Nova Law Review 18, 1

Nova Law Review*
THE 1993 SURVEY OF FLORIDA LAW

SURVEYS OF FLORIDA LAW

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I. AMENDMENTS TO THE FLORIDA RULES OF APPELLATE PROCEDURE

The most significant development in the field of appellate practice in Florida during the 1992-93 year was the revision of the Florida Rules of Appellate Procedure.

As is the case with each set of Florida court rules, such revisions occur every four years pursuant to the cycle established by Florida Rule of Judicial Administration 2.130(c). Proposals are submitted by the Florida Appellate Court Rules Committee ("the Committee") to the Supreme Court of Florida, which adopts such portions of the proposals as it deems appropriate. The numerous changes that resulted from this process were adopted by the supreme court on October 22, 1992, and took effect on January 1, 1993.

A. Gender-Neutral Language and Compliance With Supreme Court Style Guidelines

The rules were rewritten in gender-neutral language and in conformance with the standard style guidelines promulgated by the supreme court for court rules. Whenever possible, the rules employed the use of plural instead of singular pronouns to avoid both gender-specific language and awkwardness. This is the approach that was suggested by the supreme court and by the report of the court's Gender Study Bias Commission.

1. In re Amendments to the Fla. Rules of Appellate Procedure, 609 So. 2d 516, 516 (Fla. 1992) [hereinafter Appellate Amendments].
2. Id. at 518.
4. THE FLORIDA SUPREME COURT GENDER BIAS STUDY COMM’N, REPORT OF THE FLA. SUPREME COURT GENDER BIAS STUDY COMM’N 239 (March 1990) (on file at Nova
Changes for these purposes were made throughout the rules and will not be detailed in this article. No substantive effect was intended by these changes.

B. Rule 9.010. Effective Date and Scope

This rule was amended to eliminate the statement that the appellate rules supersede all conflicting rules. The Committee noted that other sets of Florida court rules contain provisions applicable to certain appellate proceedings. The Committee felt that, in the absence of a clear mandate from the supreme court that only the appellate rules are to address appellate concerns, the appellate rules should not automatically control in the event of a conflict. The portion of the rule indicating that the appellate rules supersede all conflicting statutes was unchanged.

C. Rule 9.020. Definitions

A change of terminology in subdivision (a) of this rule reflects the fact that workers' compensation matters are now heard by judges of compensation claims, rather than deputy commissioners. Similar references are changed in other rules, but will not be specifically noted in this article.

The court also adopted an extensive rewrite of subdivision (g) of the rule, relating to rendition of orders. The provision was expanded to include motions for clarification among those motions that delay rendition when they are timely and authorized. The provision was also rewritten to make clear that when a rule of procedure specifically provides that a particular motion does not delay rendition, that rule prevails and even a timely and authorized motion that would otherwise delay rendition will not have that effect. This change recognizes the fact that in such instances
the supreme court has indicated that the rule dealing with the specific motion in question prevails over the general appellate rule. 12

Subdivisions (g)(1), (g)(2) and (g)(3) replace previous language that simply stated that when an appropriate motion was filed, an order would not be deemed rendered until the disposition of the motion. 13

Subdivision (g)(1) reflects that in multiple party cases, the rendition of an order is delayed only with respect to any claim between a movant and the party or parties against whom relief is sought by motion. 14 This change incorporates existing case law. 15 It does not affect cases with just one plaintiff and one defendant, as the filing of an appropriate motion in such cases postpones rendition of the entire final order as to all claims between the parties. 16

Subdivision (g)(2) was added to make clear that an order granting a new trial shall be deemed rendered when filed with the clerk even if other motions remain pending at the time. 17 This change also incorporates existing case law 18 and is intended to insure that subdivision (g)(1) is not read as a modification of this principle. 19

Subdivision (g)(3) provides that if a notice of appeal is filed before the filing of a signed, written order disposing of all motions, all motions filed by the appealing party that are pending at the time shall be deemed abandoned and the final order shall be deemed rendered upon the filing of the notice of appeal as to all claims between parties who then have no motion pending between them. 20 This provision was added to clarify confusion generated by dicta in Williams v. State, 21 which appeared contrary to the settled principle that the rule incorporates. 22 Even when one party files a notice of appeal, however, the order appealed from is still

13. Appellate Amendments, 609 So. 2d at 521-22.
14. Id.
17. Appellate Amendments, 609 So. 2d at 522.
20. Appellate Amendments, 609 So. 2d at 522.
21. 324 So. 2d 74 (Fla. 1975).
not deemed rendered with regard to any other party whose post-judgment motions are still pending.\textsuperscript{23}

D. \textit{Rule 9.030. Jurisdiction of Courts}

Subdivision (c)(1)(B) of this rule was amended to correctly indicate that the appellate jurisdiction of circuit courts extends to all non-final orders listed in Rule 9.130,\textsuperscript{24} not just those set forth in subdivision (a)(3) of that rule, as the rule had previously stated.

Subdivision (c)(1)(C) was amended to include the jurisdiction conferred on circuit courts by article V, section 5 of the Florida Constitution,\textsuperscript{25} which provides for “the power of direct review of administrative action prescribed by general law.”


Subdivision (h) was amended to provide that the failure to file conformed copies of orders designated in notices of appeal, as required by Rules 9.110(d), 9.130(c) and 9.160(c), is not a jurisdictional defect, but that such failure may be the subject of appropriate sanctions.\textsuperscript{26}

F. \textit{Rule 9.100. Original Proceedings}

There were two additions to subdivision (b) of this rule. One change is to prohibit the practice of bringing original proceedings to enforce a private right on the relation of the state.\textsuperscript{27} Thus, such actions must now be brought in the name of the parties.\textsuperscript{28} The other change requires that if a petition seeks review of an order entered by a lower tribunal, all parties to the proceeding in the lower tribunal who are not named as petitioners shall be named as respondents.\textsuperscript{29} This change complies with the definitions set forth in Rule 9.020 (f)(3) and (4), which defines “[p]etitioner” as “[a] party who seeks an order under Rule 9.100 or Rule 9.120,” and “[r]espondent” as “[e]very other party in a proceeding brought by a petitioner.”\textsuperscript{30}

\textsuperscript{23} FLA. R. APP. P. 9.020 Committee Note-1992 Amendments.
\textsuperscript{24} Appellate Amendments, 609 So. 2d at 525.
\textsuperscript{25} Id.
\textsuperscript{26} Id. at 529.
\textsuperscript{27} FLA. R. APP. P. 9.100 Committee Note-1992 Amendment.
\textsuperscript{28} Id.
\textsuperscript{29} Id.
\textsuperscript{30} Appellate Amendments, 609 So. 2d at 521.
Subdivision (c) was substantially rewritten. Although it retains the substance of its previous text, two significant changes were incorporated. It now states in subdivision (c)(2) that petitions for review of final quasi-judicial actions of agencies, boards and commissions of local government must be filed within thirty days of the rendition of the order to be reviewed, the same time limit that is set forth in subdivisions (c)(1) and (3) for the filing of petitions for common law certiorari and petitions for review of non-final administrative actions. It also prohibits the practice of naming as separate respondents to petitions filed under the rule lower court judges, individual members of agencies, boards and commissions of local governments, and hearing officers. It continues the practice of requiring copies of petitions to be served on such individuals, however. The purpose of the change is to eliminate any suggestion that these individuals are parties or that they are adverse to the petitioner.

Subdivision (e) was amended to require that the caption of a petition designate all parties on each side, rather than at least one party on each side, as had previously been the case. In addition, a requirement was added for petitions seeking orders directed to lower tribunals to contain references to the appropriate pages of the supporting appendix required by Rule 9.220. This requirement was intended to mirror the requirement of Rule 9.210(b)(3), which calls for page references to records or transcripts in briefs.

Subdivision (f) was amended to reflect the existing requirement in the law that a petition for certiorari under this rule must demonstrate not only that there has been a departure from the essential requirements of law, but also that the departure will cause material injury for which there is no adequate remedy by appeal. Previously the rule referred only to the need...
to show a departure from the essential requirements of law and the Committee felt that it therefore established a standard other than that established by decisional law.\textsuperscript{40}

Subdivision (h) was amended to extend to responses the requirement adopted for petitions\textsuperscript{41} that appropriate page references to appendices be included.\textsuperscript{42}


Subdivision (d) was amended to impose a requirement that, except in criminal cases, conformed copies of orders designated in notices of appeal be attached to such notices.\textsuperscript{43} Copies of orders entered on timely motions postponing rendition of orders from which appeals are taken must also be attached.\textsuperscript{44} These requirements are for the purpose of assisting the clerk in determining the nature and type of orders being appealed and the timeliness of appeals,\textsuperscript{45} and are not jurisdictional in nature.\textsuperscript{46}

Subdivision (m) was created to deal with situations in which notices of appeal are filed before the rendition of final orders. The subdivision provides that in such situations, appeals shall be subject to dismissal as premature,\textsuperscript{47} but that if a final order is rendered before dismissal of the premature appeal, the premature notice of appeal will be considered effective to vest jurisdiction in the appellate court to review the final order.\textsuperscript{48} It goes on to provide that before dismissal, the court, in its discretion, may permit the lower tribunal to render a final order.\textsuperscript{49} This rule would not apply to situations in which the only reason a final order has not been rendered is the pendency of a motion delaying rendition that was filed by the same party that filed the notice of appeal. In such a situation, the pending motion would be deemed abandoned.\textsuperscript{50}

\begin{itemize}
\item \textsuperscript{40} FLA. R. APP. P. 9.100 Committee Note-1992 Amendment.
\item \textsuperscript{41} FLA. R. APP. P. 9.100(e).
\item \textsuperscript{42} Appellate Amendments, 609 So. 2d at 532.
\item \textsuperscript{43} \textit{id.} at 535.
\item \textsuperscript{44} \textit{id.}
\item \textsuperscript{45} FLA. R. APP. P. 9.110 Committee Note-1992 Amendment.
\item \textsuperscript{46} See supra part I.E.
\item \textsuperscript{47} Appellate Amendments, 609 So. 2d at 535.
\item \textsuperscript{48} \textit{id.} at 535-36.
\item \textsuperscript{49} \textit{id.} at 536.
\item \textsuperscript{50} See supra part I.B.
\end{itemize}
H. Rule 9.120. Discretionary Proceedings to Review Decisions of District Courts of Appeal

An amendment to subdivision (d) makes clear that the formal requirements for briefs specified in Rule 9.210 also apply to briefs on jurisdiction.51

I. Rule 9.130. Proceedings to Review Non-Final Orders

This rule was amended to expand the list of non-final orders that may be reviewed. Specifically, subdivision (a)(3)(C)(vii) adds orders that determine that a class should be certified,52 subdivision (a)(6) adds orders that deny a motion to certify a class and subdivision (a)(3)(D) adds orders that grant or deny the appointment of a receiver,53 and terminate or refuse to terminate a receivership.54

The provisions allowing review from orders relating to the grant or denial of class certification arose from the Committee's belief that such orders determine the nature of an action and the extent of the parties and are analogous to other orders reviewable under the rule.55 These provisions have been held to apply to orders entered after January 1, 1993, and are therefore not limited just to orders in cases instituted after that date.56

The provision relating to receivers and receiverships was added in response to the decision in Twinjay Chambers Partnership v. Suarez,57 in which the court found that an order denying a request to appoint a receiver was not appealable under subdivision (a)(3)(C)(ii), which allows appeals from orders that determine the right to immediate possession of property.58 The court suggested that the Committee consider whether subdivision (a)(3)(C)(ii) should be amended to set out whether and to what extent orders granting or denying such requests should be appealable.59 The Committee was of the opinion that orders terminating or refusing to terminate receiverships are of the same quality as those that grant or deny the

51. Appellate Amendments, 609 So. 2d at 538.
52. Id. at 542.
53. Id.
54. Id.
55. FLA. R. APP. P. 9.130 Committee Note-1992 Amendment.
57. 556 So. 2d 781 (Fla. 2d Dist. Ct. App. 1990).
58. Id. at 782.
59. Id.
appointment of receivers and that, rather than amending subdivision (a)(3)(C)(ii), it was preferable to create a new provision that specifically identifies those orders with respect to a receivership that are subject to review under this rule.\textsuperscript{60}

In this regard, it should be noted that in a case wholly independent of the four-year cycle revisions, the supreme court adopted an amendment that also added a category of orders that may be reviewed. In \textit{Mandico v. Taos Construction, Inc.},\textsuperscript{61} the court adopted subdivision (a)(3)(C)(vi), which allows for review of orders determining that a party is not entitled to workers' compensation immunity as a matter of law.\textsuperscript{62} That amendment became effective upon release of the court's opinion\textsuperscript{63} on July 9, 1992.\textsuperscript{64}

Subdivision (c) was also amended to impose a requirement that, except in criminal cases, conformed copies of orders designated in notices of appeal of non-final orders shall be attached to the notice.\textsuperscript{65} This requirement is consistent with the identical requirement added to Rule 9.110(d), dealing with notices of appeal to review final orders, and is clearly for the same purpose.\textsuperscript{66} The requirement is not jurisdictional in nature.\textsuperscript{67}

\textbf{J. Rule 9.140. Appeal Proceedings in Criminal Cases}

Subdivision (b)(3)(A)(v) was added to provide that when an appeal is taken in a criminal proceeding, the attorneys of record shall not be relieved of any professional duties until substitute counsel has been obtained or appointed, or a statement has been filed with the appellate court that the appellant has exercised the right to self-representation.\textsuperscript{68} The provision also states that in public-funded cases, the public defender for the local circuit shall initially be appointed until the record is transmitted to the appellate court.\textsuperscript{69}

Subdivision (g) was amended to apply the procedure in effect for appeals from summary denials of motions for post-conviction relief under Florida Rule of Criminal Procedure 3.850, to appeals from summary denials

\textsuperscript{60.} FLA. R. APP. P. 9.130 Committee Note-1992 Amendment.
\textsuperscript{61.} 605 So. 2d 850 (Fla. 1992).
\textsuperscript{62.} \textit{Id.} at 855.
\textsuperscript{63.} \textit{Id.} at 850.
\textsuperscript{64.} \textit{Id.} at 850.
\textsuperscript{65.} Appellate Amendments, 609 So. 2d at 542.
\textsuperscript{66.} See supra part I.G.
\textsuperscript{67.} See supra part I.E.
\textsuperscript{68.} Appellate Amendments, 609 So. 2d at 545.
\textsuperscript{69.} \textit{Id.}
of motions for correction of sentences under Florida Rule of Criminal Procedure 3.800(a).70 The provision was also changed to require the clerk of the lower tribunal to include in the record, on an appeal from the summary denial of a Rule 3.800(a) motion, any attachments to the motion, order, motion for rehearing and order thereon.71 This requirement was added because a motion under Rule 3.800(a) does not have the same detailed requirements as one under Rule 3.850.72 A proposal by the Committee that would have eliminated briefs, except by court permission, in appeals from motions under both of the criminal rules, was rejected by the court.73


Subdivision (c) was amended to impose a requirement that, except in criminal cases, conformed copies of orders designated in notices invoking the discretionary jurisdiction of district courts of appeal to review county court orders be attached to such notices.74 Copies of orders entered on timely motions postponing rendition of orders from which review is sought must also be attached.75 These requirements are consistent with the identical requirements added to Rule 9.110(d), dealing with notices of appeal from final orders, and are clearly for the same purpose.76 The requirements are not jurisdictional in nature.77

L. Rule 9.200. The Record

Subdivision (b)(2) was amended to require the court reporter to bind the transcript of proceedings in consecutively numbered volumes and to number each page consecutively.78

70. Id. at 546.
71. Id.
73. Appellate Amendments, 609 So. 2d at 517.
74. Id. at 550.
75. Id.
76. See supra part I.G.
77. See supra part I.E.
78. Appellate Amendments, 609 So. 2d at 552.
Subdivision (d)(1)(A) was amended to require the clerk to incorporate the trial transcript at the end of the record and to prohibit the clerk from renumbering that transcript.\textsuperscript{79}

Subdivision (d)(1)(B) was amended to include any transcripts other than the trial transcript as part of the remainder of the record that is to be consecutively numbered.\textsuperscript{80}

These changes were made to standardize the lower court clerk’s procedure with respect to the placement and pagination of the transcript in the record on appeal.\textsuperscript{81}


Significant additions were made to subdivision (a)(2) with regard to the type, size and spacing required for briefs. The provision requires that the text be printed in type of no more than ten characters per inch and that text should be double spaced with no more than twenty-seven lines per page.\textsuperscript{82} It further states that, although footnotes may be single spaced, they shall be in the same type size, with the same spacing between the characters, as the text.\textsuperscript{83}

These requirements were imposed to bring about uniformity, to preclude efforts to circumvent the length requirements for briefs established by subdivision (a)(5) by the use of smaller type and to eliminate the filing of briefs that are difficult to read because of small type and spacing.\textsuperscript{84} It appears that modern technology brought about these changes, as the Committee took into account the fact that “[t]hrough the utilization of various word processing systems, lawyers, if they choose, can reduce the size of print and spacing in footnotes and significantly extend the allowable length of their briefs, while at the same time making the ultimate product more difficult to read.”\textsuperscript{85}

Subdivision (g) was amended to allow for the filing of notices of supplemental authority that call the court’s attention not just to decisions, rules or statutes, but also to other authorities.\textsuperscript{86} A provision was also added allowing the notice to identify briefly the points argued on appeal to

\begin{itemize}
\item \textsuperscript{79} \textit{Id.} at 553.
\item \textsuperscript{80} \textit{Id.}
\item \textsuperscript{81} \textit{FLA. R. APP. P. 9.200 Committee Note-1992 Amendment.}
\item \textsuperscript{82} \textit{Appellate Amendments,} 609 So. 2d at 556.
\item \textsuperscript{83} \textit{Id.}
\item \textsuperscript{84} \textit{FLA. R. APP. P. 9.210 Committee Note-1992 Amendment.}
\item \textsuperscript{85} \textit{REPORT OF THE FLA. BAR APPELLATE COURT RULES COMM. 6 (1992).}
\item \textsuperscript{86} \textit{Appellate Amendments,} 609 So. 2d at 556.
\end{itemize}
which the supplemental authorities are pertinent, but stating that the notice shall not contain argument. 87

N. Rule 9.220. Appendix

This rule was amended to provide that if an appendix includes documents filed before January 1991, on paper measuring 8 1/2 by 14 inches, the documents should be reduced in copying to 8 1/2 by 11 inches, if practicable. 88 If impracticable, the appendix may measure 8 1/2 by 14 inches, but it should be bound separately from the document it accompanies. 89

These additions to the rule were necessitated by the adoption of Florida Rule of Judicial Administration 2.055, which requires the use of 8 1/2 by 11 inch paper for all documents filed in any court and which became mandatory on January 1, 1991. 90 Problems arose when documents filed prior to that date on the longer paper needed to be included in an appendix filed after that date and the new rules address those problems. 91

O. Rule 9.300. Motions

Subdivision (b) was clarified to reflect that an order granting an extension of time for preparation of the record or the index of the record or for filing of the transcript of proceedings automatically extends, for a like period, the time for service of the appellant’s initial brief. 92 Although the subdivision already provided, and continues to provide, that an order extending time for any act automatically extends the time for all other acts that bear a relation to it, the briefing schedule is related by time only to the filing of the notice of appeal. 93 Thus, it was felt that the existing rule did not act to automatically extend the time for filing the appellant’s brief when there was a delay in preparing or filing the record, index of record or transcript. Accordingly, the specific language was added. 94 The subdivision was also modified to eliminate the reference to an order extending time

87. Id. at 556-57.
88. Id. at 558-59.
89. Id. at 559.
92. Appellate Amendments, 609 So. 2d at 559.
93. See FLA. R. APP. P. 9.110(f).
94. FLA. R. APP. P. 9.300 Committee Note-1992 Amendment.
entered by the lower tribunal. This action was taken to correlate the rule with Rule 9.600(a), which provides that only an appellate court can grant an extension of time for any act under the appellate rules.

P. Rule 9.310. Stay Pending Review

Subdivision (c)(1) was modified to eliminate the ability of parties posting a bond through the use of two personal sureties, but to allow parties, as an alternative, the use of a surety company, to deposit cash in the circuit court clerk’s office. The Committee was of the opinion that a meaningful supersedeas could be obtained only through the use of one of those two methods. Specific language was also added to note that the lower tribunal retains continuing jurisdiction to determine the actual sufficiency of any such bond.

Q. Rule 9.800. Uniform Citation System

The uniform citation system set forth in this rule underwent significant revision. In citing to the Southern Reporter, Second Series, a space between “So.” and “2d” is required. Similarly, spaces are inserted between “S.” and “Ct.” in citing to the Supreme Court Reporter and between “L.” and “Ed.” and “2d” in citing to Lawyer’s Edition, Second Series. There is no space, however, between “U.” and “S.” in citing to United States Reports.

When citing to a United States Supreme Court decision, the first citation should include all three of the above reports, while subsequent citations, as well as pinpoint citations, should be to the United States Reports only.

95. Appellate Amendments, 609 So. 2d at 558.
97. Appellate Amendments, 609 So. 2d at 561.
99. Appellate Amendments, 609 So. 2d at 563.
100. The changes are too numerous for each one to be discussed in this article. Some of the more significant changes will be noted.
102. Id. 9.800(k).
103. Id.
104. Id.
105. Id.
The citation for Florida Law Weekly has been changed to "Fla. L. Weekly" from "F.L.W." Other provisions state that the rule applies to all legal documents, including court opinions, that citations not covered by the rule or by The Bluebook: A Uniform System of Citation, shall be in the form prescribed by the Florida Style Manual published by Florida State University, and that case names should be underscored or italicized in both text and footnotes.

R. Rule 9.900. Forms

Forms 9.900(a), (c) and (e) were revised to remind the practitioner that conformed copies of the order or orders designated in a notice of appeal or a notice to invoke the discretionary jurisdiction of district courts of appeal to review county court orders should be attached to the notice of appeal as provided in Rules 9.110(d), 9.130(c) and 9.160(c).

II. Amendments to the Florida Rules of Judicial Administration

Some of the changes to the Florida Rules of Judicial Administration that were made during the same four-year cycle that brought about the revisions to the appellate rules will also impact on appellate practice. The changes to the Rules of Judicial Administration were adopted by the supreme court on October 8, 1992, and took effect on January 1, 1993.

A. Rule 2.040. District Courts of Appeal

Changes in terminology were adopted to reflect changes in the appellate rules and in the Florida Constitution. In subdivision (b)(5), the term "petition for rehearing" was changed to "motion pursuant to Florida Rule of

107. Id. 9.800.
112. Id. at 466.

This action was taken in recognition of the fact that the appellate rule cited now calls for rehearing by motion, rather than by petition, and the fact that the rule allows a party to seek not just rehearing, but also clarification and certification. In the same subdivision, the references to a “petition for certiorari” being “filed” in the supreme court were changed to “discretionary review proceedings” being “timely commenced” in the supreme court.

This substitution was made in recognition of the changes in article V, section 3(b) of the Florida Constitution that gave the supreme court the authority to consider cases on discretionary review rather than by certiorari. The amendments are not intended to impact on the rule in a substantive manner.

B. Rule 2.055. Paper

The most obvious impact of the changes to the Rules of Judicial Administration will come from the amendments to Rule 2.055, which require the use of recycled paper for all documents filed in any court. The rule defines “recycled paper” as paper containing a minimum content of fifty percent waste paper. The definition was taken from the United States Environmental Protection Agency Recommended Minimum Content Standards of Selected Papers and Paper Products. In an effort to ensure the easy availability of paper that meets the definition, no requirement was included that any of the paper's content be post-consumer waste materials. This amendment provides the one exception to the effective date of the four-year cycle revisions. Although it took effect on January 1, 1993, like the other rule changes, it does not become mandatory until January 1, 1994.

113. Id. at 472.
115. Judicial Administration, 609 So. 2d at 472.
117. Id.
118. Judicial Administration, 609 So. 2d at 476.
119. Id.
122. Judicial Administration, 609 So. 2d at 476.
C. **Rule 2.060. Attorneys**

Changes to subdivision (b) of this rule require foreign attorneys who seek to appear in particular cases in Florida courts to be active members of the bar of another state.\(^{123}\) These foreign attorneys are also required to submit verified motions for permission to appear with or before their initial personal appearance, paper, motion or pleading.\(^{124}\) Moreover, they must also state in the motion all jurisdictions in which they are active members in good standing of the Bar and the number of cases in which they have filed a motion for permission to appear in Florida in the preceding three years.\(^{125}\)

D. **Rule 2.160. Disqualification of Trial Judges**

This is a new rule that deals with the disqualification of trial judges. It embodies the dictates of *Brown v. St. George Island, Ltd.*,\(^{126}\) which interpreted sections 38.02 and 38.10 of the Florida Statutes, dealing with disqualification. The rule states in subdivision (a) that it applies only to circuit and county court judges.\(^{127}\) That is because it was held in *In re Carlton*\(^{128}\) that sections 38.02 and 38.10 do not apply to appellate judges.\(^{129}\) In adopting this rule, the supreme court stated that it declined "to adopt a review authority"\(^{130}\) as part of the rule, indicating that authority for review must be in the appellate rules.\(^{131}\) Accordingly, the court asked that the Appellate Court Rules Committee consider the appropriate authority for reviewing orders of disqualification and whether an amendment to the

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123. *Id.* at 477.
124. *Id.*
125. *Id.*
126. 561 So. 2d 253 (Fla. 1990).
127. *Judicial Administration*, 609 So. 2d at 490.
128. 378 So. 2d 1212 (Fla. 1979), cert. denied, 447 U.S. 922 (1980).
129. Because subdivision (a) indicates that the rule applies "to county and circuit judges in all matters in all divisions of court", the question may well arise as to whether the rule applies to circuit judges sitting in their appellate capacity. It appears that the rule was not intended to apply in such a manner. The committee report proposing the change indicates that "[s]ubdivision (a) of the proposed rule limits the scope of the rule to trial judges," and states that the limitation is in recognition of the fact that in *Carlton*, the supreme court found that the statutory provisions that were later interpreted in *Brown*, the case that formed the basis for the rule, do not apply to appellate judges. *REPORT OF THE FLA. RULES OF JUDICIAL ADMIN. COMM.* 28 (1992). Moreover, the title of the rule specifically refers to trial judges.
130. *Judicial Administration*, 609 So. 2d at 466.
131. *Id.*
appellate rules is necessary. Thus, it is presently unclear what form of review is appropriate for orders dealing with disqualification. Presumably, this question will be answered by revision of the appellate rules or by case law in the near future.

III. Cases

In a broad sense, every appellate decision falls within the scope of appellate practice. Decisions relating to substantive areas of the law, however, are more properly dealt with in articles relating to those substantive areas and therefore will not be discussed here. Rather, this article will focus on matters relating to practice in the appellate courts and will deal with substantive areas only with regard to appellate considerations unique to those areas. The article will be limited to appellate practice in the supreme court and the district courts of appeal and will not deal with issues relating to circuit courts sitting in their appellate capacities, except insofar as such issues relate or compare to the district courts or the supreme court. Additionally, this article will not discuss cases relating to the preservation of issues or the question of whether particular errors were harmless.

A. The Appellate Process

1. Notice of Appeal

In Alfonso v. Department of Environmental Regulation, the supreme court dealt with a situation in which an appellant filed a notice of appeal in the district court of appeal, rather than in the circuit court, as required by Florida Rule of Appellate Procedure 9.110(b). Receding from its prior decision in Lampkin-Asam v. District Court of Appeal, the court in Alfonso held "that an appellate court’s jurisdiction is invoked by a timely filing of a notice of appeal or a petition for certiorari in either the lower court that issued the order to be reviewed or the appellate court which would have jurisdiction to review the order." It is thus likely that the appellate rules will need to be amended to incorporate this holding.

132. Id.
133. 616 So. 2d 44 (Fla. 1993).
134. 364 So. 2d 469 (Fla. 1978).
135. Alfonso, 616 So. 2d at 47.
In *In re E.H.*, the court found that in a case involving the termination of parental rights, parents are entitled to belated appeals based on ineffective assistance of counsel when their attorneys fail to timely file the notices of appeal. The court stated, "[w]e do not believe that the attorney's mistake should be imputed to the mother when the consequence of the mistake is the mother's permanent loss of custody of her children." While such reasoning is routinely employed to grant belated appeals in criminal cases, its application in the civil context is quite unusual. As the court noted, "[w]e did not grant the belated appeal in this case based on precedent, but on the significant policy interest in ensuring that a parent and child are not separated without a thorough review of the merits of the case." The court also found a petition for writ of habeas corpus in the trial court to be the appropriate remedy for obtaining a belated appeal in this context.

2. Captions of Cases and Parties

In *Fink v. Holt*, the Fourth District Court of Appeal disapproved of the widespread practice of identifying appeals in forfeiture cases by reference to the property involved. The notice of appeal and the briefs in the case bore a caption identical to that used in the circuit court proceeding, which read, "In Re: Forfeiture of One 1985 Chevrolet Corvette, Florida Tag No. ACL959, VIN 161YY0785F5100137, Together With All Tangible and Intangible Personal Property Found Therein." Noting that the rules of appellate procedure require that the caption of cases contain the name and designation of at least one party on each side, the court, on its own motion, amended the caption of the appeal to identify the parties involved.

The Fourth District also questioned the wisdom in the naming of the trial court judge as the only proper respondent in a petition for a writ of habeas corpus.
prohibition. In *Fabber v. Wessel*, the court stated that the response filed in the case on behalf of the named respondent judge, which took exception with the accuracy of the petitioner’s factual account, created “an intolerable adversary atmosphere between the trial judge and the litigant.” Although the court declined to hold that any response filed by a judge in a prohibition-disqualification proceeding is per se disqualifying, the court stated that it is “decidedly dangerous” for the judge to respond and suggested that it is “much the better practice” for the judge to remain silent and let the adversarial party supply the response.

3. Record on Appeal

   a. Contents of Record

Several cases addressed issues relating to the record on appeal. In *Citizens of the State of Florida v. Beard*, the supreme court was called upon to decide whether memoranda of staff and transcripts of agenda conferences are properly included in records of appeals from decisions of the Public Service Commission. The court concluded that such memoranda are properly considered part of the record if they are memoranda of staff who testify or otherwise become involved in the hearing with which the appeal is concerned. On the other hand, when the advisory staff neither testifies nor actively participates in the hearing, such memoranda are not to be considered part of the record. The court recognized that an agenda conference is somewhat akin to the discussion of appellate judges in conference, but concluded that the transcripts of such conferences may be made part of an appellate record because the conferences are public meetings and the transcripts are public records.

An effort to supplement the record with an affidavit of the trial judge, setting forth the judge’s recollection of a hearing, was rejected by the First

145. 604 So. 2d 533 (Fla. 4th Dist. Ct. App. 1992), review denied, 617 So. 2d 322 (Fla. 1993).
146. The court indicated that the fact that the response was prepared and signed by a member of the attorney general’s staff did not make it any less a response by the judge, for it was submitted expressly in his name. *Id.* at 534 n.1.
147. *Id.* at 534 (quoting *Bundy v. Rudd*, 366 So. 2d 440, 442 (Fla. 1978)).
148. *Id.*
149. 613 So. 2d 403 (Fla. 1992).
150. *Id.* at 404.
151. *Id.*
152. *Id.* at 405.
District in *Hadden v. State*. The court noted that such an affidavit is not part of the record as defined by Florida Rule of Appellate Procedure 9.200 and that the affidavit in the case was not the product of the procedure set forth by Rule 9.200(b)(4) for offering a statement of the evidence for use when a transcript is unavailable.

**b. Filing of Record and Transcripts**

Florida Rule of Appellate Procedure 9.200(e) states that “[t]he burden to ensure that the record is prepared and transmitted in accordance with these rules shall be on the petitioner or appellant.” In *Kobel v. Schlosser*, the Fourth District indicated that it was placing “everyone” on notice that it was interpreting this provision “to require an appellant to seek an enlargement of time to prepare the record and serve the index, or other appropriate relief where such is necessary, before the expiration of the period prescribed by the rules.” The court allotted the responsibility in this manner, rather than requiring the circuit court appeals clerk to seek enlargements of time when necessary, a process that had apparently been followed at some point in the past.

In *Freeman v. State*, the Fourth District also indicated that it was “not sympathetic to requests for extraordinary extensions of time because the court reporter has too many cases,” particularly in criminal cases. The court went on to state, “[t]his court will not tolerate court reporters delaying criminal appeals, while defendants are incarcerated, because the reporters knowingly take on more work than they can timely perform.” In light of these principles, the court imposed a fine on a court reporter who received a sixty day extension to prepare a transcript of a five day trial, who unsuccessfully sought a second, fifty day extension and who filed the transcript over a month after the date set by the court in denying her second motion.

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154. Id. at 154.
157. Id. at 602-03.
158. 621 So. 2d 472 (Fla. 4th Dist. Ct. App. 1993).
159. Id. at 473.
160. Id.
161. Id.
4. Motions

In *City of Miami Beach v. Korostishevski*, the First District commented that it is an improper procedure for a party wanting some relief from the court to send a letter to the court or to make a phone call to the clerk. Rather, the court indicated that such parties should file an appropriate motion.

The Fourth District, in *Kobel*, noted that motions for additional time to do something required or permitted by the rules, filed after the expiration of the original period, are required to show some good reason why timely application was not sought.

In *Lurie v. Auto-Owners Insurance Co.*, the First District pointed out that the Florida Rules of Appellate Procedure do not authorize a reply to a response to a motion and that such unauthorized pleadings are ordinarily ignored or sua sponte stricken by the court.

In *In re C.G.*, the Second District published an order granting a short extension of time “as notice that parental termination appeals should be expedited by all persons involved in the process.” The court noted that in the future it will grant extensions in such cases only for extraordinary reasons and will impose sanctions, if necessary, to assure that the cases are expedited.

5. Briefs

In *F.M.W. Properties, Inc. v. Peoples First Financial Savings & Loan Ass’n*, the First District pointed out that “proper organization of briefs pursuant to the Florida Rules of Appellate Procedure is not only desirable and convenient, it has become an absolute necessity.” The court refrained from striking the appellant’s brief in the case despite the fact that the argument section of the brief did not track the issues the appellants

163. Id. at 495.
164. Id.
165. Kobel, 601 So. 2d at 603.
167. Id. at 1025.
169. Id. at 632.
170. Id.
172. Id. at 377.
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purported to raise. The court noted, however, "that the failure to organize arguments under cogent and distinct issues on appeal presents sufficient reason for an appellate court to decline consideration of a matter." The First District also provided guidance as to the appropriate procedure to correct typographical errors in briefs. In North Florida Regional Medical Center v. Witt, the court disapproved of the practice of providing the court with pages upon which corrections have been made to be substituted for the original pages. The court stated, "we do not have the staff resources to perform such tasks nor are we willing to accept the responsibility for error that might occur in the process." Rather, the court indicated that parties moving to amend briefs must accompany their motions with an original and three copies of an amended brief. The same process is to be followed, the court noted, by any party required to serve an amended brief due to the striking of a brief.

In Beatty v. State, the Second District denied a motion to file an enlarged brief of sixty-five pages when forty pages were used for the statement of facts. The court noted that the statement started at the beginning of the trial and summarized the testimony of every witness who testified, without regard to the issues on appeal. The court stated that this approach made it "virtually impossible to obtain an overview of the factual situation," which the court indicated should be the purpose of the statement of facts. Moreover, the court noted that it could "only assume this method is used because it is easier than setting forth the facts in a logical, more readable fashion." Although recognizing that it had little control in most cases as to the method used by appellate counsel to

173. Id.
174. Id. at 377-78.
175. 616 So. 2d 614 (Fla. 1st Dist. Ct. App. 1993).
176. Id. at 614-15.
177. Id. at 615.
178. Id.
180. Absent court permission, initial briefs of appellants and answer briefs of appellees are limited to 50 pages by Florida Rule of Appellate Procedure 9.210(a)(5).
181. Beatty, 621 So. 2d at 678.
182. Id.
183. Id.
184. Id.
state the facts, the court commented that it had “no intention of encouraging the practice used here.”

6. Appendices

The First District, in Korostishevski, dealt with the question of how appellees in appeals from non-final orders in workers’ compensation cases should cite to items not included in appellants’ appendices which appellees feel are necessary to the court’s decision. The court interpreted Florida Rule of Workers’ Compensation 4.180(b)(3) as calling for such appellees to file their own appendix and for citations in their briefs to be made to appellant’s appendix, appellee’s appendix, or both, as may be appropriate.

In a case involving review of non-final administrative orders, Agency for Health Care Administration v. Orlando Regional Healthcare System, Inc., the First District rejected an attempt to file as an appendix evidence which had not been submitted to the hearing officer for consideration. It was unsuccessfully argued that the 1977 Committee Note to Florida Rule of Appellate Procedure 9.100(e) authorized the inclusion of such material. That note refers to an appendix “containing conformed copies of the order to be reviewed and other relevant material, including portions of the record, if a record exists.” The court noted the basic rule that an appeal asserting error on the part of a lower tribunal can only be based on evidence presented to that tribunal and stated that any exception to the general rule which may be implied from the committee note was not present in the case.

7. Relinquishment of Jurisdiction

In Lurie v. Auto-Owners Insurance Co., the First District discussed the procedures and standards involved when a party seeks relinquishment of jurisdiction. The court stated that the burden is on the moving party to

185. Id.
186. Korostishevski, 619 So. 2d at 494.
187. Id. at 495.
188. 617 So. 2d 385 (Fla. 1st Dist. Ct. App. 1993).
189. Id.
190. FLA. R. APP. P. 9.100(e) Committee Note-1977 Amendment.
191. Agency for Health Care Admin., 617 So. 2d at 389.
192. Id.
show entitlement to relief and that the presumption is that judicial economy would be best served by leaving jurisdiction in the appellate court until issuance of mandate and that, a party wishing to overcome that presumption must show entitlement to relief by informing the court of the specific nature of the proceedings it seeks to have conducted in the trial court.

8. Notices of Supplemental Authority

In *Ogden Allied Services v. Panesso*, the First District struck notices of supplemental authority and published its order doing so “to place the bar on notice” that abuses involved with such notices will be treated similarly. The appellee in the case, on the afternoon before oral argument, filed and served a notice of supplemental authority which had attached to it copies of twenty-two cases, totalling 125 pages, all of which had been decided before the appellee’s answer brief was filed. The notice prompted the appellants to respond with their own notices on the morning of oral argument.

The court found such filings to be a misuse of Florida Rule of Appellate Procedure 9.210(g) and Florida Rule of Workers’ Compensation Procedure 4.225, which “are intended to permit a litigant to bring to the court’s attention cases of real significance to the issues raised which were not cited in the briefs, either because they were not decided until after the briefs had been filed; or because, through inadvertence, they were not discovered earlier.” These rules, the court went on to state, “are not intended to permit a litigant to submit what amounts to an additional brief, under the guise of ‘supplemental authorities’; or to ambush an opponent by deliberately withholding significant case citations until just before oral argument.

194. *Id.*
195. *Id.* at 1025.
196. *Id.*
198. *Id.* at 1023.
199. *Id.*
200. *Id.* at 1024.
201. *Id.*
9. Proceedings After Appellate Determination is Final

In *Green v. Rety*, the supreme court considered the certified question of whether Florida Rule of Appellate Procedure 9.340(c), which states that if a judgment of reversal is entered that requires the entry of a money judgment on a verdict, the mandate shall be deemed to require such money judgment to be entered as of the date of the verdict, applies when an appellate court-ordered remittitur requires entry of a judgment in an amount less than the full amount of the jury's verdict. The court concluded that the district court's finding that the trial court's remittitur had been excessive constituted a "reversal" under the rule. Accordingly, the court answered the question in the affirmative, found that the date of the verdict controlled, and determined that all interest would be computed from that date.

In *City of Miami v. Arostegui*, the First District issued its mandate after the appellant filed a notice invoking the discretionary jurisdiction of the supreme court. The appellant moved to recall the mandate. The motion was treated as a motion to stay the effect of the mandate and was denied by the court.

The court found that the filing of a notice invoking discretionary jurisdiction does not deprive a district court of jurisdiction to issue a mandate. The court rejected a claim that the automatic stay provision of Florida Rule of Appellate Procedure 9.310(b)(2), which states that the timely filing of a notice of appeal by a public body or a public officer shall automatically operate as a stay, applies when discretionary review is sought. The court also rejected an additional argument that the mere fact that a case was pending review in the supreme court compels a district court to recall its mandate. The court therefore concluded that when a public body desires to stay the decision of a district court while discretionary review is pending, it should file a motion to stay the mandate before the mandate is issued by the district court. Once the mandate is issued,
the court stated, a motion to stay its effect should be filed in the supreme court.\textsuperscript{211}

In \textit{Wilcox v. Hotelorama Associates, Ltd.},\textsuperscript{212} the Third District dealt with the question of whether, after mandate issued in a case that was reversed and remanded for a new trial, the trial court could stay the retrial until the losing parties on appeal paid an award of appellate costs or posted a cost bond. The court found such a stay to be improper, noting that "a trial court's role upon the issuance of a mandate from an appellate court becomes purely ministerial, and its function is limited to obeying the appellate court’s order or decree."\textsuperscript{213} Despite recognizing the broad discretion a trial court has in ordering stays in proceedings before it,\textsuperscript{214} the court concluded that in light of its specific mandate, which was not conditioned upon payment of the appellate costs, "the trial court was without discretion in its obligation to proceed with the disposition of the case without entering a stay pending the payment of the costs of the appeal."\textsuperscript{215}

In \textit{In re B.C.},\textsuperscript{216} the First District held that the county, rather than the state, has the burden of paying for appointed counsel and for costs in proceedings for the termination of parental rights.\textsuperscript{217} The court relied on section 43.28 of the Florida Statutes, which requires counties to provide, among other things, the "personnel necessary to operate the circuit and county courts."\textsuperscript{218} The court rejected the county's contention that a different result was compelled by article VII, section 18 of the Florida Constitution, which limits the circumstances under which a county can be required by a general law to spend funds. The court concluded that the constitutional provision, which was ratified by the electorate in the November, 1990 election, was prospective in operation and thus targeted at

\textsuperscript{211} Arostegui, 616 So. 2d at 1121.
\textsuperscript{212} 619 So. 2d 444 (Fla. 3d Dist. Ct. App. 1993).
\textsuperscript{213} Id. at 445-46 (citing Milton v. Keith, 503 So. 2d 1312 (Fla. 3d Dist. Ct. App. 1987); O.P. Corp. v. Village of North Palm Beach, 302 So. 2d 130 (Fla. 1974); Berger v. Leposky, 103 So. 2d 628 (Fla. 1958)).
\textsuperscript{214} Id. at 446 (citing Regan, Inc. v. Val-Ro, Ltd., 396 So. 2d 834 (Fla. 3d Dist. Ct. App. 1981); Neale v. Aycock, 340 So. 2d 535 (Fla. 1st Dist. Ct. App. 1976), cert. denied, 351 So. 2d 405 (Fla. 1977); Price v. Hernando Beach, Inc., 286 So. 2d 279 (Fla. 2d Dist. Ct. App. 1973)).
\textsuperscript{215} Id.
\textsuperscript{216} 610 So. 2d 627 (Fla. 1st Dist. Ct. App.), review granted, 613 So. 2d 5 (Fla. 1992).
\textsuperscript{217} Id.
\textsuperscript{218} Id. at n.1 (quoting FLA. STAT. § 43.28 (Supp. 1992)).
laws passed after its effective date, laws which do not include section 43.28 of the Florida Statutes.

Several other cases also dealt with issues relating to appellate attorney’s fees. In *Hernstadt v. Brickell Bay Club Condominium Ass’n*, the Third District found that when an appellate court awards appellate attorney’s fees and remands for a determination of the amount, it is improper for the party against whom the fees are to be assessed to argue in the trial court or on a subsequent appeal the issue of entitlement to the fees. In *Duffy v. Brooker*, the First District rejected a claim that sections 59.46 and 766.206(3) of the Florida Statutes mandate an award of appellate attorney’s fees to prevailing parties in medical malpractice cases on the issue of compliance with the reasonable investigation requirements of chapter 766, Florida Statutes. In *Langel v. Aetna Casualty & Surety Co.*, the Fourth District found attorney’s fees appropriate when the appellants impermissibly sought to reargue issues they had already raised and argued, and which were rejected, in a previous appeal.

**B. Appeals in Workers’ Compensation Cases**

In *Hines Electric v. McClure*, the First District interpreted Florida Rule of Workers’ Compensation Procedure 4.160(b), a recently adopted rule that deals with appellate review of non-final orders. The rule states that the district court “may” review certain listed non-final orders. The court stated that it was “candidly perplexed” by the new rule. The court pointed out that the rule was derived from Florida Rule of Appellate Procedure 9.130, but that the appellate rule provides for review as a matter of right from the non-final orders listed therein. The court further noted that neither the text of the rule nor the commentary accompa-

219. *Id.* at 628.


221. *Id.* at 968.


223. *Id.* at 547.


225. *Id.* at 1218.


228. *Hines Elec.*, 616 So. 2d at 134.

229. *Id.*
nying its adoption provided guidance as to the correct legal standard to be utilized in determining whether to exercise jurisdiction.\textsuperscript{230}

The court also pointed out that the rule provides for discretionary review of some orders that were reviewable by common law certiorari, and some that were not reviewable by certiorari or otherwise until a final order was entered by a judge of compensation claims.\textsuperscript{231} This fact caused the court to comment that there was no indication of whether the adoption of the rule was intended to provide for review of a greater number of orders prior to the ultimate disposition by the judge of compensation claims, or to ease the appellate court’s overburdened docket by granting greater flexibility to refuse certain types of cases.\textsuperscript{232}

The court went on to indicate that the rule did not set forth a procedural mechanism for the parties to address the jurisdictional issue\textsuperscript{233} nor did the rule set forth a standard of review to be used after jurisdiction is accepted.\textsuperscript{234} Summing up its frustration with the rule, the court opined that it “creates a whole new type of review which did not previously exist under Florida law”\textsuperscript{235} and that the court was “faced with the unenviable task of determining the procedural and substantive effect of a rule that is unclear, ambiguous and which could have a significant impact”\textsuperscript{236} on the court’s workload.\textsuperscript{237}

The court therefore adopted a procedure calling for a party seeking review pursuant to Rule 4.160(b) to file a brief and an appendix along with the notice of appeal.\textsuperscript{238} The brief is to address whether the court should exercise its jurisdiction and the merits of the issue being appealed.\textsuperscript{239}

\begin{thebibliography}{99}
\bibitem{230} Id.
\bibitem{231} Id.
\bibitem{232} Id.
\bibitem{233} Hines Elec., 616 So. 2d at 134.
\bibitem{234} Id.
\bibitem{235} Id.
\bibitem{236} Id. at 134-35.
\bibitem{237} The court noted that it appeared that the rule was adopted without any meaningful input from the judges of the court, which has statewide primary jurisdiction over workers’ compensation appeals. The court took issue with the opinion adopting the rules by the supreme court, which stated that the proposed new rules had been published in the Florida Bar News. \textit{Amendments to Fla. Rules of Workers’ Compensation Procedure}, 603 So. 2d at 425. The court stated that all that was actually published was a summary of the rules and that the summary, in the court’s opinion, was not accurate. \textit{Hines Elec.}, 616 So. 2d at 135 n.5.
\bibitem{238} Hines Elec., 616 So. 2d at 136.
\bibitem{239} Id.
\end{thebibliography}
The court will then review the brief and appendix to determine whether the appellant has demonstrated a prima facie case for entitlement to interlocutory relief. For appeals from all orders listed in the rule other than discovery matters under subdivision (b)(5), the court will exercise its discretion to review the order if the order is one that would be reviewable as a matter of right under Florida Rule of Appellate Procedure 9.130. If the order is not one reviewable as a matter of right under the appellate rule, the court will exercise its discretion only if: (1) the order constitutes a departure from the essential requirements of law; (2) would cause material harm; and (3) could not be adequately remedied by appeal. Appeals relating to discovery matters under subdivision (b)(5) will be judged by the standard set forth by that provision, which requires the party seeking review to demonstrate irreparable harm and that there is no adequate remedy at law to rectify such harm.

If the court determines that a prima facie basis for relief exists, it will issue an order accepting jurisdiction and briefing will continue in accordance with the appellate rules. The answer and reply briefs will also need to address the jurisdictional issue.

The court recognized that as it gained more experience with this type of case, it may have to revisit the adopted procedure. The court also urged the Workers’ Compensation Rules Committee to revisit the rules in an effort to alleviate the problems discussed in the opinion.

C. Appeals in Criminal Cases

1. Appointed Counsel

In Green v. State, the supreme court dealt with a situation in which a court-appointed attorney for a defendant, whose conviction and death sentence had been upheld, requested the trial court to appoint him at the county’s expense for the purpose of petitioning the United States Supreme Court.
Court for certiorari.\textsuperscript{249} The supreme court reversed the denial of this motion, finding that the ruling denied the defendant equal protection under article 1, section 2 of the Florida Constitution.\textsuperscript{250}

The defendant had initially been represented on appeal by the public defender, who withdrew due to an excessive caseload.\textsuperscript{251} A private attorney was then appointed to handle the unsuccessful appeal.\textsuperscript{252} At a hearing on the motion to appoint counsel for the United States Supreme Court proceeding, testimony was presented that the public defender seeks certiorari review in the United States Supreme Court in every case in which the defendant is sentenced to death.\textsuperscript{253}

The supreme court concluded that when a defendant is represented by court-appointed counsel and is sentenced to death, “the court-appointed counsel must have the same professional independence to seek federal relief on an individual basis as the public defender whom court-appointed counsel replaces and must be compensated accordingly.”\textsuperscript{254}

In \textit{Turner v. State},\textsuperscript{255} the Fourth District also addressed an issue dealing with appointed counsel. In that case, the attorney that had been appointed to represent the defendant at trial, due to the public defender’s conflict of interest, was later appointed for the purpose of appeal.\textsuperscript{256} On motion for reconsideration by the County Commission of Palm Beach County, which was concerned with the expense of appointed counsel, the trial court determined that the conflict of interest did not carry through to the appellate stage and that it was obligated to appoint the public defend-\textsuperscript{er.}\textsuperscript{257} Noting first that Palm Beach County had no standing to intervene in the proceedings,\textsuperscript{258} the appellate court found that because the public defender asserted that the conflict still existed, the issue of conflict was not extinguished, as an appeal is merely a continuation of the original proceed-

\begin{itemize}
\item[249.] \textit{Id.} at 188.
\item[250.] \textit{Id.}
\item[251.] \textit{Id.} at 188-89.
\item[252.] \textit{Id.} at 189.
\item[253.] \textit{Green}, 620 So. 2d at 189.
\item[254.] \textit{Id.} at 190.
\item[255.] 611 So. 2d 12 (Fla. 4th Dist. Ct. App. 1992).
\item[256.] \textit{Id.} at 12.
\item[257.] \textit{Id.}
\item[258.] \textit{Id.} (citing \textit{In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender}, 561 So. 2d 1130 (Fla. 1990); Escambia County v. Behr, 384 So. 2d 147 (Fla. 1980)).
\end{itemize}
ings. The court therefore reversed the order appointing the public defender and directed the trial court to appoint a special counsel to represent the defendant on appeal.

2. Appellate Proceedings Instituted by the State

In State v. Zenobia, the Fourth District discussed the manner in which it reviews petitions for writs of common law certiorari in which the state seeks review of a pre-trial ruling on a motion in limine denying the state’s request to admit certain evidence. The court noted that it viewed such rulings as “entirely tentative,” because a judge “may suffer a change of mind” after the evidence is actually adduced at the trial. Accordingly, the court stated that it begins its “analysis of a petition for certiorari seeking reversal of a pre-trial exclusion of evidence with an inclination to forego extraordinary review.” The court went on to indicate that when the pre-trial exclusion is attended also by factual rulings by the trial judge, such as a finding that the evidence’s unfair prejudicial aspects outweigh its probative value, the court is “doubly reluctant” to reverse the exclusion.

An unusual situation presented itself in State v. Lozano, when the state petitioned the First District for a writ of certiorari purportedly to protect a defendant’s constitutional rights. The case dealt with a situation in which the trial court granted a defense motion for a change of venue and moved the trial from Miami to Orlando. Subsequently, the court on its own motion, moved the trial to Tallahassee. The defendant then moved for another change of venue.

After the trial court took evidence and heard argument on the motion for change of venue, the state joined in the motion insofar as the defendant claimed that his rights were violated by the small Hispanic population in

259. Id. at 13 (citing Aranda v. State, 205 So. 2d 667, 670 (Fla. 4th Dist. Ct. App.), cert. dismissed, 218 So. 2d 167 (Fla. 1968).
261. 614 So. 2d 1139 (Fla. 4th Dist. Ct. App. 1993)
262. Id. at 1139.
263. Id.
264. Id. at 1140.
265. Id.
266. 616 So. 2d 73 (Fla. 1st Dist. Ct. App. 1993).
267. Id. at 74.
268. Id.
269. Id.
Tallahassee’s county and because the site was chosen solely upon racially-based reasons.\(^{270}\)

The appellate court initially noted its concern with the question of whether its jurisdiction was timely invoked because the state was in effect challenging the order moving the case to Tallahassee, which had been entered some ten months before the petition was filed.\(^{271}\) The court pointed out that the State’s challenge to the order was not presented to the trial court until the day the petition was filed.\(^{272}\) It then stated that although it could be argued that the State’s challenge was untimely, the court would decline “to adopt a rule which would preclude the State from asserting at any time that continued prosecution under the circumstances would constitute a violation of the constitutional rights of a criminal defendant.”\(^{273}\) The court therefore concluded that the state’s petition was timely and proceeded to consider the case on the merits.\(^{274}\)

In *State v. Ashley*,\(^{275}\) the Second District denied the state’s petition for certiorari without opinion. A specially concurring opinion by Judge Parker, however, reveals the existence of an interesting issue. The judge noted that he concurred because of the supreme court’s decision in *State v. MacLeod*,\(^{276}\) which concluded that the state has no statutory right to appeal a trial court’s order which denies restitution in a criminal case “provided the reasons for the denial are set forth.”\(^{277}\) The concurring opinion stated that because no right of appeal exists, no right of review by certiorari exists.\(^{278}\)

Judge Parker therefore opined that, a victim of a crime is denied the right of appellate review of a trial court’s denial of restitution from a criminal defendant if the trial judge lists any reasons, right or wrong, for the denial.\(^{279}\) Thus, notwithstanding his belief that the right of restitution in this case was denied for reasons contrary to Florida law, Judge Parker felt

\(^{270}\) *Id.*

\(^{271}\) *Lozano*, 616 So. 2d at 75.

\(^{272}\) *Id.*

\(^{273}\) *Id.*

\(^{274}\) In doing so, the court noted that the state, in an appeal from a Tallahassee conviction, would be bound by its position that the motion for change of venue should have been granted. *Id.* at n.4.

\(^{275}\) 621 So. 2d 743 (Fla. 2d Dist. Ct. App. 1993).

\(^{276}\) 600 So. 2d 1096 (Fla. 1992).

\(^{277}\) *Id.* at 1098.

\(^{278}\) *Ashley*, 621 So. 2d at 743 (Parker, J., specially concurring) (citing Jones v. State, 477 So. 2d 566 (Fla. 1985)).

\(^{279}\) *Id.*
compelled to concur with the appellate court's decision. Judge Parker went on to note that as long as MacLeod remains the law, establishing a right to appellate review for victims who are wrongly denied restitution will apparently require legislative action.

