courts exclusive original jurisdiction in “all cases in equity,” which is different from saying “all matters in equity involved in any case within the jurisdictional amount of the county court, except as otherwise restricted.”\(^6^9\) It seems, therefore, that the limited grant of equity jurisdiction in 90-269 was intended only to increase trial court efficiency by eliminating the needless delay which results in cases which are properly brought in county courts but must be transferred to circuit courts.\(^7^0\)

The legislature failed, however, to make its intention clear in the wording of section 34.01(4), especially in light of the conflicting provision in section 26.012(2)(c).\(^7^1\) As a result, there has been significant confusion and debate as to the proper construction of the two jurisdictional statutes.\(^7^2\) Guided by the apparent legislative intent to increase the responsibility of the county courts and to lighten the burden of the circuit courts, as signified by the considerable increases in monetary limits of the county courts, some practitioners have construed section 34.01(4) to give the county courts

\(^6^5\) Staff Analysis, supra note 58, at 3.

\(^6^6\) In fact, if the legislature wanted to grant the county courts full powers in equity within their jurisdictional amounts, it could have merely changed sections 34.01(1)(c)3-4 of the Florida Statutes to read “actions at law and in equity.” It did not do so.


\(^6^8\) Ch. 90-269, § 1, 1990 Fla. Laws at 1973.

\(^6^9\) See id. (emphasis added).

\(^7^0\) See Staff Analysis, supra note 58, at 3.

\(^7^1\) The conflicting provision provides that the circuit courts have exclusive original jurisdiction in “all cases in equity.” See FLA. STAT. § 26.012(2)(c) (1993).

\(^7^2\) See infra part IV.
jurisdiction to hear small foreclosures.\textsuperscript{73} However, this interpretation conflicts not only with section 26.012(2)(c), but also with section 26.012(2)(g) which provides that the circuit courts have exclusive original jurisdiction in all cases "involving the title and boundaries of real property."\textsuperscript{74} Foreclosures of liens on real property, including mortgages, are usually understood to involve title to real property because the product of a foreclosure is a sale and accompanying transfer of ownership.\textsuperscript{75} Therefore, if there was any doubt that foreclosure was under the jurisdiction of the circuit courts because of the new equitable jurisdiction provision of 34.01(4), then this "title and boundaries" provision seems to ensure that at least all foreclosures of real property are within the circuit courts' jurisdiction.\textsuperscript{76} The practitioners who have construed section 34.01(4) to grant the county courts jurisdiction to hear foreclosures not exceeding $15,000 have been forced to argue that section 26.012(2)(c) is not a law that restricts the application of section 34.01(4) and that their foreclosure action does not involve title and boundaries to real property.\textsuperscript{77}

III. Litigation Involving the 1990 Changes

A. Spradley v. Doe

The first case to raise the issue of the county courts' increased subject matter jurisdiction in equity was \textit{Spradley v. Doe.}\textsuperscript{78} The plaintiff, Spradley,
appealed the Circuit Court of Leon County’s dismissal of his civil rights action, in which he sought a declaratory judgment and damages in the amount of $950. Spradley argued on appeal that the circuit court lacked subject matter jurisdiction, and that the action, which requested both equitable relief and money damages, was within the jurisdictional amount of the county courts. The First District Court of Appeal agreed, reversing the circuit court’s dismissal, and transferring the action to the county court.

The First District Court of Appeal acknowledged that “matters in equity” have historically been heard only in circuit courts, citing section 26.012(2)(c). The court then addressed the 1990 amendment to sections 34.01 and 86.011, which it construed to be a full grant of equity jurisdiction to the county courts for cases within their jurisdictional amounts. The court stated:

Unfortunately, the legislature failed to amend section 26.012 by deleting the provisions therein, which stated that the circuit courts have exclusive equitable jurisdiction. Thus, because the grant of equity jurisdiction to county courts in section 34.01(4) is restricted by section 26.012(2)(c), vesting equitable matters exclusively in the circuit courts, an irreconcilable inconsistency exists between the two statutes.

Under circumstances in which statutory provisions are inconsistent and cannot be harmonized, a court must reach a construction that will give effect to the purpose of the statute and the legislative intent. One important maxim of statutory construction is that the last expression of the legislature prevails.

The clear intent of the legislature was to expand county court jurisdiction over certain specified equitable matters. This intent is reflected not only by the express language employed in section 34.01(4), but as well by the title to Chapter 90-269 [the act provides “that a county court may hear all matters in equity that are within jurisdictional amount,” instead of referring to “all matters in equity involved in any case. . . .”]. Section 34.01(4) is clearly consistent with the expressed legislative purpose, and, because it is the last expression of legislative will, it should prevail. We therefore construe section 34.01(4) as granting equitable jurisdiction to county courts over matters within those

79. Id. at 723.
80. Id.
81. Id. at 724.
82. Id. at 723.
83. Spradley, 612 So. 2d at 723-24.
courts' jurisdictional amounts, despite the existence of the patent inconsistency in section 26.012(2)(c). 84

Although Spradley involved a civil rights action by a pro se prisoner seeking a declaratory judgment, 85 it established a precedent for interpreting section 34.01(4) as requiring actions in equity not exceeding $15,000 to be brought in the county courts. 86 Section 34.01(4) was now construed to deny the circuit courts subject matter jurisdiction in equity when the case involves $15,000 or less. 87 The court did not address the fact that section 34.01(4) does not mandate that such actions be brought only in the county courts; the wording only states that county courts "may" hear such matters involved in a case within their jurisdictional amount. 88 The case was not appealed.

B. Nachon Enterprises Inc. v. Alexdex Corp.

Shortly after the decision in Spradley, the Third District Court of Appeal decided a case which caused great concern in the area of real property. It involved the foreclosure of a construction lien in the amount of $4,140.44. 89 Nachon Enterprises filed a notice of lis pendens to establish and foreclose its lien in the County Court of Dade County. 90 The defendant responded by filing a complaint in the Circuit Court in Dade County (Eleventh Judicial Circuit) to show cause and to discharge the lien, pursuant to section 713.21(4) of the Florida Statutes. 91 Section 713.21(4) specifies that complaints to show cause why a lien should not be discharged must be filed in the circuit court, not the county court. 92 Nachon filed a

84. Id. (citations omitted)
85. Id.
86. Id. at 724.
87. Id.
88. The meanings of the words "may" and "shall" differ greatly. See 49 FLA. JUR. 2D Statutes § 18 (1992).
89. Nachon, 615 So. 2d at 246.
90. Id.
91. Id. at 247.
92. FLA. STAT. § 713.21(4) (1993). If county courts were now empowered to hear lien foreclosure cases, this section should have also been amended to conform to § 34.01(4). Richard Burton, counsel for Alexdex, used this argument in his brief to the Third District Court of Appeal:

Chapter 713.21(4) is specific that all actions in response to a Rule to Show Cause must be brought in Circuit Court. This specific jurisdictional requirement has been readopted during the Legislature's reexamination of the Mechanic Lien
motion to dismiss the defendant's complaint in the circuit court, based upon
the pendency of the foreclosure filed in the county court. The circuit
court denied Nachon's motion to dismiss and discharged Nachon's lien.
The court held that the foreclosure pending in the county court did not
satisfy the statutory requirement that an action to enforce a lien must
commence in a court of competent jurisdiction within one year of recording
a claim of lien. The holding implied that the county court was not a
court of competent jurisdiction to hear lien foreclosures, even when they
involve amounts within the county court's monetary jurisdiction.

Nachon appealed to the Third District Court of Appeal, arguing that the
foreclosure action filed in county court was a valid action, complying with
the one year statute of limitations under section 713.22(1) for enforcing
construction liens. The district court agreed and, without referring to
Spradley, stated:

Pursuant to this section [34.01(4)], a "court of competent jurisdiction"
to hear foreclosure actions, which are equitable in nature, now includes
the County Court. Unlike an action to quiet title, which is within the
exclusive jurisdiction of the Circuit Court, see s. 26.012(2)(g), Fla. Stat.
(1991), the foreclosure action at issue here is not an action "involving
the title and boundaries of real property." Thus, construction lien
foreclosure actions are to be filed in the County Court if the amount
involved does not exceed the jurisdictional limit of that court.

93. Nachon, 615 So. 2d at 246. In Nachon's reply brief, it stated that Nachon did
attempt to transfer the county court lien foreclosure action to the circuit court, but the motion
was denied by administrative judge order, finding no basis for the transfer; Nachon used this
to argue that the lien foreclosure action had been properly brought in the county court.
Appellant's Reply Brief at 2, Nachon Enters. Inc. v. Alexdex Corp., 615 So. 2d 245, 246
(Fla. 3d Dist. Ct. App.) (No. 92-01456), review granted, 626 So. 2d 203 (Fla. 1993), and
approved, 641 So. 2d 858 (Fla. 1994).

94. Nachon, 615 So. 2d at 246.

95. Id.

96. Appellant's Initial Brief at 5, Nachon Enters. Inc. v. Alexdex Corp., 615 So. 2d 245
(Fla. 3d Dist. Ct. App.) (No. 92-01456), review granted, 626 So. 2d 203 (Fla. 1993), and
approved, 641 So. 2d 858 (Fla. 1994).

97. Nachon, 615 So. 2d at 246-47 (citations omitted).
Thus, the district court construed section 34.01(4) as denying the circuit courts jurisdiction in equity cases not exceeding $15,000, including construction lien foreclosures, because they do not involve title and boundaries to real property.98

The Third District Court of Appeal’s reasoning in its decision is troubling. The court never acknowledged any inconsistency between sections 34.01(4) and 26.012(2)(c).99 First, it equated the phrase in 34.01(4), “all matters in equity involved in any case,” with actions solely in equity.100 Second, the court construed the exception in section 34.01(4) [“except as otherwise restricted by the State Constitution or the laws of Florida”] as referring only to section 26.012(2)(g), which provides that circuit courts have exclusive original jurisdiction in all actions “involving title and boundaries to real property.”101 The court did not attempt to explain how the circuit courts could have exclusive original jurisdiction in all cases in equity and yet not have exclusive original jurisdiction when the amount in controversy is under $15,000. If the restriction in section 34.01(4) was intended to refer only to section 26.012(2)(g), the use of language as encompassing as “the State Constitution or the laws of Florida” was unnecessary.

Even if the restriction in section 34.01(4) referred only to section 26.012(2)(g) (that the county courts’ equity jurisdiction is restricted only in the area of actions involving title and boundaries to real property), as the Third District Court of Appeal suggests, a construction lien foreclosure such as Nachon’s would necessarily involve title to real property.102 Nevertheless, the Nachon court stated that construction lien foreclosures do not involve title and boundaries to real property.103 In making this assertion, the court stated that the provision in section 26.012(2)(g) concerning actions “involving title and boundaries to real property” meant only actions to quiet title.104 In support of its position, the court cited several landlord-tenant and unlawful detainer cases to demonstrate that there are actions which deal with real property but do not involve title or boundaries.105 The cases

98. Id.
99. See id.
100. Id.
101. Id.
102. See supra note 5.
103. Nachon, 615 So. 2d at 246-47.
104. Id.
105. Id. (citing Spector v. Old Town Key West Dev., Ltd., 567 So. 2d 1017 (Fla. 3d Dist. Ct. App. 1990) (declaratory relief and appointment of a receiver); Kugeares, 372 So. 2d at 1132 (landlord-tenant possession action); Williams v. Gund, 334 So. 2d 314 (Fla. 2d
cited referred only to the power of a county court hearing such cases to hear equitable defenses. Landlord-tenant cases involve disputes over the possession and not the title to real property and have historically been within the jurisdiction of the county courts. Lien foreclosures are quite different from possessory actions.

An action to foreclose a mechanic’s lien, like an action to foreclose a mortgage on land, is an action seeking to judicially convert a lien interest (an equitable interest) against a land title to a legal title to the land and in such an action the result sought by the action requires the trial court to act directly on the title to the real property.

Lien foreclosures are usually considered to be in rem or quasi in rem actions. Condemnation actions, partition actions, ejectment actions, and quiet title actions are other examples of in rem actions where the res is real property. With this in mind, it would seem that the phrase “involving title and boundaries to real property” may be referring not only to quiet title actions, but also to any actions where the res is real property. More importantly, a foreclosure action in enforcement of a construction lien or a mortgage does necessarily fall into the category represented by section 26.012(2)(g).

Dist. Ct. App. 1976) (action for damages and for unlawful detainer)). The cases were closely scrutinized by the Florida Bar’s Real Property, Probate and Trust Law Section in their amicus brief filed in the Nachon supreme court appeal. Amended Brief of Amicus Curiae (Florida Bar) at 6, 15, 16, Alexdex (No. 81,765).

106. See supra note 105.
108. Possessory actions usually do not involve disputes over title, only possession. Usually someone who has title seeks to oust someone who does not, as is the case with landlord-tenant situations. Lien foreclosures, on the other hand, seek to force a sale of a property, with the accompanying transfer of title, in order to satisfy an unpaid debt. The claimant’s main interest is usually to be reimbursed and not to take possession of the property.

110. Publix, 502 So. 2d at 486-87. “A suit to foreclose a mortgage is to a certain extent and for certain purposes a proceeding in rem, since it is primarily directed against the mortgaged property, but it is more accurately termed ‘quasi in rem.’” Id. at 487.
111. Id. at 486.
112. Cf. Appellee’s Reply Brief at 3, Nachon (No. 81,765) (citing Scott v. Premium Dev., Inc., 328 So. 2d 557 (Fla. 1st Dist. Ct. App. 1976) for its discussion of the drastic effect a mechanic’s lien has on the use and alienation of real property); see also supra note
Alexdex Corporation appealed to the Florida Supreme Court. Oral arguments were heard in January 1994. Nine months later, the supreme court issued its per curiam decision, holding that county and circuit courts have concurrent jurisdiction, partially affirming the Third District Court of Appeal’s decision. The substance of the parties’ arguments, several amicus curiae briefs filed in the case, and the court’s decision will be discussed in part V to elucidate the factors that may have influenced the court’s decision.

C. Brooks v. Ocean Village Condominium Ass’n

Brooks v. Ocean Village Condominium Ass’n was the second case decided by the Third District Court of Appeal regarding the jurisdiction of county courts to decide foreclosures. Brooks involved a condominium assessment lien foreclosure, which the condominium association had brought in circuit court. The court held that condominium assessment lien foreclosures not exceeding $15,000 are within the exclusive jurisdiction of the county courts. In a short opinion, which was based upon its prior holding in Nachon, the court did express recognition of the developing controversy, stating that, in holding that the county court had jurisdiction in Nachon, it was agreeing with the rationale in Spradley. Additionally, in a footnote to the opinion, the court stated: “We urge the legislature to take action to correct the conflict now existing between paragraph 26.012-(2)(c), Florida Statutes (1991), and subsection 34.01(4), Florida Statutes (1991). In our view the statutes prescribing the jurisdiction of the county and circuit courts should be clear and unequivocal.” The court here recognized the clear conflict, which it ignored in Nachon, with respect to sections 26.012(2)(c) and 34.01(4), and seemed to retreat from its interpretation of section 26.012(2)(g) in Nachon, holding that lien foreclosures do not involve title and boundaries to real property.

5.

113. Alexdex, 641 So. 2d at 858.
114. Id.
115. Id. at 860.
117. Id.
118. Id.
119. Id.
120. Id. at 112 n.2 (citation omitted).
121. Brooks, 625 So. 2d at 112 n.2.; see infra part V. As urged by ARDA in its amicus brief in the Nachon supreme court appeal, this case can be used as an example of the proper
D. Blackton, Inc. v. Young

The most recent case dealing with this issue in the context of lien foreclosures is Blackton, Inc. v. Young.\textsuperscript{122} Relying on Nachon, the Fifth District Court of Appeal held that the circuit court did not have subject matter jurisdiction over the foreclosure of the $757.05 lien involved in the case.\textsuperscript{123} The court used the exact reasoning employed by the Third District in Nachon—that foreclosures do not "involv[e] . . . title and boundaries . . . [t]o real property."\textsuperscript{124} The Blackton court, however, was more thorough in its explanation:

There are several constitutional provisions which restrict the county courts' jurisdiction. Specifically, Article V, Section 6(b), Florida Constitution provides that county courts shall exercise the jurisdiction prescribed by general law. Additionally, Article V, Section 20(e)(3), Florida Constitution provides that circuit courts shall have exclusive original jurisdiction in all actions at law not cognizable by county courts, in all cases in equity and in all actions involving the titles or boundaries or right of possession of real property (emphasis supplied). Article V is effective from January 1, 1973 until changed by general law. FLA. CONST. art. V ss 20(e), (j).