3. Cross Appeals by Defendants

In State v. Waterman, the state appealed a trial court's pre-trial order partially suppressing seized evidence. The defendant cross appealed that aspect of the order denying his motion to suppress all of the evidence. The state moved to dismiss the cross appeal on the ground that it was not authorized under the appellate rules. Aligning itself with the decision of the Fifth District in State v. McAdams, the Second District found that a cross appeal was not foreclosed.

In doing so, the court noted that several districts have held that there is no jurisdiction to entertain a cross appeal when the order in question is one which could not have been independently appealed by the defendant, such as a ruling or motion to suppress. It thus appears that the issue involved in this case is one that will have to eventually be resolved by the supreme court.

4. Application of Florida Supreme Court Precedent to Pending Cases

In Smith v. State, the supreme court, relying on article I, sections 9 and 16 of the Florida Constitution, established a clear standard regarding

280. Id. at 744.
281. Id.
282. 613 So. 2d 565 (Fla. 2d Dist. Ct. App. 1993).
283. Id. at 565-66.
284. Id. at 566.
285. Id.
286. 559 So. 2d 601 (Fla. 5th Dist. Ct. App. 1990).
287. Waterman, 613 So. 2d at 566.
288. Id. (citing State v. Williams, 444 So. 2d 434 (Fla. 3d Dist. Ct. App. 1983); State v. Willits, 413 So. 2d 791 (Fla. 1st Dist. Ct. App. 1982); State v. Clark, 384 So. 2d 687 (Fla. 4th Dist. Ct. App.), review denied, 392 So. 2d 1372 (Fla. 1980)).
289. In State v. Lopez, 18 Fla. L. Weekly D1914 (Fla. 3d Dist. Ct. App. Aug. 31, 1993), the Third District adhered to its view that a cross appeal is inappropriate and, pursuant to article V, section (3)(b)(4) of the Florida Constitution, certified to the supreme court that the decision was in conflict with Waterman and McAdams.
290. 598 So. 2d 1063 (Fla. 1992).
the retrospective application of its decisions in criminal cases. Noting that it was troubled by the inconsistency or lack of clarity in its various decisions on the subject,291 the court held “that any decision of this Court announcing a new rule of law, or merely applying an established rule of law to a new or different situation, must be given retrospective application by the courts of this state in every case pending on direct review or not yet final.”292 The court went on to note that in order to benefit from the change in law, defendants must have timely objected at trial if an objection was required to preserve the issue for appellate review.293

5. Appellate Jurisdiction After Change of Venue

In Vasilinda v. Lozano,294 a member of the media challenged an order restricting certain aspects of television coverage of a criminal trial.295 The challenge was brought in the Third District, the court that hears appeals from cases in the Eleventh Circuit, where the charges had originally been filed. Because a change of venue had been granted,296 moving the case to the Ninth Circuit, and because the trial judge had been assigned by the supreme court to serve as judge of that circuit for purposes of the case, the district court transferred the appellate proceeding to the Fifth District, which has appellate jurisdiction over Ninth Circuit cases.297

In an opinion filed the following day, the Fifth District indicated that it was unclear as to whether the factors relied upon by the Third District gave the court jurisdiction over the appeal.298 Because the trial was set to start one business day later, the court did address the issues presented by the case;299 it also certified to the supreme court as a matter of great public importance, the question of when jurisdiction vests and in which appellate court jurisdiction lies when a change of venue is granted to a circuit in

291. Id. at 1064.
292. Id. at 1066.
293. Id.
295. Id. at 5.
296. The defendant was the same defendant involved in the case of State v. Lozano, 616 So. 2d 73 (Fla. 1st Dist. Ct. App. 1993). See also supra text accompanying notes 264-72.
297. Vasilinda, 622 So. 2d at 5.
298. Vasilinda v. Lozano, 618 So. 2d 758, 759 (Fla. 5th Dist. Ct. App.); review granted, __ So. 2d __ (Fla. 1993).
299. Id. at 759-60.
another district and the circuit judge is appointed as a judge of the circuit to which the case is transferred.\textsuperscript{300}

A similar issue was dealt with by the Fourth District in \textit{Kohut v. Evans}.\textsuperscript{301} In that case, a change of venue had been granted, moving the matter from the Thirteenth Circuit, within the Second District, to the Fifteenth Circuit, within the Fourth District and in which an order had been entered temporarily assigning the trial judge of the Thirteenth Circuit to the Fifteenth Circuit to hear the case.\textsuperscript{302} On his own motion, the trial judge re-examined the venue question and determined that a jury would be selected in the Fifteenth Circuit and that the case would then be returned to the Thirteenth Circuit for the remainder of the trial, with the jurors sequestered within that circuit.\textsuperscript{303}

One of the defendants challenged the procedure in a petition for writ of prohibition filed in the Second District. That court determined that the petition was directed to the trial judge in his capacity as a judge of the Fifteenth Circuit and that it therefore lacked jurisdiction to address the merits of the petition. Accordingly, it transferred the case to the Fourth District.\textsuperscript{304} The Fourth District stated that it was unsure whether the trial judge thought he was acting as a Fifteenth Circuit judge when he issued the order in question, but accepted that it was the appropriate court to take jurisdiction of the case because the judge was to be acting as a judge of the Fifteenth Circuit in conducting the jury selection and ordering the jury to return to the Thirteenth Circuit for the remainder of the trial.\textsuperscript{305}

D. \textit{Certification of Questions}

In \textit{Bradley v. State},\textsuperscript{306} the First District discussed the circumstances under which the court will exercise its discretionary review authority and consider certified questions from county courts pursuant to Florida Rule of Appellate Procedure 9.030(b)(4). The opinion dealt with two appeals in which county courts had certified essentially the same question as one of great public importance.

\textsuperscript{300} \textit{Id.} at 759.
\textsuperscript{301} 623 So. 2d 569 (Fla. 4th Dist. Ct. App. 1993).
\textsuperscript{302} \textit{Id.} at 569.
\textsuperscript{303} \textit{Id.}
\textsuperscript{304} \textit{Id.}
\textsuperscript{305} \textit{Id.}
\textsuperscript{306} 615 So. 2d 854 (Fla. 1st Dist. Ct. App. 1993).
The court noted there existed little discussion in case law to guide it in exercising its discretion, but determined that it should accept jurisdiction in at least one of the appeals because the issue was one of constitutional magnitude that was frequently raised in the lower tribunals. \(^{307}\) Pointing to its “highly taxing” caseload, the court concluded that there was no useful purpose to be served by accepting more than one appeal presenting the issue. \(^{308}\) Doing so, the court stated, would only delay resolution of other matters before the court. \(^{309}\) The court therefore accepted jurisdiction in the appeal that involved factors which made the preparation of the record and briefing easier and declined to accept jurisdiction in the other. \(^{310}\)

The First District also declined to accept an appeal involving a certified question from a county court in *State v. Boyd*, \(^{311}\) noting that such appeals are appropriate from non-final orders under Florida Rule of Appellate Procedure 9.030(b)(4)(B) only when the orders are otherwise appealable to the circuit court. \(^{312}\) Since the order in the case was not appealable in that manner, the court concluded that it was without jurisdiction. \(^{313}\)

The First District also found that it lacked jurisdiction to consider the certified questions in *Florida Department of Health & Rehabilitative Services v. State*. \(^{314}\) In that case, the questions were certified by a circuit court and the appellate court determined that only county courts have the authority to certify questions. \(^{315}\)

In several cases, such as *State v. Burgos*, \(^{316}\) the Fourth District employed a method of double certification that resulted in a county court case being reviewed by the supreme court. Pursuant to Florida Rule of Appellate Procedure 9.160, the court accepted jurisdiction from an order certified by a county court to be of great public importance. In turn, the court certified to the supreme court, pursuant to Rule 9.125, not only that the issues were of great public importance, but also that they had an effect

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\(^{307}\) *Id.* at 855.

\(^{308}\) *Id.*

\(^{309}\) *Id.*

\(^{310}\) *Id.*

\(^{311}\) 610 So. 2d 64 (Fla. 1st Dist. Ct. App. 1992).

\(^{312}\) *Id.* at 65.

\(^{313}\) *Id.*

\(^{314}\) 616 So. 2d 66 (Fla. 1st Dist. Ct. App. 1993).

\(^{315}\) *Id.* at 68.

\(^{316}\) 614 So. 2d 694 (Fla. 4th Dist. Ct. App.), review denied, 618 So. 2d 1369 (Fla. 1993).
on the administration of justice throughout the state and that the case required immediate resolution by the supreme court.\textsuperscript{317}

E. Effect of Prior Prohibition Proceedings on Appeals

In \textit{Thomason v. State},\textsuperscript{318} the Fourth District considered a direct appeal from an order withholding adjudication and placing a defendant on probation in a criminal case. The defendant raised a double jeopardy claim that he had previously asserted in a petition for writ of prohibition that had been denied without opinion by the same court.\textsuperscript{319} The court affirmed without opinion, but Judge Farmer, in a dissenting opinion, addressed the question of whether consideration of the double jeopardy claim was proper in light of the prior proceeding.\textsuperscript{320}

Judge Farmer noted that such consideration was appropriate because prohibition is an “extraordinarily prerogative writ”\textsuperscript{321} that is sometimes denied for good reasons having nothing to do with the underlying merits of a petitioner’s position.\textsuperscript{322} The judge noted that his view\textsuperscript{323} was contrary to that taken by the Third District in \textit{Obanion v. State},\textsuperscript{324} in which the court considered a claim previously raised in a prohibition proceeding, but stated that in future cases, summary denials of petitions for writs of prohibition would be deemed to be denials on the merits unless the denial says otherwise.\textsuperscript{325} Judge Farmer stated that the Fourth District had never adopted such a rule and that he hopes it never does, “at least as long as prohibition is deemed a matter of mere grace.”\textsuperscript{326}

\begin{itemize}
\item \textsuperscript{317} Id. at 694.
\item \textsuperscript{318} 594 So. 2d 310 (Fla. 4th Dist. Ct. App. 1992), quashed on other grounds, 620 So. 2d 1234 (Fla. 1993).
\item \textsuperscript{319} Thomason v. State, 620 So. 2d 1234, 1236.
\item \textsuperscript{320} Thomason, 594 So. 2d at 310. (Farmer, J., dissenting).
\item \textsuperscript{321} Id. at 312 n.2 (Farmer, J., dissenting).
\item \textsuperscript{322} Id.
\item \textsuperscript{323} The other members of the panel apparently shared Judge Farmer’s belief that review of the merits was appropriate because the case was affirmed, rather than dismissed.
\item \textsuperscript{324} 496 So. 2d 977 (Fla. 3d Dist. Ct. App. 1986), review denied, 504 So. 2d 768 (Fla. 1987).
\item \textsuperscript{325} Thomason, 594 So. 2d at 312 n.2 (Farmer, J., dissenting).
\item \textsuperscript{326} Id.
\end{itemize}
This conflict between the districts was not resolved by the supreme court's review of Thomason, as the court's opinion, despite setting forth the procedural history of the case, dealt only with the merits of the double jeopardy claim.

F. Cross Appeals When Appeals are Untimely

In Peltz v. District Court of Appeal, Third District, the supreme court dealt with the question of whether a district court has jurisdiction to consider a cross appeal when the original notice of appeal is untimely. The case involved a situation in which one party filed an untimely notice of appeal from an order of a trial court. Ten days later, the opposing party filed a notice of cross appeal. Subsequently, a notice of voluntary dismissal of the original appeal was filed and the district court entered an order accepting the voluntary dismissal but stating that the cross appeal would remain pending.

Acting on a petition for prohibition, the supreme court found that the notice of cross appeal could not provide an independent basis for jurisdiction and that because the original notice of appeal did not vest the district court with jurisdiction to proceed, there was no jurisdictional basis upon which the notice of cross appeal could be based. Accordingly, prohibition was granted.

327. The approach taken by the Third District in Obanion also conflicts with that taken by the First District in State v. Falls Chase Special Taxing District, 424 So. 2d 787, 790 (Fla. 1st Dist. Ct. App. 1982), review denied, 436 So. 2d 98 (Fla. 1983), and the Second District in Thomas v. State, 422 So. 2d 93, 94 (Fla. 2d Dist. Ct. App. 1982).

328. Thomason, 620 So. 2d at 1236.

329. The case was reviewed pursuant to a certified question relating to the merits. Id. at 1235. The issue relating to the prior prohibition proceeding was not presented to the court.

330. 605 So. 2d 865 (Fla. 1992).

331. Id.

332. Florida Rule of Appellate Procedure 9.110(g) provides that an appellee may cross appeal by serving a notice within 10 days of service of the appellant's notice or within the time allowed for the filing of a notice of appeal directed to the order to be reviewed, whichever is later. FLA. R. APP. PROC. 9.110(g).

333. Peltz, 605 So. 2d at 865.

334. Id. at 866.

335. Id.
G. Nature of Review

Many cases dealt with the question of whether orders were reviewable, either by appeal or by certiorari. The sheer volume of cases involving such issues precludes discussion of the reasoning relied on each case. Nonetheless, this article will set forth some of the cases, and indicate the type of order involved, and the conclusion reached.

1. Cases in Which Review by Appeal was Found to be Appropriate

Among the orders that were reviewed by appeal were: (1) an order dismissing a civil action without prejudice because of a plaintiff's failure to serve the complaint within 120 days after it was filed; 336 (2) an order in a prosecution for driving under the influence suppressing breath test results because the breath testing device was not maintained in compliance with the appropriate regulations; 337 (3) an order dismissing a petition for a writ of mandamus; 338 (4) an adjudicatory order which reaffirmed a dependency finding and which terminated the parental rights of the natural father; 339 (5) an order granting a motion for summary final judgment on a permanent injunction; 340 (6) a non-final order denying immunity under the Longshore and Harbor Workers' Compensation Act, 341 (7) an order denying a motion to set aside a clerk's default, 342 and (8) an order compelling compliance with an investigative subpoena served by the Attorney General of Florida.

2. Cases in Which Review by Appeal was Found to be Inappropriate

Orders which were found not to be reviewable by appeal included: (1)
non-final orders in child dependency proceedings;\textsuperscript{344} (2) a partial summary judgment establishing the existence of insurance coverage;\textsuperscript{345} (3) an order vacating an arbitration award and ordering a new hearing before a new arbitrator;\textsuperscript{346} (4) an order granting a motion for final summary judgment on attorney’s fees;\textsuperscript{347} (5) an order granting a defendant’s cross-motion for partial summary judgment, denying a plaintiff’s motion for partial summary judgment and retaining jurisdiction for any and all other matters applicable to the case;\textsuperscript{348} and (6) orders impleading a third party prior to the entry of a final order against the impleaded third party.\textsuperscript{349}

3. Cases in Which Review by Appeal was Found to be Inappropriate but in Which Review by Certiorari was Found to be Appropriate

In some cases, the courts found that orders were not appealable, but that certiorari review was proper. The orders involved in these cases included: (1) an order denying a motion to mitigate a sentence in a situation in which the trial court erroneously believed that it was without jurisdiction to consider the motion;\textsuperscript{350} (2) a writ of prohibition by a circuit court to a county court ordering a defendant in a criminal case discharged on speedy trial grounds;\textsuperscript{351} (3) an order waiving juvenile jurisdiction and certifying a juvenile for trial as an adult;\textsuperscript{352} (4) an order suppressing identification testimony in a criminal prosecution;\textsuperscript{353} (5) a final judgment of foreclosure in a case in which the appellant’s counterclaim asserting fraud had been severed and was still pending in the trial court;\textsuperscript{354} (6) an order to show cause why a writ of prohibition should not be granted in a situation in which, absent immediate review a party might have suffered irreparable

\textsuperscript{344} In re M.A., 609 So. 2d 596 (Fla. 1992).
\textsuperscript{345} Interamerican Car Rental, Inc. v. O’Brien, 618 So. 2d 760 (Fla. 3d Dist. Ct. App. 1993).
\textsuperscript{346} Central Fla. Police Benevolent Ass’n v. City of Orlando, 614 So. 2d 1203 (Fla. 5th Dist. Ct. App. 1993).
\textsuperscript{347} Korandovitch v. Vista Plantation Condominium Ass’n, 614 So. 2d 5 (Fla. 4th Dist. Ct. App. 1993).
\textsuperscript{350} Arnold v. State, 621 So. 2d 503 (Fla. 5th Dist. Ct. App. 1993).
\textsuperscript{351} State v. Frazee, 617 So. 2d 350 (Fla. 4th Dist. Ct. App. 1993).
\textsuperscript{352} In re D.W., 616 So. 2d 620 (Fla. 4th Dist. Ct. App. 1993).
\textsuperscript{353} State v. Houston, 616 So. 2d 595 (Fla. 4th Dist. Ct. App. 1993).
\textsuperscript{354} Norris v. Paps, 615 So. 2d 735 (Fla. 2d Dist. Ct. App. 1993).
harm for which remedy on plenary appeal was inadequate;\textsuperscript{355} (7) an order abating an action for exhaustion of administrative remedies;\textsuperscript{356} (8) an order granting a psychiatric examination of children entered after final judgment but as part of a supplementary proceeding on a petition for change of custody;\textsuperscript{357} and (9) an order withholding adjudication of guilt and imposing court costs that did not place the defendant on probation.\textsuperscript{358}

4. Cases in Which Certiorari Review was Found to be Appropriate

In addition to those noted in the preceding section of this article, certiorari was deemed the proper method to review numerous other orders, such as: (1) an order requiring production and \textit{in camera} inspection of certain investigative reports of Florida’s Department of Health and Rehabilitative Services;\textsuperscript{359} (2) an order entered on a master’s report prior to the expiration of the ten day period under Florida Rule of Civil Procedure 1.490(h) for serving exceptions to the report;\textsuperscript{360} (3) a protective order allowing a plaintiff, but not a defendant, to communicate \textit{ex parte} with the defendant’s former employees;\textsuperscript{361} (4) an order compelling disclosure of the petitioner’s workers’ compensation file on the respondent;\textsuperscript{362} (5) an order imposing sanctions in the form of attorney’s fees and costs for failure to negotiate in good faith during court ordered mediation;\textsuperscript{363} (6) an order compelling the victim of a criminal offense to appear at a live lineup and identify the person who committed the offense upon her;\textsuperscript{364} (7) an order reducing a sentence upon a defendant’s motion to mitigate sentence entered after the trial court lost jurisdiction to reduce or modify the sentence;\textsuperscript{365}

\begin{itemize}
\item 364. State v. Ray, 604 So. 2d 1249 (Fla. 4th Dist. Ct. App.), \textit{review denied}, 613 So. 2d 8 (Fla. 1992).
\end{itemize}
and (8) an order denying a motion to amend and/or supplement a motion for post-conviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850.366

IV. Certification

A major development in the field of appellate practice in Florida was the approval by the supreme court of board certification for appellate lawyers.367 The rule adopted by the court368 on the subject defines “appellate practice” as “the practice of law dealing with the recognition and preservation of error committed by lower tribunals, and the presentation of argument concerning the presence or absence of such error to state or federal appellate courts through brief writing, writ and motion practice, and oral argument.”369 They go on to state that appellate practice “includes evaluation and consultation regarding potential appellate issues or remedies in connection with proceedings in the lower tribunal prior to the initiation of the appellate process.”370

To become certified as an appellate lawyer, an applicant must demonstrate substantial involvement in appellate practice,371 a showing which requires meeting several criteria,372 including five years of the actual practice of law, at least thirty percent of which has involved appellate practice;373 having sole or primary responsibility in at least twenty-five appellate actions for the filing of principal briefs in appeals or petitions or responses in extraordinary writ cases;374 having sole or primary responsibility for at least five oral arguments;375 and a demonstration of special competence as an appellate lawyer within the three years immediately preceding application.376

369. Florida Bar Amendments, 621 So. 2d at 1059-60.
370. Id. at 1060.
371. Id.
372. Id.
373. Id.
374. Id.
375. Florida Bar Amendments, 621 So. 2d at 1060.
376. Id.
In addition, applicants must submit the names of at least four lawyers and three judges to attest to their substantial involvement in appellate practice, demonstrate that within the three years immediately preceding application, they have accumulated approved continuing legal education credits in the field of appellate practice in amounts varying from thirty to forty-five hours depending upon when application is made, and pass an examination.

The rule also establishes the requirements for recertification, which, with the exception of the examination, are concerned with the same factors as the requirements for initial certification.

It is hoped that the certification process will "identify those lawyers who engage in appellate practice and have the special knowledge, skills, and proficiency to be properly identified to the public as certified appellate lawyers."

V. CONCLUSION

The changes that have occurred in Florida over the past year in the field of appellate practice have been widespread and significant. They include not only the large number of court decisions that are expected each year, but also important changes to the rules and the birth of certification. These events will undoubtedly shape the future of appellate practice in this state. The recent creation by The Florida Bar of its Appellate Practice and Advocacy Section will also impact on that future. The net result of these developments should be a better appellate process.

377. Id.
378. Id.
379. Id.
380. Florida Bar Amendments, 621 So. 2d at 1061.
381. Id. at 1059.

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2. Ch. 92-9, § 3, 1992 Fla. Laws 156, 159 (repealing and amending Fla. Stat. § 517.12(14))
Chapter 92-9 entitled, "Banking and Finance Department—Investigations—Confidentiality of Information," amends chapter 517 to provide exceptions to the state disclosure laws\(^3\) for certain information provided to the Department of Banking and Finance ("Department"), and a privilege against civil liability for persons who provide information to the Department for the furnishing of such information.\(^4\)

This relatively small amendment may have significant impact. First, it enacts an investigative privilege from state disclosure laws similar to that long enjoyed by federal agencies under the Freedom of Information Act ("FOIA").\(^5\) Second, it exceeds the privilege granted federal investigative agencies by making consumer complaints or other information relevant to investigations by the Department, confidential even after the close of an investigation where the disclosure of such information might reveal identifying information of any complainant, customer or account holder.\(^6\)

\(^3\) FLA. STAT. §§ 119.01-119.16 (1991). These sections state that, generally, information obtained by state officials must be made available to the public and contains exemptions thereto, for various circumstances. See generally id. § 119.07.


\(^5\) 5 U.S.C. § 552 (1988). The new section appears to be modeled upon FOIA, but contains some important differences as discussed infra.

\(^6\) FLA. STAT. § 517.2015(1)(b)2 (Supp. 1992); cf. 5 U.S.C. § 552(b)(7) (1988) which only allows protection of information gathered for law enforcement purposes and only to the extent that such information:

(A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably
This section also makes provision for non-disclosure of information relating to department personnel and their families. It also makes provisions for the continuing confidentiality of the information even if it is offered in evidence in an administrative, civil or criminal proceeding at the discretion of the presiding officer. Furthermore, the Department is permitted to share information with any law enforcement, administrative agency, or regulatory organization, provided such agency or organization maintains the confidentiality of the information, so long as it would otherwise be confidential.

This section also extends exemption from disclosure laws to information made available to the Department on a "confidential or similarly restricted basis;" however, the subparagraph contains limiting language specifying that the exemptions are not to be construed to prohibit disclosure of information required by law to be filed with the Department or otherwise subject to disclosure laws. Presumably, this is intended to be a coordinate provision to the one allowing the Department to give information to other law enforcement agencies so that it could receive confidential information from those agencies without the necessity of making such information subject to disclosure laws.

Undoubtedly, securities counsel will attempt to use this provision to exempt from disclosure laws any information provided to the Department by securities broker/dealers during the course of an investigation or examination, which include, for example, witness statements and the like. How much the Department will cooperate with these efforts, and how much the protections offered by this section will be challenged, remains an open question at this juncture. Likewise, the question of who has standing to claim or defend the exemption offered by this section, and whether it will be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual . . . .

5 U.S.C. § 552(b)(7) (1988) (emphasis added). Furthermore, the new section also allows the Department to keep information confidential and exempt from disclosure under the disclosure laws in four situations also covered by the FOIA exemptions: 1) where disclosure would jeopardize the integrity of another active investigation or examination; 2) where disclosure would reveal the identity of a confidential source; 3) where disclosure would reveal investigative techniques or procedures; and 4) where disclosure would reveal a trade secret. Fla. Stat. § 517.2015(1)(b)(1), 3-5 (Supp. 1992). The FOIA does provide a privilege similar to that granted in section 517.2015 of the Florida Statutes for information gathered in examination of financial institutions. 5 U.S.C. § 552(b)(8) (1988).

8. Id. § 517.2015(2).
9. Id. § 517.2015(1)(d).
10. Id. § 517.2015(1)(e).
11. Id.
give rise to a flurry of litigation similar to that found under FOIA remains uncertain.\textsuperscript{12}

Chapter 92-9, section 4, grants a privilege against civil liability to persons who furnish information or evidence to the Department.\textsuperscript{13} This subsection may have the greatest impact in the area of securities broker/dealer employment cases. There has been a significant amount of litigation concerning questions of defamation over statements made on Form U-5, regarding terminations of registered persons from broker/dealers.\textsuperscript{14} Presumably, although it was clearly not the intended purpose of the section, brokerage firms will attempt to use the privilege against civil liability, provided by section 517.2015(3), to defend actions for defamation brought by terminated employees.\textsuperscript{15}

The new section may, however, be a double edged sword in that it provides an exemption or an exception to the privilege if the person furnishing information to the Department, acted either in bad faith or with malice in providing such information or evidence.\textsuperscript{16} This appears to be a more difficult standard for the employer to meet than was previously

\begin{itemize}
\item \textsuperscript{13} Ch. 92-9, § 4, Fla. Laws 156, 159 (codified at FLA. STAT. § 517.2015(3) (Supp. 1992)).
\item \textsuperscript{14} A broker/dealer is required to file Form U-4 with the National Association of Securities Dealers, Inc., as well as with the State of Florida, upon the hiring of a person to be employed as a registered person, and upon the registered person's termination, a Form U-5 must be filed. Broker/dealers are also required to submit additional information to the Department on Disclosure Reporting Pages ("DRP") concerning the background of the registered person. This includes any complaints filed by customers, any administrative or civil actions brought by a regulatory authority, and of course, any criminal actions brought against the registered person. In addition, Form U-5 requires the broker/dealer to state the basis for the termination of employment. \textit{See} FLA. STAT. § 517.12 (Supp. 1992); FLA. ADMIN. CODE ANN. r. 3E-600.002, r. 3E-600.008 (1992).
\item \textsuperscript{15} FLA. STAT. § 517.2015(3) (Supp. 1992).
\item \textsuperscript{16} \textit{Id.}.
\end{itemize}
available at common law where a terminated employee would have to prove both bad faith and malice, not either.17 Thus, while the section codifies the common law privilege for communications required to be made by law, it broadens the exemption to that privilege by allowing one who maintains an action in defamation to prove either bad faith or malice to avoid the statutory privilege.18 What the effect of this provision will be in defamation cases is, of course, an open question as is the interpretation of this section by Florida courts. It is possible that the courts may rule that the privilege, being part of a section relating to investigations or examinations by the Department of Banking and Finance, extends only to information transmitted in that context and not in the context of regular Form U-5 disclosures made by a brokerage firm. In that case, brokerage firms would be left to rely on common law privileges and exceptions to the laws of defamation.

It is equally conceivable that the courts would construe the disjunctive “or” to be read conjunctively as “and” and thus, to bring in line the exemption to the privilege with the exception currently available at common law.19 This would have the effect of making a person who attempts to rely on the exception to the privilege, prove that a brokerage firm acted not only in bad faith, but also with malice in providing information or evidence to the Department before the exemption to the privilege granted by this section is overcome.20

Finally chapter 92-9, section 3 amends Florida Statutes section 517.12 to make exempt from disclosure currency reports.21 According to this section, registered persons are required to file currency reports with the Department.22

The second major piece of legislation amending chapter 517 is chapter 92-45, sections 1-9, which made far more changes to the law than chapter

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17. See 19 FLA. JUR. 2D Defamation and Privacy § 112 (1980).
19. See id.
20. Cf Form U-4 contains language granting a similar privilege from employee to employer which authorizes the employer to release information to the Department and releases the employer from any liability whatsoever for doing so. This authorization and release is, of course, contractual and not statutory. The provision states: “I release each employer, former employer and each other person from any and all liability, of whatever nature, by reason of furnishing any of the above information, including that information reported on the Uniform Termination Notice for Securities Industry Registration (Form U-5) ....” Rev. Form U-4 (11/91) 2, at ¶ 8.
22. Id.
92-9, but whose impact may, except in one or two areas, be less significant. This act makes several technical and clarifying amendments,\textsuperscript{23} including amendments to section 517.051 (relating to securities exempt from registration under the blue sky laws) specifying that the exemptions granted by that section are self-executing, and that the person claiming any entitlement to the exemption bears the burden of proving such entitlement.\textsuperscript{24} This amendment to the introductory paragraph of Florida Statutes section 517.051 does nothing more than codify the existing status of the law.\textsuperscript{25} This section is also amended to provide an exemption for securities issued or guaranteed by the National Credit Union Association where formerly, the law provided the same exemption for the Federal Savings and Loan Insurance Corporation.\textsuperscript{26} The amendment also added credit unions to the list of institutions specifically named as exempt under that section.\textsuperscript{27}

Chapter 92-45, section 2 also amended Florida Statutes section 517.061 (relating to exempt transactions in securities) to codify existing law that the exemptions, provided by the section are self-executing, and that the burden of proving such exemption is on the persons claiming same.\textsuperscript{28} The chapter make certain amendments to existing subsections (6) and (7) of Florida Statutes section 517.061, which are designated clarifying amendments by the preamble to the session law.\textsuperscript{29} Subsection (6) of Florida Statutes section 517.061, which previously granted an exemption for transactions involving the distribution of securities of an issuer exclusively among its own securities, in a circumstance where no commission or other remuneration is paid in connection with the distribution was, in fact, clarified to specify securities holders as any person holding convertible securities, non-transferable warrants, or warrants exercisable within not more than ninety days of issuance.\textsuperscript{30}

Subsection (7) of Florida Statutes section 517.061 is amended to include transactions with qualified institutional buyers, essentially as that term is defined by the United States Securities and Exchange Commission.

\begin{itemize}
\item \textsuperscript{23} Ch. 92-45, 1992 Fla. Laws 413 (codified at FLA STAT. §§ 517.051-517.301 (Supp. 1992)).
\item \textsuperscript{24} Id. § 1, Fla. Laws at 413 (codified at FLA. STAT. § 517.051 (Supp. 1992)).
\item \textsuperscript{25} See id.
\item \textsuperscript{26} FLA. STAT. § 517.051(5) (Supp. 1992).
\item \textsuperscript{27} Id. § 517.051(5)(f).
\item \textsuperscript{28} Ch. 92-45, § 2, 1992 Fla. Laws 413, 415 (codified at Fla. Stat. § 517.061 (Supp. 1992)).
\item \textsuperscript{29} Id.
\item \textsuperscript{30} Id. (codified at FLA. STAT. § 517.061(6) (Supp. 1992)).
\end{itemize}
It also deletes the requirement that transactions with pension or profit sharing plans are exempt where such plans have assets not less than $500,000 and instead refers the exemption to rules also promulgated by the Department in accordance with SEC Rules. Potentially the most interesting amendment to the section is the deletion of the word "regulated" before the words "investment company," and the insertion thereafter of the words "as defined by the Investment Company Act of 1940." Thus, the exemption, previously only for regulated investment companies is now extended to any investment company, as that term is defined under the federal law.

Chapter 92-45, section 3 amended Florida Statutes section 517.111 (relating to revocation or denial of registration of securities) by extending the grounds for revocation or denial of registration of securities. Subparagraphs (b) and (c) of subsection (1) have been clarified by the addition of the terms "officer" and "director." Previously, the paragraphs stated that acts by the issuer or its controlling person were grounds for denial or revocation of registration. Thus, the subsection specifically includes acts of officers and directors as a basis for denial or revocation, even if an argument could be made that they are not control persons.

31. ld. (codified at FLA. STAT. § 517.061(7) (Supp. 1992)).
32. ld.
33. Ch. 92-45, § 2, 1992 Fla. Laws 413, 415 (codified at FLA. STAT. § 517.061(7) (Supp. 1992)).
34. 15 U.S.C. § 80a-3(a) defines "investment company" to be any issuer which: (1) is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities; (2) is engaged or proposes to engage in the business of issuing face-amount certificates of the installment type, or has been engaged in such business and has such certificate outstanding; or (3) is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer's total assets (exclusive of Government securities and cash items) on an unconsolidated basis. 15 U.S.C. § 80a-3 (1988). For further discussion on companies covered by the Investment Company Act see T. HAZEN, THE LAW OF SECURITIES REGULATION § 17.3 (2d ed. 1990).
35. Ch. 92-45, § 3, 1992 Fla. Laws 413, 416 (codified at FLA. STAT. § 517.111 (Supp. 1992)).
36. ld. (codified at FLA. STAT. § 517.111(1)(b), (c) (Supp. 1992)). These amendments are primarily clarifying since officers and directors are generally defined as control persons of the issuer.
37. ld. (codified at FLA. STAT. § 517.111(1)(g) (Supp. 1992)).
38. The practical effect of this amendment is questionable. It is rare that circumstances could exist where an officer or director could sustain the argument that he or she was not a
addition to (1)(b) and (1)(c), this chapter similarly adds the terms "officer" and "director" to subparagraph (1)(g) (formerly (d)) as persons whose dishonesty can lead to suspension, revocation or denial of the issuer's registration. 39

Chapter 92-45 adds new subparagraphs (d), (e), (f), (h) and (j) to subsection (1) of Florida Statutes section 517.111 which provide additional grounds for the revocation or denial of registration of securities. 40 Subparagraph (1)(d) extends the revocation, suspension or denial powers to a case where an issuer, officer, director or control person has been found guilty of a fraudulent act in connection with the sale of securities, or is engaged or is about to engage in making a fictitious sale or purchase of securities, or in any practice or sale of any security which is fraudulent or in violation of any law. 41 Subparagraph (e) extends the revocation, suspension or denial powers to cases where the issuer, officer, director or control person of the issuer had a final judgment entered against him in a civil action on grounds of fraud, embezzlement, misrepresentation or deceit. 42 Subparagraph (f) extends the power to instances in which the issuer, officers, directors, or control persons of the issuer have "demonstrated any evidence of unworthiness." 43 Subparagraph (h) extends the power to circumstances where the security in question is the subject of an injunction or an administrative stop order or similar order prohibiting the offer or sale of a security. 44 Subparagraph (j) extends the power to circumstances where the issuer or any person acting on its behalf has failed


39. Ch. 92-45, § 3, 1992 Fla. Laws 413, 416 (codified at Fla. STAT. § 517.111(1)(g) (Supp. 1992)).
40. Id. (codified at Fla. STAT. § 517.111(1)(d)-(j) (Supp. 1992)).
41. Id. (codified at Fla. STAT. § 517.111(1)(d) (Supp. 1992)).
42. Id. (codified at Fla. STAT. § 517.111(1)(e) (Supp. 1992)).
43. Id. (codified at Fla. STAT. § 517.111(1)(f) (Supp. 1992)).
44. Ch. 92-45, § 3, 1992 Fla. Laws 413, 416 (codified at Fla. STAT. § 517.111(1)(h) (Supp. 1992)).
timely to complete any application for registration filed with the Department.\textsuperscript{45}

These provisions significantly broaden the Department's ability to deny, suspend or revoke securities registrations.\textsuperscript{46} Their scope, and no doubt, their intended scope, is extremely broad. For example, subparagraph (d) of subsection (1) allows the Department to revoke or suspend registration where a determination is made that an issuer or a related party is about to engage in any securities transaction which is fictitious or fraudulent or in violation of any law.\textsuperscript{47} Under subsection (1)(e), the Department has the right to suspend, revoke or cancel any registration if any officer, director or control person of the issuer or the issuer itself has a judgment entered against it in a civil action on grounds of fraud, embezzlement, misrepresentation or deceit.\textsuperscript{48} The section is not in any way limited by time, and presumably, the Legislature determined that rather than impose a limitation similar to the ten year limitation of disclosure of such items on Form U-4, it would leave it to the discretion of the Department to utilize its authority under this section regardless of the timing of the civil determination. Subparagraph (f) is by far the broadest grant of powers to the Department which allows it to suspend, revoke or cancel the registration of any security where the issuer or any officer, director or control person of the issuer has demonstrated "any evidence of unworthiness."\textsuperscript{49} This section neither defines "evidence of unworthiness," nor explains what demonstration of such unworthiness need be made. This subparagraph has no coordinate provision in the federal law and may well be challenged on constitutional vagueness standards. It is clearly a reaffirmation of the qualitative review standard found in the blue sky laws of Florida and other states, and is a coordinate provision of new subparagraph (i), formerly subsection (e), which denies registration or grants authority to the Department to suspend or revoke registration of securities where the offer or sale of such securities would not be "fair, just or equitable."\textsuperscript{50}

\begin{flushright}
\textsuperscript{45} Id. (codified at Fla. Stat. § 517.111(1)(j) (Supp. 1992)).


\textsuperscript{47} Id. § 517.111(1)(d). This authority is akin to that granted to the SEC under Section 8(e) of the Securities Act of 1933. 15 U.S.C. § 77h(e) (1991). However, the power of the SEC, absent a stop order proceeding to suspend or delay a registration, has been rarely used. But cf. Jones v. SEC, 298 U.S. 1 (1936); Las Vegas Hawaiian Dev. Co. v. SEC, 466 F. Supp. 928, 932 (D. Hawaii 1979).


\textsuperscript{49} Id. § 517.111(1)(f).

\textsuperscript{50} Ch. 92-45, § 3, 1992 Fla. Laws 413, 416 (codified at Fla. Stat. § 517.111(1)(i) (Supp. 1992)).
\end{flushright}
Section 517.12(11) is amended to change the dates for re-registration of branch offices. Presumably, this administrative change will help in the processing of paperwork. This section is also amended to require the payment of any amounts lawfully due and owing to the Department as a precondition of re-registration. Presumably, this would require the payment of any fines levied by the Department as a precondition of re-registration for any dealer, associated person, investment advisor or branch office of a broker/dealer.

Section 517.131(3), relating to persons eligible to seek recovery from the Securities Guaranty Fund, has also been amended. That section, and the ensuing sections, provide for a fund against which persons damaged by entities regulated by the Department can seek reimbursement up to a statutory limit of $10,000 if that person has been unsuccessful in collecting a judgment against the judgment debtor. Subsection (3)(b), which had previously required the issuance of a writ of execution and a return showing that no personal or real property of the debtor was available to be levied upon in satisfaction of the judgment or that such property was insufficient to satisfy the judgment, has now been deleted. Instead, the new law makes such a showing to be a condition within the Department’s discretion. This amendment is an addition to the old subsection (3)(c) now denominated (3)(b). The new law also adds subsection (3)(e), which allows the Department to waive compliance with paragraphs (a) and (b), which require the person to receive a final judgment and make reasonable inquiries to ascertain whether there are sufficient assets to satisfy it if the regulated person against whom the claim is filed is the subject of a proceeding in which a receiver has been appointed.

While subsection (3)(e) grants the Department the authority to make such a waiver in the event of the appointment of a “receiver,” the next sentence makes clear that the term receiver is meant to encompass the “court appointed trustee or examiner” as well as a receiver. Therefore, upon petition by the debtor or the court

52. Id.
53. Id.
54. Id. § 5, 1992 Fla. Laws at 417 (codified at Fla. Stat. § 517.131(3) (Supp. 1992)).
57. Id.
59. Id. §§ 517.131(3)(c), 517.131(3)(a), (b).
60. Id. § 517.131(3)(c).
appointed trustee, examiner or receiver, any waiver granted by the Department will be considered a judgment for purposes of satisfying the requirements of Florida Statutes sections 517.131 and 517.141.61 This relaxation of the requirements is welcome and long overdue for individuals defrauded of their funds by members of the brokerage industry.

What the government giveth, the government taketh away. The amendments to subsection (1) of Florida Statutes section 517.141 exclude from payment to a claimant any award for costs and attorney fees.62 In addition, if the Department honors a claim by a trustee or a receiver, the claimant must assign all his rights against the debtor to the Department.63 The 1992 amendments to Florida Statutes section 517.141 (4), clarify that a claimant is entitled to no more than ten thousand ($10,000) dollars from the fund, regardless of how many accounts the claimant may have had with a regulated entity or how many judgments the claimant attains against same.64 Subsections (5), (6) and (7) of Florida Statutes section 517.141 clarify the obligation of a claimant to reimburse all amounts received in excess of what is permitted by law, or if the judgment is overturned on appeal or in a collateral proceeding, also authorizes the Department to enforce compliance with this section by instituting legal actions to recover such monies.65 Curiously, the amendments entitle the Department to obtain interest, costs and attorney fees if the Department is the prevailing party in an action to recover same, despite the fact that a claimant may not recover for same, either in an action brought against him or her by the State to recover excess funds paid, or as part of the judgment upon which the original claim is based.66

Perhaps the most significant changes made by the 1992 amendments are to be found in Florida Statutes sections 517.16167 and 517.301,68 the former regarding revocation, denial or suspension of registration of a dealer, investment advisor, associated person or branch office, and the latter

61. Id. §§ 517.131(3)(e), 517.141.
64. Ch. 92-45, § 6, 1992 Fla. Laws 413, 418 (codified at Fla. Stat. § 517.141(4) (Supp. 1992)).
68. Id. § 8, 1992 Fla. Laws at 421 (codified at Fla. Stat. § 517.301 (Supp. 1992)).
both sections have been amended to specifically include for the first time the power to regulate the rendering of investment advice. Subparagraphs (c), (d), (g) and (j) of subsection (1) of Florida Statutes section 517.161 have been amended to add, specifically, fraudulent conduct in connection with rendering investment advice as well as in the sale or purchase of any securities as a ground for revocation, suspension or denial of registration. In addition, misrepresentations, concealing material facts or false statements made in connection with the rendering of investment advice is similarly made a grounds for administrative action. Finally, rendering investment advice through any associated person not registered in compliance with the provisions of chapter 517 is also made a ground for revocation, denial or suspension of registration.

Similarly, Florida Statutes section 517.301 has been broadened to make unlawful, not only fraud in connection with the offer, sale or purchase of any investment or security, but also in connection with the rendering of any investment advice.

These changes clearly reflect the national concern for the growing number of people defrauded by individuals or entities labeling themselves "investment advisors." The federal government has focused on strengthening federal regulation of investment advisors. The Florida amendments


70. Id. § 7, 1992 Fla. Laws at 420 (codified at Fla. Stat. § 517.161 (Supp. 1992)).


74. Id. § 8, 1992 Fla. Laws at 421 (codified at Fla. Stat. § 517.301 (Supp. 1992)).

75. Investment Advisors Act of 1940, 15 U.S.C. §§ 80b-1 to 80b-21 (1988). Additionally there is currently pending before Congress a bill entitled the "Investment Adviser Regulatory Enhancement and Disclosure Act of 1993." H.R. 578, 103rd Cong., 1st Sess. (1992). The bill would amend the Investment Advisors Act of 1940 and would provide the SEC with additional resources for its regulatory activities, and enhance investor protection by strengthening the duties upon investment advisors as to disclosure, suitability and confidentiality. The bill would establish a fee structure for registered investment advisors. Such fees generated would be used to offset the cost of an increase in the SEC's investment advisor inspection staff, and to conduct surveys of unregistered advisors. The bill would also: 1) increase the frequency of examinations of high-risk advisors; 2) establish a mechanism for identification of unregistered advisors; 3) establish express suitability standards; 4) improve disclosure of conflicts of interest and other pertinent information; 5)
seem an aggressive and positive step in closing the loopholes concerning the regulation of those who offer financial services to the public.\textsuperscript{76} Definitio-
nal uniformity and vigorous enforcement of the new federal and state provisions are enthusiastically anticipated.

The change in the Florida law may present certain regulatory problems. Previously, fraud was only actionable in the offer, purchase or sale of securities.\textsuperscript{77} That is, an offer, or the purchasing or selling of securities, was required before an unlawful act could be deemed to have occurred. By making unlawful the fraudulent rendering of investment advice absent the offer, purchase or sale of securities, an argument could be raised that the unlawful act is totally inchoate until acted upon by the potential victim. In response, no doubt, the Department and plaintiff's counsel will argue that the rendering of fraudulent investment advice is akin to the offer of a security, the alleged perpetrator having committed all the acts necessary for a violation of the law. In private actions, presumably, absent a showing of detrimental reliance, damages, if available, would be nominal. The Department on the other hand, would presumably not need a showing of damages to institute injunctive proceedings against an investment advisor for rendering fraudulent investment advice.\textsuperscript{78}

Moreover, the 1992 amendments add new subparagraph (m) to Florida Statutes section 517.161(1) which enables the Department to suspend, revoke, restrict or deny the registration of any investment advisor or other regulated person having been civilly adjudicated to have committed fraud in connection with the rendering of investment advice or any violation of federal or state securities or commodities laws or any rule or regulation promulgated thereunder or any injunction or adverse administrative order by

\begin{itemize}
  \item require fidelity bonds of certain advisors;
  \item provide for the establishment of a toll-free telephone listing to receive inquiries regarding disciplinary history of investment advisors; and
  \item provide for confidentiality of client financial information. \textit{Id.}
\end{itemize}

The proposed legislation would require investment advisors, under certain circum-
stances, to pay, upon registration, and annually thereafter, a fee based on assets under management. One of the most important provisions of this proposed legislation is that it would add to the Investment Advisor's Act a section specifically prohibiting advisors from making unsuitable recommendations and require that the advisor make a reasonable inquiry into the client's financial circumstances.

\textsuperscript{76} See Ch. 92-45, §§ 7-8, 1992 Fla. Laws 413, 420-21 (codified at FLA. STAT. §§ 517.161-517.301 (Supp. 1992)).


\textsuperscript{78} \textit{Id.} § 517.191. The Department is granted the right to seek injunctive relief for any violation of chapter 517. \textit{Id.} This section makes clear that no damage need already to have occurred, granting the Department authority to seek injunction against one who "is about to engage in any act or practice constituting a violation of this chapter." \textit{Id.}
a state or federal agency regulating banking, insurance, finance or small loan companies, real estate, mortgage brokerage or other related or similar industries.  

The subparagraph does limit the right and power of the Department to bring such a proceeding if the registered entity has been continuously registered with the Department for five years after the entry of the decision, provided of course, that the decision has been timely reported to the Department pursuant to its rules.  

Presumably, the threat of a coattail action by the Department to revoke or suspend the registration of a regulated entity because of the entry of a civil or regulatory judgment of fraud will encourage additional lawsuits against regulated persons as well as settlements prior to determination of those actions. More liberal settlement policies on the part of regulated entities can be expected to generate even further litigation.

The language of subsection (1)(m) of Florida Statutes section 517.161 is exceedingly broad. This is no doubt intentional. It allows the Department to deny, revoke or suspend registration when any regulated person “has been the subject of any decision, finding, injunction, suspension, prohibition, revocation, denial, judgment, or administrative order by any court of competent jurisdiction, administrative law judge, or by any state or federal agency, national securities, commodities, or option exchange, or national securities, commodities, or option association . . .,”.  

It is an open question whether this includes a decision by an arbitrator or arbitration panel of the National Association of Securities Dealers, Inc., or New York Stock Exchange, Inc., or arguably, even of the American Arbitration Association. While the language, though broad, does not include the terms arbitrators or arbitration panel, it is conceivable that the Department could deem an arbitrator’s decision to be a “decision” or “finding” of a national securities, commodities, or option exchange or national securities or option association.  

Further credence to this argument is lent by the fact that the subparagraph refers to reported or reportable determinations, and arbitration decisions have been deemed to be such according to the rules governing reports on Forms U-4 and U-5. If this was in fact the intention of the legislature, arbitral decisions should be one of the specified grounds for

81. Id.
82. See id.
83. Id.
84. Rev. Form U-4 (11/91) and Rev. Form U-5 (11/91).
revocation or suspension spelled out in the statute and further legislation is needed for its inclusion. In the absence of such legislation and the otherwise expansive reach of subparagraph (m), a compelling argument can be made that it was not the intent of the legislature to include such decisions. The final legislative amendment to chapter 517, made in the 1992-1993 legislative sessions, was added by chapter 92-198.\textsuperscript{85} This amendment added Florida Statutes section 517.075 to the securities laws requiring disclosure in any prospectus for the issuance of securities in this state, if the issuer or any affiliate of the issuer does business with the government of Cuba or with any person or affiliate located in Cuba.\textsuperscript{86} The section further provides that after a registration is in effect, if a company later engages in business with the government or any person or affiliate located in Cuba, the issuer must file with the Department a statement to that effect within 90 days.\textsuperscript{87} Additionally, the section provides penalties for non-compliance, including a civil remedy to any purchaser of securities sold in violation of the section.\textsuperscript{88} This section also provides for public disclosure, upon request, of any statements or forms filed with the Department by an issuer doing business with the government of Cuba or its citizens or affiliates.\textsuperscript{89} The authors believe this provision to be unique to the laws of the State of Florida.

In addition to the enacted legislation, five bills affecting or seeking to regulate or amend the securities laws were introduced in the last two legislative sessions. Senate Bill 1058\textsuperscript{90} and its coordinate House Bill 0241\textsuperscript{91} sought to reduce statutory interest rates from twelve to nine percent in the absence of a written contract.\textsuperscript{92} The bills died in the Senate and House.\textsuperscript{93} House bill 1893 also introduced in the 1993 session, had as its primary purpose to clarify the provisions related to selling and registering

\textsuperscript{85} Ch. 92-198, § 1, 1992 Fla. Laws 1837 (codified at FLA. STAT. § 517.075 (Supp. 1992)).
\textsuperscript{86} FLA. STAT. § 517.075 (Supp. 1992).
\textsuperscript{87} \textit{Id.} § 517.075(3).
\textsuperscript{88} \textit{Id.} § 517.075(6).
\textsuperscript{89} \textit{Id.} § 517.075(2)(c).
\textsuperscript{90} S. 1058, FLA. S. JOUR 117 (Reg. Sess. 1993) (died in Senate Commerce Committee 3/24/93); see FLA. LEGIS., PROVISIONAL LEGISLATIVE BILL INFORMATION, 1993 REGULAR SESSION, HISTORY OF SENATE BILLS at 109, S. 1058.
\textsuperscript{91} H. 0241, FLA. H.R. JOUR. 18 (Reg. Sess. 1993) (died in Committee on Judiciary 4/04/93); see FLA. LEGIS., PROVISIONAL LEGISLATIVE BILL INFORMATION, 1993 REGULAR SESSION, HISTORY OF HOUSE BILLS at 26, H. 0241.
\textsuperscript{92} \textit{Id.}
\textsuperscript{93} See supra notes 90-91.
small corporate securities offerings and to simplify registration for such offerings, i.e. offerings under one million dollars. This bill also died in committee. Senate Bill 354 would have provided a rate of interest for certain judgments equal to the prime rate plus two percent and would also have provided for the imposition of prejudgment interest. It too died in committee. Finally, Senate Bill 1252 sought to incorporate some of the amendments of the prior unsuccessful bills and would have included a prohibition on the sale of securities into, from or within the state without registration. It also would have deleted an exception to the definition of "associated person" for the registration of small corporate offerings and would have authorized the Department to adopt rules to facilitate these registrations. This bill also died in committee and no securities legislation was enacted in the 1993 session.

In 1992, the Legislature amended one section of the Florida Statutes, which though not specifically relating to securities regulation, may have a significant impact in the area. Chapter 768.73, regarding punitive damages, previously provided that sixty percent of all judgments awarding punitive damages in the areas of "negligence, strict liability, products liability, misconduct in commercial transactions, professional liability or breach of warranty that involves willful, wanton or gross misconduct"

95. See supra note 94.
97. See supra note 96.
99. See supra note 98.
100. See supra note 98.
101. During 1992-93, the SEC enacted several new rules and regulations affecting, inter alia, proxy solicitations, small business capital formation and reporting requirements, and, most notably, penny stock regulation. The details of these initiatives are beyond the scope of this paper, but should be of interest to Florida Securities practitioners, the SEC's activities are the subject of a well written article entitled "Significant 1992 Regulatory Developments," 48/3 The Business Lawyer 977 (May 1993).
102. Ch. 92-85, § 2, 1992 Fla. Laws 821 (codified at FLA. STAT. § 768.73 (Supp. 1992)).
103. FLA. STAT. § 768.73(1)(a) (1988).
was payable either to the Public Medical Assistance Trust Fund in the case of personal injury or wrongful death, or to the General Revenue Fund in the case of other punitive damages awards. Chapter 92-85, effective April 8, 1992, reduced the percentage of punitive damages awards payable to the state from sixty to thirty-five percent. Thus, a successful plaintiff in an action covered by Florida Statutes section 758.73 will now recover sixty-five percent rather than forty percent of any punitive damage award. The provision of subsection 1(a) of Florida Statutes section 768.73 relating to “misconduct in commercial transactions” certainly appears broad enough to cover securities cases. Moreover, since securities related causes of action are often founded in fraud, which has traditionally been a subject of punitive damage awards, it appears likely that courts confronting the issue will apply Florida Statutes section 768.73 to securities cases. Recently, the Court of Appeals for the Eleventh Circuit certified to the Florida Supreme Court the question of whether Florida Statutes section 768.73 applied to arbitration awards in a securities case. This issue was previously raised in the case of Peabody v. Rotan Mosle, Inc., where the court refused to apply section 768.73 to an award of punitive damages made by an arbitration panel because the cause of action arose prior to the then operative date of the statute even though the award was made after that date. Section 4 of chapter 92-85 amends Florida Statute section 763.73 to clarify that subsections (2) and (3) of Florida Statutes section 768.73 shall apply to pending cases and causes of action in which a judgment has not yet been entered, in effect putting to rest the issue

104. Id. § 768.73(2)(b).
105. Id.
106. Ch. 92-85, § 2, 1992 Fla. Laws 821 (codified at FLA. STAT. § 768.73 (Supp. 1992)).
108. See id. § 768.73(1)(a). But see infra notes 111-14 and accompanying text.
109. But cf. Alamo Rent-A-Car v. Mancusi, 599 So. 2d 1010, 1013 (Fla. 4th Dist. Ct. App. 1992). The Fourth District Court of Appeal held that the intentional tort of malicious prosecution was not intended to be included among those civil actions for which punitive damages are limited by section 768.73(1)(a) of the Florida Statutes. Id.; see also infra notes 378-386 and accompanying text for a discussion of Florida’s economic loss rule limiting securities actions to breach of contract causes. Presumably, this would also limit the application of punitive damages in securities cases.
110. Miele v. Prudential-Bache Sec., 986 F.2d 459 (11th Cir. 1993).
111. 677 F. Supp. 1135 (M.D. Fla. 1987)
112. Id. at 1139.
113. Ch. 92-85, § 4, 1992 Fla. Laws 821, 822 (codified at FLA. STAT. § 768.73 (Supp. 1992)).
II. LITIGATION

A review of securities litigation requires inquiry on both the state and federal level since regulation of securities is concurrent. Moreover, since the United States Supreme Court decisions in *Dean Witter Reynolds, Inc. v. Byrd* and *Shearson/American Express, Inc. v. McMahon*, endorsing arbitration as a means for resolution of disputes between broker/dealers and their customers and employees, the great majority of these disputes have been brought either in the first instance or ultimately in arbitration. Finally, a substantial portion of the judicially created law regarding securities regulation in Florida is made on the circuit court level which is reported, unfortunately, sporadically, if at all. Any review therefore, of securities litigation in Florida, cannot purport to be complete and the practitioner is cautioned to recognize the externally imposed limitations of any such undertaking.

117. The National Association of Securities Dealers, Inc., reports that the Fort Lauderdale office handled 657 cases in 1992 and another 701 have been filed to date in 1993. Additionally, cases are arbitrated before the American Arbitration Association, the New York Stock Exchange, Inc., and other arbitral fora in Florida. Arbitrators are not required by arbitration rules to write opinions but merely state the ultimate resolution of the arbitration matter. See, e.g., NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC. ("NASD") CODE OF ARBITRATION PROCEDURE § 41 (1992). These decisions are not widely reported, and as stated, only infrequently contain any rationale. Section 41(f) of the NASD Code has been amended to make arbitration awards, their contents, and the names of the arbitrators publicly available. "The NASD will implement this rule change October 1, 1993. For public customer cases, the rule change will apply to awards rendered on or after May 10, 1989. For industry cases, including employment disputes, the rule change will apply to awards rendered on or after October 1, 1993." Self-Regulatory Organization; Order Approving Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Public Availability of Arbitration Awards, SEC Release No. 34-32740 (August 12, 1993). Any interested practitioner should also consult the Securities Arbitration Commentator, an invaluable source of information concerning securities arbitration. The New York Stock Exchange ("NYSE") makes all of its awards publicly available, and the AAA is reportedly considering doing the same in securities cases. 118. This paper also is intended as a survey only and not as an in depth analysis or discussion of each and every decision reported in the field during the period.
A review of federal and state court cases for the period 1992-1993\textsuperscript{119} reveals that the court decisions have been concentrated primarily in arbitration related cases. Most of these cases can be loosely divided into two areas relating to arbitration disputes: The first, involves the extent of judicial intervention in determining under what circumstances and in what manner aggrieved parties must submit their disputes to arbitration. These cases generally arise on motions or petitions either to compel or stay arbitration. The second, involves the extent, manner and grounds for judicial review of arbitration decisions.

On the federal level, judicial inquiry into compelling or staying arbitration has been delimited by the mandates of the Federal Arbitration Act ("FAA").\textsuperscript{120} Under the FAA, the court’s authority is confined to determining whether there is an agreement to arbitrate.\textsuperscript{121} If the parties have validly agreed to arbitrate their dispute, under the FAA, the district court must compel arbitration.\textsuperscript{122}

The federal courts have made clear, however, that while the scope of their inquiry may be limited, they must and will inquire into the issue of the making of an agreement to arbitrate where the validity of the agreement to arbitrate is in issue. In such circumstances, a district court will decide if the arbitration agreement is enforceable against the parties and will not allow the question to be addressed by the arbitrators.\textsuperscript{123} In \textit{Chastain v. Robinson-Humphrey},\textsuperscript{124} the Eleventh Circuit affirmed a denial of a motion to compel arbitration where the customer denied signing the arbitration agreement.\textsuperscript{125} Stating the general rule that a mere denial without more is

\begin{itemize}
  \item \textsuperscript{119} The authors have attempted to review the decisions published between January 1, 1992 and August 31, 1993.
  \item \textsuperscript{120} 9 U.S.C. §§ 1-208 (1988).
  \item \textsuperscript{121} \textit{Id.} § 4. This section further provides that the court make this determination in a summary proceeding. \textit{Id.}
  \item \textsuperscript{122} \textit{Id.} §§ 2, 3. Section two of the FAA mandates that a written agreement to arbitrate "shall be valid, irrevocable, and enforceable . . . ." \textit{Id.} § 2, and section three of the FAA requires courts to stay trial of any action in which it finds any issue contained therein to be referable to arbitration pursuant to an agreement of the parties. \textit{Id.} § 3. See, e.g., \textit{Chastain v. Robinson-Humphrey Co., Inc.}, 957 F.2d 851 (11th Cir. 1992).
  \item \textsuperscript{123} See \textit{Chastain}, 957 F.2d at 854; see also \textit{Volt Information Sciences, Inc. v. Trustees of Leland Stanford Junior Univ.}, 489 U.S. 468 (1989). In \textit{Volt}, the Supreme Court instructed: "[w]e have recognized that the FAA does not require parties to arbitrate when they have not agreed to do so . . . nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement . . . ." \textit{Id.} at 478 (citations omitted).
  \item \textsuperscript{124} 957 F.2d at 851.
  \item \textsuperscript{125} \textit{Id.} at 854.
\end{itemize}
normally insufficient to deny compelling arbitration, the Chastain court nevertheless affirmed the lower court ruling. The court recognized that in the rare instance, where, as here, a customer makes a substantial showing that she had not, in fact, signed the arbitration agreement, the court, not the arbitrators, must determine the validity of the agreement. The Chastain court expressed the general rule as follows: "the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute."

In Shearson Lehman, Hutton, Inc. v. Lifshutz, the Fourth District Court of Appeal construed the state court’s duty under the Florida Arbitration Code ("FAC") to be identical, that is, the court must make the determination whether an enforceable written agreement to arbitrate exists between the parties. Unlike its federal counterpart, however, the state court construed the burden to be on the party seeking arbitration to establish the existence of an enforceable agreement to arbitrate. Finding that despite submitting the arbitration agreements, appellant Shearson Lehman had failed to produce handwriting experts or make any other attempt to authenticate the signature on the brokerage agreement. The appellate court affirmed the lower court’s denial of the motion to compel, holding that “[t]he record does not show any evidence that the appellees signed or

126. See id.
127. Id. at 855.
128. Id. at 854.
129. Chastain, 957 F.2d at 854 (citation omitted). Where, however, it is undisputed that the party seeking to avoid arbitration has not signed any contract requiring same, as the court stated, "the calculus changes." Id. "Under these circumstances, there is no presumptively valid general contract which would trigger the district court's duty to compel arbitration pursuant to the Act." Id. "Therefore, before sending any such grievances to arbitration, the district court itself must first decide whether or not the non-signing party can nonetheless be bound by the contractual language." Id.; see also Cancanon v. Smith Barney Upham & Co., 805 F.2d 998, 1000 (11th Cir. 1986) (per curiam). Stating that in such circumstances “[t]o make a genuine issue entitling the [party seeking to avoid arbitration] to a trial by jury [on the arbitrability question], an unequivocal denial that the agreement has been made [is] needed, and some evidence should [be] produced to substantiate the denial.” Chastain, 957 F.2d at 854. In the instant matter, the court agreed that appellant Chastain had, in fact, made such showing and was therefore entitled to a trial on the issue of the validity of the arbitration agreement. Id.
130. 595 So. 2d 996 (Fla. 4th Dist. Ct. App. 1992).
131. FLA. STAT. §§ 682.01-682.22 (1991).
132. Lifshutz, 595 So. 2d at 997.
133. Id.
134. Id.
assented to the brokerage agreement submitted by the appellants."  

One year later, in *Wheat, First Securities, Inc. v. Green*, the Eleventh Circuit reiterated the proposition that it is the task of the court asked to compel arbitration to determine whether the parties agreed to arbitrate that dispute. In *Wheat*, while recognizing that Congress in enacting the Federal Arbitration Act declared a national policy favoring arbitration, the court reiterated its position in *Chastain* stating that "[s]imply put, parties cannot be forced to submit to arbitration if they have not agreed to do so."

The *Wheat* court was asked to review a judgment of the district court that a securities broker/dealer had no obligation to arbitrate claims by investors arising from transactions with the broker/dealer's predecessor in interest. Appellants, customers of another brokerage firm, signed arbitration agreements with that broker. Thereafter, Wheat purchased the assets of the original broker, and in its agreement expressly denied assuming any liabilities of its predecessor. Notwithstanding, appellants, whose accounts were transferred to Wheat after the asset purchase, sought to hold Wheat liable on the questioned transactions conducted by the predecessor. The Eleventh Circuit, echoing its prior ruling in *Chastain*, held that the parties had not agreed to arbitrate the matters before it.

In affirming the lower court's determination that Wheat was not bound by the arbitration agreement of its predecessor, the Eleventh Circuit also stated that since contract interpretation is generally a question of law,

135. *Id.* In his dissent, Judge Anstead noted that appellants had in fact successfully introduced the arbitration agreements into evidence and that since no other evidence to the contrary existed in the record, a motion to compel arbitration should have been granted. *Id.* at 998. Presumably, Judge Anstead was recognizing that the burden of disputing the making of the arbitration agreement shifted to the appellee after the agreement itself was submitted in evidence. It is arguable that the dissent's position in *Lifshutz* is closer to that espoused by the Eleventh Circuit in *Chastain*, since the *Chastain* court, at least impliedly recognized that the party seeking to compel arbitration is required to make a *prima facie* showing of the existence of an arbitration agreement, the burden then shifts to the party challenging that agreement to present evidence rebutting same. See *Chastain*, 957 F.2d at 854.

136. 993 F.2d 814 (11th Cir. 1993).
137. *Id.* at 817.
138. *Id.*
139. *Id.* (citing *Chastain*, 957 F.2d at 854).
140. *Id.* at 815.
141. *Wheat*, 993 F.2d at 816.
142. *Id.*
143. *Id.*
144. *Id.* at 818.
"[d]eterminations of arbitrability, like the interpretation of any contractual provision, are subject to de novo review." Thus, while the de novo review standard announced in Wheat was applied therein to facts that were not in dispute, the court's previous review in Chastain involved a case where the facts were very much in question: whether or not appellant Chastain was bound by an arbitration agreement, despite her vehement assertion that she had never signed same. In Chastain, however, the Eleventh Circuit was careful to note that "the district court did not decide that Chastain could not in fact be bound by the arbitration clauses of the customer agreements. The district court only determined that Chastain's duty to arbitrate would be decided by the district court, rather than being decided by an arbitration panel." The court carefully noted that this was the only determination that it reviewed upon appeal. Left open by its two rulings, Chastain and Wheat, is the question of what standard the court would apply to any subsequent determination of the district court in Chastain. In other words, whether the appellate court would review the district court's determination on the issue of arbitrability de novo, or under the more common abuse of discretion standard normally applied in cases where a district court makes factual determinations.

The Eleventh Circuit may have indicated its view on this question earlier in the year in its decision in Kelly v. Merrill Lynch, Pierce, Fenner & Smith, Inc. In Kelly, plaintiffs filed a complaint alleging two causes of action under Section 10(b) of the Securities Exchange Act of 1934. After two years, the plaintiffs dismissed one of their claims and the trial court granted summary judgment in favor of the defendant on the remaining claim. Thereafter, the plaintiffs commenced arbitration of four state common law claims alleging essentially the same conduct as the earlier litigation, based on a clause in the arbitration agreement which required arbitration of all claims with the exception of federal securities laws claims. On motion of the defendant, the district court enjoined the

145. Id. (citations omitted).
146. Wheat, 993 F.2d at 815.
147. Chastain, 957 F.2d at 854.
148. Id. at 853.
149. Id.
150. PHILIP J. PADAVANO, FLORIDA APPELLATE PRACTICE § 5.5 (1988).
151. 985 F.2d 1067 (11th Cir. 1993).
152. Id. at 1068; see also 15 U.S.C. § 78j(b) (1983).
153. Kelly, 985 F.2d at 1068.
154. Id.
arbitration proceeding and Kelly appealed. In affirming the lower court’s order, the Eleventh Circuit stated, “[w]e review the district court’s injunction for abuse of discretion.” Thus, it appears that despite its enunciation in Wheat of the de novo review standard in questions of arbitrability, whereas in Kelly, the district court has been required to review evidence in making its determination on whether or not to compel arbitration, the court will apply an abuse of discretion standard not de novo review of the lower court’s determination. As the Eleventh Circuit explained in Kelly, “the district court . . . [is] in the best position to decide whether . . . an injunction was necessary.”

In Kelly, appellants sought to enjoin the subsequent arbitration proceeding on grounds of res judicata. In upholding the district court’s power to grant an injunction to protect its own rulings, the court rejected an argument that the issue of res judicata should be left to the arbitrators “because it is an affirmative defense that goes to the merits of . . . [the] claims.” The court stated “[w]e think the better rule is that courts can decide res judicata.”

The Eleventh Circuit’s willingness to have courts, rather than the arbitrators, consider the issue of res judicata is interesting in that it appears to be contrary to and a departure from the general rule that courts faced with a request to compel arbitration will limit their review to the issue of the making of the agreement to arbitrate and the failure or refusal of one of the parties to agree to arbitration. The Kelly court’s departure from the general rule resurrects questions that had previously been thought, at least on the federal level, to have been settled. By deciding the res judicata issue, the court clearly did not limit the scope of its inquiry to the valid making of an agreement to arbitrate. Whether and under what circumstances federal courts will expand their scope of inquiry when asked to compel or stay arbitration are again open questions. As we shall see, on the state level, the question of the scope of judicial review of motions to compel or stay arbitration is not at all well settled and is, in fact, the subject of a rather

155. Id.
156. Id. at 1070.
157. Id.
158. Kelly, 985 F.2d at 1069.
159. Id.
160. Id.
161. Id.
162. See Chastain, 957 F.2d at 817; see also Wheat, 993 F.2d at 817.
furious debate.163

During the period 1992-93, the Eleventh Circuit, following the dictates of the United States Supreme Court in Gilmer v. Interstate/Johnson Lane Corp.,164 joined the Fifth,165 Sixth,166 and Ninth167 Circuits in determining that claims of sex discrimination under Title VII, the Equal Employment Opportunity Act of 1972,168 were subject to arbitration. In Gilmer, the United States Supreme Court held that a former stockbroker, dismissed from his employment, who sought recovery under the Age Discrimination in Employment Act of 1967,169 was required, by having signed a U-4 registration form which provided for arbitration of all disputes between him and his employer, to arbitrate his age discrimination claims.170 The Supreme Court rejected the employee’s contentions that Congress had intended to exclude age discrimination claims from the purview of the FAA171 In Bender v. A.G. Edwards & Sons, Inc.,172 the plaintiff filed a complaint in federal court alleging sexual harassment and seeking relief under Title VII and pendent state law claims.173 The defendants sought a stay of the Title VII claims pending arbitration under the FAA.174 The Eleventh Circuit, noting that in her application for registration as a stockbroker plaintiff had agreed to arbitrate all her disputes with her employer, compelled arbitration of all claims including the Title VII claims.175

The expansion of the scope of causes of action which have been held to be arbitrable in cases like Bender undoubtedly come as a result of what the courts see as a clear mandate from the Supreme Court: They are to effectuate the intention of parties signing arbitration agreements and order

163. See infra notes 211-46 and accompanying text.
165. Alford v. Dean Witter Reynolds, Inc. 939 F.2d 229 (5th Cir. 1991), appeal after remand, 975 F.2d 1161 (5th Cir. 1992). Originally, the Fifth Circuit had determined Title VII cases were not subject to arbitration, but its decision was vacated by the United States Supreme Court for reconsideration in light of the Supreme Court’s opinion in Gilmer. Id.; see also Gilmer, 111 S. Ct. at 1647.
171. Id. at 1657.
172. 971 F.2d 698 (11th Cir. 1992).
173. Id. at 699.
174. Id.
175. Id. at 700.
all claims not specifically required to be determined by a court to arbitration.176 Perhaps the attitude was best described by the Fourth District Court of Appeal in Pierce v. J.W. Charles-Bush Securities, Inc.177 The Pierce court in determining that parties could agree to grant arbitrators authority to award attorneys’ fees, reviewed the various decisions of the United States Supreme Court expanding the scope of arbitration in Moses H. Cone,178 Southland Corp. v. Keating,179 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.180 Shearson/American Express, Inc. v. McMahon,181 and Gilmer v. Interstate/Johnson Lane Corp.182. The Pierce court then stated: “[i]f civil rights, antitrust and securities fraud claims are not inappropriate for arbitration, it is very difficult to imagine a civil claim in which an agreement to arbitrate would not be enforced.”183 In general, this is probably a fair statement of the law.184

Perhaps the most highly debated issue regarding judicial intervention to compel or stay arbitrations before Florida courts during 1992-1993, involves what has come to be known as the “AMEX Window.” 185 The matter was ultimately resolved, at least in part, by the Eleventh Circuit’s recent opinion in Luckie v. Smith Barney, Harris, Upham & Co.186 The

176. See, e.g., Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983) (the FAA is a “congressional declaration of the liberal federal policy favoring arbitration . . . [requiring that] as a matter of federal law, any doubts concerning the scope of arbitrable issues, should be resolved in favor of arbitration . . . ”).
177. 603 So. 2d 625 (Fla. 4th Dist. Ct. App. 1992).
178. 460 U.S. 1 (1983); see also supra note 176 and accompanying text.
179. 465 U.S. 1 (1984) (holding that the Federal Arbitration Act prohibited the states from requiring a judicial forum for the resolution of claims that the contracting parties had agreed to resolve by arbitration).
180. 473 U.S. 614 (1985) (holding that certain antitrust and RICO claims were arbitrable).
183. Pierce, 603 So. 2d at 628.
185. See, e.g., Luckie v. Smith Barney, Harris Upham & Co., 999 F.2d 509 (11th Cir. 1993). In essence, the AMEX Window cases do not involve the courts in making a determination of whether or not parties agreed to arbitrate, but rather whether specific fora for those arbitrations are permitted or specified in the contracts. Id.
186. Id.
controversy surrounding the AMEX Window involves whether or not an involved customer of a broker/dealer may seek resolution of disputes by arbitration before the American Arbitration Association ("AAA"). In Luckie, the Eleventh Circuit decided that, where there was a valid arbitration agreement between the parties which contained a provision denominating fora for arbitration (a "forum selection provision") which did not include AAA, the answer was no. In Luckie, the plaintiffs, who were customers of the broker/dealer and its registered representatives, alleged that the defendant mismanaged and misused their investment accounts. In April 1989, the plaintiffs filed a complaint with the AAA to resolve the dispute. The case was filed pursuant to article VIII, sections 1 and 2(c) of the AMEX Constitution which allow a customer of any member organization to demand arbitration before the AAA. Thereafter, plaintiffs commenced suit in the Sixth Circuit Court of Florida seeking a declaratory judgment, affirming AAA jurisdiction and compelling arbitration before the AAA. The case was subsequently removed to the federal district court on diversity jurisdiction. The day before removal, however, the defendant filed suit in New York City attacking the jurisdiction of the AAA and seeking to compel arbitration before the New York Stock Exchange, ("NYSE"), National Association of Securities Dealers, Inc., ("NASD"), or AMEX. The New York court then enjoined the plaintiffs from proceed-

187. Id. at 514. ("[T]he New York Stock Exchange, Inc. ("NYSE"), the American Stock Exchange, Inc. ("AMEX"), and the National Association of Securities Dealers, Inc. ("NASD") are all self-regulatory organizations, overseen and regulated by the Securities and Exchange Commission. The AAA is an independent arbitral forum.") Id. at 511.

188. Luckie, 999 F.2d at 510.

189. Id.

190. Id. Section 1 of article VIII of the AMEX Constitution provides that members of the exchange "shall arbitrate all controversies arising in connection with their business... between them and their customers as required by any customer's agreement or, in the absence of a written agreement, if the customer chooses to arbitrate." Id. Section 2(c), the so-called "AMEX Window" provision, states that "[a]rbitration shall be conducted under the arbitration procedures of this Exchange, except as follows:... (c) if any of the parties to the controversy is a customer, the customer may elect to arbitrate before the American Arbitration Association in the City of New York, unless the customer has expressly agreed, in writing, to submit only to the arbitration procedure of the Exchange." Id.


192. Id.

193. Id. The defendants actions were based upon a "choice of law" provision of the arbitration agreement which specified that New York law was to apply to any disputes between the parties.
ing in any manner with their claim before the AAA and the plaintiffs filed a motion challenging the jurisdiction of that court to hear the case. The federal district court in Florida then stayed further action in the Florida matter pending the New York court's resolution of the jurisdictional issue. The New York court then issued an internal order affirming its jurisdiction to which plaintiffs filed objection on September 18, 1989. The Florida federal court continued its stay pending a final decision of the jurisdictional question in New York until that court had failed to act for almost two years. In June 1991, the district court lifted its stay.

The court then ruled on the plaintiff's motion to compel arbitration and determined that the customer's agreement in the instant case, which provided in relevant part for "arbitration in accordance with the rules, regulations and procedures then in effect of the New York Stock Exchange, Inc., the AMEX or the National Association of Securities Dealers, Inc..." barred arbitration before the AAA. The district court, adopting the defendant's position that the AMEX window operates only as a default provision in the absence of a specific agreement between the parties, refused to compel AAA arbitration. The case made its tortuous way to the

194. Id.
195. Id.
197. Id.
198. Id.
199. Id. at 1119.
200. Id. at 1120.
201. Luckie, 766 F. Supp. at 1120. Ultimately, the New York court decided to rule on the matter before it. In Smith Barney Harris Upham & Co., Inc. v. Charles Luckie, Index No.: 9909/89 (Supreme Court, New York October 14, 1992), the New York court, noting the actions of the Middle District of Florida, finally determined the only issue remaining before it, Smith Barney's motion to dismiss one of the plaintiff's claims as time-barred under the Supreme Court decision in Lampf, Pleva, Lipkind, Prupis & Petigrew v. Gilbertson, 111 S. Ct. 2773 (1991) (adopting the one/three year statute of limitations applicable to other sections of the Securities Exchange Act of 1934 to actions under section 10(b) thereof). The New York court denied petitioner's motion to dismiss the claims as time-barred on the grounds that the claim was not time-barred under New York or federal statutes of limitation. Id. at 5. The court based its reasoning on the fact that Congress had amended the Securities Exchange Act of 1934 by enacting Section 27A "to modify the retroactive effect of the Lampf ruling." Id. at 4. "Section 27A provides for re-instatement of certain actions time-barred and dismissed under Lampf, if timely commenced prior to June 19, 1991, [date of the Lampf decision], under applicable federal or state limitations as herein." Id. Accordingly, the court found that respondent's claim was not time-barred under the New York (CPLR 213[9]) or federal law. Id.
Eleventh Circuit Court of Appeals. On August 26, 1993, the Eleventh Circuit affirmed the District Court's holding closing the AMEX Window in cases where the contract between the parties specifically designates other fora for arbitration. Relying on Second Circuit decisions in Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Georgiadis and PaineWebber, Inc. v. Rutherford, as well as the Sixth Circuit decision in Roney & Co. v. Goren, the court held that a forum selection provision of a customer arbitration agreement can supersede the arbitration provisions of the AMEX Constitution, namely the AMEX Window.

Prior to the Eleventh Circuit's pronouncement in Luckie, the District Court for the Middle District of Florida was again required to consider the viability of the AMEX Window. In Merrill Lynch, Pierce, Fenner & Smith, Inc. v. King, Judge Elizabeth A. Kovachevich was confronted with an arbitration agreement containing a forum selection clause providing for specific fora which, while specifically including the AMEX, did not provide for arbitration before the AAA. Relying on her previous ruling in Luckie, the Judge preliminarily enjoined an AAA arbitration based on the fact that the AMEX Window was superseded or closed by the specific provisions in the arbitration agreement.

On the state level, a rather heated debate is raging about the proper scope of inquiry for a court when faced with a motion to compel or stay arbitration. In 1989, the Fourth District Court of Appeal, in Anstis Ornstein v. Smith Barney, Harris Upham & Co., Inc., held that the AMEX Window was closed and the AMEX constitutional provision was superseded by the specific arbitration agreement. But see Ray v. A.G. Edwards & Sons, Inc., Case No. 92-845-CAOI (Fla. 5th Cir. Ct. 1992) where a court denied a motion for judgment on the pleadings and directed the parties to proceed immediately with the arbitration then pending before the AAA pursuant to the AMEX Window. The court specifically referred site selection and all other issues to the arbitrators for resolution.
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Associates v. Palm Beach County, a non-securities case, held that issues of statutes of limitation when raised as objections to submitting matters to arbitration, are to be determined by the courts and not by arbitrators. Two years later, the Fourth District Court of Appeal, relying on its previous holding in Anstis Ornstein, refused to allow an arbitration panel to determine whether or not a claim under the Florida probate code was time-barred. The court, in a rather pugnacious opinion in Estate of Vernon v. Shearson, Lehman Bros., Inc., stated:

We hold that just because parties agree to the arbitration of disputes in the execution of a contract, this does not mean that statutes of limitation are without effect. It certainly does not mean that the arbitrators should interpret the applicable statute of limitation to decide whether it applies or not.

In 1992, in a per curiam decision in Lange v. Dean Witter Reynolds, Inc., the Fourth District Court of Appeal again refused to allow arbitrators to consider the issue of statutes of limitation, relying on its opinions in Anstis Ornstein and Vernon.

In Anstis Ornstein, the Fourth District Court of Appeal was not required to consider the applicability and effect of the FAA because it was a non-securities case. Nor was it required to consider that most federal courts, in construing their role under the FAA, have usually refused to determine issues of statutes of limitation, and referred such issues to arbitration.

211. 554 So. 2d 18 (Fla. 4th Dist. Ct. App. 1989).
212. Id. at 19.
213. Id.
215. Id. at 1170.
217. Id.
218. See, e.g., Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114 (2nd Cir. 1991); Hanes Corp. v. Millard, 531 F.2d 585 (D.C. Cir. 1976); Titan Group, Inc. v. Anne Arundel County, 588 F. Supp. 938 (D. Md. 1984), aff'd, 749 F.2d 32 (4th Cir. 1984). The Eleventh Circuit has adopted the rationale of the Second Circuit's Wagoner opinion. See Belke v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 693 F.2d 1023 (11th Cir. 1982). Generally, the rationale is that statutes of limitation are affirmative defenses and do not go to the issue of whether or not the parties agreed to arbitrate. See generally Wagoner, 944 F.2d at 121 (where the rule is that "it is up to the arbitrators, not the court, to decide the validity of time-bar defenses."). But cf. Lawler v. Dean Witter Reynolds, Inc., Case No.: 91-136-CIV-FTM-17D (M.D. Fla. 1992):
In *Vernon* (and presumably *Lange*), however, the Fourth District Court of Appeal directly confronted the dictates of the FAA, as well as the decisions of the federal courts construing same. Not only did the *Vernon* court find exception to the general application of the FAA in cases of statutes of limitation arising under state probate law, its strong dicta indicated a disinclination to apply the majority approach to statutes of limitation issues in general. The *Vernon* court, referring to its opinion in *Anstis Ornstein*, stated: "this court [has previously] held that it is the court's responsibility, and not that of the arbitrators, to decide whether arbitration has been time barred by statute." The court's 1992 *per curiam* decision in *Lange*, derived from a circuit court injunction of an AAA arbitration concerning "standard" securities law claims of fraud, breach of fiduciary duty, negligence and breach of contract. In *Lange*, the Fourth District affirmed the circuit court ruling without deeming the subject worthy of comment.

The position of the Fourth District has, however, by September 1993, become a rather solitary one. The Fifth District in *Victor v. Dean Witter*  

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In an action to compel arbitration under [sic] Federal Arbitration Act, [a court] generally considers no issues other than the making of the agreement to arbitrate and the failure or refusal of the other party to arbitrate, and apart from equity doctrines such as laches, which on a motion to compel arbitration the court sitting as a court of equity must take into account, all other issues of law and fact are for determination by the arbitrators.

Opinion at 3 (emphasis added) (citing *In re Ropner Shipping Co.*, 118 F. Supp 919 (D.C.N.Y. 1954). In *Lawler*, in an arbitration that was heard before the American Arbitration Association, the AAA was advised that one of the respondents filed a petition in bankruptcy two years earlier. In light of the bankruptcy proceedings, the AAA *sua sponte* temporarily suspended the arbitration. *Id.* at 2. Lawler thereafter filed a petition with the court seeking an order overruling the decision of the AAA. *Id.* The court deemed itself bound by the general rule that it could inquire only into issues of the making of the agreement to arbitrate and the failure of one party to arbitrate. The court, therefore, refused to reverse the arbitrators' decision, and found that "[r]eversal of the arbitrators' decision would be contrary to our national policy favoring arbitration and would undermine the authority of the arbitrators to make procedural decisions." *Id.* at 3.

220. *Id.*
Reynolds, Inc., considered and expressly rejected the Fourth District’s approach to the extent that it extended past the probate code. In the securities context, the Victor court refused to follow Vernon, noting that cases construing the court’s powers of review under the FAA require it to leave issues of statutes of limitation to the arbitrators. The Victor court also rejected an argument based on Volt, that since the arbitration agreement contained a choice of law provision specifying the application of New York law, the FAA was inapplicable. The Victor court reasoned that the application of New York law was precluded on preemption grounds since the application of New York law would have resulted in barring arbitration. Finally, while feeling constrained by the FAA and the federal cases construing it, the Victor court curiously—and in the authors’ view, correctly—expressed sympathy with Dean Witter’s argument that since “arbitrators are not frequently steeped in the law and cannot always be expected to follow its precepts. . . . [They] are wont to ignore valid statute of limitations defenses.”

The rationale of the Fifth District was quickly followed by the District Court of Appeal for the Second District in Marschel v. Dean Witter Reynolds, Inc. The Marschel court refused to allow the courts to consider the issue of statutes of limitation, stating:

[T]he Fifth District recently decided the exact issue presented in this case regarding whether the arbitrators or the court should decide time bar defenses . . . . The Fifth District concluded that the arbitrators should decide the statute of limitations issue . . . . We agree with the conclusion reached in Victor . . . .

223. 606 So. 2d 681 (Fla. 5th Dist. Ct. App. 1992), review denied, 614 So. 2d 502 (Fla. 1993).
224. Id.
225. Id. at 683.
227. Victor, 606 So. 2d at 685.
228. Id.
229. Id.
230. 609 So. 2d 718 (Fla. 2d Dist. Ct. App. 1992), review denied, 617 So. 2d 318 (Fla. 1993).
231. Id. at 720; see also Daugherty v. Dean Witter Reynolds, Inc., 618 So. 2d 802 (Fla. 2d Dist. Ct. App. 1993) (Second District Court of Appeal, relying on its holding in Marschel, summarily reversed a circuit court’s refusal to compel arbitration on statute of limitations grounds).
In April of this year, the Third District Court of Appeal joined the debate,232 siding with the Second and Fifth District Courts of Appeal in a succinct opinion in Dean Witter Reynolds, Inc. v. Clarke.233 The Clarke court stated: "The decision below that the dispute must be arbitrated is affirmed on the authority of . . . [Victor and Marschel], with which we are in complete agreement."234

Despite the Third District's agreement with the Victor and Marschel decisions, one important issue raised in both cases was resolved in opposite manners by those two courts. Both cases construed the same arbitration clause, containing a New York choice of law provision.235 The Victor court found that the choice of law provision was preempted by the FAA,236 while the Marschel court found the contract did not show an intent to apply state law and, therefore, decided that it need not determine whether New York law would conflict with the goals and policies of the FAA and, therefore, be preempted.237

Most recently, in a rather unusual written (and reported) opinion of a circuit court in Paine Webber, Inc. v. Hall,238 Judge Leroy H. Moe, of the Seventeenth Judicial Circuit in and for Broward County, a court within the jurisdiction of the Fourth District Court of Appeal, openly rejected the holdings of the Fourth District in Anstis Ornstein, Vernon and Lange and sided with the Second, Third and Fifth District Courts of Appeal holding that the question of statutes of limitation are for the arbitrators and not for the court under the Federal Arbitration Act.239 This case has apparently been appealed to the Fourth District Court of Appeal.240 Thus, the issue

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232. The Third District's position was predictable. In Miami Dolphins, Ltd. v. Cowan, 601 So. 2d 301 (Fla. 3d Dist. Ct. App. 1992), the Third District disposed of an argument in a federal labor law case seeking to preclude arbitration as time barred by the terms of a collective bargaining agreement. The Cowan court stated: "[t]hat contention is a matter to be presented to the arbitrators and is not for us to determine." Id. at 302 n.2. See also infra note 255 and accompanying text.


234. Id. But see Seaboard Surety Co. v. Cates, 604 So. 2d 570 (Fla. 3d Dist. Ct. App. 1992) (citing Anstis Ornstein Assoc. v. Palm Beach County, 554 So. 2d 18 (Fla. 4th Dist Ct. App. 1989) for the proposition that timeliness of a claim for arbitration is for the courts not the arbitrators). It is important to note, however, that this is a non-securities case to which the FAC, and not the FAA, probably applied.

235. Victor, 606 So. 2d at 682.

236. Id. at 683.

237. Marschel, 609 So. 2d at 721.


239. Id. at 97,239.

240. 5 Securities Arbitration Commentator 9, at 11 (August 1993).
has been squarely joined; the ball so to speak is in the court of the Fourth District Court of Appeal. Should the Fourth District continue in its position taken in *Anstis Ornstein, Vernon and Lange*, the issue, no doubt, will ultimately be decided in the Florida Supreme Court.

Ironically, the issue of court inquiry into statutes of limitation which the Second, Third and Fifth District courts determined to be resolved by the dictates of the federal courts in construing the FAA, may not be so clear-cut on the federal level. In *Lawler v. Dean Witter Reynolds, Inc.*, the court specifically included among the duties of a court faced with a motion to stay or compel arbitration, determination of issues of equitable defenses. Presumably, this would include laches. If courts have jurisdiction to construe laches, why not statutes of limitation? Similarly, the Eleventh Circuit has, at least nominally, widened the scope of inquiry in its recent decision in *Kelly v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, in holding that issues of *res judicata* are properly for the court and not the arbitrators. Other federal courts have, at least in part, left the door open to judicial review of statute of limitation issues and it is difficult to say that the issue is fully resolved at either level.

241. The Fourth District Court of Appeal has had ample opportunity to reverse its position. To date it has chosen not to do so. See, e.g., Investment Management & Research, Inc. v. Wylie, Appeal No.: 92-3256, pending since November 6, 1992, before the Fourth District. In *Wylie*, Judge Edward Fine of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida enjoined an arbitration proceeding on statute of limitations grounds. Investment Management & Research, Inc. v. Wylie, No. CL-92-6169-AN (Fla. 15th Cir. Ct. Oct. 20, 1992) (order on Defendant’s Motion to Dismiss). In at least two other cases, circuit courts in the Fourth District have enjoined arbitrations based on *Vernon*, see *Dean Witter Reynolds, Inc. v. Banks*, Case No.: 92-8685 AC (Fla. 15th Cir. Ct. 1992); *Dean Witter Reynolds, Inc. v. DeGroff*, Case No.: 92-00638 (Fla. 17th Cir. Ct. 1992).

242. *Case No.: 91-136-CIV-FTM-17D (M.D. Fla. 1992).*

243. *Id.* at 3.

244. 985 F.2d 1067 (11th Cir. 1993).

245. *Id.* at 1069; see also supra notes 157-61 and accompanying text.

246. See, e.g., Smith Barney, Harris Upham & Co. v. Escobar, Case No.: 91-1078-CIV-T-15A (M.D. Fla. 1991). In *Escobar*, the district court found certain claims to be time barred and enjoined defendants therein from prosecuting those claims in a pending NASD arbitration. *Id.; see also* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Gimenez (N.Y. Sup. Ct.) N.Y.L.J., Sept. 24, 1992. In *Gimenez*, a New York court was asked to consider, *inter alia*, whether or not arbitration between a broker and its disgruntled customer was barred by the statute of limitations. The New York court, finding that the matter was governed by the FAA, specifically referred the issue of statutes of limitation to the arbitrators. Interestingly, the New York court refused to decide that the FAA and federal law applied since securities transactions, including the mailing of monthly account statements and confirmations, involve interstate commerce. Rather, the court found federal law applicable on the grounds of
Another major issue confronting state courts in considering motions to compel or stay arbitration during 1992-1993, is the issue of waiver. The courts have ruled that, while parties may agree to arbitrate, a party seeking to compel arbitration may waive the right by taking actions inconsistent with the right to arbitrate. The general rule was clearly enunciated in *Mike Bradford & Co. v. Gulf States Steel Co.*: “[where] a party to a contract, containing a provision for arbitration . . . commences suit, or takes other inconsistent action therewith, he will be held to have waived his rights to arbitration.”

This rule has been consistently followed by the Florida courts and has been specifically adopted by the Florida Supreme Court in *DeSantis*, 614 So. 2d 7 (Fla. 4th Dist. Ct. App. 1993). In *DeSantis*, Judge Anstead questioned the continuing viability of the Florida Supreme Court decision in *Damora v. Stresscon International, Inc.*, 324 So. 2d 80 (Fla. 1975), which held that an agreement to arbitrate in another state will not be enforced in Florida upon the authority of section 682.02 of the Florida Statutes. In *DeSantis*, Judge Anstead stated:

> I do not believe the policy reasons underlying the *Damora* decision remain valid, and hope both the legislature and the Florida Supreme Court would revisit the issue. When parties agree to arbitrate their disputes, even in another state, there is no valid reason why Florida courts, if properly called upon to do so, should not enforce the parties’ agreement to the extent that the courts have jurisdiction over the parties.

*DeSantis*, 614 So.2d at 8.


248. *Id.* at 913.

249. See, e.g., *Finn v. Prudential-Bache Sec., Inc.*, 523 So. 2d 617, 618 (Fla. 4th Dist. Ct. App.), *review denied*, 531 So. 2d 1354 (Fla. 1988); R.W. Roberts Constr. Co. v. Masters
In Bradford, and its progeny, the courts have made clear that a party claiming waiver of arbitration must demonstrate: (1) knowledge of an existing right to arbitrate; and (2) commencement of suit or other acts inconsistent with the right. In *Finn v. Prudential-Bache Securities, Inc.*, the Fourth District Court rejected a claim that in order to find a waiver of arbitration, a court must not only find knowledge and inconsistent acts, but also prejudice to the party opposing arbitration. The *Finn* court stated: "prejudice must be shown only where there is a finding of waiver based upon delay in assertion of one's right. A showing of prejudice is not required if waiver is based on inconsistent acts." The *Finn* rule seems to be one of lack of ambiguity; that is, the actions of one claimed to have waived arbitration are not ambiguous but are clearly inconsistent with that right and clearly reflect knowing waiver.


251. *Bradford*, 184 So. 2d at 915; *Klosters*, 280 So. 2d at 681.

252. 523 So. 2d 617 (Fla. 4th Dist. Ct. App. 1988).

253. Id. at 619.

254. Id. at 619-20.

255. *See*, e.g., Rosen v. Shearson, Lehman Bros., Inc., 534 So. 2d 1185, 1187 (Fla. 3d Dist. Ct. App. 1988), *review denied*, 514 So. 2d 200 (Fla. 1989) (affirmative selection of a course of action-litigation in the court-runs counter to the very purpose of arbitration); Lapidus v. Arlen Beach Condominium Ass'n, Inc., 394 So. 2d 1102, 1103 (Fla. 3d Dist. Ct. App. 1981) (manifest acceptance of the judicial forum). Several cases have held that commencing suit or answering a complaint is sufficient to waive arbitration. *Ojus Indus.*, 221 So. 2d at 782; *Gettles*, 276 So. 2d at 840; *King*, 352 So. 2d at 1235; Hardin Int'l, Inc. v. Firepak, Inc., 567 So. 2d 1019 (Fla. 3d Dist. Ct. App. 1990); *see also Handmacher v. Campagna*, 621 So. 2d 445 (Fla. 4th Dist. Ct. App. 1993). The Fourth District Court of Appeal affirmed *per curiam* an order from the Fifteenth Judicial Circuit denying appellant's motion to stay the lower court proceedings and compel the matter to arbitration. In *Handmacher*, the plaintiff filed a complaint alleging wrongdoing against her former investment adviser, its two principals and the broker dealer through whom her trades were placed by the advisory company. The plaintiff and three of the defendants agreed to arbitration of their dispute. The fourth defendant objected claiming that by filing her complaint in circuit court, the plaintiff had waived her right to arbitrate. The circuit court agreed, and the Fourth District affirmed this ruling on appeal. *Handmacher*, 621 So. 2d at 445.
The issue of the necessity of showing prejudice, where waiver of arbitration is based merely on delay in asserting the right to arbitrate, apparently left open in *Finn*, has been the subject of debate among the district courts of appeal during the period 1992-1993. In a case involving federal labor law, *Miami Dolphins, Ltd. v. Cowan*, the Third District held that in cases of delay, a party opposing arbitration must additionally demonstrate that he was prejudiced by the inconsistent acts (delay). The *Cowan* court, recognizing that the case involved federal labor law, applied federal substantive law to the issue of waiver of arbitration. Relying on decisions of various federal circuit courts, and the now familiar litany that doubts concerning arbitration are to be resolved in favor of arbitrability, the court found no showing of prejudice caused by the delay in asserting a right to arbitration, and referred the matter to arbitration.

In 1993, the Second District Court of Appeal apparently threw down the gauntlet, challenging the Third District’s *Cowan* decision. In *Donald & Co. Securities, Inc. v. Mid-Florida Community Services, Inc.*, the Second District refused to require a showing of prejudice in order to conclude that arbitration had been waived by inconsistent acts. The *Donald & Co.*, court recognized the applicability of the FAA. Nevertheless, the court reasoned that since the United States Supreme Court had not ruled on the necessity of showing prejudice, and since Florida courts are bound only by the United States Supreme Court in interpreting acts of Congress, it was free to ignore lower federal court precedent and apply the law of Florida. The Second District then ruled that following Florida law: "a party may waive arbitration by actively participating in a law suit or by taking action inconsistent with that right. . . . [I]t is not necessary to show prejudice to establish waiver. . . ."

257. Id. at 302.
258. Id.
259. Id.
260. Id. (citing Dryer v. Los Angeles Rams, 709 P.2d 826 (1985)).
262. Id. at 194.
263. Id. at 193.
264. Id. The Second District did note that at least one federal court had held that waiver may be found absent a showing of prejudice. See National Found. for Cancer Research v. A.G. Edwards & Sons, 821 F.2d 772, 775 (D.C. Cir. 1987).
265. *Donald & Co.*, 620 So. 2d at 194.
In so holding, the court specifically noted that the Third District had ruled to the contrary in *Cowen*.

The court did conclude, however, that while the facts in *Cowen* demonstrated no prejudice, the court could infer prejudice from the facts of *Donald & Co. sub judice*. It was careful to point out, however, that it was following the rule that a showing of prejudice was not necessary.

Curiously, the Second District's decision in *Donald & Co.* makes almost no reference to its decision of the prior year in *Bared & Co. v. Specialty Maintenance & Construction, Inc.*, a non-securities case that apparently did not involve construction of the FAA or a review of the federal law on waiver of arbitration. In *Bared*, the Second District succinctly found waiver of arbitration by the filing of an answer.

The Florida courts in 1992-1993 have considered several other issues in the context of motions to compel or stay arbitration. These include determinations of what issues are properly the subject of arbitration, who may demand arbitration, and whether disputes arising prior to the making of the arbitration agreement or subsequent to the conclusion of that agreement are properly arbitrable. In *Stratton Oakmont, Inc. v. Goldstein*, the court confronted the issue of whether an introducing broker may validly enforce an arbitration agreement entered into between a customer and a clearing broker.

In *Stratton*, the customer had entered into a customer account agreement with the clearing broker, Bear Stearns & Co., which provided that disputes between them were to be resolved in

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266. *Id.*

267. *Id.*

268. *Id.*


270. *Id.* at 3.

271. *Id.*

272. 615 So. 2d 183 (Fla. 3d Dist. Ct. App. 1993).

273. *Id.* The court explained: "The "introducing broker" deals directly with the customer and relays orders to the "clearing broker," who has access to the relevant stock exchanges." *Id.* Introducing brokers use the services of clearing brokers in order to gain access to exchanges in which they may not be members. Frequently, in such arrangements, the customers are required to contract directly with and be financially responsible to the clearing broker. Typically, introducing brokers guarantee the accounts of their customers to the clearing broker.
arbitration. 74 Another part of the agreement provided that "[y]ou agree that your broker (including Bear Stearns & Co., Inc.) is a third party beneficiary of this agreement, and that the terms and conditions hereof, including the arbitration provision, shall be applicable to all matters between or among any of you . . . ." 75 Finding that the introducing broker, Stratton, was a third party beneficiary of the contract, and that the contract clearly covered the controversy between the parties, the Third District reversed the trial court decision refusing to compel arbitration and remanded with directions to refer the matter to arbitration. 76

Florida courts were also asked to construe what claims were properly determined in arbitration. In Pierce v. J.W. Charles-Bush Securities, Inc., 77 the court readily determined that parties could agree to grant arbitrators authority to award attorney fees stating: "If civil rights, antitrust and securities fraud claims are not inappropriate for arbitration, it is very difficult to imagine a civil claim in which an agreement to arbitrate would not be enforced." 78 Perhaps mindful of the Fourth District's admonitions in Pierce, the circuit court for Indian River County, in an action brought before it, issued an order compelling arbitration. 79 In Noe v. Dean Witter Reynolds, Inc., 80 the Fourth District Court of Appeal reversed the trial court's order compelling arbitration. The court stated in a succinct per curiam opinion: "We reject appellees' argument that subsequent federal cases require us to depart from the holding expressed in Montgomery Distributors." 81 In Montgomery Distributors, Inc. v. G. Heileman Brewing Co., Inc., 82 the Fourth District Court of Appeal held that: (1) antitrust claims were not a proper subject for arbitration; and (2) the doctrine of permeation did not require a stay of arbitration of breach of contract claims pending a trial on antitrust issues. 83 The doctrine of permeation has subsequently been rejected on the federal level. 84 To the extent that the

274. Id.
275. Id.
276. Stratton, 615 So. 2d at 184.
278. Id. at 628; see supra notes 176-82 and accompanying text.
281. Id. (citing Montgomery Distrib., Inc. v. G. Heileman Brewing Co., Inc., 505 So. 2d 443 (Fla. 4th Dist. Ct. App. 1986)).
282. 505 So. 2d 443 (Fla. 4th Dist. Ct. App. 1986).
283. Id. at 445.
284. See, e.g., Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213 (1985). If arbitrable claims were so intertwined with nonarbitrable claims that the arbitrators could not reasonably
Fourth District’s decision in Noe reflects a conflict with its own decision in Pierce, it is an anomaly.\textsuperscript{285} In Bachus & Stratton, Inc. v. Mann,\textsuperscript{286} the Fourth District compelled arbitration of Title VII sex discrimination and various common law claims against a broker/dealer and its registered representatives.\textsuperscript{287} The court also compelled arbitration of the claims against the broker/dealer’s parent company, holding that the issue of whether it was vicariously liable for the acts of its agents is properly referable to arbitration.\textsuperscript{288}

In Bachus & Stratton, the Fourth District was also required to consider the issue of the arbitrability of claims which arose after the termination of appellee’s employment by the appellants, and thus, arguably after the extinction of the agreement between them to arbitrate.\textsuperscript{289} The Fourth District upheld the trial court’s ruling that the arbitration agreement did not apply to claims which arose after the termination of appellee’s employment.\textsuperscript{290}

The Fourth District, without reference to same, apparently followed its holding in Bachus & Stratton in its decision in Chelsea Street Securities, Inc. v. Cawthon,\textsuperscript{291} issued on the same day. In Chelsea, the Fourth District in a \textit{per curiam} opinion affirmed, without opinion, a lower court’s refusal to compel arbitration of a suit by a former employee of a securities brokerage firm alleging slander and infliction of emotional distress.\textsuperscript{292} The alleged conduct giving rise to the suit apparently occurred some ten days after the employee resigned.\textsuperscript{293}

\begin{footnotes}
\footnotetext{285}{Since the circuit court ruling in Noe is unreported, and the Fourth District opinion sheds no light on the issues considered by the circuit court, it is arguable that the decision is unique to its facts and does not reflect a retreat from the court’s position in Pierce. It is important to note, however, that the court’s broad statement in Pierce may not have been entirely accurate. In its decision in Mitsubishi, 473 U.S. 614 (1985), the Supreme Court noted that its ruling that antitrust claims were arbitrable was limited to cases involving international arbitrations. \textit{See supra} note 184.}\footnotetext{286}{18 Fla. L. Weekly D1275 (Fla. 4th Dist. Ct. App. May 19, 1993).}\footnotetext{287}{\textit{Id.}}\footnotetext{288}{\textit{Id.; see also} Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698 (11th Cir. 1992) (compelling arbitration of Title VII claims); \textit{supra} notes 163-74 and accompanying text.}\footnotetext{289}{Bachus, 18 Fla. L. Weekly at D1275.}\footnotetext{290}{\textit{Id.}}\footnotetext{291}{18 Fla. L. Weekly D1272 (Fla. 4th Dist. Ct. App. May 19, 1993).}\footnotetext{292}{\textit{Id.}}\footnotetext{293}{\textit{Id.}}
\end{footnotes}
Notwithstanding his concurrence in *Bachus & Stratton*, which held that claims arising after termination of employment were not subject to arbitration, Judge Farmer of the Fourth District Court of Appeal, inexplicably wrote a scathing dissent in *Chelsea*. Judge Farmer reasoned that the arbitration clause at issue in *Chelsea*, even though it was identical to the arbitration clause in *Bachus*, was in fact broad enough to encompass post employment disputes, so long as they arose “out of, or in connection with, the business of the firm.” Judge Farmer noted the liberal federal policy favoring arbitration set forth in the FAA and the case law requiring that all doubts be resolved in favor of arbitration rather than against it. Relying on the court’s previous holding in *Pierce*, Judge Farmer stated: “Manifestly, there is nothing inherent in slander or infliction of emotional distress claims that precludes arbitration. Or, to put it another way, there is nothing about such claims that requires a court in preference to an arbitration forum.”

In summary, Judge Farmer stated:

I do note that the employee’s causes of action all arose after his employment relationship with the firm had already terminated. I do not understand why the date of the employee’s termination of employment might be thought to determine whether the claims are arbitrable.

In light of his same day concurrence in the *Bachus* decision, which held directly to the contrary, Judge Farmer’s *Chelsea* dissent is an apparent anomaly.

In *Prudential-Bache Securities, Inc. v. Segal*, the Fourth District was confronted with a similar issue to that raised in *Bachus & Stratton* and *Chelsea*. In *Segal*, the brokerage firm sought retroactive application of an agreement to arbitrate. The Fourth District Court of Appeal affirmed
the lower court ruling refusing to apply the subsequent arbitration agreement to pre-employment disputes.\textsuperscript{302}

The second major focus of judicial review of arbitration decisions in the period 1992-1993 in Florida, has been the extent, manner and grounds for judicial review of arbitration decisions. This category can be loosely termed post-arbitration review. In this context, Florida courts on both the state and federal level have considered issues relating to the vacatur of arbitration awards as well as the grounds and standards of review to be applied in doing so. Three principal cases concerning this issue reached the Eleventh Circuit in 1992-1993. The first two were \textit{Ainsworth v. Skurnick},\textsuperscript{303} ("\textit{Ainsworth II}") a case having its genesis in the Southern District of Florida,\textsuperscript{304} and \textit{Brown v. Rauscher Pierce Refsnes, Inc.}\textsuperscript{305} Brown involved a review of a decision of the District Court for the Middle District of Florida.\textsuperscript{306} Curiously, both \textit{Ainsworth} and \textit{Brown} involved the construction of Florida Statutes section 517.12 relating to the unregistered sale of securities in Florida.\textsuperscript{307} The third case, \textit{Robbins v. Day},\textsuperscript{308} arose out of the vacatur of an arbitration award by the United District Court for the Northern District of Alabama in a case primarily concerning Alabama blue sky violations.\textsuperscript{309}

The FAA makes specific provision for vacatur of arbitration awards by

\begin{footnotesize}
\textsuperscript{302} Id. The court held that the broker's subsequent agreement to arbitrate, which was executed incident to the broker's registration after his employment dispute with the brokerage firm, does not constitute an agreement to arbitrate disputes arising prior to registration. \textit{Id.} The court found that "[[the rules of the NASD and NYSE do not provide that a registrant's agreement to arbitrate disputes applies retroactively.” \textit{Segal}, 603 So. 2d at 689.

\textsuperscript{303} 960 F.2d 939 (11th Cir. 1992), \textit{cert. denied}, 113 S. Ct. 1269 (1993).

\textsuperscript{304} \textit{Id.}

\textsuperscript{305} 7 Fla. L. Weekly Fed. C508 (11th Cir. July 2, 1993).

\textsuperscript{306} \textit{Id.; see Brown v. Rauscher Pierce Refsnes, Inc., [1992] Fed. Sec. L. Rep. (CCH) \$ 96,935, at 93,956 (M.D. Fla. 1992), wherein Judge Elizabeth Kovachevich of the Middle District issued a typically well reasoned and well written opinion which thoroughly summarizes the law to that time of judicial review of arbitration decisions in the Eleventh Circuit.

\textsuperscript{307} \textit{Brown}, 7 Fla. L. Weekly Fed. at C508; \textit{Ainsworth}, 960 F.2d at 939.

\textsuperscript{308} 954 F.2d 679 (11th Cir.), \textit{cert denied}, 113 S. Ct. 201 (1992).

\textsuperscript{309} \textit{Id.} The district court vacated an arbitration award in the amount of $325,000 since the arbitrators' decision did not explain their rationale for determining liability or their methodology for imposing damages. \textit{Id.} at 681. Claimants originally sought 4.2 million dollars in actual damages, 12 million in punitive damages and 12.6 million dollars in RICO damages, attorneys' fees, costs and expenses totalling over 26.8 million dollars in damages. \textit{Id.} at 681 n.1.
\end{footnotesize}
the district courts in section 10 thereof. However, the grounds provided by section 10 are extremely limited. Specifically, section 10 enumerates four grounds for vacating an arbitration award:

1. Where the award was procured by corruption, fraud, or undue means.
2. Where there was evident partiality or corruption in the arbitrators, or either of them.
3. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing . . . or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
4. Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Given the limited grounds for vacatur of arbitration awards specified in United States Code Title 9, section 10, it is perhaps not surprising that several federal courts have fashioned other grounds to vacate awards. The first of these judicially crafted means allows vacatur if the arbitrators' award is "arbitrary or capricious." Another ground is when a court finds an award "violates public policy." Another ground cited by the courts is that the award is "irrational." The final method crafted by the courts to vacate arbitration awards is upon a finding that the award was rendered in "manifest disregard of the law.