Notably, there is an inconsistency between Article V, Section 20(e)(3), Florida Constitution which vests circuit courts with exclusive original jurisdiction in all actions involving the titles or boundaries of real property [and in all equity actions] and section 26.012(2)(g), Florida Statutes (1991) which vests circuit courts with exclusive original jurisdiction in all actions involving title and boundaries of real property (emphasis supplied). However, Article V, Sections 20(c) and (j), Florida Constitution specifically provide that Article V is effective from January 1, 1973 until changed by general law. In 1974, the legislature changed the language in section 26.012(2)(g), Florida Statutes (1973) giving circuit courts jurisdiction in "all actions involving the title, method of asserting the amount in controversy. Ocean Village sought to foreclose its claim of lien for condominium assessments of $3984.44. Knowing that the real property value of the condominium was approximately $50,000, the court concluded that the county court had proper jurisdiction because the plaintiff's good faith amount in controversy was below the $15,000 county court jurisdictional amount. Amicus Curiae Brief of American Resort Development Association at 16, Alexdex Corp. v. Nachon Enters., Inc., 641 So. 2d 858 (Fla. 1994) (No. 81,765) [hereinafter Amicus Curiae Brief (ARDA)].

\textsuperscript{122} 629 So. 2d 938 (Fla. 5th Dist. Ct. App. 1993), review granted, 639 So. 2d 976 (Fla. 1994).
\textsuperscript{123}  Id. at 941.
\textsuperscript{124}  Id. at 940.
boundaries, or right of possession of real property". See s 26.012(2)(g), Fla. Stat. (1974 Supp). Additionally, section 34.01(4), Florida Statutes (1991), which expands the circuit courts’ equity jurisdiction to include county courts, became effective October 1, 1990. These provisions thereby supersede the constitutional provision.125

The court seemed to place the inconsistency in the wrong part of the statute. First, the court need not have referred to section 26.012(2)(g), stating that circuit courts have exclusive original jurisdiction “in all actions involving title and boundaries of real property.” Presumably, if we accept the court’s reasoning that lien foreclosures are not actions involving title and boundaries to real property, then this section does not apply.126 Therefore, the conflict as to which court can hear lien foreclosures was due only to the changes in section 34.01(4), which refer to “matters in equity involved within any case.”127 The court did not attempt to resolve the patent conflict between section 34.01(4) and 26.012(2)(c), stating only that the circuit court’s equity jurisdiction is now expanded to include the county courts.128 This statement is contradictory; how can a court expand its own jurisdiction by giving part of it away to another court? This statement could be interpreted to mean that the circuit court had not given up any of its equity jurisdiction to the county court, meaning that the circuit and county courts have concurrent jurisdiction. But this interpretation conflicts with the outcome of the case, which affirmed the circuit court’s dismissal for lack of subject matter jurisdiction.129 Furthermore, section 34.01(4) is limited by the phrase “except as otherwise restricted by the Constitution or the laws of Florida.”130 Section 26.012(2)(c), which fits this description, states that

125. Id.
126. Cf. Appellant’s Reply Brief at 6, Blackton, Inc. v. Young, 629 So. 2d 938 (Fla. 5th Dist. Ct. App. 1993) (No. 93-2214), review granted, 639 So. 2d 976 (Fla. 1994) (referring to Florida’s Marketable Record Title Act, FLA. STAT. §§ 712.01-10 (1993)). Section 712.01(3) defines “title transaction” as “any recorded instrument or court proceeding which affects title to any estate or interest in land and which describes the land sufficiently to identify its location and boundaries.” Lien foreclosures fall under that definition, urged counsel for Blackton, Inc. The appellant’s counsel also used the fact that the property owner is an indispensable party, that a foreclosure action not seeking a deficiency decree is purely in rem, and that the legal description must be in the foreclosure complaint, to support the assertion that foreclosures do involve title and boundaries. See Appellant’s Reply Brief at 7-8, Blackton (No. 93-2214).
127. FLA. STAT. § 34.01(4) (1993).
128. Blackton, 629 So. 2d at 940.
129. Id. at 941.
130. FLA. STAT. § 34.01(4) (1993).
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circuit courts have exclusive original jurisdiction in all cases in equity.\textsuperscript{131} Blackton appealed to the Florida Supreme Court, and the court accepted jurisdiction on May 3, 1994, in light of the Nachon appeal.\textsuperscript{132}

IV. THE IMPACT OF THE UNCERTAINTY

Nachon and its progeny generated considerable discussion and debate in the real estate industry. Although the cases decided involved foreclosures of construction liens and condominium assessment liens, most practitioners believed that mortgage foreclosures would be treated similarly.\textsuperscript{133}

Several major title insurers, who know all too well how foreclosures "involve title and boundaries" of real property, issued bulletins to policy issuing agents and lenders. The bulletins stated that because of the current conflict, the insurability of title coming through foreclosures not exceeding $15,000 was being curtailed.\textsuperscript{134} Some companies refused to insure such

\begin{footnotesize}
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\item 131. Id. § 26.012(2)(c).
\item 132. Blackton, Inc. v. Young, 639 So. 2d 976 (Fla. 1994).
\item 133. Interview with Louis Nicholas, Counsel, Ocean Bank Legal Department, in Miami, FL (May 20, 1994).
\item 134. See, e.g., Memorandum from Patricia P. Jones, Underwriting Manager, Attorneys' Title Insurance Fund, to All Fund Agents (June 7, 1993) (on file with author), which advises:
\end{itemize}
\end{footnotesize}
titles regardless of the court in which the foreclosure judgment was obtained. An additional indication of the impact that the uncertainty has had on real estate law is the fact that the Attorney’s Title Insurance Fund discussed the Nachon and Brooks cases in their Annual Fund Assembly Seminar in Orlando, Florida held on May 12-14, 1994.

Several amici curiae, who filed briefs in the Nachon supreme court appeal, effectively described the worst case scenario: Title through foreclosure is declared void because of a judgment entered by a court lacking subject matter jurisdiction. One group of amici curiae, comprised of title insurers and one lender, expressed its views about the implications of the confusion in the following manner:

A person purchases vacant land at a foreclosure sale, or buys the property from the successful bidder. The new purchaser builds his or her dream home on the land. Since the underlying judgment would be void, and the title defective, a title pirate could buy the foreclosed owner’s interest for a nominal sum, and then hold the title for ransom at the expense of the innocent buyer or the title insurance company which insured the title out of foreclosure.

This is not the stuff of mere speculation, but a harsh reality were the Florida Bar’s interpretation of the statutes and Constitution followed issuance of policies insuring title coming through foreclosures where the amount of the lien foreclosed is $15,000 or less, regardless of whether the suit was brought in circuit court or county court.

Id.; see also Bulletin No. 93-020 from American Pioneer Title Insurance Company to All Florida Offices (May 20, 1993) (on file with the author) (stating that company will continue to insure only foreclosures decided in circuit court, and only as long as the jurisdictional issue is not raised as a defense in the proceedings); Underwriting Bulletin from Commonwealth Title Insurance Company to Florida Agents (May 17, 1993) (on file with the author) (advising that “Commonwealth will not insure any transaction in which a certificate of title has been issued in a foreclosure action filed after October 1, 1990, where the amount to be recovered was less than $15,000.00 (exclusive of costs and attorneys fees)”).