The Eleventh Circuit has been considering the manifest disregard standard without specifically adopting same since its decision in O.R. Securities, Inc. v. Professional Planning Associates, in 1988. Given the Eleventh Circuit's relatively long term flirtation with the manifest disregard standard, it was inevitable that a district court below would vacate an arbitration award on the grounds of manifest disregard of the law, and

311. Id.
312. Id.
314. See Delta Airlines, Inc. v. Air Line Pilots Ass'n Int'l, 861 F.2d 665 (11th Cir. 1988).
316. O.R. Sec., Inc. v. Professional Planning Assocs. Inc., 857 F.2d 742 (11th Cir. 1988). In O.R. Sec., the Eleventh Circuit discussed the manifest disregard standard noting that it had never adopted same. Id. at 747.
317. 857 F.2d 742 (11th Cir. 1988).
318. Id.; see Raiford, 903 F.2d at 1412-16.
that the decision would be appealed to the Eleventh Circuit. In *Ainsworth v. Skurnick* ("Ainsworth I"), the District Court for the Southern District of Florida did just that and the case was appealed to the Eleventh Circuit.\(^{319}\) In *Ainsworth I*, the Eleventh Circuit reviewed an order of the Southern District vacating an arbitration award in which a customer sued a broker alleging *inter alia* that the broker was not registered to sell securities in Florida, and that, despite the fact that his office was in New York, his effectuation of the Florida customer's orders constituted the sale of securities in Florida by an unregistered person, in violation of Florida Statutes section 517.12.\(^{320}\) The arbitration panel refused to award damages. On appeal, the district court specified the elements of a section 517.12 violation, including an instruction that a finding of scienter was unnecessary and remanded to the arbitrators for a clarification of their decision.\(^{321}\) The panel responded that although the broker had acted negligently, the claimant had suffered no damages, and no violation of section 517.12 had been proven.\(^{322}\) The district court, reviewing the transcript of the arbitration proceeding *de novo*, determined that there had clearly been a violation of Florida Statutes section 517.12, and vacated the arbitration award as being in manifest disregard of the law.\(^{323}\) On appeal, the Eleventh Circuit, was unable to ascertain the status of the law concerning this statute from Florida court decisions, and therefore certified, in *Ainsworth I*, the question of whether the broker's conduct constituted a violation of section 517.12 to the Florida Supreme Court.\(^{324}\) The Florida Supreme Court held that the District Court had been correct.\(^{325}\) The case again went to the Eleventh Circuit.\(^{326}\)

In *Ainsworth II*, the Eleventh Circuit, armed with the opinion of the Florida Supreme Court, affirmed the district court’s vacatur,\(^{327}\) but rejected the court’s use of the manifest disregard standard, again noting that it had never adopted that standard as a ground for vacating arbitration awards.\(^{328}\) The *Ainsworth II* court did adopt the arbitrary or capricious standard as a non-statutory ground upon which courts could, under proper circumstances,
vacate an arbitration award.\textsuperscript{329} Defining the arbitrary or capricious standard as one in which "a ground for the arbitrator's decision cannot be inferred from the facts of the case,"\textsuperscript{330} the court explained that, since the district court correctly instructed the arbitrators on the law, and they nevertheless refused to apply it properly, the refusal to grant damages was arbitrary and capricious.\textsuperscript{331} The \textit{Ainsworth II} court stated: "In this case, it is not a question of deciding the law and getting it wrong or for some reason disregarding the law. The decision was simply an apparent arbitrary and capricious denial of relief with no factual or legal basis."\textsuperscript{332}

Prior to \textit{Ainsworth II}, the Eleventh Circuit reviewed the district court's decision in \textit{Robbins}, which held the actions of an arbitration panel to be in manifest disregard of the law since a review of the record supported a finding of fraud, and yet the arbitrators refused to apply a mandatory damages provisions of the Alabama Securities Act.\textsuperscript{333} The Eleventh Circuit, however, reversed.\textsuperscript{334} The court stated: "[f]ollowing Eleventh Circuit precedent, we decline to adopt the manifest disregard of the law standard."\textsuperscript{335} The \textit{Robbins} court did not completely reject the idea of judicial grounds for vacatur; instead, it declared that the court could look beyond the statutory grounds of the FAA "[o]nly after it is determined that there could be no proper basis for the award . . . ."\textsuperscript{336}

Relying on the Eleventh Circuit's pronouncement in \textit{Robbins}, the district court in \textit{Brown v. Rauscher Pierce Refsnes, Inc.},\textsuperscript{337} found that the arbitrators below had a "proper basis" for their award since the issue of what constituted a violation of Florida Statutes section 517.12 was not clear at the time of the \textit{Brown} arbitration, and the arbitrators' interpretation of the law was reasonable.\textsuperscript{338} Although the Eleventh Circuit affirmed the district court finding, it noted that by inquiring into whether the arbitrators had a

\textsuperscript{329} \textit{Id.}
\textsuperscript{330} \textit{Id.} at 941 (quoting \textit{Raiford}, 903 F.2d at 1413).
\textsuperscript{331} \textit{Ainsworth II}, 960 F.2d at 941.
\textsuperscript{332} \textit{Id.}
\textsuperscript{335} \textit{Id.} at 684. As discussed above, it is not at all clear to the authors and, presumably to the district court in \textit{Robbins}, that this was the case. \textit{See} \textit{O.R. Sec.}, 857 F.2d at 42; \textit{Raiford}, 903 F.2d at 1410.
\textsuperscript{336} \textit{Robbins}, 954 F.2d at 684.
\textsuperscript{338} \textit{Id.} at 93,962.
proper basis, the district court abused its discretion. The Eleventh Circuit instructed that, since the arbitrators stated the rationale for their decision, the district court should have confined its consideration to appellant's contentions that the award was arbitrary, capricious and contrary to public policy.

If any bright line can be determined from these cases, it is that the Eleventh Circuit has nominally rejected the manifest disregard standard for judicial review of arbitrations and directed the district courts to be extremely circumspect in vacating arbitration awards. To this end, the court in Robbins directed the district courts to review arbitration decisions under the abuse of discretion standard; that is, to uphold arbitration decisions if any basis can be inferred for the arbitrators' decision, while warning that it would review any vacatur of an arbitration award de novo. While the dictates of the Eleventh Circuit are far from clear, by its failure to reject all judicially crafted grounds for review of arbitration decisions, and to allow vacatur solely on the grounds provided in 9 U.S.C., section 10, the court arguably encouraged the district courts to continue vacating arbitration awards under proper circumstances.

One other decision of the federal courts concerning post-arbitration review is of note. Again, the opinion was written by Judge Elizabeth A. Kovachevich of the Middle District of Florida. In In re Arbitration between Prudential-Bache Securities, Inc. & Depew, the court vacated an arbitration award of attorney fees awarded by an AAA panel. In Depew, claimants alleged their investment accounts had been mishandled in violation of various statutes, including section 517.211(6) of the Florida Statutes and Securities and Exchange Commission Rule 10b-5, and alleged various common law causes of action. In their statement of claim, the Depews requested attorneys fees for the 10b-5 allegations and for violation of chapter 517, but did not request attorney fees for the common law causes. Notwithstanding, the arbitrators awarded damages and attorney fees despite finding the broker had committed no statutory viola-
The court, noting that under the American Rule, attorneys fees awards are improper unless provided by statute or contract, also recognized that even if an arbitration clause in a contract is ambiguous, but can be read to include an award of attorney fees, the court will not vacate an arbitration award of attorney fees made under the contract. The court determined that the Depew panel found no statutory violations and, therefore, it could not have awarded attorney fees pursuant to the statute. It also found that the contract did not provide for attorneys fees and held that even though the contract incorporated AAA rules, and that Rule 43 of the AAA arguably provides for the award of attorneys fees, the Rule failed to grant the arbitrators the power to award attorneys' fees. Presumably the court found that such a tortured construction of the contract failed to demonstrate a clear intent of the parties to empower the arbitrators to award attorneys fees.

The state courts have also reviewed arbitration decisions and awards during the period 1992-1993 and have focused on many of the same issues as the federal courts. For example, several cases have addressed the issue of the propriety of arbitrators awarding attorneys fees. In Pierce v. J.W. Charles-Bush Securities, Inc., the Fourth District Court of Appeal concluded that there was no reason not to allow parties to submit attorneys' fees claims to arbitration if they so desired since applicable statutes do not evidence a legislative intent to require that all attorneys fees be determined by a judge. In a well reasoned opinion, Judge Farmer explained that the court’s decision in Pierce, allowing for an award of attorneys fees, was a retreat from the court’s prior opinion in Loxahatchee River Environmental Control District v. Guy Villa & Sons, Inc. In Loxahatchee River, the court construed the plain language of section 682.02 of the Florida Statutes, and deemed that arbitrators could not award attorneys fees. In Pierce, Judge Farmer noted the change at both the federal and state level in the judicial view of arbitration since the time of the Loxahatchee decision.

347. Id.
348. Id.
349. Id.

350. Depew, 814 F. Supp. at 1083-84 (stating, "Rule 43 does not grant unlimited power to the arbitrators. The rule allows arbitrators to grant only those awards which are 'within the scope of the agreement between the parties.'").

352. Id. at 630-31.
354. FLA. STAT. § 682.02 (1975).
355. Loxahatchee River Envtl. Control Dist., 371 So. 2d at 1113.
and determined that if ambiguous, statutes should be construed to favor arbitration.\(^{356}\) The court instructed, "[a]ny legislative mandate to force contracting parties to a courtroom for legal fees should thus be stated in language far more clearly requiring that result than the current text of FAC Section 682.18(1)."\(^{357}\) Based on this reasoning, the *Pierce* court concluded that appropriately read, the Florida Arbitration Code ("FAC") precludes the arbitrators from awarding attorney fees "but not when the parties have specifically agreed to submit the fee issue to arbitration."\(^{358}\) The court questioned whether, in light of the clear federal mandate favoring arbitration, *any* civil claim could not be subject to arbitration upon the agreement of the parties.\(^{359}\) It is significant to note that despite the fact that *Pierce* involved a typical securities related arbitration between a customer and a broker, neither party argued the applicability of the FAA. Because the record was silent, the court, although itself remarking upon the likely applicability of the FAA, considered the question solely under Florida law.\(^{360}\) Florida courts, during 1992-93 entertained several issues concern-

\(^{356}\) *Pierce*, 603 So. 2d at 629.

\(^{357}\) Id. at 630.

\(^{358}\) Id. at 631.

\(^{359}\) Id. at 628. See also supra text accompanying notes 177-83.

\(^{360}\) Id. It appears that appellants got lucky. While the *Pierce* court recognized that "[u]nder the previously cited Supreme Court decisions, we have little doubt that Congress has barred the states from refusing to enforce arbitration awards under . . . [the FAA] which determine entitlement to attorney's fees." *Pierce*, 603 So. 2d at 628. Appellants apparently chose not to seek confirmation of the award under the FAA and, thus, were required to hope that the Fourth District would reverse its prior *Loxahatchee* decision. Fortunately for them, that is precisely what the court did. *Id.* Three months later, in *Paston & Coffman, M.D.S., P.A.,* v. *Katzen*, 610 So. 2d 512 (Fla. 4th Dist. Ct. App. 1992), the Fourth District, in a non-securities case, followed its judgment in *Pierce*, by upholding an arbitration award of attorney fees based upon the arbitrators' determination that the parties stipulated during the hearing that the arbitrators could determine the issue of attorneys' fees. The Second District Court of Appeal, on the other hand, in *Fridman v. Citicorp Real Estate, Inc.*, 596 So. 2d 1128, 1129 (Fla. 2d Dist. Ct. App. 1992), determined that under the FAC, arbitrators were not empowered to award attorney fees. On motion for rehearing, the Fourth District Court of Appeal reviewed its decision in *Paston & Coffman, M.D.S.*, and amended its determination to certify that its decision was in conflict with *Fridman*, apparently setting the stage for a determination by the Florida Supreme Court of the issue. *Paston & Coffman M.D.S., P.A.*, 610 So. 2d at 513. Finally, in *Consolidated Southern Security, Inc. v. Geniac & Associates, Inc.*, 619 So. 2d 1027 (Fla. 2d Dist. Ct. App. 1993), the Second District again, in a non-securities case, confronted the issue of how attorneys fees should be awarded by the trial court. Noting that in the case before it one party prevailed on six of seven claims, the court instructed that the attorneys fees should be considered for each claim including an allocation of time spent on all claims and that the trial court erred in attempting to net out fees. *Id.* at
ing vacatur and the standards to be applied. In *Lee v. Dean Witter Reynolds, Inc.*, the Second District Court of Appeal refused to conclude that an AAA arbitration panel’s denial of a continuance constituted arbitrator misconduct such that under section 10(c) of the FAA, its decision should be reversed by the court. The first question confronted by the *Lee* court was whether on issues of vacatur, the FAA preempted or superseded the FAC. The court quickly resolved this issue stating, “[a]s this court has previously determined, the Federal Arbitration Act supersedes the Florida Arbitration Code when interstate commerce is involved.”

The *Lee* court then determined that the trial court exceeded its authority, in taking evidence which went beyond that presented to the arbitrators, in its inquiry into the reasons for a requested continuance. The court stated: “[t]he trial court was not authorized to delve beyond [the] . . . record and second guess the AAA on evidence which the AAA did not have the benefit of when it made its ruling.” Instead, the Second District Court of Appeal determined that the AAA’s refusal to grant a continuance was not, based on the limited information presented to it, an “abuse of discretion, i.e. ‘misconduct,’ on the part of the AAA.” Thus, the Second District made clear that the trial court’s proper role in reviewing arbitrations is not *de novo* review but rather a summary review of the record to determine whether or not there had been an abuse of discretion.

1028. The court instructed that the trial court must consider each claim separately and account for time spent by the opposing party on the claim on which it prevailed as well. *Id.* at 1028-29.


362. *Id.* at 784-85.

363. *Id.* at 785.

364. *Id.*; see also supra notes 230-31 and accompanying text; Marschel v. Dean Witter Reynolds, Inc., 17 Fla. L. Weekly D2722; Daugherty v. Dean Witter Reynolds, Inc., (Fla. 2d Dist. Ct. App. Dec. 2, 1992); 18 Fla. L. Weekly D1385 (Fla. 2d Dist Ct. App. June 4, 1993). Thus, it appears that in the Second District Court of Appeal, at least, securities cases will be solely governed by the FAA. *See id.* The court’s summary determination of this issue perhaps ignores the instruction of the United States Supreme Court in Volt Info. Sciences, Inc. v. Trustees of Leland Stanford Junior Univ., 489 U.S. 468 (1988), to the effect that the FAA is only intended to preempt state law when that state law offends the congressional purposes behind the FAA. *Id.* at 477.

365. *Lee*, 594 So. 2d at 785.

366. *Id.* The state court’s decision clearly reflects the limited scope of review available to trial courts on issues of vacatur. *See id.*

367. *Id.*

368. *Id.*
The scope of review of arbitration decisions by the circuit courts was also the subject of the Third District Court's opinion in Okun v. Litwin Securities, Inc. In Okun, the court enunciated perhaps the most stringent standard found in any of the decisions on the state or federal level construing the scope of review of arbitration awards. Recognizing that the FAC provided five grounds for vacating an arbitration award, the court pronounced: "[i]n the absence of one of those five grounds, the trial court does not have the authority to vacate the arbitration award." Thus, the Third District Court of Appeal appears to have eliminated judicially crafted grounds for vacatur entirely. While the authors are unaware of any other court applying quite such a stringent standard, and it is important to note that the Okun court was not faced with a judicially created basis for vacatur, the concept of narrow review of arbitration awards prevails both on the federal and state level.

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370. Id.
371. Section 682.13(1) of the Florida Statutes provides in pertinent part:
(1) Upon application of a party, the court shall vacate an award when: (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.

FLA. STAT. ANN. § 682.13(1) (1991). The grounds for vacatur under section 682.13 Florida Statutes are similar to those under 9 U.S.C. § 10 of the FAA. The most notable difference is subsection (e) of section 682.13(1) allowing the court on motion to vacate to again determine the validity of the making of an agreement to arbitrate.
372. Okun, 619 So. 2d at 995.
373. Id. But compare the trial court’s determination in Raymond James & Assoc., Inc. v. Deutsch, Case No. 92-08793 (Fla. 17th Cir. Ct. April 28, 1993), in which the court conducted a full evidentiary hearing (and allowed depositions) in vacating an arbitral decision on grounds of arbitral bias or “evident partiality.” It is logical that a more in depth court inquiry is appropriate where the issue is bias.
374. See, e.g., Applewhite v. Sheen Fin. Resources, Inc., 608 So. 2d 80 (Fla. 4th Dist. Ct. App. 1992). In Applewhite, the circuit court upheld an injunction granted by an arbitration panel enforcing a non-competition agreement and employment contract between a broker and its registered representatives. Id. While the trial court did modify the
Finally, state courts have been asked during 1992-1993 to consider and determine the timing of review of an order vacating arbitration. In Raymond James & Associates, Inc. v. Deutsch, the Fourth District dismissed the appeal of a lower court’s vacatur of an arbitration award, on grounds of evident partiality or bias of the arbitrator, holding that the vacatur order was non-final and therefore not appealable on an interlocutory basis. The Fifth District Court of Appeal, in a non-securities case, also considered the issue of whether a trial court order vacating an arbitration award and ordering a re-hearing is a final appealable order. In Central Florida Police Benevolent Ass’n, Inc. v. City of Orlando, the court, following the Fourth District Court of Appeal, ruled that it was not a final appealable order.

An emerging area of judicial concern in Florida involves what has come to be known as the “economic loss rule.” The economic loss rule had its genesis in Florida in a case certified to the Supreme Court by the Eleventh Circuit entitled AFM Corp. v. Southern Bell Telephone & Telegraph Co. and the Supreme Court’s previous decision in Florida Power & Light Co. v. Westinghouse Electric Corp. In those cases, the Florida Supreme Court enunciated the rule that parties could not recover in tort for damages arising solely out of a contractual relationship between the

injunction, which was again modified by the Fourth District Court of Appeal, nevertheless the Fourth District instructed, “[w]e note first that the standard of judicial review applicable to challenges of an arbitration award is very limited . . . .” Id. at 83; see also Goldman v. Chang, 622 So. 2d 30 (Fla. 3d Dist. Ct. App. 1993). In Goldman, the Third District Court of Appeal reversed the trial court’s attempt to award damages in a case in which the arbitrators had determined the percentage interest of a minority shareholder in a close corporation. Id. at 31. The trial court had requested the arbitrators to clarify whether they intended to enter a damage award and if so, against which parties. The arbitrators responded that they had not intended to enter a damage award, they had only computed the value of shareholders’ interest. Nevertheless the trial court entered judgment awarding the plaintiff damages. Id. at 30-31. The Third District Court of Appeal reversed the trial court noting that “the trial court was without power, authority, or jurisdiction to enter an award of damages” in light of the ruling of the arbitration panel. Id. at 31.

376. Id.; accord City of Fort Lauderdale v. Fraternal Order of Police, Lodge No. 31, 582 So. 2d 162 (Fla. 4th Dist. Ct. App. 1991).
378. Id.
379. Id. at 1204.
380. 515 So. 2d 180 (Fla. 1987).
381. 510 So. 2d 899 (Fla. 1987).
Thus, the rule has developed that where a plaintiff fails to allege and prove the existence of a tort independent of the contractual breach, it cannot recover economic damages under a tort theory. The economic loss rule was soon applied in the securities context. The courts, recognizing that the essential relationship between customer and broker is contractual, have continued to limit non-contractual grounds for suits between broker/dealers and their customers.

During 1992-1993 at least two federal courts have considered the application of the economic loss rule in the context of securities claims and curiously, at least one state court which might have, has not been required to do so. In *City of Miami Firefighters' & Police Officers' Retirement Trust v. Invesco MIM, Inc.*, the trial court was requested to consider the application on a motion to dismiss of plaintiffs claim of tort damages resulting from defendants alleged wanton, willful and reckless conduct in speculative investments in plaintiffs account. The Southern District court, reviewing the case law concerning the economic loss rule, construed the law, stating:

> no independent tort can exist solely for contractually based economic damages, absent personal injury or damage to property other than that which was subject to the contract. ... If a claimant, however, does not have a contractual remedy because no contract exists, then this lack of alternate means of recovery provides claimant with an exception to the economic loss rule.

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382. See AFM Corp. v. Southern Bell Tel. & Tel. Co., 515 So. 2d 180 ( Fla. 1987).
383. See, e.g., Interstate Sec. Corp. v. Hayes Corp., 920 F.2d 769, 774 (11th Cir. 1991).
384. See, e.g., id. (refusing to allow claims of breach of fiduciary duty and negligence in light of the contractual relationship between the parties); see also Zitrin v. Raymond James & Assocs., Inc., Case No.: CL-91-13284-AF ( Fla. 15th Cir. Ct. Nov. 9, 1992) (unpublished order striking civil theft, breach of fiduciary duty and negligence claims); Tietig v. E.F. Hutton & Co., Case No.: 89-1572-CIV-MARCUS (S.D. Fla. Oct. 15, 1991) (barring negligence, fraud and breach of fiduciary duty claims); Dziabis v. Gandolfo, Case No.: 90-402-CIV-T-10 (C) (M.D. Fla. Nov. 27, 1991) (holding that allegations in complaint that defendant was a paid professional investment advisor created a contractual relationship as a matter of law and then applying the economic loss rule to bar claims of common law fraud, negligence, and breach of fiduciary duty).
386. Id. at 393.
387. Id. at 393-94 (citation omitted). But see Casa Clara Condo. Ass'n, Inc. v. Charley Toppino & Sons, Inc., 620 So. 2d 1244, 1248 (Fla. 1993) (overturning Latite Roofing Co. v. Urbanek, 528 So. 2d 1381 (Fla. 4th Dist. Ct. App. 1988) wherein the exception to the economic loss rule relied upon by the Southern District of Florida in *Invesco* was enunciated). In *Casa Clara*, the Florida Supreme Court denied a tort remedy to a homeowner against a
Relying on the economic loss rule the Southern District court dismissed the trust's tort allegations stating that the plaintiffs could seek recovery through a claim for breach of contract.\textsuperscript{388}

In \textit{BankAtlantic v. Blythe Eastman Paine Webber, Inc.},\textsuperscript{389} the Eleventh Circuit had occasion to consider the scope of the Florida economic loss rule. In \textit{BankAtlantic}, the bank sued Paine Webber who had served as its investment advisor and had also served as a broker for BankAtlantic in certain securities transactions.\textsuperscript{390} BankAtlantic sued Paine Webber over the securities transactions alleging breach of fiduciary duty, negligence and fraud.\textsuperscript{391} A jury returned a verdict in favor of the broker and an appeal was taken.\textsuperscript{392} The broker claimed that the bank's appeal was moot since the underlying claims were barred by Florida's economic loss rule.\textsuperscript{393} The Eleventh Circuit disagreed, in \textit{dicta} noting that the broker had argued until its brief on appeal that the brokerage transactions were outside of the contract for investment advisory services.\textsuperscript{394} Accordingly, the Eleventh Circuit decided the claims were not barred by the economic loss rule.\textsuperscript{395}

The final case regarding economic loss is interesting primarily for the fact that the defense was apparently not raised. In \textit{Csordas v. Smith Barney, Harris Upham & Co., Inc.},\textsuperscript{396} the customer sued a brokerage firm and its account executive trainee for losses suffered on a bond purchase recom-
mended to the customer by the trainee. The customer sued the broker/dealer and the trainee alleging violation of chapter 517, breach of contract, breach of fiduciary duty, negligence and common law fraud.

The trial court sitting without a jury, found for the plaintiff on breach of fiduciary duty and negligence and for the defendants on the other counts. The opinion contains no reference whatsoever to the economic loss doctrine and one can only conjecture whether it was raised in preliminary matters or at the trial by either the defendants or the court. It is possible that in finding for the defendants on breach of contract, the court determined that there was no contract between the parties which would preclude the tort claims. However, such a ruling would ignore written documents and the essential nature of the relationship between broker and customer recognized by so many of the Florida courts.

The case does contain a good explanation of the nature and scope of the fiduciary duty owed by broker to customer as that law has developed in Florida and elsewhere. This case demonstrates the continuing, if improper, viability of actions based on such duties. Notwithstanding the Csordas decision, the practitioner should not underestimate the effect of the economic loss rule on securities litigation in Florida.

397. Id.
398. Id.
399. Id.
400. See Central Florida Police Benevolent Ass’n, Inc. v. City of Orlando, 614 So. 2d 1203 (Fla. 5th Dist. Ct. App. 1993); see also Okun v. Litwin Sec. Inc., 619 So. 2d 995 (Fla. 3d Dist. Ct. App. 1993).
402. Id. The case indicates that the trainee had not studied the bonds he recommended and only knew what his computer displayed. He did not obtain a pricing history, which was available in the computer. Apparently, he did not consult Moody’s Bonds Ratings, which indicated that the bonds had speculative elements. The court also faulted the trainee for not consulting Standard and Poor’s Corporation Records available in his office, which would have indicated that the corporation, whose bonds were recommended by him, had substantial holdings in real-estate and savings and loan institutions which the court found were in financial trouble at the time. Id. at 95,000. The opinion is silent on whether the trainee found the bonds on the employer’s recommended list or whether simply recommending a security found on such a list would have satisfied his duty to the customer. It is interesting to note that the broker, itself was only found vicariously liable for the negligence and breach of fiduciary duty of its trainee. From this, one can infer that the security was not on its recommended list and that the court did not have before it or consider the issue of negligent supervision. Id. at 94,999-95,000.
403. Inter alia, by limiting securities controversies to actions in contract, litigation will be streamlined. Presumably, such a limitation will also eliminate or virtually eliminate awards of punitive damages in securities cases. It is even questionable whether parties could
The third major focus of Florida courts in securities cases decided in 1992-1993 may generally be classified as non-arbitration cases. They cover numerous subjects under the state and federal securities laws. In 1992, the Eleventh Circuit joined the growing number of courts which have upheld the constitutionality of Section 27A of the Securities Exchange Act of 1934,\textsuperscript{404} in its decision in \textit{Henderson v. Scientific-Atlanta, Inc.}\textsuperscript{405} In \textit{Lampf, Pleva, Lipkind, Prupis & Pettigrow v. Gilbertson},\textsuperscript{406} the Supreme Court rejected the practice of borrowing state statutes of limitation for private causes of action under Section 10(b) of the 1934 Act.\textsuperscript{407} Instead the Court held that the one year/three year statute of limitations applicable to express private rights of action under other sections of the 1934 Act governed 10(b) actions and that the \textit{Lampf} rule should be retroactively applied in that case.\textsuperscript{408} In \textit{James B. Beam Distilling Co. v. Georgia},\textsuperscript{409} announced the same day as \textit{Lampf}, the Supreme Court held that when the Court applies a new rule to litigants in a particular case, that rule must be retroactively applied to all other similarly situated litigants.\textsuperscript{410} In 1992, in \textit{Lufkin v. McCallum},\textsuperscript{411} the Eleventh Circuit ruled that \textit{Beam} required retroactive application of the new statute of limitations rule announced in \textit{Lampf}.\textsuperscript{412} Thereafter, Congress amended the 1934 Act by specifically providing in Section 27A that private civil actions implied under Section 10(b) begun before June 19, 1991 were to be governed by the limitations period provided by the laws applicable to the jurisdiction as such laws existed on June 19, 1991.\textsuperscript{413} Section 27A also provided that cases dismissed as time-barred subsequent to June 19, 1991, which would have been timely filed under the limitation provision provided by laws applicable in the jurisdiction as such laws

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\textsuperscript{405} 971 F.2d 1567 (11th Cir. 1992), \textit{cert denied}, 114 S. Ct. 95 (1993).
\textsuperscript{407} \textit{Id.} at 2781-82.
\textsuperscript{408} \textit{Id.}
\textsuperscript{410} \textit{Id.} at 2441.
\textsuperscript{411} 956 F.2d 1104 (11th Cir. 1992) ( superseded by statute as recognized in, Henderson v. Scientific-Atlanta, 971 F.2d 1567 (11th Cir. 1992), \textit{cert. denied}, 114 S. Ct. 95 (1993)).
\textsuperscript{412} \textit{Id.} at 1108.
existed on that date, must be reinstated on motion.\textsuperscript{414} Thus Section 27A amounted to a Congressional reversal of the retroactivity rulings of the Supreme Court in \textit{Lampf} and \textit{Beam}, at least as to 10(b) actions.

In \textit{Henderson v. Scientific-Atlanta},\textsuperscript{415} the Eleventh Circuit considered a case in which the plaintiff had filed a class action securities claim against the defendant in September, 1988 alleging violations of Section 10(b) of the 1934 Act.\textsuperscript{416} After the action was filed, the Supreme Court issued its decision in \textit{Lampf} and Scientific-Atlanta moved for summary judgment on time-bar grounds.\textsuperscript{417} The district court granted summary judgment in favor of defendant on the federal securities laws claims and dismissed the pendent state law claims without prejudice.\textsuperscript{418} The plaintiffs then appealed to the Eleventh Circuit.\textsuperscript{419} While the appeal was pending, Congress enacted Section 27A.\textsuperscript{420} Scientific-Atlanta argued that Section 27A violated the separation of powers doctrine because Congress sought to render \textit{Lampf} a nullity.\textsuperscript{421} Appellee also contended that Section 27A was unconstitutional because it operated to deny it due process since Congress intended in enacting Section 27A to direct the outcome of pending litigation.\textsuperscript{422} The court rejected both constitutional challenges, finding first that Congress has the right under our federal system to amend a statute as it sees fit if it disagrees with a court's interpretation of that statute,\textsuperscript{423} and second that the fact that the statute had an effect upon pending litigation does not constitute a due process violation.\textsuperscript{424} Appellees made two other attacks upon the constitutionality of the statute, the first, also on due process grounds, alleging that the statute made no attempt to define what would be an appropriate limitations period.\textsuperscript{425} The court summarily disagreed, stating that under the statute, the limitations period is clear.\textsuperscript{426} The court, in similar summary fashion, disposed of an argument claiming the statute

\textsuperscript{414} Id. § 78aa-1 (not later than 60 days after the date of enactment of § 78aa-1 [enacted Dec. 19, 1991]).
\textsuperscript{415} 971 F.2d 1567 (11th Cir. 1992), \textit{cert denied}, 114 S. Ct. 95 (1993).
\textsuperscript{416} Id. at 1568.
\textsuperscript{417} Id. at 1569.
\textsuperscript{418} Id.
\textsuperscript{419} Id.
\textsuperscript{420} \textit{Henderson}, 971 F.2d at 1570.
\textsuperscript{421} Id.
\textsuperscript{422} Id.
\textsuperscript{423} Id. at 1573.
\textsuperscript{424} Id. at 1574.
\textsuperscript{425} \textit{Henderson}, 971 F.2d at 1574.
\textsuperscript{426} Id.
violated appellee’s right to equal protection noting that the statute must be upheld as long as it is rationally related to a legitimate governmental interest.\footnote{427. \textit{Id.}} The court found protecting litigants from an unexpected change in the law to be a legitimate governmental interest and that Section 27A is rationally related to that end.\footnote{428. \textit{Id.}} The court also found that the equal protection clause was not offended by the fact that plaintiffs in different areas would, under Section 27A, have different statutes of limitation. The court concluded that there is nothing irrational about borrowing statutes of limitation in cases where Congress has failed to provide one.\footnote{429. \textit{Id.}} The court also found it rational for Congress to conclude that litigants not already in court on June 19, 1991 were not in need of the protection offered by the statute.\footnote{430. \textit{Henderson}, 971 F.2d at 1574.} Thus, the Eleventh Circuit became the first court of appeal to address the constitutionality of Section 27A.

\textit{Henderson v. Scientific-Atlanta} arose in the context of a securities class-action suit. During the period 1992-1993, the Eleventh Circuit had occasion to consider one other securities class-action suit of note and one district court has written two cogent opinions in the area. In \textit{In re U.S. Oil \\& Gas Litigation v. Wolfson},\footnote{431. 967 F.2d 489 (11th Cir. 1992).} the court upheld a determination by Judge William H. Hoeveler of the United States District Court for the Southern District of Florida enforcing a bar order against a settling defendant on a cross-claim.\footnote{432. \textit{Id.} at 491.} In \textit{In re U.S. Oil \\& Gas Litigation}, the lower court was faced with an incredibly complex case.\footnote{433. \textit{Id.} The case included 96 defendants, requiring 50 hearings between the period 1984-1990 and 260 depositions. \textit{Id.} at 491. On the eve of trial, plaintiffs stipulated that more than 700 issues of fact remained unresolved in the matter. \textit{Id.}} One defendant settled, carefully preserving its rights to cross-claim against another of the defendants.\footnote{434. \textit{U.S. Oil \\& Gas Litigation}, 967 F.2d at 491-92.} Notwithstanding, when the second defendant settled it asked the court to bar the cross-claim.\footnote{435. \textit{Id.}} The district court granted the settlement bar and the first defendant appealed but did not withdraw its settlement offer despite being offered the opportunity to do so by the court.\footnote{436. \textit{Id.} at 492.} The Eleventh Circuit affirmed the lower court’s right to enforce the settlement bar holding that a court is so empowered where it makes a reasonable determination that
to do so is fair and equitable. The Eleventh Circuit, noting that the appellants' cross-claims were not independent claims but rather claims for indemnity, found that the lower court could appropriately bar the same as part of its settlement approval duties in class-action cases.

The decision in In re U.S. Oil & Gas Litigation assumes, but does not discuss, the obligation courts have under the federal rules of civil procedure to approve proposed class action settlements. In Ressler v. Jacobson, the Middle District of Florida was requested to consider the propriety of a proposed settlement in a securities class-action. Concluding that the settlement was fair, reasonable and adequate, the court explicated the elements a court must consider in making such a determination, setting forth a six-factor test. The court then applied those factors to the proposed settlement at bar and approved it. The practitioner considering a securities class action matter is recommended to the court's well written opinion. In a second reported opinion in Ressler v. Jacobson, the same court was asked to award attorneys fees. Again, the court set forth the factors involved in granting such an award.

Applying the standard to the facts, the court, in another opinion recommended to the practitioner, approved the award of attorneys fees.

437. Id.
438. Id.; see FED. R. CIV. P. 23(3) (requiring that courts approve class action settlements). Curiously, the court noted that indemnification claims are not cognizable under the 1933 and 1934 Acts and concluded that they would have been unlikely to survive a cursory adjudication on the merits in any event. U.S. Oil & Gas Litigation, 967 F.2d at 495. The Supreme Court, however, in Musick, Peeler & Garrett v. Employee's Ins. of Wausau, 113 S. Ct. 2085 (1993), held that parties have a right to seek contribution as a matter of federal law and courts have a right to imply such a private right of action under Section 10(b) of the 1934 Act. Id. Accordingly, the Eleventh Circuit's assertion in In re U.S. Oil & Gas may not be a fair statement of the law.
440. The court's six factors were:
   (1) The existence of fraud or collusion behind the settlement; (2) the complexity, expense and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of plaintiff's success on the merits; (5) the range of possible recovery; and (6) the opinions of class counsel and absent class members.
441. Id. at 1553.
443. Id. These factors included, inter alia, benefits conferred upon the class as a result of counsel's work, the complex nature of the litigation, the risks faced, the quality of the work performed, and the promptness and efficiency in which the litigation was resolved.
444. Id.
In *Budget Rent A Car Systems, Inc. v. Hirsch*, the Southern District of Florida confronted the issue of whether section 12(2) of the 1933 Act applies to secondary market transactions. Section 12(2) provides an express remedy for material omissions or misrepresentations made in connection with the offer or sale of a security. As noted by the district court, the majority of courts considering the issue have held that "section 12(2) applies only to initial offerings [of securities] and not to secondary market transactions." The court recognized that the majority of courts based their decision on three factors. First, the legislative history supports the conclusion that the 1933 Act was enacted in order to regulate initial offerings of securities and that the 1934 Act was enacted in order to regulate secondary transactions. Second, the section makes reference to statements made in a prospectus, and prospectuses normally accompany only initial offerings not secondary market transactions. Finally, the United States Supreme Court's holding in *United States v. Naftalin*, making section 17(a) of the 1933 Act applicable to secondary transactions, distinguishes that section from "much of the rest of the [1933] Act," in that regard.

The *Budget Rent A Car Systems* court also noted that one federal court had carved an exception to the majority rule and extended coverage of

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446. Id. at 1255.
447. 15 U.S.C.S. § 77l(2) (1991). In relevant part, section 12(2) of the 1933 Act provides:

> any person who . . . (2) offers or sells a security . . . by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such truth or omission shall be liable to the person purchasing such security from him . . . .

Id.
449. Id.
450. Id.
451. Id.
452. 441 U.S. 768 (1979).
453. Id. at 777-78.
section 12(2) to a sale of stock that, while not an actual initial offering, is similar to an initial offering because it is the sale of a large block of stock by a corporate insider.\textsuperscript{455} Therefore, an exception was made “where a corporate insider sells his own stock in such a manner that it takes on the characteristics of a new offering.”\textsuperscript{456} The district court explicated the requirements of the exception: that is, all the outstanding stock of the corporation, is distributed through a controlling distributor, and the stock must be offered to the public.\textsuperscript{457} Without deciding the validity of the exception, however, the district court held that the criteria were not present in the case \textit{sub judice}.\textsuperscript{458} Accordingly, the court adopted the majority rule finding that section 12(2) did not apply to secondary offerings and refused to find an exception to that rule for the transaction at issue.\textsuperscript{459}

One year later, the issue of the applicability of section 12(2) was presented to the Eleventh Circuit in the case of \textit{First Union Discount Brokerage Services, Inc. v. Milos}.\textsuperscript{460} In \textit{First Union Discount Brokerage Services}, a customer of a discount broker/dealer\textsuperscript{461} had maintained large positions at the broker on margin.\textsuperscript{462} With the stock market crash of October 1987, the customer lost not only the equity in his account but also owed the broker substantial funds for the margined positions.\textsuperscript{463} The broker sued the customer for the margin debits. The customer filed counter-claims on various state law grounds. Additionally, the customer alleged that the broker violated section 12(2) by making materially false representations in connection with the sale of securities.\textsuperscript{464} These alleged false representations consisted of oral representations that the broker would forebear enforcement of margin calls\textsuperscript{465} on the customer’s account.\textsuperscript{466} The trial

\textsuperscript{455.} \textit{Id.} at 1257.
\textsuperscript{456.} \textit{Id.} (citing Hedden v. Marinelli, 796 F. Supp. 432 (N.D. Cal 1992)).
\textsuperscript{457.} \textit{Id.}
\textsuperscript{458.} \textit{Id.} at 1258.
\textsuperscript{459.} \textit{Budget Rent A Car Systems}, 810 F. Supp. at 1256.
\textsuperscript{460.} 997 F.2d 835 (11th Cir. 1993).
\textsuperscript{461.} A discount broker, unlike its full service counterparts, does not provide research and investment advice. It handles all transactions on a non-discretionary basis. That is, it acts primarily as an order taker and not as a provider of securities trading advice. \textit{See, e.g.}, \textit{id.}
\textsuperscript{462.} \textit{Id.} at 837.
\textsuperscript{463.} A margin account is one in which the broker extends credit to the customer which credit extension is normally secured by the securities portfolio of the customer and cash deposits in to his account. \textit{See, e.g.}, \textit{id.}
\textsuperscript{464.} \textit{Id.} at 840.
\textsuperscript{465.} Margin calls are demands for the deposit of additional securities or cash to collateralize the credit extensions made by the brokerage firm and normally occur when the
court determined that the customer was liable for the debt and granted summary judgment to the broker on its complaint for account stated. The Eleventh Circuit affirmed the holding, recognizing that the broker had established the account stated and that the customer had failed to object to the statements presented to him in the manner provided on the statements. The court then considered the section 12(2) issue, that is whether section 12(2) applies to aftermarket or secondary market transactions. Relying on the opinion of the Third Circuit Court of Appeals in Ballay v. Legg Mason Wood Walker, Inc., the court held that Section 12(2) does not apply to aftermarket transactions. The Third Circuit first noted in Ballay that the section’s language itself limited the section’s scope to initial distributions. Second, the court observed that section 12(2) is structurally positioned after sections 11 and 12(1) of the 1933 Act, which govern the registration of securities and liability for the sale of unregistered securities, and before section 13, which establishes limitation periods for sections 11 and 12. Noting that this position “sandwiched” section 12(2) between sections that dealt exclusively with initial distributions, the court reasoned that section 12(2) also must be so limited. Finally, the court rejected the suggestion that since section 17(a) of the 1933 Act applies to secondary market transactions, section 12(2) must, by analogy, as well. Noting the materially distinct language between sections 12(2) and 17(a), the former being restrictive while the latter is expansive, the court concluded that the broad reading appropriate for section 17(a) was not applicable to section 12(2). Noting finally that the Third Circuit had concluded that:

the language and legislative history of section 12(2), as well as its relationships to sections 17(a) and 10(b) within the scheme of the 1933 

value of the securities or cash in the account diminishes. See First Union Discount Brokerage Serv., 997 F.2d at 837-38.

466. Id. at 840.
467. Id.
468. Id. at 841.
469. Id. at 842-43.
471. First Union Discount Brokerage Serv., 997 F.2d at 843 (citing Ballay, 925 F.2d at 682).
472. Ballay, 925 F.2d at 688.
473. Id. at 691.
474. Id. at 691-92.
475. Id. at 693.
and 1934 Acts, compel our conclusion that section 12(2) applies only to initial offerings and not to aftermarket trading.\textsuperscript{476}

The Eleventh Circuit also refused to extend the reach of section 12(2) to secondary transactions.\textsuperscript{477}

The \textit{First Union Discount Brokerage Services} case is notable not only for its determination of the applicability of section 12(2), but also for the court’s interesting discussion on the element of causation in securities fraud allegations. First the court noted that in connection with a securities fraud claim under state law, a customer had to prove that its injuries were proximately caused by any alleged false representation or omission.\textsuperscript{478} The court went on to note that the Milos’ injury did not result from their reliance on the broker’s representations, but rather on the market crash.\textsuperscript{479} Thus, the court clearly reinforced the focus on an element of a securities fraud claim not infrequently overlooked by arbitrators and courts, to wit: the necessity of a direct causal relationship between the allegedly unlawful conduct and the injury to the claimants.

The duties of a broker/dealer to its clients were also considered during 1992-1993 on the state court level by the First District Court of Appeal in \textit{Palmer v. Shearson Lehman Hutton, Inc.}\textsuperscript{480} In \textit{Palmer}, the plaintiffs claimed that they were injured by the actions of a registered representative who had formerly worked for the defendant, Shearson, not while he was employed by Shearson, but several years after the representative left Shearson and had gained employment elsewhere.\textsuperscript{481} Since Shearson had not appropriately indicated on the representative’s termination documents the real reasons for his termination, the plaintiffs claimed the broker was liable to them for the injuries subsequently caused by their former employee.\textsuperscript{482} Noting that while the complaint was legally insufficient to show that the broker owed a common law duty to appellants, the district court found that

\begin{itemize}
  \item \textsuperscript{476} Id.
  \item \textsuperscript{477} See \textit{First Union Discount Brokerage Serv.}, 997 F.2d at 844 (11th Cir. 1993).
  \item \textsuperscript{478} Id. at 843-44.
  \item \textsuperscript{479} Id. at 844-45.
  \item \textsuperscript{480} 622 So. 2d 1085 (Fla. 1st Dist. Ct. App. 1993).
  \item \textsuperscript{481} Id.
  \item \textsuperscript{482} Id. at 1086-88. Plaintiffs alleged that had Shearson disclosed his prior bad conduct, plaintiffs never would have done business with him since he would not have been allowed to re-register with the Department. Id. Whether this actually amounts to proximate causation is at least questionable since it assumes an intervening act by the Department. The opinion is silent about any allegation that the plaintiffs had obtained the representative’s employment history before doing business with him.
\end{itemize}
a broker can be held accountable in negligence for damages to a customer for breach of its statutory duty to report accurately the terms of an employee’s termination.\textsuperscript{483} The court stated that by falsely reporting in his termination documents that the broker had "no reason to believe that... [the registered representative] had violated any state or federal law or regulation or... had engaged in any conduct inconsistent with just and equitable principles of trade"\textsuperscript{484} when in fact the broker had knowledge to the contrary, the broker was in violation of section 517.12 of the Florida Statutes requiring that accurate termination reports be filed with the Department of Banking.\textsuperscript{485} Further, the court determined that the statute "creates a duty of care upon one whose behavior is the subject of the statute to a person who is in the class designed to be protected" by same.\textsuperscript{486} Thus a finding of liability for negligence will be supported "when the injury suffered by a person in the protected class is that which the statute was designed to prevent."\textsuperscript{487} The court continued its analysis stating that:

\begin{quote}
  [a]lthough the violation of a statute establishing a duty to take precautions to protect a particular class of persons from a particular injury or type of injury constitutes negligence per se, the fact of negligence per se resulting from a statutory violation does not necessarily mean that there is actionable negligence. It must also be shown that the plaintiff falls within the class of persons the statute was intended to protect, that the plaintiff suffered an injury of the type the statute was designed to prevent, and that the violation of the statute was the proximate cause of this injury.\textsuperscript{488}
\end{quote}

The court then concluded that the facts presented to it, if true, were legally sufficient to satisfy these elements.\textsuperscript{489} The court distinguished the pronouncements of the Florida Supreme Court in \textit{E.F. Hutton & Co. v. Rousseff},\textsuperscript{490} requiring privity to recover damages for violations of chapter

\begin{itemize}
  \item \textsuperscript{483} \textit{Id.} at 1087.
  \item \textsuperscript{484} \textit{Palmer}, 622 So. 2d at 1088.
  \item \textsuperscript{485} \textit{Id.}
  \item \textsuperscript{486} \textit{Id.} at 1090 (citing \textit{deJesus v. Seaboard Coast Line Ry.}, 281 So. 2d 198 (Fla. 1973)).
  \item \textsuperscript{487} \textit{Id.}
  \item \textsuperscript{488} \textit{Palmer}, 622 So. 2d at 1090 (emphasis added) (footnotes omitted).
  \item \textsuperscript{489} \textit{Id.} The case was before the First District on an appeal of a summary judgment. \textit{Id.} at 1086. It is important to note that this required the court to view the record before it in the context of determining whether the appellee was entitled to judgment as a matter of law. That is, as the court carefully noted in its conclusion, it was required to presume facts which may not be later proven. \textit{Id.} at 1093; see also FLA. CIV. P. 1.540.
  \item \textsuperscript{490} 537 So. 2d 978 (Fla. 1989).
\end{itemize}
517. Noting that in Rousseff, a case involving securities transactions between buyers and sellers, the plaintiffs relied on section 517.301(1) relating to wrongs committed "in connection with the offer, sale or purchase of any security," the court distinguished the claims in the matter before it, finding that they were governed by subsection 517.301(3). That subsection makes it unlawful and a violation of chapter 517 for any person in any matter within the jurisdiction of the Department to knowingly make false and misleading statements or omissions. The Palmer court concluded that this section does not require privity like the section in issue in Rousseff.

The duty of brokers to subsequent customers of a former employee to report accurately the circumstances surrounding the termination of that employee, will undoubtedly be a fertile area for securities litigation in the future. Given the already thorny issue of defamation claims against brokers for reports of termination and the unsettled law in that area, these subjects will clearly occupy the securities bar in Florida in the future.

Another area in which the Florida courts in 1992-1993 have addressed duties of persons involved in securities transactions is in the area of the duties of corporate insiders. In Tapken v. Brown, the court found that allegations in a complaint concerning misrepresentations in a company’s reports and SEC filings were sufficient to state a fraud claim against individual directors even if their specific roles in the alleged fraud were not detailed in the complaint. The court also found that allegations that outside directors, because of their positions with the company, had knowledge of and assisted in the dissemination of false information stated an aider and abettor claim against the outside directors. The court also held that the accounting firm that audited the company’s allegedly false and misleading financial statements could be liable for aiding and abetting in the company’s claimed violation of section 10(b). The Tapken case is noted principally for its discussion of the pleading requirements for primary and secondary liability under section 10(b) of the 1934 Act, liability under

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491. Id. at 979.
492. Id.
494. Id.
495. See supra notes 13-19 and accompanying text.
497. Id. at 93,169.
498. Id.
499. Id. at 93,170.
section 20 of the 1934 Act, liability for common law fraud, especially as compared to the federal fraud action and liability for negligent misrepresentation. It also discusses the elements necessary for class certification in a securities fraud class action.\textsuperscript{500}

In \textit{Securities & Exchange Commission v. Tuchinsky},\textsuperscript{501} the court construed the elements of liability under section 5 of the 1933 Act and the exemptions thereto. The court first explained that to make a \textit{prima facie} case for violation of section 5 of the 1933 Act, which makes unlawful the offer or sale of unregistered securities, the plaintiff must prove three elements:

First, it must show that no registration statement was in effect as to the securities. Second, it must establish that [the parties sought to be charged] sold or offered to sell . . . securities. Third, it must prove that . . . [the person sought to be charged] used interstate transportation or communication or the mails in connection with the sale, offer to sell, or delivery [of the securities].\textsuperscript{502}

The court then noted that section 5 imposes strict liability in the civil context on offerors or sellers of unregistered securities. As the court noted, once the plaintiff has established a \textit{prima facie} case of the sale of unregistered securities, the burden falls on the party to be charged to demonstrate that either the securities or transactions involved were exempt from the registration requirements.\textsuperscript{503} In \textit{Tuchinsky}, the court noted that the SEC had demonstrated these elements.\textsuperscript{504} Despite recognizing that the defendant had failed to raise any exemption as a defense, the court refused to grant summary judgment \textit{sua sponte}, noting that an issue of fact existed as to whether or not the defendant fell within the scope of certain of the exemptions provided by the 1934 Act.\textsuperscript{505}

The \textit{Tuchinsky} ruling is troubling since the court went beyond the record on a motion for summary judgment to consider defenses thereto not raised by the parties. The authors question the propriety of such a course of conduct. As the court itself noted, the burden of claiming and proving the exemption once the SEC had established its \textit{prima facie} case falls on the

\textsuperscript{500} See \textit{id}.
\textsuperscript{502} \textit{id}. at 93,803.
\textsuperscript{503} \textit{id}.
\textsuperscript{504} \textit{id}.
\textsuperscript{505} \textit{id}. at 93,804-05.
Having found that the defendant failed to do so in this case, it appears that the court abused its discretion in refusing to uphold the grant of summary judgment.

In Marcus v. Shapiro, Abramson & Schwimmer, P.A., the Fourth District Court of Appeal was confronted with an allegation of violation of section 517.301 of the Florida Statutes by the failure to disclose material facts. The case involved an allegation that a passive investor was defrauded in connection with his investment in the stock of a proposed savings and loan association. The venture was unsuccessful. The investor sued the promoters of the venture alleging violation of the anti-fraud provisions of chapter 517. The trial court granted summary judgment in favor of the promoters on the basis that the investor was committed to the purchase of the stock prior to any alleged misconduct; therefore, the misconduct was not “in connection with” his purchase transaction. The Fourth District Court, for the purposes of summary judgment, disagreed with this pronouncement and reversed. The issue upon which the matter turned was the timing of the purchase by the investor. The trial court, in fixing the date of the sale, relied on what is known as the “commitment test.” Under this test, the date of the sale is fixed at the date that the investor enters into a binding commitment to undertake a securities transaction. The trial court, noting that the investor had signed a stock purchase agreement, fixed the sale date as the date of signing. The investor argued instead that the agreement was not a binding commitment because it was revocable within six months. The promoters argued that even assuming arguendo that the stock purchase became revocable, the purchase date was fixed by the time the investor made his down payment and submitted his application for a loan for the balance due. The Fourth District, noting that the appellees might well be correct, concluded

507. 620 So. 2d 1284 (Fla. 4th Dist. Ct. App. 1993).
509. Marcus, 620 So. 2d at 1285.
510. Id.
511. Id. at 1286.
512. Id. at 1288.
513. Id. at 1286. (the “commitment test” was set out in Radiation Dynamics, Inc. v. Goldmuntz, 464 F.2d 876 (2d Cir. 1972)).
514. Marcus, 620 So. 2d at 1286.
515. Id.
516. Id.
517. Id.
that the date when the sale occurred was, in any event, a disputed issue of material fact which precluded summary judgment.\textsuperscript{518} Thus, while the Fourth District discussed the issue of the date upon which a purchase of securities is deemed to have occurred, it refused to supply a definitive answer to the question in light of the procedural context in which this matter was before the court.\textsuperscript{519} The court specifically noted that its opinion was “in no way intended as a definitive exposition of the law in this area. It is but a reversal of summary judgment with perceived reasons why such was inappropriate.”\textsuperscript{520}

One cannot adequately review or understand securities regulation in Florida without reference to the activities of the federal and state agencies charged with the responsibility of regulating the entire scope of securities transactions, that is, the United States Securities and Exchange Commission and the Florida Department of Banking and Finance, Division of Securities and Investor Protection. Unfortunately, the activities of these agencies often go under-reported or unreported entirely.\textsuperscript{521} Certain cases reflecting the action of the administrative agencies during the period 1992-1993 have been reported and may be notable more for an analysis of the areas of activity of

\textsuperscript{518} Id. at 1287.
\textsuperscript{519} See Marcus, 620 So. 2d at 1285-88.
\textsuperscript{520} Id. at 1288.
\textsuperscript{521} A full cognizance of the regulation of securities in Florida also is impossible without reviewing the activities of the self-regulatory organizations, most notably the National Association of Securities Dealers, Inc. and the New York Stock Exchange, Inc. They regularly inquire into the conduct of stockbrokers and other regulated persons in Florida and throughout the country, make rules of conduct for regulated persons, and in fact, provide two of the primary arbitration fora for resolution of brokerage disputes. In fact, the United States Supreme Court in its decision in Shearson/American Express, Inc., v. McMahon, 482 U.S. 220 (1987) specifically recognized the integrity and abilities of these organizations as one of the grounds for reversing its long standing policy against the arbitration of securities disputes and indeed as a basis for mandating a change in the long standing judicial antipathy for alternative dispute resolution. Id. at 225-26. The third major arbitration forum, the American Arbitration Association, is, as noted above, specifically set forth as an arbitral forum in the constitution of the American Stock Exchange, Inc., the so-called AMEX Window (Article VIII of the American Stock Exchange Constitution Section 2(c)). Its attractiveness as a “non-industry” forum should not be underestimated. See id. at 226-27. Unfortunately, arbitration decisions too, are unreported and frequently contain no opinions or rationale upon which an interested practitioner can rely. Also it is important to recognize that arbitration decisions have no \textit{stare decisis} effect. Whether such opinions have \textit{res judicata} effect is an interesting and open question. Compare, Marilyn Blumberg Cane & Patricia A. Shub, \textsc{Securities Arbitration Law and Procedure}, 340-51 (1991) with Phillip J. Hoblin, Jr., \textsc{Securities Arbitration: Procedures, Strategies, Cases}, §§ 13-2 to 13-5 (1988).
these agencies than necessarily for the opinions or rationale of the courts. For example, in *Securities & Exchange Commission v. Elliott*, the court considered various objections to a proposed plan of distribution of assets made by an SEC recommended and court appointed receiver. This matter arose out of an SEC investigation of a massive Ponzi-type scheme in which investors were paid paper profits from funds invested by subsequent investors. As the court points out, this massive scheme left the receiver and the court the mammoth task of sorting out the equities. The opinion is important for the court’s discussion of the receiver’s role, the legal and equitable basis for a receiver’s powers and the limits on same. Thus, it emphasizes the SEC’s essential role in uncovering and halting such illegal enterprises and its predilection for appointing a receiver to unwind the result of the fraud.