135. See supra note 131.
136. Annual Fund Assembly Seminar, Attorneys’ Title Insurance Fund, in Orlando, FL (May 12-14, 1994).
138. See supra note 136.
by this court. It is this Court's duty to search out an interpretation which would avoid this precise result.\textsuperscript{139}

Another organization whose interests were affected by the uncertainty regarding in which court to file small foreclosures is the American Resort Development Association (“ARDA”).\textsuperscript{140} The amicus curiae brief explained:

Each year ARDA’s members file large number of mortgage or claim of lien foreclosure actions in amounts below $15,000.00. Subsequent to retaking title to a timeshare interest by foreclosure, ARDA’s members offer to sell these timeshare interests to the general public. However, title insurance companies are unwilling to issue title insurance until the court has made a determination as to the proper court to hear foreclosure matters. Without title insurance, a timeshare interest is virtually unsalable.\textsuperscript{141}

ARDA described its own version of the worst case scenario:

There are approximately 780,810 timeshare unit weeks in Florida. In Lee County alone there are 60,000 timeshare unit weeks. All Lee County foreclosure actions with an Amount in Controversy below $15,000 must be filed in county court. If only one percent of the 60,200 timeshare unit weeks went into foreclosure over the last three years, over 600 void judgments would result if the circuit courts are held to have exclusive jurisdiction.\textsuperscript{142}

\textsuperscript{139} Amicus Curiae Brief for Stewart Title Guaranty Corp., et al. at 10, Alexdex Corp. v. Nachon Enters., Inc., 641 So. 2d 858 (Fla. 1994) (No. 81,765) [hereinafter Amicus Curiae Brief (Stewart)]. The amici further noted that:

Title insurance is usually issued for the purchase price. In the example, the owner would lose the value of the property to the extent it exceeded his purchase price. Even if fully insured at the time of purchase, the owner would lose any increase in value in the months or years before the foreclosed owner or his assignee appeared. \textit{Id.} at 10 n.4.

\textsuperscript{140} Amicus Curiae Brief (ARDA) at 1, \textit{Alexdex} (No. 81,765). The Association describes itself as follows: ARDA is a trade association representing the resort and vacation ownership industry. Our 800 members include roughly all the timeshare developers nationwide. ARDA is dedicated to the resort industry and educating its members, the public, and state and federal legislatures, by promoting responsible and effective timeshare regulation. \textit{Id.}

\textsuperscript{141} \textit{Id.} at 2.

\textsuperscript{142} \textit{Id.} at 6.
The confusion also impacted the courts. The circuit courts began issuing administrative orders requiring lien foreclosures not exceeding $15,000 to be brought in county courts. For example, "Lee and Collier County Circuit Courts, in Administrative Order Number 1.7, require that 'all mortgage and lien foreclosure actions filed within the Twentieth Judicial Circuit shall come within the jurisdiction of the County court if the amount in controversy does not exceed Fifteen Thousand ($15,000.00) Dollars.'"


A. The Litigants' Arguments to the Florida Supreme Court

Alexdex Corporation appealed the Third District Court of Appeal's decision to the Florida Supreme Court. The supreme court heard oral arguments in January of this year and released its decision on September 1, 1994. The court held that county and circuit courts have concurrent jurisdiction in equity, partially affirming the district courts decision. Interestingly, the construction lien involved in the Nachon case was transferred to bond before the supreme court appeal was filed. This would seem to have made the claim strictly monetary because title to property was no longer at stake. However, the issue of whether the county court had jurisdiction was still relevant in Nachon. If it had been decided that the county courts lacked jurisdiction to hear lien foreclosures, Nachon's lien would have been discharged because Nachon did not file its

143. Amicus Curiae Brief (Stewart) at 9, Alexdex (No. 81,765).
144. Id.
145. Alexdex, 641 So. 2d at 858.
146. Id. at 860.
147. Telephone Interview with Luis Consuegra, General Counsel, Ocean Bank, in Miami, FL (June 7, 1994). Mr. Consuegra advised that Ocean Bank, in its underwriting of a loan to be secured by the property involved in Nachon, required that Nachon's lien be transferred to bond to clear the title on the subject property. Id.; see also Appellant's Initial Brief at 3, Alexdex (No. 81,765). The brief stated that on July 30, 1992, prior to the Third District Court of Appeal's decision, the Clerk of the Circuit and County Courts in and for Dade County, Florida filed its certificate of a cash bond filed by Alexdex transferring Nachon's lien to security. The issue presented by the lien being transferred to bond was whether the action was converted into a purely monetary action, no longer involving real property.
suit in a "court of competent jurisdiction" within the specified time. The supreme court appeal garnered great publicity, having been reported in the Florida Bar Journal. The legislature seems to have been waiting for the decision to give it guidance on how to proceed. As mentioned earlier, title insurance companies discussed the case in seminars, and issued notices regarding the Third District Court of Appeal's decision. Several amicus curiae briefs were submitted, including one by the Florida Bar Real Property, Probate and Trust Section, arguing that foreclosures should be kept under the jurisdiction of the circuit courts. On appeal the litigants were primarily concerned with prevailing in their immediate action; concerns about how the decision would affect the practice of real estate law were given much less attention. Nachon argued in its supreme court brief that a distinction exists between actions which “involve” title to real property and actions which “affect” title, and that lien foreclosures affect title but do not involve title. Nachon stated that an action to foreclose a construction lien is not an example of an action involving title to land. Its counsel reasoned:

A construction lien foreclosure action is a statutory action created by the legislature which allows a lienor even without privity with the owner to encumber the real property improved by the services, labor and/or materials of said lienor in order to secure the payment to lienor of said services, labor and/or materials. Therefore, a construction lien foreclosure action is not different from an action to collect monies for

152. See supra note 134.
153. See infra note 173.
154. Respondent's Brief on the Merits at 4, Alexdex Corp. v. Nachon Enters., Inc., 641 So. 2d 858 (Fla. 1994) (No. 81,765) [hereinafter Respondent's Brief]. The definition of "affect" is: “To act upon; influence; change; enlarge or abridge; often used in the sense of acting injuriously upon persons and things. To lay hold of or attack (as a disease does); to act, or produce an effect or result upon; to impress or influence (the mind or feelings); to touch.” BLACK'S LAW DICTIONARY 57 (6th ed. 1990). The definition of “involve” is: “to enfold or envelop; to make intricate or complicated; to entangle in difficulty, danger, etc.; implicate; to draw or hold within itself; include or entail; to relate to or affect.” WEBSTER'S NEW WORLD DICTIONARY 396 (2d ed. 1975).
155. Respondent's Brief at 4, Alexdex (No. 81,765).
services rendered and/or goods sold and delivered which does not involve title to land.\textsuperscript{156}

Nachon argued that because a lien foreclosure judgment can be satisfied by the payment of money, it does not necessarily involve the judicial determination of rights to the title of property.\textsuperscript{157} Nachon further stated: “The legislature in enacting § 26.012(2)(6) did not intend to vest original exclusive jurisdiction in the circuit court in all actions affecting real property, but in all actions involving the title and boundaries of real property.”\textsuperscript{158} This statement is true but irrelevant. It is true that the circuit court does not have jurisdiction in all actions “affecting” real property; it lacks jurisdiction to hear a landlord-tenant action which “involves” possession and is one “affecting” real property.\textsuperscript{159} However, as discussed previously, it seems illogical to argue that a foreclosure action does not “involve” and “affect” title to real property.\textsuperscript{160} Nachon further argued in its answer brief on jurisdiction, that if a lien foreclosure involves title to real property, then any action seeking a judgment for money damages could be considered an action involving title to real property because the money “judgment obtained becomes a lien against the real property of the judgment-debtor which execution seeks a judicial sale of said real property and therefore directly affects the title to said property.”\textsuperscript{161} This conclusion seemed to implicitly admit that the lien foreclosure stated in his hypothetical was an action involving title to real property.

The petitioner, Alexdex, in its supreme court reply brief, stressed the distinction between the creation of a lien and its foreclosure in determining

\begin{itemize}
  \item \textsuperscript{156} Id.
  \item \textsuperscript{157} Id. at 6 (citing McMullen v. McMullen, 122 So. 2d 626 (Fla. 2d Dist. Ct. App. 1960). \textit{But see supra} note 108 (lien foreclosures require the court to act directly on the title to the property).
  \item \textsuperscript{158} Respondent’s Brief at 7, \textit{Alexdex} (No. 81,765).
  \item \textsuperscript{159} \textit{See, e.g.}, EMSA Ltd. Partnership v. Community Health Related Servs., Inc., 615 So. 2d 258, 259 (Fla. 3d Dist. Ct. App. 1993) (holding that county court had exclusive subject matter jurisdiction over the right of possession).
  \item \textsuperscript{160} In fact, one of the cases Nachon cited, \textit{In re Estate of Weiss}, 106 So. 2d 411 (Fla. 1958), seemed to contradict rather than support Nachon’s argument:
  An action involves title to real estate only where the necessary result of the decree or judgment is that one party gains or the other loses an interest in the real estate, or where the title is so put in issue by the pleadings that the decision of the case necessarily involves the judicial determination of such rights. \textit{Id}.; Respondent’s Brief at 7, \textit{Alexdex} (No. 81,765).
  \item \textsuperscript{161} Respondent’s Answer Brief on Jurisdiction at 5, Alexdex Corp. v. Nachon Enters., Inc., 641 So. 2d 858 (Fla. 1994) (No. 81,765).
\end{itemize}
whether a lien foreclosure involves title to real property. Counsel for Alexdex argued:

There is a major difference between the establishment of a lien and the foreclosure of it. Once a lien is to be foreclosed, then under the operative statutes and case law, the title to the property is dealt with directly and conclusively within the final judgment, and it is an action which should be exclusively within the province of the circuit court.

Counsel for Alexdex recognized that reversing the Third District Court of Appeal's decision could invalidate numerous foreclosure actions which have been completed in county court, but argued that:

That result can be obviated by this Court through the application of the "de facto judge" theory to those cases which are complete, by the requirement that all pending property foreclosure cases of all types be forthwith administratively transferred to circuit court, and by the requirement that henceforth all filings be taken only in the circuit court.

Counsel for Alexdex also mentioned the fact that all actions that are in rem or quasi-in rem by definition involve title to real property, and cited cases which discuss the local action rule. Alexdex argued:

Although county courts were given equitable jurisdiction (a coercive, in personam, type of jurisdiction) they were not given in rem jurisdiction over realty. As a result, the jurisdiction statutes can be reconciled in the foreclosure context.

The courts have consistently held that a court cannot cause its own judgment to effect a title transfer unless that court has in rem jurisdiction.

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162. Petitioner's Reply Brief at 1, Alexdex Corp. v. Nachon Enters., Inc., 641 So. 2d 858 (Fla. 1994) (No. 81,765).
163. Id. Counsel for Alexdex did not seem to recognize Nachon's argued distinction between "involve" and "affect;" Alexdex repeatedly equated the two, and substituted affect for involve, claiming that Nachon was arguing that foreclosure does not affect title, when Nachon was arguing was that it does affect title, but does not involve it. Id.
164. Id.
165. Id. at 3.
166. Petitioner's Reply Brief at 3, Alexdex (No. 81,765) (citing Greene v. A.G.B.B. Hotels, Inc., 505 So. 2d 666, 667 (Fla. 5th Dist. Ct. App. 1987) (holding that a suit was converted from in rem to in personam once a mechanic's lien was transferred to bond)).
Alexdex noted that section 45.031(5), which prescribes the procedures for judicial sales, "states that the certificate of title recorded in furtherance of a judicial sale - the object of a foreclosure action - transfers title without the necessity of any further proceedings or instruments ... and directly proves that the action effects the boundaries and title to property. . . ."167 In its brief, Alexdex noted that the supreme court also approved a form foreclosure judgment forms:

The last, and to Petitioner's mind most convincing, is that the form foreclosure judgment approved by this Court as an appendage to the Florida Rules of Civil Procedure, and by the legislature in Chapter 45, sets forth that a particular parcel of property to which the lien had attached, described by legal description, will be sold by the Court at a date certain. That is not a judgment for payment of money. The payment may stop the sale, it may redeem the title, but the judgment orders the sale. The judgment, and its attendant certificate of title, effects a transfer of title without the intervention of the party or further court proceedings.168

Alexdex urged the court to hold that the circuit courts have exclusive jurisdiction in foreclosure actions, and that the de facto judge theory be applied to resolve the problem of the potential invalidity of foreclosure cases decided in the interim period in county courts.169 Although de facto judge

167. Id. at 4.
168. Id. at 5; see also Petitioner's Main Brief at 7, Alexdex Corp. v. Nachon Enters., Inc., 641 So. 2d 858 (Fla. 1994) (No. 81,765) which provides:
   In the typical lien foreclosure complaint, where the lien has not been transferred to bond, the complaint, as is true herein, seeks a judicial sale of the underlying realty. Thus, lien foreclosure actions are one class of actions which directly involve title to property since one party stands to lose an interest in real estate by virtue of the judicial act taken - a forced sale. Absent payment or redemption, a certificate of title is issued from the clerk of the court to a successful buyer. Common sense tells us that nothing could effect [sic] title more than a direct judicial sale of the underlying parcel. Id. (footnotes omitted).
169. Petitioner's Reply Brief at 5-6, Alexdex (No. 81,765) states:
   This Court has, in appropriate cases, found that a judge improperly assigned, acting under color of authority and without objection could be found to be a "de facto judge" so as to validate questionable judicial acts. But for an order of temporary assignment to circuit court, these judges would have been capable of hearing the foreclosure proceedings. The clerks office is shared between the county and circuit courts.
theory is frequently used in the criminal division of the circuit court because of the overwhelming volume of cases, its use is less common in the civil division. It should not be transformed from an emergency measure into a means of increasing the jurisdiction of the county court.

Alexdex further argued against distinguishing liens by individual value, with liens of $15,000 heard in the circuit court. It would be more efficient if one court heard all foreclosure cases involving a particular piece of land. A county court sitting in equity might hear a small lien foreclosure case in which a senior lienor intervenes. Would it be fair for a county court, which is only empowered to hear cases not exceeding $15,000, to decide the rights of all liens to a property, when the combined amount of all liens exceeds $15,000? The answer is probably no, but the issue is illusory because such a case would likely be transferred to the circuit court. Even if not, the county and circuit courts use the same clerk. As such, a lis pendens filed with respect to an action in county court imparts notice just as much as a lis pendens filed with respect to an action in circuit court. Furthermore, if the county courts were vested with powers in equity, they should be able to balance the equities regardless of the amount in controversy. Equity is usually not related to money, and equitable relief is

Id. (citations omitted); see also Fla. Stat. § 26.57 (1993) (providing for temporary designation of county court judges to preside over circuit court cases).

170. Interview with Edward Iturralde, Assistant State Attorney, Office of The State Attorney, Eleventh Judicial Circuit of Florida, in Miami, FL (June 14, 1994).

171. Petitioner’s Main Brief at 9-10, Alexdex (No. 81,765). Alexdex, the petitioner, argued that for the sake of consistency, one court should hear all liens filed against one parcel:

[I]t does not seem likely that the intent of permitting equitable jurisdiction was to place into the hands of county courts the ability to sell unlimited values of property all because of small liens. Until our two tier system of trial courts is totally abrogated, demarcation must be based upon the total value of the issues being handled, not just the individual components of the lawsuits in question. Id.; see also Petitioner’s Amended Brief on Jurisdiction at 6, Alexdex Corp. v. Nachon Enters., Inc., 641 So. 2d 858 (Fla. 1994) (No. 81,765): “Although to some degree the lines between county and circuit courts are blurring, they still remain district [sic] in that the circuit court is still the only court with constitutional and statutory jurisdiction to transfer title to real property from one party to another.” Id. Alexdex also argued that by allowing foreclosure in both courts, foreclosure sales of the same property could be conducted in two courts. Id. at 6-7.

172. Where the holder of a small lien seeks to foreclose, the larger lienors usually intervene, foreclosing their own liens, and moving to transfer the case to the circuit court because the amount in controversy is over $15,000.

173. See Fla. Stat. § 34.031 (1993) (providing that the “clerk of the circuit court shall be the clerk of the county court unless otherwise provided by law”).
granted in cases involving land, not because the parties may lose money, but because they may lose land, which is unique.  