The SEC was involved in several other cases of note during the period which bear mention. These cases demonstrate areas of concern of the SEC in Florida as well as the remedies sought and obtained by it. In *Securities & Exchange Commission v. Walloga*, the court permanently enjoined Walloga, a principal of a broker/dealer, from violating the anti-fraud provisions of the 1933 Act and the anti-fraud and recordkeeping provisions of the 1934 Act. Additionally, it ordered Walloga to disgorge all ill-gotten gains. The SEC alleged that Walloga failed to disclose to investors purchasing securities in the secondary market that the broker/dealer was acting as a market maker with respect to those securities. It further alleged that Walloga charged customers excessive undisclosed mark-ups and inaccurately maintained his books in order to conceal his undercapitalization. In *Securities & Exchange Commission v. Rosemary Grady*, the SEC charged and the court found that Grady, the president and controlling stockholder of a broker/dealer, violated the registration and anti-fraud provisions of the securities laws and aided and abetted violations of the anti-fraud and recordkeeping provisions of the securities laws. The court found that Grady manipulated prices of securities of at least two issuers by fraudulent sales practices. The court ordered her to disgorge one million five hundred seventy thousand ($1,570,000) dollars of ill-gotten gain and to pay prejudgment interest of eight hundred thirty three thousand nine hundred

522. 953 F.2d 1560 (11th Cir. 1992), *rev’d in part*, 998 F.2d 922 (11th Cir. 1993).
523. *Id.* at 1565.
524. *Id.*
seventy-six ($833,976) dollars.\textsuperscript{527} In \textit{Securities & Exchange Commission v. First Fidelity Financial Corp.},\textsuperscript{528} the SEC sought and the court granted an injunction against the defendants from further violations of the broker/dealer registration provisions and violations of the anti-fraud provisions of the federal securities laws. The defendants were ordered to disgorge five hundred sixty thousand ($560,000) dollars and pay civil penalties upon a determination by the court that they operated a boiler-room selling speculative over-the-counter securities to the public through high pressure sales tactics and misrepresentations.\textsuperscript{529} In \textit{Securities & Exchange Commission v. Omni Capital Group, Ltd.},\textsuperscript{530} the court permanently enjoined Thomas R. Mullens, the president and sole shareholder of defendant Omni Capital Group, Ltd., from future violations of the registration and anti-fraud provisions of the 1933 Act and the anti-fraud provisions of the 1934 Act. The court ordered disgorgement, civil penalties and other relief against Mullens.\textsuperscript{531} The court found that Mullens had engaged in unregistered non-exempt offerings of securities and that through Omni had made material misrepresentations and omissions of material facts to investors and prospective investors concerning, among other things, Mullens’ personal criminal history, the use of the proceeds from the offerings, the risks associated with the investment and the existence of a guaranteed rate of return on the investments.\textsuperscript{532} The court appointed a receiver to unravel an approximately 25 million dollar Ponzi scheme in which, despite making various representations of the profits being made, Mullens, in fact, never made any investments on behalf of his clients.\textsuperscript{533} Mullens was recently sentenced to more than thirty years in prison on various criminal charges arising from his Omni activities. On June 14, 1993 the court entered a final judgment of permanent injunction against the defendants in \textit{Securities

\footnotesize{\textsuperscript{527} Id.  
\textsuperscript{529} Id.  
\textsuperscript{531} Id.  
\textsuperscript{532} Id.  
\textsuperscript{533} The SEC has and continues to bring numerous actions to terminate fraudulent investment schemes. \textit{See, e.g., In re: Cascade Int'l Sec. Litig., [1992] Fed. Sec. L. Rep. (CCH) ¶ 96,867, at 93,531 (S.D. Fla. June 22, 1992) (growing out of the SEC's action to enjoin an apparent massive fraud in connection with a public company's false statements regarding the nature and extent of its business and assets, and granting a preliminary injunction freezing the assets of one of the outside directors of Cascade in order to avoid his secreting such assets to avoid judgment).}
Exchange & Commission v. Premium Sales Corp., enjoining the defendants from further violation of the anti-fraud provisions of the 1933 and 1934 Acts. The SEC alleged that the defendants falsely represented to investors that they had an extremely profitable grocery diversion business which could yield upwards of 60% return on investment. In fact, the SEC alleged, defendants had not made the represented returns and a material number of the diversion transactions reported were overstated or sham transactions. As a result of their activities, the defendants raised approximately five hundred fifteen million ($515,000,000) dollars from investors. At the time of the filing of the action, only eighty nine million ($89,000,000) dollars was accounted for, according to the SEC complaint. The SEC, in addition to the injunctions, sought and obtained the appointment of a receiver, and an order freezing assets of the defendants and prohibiting the destruction of records. The SEC is seeking disgorgement and civil penalties against the defendants.

Finally, in Securities & Exchange Commission v. Premier Benefit Capital Trust, the court preliminarily enjoined the defendants from further violations of the registration and anti-fraud provisions of the federal securities laws. It also entered orders freezing assets, prohibiting the destruction of records, expediting discovery and appointing a receiver. The SEC’s complaint alleged that the defendants had raised at least six million six hundred thousand ($6,600,000) dollars through the unlawful sale of unregistered securities to 180 investors. The SEC further alleged that these sales had been accomplished through materially false representations and omissions in offering documents, radio and newspaper advertisements and by oral communications which employed “boiler-room” techniques.

The SEC’s litigation release cited the substantial assistance of the Florida Department of Banking and Finance in its investigation. Such cooperative efforts among the regulatory agencies, appears to be an increasing trend in securities regulation in Florida.

Unfortunately, the activities of the Florida Office of the Comptroller, Department of Banking and Finance, Division of Securities and Investor Protection are even less well reported than those of the SEC. Two reported decisions concerning that agency demonstrate some of the matters within the purview and concern of the Department. In Giordano v. Department of

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535. Id.
Banking & Finance, appellant sought review of an administrative order of the Department of Banking and Finance requiring him to cease and desist from the unauthorized sale of securities. The district court affirmed the administrative order in an opinion that gave some insight into the workings of the Department and its powers. The district court held that the Department did not have to hold an evidentiary hearing or to consider reasons why appellant had failed to respond to an administrative complaint prior to entry of a default order. The decision outlines the practice of the Department to conduct administrative hearings on complaints of securities laws violations and examines some of the procedures involved therewith. It also demonstrates the broad latitude given the Department by the state courts. In Santacroce v. Department of Banking & Finance, Division of Securities & Investor Protection, the Fourth District Court of Appeal held that the Department had properly found that a broker had violated a statute concerning receiving commissions on securities transactions before the broker was properly registered with the state, but suggested that the sanction imposed may have been excessive. Again, the Department was concerned with the sale of securities by unregistered persons in the state and the case gives additional insights into the Department's workings and processes. As in Giordano, it demonstrates the latitude granted the Department by the courts. The court in Santacroce affirmed the right of the Director of the Department to act as a hearing officer in a revocation (of license) hearing against the securities broker. The court also held the constitutional guarantee of right to counsel not to be applicable to revocation hearings. It also upheld the hearing officer's determination that the appellant had violated section 517.12, requiring registration of brokers before they may sell securities, regardless of the fact that the violation may have been inadvertent and that appellant had asserted a good faith belief that he was registered. The court held, "appellant's argument regarding his good faith belief that he was registered at the time he

538. Id. at 715.
539. Id. at 713-15.
541. Id. at 136-37.
542. Id.
543. Id. at 136; cf. supra notes 319-39 and accompanying text.
conducted the subject transactions did not provide him with a defense to section 517.12.\textsuperscript{544}

One other decision of interest which was reported during the period involves the effect of SEC Rule 2(e)(1)\textsubscript{1} of the SEC Rules of Practice.\textsuperscript{545} Under Rule 2(e), the SEC is empowered to discipline lawyers who practice before it, including the power to revoke that lawyer’s right to practice before the SEC. In \textit{The Florida Bar v. Tepps},\textsuperscript{546} the Supreme Court held that The Florida Bar could not consider the entry of an SEC 2(e) revocation as “conclusive proof of misconduct” under the Bar’s rules allowing the Bar to revoke the license of a lawyer solely on the basis of the entry of an order of another jurisdiction terminating the lawyer’s right to practice there.\textsuperscript{547} The court concluded that “the SEC is not a ‘court or other authorized disciplinary agency of another jurisdiction’” and refused to recognize its order as a basis for disciplinary action without a full evidentiary hearing.\textsuperscript{548}


\textsuperscript{545} 17 C.F.R. § 201.2(e)(1)(1991).

\textsuperscript{546} 601 So. 2d 1174 (Fla. 1992).

\textsuperscript{547} \textit{Id.}

\textsuperscript{548} \textit{Id.} at 1175.
Capital Crimes: 1993 Survey of Florida Law

Gary Caldwell

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I. DETERMINATION OF GUILT

For practical purposes, Florida applies the death penalty only to first degree murder cases. The State recognizes two forms of this offense: unlawful killing from a premeditated design to kill,¹ and unlawful killing during the attempt to commit, the commission of, or the flight from the commission of an enumerated felony.² Although the Florida Supreme Court did nothing significant during the reporting period respecting felony murders, it issued two interesting opinions regarding murder by premeditated design. It also issued opinions regarding the State's failure to abide by plea bargains in capital cases.

¹ FLA. STAT. § 782.04(1)(a)1 (1991).
² ld. § 782.04(1)(a)2.
A. The Element of Premeditated Design

In *Hoefert v. State*,\(^3\) the court found that the evidence did not support a finding of a premeditated design to kill. The evidence showed that a strangled woman was found in Robert Earl Hoefert's apartment, and the State presented ample collateral crime evidence that he had also choked other women while assaulting or raping them.\(^4\) Thus, it appeared that he had strangled the woman while committing a sexual assault on her. Nevertheless, the supreme court found that the evidence did not support his conviction for first degree murder, notwithstanding previous cases stating that strangulation is sufficient to establish premeditation.\(^5\) *Hoefert* is especially interesting because the court left open the question of whether Florida's standard jury instruction on premeditation correctly defines the statutory element of premeditated design.

In contrast to *Hoefert* is *Trepal v. State*.\(^6\) George J. Trepal, in an elaborate attempt to force a neighboring family to move away, put poison in Coca-Cola bottles in the family's home, and as a result, one person died and the others fell quite ill.\(^7\) With two justices dissenting, the supreme court held the evidence supported a finding of a premeditated design to kill.\(^8\) In his dissent, Justice McDonald argued that the evidence did not show that Mr. Trepal intended to kill any of the family members, so that the evidence supported only a finding of second degree murder.\(^9\)

In another case involving the premeditation element, the court found no error in excluding mental health expert testimony showing that the defendant did not premeditate the murder.\(^10\)

B. Violation of Plea Agreements

In *Hunt v. State*,\(^11\) Deidre Hunt pleaded guilty to two first degree murders once the State agreed her penalty proceeding would take place after that of her co-defendant, Konstantino Fotopoulos. She thereafter indicated her refusal to testify against Mr. Fotopoulos. Deeming this refusal a

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3. 617 So. 2d 1046 (Fla. 1993).
4. *Id*.
5. *Id* at 1049.
6. 621 So. 2d 1361 (Fla. 1993).
7. *Id*.
8. *Id* at 1367.
9. *Id* (McDonald, J., dissenting).
11. 613 So. 2d 893 (Fla. 1992).
violation of the plea agreement, the State sought, and the trial court granted, an order to reschedule her sentencing so that it would occur before the Fotopoulos trial. Ms. Hunt was sentenced to death. On appeal, she argued the plea should be set aside because the State had violated the plea agreement. Determining that “the State’s agreement that Hunt’s sentencing would be postponed until after Fotopoulos’ trial was not contingent upon Hunt’s cooperation and testimony in that case,” the supreme court found that the State had violated the plea agreement. Nevertheless, the court concluded that “specific performance is an adequate remedy,” refused to grant Ms. Hunt her requested relief and, instead, ordered new sentencing proceedings.

In *Long v. State*, the supreme court found that the State had also failed to abide with a plea agreement in its tangled dealings with Robert Joe Long. In 1985, Mr. Long was found guilty of first degree murder and other offenses in Pasco County. Later that year, he pleaded guilty to eight murders and several other felonies in Hillsborough County after the State agreed not to use those crimes against him in any subsequent penalty proceeding. He was sentenced to death for one of the Hillsborough County convictions, and to life imprisonment for the others. In separate appeals, his Pasco County conviction and death sentence, and the Hillsborough death sentence were vacated. On remand, Mr. Long was again found guilty of the Pasco murder and sentenced to death. In a separate proceeding he was sentenced to death for the Hillsborough murders. In the Pasco County sentencing proceedings, the State used evidence of the Hillsborough County offenses. On appeal, the supreme court again reversed the Pasco conviction for various reasons, and ruled that use of the Hillsborough offenses violated the Hillsborough plea agreement. In the new Hillsborough appeal, however, the supreme court refused to set aside the plea agreement. It reasoned that since it had set aside the Pasco sentence and ruled that the State could not use the plea agreement in any subsequent penalty proceedings, the matter was moot: Mr. Long had in effect received specific performance.

12. *Id.* at 897.
13. *Id.* at 898.
14. *Id.*
15. 529 So. 2d 286 (Fla. 1988).
16. *Id.* at 292.
19. *Id.*
C. Evidence: Gruesome Photographs

Murder trials typically involve the State’s use of gruesome photographs of the decedent. In the past, the supreme court has deferred to the trial court’s discretion regarding the admissibility of such photographs, but during the survey period, it strongly cautioned that their use may lead to reversal of a conviction. 20

II. PENALTY PROCEEDINGS

A. Aggravating Circumstances

1. Sentence of Imprisonment 21

There were no developments regarding this circumstance during the survey period.

2. Previous Violent Felony Conviction 22

There were several recent developments regarding the “previous violent felony conviction” circumstance.

a. Evidence

In the past, the supreme court has ruled the State may introduce extensive evidence detailing the facts of a defendant’s prior violent offenses. 23 However, in two cases during the survey period, the court found error when the State used photographs depicting the victims of the prior violent felonies during the penalty phase of the case. 24

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21. See FLA. STAT. § 921.141(5)(a) (1991) (“The capital felony was committed by a person under sentence of imprisonment or placed on community control.”).
22. See id. § 921.141(5)(b) (“The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.”).
23. E.g., Rhodes v. State, 547 So. 2d 1201 (Fla. 1989); Elledge v. State, 346 So. 2d 998 (Fla. 1977). But see Freeman v. State, 563 So. 2d 73 (Fla. 1990) (holding it was error to permit spouse of victim, whom defendant had previously been convicted of killing, to testify concerning victim’s death at penalty phase of prosecution).
24. See Duncan v. State, 619 So. 2d 279 (Fla. 1993); Elledge, 613 So. 2d at 434.
b. Weight

During the survey period, the court appears to have increased the weight that is given to a prior violent felony when the prior violent felony was a murder. In Duncan v. State, the court upheld a death sentence when a prior violent felony was the only aggravating circumstance to support Donn A. Duncan's death sentence for the murder of his fiancee. 25 Mr. Duncan had previously been convicted of a second degree murder committed in prison, and had a contemporaneous (and hence "previous") 26 conviction for a second degree murder of a fellow prison inmate twenty-one years before.

In Slawson v. State, 27 the court upheld three death sentences where the only aggravating circumstance was that the defendant had "previous" violent felony convictions for contemporaneous murders on various members of the victim's family. 28 The supreme court supported the trial court's reasoning that the murder of two helpless children gave added weight to the circumstance. 29

3. Great Risk 30

The court upheld application of the "great risk" circumstance to the curious facts in Trepal v. State. 31 During a dispute with the neighboring Carr family, George Trepal decided to put poison into bottles of Coca-Cola in the Carrs' home. Peggy Carr died and two others were hospitalized. A jury found Mr. Trepal guilty of first degree murder, six counts of attempted first degree murder, seven counts of poisoning food or water, and one count of tampering with a consumer product. The supreme court wrote of the trial court's use of the "great risk" circumstance:

Trepal raises . . . that it was error to find the aggravating circumstance "great risk of death to persons." He argues that only a possible risk, a mere speculation, existed and even the full bottles of cola were not

25. Duncan, 619 So. 2d at 279.
27. 619 So. 2d 255 (Fla. 1993).
28. Id. at 260. The court also sustained the death sentence for the murder of another family member where the trial court also applied the heinousness circumstance. Id. at 261.
29. Id. at 259.
30. See FLA. STAT. § 921.141(5)(c) (1991) ("The defendant knowingly created a great risk of death to many persons.").
31. 621 So. 2d 1361 (Fla. 1993).
proven to contain a deadly dose of poison, so great risk of death was not proven. He argues that only four persons resided in the Carr home, the other three lived in the detached apartment; therefore, this is not many persons. He also argues that as the number of persons who consumed the cola increased the risk of death decreased because the more people among whom it was divided the less the likelihood that a sufficiently large quantity of poison would be consumed. We reject these arguments. The evidence showed that seven family members lived on the Carr property at all times, other family members visited regularly, and Trepal knew that "there were a lot of people coming and going" on the Carr property. The contents of the full cola bottles contained lethal doses of thallium. The contents of the empty cola bottles killed and seriously injured members of the Carr household. Great risk of harm to many persons has been shown.

Trepal next argues that the "great risk" aggravating circumstance was improperly doubled with the "prior violent felony" aggravating circumstance. Prior violent felony may involve great risk of harm to many persons but need not necessarily do so. Each of these circumstances deals with a different aspect of the crime; therefore, each is proper.  

4. Felony Murder

Application of the felony murder circumstance is usually straightforward; either the murder occurred during an enumerated felony or it did not. In one case, however, the court struck the circumstance. In Clark v. State, Ronald Clark shot a man with the apparent motive of obtaining the man's job. After shooting him, he took his money and boots. The supreme court disapproved use of the felony murder circumstance, reasoning that the theft of the money and boots was an afterthought.

32. Id. at 1367 (footnote omitted) (citations omitted).
33. See Fla. Stat. § 921.141(5)(d) (1991) ("The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.").
34. 609 So. 2d 513 (Fla. 1992).
35. Id.
5. The Law Enforcement Circumstances: Avoiding Arrest, Hindering Law Enforcement, and Murder of Law Enforcement Officer

Of the three law enforcement circumstances, courts most frequently apply the one involving avoiding arrest; the other two generally merge with that circumstance. The court set forth the law which governs the aggravating circumstance of avoiding arrest in *Robertson v. State*.

The State must prove beyond a reasonable doubt that an aggravating circumstance exists. Moreover, even the trial court may not draw "logical inferences" to support a finding of a particular aggravating circumstance when the State has not met its burden. In order to support a finding that a defendant committed a murder to avoid arrest, the State must show beyond a reasonable doubt that the defendant’s dominant or only motive for the murder of the victim, who is not a law enforcement officer, is the elimination of a witness. "Proof of the requisite intent to avoid arrest and detection must be very strong" to support this aggravating circumstance when the victim is not a law enforcement officer.

Thus, in the fairly typical case of *Davis v. State*, the court disapproved use of the circumstance where Henry Davis killed an elderly woman whose home he was burglarizing. The trial court had found the circumstance because the woman knew Mr. Davis and could identify him as the burglar. The supreme court held that the fact that witness elimination may have been a motive in the murder was insufficient to support the circumstance. Although *Davis* represents the usual approach to the circumstance, the supreme court will sometimes uphold the circumstance even where there is no clear evidence of motive. In *Hall v. State*, the court upheld the

36. See FLA. STAT. § 921.141(5)(e) (1991) ("The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody."); id. § 921.141(5)(g) ("The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws."); id. § 921.141(5)(j) ("The victim of the capital felony was a law enforcement officer engaged in the performance of his official duties.").
37. 611 So. 2d 1228, 1232 (Fla. 1993) (striking circumstance where defendant murdered woman who had witnessed her companion’s murder).
38. Id. (citations omitted).
39. 604 So. 2d 794 (Fla. 1992).
40. Id. at 795.
41. Id. at 798; see also Lawrence v. State, 614 So. 2d 1092 (Fla. 1993) (murder of store clerk during robbery).
42. 614 So. 2d 473 (Fla. 1993).
circumstance when Freddie Lee Hall and another man kidnapped, raped and murdered a woman, leaving her body in the woods. Citing to many prior cases which applied the circumstance "when the victim is transported to another location and then killed," the supreme court determined "the evidence leaves no reasonable inference except that Hall and Ruffin killed the victim to eliminate the only witness to their having kidnapped and raped her and having stolen her car." One may wonder how this is not the sort of "logical inference" forbidden by *Robertson v. State*.

In *Fotopoulos v. State*, the supreme court also approved application of the circumstance to Deidre Hunt's co-defendant, Konstantinos Fotopoulos, as there was evidence that Fotopoulos killed a man who knew of his illegal activities and planned to blackmail him. The court rejected the defense's argument that witness elimination was but one of several motives for the murder.

6. Pecuniary Gain

Except when the murder occurs to obtain insurance proceeds, this circumstance is usually merged with the felony murder circumstance. *Fotopoulos* presented a somewhat different merger issue. The evidence was that Mr. Fotopoulos committed two murders as part of a fantastic plan to obtain insurance proceeds in his wife's murder. The supreme court rejected the defense's argument that it was error to give separate consideration to the pecuniary gain and premeditation circumstances because they involved the same aspects of the crime.

43. *Id.* at 477-78.
44. *Id.* at 477-78.
45. 611 So. 2d 1228 (Fla. 1992).
46. 608 So. 2d 784 (Fla. 1992).
47. *Id.* at 792.
48. *Id.* Another strong motive behind the blackmailer's murder was to ensnare Ms. Hunt into a plot to kill Mr. Fotopoulos's wife. *Id.*
49. See Fla. Stat. § 921.141(5)(f) (1991) ("The capital felony was committed for pecuniary gain.").
50. E.g., *Fotopoulos*, 608 So. 2d at 784.
51. E.g., *Davis*, 604 So. 2d at 794.
52. Having had Ms. Hunt participate in the videotaped murder of a man who had been blackmailing him, Mr. Fotopoulos used the tape to blackmail her into participating in a scheme in which they would murder another man hired to murder Mrs. Fotopoulos, after which they would gain insurance proceeds in the wife's death. The plan went awry when the second man shot, but failed to kill the wife. *Fotopoulos*, 608 So. 2d at 784, 786.
53. *Id.* at 790.
The supreme court has held in the past that this circumstance does not apply vicariously when the defendant ordered the murder but did not command that it involve torture, and does not apply when the murder is by gunshot. During the survey period, the court struck the circumstance in several cases in conformance with these precedents. While cases striking vicarious application are straightforward, gunshot cases turn on fine distinctions. In Clark, the court rejected the State's argument that the murder was heinous because the defendant reloaded his gun between the first shot and the fatal shot so as to make the decedent aware of an impending death:

The State argues that . . . because Carter was probably conscious between the time the first shot was fired and the time he was killed by the second shot, and therefore was probably aware of his impending death. However, the evidence indicates that the fatal shot came almost immediately after the initial shot to the chest. The fact that it took more than one shot to kill this victim does not set this crime apart from the norm of capital felonies, and there is no indication that the crime was committed in such a manner as to cause unnecessary and prolonged suffering to the victim. We therefore agree with Clark that this aggravating circumstance is not present in this case.

The Clark court cited Brown v. State and Lewis v. State in support of its decision. In Brown, the court ruled the heinous, atrocious, or cruel aggravator was not warranted when the victim had been shot in the arm, begged for his life, and then was shot in the head. Similarly, the Lewis court held the heinous, atrocious or cruel aggravator was improperly found.

54. See Fla. Stat. § 921.141(5)(h) (1991) ("The capital felony was especially heinous, atrocious, or cruel.").
57. Williams v. State, 622 So. 2d 456 (Fla. 1993) (vicarious application); Archer v. State, 613 So. 2d 446 (Fla. 1993); see also Cannady v. State, 620 So. 2d 165 (Fla. 1993) (murder by gunshot); Lawrence v. State, 614 So. 2d 1092 (Fla. 1993); Robertson v. State, 611 So. 2d 1228 (Fla. 1992); Clark v. State, 609 So. 2d 513 (Fla. 1992).
58. Clark, 609 So. 2d at 514-15 (citing Brown v. State, 526 So. 2d 903 (Fla.), cert. denied, 488 U.S. 944 (1988); Lewis v. State, 377 So. 2d 640 (Fla. 1979)).
59. 526 So. 2d 903 (Fla. 1988).
60. 377 So. 2d 640 (Fla. 1979).
61. Brown, 526 So. 2d at 907.
when the victim was shot in the chest, attempted to flee, and then was shot in the back.\textsuperscript{62}

One might have trouble squaring the supreme court’s decisions in \textit{Brown v. State}\textsuperscript{63} and \textit{Lewis v. State}\textsuperscript{64} with the court’s decision in \textit{Rodriguez v. State},\textsuperscript{65} where the court wrote:

Next, we reject Rodriguez’s claim that this murder was the result of a simple shooting and therefore cannot be considered heinous, atrocious, or cruel under section 921.141(5)(h), Florida Statutes (1989). After the shooting, Rodriguez bragged that when Mr. Saladrigas would not turn over his belongings, Rodriguez shot the man twice, first in the knee and then in the stomach. As his victim ran, pleading for his life, Rodriguez shot him again because Saladrigas still had not given up his watch. After being wounded, Mr. Saladrigas ran over 200 feet with his attacker in pursuit only to be shot a fourth time behind a car where he sought cover. These facts set this murder apart from the norm of capital felonies and support the conclusion that Rodriguez enjoyed or was utterly indifferent to the suffering of his victim.\textsuperscript{66}

Although they were decided in the same month, and were pending on rehearing at the same time, \textit{Clark} and \textit{Rodriguez} make no mention of each other. Similar to \textit{Rodriguez} is \textit{Lucas v. State},\textsuperscript{67} in which the court upheld application of the circumstance when, after repeatedly threatening her, Harold Gene Lucas chased, beat, and repeatedly shot a 16-year-old girl.\textsuperscript{68}

The court continued to uphold the circumstance in almost all non-gunshot murders.\textsuperscript{69} However, the supreme court recently rejected State

\begin{itemize}
\item \textsuperscript{62} \textit{Lewis}, 377 So. 2d at 646.
\item \textsuperscript{63} 526 So. 2d 903, 906-07 (Fla. 1988) (heinous, atrocious, or cruel aggravator improperly found where victim was shot in the arm, begged for his life, then shot in the head); \textit{see also Robertson}, 611 So. 2d at 1228 (defendant repeatedly shot woman as she cried and screamed after he shot her companion); \textit{Burns v. State}, 609 So. 2d 600 (Fla. 1992) (striking circumstance where drug trafficker shot officer begging for his life while standing in water-filled ditch).
\item \textsuperscript{64} 377 So. 2d 640, 646 (Fla. 1979) (heinous, atrocious, or cruel aggravator improperly found where victim shot in the chest, attempted to flee, then shot in the back).
\item \textsuperscript{65} 609 So. 2d 493 (Fla. 1992).
\item \textsuperscript{66} \textit{Id.} at 501 (citations omitted).
\item \textsuperscript{67} 613 So. 2d 408 (Fla. 1992).
\item \textsuperscript{68} \textit{Id.} at 411 n.5.
\item \textsuperscript{69} \textit{See Hall v. State}, 614 So. 2d 473, 478-79 (Fla. 1993) (rape and beating); \textit{Happ v. State}, 618 So. 2d 205, 206-07 (Fla. 1993) (beating and anal rape); \textit{Slawson v. State}, 619 So. 2d 255, 259-60 (Fla. 1993) (shooting and slicing pregnant woman, expelling fetus from abdomen); \textit{Sochor v. State}, 619 So. 2d 285, 291-93 (Fla. 1993) (strangulation); \textit{Davis v.
argument that the trial court erred in not finding the circumstance in a strangulation case, noting that it was not clear whether the victim was awake when murdered.\footnote{DeAngelo v. State, 616 So. 2d 440 (Fla. 1993).}

Cases remanded by the Florida Supreme Court for reconsideration in view of Espinosa v. Florida\footnote{112 S. Ct. 2926 (1992).} are discussed below in the section on appellate review.

8. Premeditation\footnote{See FLA. STAT. § 921.141(5)(i) (1991) ("The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.")}.

The premeditation circumstance continues to be the one most prone to misapplication. During the survey period the supreme court struck the circumstance in eight direct appeal cases,\footnote{See Crump v. State, 622 So. 2d 963 (Fla. 1993); Cannady v. State, 620 So. 2d 165 (Fla. 1993); Padilla v. State, 618 So. 2d 165 (Fla. 1993); Maulden v. State, 617 So. 2d 298 (Fla. 1993); White v. State, 616 So. 2d 21 (Fla.), cert denied, 114 S. Ct. 214 (1993); Lawrence v. State, 614 So. 2d 1092 (Fla. 1993); Clark v. State, 609 So. 2d 513 (Fla. 1992); Power v. State, 605 So. 2d 856 (Fla. 1992).} and affirmed it in ten.\footnote{Williams v. State, 622 So. 2d 456 (Fla. 1993); Trepal v. State, 621 So. 2d 1361 (Fla. 1993); DeAngelo v. State, 616 So. 2d 440 (Fla. 1993); Hall v. State, 614 So. 2d 473 (Fla. 1993); Foster v. State, 614 So. 2d 455 (Fla. 1992); Jones v. State, 612 So. 2d 1370 (Fla. 1992), cert. denied, 114 S. Ct. 112 (1993); Long v. State, 610 So. 2d 1268 (Fla. 1992); Fotopolous v. State, 608 So. 2d 784 (Fla. 1992); Johnson v. State, 608 So. 2d 4 (Fla. 1992), cert. denied, 113 S. Ct. 2366 (1993); Durocher v. State, 604 So. 2d 810 (Fla. 1992), cert. denied, 113 S. Ct. 1660 (1993).} As in past years, it disapproved of the use of the circumstance in felony murder cases when the evidence showed the felony, but not the murder, was planned,\footnote{Power, 605 So. 2d at 856.} or when the defendant was so upset that the murder was not
cold-blooded.76 In one case, the supreme court found it could not apply the circumstance when the defendant was high on cocaine at the time of the murder.77

The court reached differing results when the murders occurred after the defendant had moved the decedent to a remote location. In Clark, the court found error in applying the circumstance when Ronald Wayne Clark took a man out to the woods and killed him with two blasts from a sawed-off shotgun.78 Similarly, in Crump v. State, the court found error when Michael Tyrone Crump bound, beat, and strangled a prostitute after driving her to a park.79 In both cases, the court reasoned the state had not proven an intent to kill when the decedents entered the killers' vehicles.80 Therefore, the circumstance did not apply. The court reached this decision notwithstanding the fact there was evidence that Mr. Crump had murdered another prostitute in very similar circumstances, which “showed that Crump killed both [women] in a criminal pattern in which he picked up prostitutes, bound them, strangled them, and discarded their nude bodies near cemeteries.”81

In Long v. State,82 the court took a less charitable view and upheld the circumstance without discussion.83 The evidence showed that Mr. Long bound and raped a prostitute and then, after deciding to return her to where he had picked her up, he instead choked and beat her and cut her throat. The supreme court also upheld the premeditation circumstance in Hall v. State.84 In Hall, the court addressed the sentencing of Freddie Lee Hall to death in the abduction and brutal murder of a pregnant woman:

The evidence also supports finding the murder to have been committed in a cold, calculated, and premeditated manner with no pretense of moral or legal justification. The record shows that Hall and Ruffin intended to steal the victim's car. To that end, they could have taken the car and simply left her in the parking lot. Instead, however, they abducted, raped, beat, and finally killed her. Even if Hall did not fire

76. Cannady, 620 So. 2d at 169; Padilla, 618 So. 2d at 165; Maulden, 617 So. 2d at 298.
77. White, 616 So. 2d at 21.
78. Clark, 609 So. 2d at 514.
79. Crump, 622 So. 2d at 966.
80. Clark, 609 So. 2d at 515; Crump, 622 So. 2d at 972.
81. Crump, 622 So. 2d at 971.
82. 610 So. 2d 1268 (Fla. 1992).
83. Id. at 1275.
84. 614 So. 2d 473 (Fla. 1993).
the shot that killed the victim, he was a willing if not predominant participant in the other acts. The totality of the circumstances show this murder to have been committed in a cold, calculated, and premeditated manner. There is no merit to Hall's argument that his mental retardation provided a pretense of moral or legal justification. Additionally it is not improper to apply this aggravator to killings committed before the legislature adopted it.85

In Trepal v. State, the court rejected a claimed "pretense of moral or legal justification."86 In Trepal, the contention was that the murder was committed to get rid of unwanted neighbors.87

B. Mitigation

1. Treatment of Co-Defendants

In Scott v. State,88 the evidence was that Jeremy Lynn Scott and Bryan Hall murdered a man to conceal the theft of his car. Mr. Hall, testifying for the state, claimed that the theft and murder were not his idea and that he hit the man only once, whereas Mr. Scott hit and strangled him. Accepting Mr. Hall's testimony at face value, the court wrote:

[w]e also note that Scott's accomplice, Bryan Hall, received a life sentence for his participation in the murder. While the disparate treatment of equally culpable accomplices can serve as a valid basis for a jury's recommendation of life imprisonment, the evidence presented at trial indicates that Hall and Scott were not equally culpable.89

The court, however, did not explain why the jury could not reasonably discount Mr. Hall's claim of lesser culpability.

The discussion in Williams v. State90 was similar. Darrell Frazier, Bruce Frazier, Timothy Robinson, and Michael Coleman participated in the brutal murders of various persons suspected of crossing a drug trafficking

85. Id. (citations omitted).
86. Trepal v. State, 621 So. 2d 1361 (Fla. 1993); see also Hall, 614 So. 2d at 473; Jones, 612 So. 2d at 1370.
87. Trepal, 621 So. 2d at 1364.
88. 603 So. 2d 1274 (Fla. 1992).
89. Id. at 1277 n.4.
90. 622 So. 2d 456 (Fla. 1993).
ring headed by Ronald Lee Williams. Testifying for the State, the Fraziers contended that the murders were Williams' idea and that Coleman and Robinson did the actual killing. Overriding a life verdict, the trial court sentenced Mr. Williams to death. The Fraziers received life sentences for their cooperation. The supreme court affirmed, saying that the disparate treatment of the Fraziers was not a mitigating factor since (according to their self-serving testimony) they were less culpable than Mr. Williams.

In contrast, Scott v. State involved a defendant whose sentence was reduced to life because of the disparate sentence of his co-defendant. Abron Scott and Amos Earl Robinson kidnapped and murdered a man, apparently to steal his car. On direct appeal, the supreme court affirmed Mr. Scott's death sentence, but reversed Mr. Robinson's in part because the trial court had refused to instruct the jury on the mitigating circumstance of minor participation. The court wrote that Mr. Robinson's statements to the police, minimizing his involvement, could reasonably support the mitigating circumstance. The trial court subsequently sentenced Robinson to life imprisonment. As a result of Robinson's resentencing, Mr. Scott moved for post-conviction relief, asserting his co-defendant's lesser sentence could reasonably lead to a lesser sentence for himself. He had powerful evidence for this claim: the original trial judge who had sentenced both men to death had written to the Clemency Board that she considered both equally culpable, and recusing herself, said that she thought they were "equally deranged and equally had poor records." In view of the judge's representations, the supreme court reduced Mr. Scott's sentence to life imprisonment. Thus, one defendant's sentence, reduced in part on a claim of minimal participation, led to reduction of the other defendant's sentence on a claim of equal participation.

91. Id. at 458.
92. Mr. Coleman and Mr. Robinson were also sentenced to death, and their sentences affirmed by the supreme court. Robinson v. State, 610 So. 2d 1288 (Fla. 1992); Coleman v. State, 610 So. 2d 1283 (Fla. 1992), cert. denied, 114 S. Ct. 821 (1993).
93. Williams, 622 So. 2d at 464.
94. 494 So. 2d 1134 (Fla. 1986).
95. Id. at 1139.
96. Robinson v. State, 487 So. 2d 1040, 1042 (Fla. 1986).
97. Id. at 1043.
99. Id.
100. Id. at 468-69.
101. Id. at 470.
2. Waiver of Mitigation

In *Koon v. Dugger*,\(^{102}\) the Florida Supreme Court established the circumstances in which the trial court should allow defense counsel to waive presentation of mitigation. The court stated:

When a defendant, against his counsel's advice, refuses to permit the presentation of mitigating evidence in the penalty phase, counsel must inform the court on the record of the defendant's decision. Counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be. The court should then require the defendant to confirm on the record that his counsel has discussed these matters with him, and despite counsel's recommendation, he wishes to waive presentation of penalty phase evidence.\(^{103}\)

C. Evidence and Argument

1. The Character of the Decedent

The Supreme Court has ruled that there is no Eighth Amendment bar to evidence and argument about the decedent's character in capital sentencing proceedings.\(^{104}\) The Florida Legislature has amended the Florida Statutes to authorize the same.\(^{105}\) The Florida Supreme Court's treatment of such evidence and argument is somewhat confusing.

In *Thomas v. State*,\(^{106}\) the court considered the decedent's criminal activity irrelevant to the sentencing decision. Similarly, in *Marshall v. State*,\(^{107}\) the court seemed to disapprove of "negative characterization of the victim" as mitigation.\(^{108}\) On the other hand, the court in *Jones v.*

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102. 619 So. 2d 246 (Fla. 1993).
103. *Id.* at 250.
105. See FLA. STAT. § 921.141(7) (Supp. 1992). At least one trial court judge has declared this subsection unconstitutional. State v. Maxwell, No. 80-8767 (B) (Fla. 17th Cir. Ct. June 22, 1993).
106. 618 So. 2d 155 (Fla. 1993) ("The victim's efforts to buy cocaine are irrelevant to Thomas' culpability."). *cert. denied*, 114 S. Ct. 321 (1993).
107. 604 So. 2d 799 (Fla. 1992).
108. *Id.* at 806 ("Furthermore, defense counsel's argument composed largely of a negative characterization of the victim does not provide a reasonable basis for the jury's life recommendation.").
State approved of evidence and argument regarding the decedent’s state of mind at the time of the killing.

In Burns v. State, seeking to rebut assertions in the defense opening statement, the State introduced evidence of the decedent’s background and character as a law enforcement officer. Pointing to Payne v. Tennessee, the supreme court rejected the argument that such evidence violated the Eighth Amendment. Nevertheless, reasoning that counsel’s opening statement is not evidence and therefore does not open the door to rebuttal evidence, the court found the trial court erred in admitting the testimony. While the improper evidence constituted harmless error as to guilt, the court found its erroneous admission required a resentencing. One may find this result baffling: even if the evidence was not admissible as to guilt, it was apparently admissible as to penalty; if it was admissible as to penalty, then the character of the victim was a valid sentencing consideration. Perhaps what really troubled the supreme court was the extent of the prosecutor’s argument.

2. Argument Generally

Although the supreme court is sometimes disposed to think that juries are improperly swayed by arguments of defense counsel, it will seldom reverse a death sentence because of improper argument by the State. It

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110. Id. at 1374 (citing Payne, 111 S. Ct. at 2597).
111. 609 So. 2d 600 (Fla. 1992).
112. Id. at 603.
113. Id. at 605.
114. Id.
115. Id. at 606. The court stated:
Reverting to our earlier finding that it was error to admit the background evidence of the deceased, we cannot with the same certainty determine it to be harmless in the penalty phase. The testimony was extensive and it was frequently referred to by the prosecutor. The prosecutor described the defendant as an evil supplier of drugs and contrasted him with the deceased. These emotional issues may have improperly influenced the jury in their recommendation.

Burns, 609 So. 2d at 607.
116. E.g., Williams v. State, 622 So. 2d 456, 464 (Fla. 1993); Marshall, 604 So. 2d at 799.
imposes a very high standard for reversal, and frequently finds claims of improper argument defaulted.\textsuperscript{117} Interesting questions regarding argument as evidence are presented by \emph{Hunt v. State}\textsuperscript{118} and \emph{Burns v. State}.\textsuperscript{119} Ms. Hunt contended that the State’s argument in her co-defendant’s trial, that her co-defendant was the leader and she was the follower, could be used as defensive evidence at her resentencing.\textsuperscript{120} The supreme court left the issue open.\textsuperscript{121} \emph{Burns} establishes that counsel’s opening statement is not evidence subject to rebuttal testimony.\textsuperscript{122}

3. Hearsay

In \emph{Duncan v. State},\textsuperscript{123} the court granted the State’s cross appeal from the trial court’s finding of mitigation. Although the record contained Mr. Duncan’s statements to the police that he “went nuts” before the murder, the supreme court found such evidence was hearsay and could not support a mitigating circumstance.\textsuperscript{124} This conclusion is questionable since the State used the statements as substantive evidence of guilt,\textsuperscript{125} and the court has elsewhere ruled that the defendant’s unsupported statements to the police can establish a mitigating circumstance,\textsuperscript{126} and can negate an aggravating circumstance.\textsuperscript{127}

\textsuperscript{117} See\textsuperscript{ Stewart v. State, 620 So. 2d 177 (Fla. 1993); White v. State, 616 So. 2d 21 (Fla. 1993); Rodriguez v. State, 609 So. 2d 493, 500-01 (Fla. 1992) (defaulting issue for failure to seek curative instruction even though defense objected and moved for mistrial); Johnson v. State, 608 So. 2d 4 (Fla. 1992).}
\textsuperscript{118} 613 So. 2d 893 (Fla. 1992).
\textsuperscript{119} Burns, 609 So. 2d at 600.
\textsuperscript{120} Hunt, 613 So. 2d at 898.
\textsuperscript{121} \textit{Id.} at 898 n.5. The court stated: “[W]e do not reach the merits of Hunt’s contention, which was made in a notice of supplemental authority to her motion for judicial notice, that the State’s portrayal of Hunt as a victim in the Fotopoulos trial must be treated as ‘judicial admissions by a party opponent.’” \textit{Id.} (citations omitted).
\textsuperscript{122} Burns, 609 So. 2d at 605.
\textsuperscript{123} 618 So. 2d 279 (Fla. 1993).
\textsuperscript{124} \textit{Id.} at 281.
\textsuperscript{125} \textit{Id.} at 284.
\textsuperscript{126} See \textit{e.g.}, Robinson v. State, 487 So. 2d 1040, 1042-43 (Fla. 1986) (defendant’s statements to police could establish circumstance of minor participation).
\textsuperscript{127} See\textsuperscript{ Banda v. State, 536 So. 2d 221, 224-25 (Fla. 1988), cert. denied, 489 U.S. 1087 (1989); Cannady v. State, 427 So. 2d 723, 730-31 (Fla. 1983).}
The court has continued to permit the State to present hearsay evidence of the defendant's prior violent felonies. In Thompson v. State, a resentencing case, the court found no error in the State's use of an unavailable witness's testimony at the first sentencing, despite defense argument that the defense cross-examination at the earlier sentencing was minimal.

4. Mental Health Evidence

In Burns, the trial court had denied a State motion to have its mental health expert examine Mr. Burns in anticipation of the defendant offering mental health as mitigating circumstance. Instead, the trial court permitted the State's expert to be present during the penalty phase in preparation for his testimony, notwithstanding the rule of sequestration of witnesses. The supreme court approved the decision waiving the rule of sequestration, but left open the question whether the state could have its expert examine the defendant. The court stated:

We do not pass on whether the court erred in denying the state's request to have its expert examine Burns. However, because there is no rule of criminal procedure that specifically authorizes a state's expert to examine a defendant facing the death penalty when the defendant intends to establish either statutory or nonstatutory mental mitigating factors during the penalty phase of the trial, the matter has been brought to the attention of the Florida Criminal Rules Committee for consideration.

In Long v. State, the court found no error in the State's penalty phase use of a mental health expert who had examined Mr. Long regarding his sanity at the time of the offense as the defendant had filed a notice of intent to rely on a defense of insanity.

129. 619 So. 2d 261 (Fla.), cert. denied, ___ S. Ct. ___ (1993).
130. Id.
131. Burns, 609 So. 2d at 603.
132. Id. at 606 n.8.
133. Id.
134. Id.
135. 610 So. 2d 1268 (Fla. 1992).
136. Id. at 1275.
In Johnson v. State, the court upheld the trial court’s ruling that the State could cross-examine a defense expert about Paul Johnson’s prior drug offenses even though Mr. Johnson had waived the mitigating circumstance of lack of a significant history of prior criminal activity.

D. Jury instructions

The supreme court usually rejects jury instruction issues on grounds of procedural default. In two cases, however, it indicated that it considers the 1991 jury instruction regarding the heinous aggravating circumstance constitutionally adequate. Meanwhile, the Supreme Court Committee on Standard Jury Instructions in Criminal Cases has proposed to submit an amended instruction to the supreme court.

E. The Judge’s Sentencing Order

The survey period contains several cases setting out the trial court’s duties in preparing its sentencing order.

137. 608 So. 2d 13 (Fla. 1992).
138. Id. at 14.
139. The jury instruction provides:

   The crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel. “Heinous” means extremely wicked or shockingly evil. “Atrocious” means outrageously wicked and vile. “Cruel” means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

In re Standard Jury Instructions Criminal Cases—No. 90-1, 579 So. 2d 75 (Fla. 1991).
140. Hall v. State, 614 So. 2d 473 (Fla. 1993); Power v. State, 605 So. 2d 856 (Fla. 1992).
141. Comment sought on “heinous, atrocious or cruel,” THE FLORIDA BAR NEWS, Feb. 15, 1993, p.2. The committee proposed the following instruction:

   The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. To commit a crime that is heinous, atrocious or cruel, the defendant must have deliberately inflicted or consciously chosen a method of death with the intent to cause extraordinary mental anguish or physical pain to the victim, and the victim must have consciously suffered such mental anguish or physical pain for a substantial period of time before death.

Id.
1. Timeliness

The trial court must enter its written sentencing order, setting out its written evaluation of aggravating and mitigating circumstances, at the time of imposition of sentence. Accordingly, the supreme court reduced a death sentence to life imprisonment where a trial court judge did not render its sentencing order, and in fact did not give any oral grounds for the sentence, until twelve days after imposition of the sentence.

In Spencer v. State, the same judge erred in the opposite direction. The judge met ex parte with the prosecutor to draft the order sentencing Leonard Spencer to death before Mr. Spencer’s attorney had an opportunity to argue for his client’s life:

Next, we find it important to address the ex parte communications between the trial judge and the state attorney. In Grossman, we directed that written orders imposing the death sentence be prepared prior to the oral pronouncement of sentence. However, we did not perceive that our decision would be used in such a way that the trial judge would formulate his decision prior to giving the defendant an opportunity to be heard. We contemplated that the following sentencing procedure be used in sentencing phase proceedings. First, the trial judge should hold a hearing to: a) give the defendant, his counsel, and the State, an opportunity to be heard; b) afford, if appropriate, both the State and the defendant an opportunity to present additional evidence; c) allow both sides to comment on or rebut information in any presentence or medical report; and d) afford the defendant an opportunity to be heard in person. Second, after hearing the evidence and argument, the trial judge should then recess the proceeding to consider the appropriate sentence. If the judge determines that the death sentence should be imposed, then, in accordance with section 921.141, Florida Statutes (1983), the judge must set forth in writing the reasons for imposing the death sentence. Third, the trial judge should set a hearing to impose the sentence and contemporaneously file the sentencing order. Such a process was clearly not followed during these proceedings.

It is the circuit judge who has the principal responsibility for determining whether a death sentence should be imposed. Capital proceedings are sensitive and emotional proceedings in which the trial judge plays an extremely critical role. This Court has stated that there

144. 615 So. 2d 688 (Fla. 1993).
is nothing “more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant.” This statement was made in recognition of the purpose of canon 3A(4), Code of Judicial Conduct, which states:

A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding.145

On the other hand, the court in *Lucas v. State*146 approved Harold Gene Lucas’ death sentence when the trial court prepared the sentencing order before the sentencing hearing, but only after considering a defense sentencing memorandum filed two months before.147

2. Treatment of Mitigation

The Supreme Court of Florida continues its inconsistency regarding discussion of mitigation in sentencing orders. At one extreme is *Farr v. State*,148 in which the court reversed because the trial court failed to consider mitigation that was apparent on the record even though Victor Marcus Farr plead guilty, waived mitigation, and demanded that he be sentenced to death.149 The court stated:

Farr argues that the trial court was required to consider any evidence of mitigation in the record, including the psychiatric evaluation and presentence investigation. Our law is plain that such a requirement in fact exists. We repeatedly have stated that mitigating evidence *must* be considered and weighed when contained anywhere in the record, to the extent it is believable and uncontroverted. That requirement applies with no less force when a defendant argues in favor of the death penalty, and even if the defendant asks the court not to consider mitigating evidence.150

145. *Id.* at 691.
146. 613 So. 2d 408 (Fla. 1992).
147. *Id.*
148. 621 So. 2d 1368 (Fla. 1993).
149. *Id.* at 1382.
150. *Id.* (emphasis added); see also *Durocher v. State*, 604 So. 2d 810, 812 (Fla. 1992) (trial court “carefully considered and weighed all of the [mitigating] evidence about Durocher that could be gleaned from” the record, despite defendant’s adamant refusal to introduce...
Thus, the supreme court sometimes reverses where a trial court’s findings regarding mitigation are unclear.\footnote{\textit{See}, e.g., \textit{Crump v. State}, 622 So. 2d 963 (Fla. 1993); \textit{Foster v. State}, 614 So. 2d 455 (Fla. 1992).}

At the other end of the spectrum is \textit{Duncan v. State},\footnote{619 So. 2d 279 (Fla. 1993).} where the court used the vagueness of the trial court’s discussion of mitigation in striking mitigating circumstances and affirming the death sentence.\footnote{\textit{Id.} at 284.} Granting the State’s cross appeal, the court found the evidence did not support findings of mitigation regarding Mr. Duncan’s state of mind at the time of the murder, and specifically pointed to the lack of clarity in the trial court’s discussion of mitigation regarding the defendant’s intoxication.\footnote{\textit{Id.} at 283.}

The court stated:

As noted by the trial court in its sentencing order, “[a]ll witnesses testified that the Defendant appeared sober and that no one observed him drink any alcoholic beverages since the night before.” In light of this finding of fact, which is supported by the record, it is unclear whether the trial court actually found that Duncan was under the influence of alcohol at the time of the murder, and specifically pointed to the lack of clarity in the trial court’s discussion of mitigation regarding the defendant’s intoxication.\footnote{\textit{Id.} (citations omitted).}

The court stated:

3. Use of Incorrect Legal Standards

Claims that sentencing orders have applied incorrect legal standards have met uneven results. In \textit{Scott v. State},\footnote{603 So. 2d 1275 (Fla. 1992).} the court wrote that the trial court’s use of the lesser standard of clear and convincing evidence for aggravating circumstances (rather than the correct standard of proof beyond a reasonable doubt) “makes the sentencing order in this case fatally defective.” The court added, “we caution trial judges to carefully apply the proper standard in rendering their sentencing decisions.”\footnote{\textit{Id.} at 1277.}

The \textit{Scott} decision starkly contrasts with \textit{Henry v. State},\footnote{613 So. 2d 429 (Fla. 1993).} in which the court stated that, notwithstanding the trial court’s explicit use of a beyond a reasonable
doubt standard in evaluating mitigation, it assumed the trial court intended
to use the correct standard which is a preponderance of the evidence.\textsuperscript{160}

There also may be some inconsistency between \textit{Valentine v. State}\textsuperscript{161} and \textit{Hall v. State}.\textsuperscript{162} In reversing Terance Valentine’s conviction and
death sentence, the \textit{Valentine} court announced without explanation that it
agreed with Valentine’s contention that “the sentencing order [was] flawed
by the court’s failure to conduct an independent weighing of aggravating
and mitigating circumstances . . . .”\textsuperscript{163} In affirming Freddie Lee Hall’s
death sentence, the \textit{Hall} court rejected a similar claim by stating:

As noted earlier, Hall’s jury recommended that he be sentenced to
death. In agreeing with that recommendation the court wrote: “It is
only in rare circumstances that this court could impose a sentence other
than what is recommended by the jury, although the court obviously has
the right, in appropriate circumstances, to exercise its prerogative of
judicial override.” Hall now argues that the “rare circumstances”
language shows that the court used the wrong standard in considering
the jury’s recommendation. We disagree. As we have stated previously:
“Notwithstanding the jury recommendation . . . the judge is
required to make an independent determination, based on the aggravat-
ing and mitigating factors.” This judge recognized that the final
decision as to penalty was his and conscientiously weighed and
discussed the aggravating and mitigating evidence and made his decision
based on the evidence. We are convinced that he applied the proper
standard.\textsuperscript{164}

\textbf{F. Appellate Review}

\textbf{1. Espinosa Remands}

The \textit{Espinosa} remand cases are a mixed bag. In 1992, after having
found unconstitutional Florida’s former standard jury instruction on the
heinousness circumstance, the United States Supreme Court remanded
several cases to the Supreme Court of Florida for reconsideration in light of
that decision.\textsuperscript{165}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{160} \textit{Id.} at 432.
\item\textsuperscript{161} 616 So. 2d 971 (Fla. 1993).
\item\textsuperscript{162} 614 So. 2d 473 (Fla 1993).
\item\textsuperscript{163} \textit{Valentine}, 616 So. 2d at 974.
\item\textsuperscript{164} \textit{Hall}, 614 So. 2d at 477 (citations omitted).
\item\textsuperscript{165} One \textit{Espinosa} remand case, Hodges v. Florida, 113 S. Ct. 33 (1992), presented a
challenge to the standard jury instruction on the premeditation circumstance. Mr. Hodges’
\end{enumerate}
\end{footnotesize}
During the survey period, the Supreme Court of Florida granted relief in one remand case, while denying relief in six others on grounds of procedural default and harmless error. Happ v. State is typical of the decisions denying relief. The Happ court found a procedural default because, although William Frederick Happ’s trial lawyer objected to instruction on the heinousness circumstance, the objection “was not based on the assertion that the instruction was unconstitutionally vague but on the assertion that the instruction was inapplicable under the circumstances of the case.” Furthermore, the court stated the error was harmless beyond a reasonable doubt since the murder was so brutal that “regardless of the instruction given, the jury would have recommended and the trial judge would have imposed the same sentence.” Likewise, in Hodges v. State, the court applied a procedural bar and then stated: “[t]here is ample support in the record for finding the cold, calculated, and premeditated aggravator. Any error in the instruction, if any existed, therefore, was harmless and would not have affected the jury’s recommendation or the judge’s sentence.”

The foregoing harmless error analyses are difficult to square with Hitchcock v. State. Hitchcock represented a paradigmatic case of heinousness. Although, in the terminology of Hodges, there was

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166. See Hitchcock v. State, 614 So. 2d 483 (Fla. 1993).
167. See Davis v. State, 620 So. 2d 152 (Fla.), revised and superseded on denial of reh’g, 18 Fla. L. Weekly S385 (Fla. June 24 1993); Hodges v. State, 619 So. 2d 272 (Fla. 1993); Happ v. State, 618 So. 2d 205 (Fla. 1993); Ponticelli v. State, 618 So. 2d 154 (Fla.), cert. denied, 114 S. Ct. 352 (1993); Gaskin v. State, 615 So. 2d 679 (Fla.), cert denied, 114 S. Ct. 328 (1993).
168. 618 So. 2d 205 (Fla. 1993).
169. Id. at 206.
170. Id.
171. 619 So. 2d 272 (Fla. 1993).
172. Id. at 273.
173. 578 So. 2d 685 (Fla. 1990), cert. granted and judgment vacated, 112 S. Ct. 3020 (1992).
174. See the discussion in Sochor v. Florida, 112 S. Ct. 2114, 2121 (1992). The evidence was that Mr. Hitchcock strangled a 12-year-old girl because she was going to report that he had sex with her. Hitchcock v. State, 578 So. 2d 685 (Fla. 1990), cert. granted and judgment vacated, 112 S. Ct. 3020, reh’g denied, 113 S. Ct. 21 (1992).
"ample evidence"175 to support the circumstance, the court asserted that it could not find the improper instruction harmless by stating: "[w]e cannot tell what part the instruction played in the jury’s consideration of its recommended sentence."176

2. Harmless Error

When constitutional error has occurred in a death penalty proceeding, reversal is generally required177 unless the State can demonstrate the error was harmless beyond a reasonable doubt.178

Harmless-error review looks, we have said, to the basis on which "the jury actually rested its verdict." The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.179

Thus, the State must show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."180 "[T]he question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials."181 The "appellate court can [not] fulfill its obligations of meaningful review by simply reciting the formulation for harmless error."182

The Florida Supreme Court does not always seem to comply with these principles in its harmless error analysis. The Hodges analysis, that there was "ample support" in the record to support the circumstance, is the exact opposite of what the United States Supreme Court requires.183 Happ did

175. Hodges, 619 So. 2d at 273.
176. Hitchcock, 614 So. 2d at 484.
177. Alternatively, the appellate court can cure the error by engaging in independent fact-finding or reweighing of evidence. See Clemons v. Mississippi, 494 U.S. 738 (1990). The Supreme Court of Florida has eschewed this approach. See also Sochor, 112 S. Ct. at 2122-23.
180. Id. at 2081 (quoting Chapman v. California, 386 U.S. 18 (1967)).
not purport to determine whether the sentencing decision "actually rested" on matters independent of the improper instruction.\textsuperscript{184} In \textit{Jones v. State},\textsuperscript{185} the court did not make any analysis in finding harmless a penalty-phase instruction and stated: "Any error in the jury instructions, including not telling the jury to merge the pecuniary gain and felony-murder factors if found, is harmless beyond a reasonable doubt."\textsuperscript{186} In \textit{Sochor v. State},\textsuperscript{187} which had been remanded by the United States Supreme Court for the state court's failure to undertake a harmless error analysis, the Florida Supreme court merely asserted that the erroneous use of an aggravating circumstance was harmless because there were other aggravating circumstances and no mitigating circumstances found by the trial court judge.\textsuperscript{188} The court did not say that it concluded, or how it could have concluded, that the erroneous circumstance, on which the trial court explicitly relied, did not contribute to the sentencing decision.\textsuperscript{189} Contrary to \textit{Sochor} is \textit{James v. State}.\textsuperscript{190} In \textit{James} the court ruled that use of the unconstitutional instruction on the heinousness circumstance may have been harmful even though there were four other valid aggravating circumstances to weigh against no mitigating circumstances.\textsuperscript{191}

Perhaps the most remarkable analysis of erroneous admissions of police statements is in \textit{Thomas v. State},\textsuperscript{192} where the court stated: "[t]he police statements give a false picture of the crime and could easily mislead or confuse the jury. On this record, however, we find the error harmless beyond a reasonable doubt."\textsuperscript{193}

\begin{itemize}
\item \textsuperscript{184} Happ, 618 So. 2d at 206.
\item \textsuperscript{185} 612 So. 2d 1370 (Fla. 1992).
\item \textsuperscript{186} Id. at 1375 (citations omitted).
\item \textsuperscript{187} 619 So. 2d 285 (Fla. 1993).
\item \textsuperscript{188} Id. at 293.
\item \textsuperscript{189} \textit{Johnson} contains this similarly brief discussion: "[s]triking a single aggravator would not affect these sentences, and the trial court's erroneous finding of pecuniary gain for the Beasley murder was harmless error. Therefore, we affirm Johnson's sentences of death." \textit{Johnson}, 608 So. 2d at 13; \textit{see also} \textit{Stewart v. State}, 620 So. 2d 177, 179 (Fla. 1993) ("On this record, however, we find the error harmless beyond a reasonable doubt.").
\item \textsuperscript{190} 615 So. 2d 668 (Fla. 1993).
\item \textsuperscript{191} Id. at 669.
\item \textsuperscript{192} 618 So. 2d 155 (Fla. 1993).
\item \textsuperscript{193} Id. at 157. Although the court did not state whether it considered the error to be constitutional, it applies the harmless beyond a reasonable doubt standard to all errors. \textit{See State v. DiGuilio}, 491 So. 2d 1129, 1134 (Fla. 1986).
\end{itemize}
3. Procedural Default

The *Espinosa* remand cases may raise questions about the Florida Supreme Court’s use of procedural defaults as a bar to constitutional claims. In *Hodges*, for instance, the court noted on remand from the United States Supreme Court that in its original opinion it had not considered Mr. Hodges’ attack of the jury instruction procedurally defaulted and stated: “[w]e summarily found the issue meritless [in the original opinion], but we should have held it procedurally barred because Hodges did not preserve it for review by objecting at trial. Therefore, we now hold that the sufficiency of the cold, calculated instruction has not been preserved for review.”

Thus, it appears the court did not apply procedural defaults consistently during the two or so years before *Espinosa*. Accordingly, federal courts may be reluctant to find that procedural defaults bar litigation of constitutional claims in Florida capital cases. A state’s inconsistent application of procedural defaults will not bar federal review of federal constitutional issues. Inconsistent application of procedural defaults may also violate the Due Process and Equal Protection Clauses of the United States Constitution.

4. Proportionality

The Supreme Court of Florida produced several interesting decisions regarding its proportionality review of death sentences.

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194. *Hodges*, 619 So. 2d at 273. The court also applied procedural defaults for the first time on remand in *Davis v. State*, 620 So. 2d 152 (Fla.), *revised and superseded on denial of reh’g*, 18 Fla. L. Weekly S385 (Fla. June 24, 1993); *Happ v. State*, 618 So. 2d 205 (Fla. 1993); *Ponticelli v. State*, 618 So. 2d 154 (Fla. 1993); *Gaskin v. State*, 615 So. 2d 679 (Fla. 1993); *see also Occhicone v. Singletary*, 618 So. 2d 730 (Fla. 1993), wherein the Florida Supreme Court stated: “We could have, and probably should have, also said [in the 1990 direct appeal decision] that the claim was procedurally barred because of no objection at the time that the claim was procedurally barred because of no objection at the trial court level. In any event, the current claims are procedurally barred.” *Id.* at 730.


197. See cases cited in this discussion *infra*, pp. 28-31.
a. Weighing of Circumstances

The Supreme Court of Florida has repeatedly said in the past that it does not reweigh circumstances in performing appellate review,198 and has emphasized that its proportionality review does not involve reweighing.199 Yet, the survey period shows the court engaged in weighing circumstances in the limited context of proportionality review.

In Kramer v. State,200 the court engaged in a type of reweighing. The court stated:

In Tillman v. State, we explained that the purpose of the doctrine of proportionality is to prevent the imposition of "unusual" punishments contrary to article I, section 17 of the Florida Constitution, among other reasons. While the existence and number of aggravating or mitigating factors do not in themselves prohibit or require a finding that death is nonproportional, we nevertheless are required to weigh the nature and quality of those factors as compared with other similar reported death appeals.201

In the court’s initial opinion regarding Douglas Cannady’s two death sentences in Cannady v. State,202 the court seemed to engage in weighing and rejected a proportionality argument. The court stated: “[i]n weighing the nature of the convictions at issue, we find Cannady’s proportionality argument with regard to Boisvert’s murder to be without merit.”203

Maulden v. State204 presented a different weighing issue. The trial court wrote that it was the premeditated nature of the murders that called for imposition of the death penalty. However, finding that the evidence did not

198. E.g., Parker v. Dugger, 498 U.S. 308, 319 (1991) ("[T]he Florida Supreme Court has made it clear on several occasions that it does not reweigh the evidence of aggravating and mitigating circumstances.").
199. See Fitzpatrick v. State, 527 So. 2d 809, 812 (Fla. 1988).
200. 619 So. 2d 274 (Fla. 1993).
201. Id. at 277. In Tillman v. State, 591 So. 2d 167, 168-69 (Fla. 1991), the court had asserted that to conduct proportionality review is “to consider the totality of circumstances in a case, and compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances.” Id. (emphasis added).
203. Id.
204. 617 So. 2d 298 (Fla. 1993).
support the premeditation circumstance, the supreme court reduced the sentence to life imprisonment.205

b. Single Aggravator Cases

A reasonable postulate of proportionality review is that the death sentence is to be reserved for the most aggravated and least mitigated murders.206 Thus, the general rule is that the death sentence is inappropriate for murders involving only a single aggravating circumstance unless there is nothing, or very little, in mitigation.207 However, where the single aggravating circumstance involves a prior murder, the supreme court has found the death penalty to be a proportional punishment.208

In Burns v. State,209 the court struck the heinousness circumstance, left only the avoid arrest circumstance, and reversed for resentencing, but did not engage in any proportionality analysis even though there was substantial mitigation in the record.210 Similarly, in Crump v. State,211 the court vacated for resentencing without engaging in proportionality analysis.212 In ordering resentencing in Crump and Burns, the court expressed uncertainty about the trial court's findings of mitigation. In another one-aggravator case,213 the court simply disapproved of the trial court's failure to find mitigation, made its own determination that there was "strong nonstatutory mitigation," and declared the death sentence disproportionate to the crime.214 Similarly, in both White v. State215 and DeAngelo v.

205. Id. at 303.
207. See Songer, 544 So. 2d at 1011.
208. See Duncan v. State, 619 So. 2d 279 (Fla. 1993); Slawson v. State, 619 So. 2d 255 (Fla. 1993).
209. 609 So. 2d 600 (Fla. 1992).
210. The substantial mitigation shown in the record was the statutory mitigating circumstance of no significant criminal history, and the non-statutory mitigation, which the trial court deemed "not significant," that Mr. Burns was raised in a poor rural environment; he worked hard to support his family, he supported his children, he received an honorable discharge from the armed services, and he expressed remorse for the murder. Id. at 603.
211. 622 So. 2d 963, 973 (Fla. 1993).
212. Id.
213. Clark v. State, 609 So. 2d 513 (Fla. 1992). The court struck three aggravating circumstances found by the trial court, leaving only the pecuniary gain circumstance (Mr. Clark had committed the murder to obtain the decedent's job). Id. at 514-16.
214. Id. at 516.
215. 616 So. 2d 21 (Fla. 1993).
State," the supreme court reduced the sentences to life imprisonment in light of the substantial mitigation found below.

Not to be overlooked is the "no aggravor" case of Cannady v. State. Thinking that his wife was depressed as a result of being raped, although it is not clear that she actually was raped, Michael Cannady fatally shot her. He then went to the home of the supposed rapist and fatally shot him. Finding that the heinousness and premeditation circumstances applied to both murders, the trial court imposed two death sentences. However, the supreme court struck both aggravating circumstances and did a curious thing. On the one hand, it decided the murder of the wife constituted a previous violent felony so that the trial court erred in not applying that circumstance to the man's murder, but on the other hand, and without explanation, it did not find the murder of the man was a violent felony that should apply to the wife's murder. It then reduced the sentence in the wife's murder to one of life imprisonment because both circumstances found by the trial court were invalid, and ordered resentencing in the other murder, for consideration of the prior violent felony circumstance notwithstanding that both circumstances found by the trial court were invalid. The court specifically held that the death sentence was not disproportionate for the man's murder.

The court rethought the matter on rehearing, deciding that since the State had not urged the prior violent felony circumstance, it had waived its application. Therefore, it determined there were no longer any aggravating circumstances applicable to either murder and both sentences were reduced to life imprisonment.

5. Review of Findings Regarding Circumstances

Although the supreme court will often give great deference to the trial court's findings of sentencing circumstances, it may at other times engage in strict scrutiny review.

Robertson v. State set a high standard for findings of aggravating circumstances, reflecting a requirement of positive proof and forbidding "logical inferences" as their sole support. However, the supreme court

216. 616 So. 2d 440 (Fla. 1993).
217. 620 So. 2d 165 (Fla. 1993).
218. Id. at 169-70. The brief proportionality discussion makes no mention of the substantial mitigation set out elsewhere in the decision.
219. Id. at 171.
220. 611 So. 2d 1228, 1232 (Fla. 1993).
221. Id.
in other cases has been willing to uphold circumstances on the basis of inferences. The court in Clark v. State\textsuperscript{222} upheld the pecuniary gain circumstance based on the defendant stating after the killing: “I guess I got his job now,” and his applying for the decedent’s job the next morning.\textsuperscript{223} In Trepal v. State,\textsuperscript{224} the court upheld the great risk circumstance based on the inference that other persons could have drunk from the poisoned Coca-Cola bottles and died.\textsuperscript{225}

In DeAngelo v. State,\textsuperscript{226} the court announced that it would recognize an aggravating circumstance not found by the trial court only where it “is unquestionably established on the record and not subject to dispute.”\textsuperscript{227} As previously noted in Cannady, the court initially had found a circumstance not found by the trial court, but on rehearing decided the state had waived this circumstance by not arguing it at the trial level and not filing a cross appeal.\textsuperscript{228}

6. Relief

The court continues to be inconsistent in its determination of what relief to give for penalty-phase errors. When striking an aggravating circumstance, the court may find the error harmless without any extensive analysis;\textsuperscript{229} order new jury sentencing proceedings;\textsuperscript{230} order resentencing without a jury;\textsuperscript{231} or may, on its own, reduce the sentence to one of life imprisonment.\textsuperscript{232}

\begin{itemize}
\item \textsuperscript{222} 609 So. 2d 513, 515 (Fla. 1992).
\item \textsuperscript{223} Id. at 515.
\item \textsuperscript{224} 621 So. 2d 1361 (Fla. 1993).
\item \textsuperscript{225} Id.
\item \textsuperscript{226} 616 So. 2d 440, 443 (Fla. 1993).
\item \textsuperscript{227} Id.
\item \textsuperscript{228} Cannady, 620 So. 2d at 171.
\item \textsuperscript{229} See Sochor v. State, 619 So. 2d 285, 293 (Fla. 1993) (reversal not required because there were other aggravating circumstances and no mitigating).
\item \textsuperscript{230} See Padilla v. State, 618 So. 2d 165, 170 (Fla. 1993) (new jury sentencing where court used circumstance not supported by evidence); James v. State, 615 So. 2d 668, 669 (Fla. 1993) (new jury sentencing even though there were four remaining valid circumstances and no mitigation); Lawrence v. State, 614 So. 2d 1092, 1096 (Fla. 1993) (stating that “due to the peculiar facts of this case, we cannot find the error in instructing the jury on and finding these inapplicable aggravators to be harmless.”).
\item \textsuperscript{231} See Robertson, 611 So. 2d at 1234 (judge resentencing where trial court used circumstances not supported by evidence).
\item \textsuperscript{232} See Maulden, 617 So. 2d at 303; DeAngelo, 616 So. 2d at 441.
\end{itemize}
Caldwell presents a curious situation. Robert Patrick Craig and Robert Schmidt murdered two men to cover up their cattle stealing operation. Mr. Schmidt received life sentences for his cooperation; Mr. Craig received two death sentences, one pursuant to a jury death recommendation, the other contrary to a life recommendation. The supreme court remanded Mr. Craig’s case for resentencing because of the trial judge’s refusal to consider additional mitigating evidence after the jury sentencing proceedings. Because the error occurred after the jury’s penalty verdict, the court ordered resentencing without a jury. On remand, a new judge took over the case and again imposed death sentences. The supreme court ruled that under Corbett v. State, the judge could not sentence the defendant without hearing all of the evidence heard by the jury. Accordingly, the supreme court vacated for new jury sentence proceedings for the death verdict murder. The court also reversed the override sentence “[b]ecause Craig’s original jury recommended life imprisonment for Eubanks’ murder, the new jury will recommend a sentence only for Farmer’s murder. The judge, however, will sentence Craig for both murders.”

G. Tedder

Although the court affirmed two override sentences during the survey period, it strongly re-emphasized the Tedder v. State rule which requires a trial court to follow a life verdict except in the most compelling cases:

Under Florida law, the role of the jury is one of great importance, and this is no less true in the penalty phase of a capital trial. Juries are at the very core of our Anglo-American system of justice, which brings the citizens themselves into the decision-making process. We choose

233. 620 So. 2d 174 (Fla. 1993).
234. Id. at 175.
235. Id. at 175-76.
236. 602 So. 2d 1240 (Fla. 1992).
237. Craig, 620 So. 2d at 176.
238. Id.
239. See Williams v. State, 622 So. 2d 456 (Fla. 1993); Marshall v. State, 604 So. 2d 799 (Fla. 1992); see also Scott v. Dugger, 604 So. 2d 465 (Fla. 1992), and Stevens v. State, 613 So. 2d 402 (Fla. 1992), it reduced the sentences to life imprisonment. Craig (remanded for resentencing) and Cannady (sentences reduced to life imprisonment) involved double homicides with one life recommendation and one death recommendation.
240. 322 So. 2d 908 (Fla. 1975).
juries to serve as democratic representatives of the community, expressing the community's will regarding the penalty to be imposed. A judge cannot ignore this expression of the public will except under the Tedder standard adopted in 1975 and consistently reaffirmed since then.241

H. Race

In *Furman v. Georgia*,242 Justice Stewart stated:

My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race. But racial discrimination has not been proved, and I put it to one side.243

In *Foster v. State*,244 the Supreme Court of Florida mirrored Justice Stewart's brand of logic. In this case, while moving to preclude the State from seeking the death penalty, Charles Kenneth Foster unsuccessfully sought an evidentiary hearing to demonstrate that the Bay County State Attorney's Office pursued prosecution more vigorously and fully in cases involving white victims than in cases involving black victims:

In support of his claim, Foster proffered a study conducted by his counsel of some of the murder/homicide cases prosecuted by the Bay County State Attorney's Office from 1975 to 1987. Analyzing the raw numbers collected, Foster concluded that defendants whose victims were white were 4 times more likely to be charged with first-degree murder than defendants whose victims were black. Of those defendants charged with first-degree murder, white-victim defendants were 6 times more likely to go to trial. Of those defendants who went to trial, white-victim defendants were 26 times more likely to be convicted of first-degree murder. The court refused to hold an evidentiary hearing, finding that the alleged facts did not make out a prima facie claim of discrimination.245

241. *Stevens*, 613 So. 2d at 403 (citation omitted).
243. *Id.* at 310 (Stewart, J., concurring) (citations omitted).
244. 614 So. 2d 455 (Fla. 1992).
245. *Id.* at 463.
Relying on *McCleskey v. Kemp*, the supreme court concluded that Mr. Foster had "offered nothing to suggest that the state attorney's office acted with purposeful discrimination in seeking the death penalty in his case." It rejected his claim that *McCleskey* did not govern because Foster had only provided statistics regarding the individual office prosecuting his case, rather than the statewide statistics which could have supported his view. Further, the court criticized Mr. Foster's numbers as raw data and pointed out that "[t]he figures indicating that of the defendants who went to trial, white-victim defendants were twenty-six times more likely to be convicted of first-degree murder than were black-victim defendants cannot be attributed to a decision by the Bay County State Attorney's Office and thus are not relevant here."

I. Discovery

One unfamiliar with Florida death penalty proceedings may be astonished to learn that in twenty years of litigation, the supreme court has never decided whether the discovery rule applies to capital sentencing. In *Elledge v. State*, the court reversed a death sentence based on the trial court's failure to conduct a hearing when the defense claimed a discovery violation in penalty proceedings. The court seemed to operate on the tacit assumption that the State did have a duty to comply with the discovery rule.

As previously noted, *Burns v. State* involved the discovery-related issue of whether the State may have a mental health expert examine the defendant in preparation for the sentencing hearing. The court left the question open.

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246. 481 U.S. 279 (1987) (while statewide statistics showed that persons killing whites were 4.3 times more likely to receive death sentences than persons killing blacks, they did not support inference that decisionmakers in individual defendant's case acted with purposeful discrimination).

247. *Foster*, 614 So. 2d at 463.

248. *Id.* at 464 n.9.

249. FLA. R. CRIM. P. 3.220.

250. 613 So. 2d 434 (Fla. 1993).

251. *Id.* at 436.

252. 609 So. 2d 600 (Fla. 1992).

253. The practice regarding the *Elledge* and *Burns* issues varies widely from circuit to circuit (and even from courtroom to courtroom) throughout the state. It is anticipated that the Criminal Rules Committee will submit a proposed rule covering these matters by the end of 1993.
III. POST-CONVICTIO N PROCEEDINGS

A. Newly discovered evidence

*Scott v. Dugger*\(^{254}\) considered questions relating to presentation of newly discovered evidence in post-conviction proceedings. As previously noted, Abron Scott contended that his co-defendant’s life sentence, entered after his own death sentence was affirmed, constituted “newly discovered evidence” to be raised in a post-conviction challenge to the death sentence.\(^{255}\) The court agreed, setting out the standards that apply to such claims:

Two requirements must be met in order to set aside a conviction or sentence because of newly discovered evidence. First, the asserted facts “must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence.” Second, “the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial.” The *Jones* standard is also applicable where the issue is whether a life or death sentence should have been imposed.\(^{256}\)

B. Discovery

While a rule of criminal procedure governs motions for post-conviction relief,\(^{257}\) they are considered civil proceedings governed at least partially by the rules of civil procedure.\(^{258}\) Nevertheless, neither the civil nor the criminal discovery rules seem to apply fully to post-conviction.\(^{259}\) However, Florida’s Public Records Act\(^ {260}\) provides for access to criminal case records after appeal and operates as a vehicle for post-conviction discovery. There continues to be substantial litigation regarding post-conviction discovery via chapter 119.

In *Hoffman v. State*,\(^{261}\) Barry Hoffman requested from the State Attorney documents possessed by agencies outside the State Attorney’s

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254. 604 So. 2d 465 (Fla. 1992).
255. Id. at 468.
256. Id. (citations omitted).
257. See FLA. R. CRIM. P. 3.850.
258. See Jackson v. State, 452 So. 2d 533, 537 (Fla. 1984).
261. 613 So. 2d 405 (Fla. 1992).
jurisdiction. The supreme court held that the defendant must address his requests directly to agencies "outside the judicial circuit in which the case was tried and those within the circuit which have no connection with the state attorney . . . ."\textsuperscript{262} The court added that

\textit{[a]t the same time, we encourage state attorneys to assist in helping defendants obtain relevant public records from such outside agencies so as to facilitate the speedy disposition of post-conviction claims. [Furthermore,] all public records in the hands of the prosecuting state attorney are subject to disclosure by way of motion under Florida Rule of Criminal Procedure 3.850 even if they include the records of outside agencies. Likewise, the public records of the local sheriff and any police department within the circuit that was involved in the investigation of the case may also be obtained in the manner outlined in \textit{Provenzano v. Dugger}.\textsuperscript{263}

In \textit{Walton v. Dugger},\textsuperscript{264} the state partially refused Jason Dirk Walton's chapter 119 request on the ground that some of the matters were privileged. It also contended on appeal that he had defaulted his chapter 119 request by demanding compliance in his rule 3.850 motion without initiating a separate civil action under section 119.11. In an interlocutory order, the supreme court rejected the claim of procedural default, ruling that a section 119.11 action was unnecessary where the defendant sought relief under rule 3.850. As to the claim of privilege, it wrote: "\textit{When, as in the instant case, certain statutory exemptions are claimed by the party against whom the public records request has been filed or when doubt exists as to whether a particular document must be disclosed, the proper procedure is to furnish the document to the trial judge for an in camera inspection.}"\textsuperscript{265}

In \textit{Parole Commission v. Lockett},\textsuperscript{266} the court decided that a judge presiding over a rule 3.850 motion does not have the power to order disclosure of parole commission investigation files prepared for use in clemency proceedings.

\begin{footnotes}
\item[262.] \textit{Id.} at 406.
\item[263.] \textit{Id.} (citing \textit{Provenzano v. Dugger}, 561 So. 2d 541 (Fla. 1990)).
\item[264.] 18 Fla. L. Weekly S309 (Fla. May 27, 1993).
\item[265.] \textit{Id.} at S310.
\item[266.] 620 So. 2d 153 (Fla. 1993).
\end{footnotes}
C. **Retroactivity**

The supreme court ruled that *Espinosa v. Florida*\(^{267}\) applies retroactively in post-conviction proceedings when the defendant argued at trial that the heinousness instruction was unconstitutional.\(^{268}\) But it refused to apply the *Espinosa* Rule retroactively in post-conviction if the trial attorney did not make the objection.\(^{269}\) It also held that *Sochor v. Florida*\(^{270}\) and *Stringer v. Black*\(^{271}\) were not fundamental changes in the law such as to apply on post-conviction.\(^{272}\)

D. **Rule 3.851**\(^{273}\)

The court held that the "speed-up" provisions of Rule 3.851, Florida Rules of Criminal Procedure, are constitutional.\(^{274}\)

### IV. CONCLUSION

For the most part, decisions during the survey period involved case-specific issues. The supreme court has yet to decide several issues affecting virtually all capital cases, including the constitutionality of the standard instruction on "premeditated murder," the standard instruction defining "reasonable doubt," and various issues pertaining to penalty-phase discovery.

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273. *See* FLA. R. CIV. P. 3.851 (providing for expedited treatment of post-conviction claims when a death warrant is signed).
274. *See* Remeta v. Dugger, 622 So. 2d 452, 456 (Fla. 1993).
Civil Procedure: 1993 Survey of Florida Law

Thomas G. Schultz
Michael J. Weber

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I. INTRODUCTION

The Florida Rules of Civil Procedure, and judicial interpretations of those rules, continue to change and develop as part of the never-ending struggle to secure "the just, speedy, and inexpensive determination of every action." Predictably, however, each change—no matter how thoughtfully crafted, and each new interpretation—no matter how carefully analyzed, potentially gives rise to unanticipated occasions of injustice, delay and added cost. As a result, both courts and practitioners must remain vigilant in their efforts to comport with both the spirit and the letter of the rules.

This survey provides an overview of the more significant developments in Florida procedural law over the past year. The most obvious development is the amendment to various provisions of the Florida Rules of Civil Procedure which went into effect on January 1, 1993. Part II of the survey will discuss and summarize the most important rule changes.

Part II of the survey discusses judicial decisions interpreting the rules. Not every case that refers to a procedural rule is covered in the survey. Rather, an attempt has been made to highlight those cases that: are of first impression, either resolve or give rise to conflicting interpretations, define or clarify important terms, or provide the practitioner with useful guidelines for complying with the rules. Additional commentary is provided where the holding of a particular case seems at odds with the purpose or the overall procedural framework established for Florida courts.

Finally, Part IV of the survey concludes with the author’s observations on trends in Florida Civil Procedure. Because this survey is written both by and for practitioners, the author’s comments and thoughts may be somewhat slanted toward a practitioner’s perspective. Care has been taken, however, to balance that perspective with the concerns of the courts and judicial administrators who are ultimately responsible for interpreting and enforcing the rules.

II. AMENDMENT OF THE FLORIDA RULES OF CIVIL PROCEDURE

The Florida Supreme Court published its amendments to the Florida Rules of Civil Procedure, after reviewing and considering the quadrennial
report of the Florida Bar Civil Procedure Rules Committee, in July 1992.\textsuperscript{3} The amendments became effective at midnight, January 1, 1993.\textsuperscript{4} Taken as a whole, the amendments are not likely to revolutionize the judicial process. Nevertheless, at least one of the amendments has a significant substantive impact, while others will influence the way in which courts and practitioners approach the various phases of litigation.\textsuperscript{5}

The first noteworthy change relates to service of process pursuant to Rule 1.070. Former Rule 1.070(d), regarding service of process on numerous defendants, was deleted in its entirety.\textsuperscript{6} In addition, Rule 1.070(i)\textsuperscript{7} was amended to emphasize that a dismissal resulting from failure to serve a defendant within 120 days after filing the initial pleading “shall not be considered a voluntary dismissal or operate as an adjudication on the merits under rule 1.420(a)(1).”\textsuperscript{8}

Rule 1.080 was revised to permit service by facsimile of pleadings and papers after the initial pleading is made.\textsuperscript{9} A copy of the pleading or paper must also be served in accordance with some other method permitted by the rule.\textsuperscript{10} Service by facsimile “occurs when the transmission is complete,”\textsuperscript{11} and a document served after five p.m. is considered served on the next business day.\textsuperscript{12} The supreme court noted that the requirement of serving a second copy by means other than facsimile is intended “to ensure that a legible copy is received.”\textsuperscript{13}

\textsuperscript{3} In re Amendments to the Florida Rules of Civil Procedure, 604 So. 2d 1110 (Fla. 1992).

\textsuperscript{4} Id. at 1111.

\textsuperscript{5} The most pervasive change to the rules involved the incorporation of gender-neutral language into the rules themselves. Compare id. at 1110 with In re Amendments to Rules of Civil Procedure, 458 So. 2d 245 (Fla. 1984) (reflecting transition to gender-neutral language). Although this change has no discernible effect on procedure, the deletion of recurrent references to “he” and “his” may help to promote the supreme court’s goal of fostering gender equality in Florida courts.

\textsuperscript{6} See FLA. R. CIV. P. 1.070.

\textsuperscript{7} Formerly 1.070(j).

\textsuperscript{8} FLA. R. CIV. P. 1.070(i).

\textsuperscript{9} Id. 1.080(b).

\textsuperscript{10} Id.

\textsuperscript{11} Id. (emphasis added).

\textsuperscript{12} Id.

\textsuperscript{13} FLA. R. CIV. P. 1.080(b). Two other recent rule changes reflect the supreme court’s conscious efforts to bring Florida’s judicial system into the 90’s. Specifically, Florida Rule of Judicial Administration 2.055 now requires that all papers filed in state court must be on recycled paper. FLA. R. JUD. ADMIN. 2.160. Rule 2.071 requires trial courts to grant requests for telephone appearances at any scheduled hearing for fifteen minutes or less. FLA.
Notices of hearing on motions must now "specify each motion or other matter to be heard" under the amendment to Rule 1.100(b). One hopes that this amendment will not affect the current practice of most attorneys. The amendment may, however, have the salutary effect of deterring those who insist on introducing and arguing matters that "just recently came to my attention" by providing the trial court with an explicit basis for refusing to hear matters not properly noticed.

An amendment to Rule 1.200(a) now permits any party to schedule a case management conference in the same manner as one would notice a hearing on a motion. A court order scheduling the management conference is no longer required. Like any notice of hearing, "reasonable" notice must be given in advance of the requested case management conference. The rule specifically requires twenty days notice in the case of a pretrial conference. While this amendment may not seem significant, Rule 1.200 has the potential to become a powerful tool if properly used to inform the court of the status of pending matters, or to enlist the court's assistance in facilitating settlement of meritorious claims. To avoid abuse of the privilege, trial court administrators should consider making express provision for conducting party-scheduled management conferences during uniform motion calendar in all but the most complex cases.

Rule 1.400, which addressed the publication of depositions, has been repealed in its entirety to conform with the suggested practice under Rule 1.310(f)(3) that deposition transcripts not be filed as a routine matter. Rule 1.420(f) has been amended to clarify the effect of dismissal on a lis pendens filed in connection with the dismissed claim. Under the amended rule, a lis pendens is automatically dissolved if, for instance, it is related to a claim that is settled and therefore dismissed, even though other claims remain pending.

An amendment to Rule 1.431(g)(2) aligns the rule regarding peremptory challenge of alternate jurors with the provisions of Rule 1.431(d) regarding peremptory challenges generally. Prior to the amendment,

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R. JUD. ADMIN. 2.071.
14. FLA. R. CIV. P. 1.100(b).
15. Id. 1.200(a).
16. See id.
17. FLA. R. CIV. P. 1.200(c).
18. Id.
19. Id. 1.400.
20. Id. 1.420(f).
21. Id. 1.420.
22. FLA. R. CIV. P. 1.431(g)(2).
there was no provision for equalizing the number of peremptory challenges permitted when the number of parties on each side was not the same.\textsuperscript{23} 

Rule 1.432 regarding disqualification of judges has been repealed in its entirety. Procedures governing the disqualification of judges can now be found in the Florida Rules of Judicial Administration.\textsuperscript{24} In one of the more significant changes to the rules, the supreme court repealed former Rule 1.442 regarding offers of judgment and replaced the former rule with directions to comply with the procedural provisions of section 768.79 of the Florida Statutes.\textsuperscript{25} This change reflects the supreme court’s prior decision in \textit{Timmons v. Combs}.\textsuperscript{26} In \textit{Timmons}, the court attempted to resolve years of conflict between the supreme court and the Florida Legislature regarding the appropriate treatment of offers of judgment by adopting section 768.79 as the governing rule.\textsuperscript{27} Only time will tell if the supreme court’s efforts have the desired effect.

Rule 1.510(c) has been amended to require timely filing of affidavits submitted in opposition to motions for summary judgment.\textsuperscript{28} Under the amended rule, opposing affidavits must be served by mail no later than five days prior to the hearing on the motion or delivered to the office of the moving party’s counsel no later than five p.m. two business days prior to the hearing.\textsuperscript{29} No court has yet been called upon to determine whether the provisions for service via facsimile pursuant to Rule 1.080(b)\textsuperscript{30} are applicable to service of opposing affidavits, or whether an illegible affidavit, “delivered” by facsimile two days prior to hearing on the motion, satisfies the requirements of this rule.

Finally, Rule 1.540(b) has been amended to eliminate the one-year time limit for filing motions for relief from judgment in situations where relief is sought in marital cases on the basis of allegedly fraudulent financial affidavits.\textsuperscript{31} Although this change affects only a limited class of litigants, the change is substantial in that it carves out an exception to the otherwise mandatory requirement that claims for relief based on “intrinsic fraud” be filed within one year from judgment.\textsuperscript{32} The amendment addresses a

\textsuperscript{23} See id.

\textsuperscript{24} See FLA. R. JUD. ADMIN. 2.160.

\textsuperscript{25} FLA. R. CIV. P. 1.442.

\textsuperscript{26} 608 So. 2d 1 (Fla. 1992).

\textsuperscript{27} Id. at 3.

\textsuperscript{28} FLA. R. CIV. P. 1.510(c).

\textsuperscript{29} Id.

\textsuperscript{30} See supra text accompanying notes 9-13.

\textsuperscript{31} FLA. R. CIV. P. 1.540(b).

\textsuperscript{32} See id.
recurring problem in marriage dissolution cases in which fraudulent affidavits form the basis for property settlements, but the former spouse does not learn of the fraud until years after judgment is rendered.

III. CASES INTERPRETING THE RULES

A. Process and Service of Process

1. The "120-day" Service Requirement of Rule 1.070(i)

During the past year, most of the action in Florida's appellate courts regarding process and service of process focused on the 120-day requirement set forth in Rule 1.070(i). This requirement provides that initial process must be served upon a defendant within 120 days after filing of the initial complaint. If service is not made within the 120-day limit, the lawsuit is dismissed without prejudice unless the plaintiff can show good cause why service was not made.

The decision on this rule with the most far-reaching implications came in *Pearlstein v. King.* At issue in *Pearlstein* was whether the 120-day service requirement applied to complaints filed prior to January 1, 1989, the effective date of the 120-day provision. The supreme court concluded that it did, approving the third district court's ruling in *Berdieux v. Eagle-Picher Industries, Inc.,* and overruling conflicting decisions by the fifth and second districts. Specifically, the supreme court held that applying the 120-day service requirement to actions pending on January 1, 1989 merely required plaintiffs to serve defendants within 120 days from that date. The court characterized this interpretation of the rule as a "prospective application [which] puts no extra burden on prior filings and does not diminish the time for complying with the rule."

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33. *Id.* 1.070(i).
34. *Id.*
35. 610 So. 2d 445 (Fla. 1992).
38. *Pearlstein,* 610 So. 2d at 446.
39. *Id.*
In Austin v. Gaylord, the court concluded that, absent a showing of due diligence or good cause, the 120-day requirement of Rule 1.070(i) is mandatory. Similarly, in Gondal v. Martinez, the court concluded that filing an affidavit of diligent search and inquiry more than 700 days after the complaint was filed and while a 1.070(j) motion to dismiss was pending, did not constitute good cause and did not preclude dismissal.

By contrast, in Sirianni v. Kiehne, the appellate court reversed the trial court’s order of dismissal pursuant to Rule 1.070 because plaintiff had shown good cause for failure to serve complaint within 120 days of filing. The court construed the phrase “within that time” in Rule 1.070(i) to mean the time within which service must be made absent showing of good cause and not the period within which good cause must be shown. The court concluded that plaintiff may either seek an extension prior to expiration or may show good cause at a hearing pursuant to a motion filed after the 120-day period has expired.

2. Additional Time for Response After Service By Mail

With respect to the extra time provided by Rule 1.090(e) after service by mail, the court in Dominguez v. Barakat, concluded that additional time is not available for filing Rule 1.530 motions for rehearing or new trial after rendition of judgment. In Dominguez, the trial court entered judgment on May 24, 1991 and provided copies of the order of judgment to counsel by mail. Apparently under the assumption that Rule 1.090(e) extended the ten-day deadline for filing motions for rehearing, the non-prevailing party filed its motion eleven days after judgment. The trial court had denied the

41. Id. at 67. The court distinguished, for purposes of taking jurisdiction to review the nonfinal order denying the motion to dismiss, Macke Laundry Services, Inc. v. Saintil, 568 So. 2d 541 (Fla. 4th Dist. Ct. App. 1990) (no jurisdiction to review denial of motion to dismiss based on “untimeliness” rather than complete lack of compliance). Austin, 603 So. 2d at 67.
42. 606 So. 2d 490 (Fla. 3d Dist. Ct. App. 1992).
43. Id. at 491. The court further determined that plaintiff’s affidavit did not cure the defect in his complaint. This plaintiff failed to allege that the defendant was a nonresident, a former resident, or a person concealing his whereabouts, as required before service on the Secretary of State would establish jurisdiction over the defendant. Id.
44. 608 So. 2d 936 (Fla. 4th Dist. Ct. App. 1992).
45. Id.
46. Id.
47. 609 So. 2d 664 (Fla. 3d Dist. Ct. App. 1992).

The Third District Court of Appeal dismissed the appeal because the notice was not filed within thirty days of rendition of judgment.49 The court held that Rule 1.530(b), which requires motions for new trials to be made within ten days after return of a jury verdict or the filing of judgment in a non-jury action, does not provide for additional time for service by mail pursuant to Rule 1.090(e).50 Thus, for purposes of calculating the time for filing a notice of appeal, rendition of judgment is not postponed by a motion for rehearing when the motion is not served within the time prescribed by Rule 1.530.

B. Pleadings and Motions

1. Proper Treatment of Affirmative Defenses

In Diaz v. Bravo,51 the court reiterated the well-settled rule that res judicata, estoppel and laches are affirmative defenses as defined by Rule 1.110(d), and are therefore not properly raised in a Rule 1.140 motion to dismiss. Similarly, in Warwick v. Post,52 the court found that the trial court improperly determined the affirmative defense of res judicata on defendant's motion to dismiss. The court further held that it was improper to dismiss the case for failure to state a cause of action under Rule 1.140(b), even where the defendant claimed that the case had already been resolved pursuant to binding arbitration.53

2. Requirements for Third-Party Complaint Under Rule 1.180

More detailed analysis was required by the court in Rupp v. Philpot,54 to resolve an issue arising under the Rule 1.180 third-party practice provi-
sions. Rule 1.180 permits a defendant to serve a summons and complaint in a third-party action for indemnity, contribution or subrogation. In reviewing a final summary judgment order entered in favor of a third party defendant, the Rupp court analyzed the following language from Rule 1.180(a):

At any time after commencement of the action a defendant may have a summons and complaint served on a person not a party to the action who is or may be liable to the defendant for all or part of plaintiff's claim against the defendant and may also assert any other claim that arises out of the transaction or occurrence that is the subject matter of the plaintiff's claim.

The court concluded that use of the word "and" permitted non-related claims to be raised in addition to, but not in the absence of, an underlying claim for indemnity, contribution or subrogation. Accordingly, the court affirmed summary judgment in favor of the third-party defendant where the third-party complaint did not allege any of the above causes of action.

3. Amended and Supplemental Pleadings Under Rule 1.190

Rule 1.190(a) provides that leave to amend pleadings "shall be freely given when justice so requires." In a series of cases decided during the past year, Florida appellate courts have re-emphasized that motions to amend should be granted unless doing so would somehow prejudice the opposing party. For example, in Walker v. Nolke, the court found that the trial court abused its discretion in failing to permit an amendment over what amounted to a scrivener's error. In Caduceus Self Insurance Fund v. Sacred Heart Hospital, the court held that one amendment to a complaint does not constitute abuse of the amendment privilege, and that the trial court erred in dismissing plaintiff's complaint with prejudice. Similarly, in Thompson v. Publix Supermarkets, Inc., the appellate court reversed an

55. FLA. R. CIV. P. 1.180(a).
56. Rupp, 619 So. 2d at 1048 (quoting FLA. R. CIV. P. 1.180(a)) (emphasis added).
57. Id. (citing Leggiere v. Merrill Lynch Realty/Fla., Inc., 544 So. 2d 240, 241 (Fla. 2d Dist. Ct. App. 1989)).
58. Id.
59. FLA. R. CIV. P. 1.190.
60. 614 So. 2d 655 (Fla. 5th Dist. Ct. App. 1993).
62. Id.
63. 615 So. 2d 796 (Fla. 1st Dist. Ct. App. 1993).
order dismissing the plaintiff's claim with prejudice after only one amend-
ment. In this case, the plaintiff sought and obtained leave to file an
amended complaint to add a new defendant. The new defendant moved to
dismiss the amended complaint for failure to state a cause of action. The
trial court granted the motion and dismissed plaintiff's complaint with
prejudice. The trial court also denied plaintiff's motion for rehearing and
motion to file a second amended complaint. The appellate court reversed,
stating that, absent exceptional circumstances, requests for leave to amend
pleadings should be granted and all doubts should be resolved in favor of
allowing the amendment. "[R]efusal to allow amendment . . . [is] an abuse
of discretion unless [the amendment would clearly] prejudice opposing
party; the privilege to amend has been abused; or amendment would be
futile."64

In Anson, Inc. v. Deutsch,65 similar considerations prompted reversal
of an order denying a defendant’s motion to amend her answer and
affirmative defenses. The court concluded that the trial court erred in
denying defendant’s motion for leave to amend when the case was not yet
scheduled for trial and where plaintiff would not have been prejudiced by
the amendment.66

The "relation back" provisions of Rule 1.190(c) received attention in
Schachner v. Sandler.67 The court reviewed an order stating that appel-
lant’s amended complaint did not relate back to the date of the original plea-
ding. The initial complaint named various corporations as plaintiffs in a
professional malpractice action against attorneys. Appellant was specifically
mentioned as owner of corporations but not named as plaintiff. Later, the
complaint was amended to include appellant as a plaintiff. Defendants
moved to dismiss on grounds that appellant’s claim was time barred, and the
trial court granted the motion. On appeal, the court stated that the Rule
1.190(c) relation back provision should be liberally interpreted.68 Moreover,
the court determined that defendants were not prejudiced because the
initial complaint provided fair notice of "kindred interest" between the
original and subsequently added plaintiffs. Accordingly, the court concluded
that appellant’s claim related back to the date of the initial complaint, and
was therefore not time barred.69

64. Id. at 797 (citations omitted).
65. 613 So. 2d 65 (Fla. 4th Dist. Ct. App. 1993).
66. Id.
67. 616 So. 2d 166 (Fla. 4th Dist. Ct. App. 1993).
68. Id. at 168.
69. Id.
Finally, in *Stewart v. Purina Mills, Inc.*, the court concluded that a pro se defendant should have been permitted to amend his original answer to include a demand for jury trial. Curiously, neither the trial court nor the appellate court concluded that no amendment was needed, despite the fact that the plaintiff ultimately filed an amended complaint in response to which defendant timely served a responsive pleading including a demand for jury trial. Under Rule 1.430(b), a party may demand jury trial within ten days after service of “the last pleading directed to such issue.” Therefore, the plaintiff’s amended complaint was undoubtedly “a pleading directed to” the issues for which defendant sought trial by jury, a fact that should have obviated the need for defendant to amend any prior pleading to include the demand.

4. Requirements for Interpleader Actions Under Rule 1.240

In *Motzkin v. Shearson Lehman Bros.*, the court reversed the trial court’s dismissal of an interpleader brought by a broker to resolve conflicting claims by a father and his daughter to proceeds from sale of bond. The trial court ruled that the father could bring separate, subsequent action against daughter. The appellate reversed, finding that this case presented a classic interpleader situation as defined by Rule 1.240. Moreover, the court concluded that where the facts so closely comport with the provisions of the rule, the broker need not demonstrate all common law elements of interpleader action.

5. Substitution of Parties Under Rule 1.260

An interesting question regarding the time for motions to substitute parties pursuant to Rule 1.260 was raised in *Musician’s Exchange Downtown Cafe, Inc. v. Merced City Center, Inc.* This was an action by a tenant against its landlord over issues involving condition and use of leased premises. After the lawsuit was filed, the tenant declared bankruptcy under Chapter 7. Thereafter, the bankruptcy trustee moved to reinstate the action against the landlord and to substitute itself for the tenant in the original

70. 615 So. 2d 876 (Fla. 5th Dist. Ct. App. 1993).
71. *Id.* at 877.
72. See *id*.
73. FLA. R. CIV. P. 1.430(b).
74. 611 So. 2d 592 (Fla. 4th Dist. Ct. App. 1993).
75. *Id.* at 593.
76. 613 So. 2d 134 (Fla. 4th Dist. Ct. App. 1993).
action. Both motions were denied on the grounds that the motions were not filed within ninety days of tenant's bankruptcy. The trial court apparently misread the ninety-day time limitation set forth in 1.260(a), regarding service of substitution motion after filing suggestion of death, as also applying to the transferred interests provisions of 1.260(c). The appellate court reversed the order denying the motion to substitute parties, reasoning that the reference in 1.260(c) to “service of the motion” refers only to method of service set forth in 1.260(a), but not to the time limits set forth in 1.260(a). The court noted that federal bankruptcy law provides trustees with two years in which to continue pending action on behalf of the debtor, and that the trustee's motions in this case were both timely filed under federal law.  

6. Requirements for Ordering Separate Trial Under Rule 1.270

In Norris v. Paps, the court reviewed for abuse of discretion an order pursuant to Rule 1.270(b) severing defendants' compulsory counterclaim for fraud from the underlying mortgage foreclosure action. Significantly, defendants raised the issue of fraud by way of affirmative defense, as well as by way of counterclaim. The mortgagee moved for judgment on the pleadings because defendants admitted in their answer that they executed a note and mortgage and failed to make payments. The trial court ordered the counterclaim severed and entered judgment for plaintiff on the mortgage. On appeal, the court held that the trial court did not have discretion to defer the jury trial on factual issues raised in the counterclaim, especially where the same fact issues were presented by way of affirmative defense. Otherwise, the trial court would in effect be entering judgment on the pleadings without resolving the affirmative defense of fraud, or by resolving the fraud issue without having heard any evidence. Although severance of compulsory counterclaims may sometimes be permissible, severance should not be granted if an affirmative defense and a counterclaim raise interrelated fact questions.

77. Id. at 135; see 11 U.S.C. § 108 (1988).
78. 615 So. 2d 735 (Fla. 2d Dist. Ct. App. 1993).
79. Id. at 737.
80. Id.
C. Discovery

1. Scope of Discovery

Recent appellate decisions regarding discovery rules fall into two broad categories: the appropriate scope of discovery and the appropriate sanctions for failure to comply with discovery. Decisions rendered over the past year show a surprising consistency in favor of the party from whom discovery is sought. Whether this alignment signals a trend against abusive discovery practices or is, instead, the result of pure coincidence remains to be seen. The decision in *Krypton Broadcasting, Inc. v. MGM-Pathe Communications Co.*\(^1\) presents some interesting ramifications for both courts and practitioners. In an action involving film distribution rights, plaintiff MGM served interrogatories seeking, *inter alia*, exhaustive biographical information (employment and residence histories, social security numbers, dates and place of birth, etc.) for a variety of people, including some, such as defendant Krypton’s stockholders, who had “no discernible relationship to the issues of the case.”\(^2\) Another interrogatory sought “any other information useful or necessary for the location of all persons who are believed or known by defendant KRYPTON . . . [and] its attorneys . . . to have any knowledge” of various matters.\(^3\) MGM further requested documents evidencing any communication between Krypton and any person or entity concerning the subject matter of the lawsuit. It also asked in interrogatories for detailed written summaries of documents that were also subject to requests to produce. Krypton objected on a variety of grounds, including relevance, vagueness, and attorney-client privilege. The trial court, while limiting the time frame of the requested information from ten years to six years, otherwise overruled the objections and ordered Krypton to respond.\(^4\)

Approximately three weeks after this order, Krypton served its answer, affirmative defenses and counterclaims. Krypton denied having assumed obligations under the contracts as alleged, raised defenses of custom-in-trade, unconscionability and estoppel, and sought declaratory relief, damages for injury to its trade reputation, and specific performance. Because the new issues in Krypton’s responsive pleading were not introduced until after the trial court’s order compelling discovery, Krypton contended on appeal that the appellate court must limit its inquiry into MGM’s discovery requests to

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82. *Id.* at D1094.
83. *Id.* at D1093.
84. *Id.*
the issues raised in MGM’s complaint. Krypton also argued that the trial court erred in overruling its other objections.

The appellate court first rejected Krypton’s argument that the discovery requests must be limited to issues raised in MGM’s complaint. In so doing, the court was forced to distinguish Jerry’s South, Inc. v. Morran, which held that “[w]hen considering a petition for writ of certiorari, this court considers the record as it existed at the time the complained of discovery order was entered.” The court observed that the discovery order in Jerry’s South involved financial records of a former party, and thus came at a time when the issues had been considerably narrowed. By comparison, the court noted that in the instant case, “the issues in litigation expanded significantly” after the trial court entered its discovery order, and concluded that the discovery requests must be viewed in light of those expanded issues. While the distinction drawn between this case and Jerry’s South is somewhat strained, the court’s conclusion has the expedient and practical effect of permitting resolution of all issues pending at the time the appeal is heard.

The court next addressed the substance of Krypton’s objections and concluded that MGM’s discovery requests, taken as a whole, were “a classic ‘fishing expedition’ and were clearly calculated for harassment.” The court also noted that at least some of the interrogatories and document requests were so broad as to include documents and information protected by attorney-client and other privileges. Accordingly, the court held that the trial court’s order compelling discovery was “a substantial departure from the essential requirements of law,” and ordered MGM’s discovery requests stricken in their entirety, albeit without prejudice to conduct further discovery in accordance with Rule 1.280. The court then went one step further, ordering MGM to file all future requests with the trial court, and, in the event of an objection, placing upon MGM the burden of demonstrating that its requests were within the scope of Rule 1.280. The court so held because MGM’s request sought voluminous, privileged and extraneous information which constituted a clear abuse of the discovery process.

85. Id.
86. 582 So. 2d 803 (Fla. 1st Dist. Ct. App. 1991).
87. Id. at 804.
88. Krypton, 18 Fla. L. Weekly at D1093.
89. Id. at D1094.
90. Id.
91. Id.
92. Id.
Furthermore, the court suggested that “the trial court may, at MGM’s expense, appoint a special master” for the purpose of resolving future discovery disputes.93

The legal basis for these final two requirements is unclear. The requirement that MGM pay the cost of a special master appears to be a prospective sanction, one that does not permit the trial court to exercise discretion or judgment in assessing the validity or appropriateness of any objections Krypton might raise to future discovery requests, or to determine when and if one party should bear more than its proportionate share of the expense of resolving disputes. As this case demonstrates, Krypton was not immune from making its own unsuccessful discovery arguments. Nonetheless, the cost of resolving future disputes is placed solely on MGM. Although Rule 1.380 permits sanctions for failing to comply with discovery, the rule does not seem to contemplate sanctions merely for serving objectionable discovery requests, and certainly does not contemplate open-ended sanctions that can be influenced, and perhaps controlled, by one’s opponent.

Perhaps even less legally defensible is the court-mandated burden shift from the party objecting to discovery to the party propounding discovery. It is well settled in Florida that the party who objects to discovery requests bears the burden of proving that the requests are in fact objectionable on some grounds.94 By contrast, the court in this case has reversed the traditional burdens by requiring the party seeking discovery (MGM) to prove that its discovery requests were proper simply because the party seeking to avoid discovery (Krypton) filed an objection.

It is doubtful that these two clearly punitive aspects of the court’s decision would withstand further scrutiny. Nonetheless, the message sent by the First District Court of Appeal is unmistakable: harassing, abusive discovery requests that look more like fishing expeditions than attempts to uncover relevant facts will not be looked upon favorably, and will be met with judicial rebukes and costly sanctions.

In re Estate of Ransburg95 is another case in which the court addressed itself to determining the proper scope of discovery directed to a party. After filing a petition to revoke probate which included a prayer for attorney’s fees, the estate’s beneficiaries served a production request seeking documents related to the petitioners’ attorney’s fees. Petitioners objected on the grounds of relevancy, work product, and attorney-client privilege. The

93. Krypton, 18 Fla. L. Weekly at D1094.
94. See, e.g., Charles Sales Corp. v. Rovenger, 88 So. 2d 551, 554 (Fla. 1956).
95. 608 So. 2d 49 (Fla. 2d Dist. Ct. App. 1992).
trial court ordered production of complete copies of the requested records for in camera inspection and “sanitized” copies for the beneficiaries. The appellate court declined to address the work product and attorney-client privilege objections, limiting its discussion solely to the question of relevancy.  

The court first observed that, in *Stockman v. Downs*, the Florida Supreme Court had held that claims for attorney’s fees must be pleaded—a ruling which forces parties seeking reimbursement of fees to raise the issue early on in the proceedings. However, it does not necessarily follow that discovery of actual fees or fee arrangements is appropriate, or even relevant, in the initial phases of the lawsuit. The court analogized the claim for attorney’s fees to a claim for an accounting, recognizing that discovery in an accounting action is typically bifurcated, with that part of the discovery related to the actual accounting deferred until it is determined whether any party is entitled to an accounting. The court concluded that “under normal circumstances,” discovery related to attorney fee claims should similarly be bifurcated with discovery pertaining to both fee agreements and the amount of fees deferred until the end of the underlying proceedings—after entitlement to attorney’s fees have been decided.

Beyond the discussion of the proper scope of discovery set forth in *Krypton* and *Ransburg*, the court in *Crandall v. Michaud*, addressed the scope of discovery directed to non-party witnesses. In *Crandall*, an independent medical examiner (“IME”) sought certiorari review of an order which both denied his motion for a protective order and compelled him to produce all patient reports (with patient names “whited out”) prepared for any defense law firm or insurance company during the previous two years. The IME’s motion for protective order was based on the grounds that the requested information was confidential and privileged, that disclosure would violate his patient’s statutory privacy rights, that the information sought was irrelevant, and that production would be unduly burdensome and oppressive. Plaintiff, obviously seeking evidence of the

96. *Id.* at 50.
97. 573 So. 2d 835 (Fla. 1991).
98. *In re Estate of Ransburg*, 608 So. 2d at 51 (citing *Stockman*, 573 So. 2d at 835).
99. *Id.*
100. 603 So. 2d 637 (Fla. 4th Dist. Ct. App. 1992).
101. An example of one court’s refusal to permit inquiry into a physician’s potential bias through discovery of confidential patient records, *Winn-Dixie Stores, Inc. v. Miles*, 616 So. 2d 1108 (Fla. 5th Dist. Ct. App. 1993), is discussed infra at notes 133-38 and accompanying text.
IME's potential bias, argued that it would be unduly burdened and unable to effectively present its case without the requested information. The appellate court approached the issue using the "balancing test" set forth in North Miami General Hospital v. Royal Palm Beach Colony, Inc., and Rasmussen v. South Florida Blood Service, Inc., and further considered whether disclosure of the requested reports would violate the patient privacy and confidentiality provisions of section 455.241 of the Florida Statutes.

Turning first to the statutory issue, the court questioned whether masking patient names would sufficiently protect their privacy interests in compliance with section 455.241. The court acknowledged that similar evidence had been held discoverable in other cases such as McAdoo v. Ogden, but distinguished those cases on the ground that the IME was required to produce invoices sent to defense lawyers and insurers, but was not required to produce the patient records themselves. Without squarely answering the statutory question it had earlier posed, the court concluded that the information contained in the requested patient records went beyond what was relevant to the question of the IME's potential bias. Moreover, the court concluded that requiring the IME to review numerous files in order to locate the requested records, copy the records, mask all references to patient identity, and then copy the masked reports, imposed a burden disproportionate to the potential value of the information sought. In a concurring opinion, Judge Stone agreed that the trial court had departed from the essential requirements of law on the privilege and privacy issues, but emphasized that certiorari relief was not being granted on the grounds of undue burden.