B. The Amicus Curiae Briefs—Bar and Real Estate Industry Proposals

Three briefs were filed by amicus curiae, which included The Real Property, Probate and Trust Law Section of the Florida Bar, Attorney's Title Insurance Fund, and the Florida Land Title Association among several others. The Real Property, Probate and Trust Law Section of The Florida Bar argued that the Third District Court of Appeal's decision "has unequivocally cast doubt on the jurisdiction of courts to hear lien foreclosure cases and adversely impacts the stability of land titles coming through foreclosure," and stressed that section 26.012(2)(g) restricts the application of section 34.01(4). The Bar argued:

[L]egislative intent, which is the primary factor in construing statutes, must be resolved from the language of the statute. Simply stated, a statute is to be construed and applied in the manner enacted. Further, all statutes are presumed to be consistent with each other and enacted with knowledge of existing statutes.

The use of the words "shall" and "exclusive" in section 26.012(2)(g) and "title and boundaries to real property," if presumed to be consistent with section 34.01(4), could only support this interpretation, according to the Bar.

The Bar argued that Spradley was inapplicable because it was an action for declaratory judgment, which does not involve title or boundaries to real property, whereas foreclosures do. Also noted was the inconsistency of section 34.01(4) with section 702.07, concerning the "[p]owers of courts and judges to set aside foreclosure decrees." Section 702.07 expressly provides that only the circuit courts have the power to set aside decrees.

175. See supra note 137.
176. Amended Brief of Amicus Curiae (Florida Bar) at 1, Alexdex (No. 81,765).
177. Id. at 2.
178. Id. at 2-3; see also 49 Fla. Jur. 2d Statutes § 180 (1992).
179. Amended Brief of Amicus Curiae (Florida Bar) at 3, Alexdex (No. 81,765).
180. Id. at 9.
181. Id. at 11.
The Bar then went on to explain the definitions of "exclusive," and "title and boundaries of real property," referring also to the Marketable Record Title Act.\textsuperscript{183} The Bar argued that foreclosure involved title to real property because the owners are necessary and indispensable parties to the action,\textsuperscript{184} and it also mentioned possible problems in valuating lien foreclosures for jurisdictional purposes.\textsuperscript{185}

A second brief, filed on behalf of several title insurers and one lender,\textsuperscript{186} argued that the circuit court should have concurrent jurisdiction with the county courts over foreclosures under $15,000, to preserve the validity of foreclosures completed since 1990.\textsuperscript{187} While the title insurers agreed with the Bar's statement that the Third District Court of Appeal's decisions in Nachon and Brooks had cast doubt on titles coming through foreclosures not in excess of $15,000,\textsuperscript{188} the insurers disagreed that the circuit courts had exclusive jurisdiction in equity, section 26.012(2)(c) notwithstanding:

The Amici do not disagree with the Florida Bar that a rule of exclusive jurisdiction in the circuit courts prospectively has tremendous appeal. Certainly, such a result would avoid amount in controversy questions, and preserve in the circuit courts their traditional role of having exclusive jurisdiction over lien foreclosures, regardless of the amount in controversy. However, the Florida Bar has studiously ignored what has happened, and is happening every day: the filing, prosecution, and termination of lien foreclosures in the county courts throughout the State.\textsuperscript{189}

\textsuperscript{183} Exclusive means: "Appertaining to the subject alone, not including, admitting, or pertaining to any others. Sole. Shutting out; debarring from interference or participation; vested in one person alone. Apart from all others, without the admission of others to participation." BLACK'S LAW DICTIONARY 564 (6th ed. 1990). The definition of "exclusive" reinforces and substantiates the conclusion that actions involving the title and boundaries of real property lie within the sole jurisdiction of the Circuit Courts.

\textsuperscript{184} Amended Brief of Amicus Curiae (Florida Bar) at 13, \textit{Alexdex} (No. 81,765).

\textsuperscript{185} Id. at 17.

\textsuperscript{186} These include Stewart Title Guaranty Corp., Attorney's Title Insurance Fund, First American Title Insurance Co., Commonwealth Land Title Insurance Corp., The Florida Land Title Ass'n, Old Republic National Title Insurance Co., and Avatar Properties, Inc.

\textsuperscript{187} Amicus Curiae Brief (Stewart) at 7-8, \textit{Alexdex} (No 81,765). The amici contended that interpreting the statutes and constitution to provide the circuit courts with exclusive jurisdiction over lien foreclosures would throw the real estate business into hopeless confusion or uncertainty, and must be rejected in favor of concurrent jurisdiction between the circuit and county courts. Id. at 7.

\textsuperscript{188} Id. at 8-9.

\textsuperscript{189} Id. at 8.
The title insurers also disagreed with the Florida Bar that the amount in controversy was a problem, stating that jurisdiction is determined by the amount claimed and put into controversy in good faith.\(^\text{190}\) They argued that the only acceptable interpretation would be to consider the circuit and county courts as having concurrent jurisdiction, thereby preserving the validity of past foreclosure judgments:

The circuit and county courts of this State have concurrent equitable jurisdiction to hear and determine lien foreclosures within the jurisdictional limits of the county courts, because any other interpretation runs contrary to established principles of constitutional and statutory construction, is inconsistent with case law from this Court favoring concurrent jurisdiction, and would be productive of much litigation and insecurity which a reasonable construction of the Constitution and statutes can avoid.\(^\text{191}\)

In this manner, the plaintiff may select his or her forum in those actions falling within the jurisdictional limits of the county courts.\(^\text{192}\) The

\(^{190}\) Id. at 8 n.2 (citing Williams v. Gund, 334 So. 2d 314 (Fla. 2d Dist. Ct. App. 1976) (arguing that “the amount claimed to be due under the lien sought to be foreclosed would control”).

\(^{191}\) Amicus Curiae Brief (Stewart) at 2, Alexdex (No. 81,765); see also id. at 16 (citing to 49 FLA. JUR. 2D Statutes § 183 (1984) (“[A] court should be astute in avoiding a construction which may be productive of much litigation and insecurity, or which would throw the meaning or administration of the law, or the forms of business, into hopeless confusion or uncertainty.”)). The amici continued:

First and foremost, a reasonable interpretation of the Constitution and statutes involved compels the conclusion that the Legislature intended for the circuit and county courts to have concurrent jurisdiction of foreclosures where the amount in controversy is less than fifteen thousand ($15,000.00) dollars. This is so, because § 26.012 Fla. Stat. (1991) vests exclusive jurisdiction in the circuit courts to hear all cases in equity, and actions involving the title and boundaries of real property. In the same vein, the Legislature has seen fit in § 34.01(4) (1990) to grant the judges of the county courts permissive jurisdiction to hear “all matters in equity.” Since a clear conflict exists, the latest expression of the legislative will should govern. Moreover, since the Legislature used the word “may” in section 34.01(4) to describe the scope of the county courts’ equitable jurisdiction, and as concurrent jurisdiction is the norm rather than the exception, the jurisdiction of the courts involved should be concurrent.

\(^{192}\) Id. at 2-3. The amici also cited to State v. Butt, 5 So. 597 (Fla. 1889), in support of the proposition that the legislature can grant one court additional jurisdiction, but in doing so, cannot diminish the constitutional jurisdiction of another court. Such a grant of additional jurisdiction must be concurrent. Id. at 15.
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insurers, apparently mindful of their duty to defend the titles they may have insured which could be invalidated by a decision either way, struggled to find the only acceptable solution for their interests:

If section 34.01 is viewed as a whole, the Legislature’s choice to restrict the equity jurisdiction of the county courts by reference to the “laws of Florida” appears not to be directed towards § 26.012(2)(g), Fla. Stat. (1991), which gives circuit courts [exclusive] jurisdiction over lawsuits involving both title and boundary disputes. Rather, the Legislature must have intended to refer to other laws of general application, which vest exclusive jurisdiction in the circuit courts over certain types of claims. 193

The amici disagreed that foreclosures necessarily involve title and boundaries of real property, and argued that it is not necessary to resort to subsection 2(g) of section 26.012 of the Florida Statutes to resolve the dispute: 194

Florida is a lien theory state. Section 697.02, Fla. Stat. (1927) provides that a “mortgage shall be held to be a specific lien on the property therein described, and not a conveyance of the legal title or of the right of possession.”