2. Examination of Persons: Waiver of Patient-Psychotherapist Privilege

In Sykes v. St. Andrews School, the court exercised certiorari jurisdiction to review an order requiring a parent to release her own
psychiatric records in the suit she brought as next friend on behalf of her
daughter. Initially, both parents brought suit against St. Andrews and a
number of individual defendants for damages related to an alleged sexual
battery of their daughter. In addition to seeking damages for emotional
harm to the daughter, the original complaint sought recovery for emotional
and mental harm to the mother. The mother was examined by defendants’
psychiatric expert who in turn was deposed by plaintiff’s attorneys. Defen-
dants subsequently filed a motion to compel the mother to authorize the
release of her previous psychiatric records. At a hearing on this motion, the
mother’s attorney made clear that the mother’s separate claims were being
abandoned. Nonetheless, the court ordered the mother to authorize the
release of the requested records.\footnote{112}

On appeal, the mother contended that the trial court’s order was a
departure from the essential requirements of law in that it violated the
psychotherapist-patient privilege set forth in section 90.503 of the Florida
Statutes. Defendants argued that the privilege does not apply where the
mental condition of the party is an element of the party’s claim.\footnote{113}
Defendants contended in the alternative that under Rule 1.360(b)(2) of the
Florida Rules of Civil Procedure, the deposition of the defendants’
psychiatric expert effectively waived any privilege the mother may have had
“regarding the testimony of every other person who has examined or may
thereafter examine that party concerning the same condition.”\footnote{114}
In analyzing the privilege/waiver provisions of the statute in conjunction
with the rule, the appellate court stated that a party could not use “the privileges
as both a sword and a shield.”\footnote{115} In other words, a party may not, on the
one hand, seek to recover damages related to emotional or mental conditions
while, on the other hand, invoke the privilege to thwart its opponent from
discovering facts regarding those same conditions. In this case, however,
the court concluded that the mother dropped her sword when she abandoned
her independent claim.\footnote{116} In addition, the court determined that, notwith-
standing the language of Rule 1.360(b)(2), the mother had not “irrevocably”
waived her privilege by deposing the defendants’ expert.\footnote{117} Rather, the
court concluded that the waiver provision of the rule was only effective to

\footnotesize{\begin{itemize}
\item \footnote{112. \textit{Id.} at 467-68.}
\item \footnote{113. \textit{Id.}}
\item \footnote{114. \textit{Id.} at 468-69.}
\item \footnote{115. \textit{Id.} at 469.}
\item \footnote{116. Sykes, 619 So. 2d at 469.}
\item \footnote{117. \textit{Id.}}
\end{itemize}}
the extent that the examined "condition" continued to be relevant as an essential element of a pending claim. 118

3. Discovery Sanctions

Although discovery abuse has become the scourge of both practitioners and courts, recent cases involving sanctions for failure to comply with discovery have generally been sympathetic to the party who allegedly failed to comply with the discovery rules. One notable exception to this apparent trend occurred in McCormick v. Lomar Industries, Inc. 119 In that case, the trial court dismissed plaintiff's lawsuit as a sanction for failing to respond to a request for production of documents for 134 days after the request was served, and for failing to comply with two intervening court orders compelling plaintiff's response. The second order compelling production was entered during a hearing on March 21, 1989, which plaintiff's counsel did not attend. The order required plaintiff to produce the requested documents by March 24, 1989 or "face 'unduly harsh penalties.'" 120 On April 3, 1989, plaintiff filed a response to the discovery request. On April 10, 1989, the court entered an order striking plaintiff's pleadings and awarding attorneys fees to defendant. The appellate court affirmed, noting that plaintiff's conduct went beyond mere "'foot dragging'" and evidenced a "'deliberate and contumacious disregard of the court's authority'"—a "'deliberate thumbnosing at the court and the rules of civil procedure.'" 121 The court also noted that while the plaintiff did respond prior to the court's order imposing sanctions, the order striking plaintiff's pleadings and awarding fees was nothing more than a "'confirmation'" of the court's oral pronouncement during the March 24, 1989 hearing. 122

While McCormick may seem like a godsend to any attorney who has wasted time and effort seeking to compel recalcitrant parties and their counsel to comply with lawful discovery requests and to any court faced with repeated motions to compel responses to the most basic discovery, the opinion is difficult to reconcile with the Fourth District Court of Appeal's

118. Id.
119. 612 So. 2d 707 (Fla. 4th Dist. Ct. App. 1993).
120. Id. at 708 (quoting the trial court's order).
121. Id. at 708-09 (quoting U.S.B. Acquisition Co. v. U.S. Block Corp., 564 So. 2d 221, 222 (Fla. 4th Dist. Ct. App. 1990)); cf. Turner v. Marks, 612 So. 2d 610 (Fla. 4th Dist. Ct. App. 1992) (upholding order striking pleadings after two years of failure to comply with discovery requests).
122. McCormick, 612 So. 2d at 709.
opinion in *Wildwood Properties, Inc. v. Archer of Vero Beach, Inc.*\textsuperscript{123} *Wildwood Properties* also involved striking claims as a sanction for failing to make discovery. The sanctioned party, the defendant, did not attend a continued deposition on March 9, 1991, at which time opposing counsel informed the defendant’s attorney that he would move to strike defendant’s pleadings for failing to appear. The motion to strike was presented for the first time at the close of argument during a hearing on a previously set motion for summary judgment.\textsuperscript{124} The trial court reserved ruling on the motion to strike, but twenty days later, with no intervening hearing or opportunity for defendant to appear, granted the motion. On appeal, defendant’s attorney objected to the motion to strike because he had received it for the first time at that hearing, and accordingly, had not informed his client to be present. The appellate court reversed, stating that “[a] party to be sanctioned for discovery violations must first be given notice and an opportunity to be heard and offer mitigating or extenuating evidence as to why discovery did not take place.”\textsuperscript{125} Failure to provide such notice and opportunity, the court held, constitutes a violation of due process.\textsuperscript{126}

As stated previously, the broad holding in *Wildwood Properties* is difficult to reconcile with the same court’s opinion in *McCormick*, filed less than five months earlier. Recall that in *McCormick*, the harshest of all possible discovery sanctions was imposed virtually sua sponte. Admittedly, the trial court in *McCormick* had previously ordered a response to a particular discovery request on two prior occasions, and had warned that failure to respond would result in “unduly harsh penalties.” Nonetheless, the court did not afford the sanctioned party an opportunity either to be heard or to offer mitigating or extenuating evidence prior to striking its pleadings. Significantly, the order striking the pleadings was the first sanction imposed by the court; all prior orders simply imposed deadlines for compliance with discovery requests. More importantly, the sanctioned party had, in fact, complied with the discovery request prior to entry of the court’s order. At worst, the party would have been required to offer extenuating evidence for its failure to timely comply, but not for its total failure to comply. Obviously, the facts in *Wildwood Properties* do not lend themselves as

\textsuperscript{123} 621 So. 2d 691 (Fla. 4th Dist. Ct. App. 1993).

\textsuperscript{124} Id. This type of “ambush litigation” should be precluded by the recent changes to Rule 1.100(b). See supra note 14 and accompanying text.

\textsuperscript{125} Id. at 692 (citing Kuechenberg v. Creative Interiors, Inc., 424 So. 2d 145, 146 (Fla. 4th Dist. Ct. App. 1982)).

\textsuperscript{126} Id.
neatly to the characterization of "deliberate thumbnosing" as did the facts in *McCormick*. Nonetheless, entitlement to due process protection should not turn on the degree of sympathy with which the court views a particular litigant. If an opportunity to appear and be heard is required under *Wildwood Properties*, it would seem that the sanctioned party in *McCormick* should have been provided this opportunity as well.

This view finds further support in *J.E.I. Airlines, Inc. v. Britton, Cassel, Schantz & Schatzman, P.A.*\(^{127}\). In that case, the trial court entered a pre-trial order on November 20, 1990, stating that appellant must submit to deposition on November 27, 1990 or have its complaint dismissed. Appellant did not appear as ordered, and without hearing or further proceedings, the trial court dismissed the case. The appellate court found that the trial court's order imposing the sanction of dismissal was defective in that it did not expressly find that J.E.I.'s conduct "demonstrated a deliberate and contumacious disregard of the court's authority or evidenced [sic] a willful failure to submit to discovery."\(^{128}\) Although the court did not address the due process issues raised by J.E.I. on appeal, it is evident that the court was influenced by the fact that neither notice nor an opportunity to present mitigating circumstances was provided prior to the court's imposing of the extreme sanction of dismissal.

Beyond any issue of procedural due process, there remains the question of proportionality in any order that forecloses a party's claim as a sanction for failure to comply with discovery requests. As the court observed in *Martin v. Laidlaw Tree Service, Inc.*,\(^{129}\) "the sanction of dismissal of a party's action is a drastic remedy which should be used only in extreme situations. . . . [T]he severity of the sanction must be commensurate with the violation . . . ."\(^{130}\) The *Martin* court acknowledged that the standard of review in discovery sanction cases is whether the trial court abused its discretion, and noted that "[i]f reasonable persons could differ as to the propriety of the action taken, there can be no finding of an abuse of discretion."\(^{131}\) Notwithstanding this accommodating standard, the court stated that "[i]n absence of some demonstration that the [party seeking discovery] has been prejudiced due to [his opponent's] defaults, this court

\(127\). 605 So. 2d 1009 (Fla. 4th Dist. Ct. App. 1992).
\(128\). *Id.* at 1010.
\(129\). 619 So. 2d 435 (Fla. 2d Dist. Ct. App. 1993).
\(130\). *Id.* at 438 (citations omitted).
\(131\). *Id.* (citing Commonwealth Fed. Sav. & Loan Ass'n v. Tubero, 569 So. 2d 1271, 1273 (Fla. 1990)).
is reluctant to affirm such a severe sanction as dismissal. In view of this formulation, it seems highly unlikely that the issue in McCormick would be so prejudicial as to justify dismissal, regardless of whether the delay caused undue expense and was therefore subject to some lesser sanction.

One final case on the topic of discovery explores the circumstances in which a non-party who prevails on a discovery-related motion is entitled to recover attorney’s fees pursuant to Rule 1.380 of the Florida Rules of Civil Procedure. In Winn-Dixie Stores, Inc. v. Miles, the defendant in a slip and fall case sought documents from a plaintiff’s treating chiropractor regarding the chiropractor’s prior treatment of other patients represented by plaintiff’s counsel, and information regarding attorneys other than plaintiff’s who had requested that the chiropractor perform medical examinations for their clients. Plaintiff moved for a protective order on the grounds of undue burden; the chiropractor submitted a supporting affidavit attesting to the burdensomeness of the request. Apparently, during the hearing on plaintiff’s motion, counsel for the chiropractor asserted his own motion, ore tenus, for a protective order. The trial court granted the motion and awarded attorney’s fees to the chiropractor as the successful movant under Rule 1.380(a)(4).

Reviewing the trial court’s order for abuse of discretion, the appellate court applied the “balancing test” for expert witness discovery suggested by cases like McAdoo v. Ogden. The court concluded that the defendant’s request went beyond what might be relevant to the chiropractor’s potential bias, that the chiropractor’s confidentiality interests should be given substantial weight, and that the defendant had done nothing to refute the

132. Id. at 439.
133. 616 So. 2d 1108 (Fla. 5th Dist. Ct. App. 1993).
134. Id. at 1109-10.
135. 573 So. 2d 1084 (Fla. 4th Dist. Ct. App. 1991) (trial court must balance “the competing interests of the relevancy of the discovery information sought as impeachment information, against the burdensomeness of its production and the confidentiality interests of the doctor.”). Although the balancing test employed by the court relates to expert witness discovery, there was no suggestion that either party had listed the chiropractor as an expert witness in this case. In fact, the court expressly stated that “[the chiropractor] is not an expert witness. Rather, he is the plaintiff’s treating physician.” Miles, 616 So. 2d at 1111. Accordingly, it seems that the court could have reached the same result by referring to the medical records confidentiality requirements of section 455.241 of the Florida Statues, as qualified by the waiver provisions of Rule 1.360(b) of the Florida Rules of Civil Procedure.
The court also upheld the award of attorney’s fees on the grounds that the chiropractor’s *ore tenus* motion was sufficient to cast him in the role of a moving party for purposes of Rule 1.380(a)(4). 138

D. Dismissal of Actions

Cases decided pursuant to Rule 1.420, which governs voluntary and involuntary dismissal of actions, can be grouped according to four categories suggested by the rule itself: (1) voluntary dismissals and their effect on pending claims; (2) involuntary dismissals in nonjury trials where the facts and the law show that the claimant is not entitled to relief; (3) involuntary dismissals as sanctions for failure to comply with court orders; and (4) dismissal for failure to prosecute. 139

Dismissing a claim in the face of other pending claims presents an intriguing procedural puzzle that challenges the courts to balance plaintiff’s control over his lawsuit with considerations of judicial economy and efficiency. By contrast, recent cases involving court-ordered dismissals underscore the traditional reluctance of courts to terminate a lawsuit on grounds other than the merits.

1. Voluntary Dismissal

As to the first category of cases, the court in *Layne Dredging Co. v. Regus, Inc.* 140 reviewed the propriety of a voluntary dismissal pursuant to Rule 1.420(a)(1)(A), where defendant’s motion to amend its answer to file a cross-claim against a codefendant was still pending. On appeal, the court distinguished cross-claims from counterclaims, the latter of which can survive voluntary dismissal pursuant to Rule 1.420(a)(2). The court reasoned that “[a]ny purpose the defendant . . . may have had to transfer its liability through a cross-claim . . . was nullified at the moment when [the plaintiff] accomplished the voluntary termination of its lawsuit.” 141 Because the court believed that defendant’s cross-claim was “extinguished” by plaintiff’s voluntary dismissal, it ruled that the trial court should not have

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136. *Miles*, 616 So. 2d at 1111.
137. *Id.*
138. *Id.; see also* Rule 1.280(c) (incorporating by reference the sanction provisions of Rule 1.380).
140. 622 So. 2d 7 (Fla. 2d Dist. Ct. App. 1993).
141. *Id.* at 8.
granted the motion to amend. Both the reasoning and the result in this case are somewhat suspect. Although the court’s opinion does not describe the substance of the defendant’s claim against the codefendant, a cross-claim, pursuant to Rule 1.170(g), can relate to “any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter of either the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action.” Unlike third-party claims under Rule 1.180, a cross-claim is not limited to seeking indemnity or contribution, and is not entirely dependent upon plaintiff’s underlying lawsuit except, perhaps, definitionally. It therefore does not follow that dismissal of the underlying complaint necessarily resolves claims and issues that are properly raised in a cross-claim.

By comparison, the court in Our Gang, Inc. v. Commvest Securities, Inc., reversed a trial court’s ruling that, due to the voluntary dismissal of the underlying complaint, it lacked jurisdiction to grant a motion for leave to file a counterclaim and cross-claim. In this case, plaintiff filed an interpleader action to determine the appropriate distribution of a portfolio account. Defendant subsequently filed a motion for leave to file a counterclaim and cross-claim against two other plaintiffs. One day before hearing on the motion, the original interpleader plaintiff voluntarily dismissed its complaint. Following Gull Construction Co. v. Hendrie, the appellate court held that voluntary dismissal was improper pursuant to Rule 1.420(a)(2) in light of the pendency of a motion to file a counterclaim, even though no counterclaim was pending at the time.

At the opposite end of the voluntary dismissal spectrum, the court in Sprague v. P.I.A. of Sarasota, Inc., reversed summary judgment in favor of defendant where plaintiff voluntarily dismissed its claim by filing and hand-delivering a copy of the notice to opposing counsel one day prior to hearing on defendant’s summary judgment motion. The appellate court noted that Rule 1.420(a)(1) permits a plaintiff to “abort his lawsuit by

142. Id.
143. FLA. R. CIV. P. 1.170(g).
144. See supra notes 54-58 and accompanying text for a more detailed discussion of the requirements for a third party claim made pursuant to Rule 1.180.
145. See Cutler Ridge Corp. v. Green Springs, Inc., 249 So. 2d 91 (Fla. 3d Dist. Ct. App. 1971) (dismissal of complaint was not the “predicate” for subsequent entry of summary judgment on surviving cross-claim).
146. 608 So. 2d 542 (Fla. 4th Dist. Ct. App. 1992).
147. 271 So. 2d 775 (Fla. 2d Dist. Ct. App. 1973).
148. Our Gang, 608 So. 2d at 544.
149. 611 So. 2d 1336 (Fla. 2d Dist. Ct. App. 1993).
serving „a notice of dismissal at any time before a hearing on motion for
summary judgment.‟ 150 Because the voluntary dismissal effectively
brought the lawsuit to an end, the trial court no longer had jurisdiction to
enter judgment. 151

2. Involuntary Dismissal During Nonjury Trial

An order of involuntary dismissal at the close of plaintiff‟s case in
chief is appropriate only where plaintiff has failed to present a prima facie
case. In Banyan Corp. v. Schucklat Realty, Inc., 152 the court reversed an
order of involuntary dismissal entered in an action to collect real estate sales
commissions. At trial, seller‟s broker moved for involuntary dismissal
pursuant to Rule 1.420(b) at the close of the evidence presented by buyer‟s
broker. The trial court granted the motion on the ground that, pursuant to
section 475.42(d) of the Florida Statutes, the real estate agent representing
the buyer lacked authority to enter into a binding commission agreement on
behalf of her broker. On appeal, the court determined that the buyer‟s
broker presented sufficient evidence to suggest a ratification of
the agreement of its sales agent, and that in any event, Florida law provides
that a broker acquires an interest in a commission agreement entered into by its
sales agent regardless of the broker’s knowledge of the agreement. 153
Accordingly, the appellate court reversed, finding that the buyer‟s broker
had presented a prima facie case, that different conclusions could be drawn
from plaintiff‟s evidence, and that under these circumstances, involuntary
dismissal against the buyer‟s broker was improper. 154

3. Dismissal as Sanction for Failure
to Comply With Court Order

In Carr v. Dean Steel Buildings, Inc., 155 the trial court ordered the
parties to a construction contract dispute to conduct a physical inspection of
the subject property. Approximately ten months went by without the
ordered inspection being performed. Accordingly, the trial court, sua
sponte, entered an order dismissing the case pursuant to Rule 1.420. While

150. Id. (quoting FLA. R. CIV. P. 1.420(a)(1)).
151. Id.
153. Id. at 1282-83 (citing Marks v. M.S.F. Management Corp., 540 So. 2d 138 (Fla. 5th Dist. Ct. App. 1989)).
154. Id. at 1281-82.
recognizing that the decision to dismiss a lawsuit for failure to comply with legitimate court orders rests within the sound discretion of the trial court, the appellate court observed that the drastic remedy of dismissal should be employed only in extreme circumstances and concluded that dismissal in this case, without notice or hearing, was too harsh a sanction. Moreover, the appellate court noted that the order dismissing the case lacked the requisite finding of willful disregard of the trial court’s order.

Kozel v Ostendorf provides the counterpoint to Carr, but raises important questions regarding the limits of the trial court’s discretion in ordering involuntary dismissal as a sanction for failure to comply with court orders. In Kozel, the plaintiff’s initial complaint was dismissed without prejudice and with leave to file an amended complaint within twenty days. The parties agreed to an additional ten day extension; however, plaintiff did not file her amended complaint for more than five months, prompting the trial court to dismiss the complaint with prejudice for failure to comply with the court’s prior order. The appellate court affirmed, noting the “extreme delay” in amending the complaint, and “the lack of any showing that the delay was solely the fault of counsel . . .”

In a lengthy dissent, Judge Altenbernd recounted Florida’s “well-established tradition of discouraging sanctions that simply cause a party to sue its lawyer for malpractice,” and decried the lack of any established framework within which the trial court’s discretion should be exercised. Judge Altenbernd suggested that such a framework “should identify the relevant factors that are typically important in making the discretionary decision” and stated that the proposed framework should be “used by all trial courts.”

Judge Altenbernd’s point was apparently well taken; the Florida Supreme Court recently quashed the majority decision in Kozel. While recognizing that the decision to impose sanctions rests within the discretion of the trial court, the supreme court observed that, “[a]lthough such broad power is vested in the trial court, it is not necessary or beneficial for that power to be exercised in all situations.” Further, in response to Judge

156. Id. at 394.
157. Id.
159. Id. at 602-03.
160. Id. at 603.
161. Id. (Altenbernd, J., dissenting).
162. Id.
164. Id. at S557 (emphasis added).
Altenbernd's request for a more objective decisional framework, the supreme court stated:

To assist the trial court in determining whether dismissal with prejudice is warranted, we have adopted the following set of factors set forth in large part by Judge Altenbernd: 1) whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience; 2) whether the attorney has been previously sanctioned; 3) whether the client was personally involved in the act of disobedience; 4) whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion; 5) whether the attorney offered reasonable justification for noncompliance; and 6) whether the delay created a significant problem of judicial administration. Upon consideration of these factors, if a sanction less severe than dismissal with prejudice appears to be a viable alternative, the trial court should employ such an alternative.\(^\text{165}\)

Adherence to these factors may ultimately lead to greater consistency among trial court decisions to impose sanctions. For now, however, the guidelines set forth by the supreme court seem to invite additional litigation to determine how many of the enumerated factors must be present prior to entry of an order of dismissal, which factors carry the most weight, the degree to which any particular factor must be present, whether an evidentiary hearing is necessary to adequately assess the factors, etc. Moreover, while these factors arguably should be considered in any decision to impose sanctions, a narrow reading of Kozel would limit use of the supreme court's decisional framework only to those cases involving sanctions imposed under Rule 1.420(b). The members of the Florida Bar's Civil Procedure Rules Committee should revisit these issues in the near future, and perhaps should propose rule changes that further refine and make uniform the application of the Kozel formula.

4. Dismissal for Lack of Prosecution

In *Samuels v. Palm Beach Motor Cars, Ltd.*,\(^\text{166}\) defendant moved to dismiss plaintiff's complaint on October 30, 1991, on the ground that no record activity had occurred during the preceding twelve months. However, on July 17, 1991, plaintiff's counsel appeared at a court-ordered status conference and, as a result of defendant's nonappearance at the conference,

\(^{165}\) *Id.* at S557-58.

\(^{166}\) 618 So. 2d 310 (Fla. 4th Dist. Ct. App. 1993).
obtained a default judgment on August 13, 1991. On August 28, 1991, the default judgment was set aside pursuant to defendant's motion.\textsuperscript{167} Despite this activity, the trial court granted defendant's motion to dismiss. The appellate court, distinguishing \textit{Toney v. Freeman},\textsuperscript{168} reversed the dismissal.\textsuperscript{169} In \textit{Toney}, the Florida Supreme Court had held that a status order and responses thereto did not constitute record activity because the purpose of the order was to provide the trial court with information, not to advance the action.\textsuperscript{170} In \textit{Samuels}, however, the court found that a trial court order requiring appearance at a status conference is, "almost by definition . . . reasonably calculated to advance the cause toward resolution . . . ."\textsuperscript{171} The court observed that "attendance at a status conference can significantly advance a cause toward resolution, for example, by narrowing the issues to be tried or through exploration of settlement possibilities."\textsuperscript{172} Moreover, the court noted that plaintiff had been able to obtain a default judgment by appearance at the status conference in this case.\textsuperscript{173} Accordingly, the court held that the trial court abused its discretion in dismissing plaintiff's complaint in light of "ample record activity in this case."\textsuperscript{174}

Similarly, in \textit{Bialy v. Stinson},\textsuperscript{175} the Fourth District Court of Appeal reversed an order of dismissal for lack of record activity. Plaintiff filed her complaint on March 1, 1990. Defendant subsequently filed a motion to dismiss. The last record activity was a re-notice of hearing filed April 25, 1990, scheduling a hearing on the motion to dismiss for June 4, 1990. Plaintiff's counsel attended the hearing, but there was no record of any order having been entered on the defendant's motion. "On May 13, 1991, the trial court, \textit{sua sponte}, entered a motion, notice and judgment of dismissal in accordance with Rule 1.420(e)."\textsuperscript{176} The appellate court found that the appearance of plaintiff's counsel at a properly noticed hearing on the motion to dismiss constituted sufficient non-record activity to preclude dismissal for lack of prosecution.\textsuperscript{177}
Likewise, in Pope v. Sose, the appellate court reversed an order of dismissal for failure to prosecute where plaintiff had caused a summons to be issued to a named co-defendant within one year prior to defendant’s motion to dismiss.

Another example of the improper application of Rule 1.420(e) occurred in In re Forfeiture of: 1977 Chevrolet Corvette. On October 24, 1990, the trial court entered final judgment of forfeiture in favor of the City of Auburndale after the Corvette owner apparently failed to show cause why his car should not be forfeited. Pursuant to the judgment, the city sold the Corvette. Thereafter, on December 10, 1990, the trial court entered an order setting aside the judgment. Significantly, the trial court never provided the City with notice of the order setting aside judgment; in other words, the City was unaware of any further proceedings after entry of final judgment of forfeiture and the subsequent sale of the car. On June 15, 1992, the original owner of the automobile filed a motion to dismiss for lack of prosecution. Based on the lack of record activity and the City’s failure to show good cause in writing at least five days prior to the hearing on the motion, the trial court dismissed the case for lack of prosecution. The appellate court reversed, observing that “the purpose of Rule 1.420(e) is to move the case toward resolution” and that in this case, the City reasonably believed that the case had been completely resolved. Under these circumstances, the court held “that the city is not required to comply with the good cause in writing requirement” of the rule.

Conversely, in Heinz v. Watson, the Fifth District Court of Appeal upheld an order of dismissal pursuant to Rule 1.420(e), at least partially on the grounds that the plaintiff failed to show good cause in writing why the case should not be dismissed at least five days prior to the hearing. In this case, an amended complaint for malpractice was filed on April 27, 1990. Defendants filed their answer on October 10, 1990. Plaintiff’s counsel filed a motion for mediation conference on April 25, 1991, but the motion was never set for hearing and no mediation conference was ever held. Defendants moved to dismiss for lack of prosecution on January 28,
1992, and the trial court granted the motion, albeit without prejudice. On appeal, the court concluded that “a motion for mediation conference, standing alone and without any follow-up activity during the subsequent six-month period, is not record activity implemented to advance the case forward to a conclusion on the merits.” The court stated that a notice of hearing on the motion would have constituted sufficient record activity had one been filed. Nonetheless, citing Norflor Construction Corp. v. City of Gainesville, the court characterized plaintiff’s conduct as “the manifestation of ‘an intention to act,’ but not actual record action.” Finally, the court noted plaintiff’s failure to show good cause at least five days prior to dismissal as required by Rule 1.420(e). Accordingly, the court upheld the trial court’s order dismissing the case.

In Toney v. Freeman, the Florida Supreme Court quashed the Fourth District Court of Appeal’s decision reversing an order of dismissal and directed the court to “address the issue of whether good cause was shown for failure to prosecute.” On remand, in Freeman v. Toney, the court cited Barton-Malow Co. v. Gorman Co., for the proposition that “‘good cause requires some contact with the opposing party and some form of excusable conduct or occurrence which arose other than through negligence or inattention to pleading deadlines.” Under this standard, the court held that the departure of a lawyer from the firm representing plaintiff, and the resultant failure of plaintiff to learn of the trial court’s order requesting status advice, did not constitute good cause for failure to prosecute.

185. Id. at 751-52. Although it is not clear in the appellate court’s opinion, it is possible that the trial court’s order created a problem for the plaintiff under the statute of repose governing medical malpractice actions. See Fla. Stat. § 95.11 (b) (1991). This might explain why plaintiff took an appeal from an order dismissing his complaint without prejudice.
186. Heinz, 615 So. 2d at 753.
187. Id.
188. 512 So. 2d 266 (Fla. 1st Dist. Ct. App. 1987).
189. Heinz, 615 So. 2d at 753.
190. Id. at 753-54.
191. Id. at 754.
192. 600 So. 2d 1099 (Fla. 1992).
193. Id. at 1101.
195. 558 So. 2d 519 (Fla. 5th Dist. Ct. App. 1990).
196. Toney, 608 So. 2d at 863-64 (citing Barton-Malow Co., 558 So. 2d at 521).
197. Id.
Finally, in Diamond v. Peninsular Life Insurance Co., the trial court held that the one year provision of Rule 1.420(e) does not apply to motions for relief from judgment filed pursuant to Rule 1.540. The trial court struck appellant's rule 1.540(b) motion and supporting affidavit because appellant never noticed the motion for hearing and no action was taken for sixteen months after the motion was filed. The appellate court observed that Rule 1.420(e) authorizes dismissal only for failure to prosecute, but "does not authorize the [trial] court to strike a motion to set aside a judgment rather than ruling on its merits."

E. Juries and Jury Trials

Two important lines of cases developed under this topic during the past year. The first relates to waiver of the right to jury trial under Rule 1.430(d). The second pertains to post-verdict interviews of jurors pursuant to Rule 1.431(h). Both lines of cases provide considerable guidance to courts and practitioners.

1. Waiver of the Right to Jury Trial Under Rule 1.430(d)

Addressing the question of waiver of the right to jury trial, the court in Herrera v. Wee Care of Flagler County, Inc., reviewed a case involving the trial court's discretion to grant a motion for jury trial when demand has not been made timely. The Fifth District Court of Appeal noted that plaintiff had not requested a jury trial until two years after the litigation commenced, and stated that "when a motion for jury trial is untimely, the trial court is called upon to exercise sound discretion in determining whether justice requires the granting of a motion." In this case, the trial court, concerned with the competence of the pro se plaintiff to represent herself, conditioned its order granting jury trial on plaintiff's continued compliance with the rules of civil procedure and orders of the court. On the day trial commenced, plaintiff and her parents apparently created a scene in the courtroom which prompted the judge to hold a non-jury trial "as it would not allow [plaintiff] to appear before a jury and cause an immediate mistri-
The appellate court found that in light of the circumstances, the ultimate denial of plaintiff’s request for jury trial did not constitute abuse of the trial court’s discretion. The court also rejected plaintiff’s argument that once the trial court placed the action on the jury trial docket, plaintiff became “vested” with the right to a jury trial.

In *Independent Fire Insurance Co. v. Arvidson*, the court addressed the more technical aspects of jury trial waiver. Plaintiff filed a complaint for rescission and declaratory relief regarding an insurance policy. Defendants counterclaimed and demanded a jury trial. Plaintiff filed a notice of non-jury trial and the trial court subsequently issued an order setting the case for non-jury trial. Both parties filed unilateral pretrial statements in which they listed the issues to be determined at trial. Additionally, the defendants listed the issues raised in their counterclaim. On appeal, defendants argued that they never noticed their counterclaim for either jury or non-jury trial, although the counterclaim itself did set forth a demand for jury trial. Defendants further argued that they could not waive their right to jury trial absent some “specific and affirmative stipulation or by announcement in open court.” The appellate court disagreed, concluding that by filing a pretrial statement which included their counterclaims as issues to be decided at the noticed non-jury trial, defendants had waived their right to jury trial on their counterclaim. Practitioners, beware!

2. Post-Verdict Juror Interviews Under Rule 1.431(h)

In *Rabun & Partners, Inc. v. Ashoka Enterprises, Inc.*, the Fifth District Court of Appeal quashed the trial court’s order permitting post-verdict inquiry into juror deliberations. The case involved a construction dispute in which the jury returned a verdict in favor of an architect for services rendered in the design of a hotel, and a lesser verdict on the hotel owner’s counterclaim for damages caused by the architect’s delays. After the verdict, the hotel owner moved pursuant to Rule 1.431(h) for an interview of one of the jurors who had allegedly told the hotel owner that some jurors “refused to look at the documentary evidence” and that others “were

203. *Id.*
204. *Id.*
205. *Herrera*, 615 So. 2d at 224.
207. *Id.* at 858.
208. *Id.*
prepared to rule against [the hotel owner] because [he] was a rich doctor and did not need the money."210 The appellate court turned to the recent Florida Supreme Court decision in *Baptist Hospital of Miami, Inc. v. Maler*211 for guidance.212 In *Maler*, the supreme court reviewed a case in which two jurors apparently told defendant’s lawyers that while the defendant in a medical malpractice case should have prevailed, verdict was rendered against the defendant out of sympathy for the child plaintiff.213 The supreme court upheld the quashing of the trial court’s order granting a juror interview, stating that “[t]o the extent an inquiry will elicit information about overt prejudicial acts, it is permissible; to the extent an inquiry will elicit information about subjective impressions and opinions of jurors, it may not be allowed.”214 Taking guidance from *Maler*, the Fifth District Court of Appeal first recognized that an express agreement between two or more jurors to ignore evidence or to otherwise disregard their oath might well constitute the type of “overt act” into which inquiry would be appropriate under the *Maler* standard.215 The court concluded, however, that there was no indication of an express agreement between jurors, or of any other overt act that would justify a juror interview under the rule. Rather, the court held that even if the jury voted against the hotel owner “because he was a rich doctor and did not need the money,” this motive reflected nothing but “the emotions and mental processes of the jurors, matters which essentially inhere within the jury verdict.”216

The court in *Carcasses v. Julien*,217 reviewed the propriety of the trial court’s order limiting the scope of its post-verdict hearing on plaintiff’s allegations of juror misconduct. Plaintiff alleged that after the jury was discharged in this medical malpractice action, one of the jurors told her that he had spoken with his sister about the case, that his sister had undergone similar treatment, and that his verdict had been influenced by sympathy for the doctor’s reputation. The trial court interviewed the jury pursuant to Rule 1.431(h) but limited the scope of the interview to any non-record information received by the juror in question. At the close of the hearing, the court denied plaintiff’s motion for a new trial. On appeal, plaintiff

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210. *Id.* at 1285.
211. 579 So. 2d 97 (Fla. 1991).
212. *Rabun*, 604 So. 2d at 1285 (citing *Maler*, 579 So. 2d at 97).
213. *Maler*, 579 So. 2d at 97.
214. *Id.*
216. *Id.*
contended that the trial court should have inquired into the juror’s desire not to harm the doctor’s reputation. The Third District Court of Appeal rejected plaintiff’s argument, citing Maler for the proposition that “to the extent an inquiry will elicit information about subjective impressions and opinions of jurors, it may not be allowed.” The appellate court determined that the trial court properly limited the scope of its hearing to information allegedly received by the subject juror from his sister, concluding that any inquiry into the juror’s “sympathy” for the doctor’s reputation “fits within the category of prohibited inquiry into the emotions and mental processes of the jurors” prohibited by section 90.607(2)(b) of the Florida Statutes. In Walgreens, Inc. v. Newcomb, the court addressed whether information obtained from a juror in violation of Rule 1.431(h) could nevertheless provide grounds for a new trial. This case involved a slip and fall in which plaintiff claimed that a dangerous condition was created by Windex sprayed on the floor of the restaurant in which she fell. After a verdict for defendant, plaintiff’s counsel, who apparently could not believe the result, took it upon herself to contact one of the jurors in an attempt to find out “what went wrong.” As a result of her conversation with the juror, plaintiff’s counsel learned of the possibility that two jurors had conducted their own experiments with Windex and communicated their findings to other jury members. With respect to the communication between plaintiff’s counsel and the juror, the appellate court found that the communication violated Rule 1.431(h), which provides that a juror may not be interviewed unless the trial court so orders after notice and hearing. The court also found that the communication violated Rule 4-3.5(d)(4) of

218. Id.
219. Id. at 488 (quoting Maler v. Baptist Hosp. of Miami, Inc., 559 So. 2d 1157 (Fla. 3d Dist. Ct. App. 1989)).
220. Id. at 487-88.
221. 603 So. 2d 5 (Fla. 4th Dist. Ct. App. 1992), review denied, Newcomb v. Walgreens, Inc., 613 So. 2d 7 (Fla. 1993).
222. Id. at 6. For purposes of analyzing court decisions under Rule 1.431, this discussion is limited to the court’s treatment of juror interviews. The implications of this decision of new trial motions are discussed, infra, in the section pertaining to Rule 1.530.
223. Id.
224. Id.
the Rules Regulating the Florida Bar which sets forth similar requirements.226

F. Offers of Judgment

The current version of Rule 1.442 does nothing more than incorporate by reference the procedural provisions of Florida Statutes, section 768.79 regarding offers of judgment. The former rule was repealed effective July 9, 1992.227 The new rule was added July 16, 1992, but did not become effective until January 1, 1993.228 It is unclear whether the new rule will resolve the variety of complications that have arisen around offer of judgment provisions in force at various times over the past decade. What is clear is that the new rule may have come too late to be of use to parties whose cases were decided in the past year.

Specifically, in Metropolitan Dade County v. Jones Boatyard, Inc.,229 the Florida Supreme Court accepted jurisdiction pursuant to article V, section 3(b)(3) of the Florida Constitution, to resolve an apparent conflict between the Third District Court of Appeal’s decision in this case and the Second District Court of Appeal’s decision in A.G. Edwards & Sons, Inc. v. Davis.230 At issue is the retroactive application of offers of judgment, and the concomitant right to attorney’s fees, pursuant to section 768.79 of the Florida Statutes.

In its opinion in Jones Boatyard, Inc. v. Metropolitan Dade County, the Third District Court of Appeal held that section 768.79 applied only to offers of judgment made in actions accruing on or after July 1, 1986, the effective date of the statute.231 The supreme court reviewed the language of the statute in question as construed in Mudano v. St. Paul Fire & Marine Insurance Co.232 and observed that under Chapter 768:

"NEGLIGENCE" is divided into three parts. Part III, "DAMAGES," contains sections 768.71 through 768.81. Section 768.71, entitled "Applicability; conflicts," provides, in part:

226. Walgreens, 603 So. 2d at 6.
227. See Timmons v. Combs, 608 So. 2d 1, 3 (Fla. 1992).
228. See In re Amendments to Florida Rules Civil Procedure, 604 So. 2d 1110 (Fla. 1992).
229. 611 So. 2d 512 (Fla. 1993).
(2) This part applies only to causes of action arising on or after July 1, 1986, and does not apply to any cause of action arising before that date.233

The supreme court in Metropolitan Dade County concluded that by its own terms, section 768.79 does not apply to offers of judgment in actions accruing before the referenced date.234 In A.G. Edwards, the Second District Court of Appeal was faced with the issue of retroactive application of the provisions of Florida Statutes, section 45.061 regarding offers of settlement.235 The court concluded that the statute was applicable to causes of action accruing before its effective date because "the operative event, the only event crucial to operation of the statute, is the making of an offer of settlement."236 The supreme court tacitly approved this interpretation in Leapai v. Milton.237

In Metropolitan Dade County, the supreme court resolved the apparent conflict in the interpretation of the two statutes by observing that "section 768.79 is part of an integrated statutory scheme . . . [which] by its plain language attaches the right to attorney's fees to the underlying cause of action."238 By contrast, the court interpreted section 45.061 as giving rise to its own independent cause of action for sanctions, one which does not rely on the underlying lawsuit.239 Specifically, the court stated that section 45.061 "exists as a distinct independent statute under the civil procedure chapter of the Florida Statutes."240 Accordingly, the court approved both the Third District Court of Appeal's interpretation of the retroactive

233. Metropolitan Dade County, 611 So. 2d at 513 (citing Mudano, 543 So. 2d at 876). The "Damages" provisions now constitute Part II of chapter 768. Formerly, Part II of the chapter set forth provisions governing Medical Malpractice Claims and Related Matters. These provisions have since been repealed or renumbered as part of chapter 766.

234. Id. at 514
235. 559 So. 2d at 236.
236. Id. at 237 (quoting Hemmerle v. Bramalea, Inc., 547 So. 2d 203, 204 (Fla. 4th Dist. Ct. App. 1989)).
237. 595 So. 2d 12 (Fla. 1992).
238. Metropolitan Dade County, 611 So. 2d at 514.
239. Id.
240. Id. In 1990, the Legislature amended section 45.061(6), limiting its applicability to causes of action accruing prior to October 1, 1990. Ch. 90-119, § 22 1990 Fla. Laws 370, 381 (amending FLA. STAT. § 45.061 (1991)). This amendment was apparently undertaken to eliminate some of the confusion surrounding the existence of separate statutory provisions for offers of settlement (section 45.061) and offers of judgment (section 768.79), and a third provision under then existing Rule 1.442 that failed to either fully incorporate or fully reconcile the different requirements of the two statutes.
application of section 768.79 and the Second District Court of Appeal’s interpretation of retroactive application of section 45.061. Moreover, the supreme court mildly chided the plaintiff for not anticipating the different interpretations, stating that plaintiff’s counsel “had or should have had the expertise to analyze section 768.79 and discover the possible inapplicability of section 768.79 in the case sub judice and the likely need to file under section 45.061.”

While the supreme court’s statutory interpretation may be valid, the result in this case seems to unnecessarily elevate form over substance. The provisions of section 45.061 and section 768.79 are substantially similar, with the notable exception of the label (section 46.051 or section 768.79) placed by the offeror on his offer to settle the lawsuit. Both statutes reflect the spirit and purpose of Rule 1.442, which is “to encourage defendants to acquiesce in claims discovered during litigation to be meritorious and to shift to the claimant the financial burden of carrying on litigation beyond the point where an appropriate offer of judgment on the merits is made.” In fact, the supreme court has treated the two types of statutory “offers” as interchangeable variations on the theme established by the rule. Specifically, in Leapai, the supreme court addressed the constitutionality of offers of settlement pursuant to section 45.061, and stated that “[t]he offer of judgment process is not a new subject to us.”

Given that the two statutory provisions under consideration promote the purposes of Rule 1.442 in all its various incarnations, and further, that some version of the rule was both in effect and valid at the time plaintiff’s offer was made, the supreme court’s disparate treatment seems hypertechnical and yields a result contrary the primary goal of the rules of civil procedure: promoting the “just, speedy, and inexpensive determination of every action” through early resolution of lawsuits and the efficient administration of justice. The Legislature’s effective repeal of section 45.061 for causes of action accruing after October 1, 1990 and its modification of section 768.79 to clarify that defendants, as well as plaintiffs, are entitled to recover under the statute, has now paved the way for the supreme court to ignore section 45.061 and to adopt in toto the procedural provisions of section 768.79, thus

241. Metropolitan Dade County, 611 So. 2d at 514.
242. Id.
244. See, e.g., The Florida Bar Re: Amendment to Rules of Civil Procedure, Rule 1.442 (Offer of Judgment), 550 So. 2d 442 (Fla. 1989).
245. Leapai, 595 So. 2d at 15 (emphasis added).
resolving the on-going conflict between the various provisions. While these changes came to late to be of any use to the parties in this case, one hopes that future litigants will no longer be required to anticipate a plethora of different interpretations of Florida's offer of judgment law.

On a somewhat less preachy note, in *Liebling v. Florida Energy Management, Inc.*, a personal injury case, the defendant made an offer of judgment in the amount of $5,001.00 sixty days prior to trial. Plaintiff rejected the offer. A jury subsequently found the defendant solely negligent and awarded plaintiff property damage in the amount of $1,237.39, but found that plaintiff had not met the threshold requirements of section 627.737(2) of the Florida Statutes for establishing bodily injury. The trial court awarded defendant costs pursuant to Rule 1.442(h), but permitted the plaintiff, as the prevailing party, pursuant to section 57.041 of the Florida Statutes, to offset costs incurred prior to service of the offer of judgment. The appellate court reversed the Rule 1.442 award noting that the trial court failed to make an express finding that plaintiff's rejection of the offer of judgment was "unreasonable." The court, citing *State Farm Mutual Automobile Insurance Co. v. Lathrop*, held that a party's rejection of an offer of judgment must explicitly be found to have "caused an unreasonable delay and needless increase in the cost of litigation," in addition to violating the percentage requirements imposed by the rule.

The court also reversed the trial court's limitation on the plaintiff's section 57.041 claim to costs incurred prior to service of the settlement offer. The court noted that plaintiff was the prevailing party and that section 57.041 entitles a prevailing party to recover all taxable costs without regard to the effect of a rejected offer of judgment.

In *Royal Caribbean Corp. v. Modesto*, the Third District Court of Appeal determined that the offer of judgment provisions of section 768.79 of the Florida Statutes are applicable in Jones Act cases brought in state court. The court first observed that the award of attorneys' fees "as a component of maintenance and cure is traditionally within the equitable

246. 619 So. 2d 441 (Fla. 2d Dist. Ct. App. 1993).
247. *Id.* at 443.
248. *Id.*
250. *Liebling*, 619 So. 2d at 443 (citing *State Farm*, 586 So. 2d at 1127).
251. *Id.*
252. *Id.*
jurisdiction of the courts" in admiralty actions.\textsuperscript{254} Additionally, the court stated that Florida’s offer of judgment provisions, like rules governing mediation, pertain to the state’s control of the judicial process, rather than to the substantive elements of Jones Act claims.\textsuperscript{255} Accordingly, the court held that “[b]ecause Florida’s rules relating to offers of judgment are an integral part of this state’s management of its courts’ proceedings and do not conflict with federal admiralty law,” the award of attorneys’ fees pursuant to section 768.79 is proper in a Jones Act case.\textsuperscript{256}

Two recent cases create an apparent conflict regarding how specific an offer of judgment must be to satisfy the requirements of Rule 1.442. In State Farm Life Insurance Co. v. Bass,\textsuperscript{257} plaintiff served an offer of judgment in the sum of $64,000 (his insurance policy limit) “exclusive of costs and attorneys’ fees . . . [which] would be agreed to or determined by the court at a later date.”\textsuperscript{258} On appeal, the Third District Court of Appeal held that the offer was insufficient to support an award of costs and fees, observing that Rule 1.442(c)(2) required the offer of judgment to state “the total amount of the offer.”\textsuperscript{259} Insofar as the offer did not specify a particular amount for costs and attorneys’ fees, the court concluded that the defendant would have been unable “to determine the acceptability of the offer.” Rejection of the offer, therefore, did not expose the defendant to liability for plaintiff’s fees and costs.

In apparent contrast to Bass, the Fifth District Court of Appeal concluded in Hellman v. City of Orlando\textsuperscript{260} that an offer of judgment made pursuant to section 768.79 and Rule 1.442 in the sum of $8,500.00 plus costs provided a sufficient basis for the later award of costs and fees. The court turned for guidance to its recent decision in Williams v. Brochu,\textsuperscript{261} in which it held that “the statutory term "judgment obtained" [in section 768.79] means the amount of the judgment for damages awarded by the jury for the cause of action being tried and does not include taxable costs or attorneys' fees . . . .”\textsuperscript{262} The court then analyzed the meaning of the term “offer” in section 768.79 and similarly determined that “an offer

\textsuperscript{254} Id. at 520 (citing Vaughan v. Atkinson, 369 U.S. 527 (1962)).
\textsuperscript{255} Id.
\textsuperscript{256} Id.
\textsuperscript{257} 605 So. 2d 908 (Fla. 3d Dist. Ct. App. 1992).
\textsuperscript{258} Id. at 909.
\textsuperscript{259} Id. at 910.
\textsuperscript{260} 610 So. 2d 103 (Fla. 5th Dist. Ct. App. 1992).
\textsuperscript{261} 578 So. 2d 491 (Fla. 5th Dist. Ct. App. 1991).
\textsuperscript{262} Hellman, 610 So. 2d at 104 (quoting Williams v. Brochu, 578 So. 2d 491 (Fla. 5th Dist. Ct. App. 1991)).
should be construed as including all damages 'which may be awarded in a final judgment.'" 263 Based upon this formulation, the court concluded that because reference in section 768.79 to "judgment obtained" does not include taxable costs "incidental to a jury's consideration of a damage award," an offer of judgment need not assign a dollar amount to such costs. 264 The court therefore found the plaintiff's offer of judgment valid and remanded the case for further proceedings. 265

The two cases are perhaps reconcilable because, unlike section 768.79 (which also requires an offer to "state its total amount"), then-existing Rule 1.442 did not define an offer of judgment as "including all damages which may be awarded in a final judgment." Accordingly, the type of analysis employed in Jones Boatyard, upholding both interpretations because they are based on different, albeit substantially similar provisions, may be appropriate. While this result would be of little comfort to parties who have made indefinite offers of judgment under former Rule 1.442, it would have the salutary effect of closing a potential loophole in the new rule, which incorporates section 768.79 by reference. The loophole is created by requiring the offering party to accurately predict the amount of fees that may eventually be incurred as a result of an opponent's intransigence. This requirement would give rise to the possibility that a party who in good faith makes an offer of judgment on the merits of her claim will be precluded from recouping costs and fees if she overestimates the amount of fees that might be incurred in prosecuting her case to final resolution. The same loophole could allow a party to escape the sanctions contemplated by the rule, despite the fact that the party caused and contributed to further needless litigation by refusing an offer of judgment.

An interpretation that permits this loophole to exist would thwart the very purpose of the rule, which is to place the burden of future costs and fees on litigants who are unwilling to concede to meritorious claims. It makes eminently more sense for an offer of judgment to be limited to the amount a party expects to pay or receive as a result of the primary claim(s) made in the lawsuit, and to leave the question of fees and costs for later determination by the court. Thus, even if the supreme court eventually approves the Third District Court of Appeal's interpretation of former Rule 1.442 in Bass, it should adopt the Fifth District Court of Appeal's construc-

263. Id.
264. Id.
265. Id.
tion of section 768.79 for all cases involving the current version of Rule 1.442.

G. Directed Verdict

In *Elmowitz v. Gloria E. Zimmerman, Revocable Trust*, the Third District Court of Appeal reviewed a directed verdict rendered in favor of a third party defendant. Reiterating the well-settled standard for directed verdicts that the trial court "must view the evidence adduced and every conclusion therefrom in a light most favorable to the non-moving party, resolving every conflict and inference for that party," the court found that the record evidence conflicted in material respects and that the jury should have been allowed to consider the conflicting evidence and enter a verdict accordingly. The most interesting aspect of this case is that after the trial court entered a directed verdict in favor of the third party defendant, the jury eventually determined that the third party defendant was fifteen percent liable for the third party plaintiff's damages. This verdict doubtless influenced the appellate court's decision.

H. Default Judgment

In a series of cases, various district courts of appeal underscored the trial court's duty to terminate litigation through entry of default judgment only in the most extreme cases. For example, in *Tufo v. Oxford Resources Corp.*, the Fourth District Court of Appeal reversed a default judgment in favor of the plaintiff where the plaintiff failed to serve defendant's counsel with notice of its motion for default or its motion for entry of final default judgment.

In *Carr v. Glass-Tech Corp.*, the Third District Court of Appeal likewise reversed a default judgment because of service improprieties. In *Lenhal Realty, Inc. v. Transamerica Commercial Finance Corp.*, the court set aside a default judgment against defendants on the grounds that defendants had filed a motion to dismiss, which, while untimely, was filed before the trial court's order entering default judgment was filed with the clerk of the court.

266. 610 So. 2d 52 (Fla. 3d Dist. Ct. App. 1992).
267. Id. at 53.
269. 614 So. 2d 1227 (Fla. 3d Dist. Ct. App. 1993).
270. Id. at 1227-28.
The well settled rule that default judgment is not appropriate where a party fails to appear at trial was reiterated in *Turner Properties, Inc. v. Marchetta.* In *Turner Properties,* the Third District Court of Appeal stated that “[n]onappearance by defendants does not relieve the plaintiff of its obligation to introduce evidence on liability, and is not a basis for entry of a default.” In *Electric Engineering Co. v. General Electric Canada, Inc.,* the Third District Court of Appeal found that a misdirected transfer of the complaint from defendant’s registered agent to defendant, who, unbeknownst to its registered agent had changed its address, constituted excusable neglect and good grounds for setting aside a default.

Finally, in *Carazo v. Status Shipping, Ltd,* the Second District Court of Appeal reversed the default entered against defendants despite defendants’ failure to appear at a court ordered case management conference and failure to comply with the court’s order to serve their answer to plaintiff’s amended complaint within ten days. The appellate court stated that while it did “not condone” the behavior of defendants’ counsel, the behavior did not rise to the level of “flagrant, persistent, willful, or otherwise aggravated violation” of the trial court’s order. While Rule 1.200 permits the trial court to “take any . . . appropriate action” in response to a party’s failure to attend a pretrial conference, the sanction of default was disproportionate to the complained of conduct on the part of defendants and their attorneys. Accordingly, the court reversed the trial court’s order entering default.

I. Summary Judgment

Four cases decided by the Fourth District Court of Appeal during the past year reemphasize the necessity of negating issues raised by way of affirmative defense in order to obtain summary judgment. For instance, in *Elkins v. Barbella,* the court noted that the moving party’s affidavit supported only the allegations in her complaint, and that the movant had done nothing more than to “merely den[y]” her opponent’s affirmative

273. Id. at 507.
275. Id. at 52.
277. Id. at 1330.
278. Id.
279. Id.
defenses. Based upon this record, the court stated that "[o]nce again we reverse a summary judgment because the moving party failed to disprove opposing affirmative defenses or establish that they were insufficient as a matter of law." In *Crago v. Citibank*, the same court reversed summary judgment in a mortgage foreclosure case, observing that the mortgagor failed to disprove one defendant's contention that title to the mortgaged property had been obtained from him under duress. The Fourth District Court of Appeal again reversed summary judgment in *Pile v. Geltex Trading Corp.* because "plaintiff failed to disprove opposing affirmative defenses or establish that said defenses were insufficient as a matter of law." The court also noted that the defendant apparently had not been served with copies of the Motion for Summary Judgment or the Notice of Hearing on the motion.

Finally, in *Doss v. Steger & Steger, P.A.*, the court reversed final summary judgment where the moving party "failed to negate appellant's affirmative defense." In addition, the court commented on the fact that the affidavit submitted in support of the motion failed to comply with both the procedural and substantive requirements of Rule 1.510(c), in that it consisted almost entirely of inadmissible hearsay statements.

The subject of affidavits was also raised in *Silva v. Hernandez*, albeit for different reasons. In *Silva*, the supreme court addressed a direct conflict between the Third District Court of Appeal's interpretation of Rule 1.510(c) regarding service of opposing affidavits, and the Second District Court of Appeal's interpretation in *Burton v. GOV Contracting Corp.* At issue was whether an affidavit submitted in opposition to a motion for summary judgment must be filed at least one day prior to hearing on the motion. The supreme court approved the approach taken in *Burton*,

281. *Id.* at 727.
282. *Id.*
284. 610 So. 2d 738, 739 (Fla. 4th Dist. Ct. App. 1993).
285. *Id.*
286. *Id.*
287. 613 So. 2d 136 (Fla. 4th Dist. Ct. App. 1993).
288. *Id.* at 137 (citing *Solimine v. Numerica Sav. Bank*, 587 So. 2d 505 (Fla. 4th Dist. Ct. App. 1991)).
289. *Id.*
290. 612 So. 2d 1377 (Fla. 1993).
291. 552 So. 2d 293 (Fla. 2d Dist. Ct. App. 1989).
292. *Silva*, 612 So. 2d at 1377.
which held that Rule 1.510(c) "only requires that opposing affidavits be served at least one day prior to the day of the hearing." The supreme court observed that Rule 1.510 does not require the opposing affidavit to be filed at any specific time, and stated that filing is proper at any time prior to the actual hearing, even if such filing takes place on the same day as the hearing.

In *Heritage Real Estate & Development Co. v. Gaich,* the Fifth District Court of Appeal provided guidance as to the proper application of the summary judgment rule in a case involving a pending counterclaim. Citing prior decisions from the Third, Fourth and Fifth Districts, the court held that under Rule 1.510,

[T]here are two ways to deal with a pending counterclaim. First, a trial court can enter partial summary judgment for a plaintiff and then take evidence on the counterclaim or, in the alternative, enter final summary judgment on the complaint but "stay" its execution pending resolution of the counterclaim.

Logically, these alternatives should equally be available to a defendant seeking summary judgment on its counterclaim where issues in the complaint remain pending.