A suit to foreclose a mortgage is most accurately viewed as a quasi in rem proceeding with its principal object being to secure repayment of the underlying debt, and its incidental object being to convert the lien interest by foreclosure and sale of the security for that debt post-judgment. . . . Certainly, the vast majority of foreclosures do not

193. Amicus Curiae Brief (Stewart) at 3-4, Alexdex (No. 81,765) (failing to note that one of these “certain types of claims” is expressly stated to be “cases in equity”).
194. Id. at 18-20. The amici contended:
  First, § 26.012(2)(g) does not appear to be a “law of the State of Florida” within the contemplation of the Legislature. . . . [I]n setting limitations on the county courts’ jurisdiction, the Legislature has historically either used the language “except those within the exclusive jurisdiction of the circuit court”, or made specific reference to 26.012. See, e.g., section 34.01(c) 1.; § 34.01(2). It would have been a simple matter for the Legislature to employ the same conventions were it intending to limit the jurisdiction of the county courts in equity actions by reference to § 26.012(g). It chose not to do so.
  Id. at 19. “[A] mortgagee does not have an estate or interest in mortgaged lands, by virtue of his mortgage, but is merely the owner of a chose in action creating a lien on the property.”
  Id. at 20 (citing Shavers v. Duval County, 73 So. 2d 684 (Fla. 1954)).
involve [both] title and boundaries of real property, giving full effect to the copulative “and” expressly provided by the statute.¹⁹⁵

Showing apparent uncertainty as to the soundness of their position, the amici alternately argued that if the court decided that the circuit courts have exclusive jurisdiction in equity, the court “must craft appropriate protections to safeguard the validity of judgments arising out of foreclosures which have been prosecuted in the county courts since the effective date of section 34.01(4) Fla. Stat. (1990).”¹⁹⁶ The insurers urged:

Pursuant to Art. V, § 2(b), Fla. Const. (1972), the Chief Judge of this Court has the power to assign any judge who is qualified to so act, to temporary duty as an acting circuit court judge. Rule 2.050(a), Fla. R. Jud. Admin. specifically preserves this power: a power which this Court has previously recognized. This Court should accordingly issue an order signed by the Chief Justice of this Court assigning those county court judges who have presided over lien foreclosures to the temporary duty as acting circuit court judges, nunc pro tunc to the effective date of § 34.01(4) Fla. Stat. (1990), in those cases which have already gone to judgment.¹⁹⁷

Still another amici brief, filed by ARDA, argued that the proper interpretation was to grant the county and circuit courts concurrent jurisdiction in lien foreclosures not exceeding $15,000.¹⁹⁸ While agreeing with Nachon’s reasoning that foreclosure is not an action involving title,¹⁹⁹ ARDA argued alternatively that a final judgment entered by a court later found to have conflicting subject matter jurisdiction would not be void:

However, the situation presented by this case is not that the statutes fail to provide jurisdiction, but instead the statutes provide conflicting

¹⁹⁵. Id. at 20-21 (citations omitted).
¹⁹⁶. Amicus Curiae Brief (Stewart) at 4, Alexdex (No. 81,765).
¹⁹⁷. Id. at 4-5; see also FLA. CONST. art. V, § 2(b):

The chief justice of the supreme court shall be chosen by a majority of the members of the court. He shall be the chief administrative officer of the judicial system. He shall have the power to assign justices or judges, including consenting retired justices or judges, to temporary duty in any court for which the judge is qualified and to delegate to a chief judge of a judicial circuit the power to assign judges for duty in his respective circuit.

Id.
¹⁹⁸. Amicus Curiae Brief (ARDA) at 3, Alexdex (No. 81,765).
¹⁹⁹. Id. at 10.
jurisdiction. This being the case, assuming arguendo that jurisdiction is found to lie with either court exclusively, decisions by the other court could be perceived as an "erroneous exercise of subject matter jurisdiction", rather than void, as not having jurisdiction.

Judgments based on mere "erroneous exercise of jurisdiction" are not void, but are subject to res judicata and are reversible on appeal. 200

ARDA also argued that for subject matter jurisdictional purposes in foreclosure actions, the amount in controversy should be the principal and accrued interest amount of the foreclosing mortgage or claim of lien. 201

C. Legislative Proposals

The legislature proposed various solutions in the Regular Session to resolve the jurisdictional conflict. 202 Senate Bill 218 would have amended section 34.01(4) to include the wording "except foreclosures," thereby removing foreclosure actions from the jurisdiction of the county courts. 203 The bill would have preserved the validity of all foreclosure judgments entered in county courts in the interim period since the 1990 changes to section 34.01(4). 204 Another bill, Senate Bill 78, proposed basically the

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200. Id. at 13. ARDA elaborated:

The United States District Court has distinguished a void judgment from a judgment based on an erroneous exercise of jurisdiction. Hobbs v. United States Office of Personnel Management, 485 F. Supp. 456 (M.D. Fla. 1980). . . . In Hobbs, the court held: A void judgment is one which from the beginning was a complete nullity and without any legal effect. . . . However a void judgment must be distinguished from a judgment based on an erroneous exercise of jurisdiction. A court has the power to determine the extent of its own jurisdiction and only when there is a clear usurpation of power will the decision be considered void. . . . A judgment which is not void, even though it may be based on an erroneous exercise of jurisdiction, is subject to res judicata and can be reviewed only by direct appeal.

Id. at 13-14 (citing Hobbs, 485 F. Supp. at 458).

201. Id. at 15.

202. The legislature also proposed changes in 1992 and 1993, but the bills were unsuccessful and died in committee. The bill proposed in 1992 was S.B. 1480, which would have amended section 26.012(2)(c) to remove the "exclusive" provision. This would have been unsuccessful because it would have required a constitutional amendment. In 1993, H.B. 1557 would have given the county and circuit courts concurrent jurisdiction in equity, and S.B. 1564 would have amended the constitution to abolish the county courts.


204. Id.
same changes, but the wording was slightly different, adding "except foreclosures on equitable mortgages" to section 34.01(4).\textsuperscript{205} Still another Senate proposal, Joint Resolution 422, would have, by constitutional amendment, abolished the county courts and transferred jurisdiction and judges of the county courts to the circuit courts.\textsuperscript{206} The House of Representatives proposed House Bill 2547, which would have amended section 34.01(4) to include the phrase "except foreclosures on real property" to deny county courts jurisdiction and prevent disputes over whether foreclosures affect or involve title and/or boundaries of real property.\textsuperscript{207}

All of these legislative proposals died in committee, due to the passage of chapter 94-138, an act creating the Article Five Task Force, which will conduct a complete review of the judicial branch.\textsuperscript{208} One of the possibilities the task force will study is "whether a single-tier trial court would better meet the needs of the state."\textsuperscript{209} The Act became law on May 11, 1994, and the task force is expected to submit a report with recommendations to the legislature by December 1, 1994.\textsuperscript{210}

The creation of the Article Five Task Force seems to have stifled other legislative action regarding the jurisdictional conflict.\textsuperscript{211} The legislature seemed to be waiting for the court to decide \textit{Nachon}, but the court, with the recent pending changes in membership due to the departures of Justices Barkett and McDonald, had not been issuing a large number of opinions.

**D. The Florida Supreme Court's Decision**

In a short, per curiam decision, the court sided with the amici title insurers and held "that circuit courts, and county courts within their statutorily set monetary limit, have concurrent jurisdiction in matters of equity."\textsuperscript{212} In doing so, the effect on the litigants was that Nachon's
county court lien foreclosure action, involving approximately $4000, was finally validated. The decision should also have the effect of reversing the dismissal in Blackton, which had also been appealed. More importantly, however, the decision preserved the validity of prior small foreclosures brought in county court. The court was apparently concerned about preserving the stability of land titles, although it makes no mention of this concern in its opinion. Title insurers undoubtedly appreciate the decision, regardless of whether the benefit was intentional or incidental. However, the court's decision may not have completely resolved all of the issues.

Although the holding states that equity jurisdiction is concurrent between county and circuit courts in cases involving $15,000 or less, the court stated that "in construction lien foreclosures, the central focus is on the actual debt owed and not the underlying securing property. Therefore, the monetary restrictions in section 34.01(c)1-4. shall apply to the amount of the lien without consideration to the value of the securing property."213 In so holding, the court has put a monetary amount classification on equitable relief, which seems to be antithetical to equity. Prior to the statutory changes in 1990, foreclosures, actions in equity, were brought exclusively in circuit courts. The amount in controversy was not a relevant factor. The property owner's right to redeem his interest, which most likely is worth much more than the county court limit of $15,000, is what is being foreclosed. The court's approach now makes the amount in controversy relevant in determining equity jurisdiction, at least with respect to construction lien foreclosures. It is unclear whether the court intended to limit the application of this controversy valuation rule to construction lien foreclosures; the relevant portion of the opinion refers only to construction lien foreclosures and not to foreclosures in general.214 This uncertainty may become a source of future litigation. Regardless of the scope of application of the court's valuation rule, it would seem more logical to determine the jurisdictional amount in controversy by evaluating the property owner's equity of redemption instead of the value of the obligation which the plaintiff seeks to collect; unlike an action at law to collect on a debt, a foreclosure action puts title to real property in controversy. This approach is consistent with the court's additional ruling in Nachon that lien foreclosures (not limiting its reference to construction liens) do involve title and boundaries to real property, reversing that portion of the Third District

213. Id. at 862.

214. Id.
Court of Appeal's decision. The court's approach to the valuation of the amount in controversy creates additional uncertainty in that it is not clear now whether the county courts can hear other equitable actions, such as equitable defenses and counterclaims, without regard to monetary value. Prior to the decision, it was understood that county courts had jurisdiction to hear equitable defenses and counterclaims which arose within actions at law within the county court's monetary limits. Now that construction lien foreclosures are valued at the amount of debt owed, it remains to be interpreted whether other equitable actions such as specific performance, rescission, or even declaratory judgments must be similarly valued.

Additionally, the court's assertion that foreclosures do involve title and boundaries of real property creates uncertainty as to whether a quiet title action can be heard in county court. Here again, the court's valuation approach will likely cause further litigation; it is not certain whether the court's statement that the value of the property is not a factor in determining whether the action falls within the county court's monetary restriction applies to quiet title actions. If so, then how would a quiet title action be valued for jurisdiction purposes? Section 34.01(2)(g) states that actions involving title and boundaries of real property, which is understood to include quiet title actions, are exclusively within the jurisdiction of the circuit courts; the court's decision only adds to the contradiction.

It is most likely apparent to the practitioner who reads sections 34.01 and 26.012 that the court, in reaching its decision, performed more than just plastic surgery on the statutes; implant surgery is a more accurate analogy to describe the court's interpretation. The court analyzed the two statutory sections, stating that it found a conflict only when the sections are taken together, but that separately, the two sections are "clear, precise, and their meanings understandable." The court then concluded that section 34.01, which grants exclusive equity jurisdiction to the circuit courts, could not logically be interpreted as restricting the more recent legislative action in section 26.012. The court stated: "A contrary holding would ignore the latest legislative expression on the subject and run counter to our principle that a statute should not be interpreted in a manner that would deem legislative action useless." The court found no constitutional infirmity in section 26.012 and did not ask the legislature to modify the jurisdictional statutes to make their meaning more clear and unequivocal. The court

215. Id. at 860-61.
216. Id. at 861.
217. Alexdex, 641 So. 2d at 862.

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seemed mindful of the strict separation of powers and the legislature’s action in creating the Article Five Task Force; the decision is probably the most neutral solution, in light of the anticipated recommendations expected from the task force by the end of the year.

**E. Final Analysis**

The court’s interpretation seems to go beyond what the legislature intended; if the legislature had intended to grant the county courts concurrent jurisdiction in equity, it could have easily done so in simple and unequivocal terms. Such action would have been well publicized as a notable change in Florida law. This was not the case, however. The author suggests that a close reading of the two statutes seems to indicate the true intent of the legislature, as expressed in the Staff Report of Chapter 90-269: Namely, that circuit courts should still have exclusive jurisdiction in *cases* in equity, while the county courts may hear *matters* involving equity *within a case*, such as defenses or counterclaims, and do not have to transfer cases clearly within county court jurisdiction over to the circuit courts just because an equitable matter arises. A lien foreclosure is not an equitable matter within a case; it is purely and completely an equitable case. There lies the distinction. This interpretation leads to the conclusion that there is no conflict between the statutes, although there may, as the staff analysis report states, be a conflict with the constitution.218 Additionally, this interpretation would have had the detrimental effect feared by the amici in *Nachon*, which could have invalidated foreclosure actions brought in county courts. However, this problem could have been resolved in several ways. The court could have expressly validated all foreclosure judgments entered in the county courts since the 1990 changes to section 34.01(4) by making its decision effective prospectively.219 Alternately, the court could have applied the de facto judge theory as urged by counsel for Alexdex; after all, the qualifications required to become a county court judge are the same as those for becoming a circuit court judge.220 Even if the court’s decision

219. Although this opinion is in theory not available when the issue involved is subject matter jurisdiction, if the court holds that the county courts do not have jurisdiction in equity to hear foreclosures, then prior judgments are void. Therefore, the court should find a way of holding both that the county courts did have jurisdiction in the prior foreclosures and then rule either way on whether each jurisdiction should continue.
220. *See* FLA. STAT. § 34.021(1) (1993) (except for judges in counties with populations under 40,000, all county judges must have been member of the bar in good standing for five years); *accord* FLA. CONST. art. V, § 8 (which prescribes the same five year requirement for
is seen as the best possible solution, the court should probably have admitted the inconsistency in the statutes and requested that the legislature take steps to correct their wording. That the court chose not to do so is an indication that it expects these matters to be resolved once and for all by the task force.\footnote{221} It will be interesting to see what the Article Five Task Force recommends.

Furthermore, looking beyond the immediate issue at hand, it may be time to begin considering the possibility of merging the circuit and county courts into a single tier trial level court. The judges in both courts must meet the same qualifications\footnote{222}, and both courts use the same clerk, the clerk of the county \textit{and} circuit courts.\footnote{223} County court judges can and often do act as temporary (and not so temporary) circuit court judges.\footnote{224} Both courts are divided into various divisions according to areas of law and types of cases,\footnote{225} and both courts usually have several branches throughout the county or counties comprising a circuit.\footnote{226} It does not seem that much disruption would result, except for possible disruptions resulting from the necessary changes in building names and letterheads. With the recent increases in monetary limits in the county court, the oft stated rationale that the county courts are not equipped to handle complex cases seems to be weakening. The constitution would have to be amended, but it is to be revised in 1998.\footnote{227} An amended article V could have one trial level court, the circuit court, with several divisions according to complexity of cases. This would eliminate the problem of a case being dismissed for lack of subject matter jurisdiction; the case could be transferred to the appropriate division if necessary.

\section*{V. CONCLUSION}

This author believes that there may be no actual conflict between the circuit and county court jurisdictional statutes, so that the circuit courts

circuit court judges).

\footnote{221. \textit{See} FLA. CONST. art. V, § 20(c)(3).}
\footnote{222. \textit{See supra} note 220.}
\footnote{223. \textit{See} FLA. STAT. § 34.031 (1993) (providing that "[t]he clerk of the circuit court shall be the clerk of the county court unless otherwise provided by law").}
\footnote{224. Interview with Edward Iturralde, Assistant State Attorney, Office of the State Attorney, Eleventh Judicial Circuit of Florida, in Miami, FL (June 14, 1994).}
\footnote{225. \textit{See} FLA. CONST. art. V, § 7.}
\footnote{226. \textit{Id.} § 20(c)(9).}
should still have exclusive original jurisdiction over cases in equity, including foreclosures of all amounts. The court seems to have been influenced by the title insurers' reality based arguments concerning the stability of land titles, and a desire to defer to the legislature in anticipation of the Article Five Task Force's pending report. The wording used by the legislature in its 1990 change of section 34.01(4) has caused so much confusion that it may be impracticable to return to the past allocation of equitable jurisdiction. This legislative malpractice may have the effect of precipitating the merger of the county and circuit courts. Maybe the time has come.

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