One other case involving the procedural aspects of summary judgment motions deserves mention. In *Kozich v. Hartford Insurance Co.*, the court determined that a trial court is without discretion to determine whether to hold a hearing on a motion for summary judgment. Perhaps following the lead of local federal courts, the trial court entered an order setting forth procedures and deadlines for various filings related to defendant's motion for summary judgment, and stated that the "[c]ourt will advise the parties in the event a hearing is required." After all parties had submitted briefs on the motion, the trial court entered judgment without hearing. On appeal, the court noted that Rule 1.510(c) specifically provides for a hearing, and does not admit any discretion on the part of the trial court to

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293. Id. (emphasis added).
294. Id.
295. 620 So. 2d 1118 (Fla. 5th Dist. Ct. App. 1993).
296. Id. at 1119.
298. See, e.g., S.D. Fla. LR 7.1 (setting forth local rules governing motion practice in the United States District Court, Southern District of Florida).
299. Kozich, 609 So. 2d at 148.
determine whether such hearing is required. Accordingly, the order entering summary judgment was reversed and the case remanded for purposes of holding the hearing required by Rule 1.510(c).

J. Motions for Rehearing and New Trial

In *Walgreens, Inc. v. Newcomb,* the court addressed whether information obtained from a juror in violation of Rule 1.431(h) could nevertheless provide grounds for a new trial. This case involved a slip and fall in which plaintiff claimed that a dangerous condition was created by Windex sprayed on the floor of the restaurant in which she fell. An informal juror interview revealed that two jurors may have impermissibly conducted their own Windex experiments and related their findings to the remaining jurors. Based upon this information, the trial court granted plaintiff's motion for a new trial. On appeal, the court noted that while this type of juror conduct would normally support a motion for new trial, the information regarding the impermissible experiment had been obtained by plaintiff's counsel in violation of Rule 1.431. The court reasoned that "[a] party ought not be able to obtain relief by violating the Rules when the relief could not be obtained by compliance with the Rules." Accordingly, the court reversed the trial court's order granting a new trial and remanded the case for entry of judgment consistent with the original verdict.

The supreme court's opinion in *Keene Bros. Trucking, Inc. v. Pennell* resolved a direct conflict between the decision of the Second District Court of Appeal in that case and the supreme court's earlier decision in *Frazier v. Seaboard System Railroad,* which dealt with simultaneous entry of orders granting motions for new trial and for

300. *Id.; cf. S.D. Fla. LR 7.1.B* ("No hearing will be held on motions unless set by the court.").
301. *Id.*
303. For purposes of analyzing court decisions under Rule 1.530, this discussion is limited to the court's treatment of plaintiff's motion for new trial. Issues regarding juror interviews are discussed, *supra,* in section E2 pertaining to Rule 1.431.
304. *Walgreens,* 603 So. 2d at 6.
305. *Id.*
306. 614 So. 2d 1083 (Fla. 1993).
308. 508 So. 2d 345 (Fla. 1987).
judgment notwithstanding the verdict. The supreme court acknowledged that its Frazier opinion did characterize such orders as "mutually inconsistent." The court also observed that Frazier expressly contemplated the possibility of the mutually inconsistent orders being entered "in the alternative" to promote judicial economy. The supreme court concluded that the trial court in this case had properly considered and decided the motions for new trial and judgment notwithstanding the verdict in the alternative.

The resolution of this conflict did not, however, dispose of all issues raised on appeal because the trial court had also declared a mistrial prior to discharging the jury. The practitioner should take special note of the bright-line test established to clarify apparent confusion regarding the timing and resultant treatment of mistrial orders. First, the court observed that "[t]he legal effect of a mistrial is the equivalent of there having been no trial at all." Accordingly, an order of mistrial entered before the jury is discharged is a non-appealable order that removes the court's authority to reinstate a verdict or to enter a judgment notwithstanding the verdict. By contrast, an order granting a mistrial entered after the jury is discharged operates as a motion for new trial. The court determined that the appropriate demarcation between these alternatives is the discharge of the jury, rather than the less easily ascertainable point at which the jury verdict is "rendered." The practitioner should also take note of one other case that indirectly involves new trial motions pursuant to Rule 1.530. In Dominguez v. Barakat, the court held that Rule 1.530(b) requires motions for new trials to be made within ten days after return of a jury verdict or the filing of judgment in a nonjury action. The rule does not, however, provide for additional time for service by mail pursuant to Rule 1.090(e). Thus, the court held that for purposes of calculating the time for filing a notice of appeal, rendition of judgment is not postponed by a motion for rehearing when the motion is not served for eleven days after entry of judgment.

309. Keene Bros. Trucking, 614 So. 2d at 1084.
310. Id.
311. Id. at 1085.
312. See id.
313. Id.
314. Keene Bros. Trucking, 614 So. 2d at 1085.
316. See FLA. R. CIV. P. 1.530.
notwithstanding the fact that notice of the final judgment is provided to
counsel by mail.\footnote{Dominguez, 609 So. 2d at 664.}

K. Relief from Judgment

Courts and practitioners alike continue to grapple with the appropriate
circumstances under which a motion for relief from judgment pursuant to
Rule 1.540 can be raised. A series of cases decided in the past year shed
considerable light on the proper application of the rule. For example, in
\textit{Rolfs v. First Union National Bank of Florida,}\footnote{604 So. 2d 1269 (Fla. 4th Dist. Ct. App. 1992).}
the court addressed the trial court's denial of a Rule 1.540 motion to vacate final judgment of fore-
closure on the grounds that the mortgagor had not filed the original note and
mortgage with the trial court.\footnote{The original documents had been produced for the mortgagor's inspection, and had been presented to the trial court at the hearing on the mortgagee's motion for summary judgment, but had not actually been "filed" with the court. \textit{Id.} at 1270.} The appellate court emphasized the well-settled rule of law that motions for relief from judgment are no
substitute for a proper appeal, and concluded that "the error, if any, was
reviewable by plenary appeal from the final judgment."\footnote{id.}

Similarly, in \textit{A.W. Baylor Plastering, Inc. v. Mellon Stuart Co.,}\footnote{611 So. 2d 108 (Fla. 5th Dist. Ct. App. 1992).}
plaintiff moved for relief from judgment claiming that the trial court was
mistaken in the law it relied upon in dismissing plaintiff's complaint.\footnote{Id.}
On appeal, the court first observed that orders denying motions for relief
pursuant to Rule 1.540 are nonfinal, and accordingly, that briefs must be
filed within fifteen days from notice of appeal from such orders.\footnote{Id.}
In this case, appellant's initial brief was filed more than two months after its notice
of appeal. Recognizing that appeals should not normally be dismissed on
the basis of "inadvertent procedural omission[s],"\footnote{Id.} the court nevertheless
dismissed the appeal because it was evident that the plaintiff's Rule 1.540
motion was impermissibly filed as a substitute for appellate review or a

\footnote{Dominguez, 609 So. 2d at 664.}
\footnote{604 So. 2d 1269 (Fla. 4th Dist. Ct. App. 1992).}
\footnote{The original documents had been produced for the mortgagor's inspection, and had been presented to the trial court at the hearing on the mortgagee's motion for summary judgment, but had not actually been "filed" with the court. \textit{Id.} at 1270.}
\footnote{Id.}
\footnote{611 So. 2d 108 (Fla. 5th Dist. Ct. App. 1992).}
\footnote{Id.}
\footnote{Id.}
\footnote{Id.}

\url{https://nsuworks.nova.edu/nlr/vol18/iss1/1}
By comparison, the court in Nichols v. Hepworth held that two separate motions for relief under Rule 1.540 were proper. Initially, the defendant in a mortgage foreclosure action moved for relief from summary judgment based upon lack of notice of the motion, the hearing on the motion, and judgment entered on the motion. The relief was requested nearly one year after judgment had been entered. The trial court characterized the motion for relief as one for rehearing, and denied the motion without explanation. Due to excusable neglect, defendant’s counsel was unaware of the order denying the motion until well after the time for filing an appeal had run. Accordingly, the defendant filed a second motion pursuant to Rule 1.540 seeking relief from the order denying defendant’s first motion for relief. The trial court denied this motion as “successive.”

The appellate court reversed, observing that the initial motion could not have been one for rehearing pursuant to Rule 1.530 since it had been filed nearly one year after judgment was entered. Moreover, the court concluded that the initial motion did not challenge the summary judgment on its merits, but rather sought relief due to mistake or inadvertence related to the lack of notice received by the defendant of the motion for summary judgment and subsequent proceedings thereon. Finally, the court held that the two motions were not successive, reasoning that “[a]n order entered under 1.540 may itself be subject to relief under the same rule when, as here, the motions do not seek relief from the same order and are based on different grounds.”

In Davidson v. Lenglen Condo Ass’n, the court also found a motion for relief under Rule 1.540 proper. In this case, plaintiff reached settlement with one of the defendants and filed a notice of voluntary dismissal, which, inadvertently, failed to limit dismissal to the settling defendant. The plaintiff subsequently filed a corrected notice and a motion to strike the

325. Id. at 109-10.
327. Id. at 575.
328. Id.
329. Id.
330. Id. at 576; see also Bermuda Atlantic Line, Ltd. v. Florida E. Coast Ry. Co., 622 So. 2d 489 (Fla. 1st Dist. Ct. App. 1993) (abuse of discretion to deny relief from judgment where party was not properly served its attorney’s motion to withdraw, order granting the motion, or notice of pretrial conference).
original notice and substitute the corrected notice. The trial court denied the motion. On appeal, the court acknowledged that plaintiff's motion to strike and substitute did not indicate the cause of the mistake, but determined that the affidavit submitted by the plaintiff's counsel in support of the notice provided sufficient information to support granting of the requested relief.\textsuperscript{332}

In \textit{Gold v. Wohl},\textsuperscript{333} the court reviewed a set of circumstances singularly deserving of post-judgment relief. In this case, a virtual comedy of errors resulted in the trial court's dismissal of a case in which both parties fully complied with all court orders, and in which neither party sought, desired or agreed to dismissal. In its initial brief, appellant contended that the trial court abused its discretion in failing to grant relief pursuant to Rule 1.540 where it was clear and undisputed that the court had made a mistake in dismissing the case. The appellate court noted that appellee filed a one page brief stating that he "is in concurrence with the brief filed by appellant."\textsuperscript{334} The court suggested that "[w]hen the lawyers for the adversary parties agree that a mistake has happened and immediately and unambiguously notify the trial court that she is in error as to both her notation and recollection," the trial court should give serious consideration to the possibility of a mistake which makes relief appropriate under Rule 1.540.\textsuperscript{335}

Two other cases were not so easily resolved by the appellate courts. In \textit{Mangham v. Jenks},\textsuperscript{336} the appellate court was unable to determine whether the trial court had reserved jurisdiction over the parties in an action to abate a nuisance. Consequently, the appellate court could not ascertain whether the defendant was entitled to relief pursuant to Rule 1.540(b)(5) on the grounds of full performance and satisfaction of the judgment entered against her.\textsuperscript{337} Similarly, in \textit{Department of Health & Rehabilitative Services. v. Schein},\textsuperscript{338} the appellate court, unable to ascertain from the record whether an order granting a motion for relief pursuant to Rule 1.540 was agreed to by the parties, stated that, absent agreement, the relief should not be granted because there was no evidence to support the moving party's

\textsuperscript{332. Id. at 689.} \\
\textsuperscript{333. 617 So. 2d 409 (Fla. 4th Dist. Ct. App. 1993).} \\
\textsuperscript{334. Id. at 410.} \\
\textsuperscript{335. Id.} \\
\textsuperscript{336. 610 So. 2d 85 (Fla. 1st Dist. Ct. App. 1992).} \\
\textsuperscript{337. Id. at 86.} \\
\textsuperscript{338. 616 So. 2d 598 (Fla. 4th Dist. Ct. App. 1993).}
Obviously, trial counsel are not the only ones who sometimes have difficulty with this rule; the cautious practitioner should therefore make every effort to have the trial court clarify the basis for its orders granting or denying the relief requested.

Two recent cases analyze the concept of a "void" judgment under Rule 1.540(b)(4). In *Patton v. Department of Health & Rehabilitative Services*, the appellant sought to set aside a default and final judgment entered against him in a paternity suit. The default and final judgment were entered as sanctions for appellant's failure to cooperate in discovery. Plaintiff contended that the trial court's order lacked the specific findings of willful or deliberate refusal to obey a court order required by the supreme court in *Commonwealth Federal Savings & Loan Ass'n v. Tubero*, and that the absence of such findings rendered the judgment "void" pursuant to Rule 1.540(b)(4), thus entitled him to relief. The court first concluded that the trial court's failure to set forth express findings of willful disobedience did not render its judgment void, but merely incapable of review. The court next observed that appellant's arguments necessarily related to events that transpired prior to rendition of judgment, and had no bearing on the timeliness of his post-judgment motion for relief. Finally, the court concluded that regardless of any infirmities in the trial court's order of final judgment, appellant's motion for relief came more than one year after that judgment, and was therefore improper under the provisions of Rule 1.540.

The question of "void" judgments was addressed more squarely in *Department of Transportation v. Bailey*. In this case, the Department of Transportation ("Department") appealed from a judgment which provided for prejudgment interest in violation of the express provisions of Florida Statutes, section 768.28(5), which limits waiver of sovereign immunity with respect to punitive damages and prejudgment interest. The Department's first Rule 1.540 motion for relief from judgment referred to section 768.28, but failed to directly raise the question of the trial court's subject

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339. *Id.* at 599.
341. 569 So. 2d 1271 (Fla. 1990).
342. *Patton*, 620 So. 2d at 1109.
343. *Id.*
344. *Id.*
345. *Id.*
347. *Id.; see also* FLA. STAT. § 768.28(5) (1985).
matter jurisdiction to award prejudgment interest. The trial court denied the motion. In its second motion for relief, the Department presented a detailed argument regarding the court's lack of subject matter jurisdiction to award prejudgment interest. This motion was also denied.

At the outset, the appellate court recognized that the award of prejudgment interest was clearly erroneous, rendering the trial court's judgment void. However, the court also acknowledged the strong policy against entertaining successive motions pursuant to Rule 1.540 in which the movant alleges matters that either were or should have been raised in prior motions, and observed that the Department's first motion raised the issue of subject matter jurisdiction, even if indirectly. Nevertheless, because the court could not determine from the record the basis for the trial court's denial of the Department's first motion, it held that the denial had no res judicata effect on the issue of subject matter jurisdiction. Accordingly, the court found that the Department's second motion was "not strictly repetitive," and therefore should not have been denied.

Two final cases draw a razor-sharp line at the outer bounds of the relief available under Rule 1.540. In the first case, *Viscomi v. Viscomi*, the court held that allegations made by a former wife in a complaint for modification of final dissolution of marriage that her ex-husband fraudulently concealed assets prior to entry of a final judgment of dissolution at best constituted intrinsic fraud, and must therefore be raised by a Rule 1.540(b) motion for relief from judgment. Since the allegations were not raised for more than a year after the judgment was rendered, the fraud claims were untimely.

In the second case, *Lamb v. Leiter*, the court upheld the propriety of an "independent action" commenced to vacate a final judgment of enforcement.

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348. Bailey, 603 So. 2d at 1386-87.
349. Id. at 1387. The appellate court pointed out that the Department should have taken a direct appeal from the final judgment. Id. Having failed to do so, and having subsequently failed to timely file a notice of appeal from the trial court's order denying its first motion for relief from judgment, the Department would ordinarily have been stuck with the result even though it was contrary to law. Id. Thus, the significance of the propriety of the Department's second motion for relief.
350. Id.
351. Bailey, 603 So. 2d at 1387.
353. Id. at 147.
354. Id. Rule 1.540(b) was amended effective January 1, 1993 to eliminate the one-year time limit in marital cases involving fraudulent financial affidavits.
dissolution and set aside property settlement. The former wife alleged that the initial settlement was procured through coercion, duress and deceit. The trial court entered judgment against the former wife on the grounds that her allegations consisted of intrinsic fraud, were not brought within one year of the final judgment, and therefore did not comply with Rule 1.540(b)(3). On appeal, the court determined that the former husband’s alleged use of coercion and duress to prevent his former wife from "litigating child custody, alimony and property division issues" constituted the type of extrinsic fraud defined by Rule 1.540(b)(4). Accordingly, the judgment was reversed and the case remanded for resolution of the former wife’s independent action on the merits, even though the action was brought more than three years after the initial final judgment was rendered.

L. Injunctions

In Denison v. Denison, the court reviewed the trial court’s order modifying an injunction obtained pursuant to divorce proceedings. Appellee had obtained an ex parte injunction to prevent his exclusion from the operation of the family business and to curtail appellant’s operation of the business. Appellants moved to dissolve or modify the injunction. The trial court conducted six days of hearings on the motion, listening to seventeen hours of testimony from appellee and extensive cross-examination of appellee’s witnesses. At the close of appellee’s presentation, appellants moved for involuntary dismissal of the injunction on the grounds that appellee had not presented sufficient facts to support its issuance. After extensive argument on the motion by counsel, but without further proceedings in which appellants could present evidence on their behalf, the trial court entered an order modifying the injunction.

On appeal, the court stated that on appellant’s motion for involuntary dismissal, "the trial court’s duty [was] to determine whether a prima facie case has been made for relief, not to weigh the credibility of the witnesses." Based upon the record presented, the court determined that the trial court had impermissibly weighed the evidence in arriving at its decision to modify the injunction. Because “[d]ue process requires an oppor-

356. Id. at 635.
357. Id.
359. The appellants included appellee’s son, the business itself, and the business’s board of directors.
360. Denison, 603 So. 2d at 116.
361. Id.
tunity to be heard," the trial court erred by modifying the injunction "without giving the appellants an opportunity to be heard on their side of the case." 362

Considering that appellant's motion for involuntary dismissal was premised exclusively on appellee's failure to present sufficient facts to support issuance of the injunction, it is curious that the appellate court found fault with the fact that the trial court considered only appellee's evidence in its tacit denial of appellant's motion for involuntary dismissal. Obviously, additional evidence from appellants would have no bearing on whether appellee met his burden of presenting a prima facie case. Thus, reference to the appropriate standard on a motion for involuntary dismissal seems inapposite. With respect to the trial court's order modifying the injunction, however, the appellate court correctly determined that appellant should have been given the opportunity to present their evidence pursuant to Rule 1.610(a)(2).

In Schiller v. Miller, 363 the court affirmed a temporary restraining order prohibiting one of the parties from disposing of four pieces of jewelry, including a 5.8 carat diamond ring, and limiting the opposing party's bond to $1,000. Citing Esposito v. Horning, 364 the court observed that while injunctions are not normally issued for retention of personal property, an injunction may properly be issued where the property is "unique" and where the party seeking the injunction demonstrates that there is no adequate remedy at law. 365 Although it appeared that appellee might have an adequate claim for damages in the event the jewelry was misappropriated, the appellate court, relying on the trial court's findings of the unique nature of the jewelry and the difficulty in ascertaining its value, declined to rule that the trial court had abused its discretion in issuing the injunction. 366

M. Miscellaneous Rules and Decisions

Objections to the report and recommendations of a special master pursuant to Rule 1.490(h) were the subject of Barnett Bank of Martin County, N.A. v. RGA Development Co. 367 The appellate court held that the entry of an order on a special master's report and recommendations less

362. Id.
363. 621 So. 2d 481 (Fla. 4th Dist. Ct. App. 1993).
364. 416 So. 2d 896 (Fla. 4th Dist. Ct. App. 1982).
365. Schiller, 621 So. 2d at 482.
366. Id.
than ten days after the report and recommendations are served constitutes reversible error because Rule 1.490(h) provides parties with ten days to file exceptions after service of the report and recommendations. The court also concluded that the "acceptance of benefits" doctrine is inapplicable in appeals from trial court orders that are not final adjudications on the merits. In a concurring opinion, Judge Polen suggested that there may be certain circumstances other than final judgments in which the "acceptance of benefits" doctrine may be applicable, although this case did not give rise to such circumstances.

In National American Insurance Co. v. Charlotte County, the court reviewed an order denying a motion filed pursuant to Rule 1.550(b) for stay of state court proceedings pending resolution of a prior declaratory judgment action filed in federal court. Citing Wade v. Clower, Schwartz v. DeLoach, and State v. Harbour Island, Inc., the court noted that a subsequently filed state court action should ordinarily be stayed until resolution of a pending federal case that involves substantially the same issues. The court recognized that a motion for stay may be denied "upon a showing of the likelihood of undue delay in the disposition of the prior action," but concluded that no such delay was threatened in this case.

Last, but not least, in Avril v. Civilmar, the court exercised its certiorari jurisdiction to review a trial court order imposing sanctions pursuant to Rule 1.720(b) and 1.730(c) for failure to negotiate in good faith during court-ordered mediation. The trial court ordered the parties to attend mediation approximately eighty days after service of the complaint upon the defendant. The defendant’s attorney and a representative of defendant’s insurance company attended the mediation in accordance with Rule 1.720(b)(2)-(3). Stating that they had not had sufficient time to conduct discovery, defendant’s representatives claimed they were unable at that time to offer anything more than $1,000 to settle the case. Thereafter, the plaintiffs moved for sanctions and the trial court granted the motion.

368. Id. at 1259.
369. Id.
370. Id. at 1260 (Polen, J., concurring).
372. 114 So. 548 (Fla. 1927).
376. Id.
On appeal, the court noted that Rule 1.730(b) allows sanctions "only for failing to appear at a duly noticed mediation conference,"[378] and that Rule 1.730(c) provides for sanctions only if a party fails to perform pursuant to a mediation agreement.[379] The court concluded that any "mischief" in this case was attributable to plaintiffs' "rush into mediation before their carrier had completed their reasonably necessary discovery."[380] The court therefore reversed the award imposing sanctions.[381]

On its face, the court's opinion is both sensible and just, and in full accordance with the express provisions of the cited rules of civil procedure. However, the broad holding in this case invites the worst type of bad faith "participation" in mediation conferences, in direct contravention of the spirit and purpose of the mediation rules. Prior to so literally limiting the meaning of the phrase "failure to attend," the court should perhaps have referred to analogous provisions in the rules governing discovery sanctions. Specifically, Rule 1.380(a)(3) defines "failure to answer" as any evasive or incomplete answer, in order to give full effect to the purpose of the discovery rules. Similarly, one can envision many scenarios in which a party's bad faith during mediation is tantamount to a failure to attend. If the courts are unable to read a similar provision into Rule 1.720, the Florida Bar's Committee on the Rules of Civil Procedure should consider including an express provision in the future.

IV. CONCLUSION

Given the tremendous amount of time and resources expended, sometimes needlessly, on litigation related to discovery, it is heartening to see the courts cracking down on discovery abuse by keeping close tabs on the proper scope of discovery and by imposing sanctions on litigants who resist or ignore proper discovery requests. It is likewise heartening to have renewed confirmation of the Florida judiciary's traditional reluctance to resolve matters on grounds other than the merits. This confirmation is somewhat clouded, however, by the often inconsistent exercise of the trial courts' discretion in awarding the extreme sanctions of striking pleadings, dismissal, and default. The Florida Supreme Court's adoption of the guidelines suggested by Judge Altenbernd's dissenting opinion in Kozel v.

378. Id. at 989.
379. Id.
380. Id. at 990.
381. Id.
Ostendorf is a significant step toward the restoration of consistency in this area. Both the Florida Supreme Court and the Legislature are to be commended for their cooperative efforts to resolve the confusion surrounding offers of judgment. The supreme court should also be commended for taking steps, such as gender-neutral language and service by facsimile, that help our judicial system keep step with ever changing times.
Contraband Forfeiture: 1993 Survey of Florida Law

Richard A. Purdy*

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I. INTRODUCTION

"If an ox gore a man or woman, and they die, he shall be stoned and his flesh shall not be eaten." Exodus 21:28

Forfeiture has its roots in biblical times. The common law followed with the view that property used to cause the death of a King's subject was forfeited to the King. The King would convert the property to a charitable use. Forfeiture later became a source of Crown revenue. America adopted forfeiture with a proliferation of in rem and in personam statutes designed both to punish the offender and to take contraband property from the careless property owner.1 Although Florida has both in personam and in rem

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1. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974). In Calero-Toledo, the Supreme Court approved forfeiture of a yacht worth over $100,000 because it
statutes, this article is limited to in rem forfeitures pursuant to the Florida Contraband Forfeiture Act, sections 932.701 through 932.707 of the Florida Statutes.

It is inherently just and proper that the vehicle used as the getaway car in an armed robbery be taken from the robber for subsequent use by the sheriff to provide road patrol protection for the public. This is called contraband forfeiture, which is a great concept. In practice, however, forfeiture threatens due process because an in rem forfeiture is not limited to vehicles owned by the criminal. Furthermore, neither an arrest nor a conviction is required for, or relevant to, forfeiture proceedings. The legal fiction that the vehicle is the offender eliminates the need for a conviction. Originally, in federal courts, innocence of the vehicle owner was not a defense to forfeiture, even if the owner was not present or did not otherwise know of the crime. To prevent forfeiture, the innocent owner had to prove that the vehicle was stolen from him by the robber, or that he had done all that reasonably could be expected to prevent the use of his vehicle in the robbery.

Prior to 1980, Florida had a limited, weak, ineffective and seldom used forfeiture statute. Three times in the past thirteen years the Florida Legislature made substantial changes to forfeiture law. In 1980, Florida made a serious entry into the forfeiture arena with the enactment of The Florida Contraband Forfeiture Act. Prior law applied only to vessels, motor vehicles, and aircrafts, and forfeited only those items used in committing crimes related to drugs, gambling, beverage or tobacco laws, and motor

Id. The owner, Pearson Yacht Leasing Co., had no knowledge of the violation. Id. at 663, 690.

2. City of Tallahassee v. One Yellow 1979 Fiat 2-Door Sedan, 414 So. 2d 1100, 1101-02 (Fla. 1st Dist. Ct. App. 1982).

3. Calero-Toledo, 416 U.S. at 689-90. The Calero-Toledo Court stated:
   
   It therefore has been implied that it would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent. Similarly, the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for, in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.

Id. (citations omitted).


fuel tax violations. The 1974 to 1980 law was further limited by courts to apply only in “drug trafficking operations.” The 1980 amendments expanded forfeiture to any personal property, including currency, used in any felony. The new law shifted the burden of proof from the state or agency to the property owner.

Incentive for law enforcement and attorneys to use the Contraband Forfeiture Act of 1980 was provided by allowing the seizing agency to use funds from the sale of property forfeited and by allowing agencies to use their own or outside counsel to file the action. Formerly, proceeds from sold property went into the general revenue fund of the municipality or county, and only the often reluctant State Attorney could file the action.

In 1989, the Act was amended to add real property used “to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article.” It is obvious that forfeiture of real estate that is used to conduct a ten dollar crack cocaine sale or to store over twenty grams of marijuana substantially increased the value of potential forfeitures. The 1989 amendments also added proceeds from the sale of contraband property and provided that other property of the defendant could be forfeited if the contraband property was sold or otherwise gone prior to seizure.

Since 1980, Florida law enforcement agencies have benefited by the forfeiture of currency and property, valued in many millions of dollars. However, the use of the forfeiture law has not been without detractors in both the courts and public domain. Forfeitures are considered harsh exactions and they are not favored in law or equity. They are strictly construed against the government. Justice Barkett, Chief Justice of the Florida Supreme Court, described the authority granted to law enforcement by the Florida Contraband Forfeiture Act as “awesome.”

6. FLA. STAT. § 943.42 (1979) (renumbered at FLA. STAT. § 732.702 (1981)).
8. FLA. STAT. § 943.41(e) (1980) (emphasis added) (renumbered at FLA. STAT. § 932.701(e) (1981)).
9. Id. § 943.43 (renumbered at FLA. STAT. § 732.703 (1980)).
10. Id. § 943.44(1) (renumbered at FLA. STAT. § 732.704 (1980)); id. § 943.44(3)(a) (renumbered at FLA. STAT. § 732.704(3)(a) (1980)).
13. Id. § 932.703(1).
stein of the Fourth District Court of Appeal termed forfeiture a “draconian remedy” in a stinging dissent to a majority opinion that upheld the forfeiture of an aircraft used in a registration felony and owned by a “player in the Noriega trial because of reported drug smuggling activities.” Judge Glickstein was greatly influenced by the series of newspaper articles in the Stuart News and the Pittsburgh Press entitled “Presumed Guilty,” which he adopted in great detail in an unusual “Epilogue to Dissent.” Other Florida newspapers have attacked the forfeiture law by describing it as an apparently unjust and excessive use of the law against “innocents.”

It is against this background of judicial and public negativity that the Florida Legislature made its third substantial alteration of forfeiture law. Our lawmakers were aided by the Florida Supreme Court’s decision in Department of Law Enforcement v. Real Property. The court held the 1989 Florida Contraband Forfeiture Act to be constitutional but only by its interpretation that the statute included substantive and procedural safeguards that were not in the wording of the Act. In July of 1992, the Florida Legislature substantially adopted the requirements of the Department of Law Enforcement opinion by enacting Florida Session Laws chapter 92-54. This survey of Florida law necessarily starts with the 1991 Department of Law Enforcement v. Real Property decision and the July 1992 amendments to the Florida Contraband Forfeiture Act. The decision and the amendments substantially changed the law affecting several important legal issues in forfeiture.

II. DUE PROCESS—JUDICIAL AND LEGISLATIVE ACTION

After holding that the Florida Contraband Forfeiture Act was facially constitutional in Department of Law Enforcement v. Real Property, a case of first impression, the Florida Supreme Court explained that the Act was applied with minimum due process requirements, but not found in the

18. Id. at 556-58.
19. See, e.g., Profit in the Name of the Law, Sun Sentinel, Mar. 10-14, 1991. This was a week-long series of articles by several authors critical of the forfeiture law.
20. 588 So. 2d at 957.
21. Id.
23. 588 So. 2d at 957.
wording of the act that were specified in the opinion. The forfeiture action was initiated by the seizure of 480 acres of land that included an airstrip, a mobile home subdivision, a restaurant, a bath house, a personal residence, garages and other improvements by the Florida Department of Law Enforcement ("FDLE"). FDLE filed a forfeiture petition seeking to forfeit the property on the grounds that it was used for drug trafficking. Based upon the affidavit of a FDLE agent, the circuit court issued warrants to seize the property. The FDLE filed notice of lis pendens the same day. The 1989 Act did not provide for the filing of an affidavit, the issuing of a "seizure" warrant, or the filing of a notice of lis pendens. The claimants, property owners, moved to dismiss the petitions. The circuit court dismissed the action on two grounds. First, the Act failed to provide substantive due process. Second, it was void for vagueness because it required "parties to guess the proper procedures and protections" and required insufficient notice as to what specific property was subject to forfeiture.

The Florida Supreme Court accepted jurisdiction from the First District Court of Appeal to decide a matter of great public importance that required immediate resolution. The court acknowledged that the Act "does not set out any procedures for filing the petition or issuing the rule to show cause, except that a rule shall issue upon the showing of 'due proof'." Prior district court opinions characterized forfeiture proceedings as "procedural quagmires" and "murky." The Fifth District Court of Appeal stated that "the Forfeiture Statute leaves much to the judicial imagination in guaranteeing procedural due process . . . ."

In deciding the issue of whether The Florida Contraband Forfeiture Act comports with substantive and procedural due process of law, the Florida Supreme Court recognized that it must resolve the conflict between the

24. Id.
25. Id.
26. Id.
27. Id.
28. Department of Law Enforcement, 588 So. 2d at 957.
29. Id. at 966.
30. Id.; see In re Forfeiture of $5300, 429 So. 2d 800, 801-02 (Fla. 4th Dist. Ct. App. 1983).
principle that forfeiture statutes are strictly construed and not favored in law or equity, and the traditional judicial policy that all doubts as to the validity of a statute are to be resolved in favor of constitutionality where reasonably possible. The court recognized its rule making powers but cautioned that it could not legislate and violate the separation of powers prohibition. The court resolved that it could require the missing safeguards by relying on the procedures set forth in prior case law and thus construe the Act to comport with minimal due process requirements. Thereafter, Florida's high court vociferously legislated several substantial changes to the Act.

The following fourteen requirements were added to the 1989 Act by the opinion. Each is followed by the provision added to the 1992 Act that corresponds to and adopts the Florida Supreme Court opinion:

1. Immediately after ex-parte seizure of personal property for forfeiture, the seizing agency must notify all interested parties that the property has been taken and that they have the right to request a post seizure adversarial preliminary hearing. The hearing is “anticipated” to be within 10 days of any such request.

1992 Statute: “Personal property may be seized at the time of the violation or subsequent to the violation, provided that the person entitled to notice is notified at the time of the seizure or by certified mail, return receipt requested, that there is a right to an adversarial preliminary hearing after the seizure to determine whether probable cause exists to believe that such property has been or is being used in violation of the Florida Contraband Forfeiture Act . . . . It shall be held within 10 days after the request or as soon as practicable.”

2. Prior to any initial restraint of real property other than lis pendens, the seizing agency must provide notice of and schedule an adversarial hearing for interested parties. The petition for forfeiture and recording of notice of the petition (lis pendens)

33. Department of Law Enforcement, 588 So. 2d at 961.
34. Id. at 961-62; see FLA CONST. art. 1, § 3.
35. Department of Law Enforcement, 588 So. 2d at 959.
36. Id. at 965-66.
should be filed simultaneously. The hearing is anticipated to be within 10 days of filing the petition.\(^{38}\)

**1992 Statute:** “Real property may not be seized or restrained, other than by lis pendens, subsequent to a violation of the Florida Contraband Forfeiture Act until the persons entitled to notice are afforded the opportunity to attend the preseizure adversarial preliminary hearing. . . . [T]he pre-seizure adversarial preliminary hearing provided herein shall be held within 10 days of the filing of the lis pendens or as soon as practicable.”\(^{39}\)

3. The agency seeking forfeiture may file its complaint by applying to the circuit court for issuance of a rule to show cause.\(^{40}\)

**1992 Statute:** “The seizing agency shall promptly proceed against the contraband article by filing a complaint in the circuit court within the jurisdiction where the seizure or the offense occurred.”\(^{41}\)

4. The “petition” must be verified and supported by verified affidavit.\(^{42}\)

**1992 Statute:** “The complaint shall be styled, ‘In RE: FORFEITURE OF ____’ (followed by the name or description of the property). The complaint shall contain a brief jurisdictional statement, a description of the subject matter of the proceeding, and a statement of the facts sufficient to state a cause of action that would support a final judgment of forfeiture. The complaint must be accompanied by a verified supporting affidavit.”\(^{43}\)

5. The court shall sign and issue a rule to show cause if it ex-parte determines that the petition on its face states a cause of action.\(^{44}\)

\(^{38}\) *Department of Law Enforcement*, 588 So. 2d at 965.

\(^{39}\) *FLA. STAT.* § 932.703(2)(b) (Supp. 1992).

\(^{40}\) *Department of Law Enforcement*, 588 So. 2d at 967.

\(^{41}\) *FLA. STAT.* § 932.704(4) (Supp. 1992). The 1992 Act eliminated the “Rule to Show Cause” language and requirement.

\(^{42}\) *Department of Law Enforcement*, 588 So. 2d at 967.

\(^{43}\) *FLA. STAT.* § 932.704(5)(a) (Supp. 1992).

\(^{44}\) *Department of Law Enforcement*, 588 So. 2d at 967.
**1992 Statute:** “If no person entitled to notice requests an adversarial preliminary hearing, as provided in s. 932.703(2)(a), the court, upon receipt of the complaint, shall review the complaint and the verified supporting affidavit to determine whether there was probable cause for the seizure. Upon a finding of probable cause, the court shall enter an order showing the probable cause finding.”

6. A copy of the petition and the rule shall be served on all persons the agency knows or should know have a legal interest in the property.

**1992 Statute:** “If the property is required by law to be titled or registered, or if the owner of the property is known in fact to the seizing agency, or if the seized property is subject to a perfected security interest in accordance with the Uniform Commercial Code, chapter 679, the attorney for the seizing agency shall serve notice of the forfeiture complaint by certified mail, return receipt requested, to each person having such security interest in the property.

7. The rule to show cause shall require that responsive pleadings and affirmative defenses be filed within twenty days of service of the rule to show cause.

**1992 Statute:** “The court shall require any claimant who desires to contest the forfeiture to file and serve upon the attorney representing the seizing agency any responsive pleadings and affirmative defenses within 20 days after receipt of the complaint and probable cause finding.”

45. FLA. STAT. § 932.704(5)(b) (Supp. 1992). The “Order” replaces the former requirement of a “Rule to Show Cause.”
46. Department of Law Enforcement, 588 So. 2d at 967.
48. Department of Law Enforcement, 588 So. 2d at 967.
8. "The Florida Rules of Civil Procedure shall otherwise control service of process, discovery, and other administration of forfeiture proceedings." 50


9. Forfeiture is decided by a jury trial unless the claimants waive that right. 52

1992 Statute: "Any trial on the ultimate issue of forfeiture shall be decided by a jury, unless such right is waived by the claimant through a written waiver or on the record before the court conducting the forfeiture proceeding." 53

10. The seizing agency has the burden of establishing probable cause at the adversary preliminary hearing. 54

1992 Statute: "Adversarial preliminary hearing’ means a hearing in which the seizing agency is required to establish probable cause that the property subject to forfeiture was used in violation of the Florida Contraband Forfeiture Act." 55

11. At trial, the seizing agency has the burden of establishing by clear and convincing evidence that the property has been used in violation of the forfeiture statute. "Due proof” in the statute means by clear and convincing evidence. 56

1992 Statute: "Upon clear and convincing evidence that the contraband article was being used in violation of the Florida

50. Department of Law Enforcement, 588 So. 2d at 967.
52. Department of Law Enforcement, 588 So. 2d at 967.
54. Department of Law Enforcement, 588 So. 2d at 966.
56. Department of Law Enforcement, 588 So. 2d at 967-68.
Contraband Forfeiture Act, the court shall order the seized property forfeited to the seizing law enforcement agency." 57

12. At trial the claimant (owner) has the burden of establishing by the preponderance of the evidence the defense of lack of knowledge that the property was used in criminal activity. 58

1992 Statute: "No property shall be forfeited under the provisions of the Florida Contraband Forfeiture Act if the owner of such property establishes by a preponderance of the evidence that he neither knew, nor should have known after a reasonable inquiry, that such property was being employed or was likely to be employed in criminal activity." 59

13. If probable cause is found during an adversarial preliminary hearing, the court must order the property restrained by the least restrictive means that will protect against disposal. Restraining order, property bond and notice of lis pendens were suggested. 60

1992 Statute: "If the court determines that probable cause exists to believe that such property has been, is being, or was attempted to be used in violation of the Florida Contraband Forfeiture Act, the court shall order the property restrained by the least restrictive means to protect against disposal, waste, or continued illegal use of such property pending disposition of the forfeiture proceeding." 61

14. "Forfeiture must be limited to the property or the portion thereof that was used in the crime." 62 The court does not discuss the reasoning for this potentially devastating limitation on real property forfeiture. Although the trial court listed vagueness as one of the reasons for finding the act violates due process because the act does not require "what specific property is subject to

58. Department of Law Enforcement, 588 So. 2d at 968.
60. Department of Law Enforcement, 588 So. 2d at 964-65.
62. Department of Law Enforcement, 588 So. 2d at 968.
there is no other discussion of the reason or meaning of this limitation in the Florida Supreme Court opinion.

1992 Statute: The legislature ignored this limitation. Section 932.701(2)(a)(6) expanded the definition of real property as contraband to include “any right, title, leasehold, or other interest in the whole of any lot or tract of land, which was used . . . in the commission of . . . any felony . . . .”

III. OTHER STATUTORY CHANGES AND ADDITIONS: 1992

In addition to adopting the requirements of the Department of Law Enforcement opinion, the 1992 Legislature made the following significant changes and additions to the Act:

1. The 1992 Act added a policy statement:

   It is the policy of this state that law enforcement agencies shall utilize the provisions of the Florida Contraband Forfeiture Act to deter and prevent the continued use of contraband articles for criminal purposes while protecting the proprietary interests of innocent owners and lienholders and to authorize such law enforcement agencies to use the proceeds collected under the Florida Contraband Forfeiture Act as supplemental funding for authorized purposes.

2. “Promptly proceed” or time to file the complaint from the date of seizure was reduced from ninety days to forty-five days.

3. “Complaint” is now defined as “a petition for forfeiture in the civil division of the circuit court . . . .” The former Act did not specify the original pleading to be a “complaint” or a “petition.” As noted earlier in this article, the court in Department of Law Enforcement found that the agency “may file its complaint”

63. Id. at 959.
65. Id. § 932.704(1).
66. Id. § 932.701(2)(c).
67. Id. § 932.701(2)(d).
and then "the petition must be verified." Since the Act now defines complaint as a petition, it is apparently proper to call the initial pleading a petition.

4. The party with proprietary interest in the property is designated as a "claimant." Litigants and courts, including the Florida Supreme Court, had often referred to interested parties as "defendants" despite the in rem nature of the proceedings.

5. Use of seized property by the seizing agency is prohibited until title is perfected. Operation for maintenance is permitted only to minimize loss of value. This was in reaction to media coverage that was critical of police using vehicles and other seized property prior to obtaining a final order of forfeiture.

6. Vehicle rental or leasing companies are now specifically excluded from forfeiture if the claimants establish that they neither knew nor should have known the vehicle was used in criminal activity. Claimants do not have the added burden of reasonable inquiry imposed on other innocent owners and lienholders. They also have the right to immediate possession.

7. Innocent co-owners other than spouses have the same protection as other innocent owners up to the value of their interest in the property. Co-owner spouses retain the right to defeat the forfeiture entirely if they make the requisite showing of no knowledge and reasonable inquiry.

8. The "attempt" to use property in violation of the Act was added to the definition of "contraband article," i.e., real and personal

68. See supra notes 40, 42 and accompanying text.
70. Id. § 932.703(1)(e).
71. Id. § 932.703(6)(d).
72. Id.
73. Id. § 932.703(7). This amendment was to conform the Act to In re Forfeiture of 1985 Ford Pick-Up Truck, 598 So. 2d 1070 (Fla. 1992), which held that the interest of innocent co-owners must be protected in order to construe the statute in a constitutional manner. In November 1992, in a forfeiture case brought under the Florida RICO Act, the Florida Supreme Court held that forfeiture of homestead property is forbidden under article X, section 4 of the Florida Constitution. Butterworth v. Caggiano, 605 So. 2d 56 (Fla. 1992).
property that may be subjected to forfeiture. 74 Formerly, attempted use was not sufficient.

9. Settlements made prior to conclusion of the forfeiture proceeding must be approved by the court, a mediator, or an arbitrator unless waived by the claimant in writing. 75 This was also in response to media publicity of some prior claimants who settled pre-trial and then complained they were coerced or “extorted” into paying money to the agency to avoid the delay and cost of litigation. It is expected that forfeiture litigation will continue to be settled pre-trial as any other civil litigation, and that the settlement will now include the required waiver.

10. If the claimant prevails at trial, any decision to appeal must be made by “the chief administrative official of the seizing agency.” If the claimant prevails on appeal, the court may require the agency to pay the claimant lost income and lost value of the seized property if the seizing agency retained the property during the appeal. 76

11. If the claimant prevails at trial, the court may award reasonable attorney fees and costs if it finds the agency did not proceed in good faith or the action was a gross abuse of the agency’s discretion. 77

12. The 1992 Act retained the agency right to use or sell forfeited property and retained the contraband forfeiture “law enforcement trust fund” for deposit of currency and proceeds from sale. The Act established priority in payment of liens (where lienholders established their “innocent” defense), storage, maintenance, security, forfeiture costs and court costs. Remaining funds may, as before, be used by the agency, upon approval of the governing body, for law enforcement purposes, but not for “normal operating needs of the law enforcement agency.” Fifteen percent of trust funds over $15,000 annually must be donated to drug treatment,

75. Id. § 932.704(7).
76. Id. § 932.704(9)(b); see In re Forfeiture of 1976 Kenworth Tractor Trailer, 546 So. 2d 1083 (Fla. 4th Dist. Ct. App. 1989), aff’d, 576 So. 2d 261 (Fla. 1990).
abuse education and prevention, crime prevention, safe neighborhood, or school resource programs. Reporting requirements by the agencies to the Department of Law Enforcement and the Legislature were changed and specified in the 1992 Act. 78

13. The 1992 Act requires training of law enforcement officers in the area of seizure and forfeiture of property. Training is to begin by October 1, 1993. 79

14. Strength was added to the previously largely ignored reporting requirement by the addition of penalties of up to $5000 against agencies that fail to comply. 80

15. The 1992 Act became effective July 1, 1992. 81

IV. CASE LAW, JULY 1992 TO JULY 1993

A. Burden and Standard of Proof—Sufficiency of Evidence

In In re Forfeiture of 1987 Chevrolet, 82 a son used his mother’s vehicle to commit a felony. The trial court found that the mother “did not use reasonable care to see that her son did not use the car for criminal purposes.” 83 Accordingly, the court held that the agency failed to meet the statutory requirement of actual or constructive knowledge that property was employed or likely to be employed in criminal activity. 84 The statute does not provide a defense for effort to prevent use although such evidence or lack of same may be relevant in proving constructive knowledge. 85

Application of the Department of Law Enforcement standard of proof was made in Fink v. Holt. 86 Martin County Sheriff’s Deputies chased a doctor for three miles until he crashed his 1985 Chevrolet Corvette. Deputies found a partially smoked marijuana cigarette on the driver’s seat

78. Id. § 932.7055 (tentatively renumbered at § 932.7055).
79. Id. § 932.706.
80. Id. § 932.707.
83. Id. at 1323.
84. Id.
86. 609 So. 2d 1333 (Fla. 4th Dist. Ct. App. 1992).
and several controlled substances that were not in marked containers in his briefcase. Possession of controlled drugs without a prescription or without labels are both felonies in Florida. The Sheriff initiated forfeiture proceedings against the Corvette. The doctor contested the forfeiture on grounds that no crime was committed because, as a doctor, he was privileged to possess the unlabeled drugs. The trial court found that there was probable cause to seize the vehicle under the totality of circumstances. On appeal, the Fourth District Court of Appeal held that the evidence did not establish probable cause because the Sheriff failed to overcome the presumption of innocence accorded to a physician that possession of schedule II substances is in the normal course of practice. "We do not believe that the mere presence in a physician’s un- or mislabeled containers is enough to suggest that the physician is not using the schedule II drug 'in the usual course of [his] business or profession' or 'in good faith and in the course of professional practice.'" Further, the district court held that the trial court erred in using the probable cause standard. Relying on Department of Law Enforcement, the court found that the Sheriff’s proof was "at best in equipoise" and does not establish the Sheriff's entitlement to forfeiture by clear and convincing evidence.

The City of Deland appealed a trial court’s directed verdict in a forfeiture action against $301 and a 1979 Ford van in City of Deland v. Miller. City police seized the van and cash after observing the owner transport stolen property in the van. The only evidence to support forfeiture of the cash was that the owner acquired the money through his television and stereo business from which he had not reported sales for the months of June through September, 1990, to the Department of Revenue. The trial court did not permit this evidence and entered a directed verdict. The Fifth District Court of Appeal affirmed as to the cash but reversed and remanded as to the van, noting that it was undisputed that stolen property was transported in the van and that the owner admitted the identity of the van in pleadings and joint pre-trial compliance.

87. Id. at 1335.
88. Id. at 1336.
89. Id. (citations omitted).
90. Id.
91. Fink, 609 So. 2d at 1337.
92. 608 So. 2d 121 (Fla. 5th Dist. Ct. App. 1992).
93. Id. at 122.
94. Id.
In *Department of Highway Safety & Motor Vehicles v. Charles*, the Florida Highway Patrol had probable cause to believe $39,390 was intended to be used to purchase drugs (contraband) where they stopped a Chevy pickup truck that was southbound on I-95 in Volusia County and the cash was found under a tarpaulin in a metal can stacked in bundles secured by different colored rubber bands. A baggie with marijuana was also found in the can. The three men in the van denied ownership of the money and knowledge of how it got in the truck. A K-9 drug-trained dog alerted positive to the presence of narcotics on the truck seat, the metal can and a separate baggie of cash found in one of the men’s pockets. Troopers gave expert opinions regarding the method of packaging money and the notoriety of Miami, Florida as a center for drug smuggling and as a source of supply. Two of the truck occupants had prior drug crime records. Valium prescribed to another person was found in the coat pocket of one of the occupants and he gave two conflicting accounts of how it got into his pocket. The truck and occupants were from Kentucky. On this evidence, the Fifth District Court of Appeal reversed the trial court’s dismissal of the forfeiture and found probable cause did exist based upon “the totality of the circumstances.” The court cautioned that upon remand the department must show grounds for forfeiture by clear and convincing evidence pursuant to *Department of Law Enforcement*.

In a case that gives no facts other than that the trial court forfeited jewelry worn by a person during a drug sale, the First District in *Jenkins v. City of Pensacola* reversed and remanded for entry of an order dismissing the forfeiture. The reversal was based upon the *Department of Law Enforcement* clear and convincing standard. It is difficult, however, by any standard to imagine how the drug dealer used jewelry worn by him as an instrumentality in the crime or in aiding or abetting the crime. Perhaps the “jewelry” was a watch and he looked at it to verify the appointed time for the drug sale thus establishing a nexus between the watch and the crime.

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95. 606 So. 2d 750 (Fla. 5th Dist. Ct. App. 1992).
96. *Id.* at 752. In a footnote, the court said “Regrettably Miami, Florida, has achieved a degree of notoriety for being a center for drug smuggling and a source of supply.” *Id.* at n.4 (citing United States v. $4,255,000, 762 F.2d 895 (11th Cir. 1985), *cert. denied, 474 U.S. 1056 (1986)).
97. *Id.* at 754.
98. *Id.* at 751; see *Department of Law Enforcement*, 588 So. 2d 755.
100. *Id.*
101. *Id.*
In re Forfeiture of $8489\textsuperscript{102} was another reversal of forfeiture, based upon Department of Law Enforcement. The Second District Court of Appeal questioned whether the "clear and convincing" standard of proof will result in greater protection for Floridians or will just result in forfeiture cases being filed in federal court where the standard of proof remains by the preponderance.\textsuperscript{103} Judge Altenbernd wrote the opinion questioning the value of the new standard in a case where $8489 was forfeited by the trial court upon evidence that the currency was found in a home pursuant to execution of a search warrant that also produced eight and one-half pounds of marijuana, a triple beam scale and other paraphernalia common for drug sellers.\textsuperscript{104} The district court reversed and remanded for a new hearing to consider the evidence in light of the higher standard.\textsuperscript{105} Certainly the evidence in this case provided probable cause and, under pre-Department of Law Enforcement law, the claimant had the burden to prove by a preponderance of the evidence that the currency was not drug money. On remand, the agency has the burden to prove it was drug money by clear and convincing evidence. Given that most similar cases are based solely upon the circumstances, it appears many of these cases may not rise to the level of clear and convincing proof.

The positive alert of a trained drug dog has long been sufficient to supply probable cause to search cars and arrest persons.\textsuperscript{106} This rule, however, was questioned by Third District Court of Appeal Judge Ferguson in a concurring opinion of Metro-Dade Police Department of Dade County v. Hildalgo.\textsuperscript{107} Judge Ferguson opined that an alert by a drug dog coupled with association with a criminal suspect supplied only "founded suspicion" and not "probable cause" to seize a vehicle for forfeiture.\textsuperscript{108}

Where claimants, who were in a 1986 Ford truck, picked up two minor females who had solicited a ride, and took them to a place where they had illegal sexual activity, the Second District Court of Appeal held that the use of the truck was only incidental to the crime and accordingly it was not subject to forfeiture.\textsuperscript{109} The men, however, then drove the females

\textsuperscript{102} 603 So. 2d 96 (Fla. 2d Dist. Ct. App. 1992).
\textsuperscript{103} Id. at 98.
\textsuperscript{104} Id. at 97.
\textsuperscript{105} Id. at 98.
\textsuperscript{107} 601 So. 2d 1259 (Fla. 3d Dist. Ct. App. 1992) (affirming forfeiture dismissal on other grounds).
\textsuperscript{108} Id. at 1261 (Ferguson, J., concurring).
\textsuperscript{109} In re Forfeiture of 1986 Ford PU, 619 So. 2d 337 (Fla. 2d Dist. Ct. App. 1993).
looking for a motel and ended up staying overnight where one of the men lived and there further illegal felony sex occurred. The court held that this second incident was sufficient to provide a nexus between the illegal acts and use of the truck to transport the girls to the scene of the crime.\textsuperscript{110} Forfeiture of the truck was affirmed because it was used in the second incident to aid the commission of a felony by transporting the parties to the scene.\textsuperscript{111}

B. Ownership—Standing

An important question of standing was clarified by the Florida Supreme Court in \textit{Byrom v Gallagher}.\textsuperscript{112} An aircraft was seized as contraband after it had been used illegally and sold but prior to the Federal Aviation Administration’s recording of the bill of sale. Since the prior owner was the “registered” owner at the time of seizure, the Fifth District Court of Appeal denied standing to Byrom who was the registered owner at the time of the forfeiture hearing.\textsuperscript{113} In reaffirming a prior decision, the Florida Supreme Court held that “[t]he fact that a person is a bona fide purchaser in itself is not adequate to give a party standing.”\textsuperscript{114} However, in prior cases, the party making a claim in the forfeiture was not the registered owner at the time of the forfeiture. The court decided to allow Byrom and future claimants to establish standing if they prove the additional element that they were bona fide purchasers.\textsuperscript{115}

Consequently, in determining whether a person has standing the trial judge should consider: 1) whether that person holds legal title at the time of the forfeiture hearing or has complied with the requirements for receiving title; \textit{and} 2) whether that person is in fact a bona fide purchaser. The trial judge should consider the facts surrounding the sale to determine whether the transfer is in fact a bona fide purchase. The relationship of the parties, the date the instruments were executed, the value of the property, the sale price, and canceled checks or bank deposits to show actual payment and receipt of money are all factors which the trial court should consider in determining whether the transfer

\begin{\footnotesize}{\textsuperscript{110}} Id. at 339-40.\end{\footnotesize}  
\begin{\footnotesize}{\textsuperscript{111}} Id.\end{\footnotesize}  
\begin{\footnotesize}{\textsuperscript{112}} 609 So. 2d 24 (Fla. 1992).\end{\footnotesize}  
\begin{\footnotesize}{\textsuperscript{113}} Id. at 24-25 (citing Byrom v. Gallagher, 578 So. 2d 715 (Fla. 5th Dist. Ct. App. 1990)).\end{\footnotesize}  
\begin{\footnotesize}{\textsuperscript{114}} Byrom, 609 So. 2d at 26 (citing Lamar v. Wheels Unlimited, Inc., 513 So. 2d 135 (Fla. 1987)).\end{\footnotesize}  
\begin{\footnotesize}{\textsuperscript{115}} Id. at 27.\end{\footnotesize}
Purdy is a bona fide purchaser. This list is not intended to be exhaustive but rather illustrative of the consideration to be made by the trial judge. In making the determination whether a title holder is also a bona fide purchaser, the trial judge should be able to sift the wheat from the chaff.\textsuperscript{116}

The sword cut from the other side on the titled owner principle of standing in forfeiture in \textit{In re Forfeiture of 1987 Chevrolet}.\textsuperscript{117} The court rejected the contention that the son who used a 1987 Chevrolet titled to his innocent mother was the "de facto" owner.\textsuperscript{118} It was again held that the term owner in section 932.703(2) "is limited to one who has obtained a title certificate . . . ."\textsuperscript{119} The final order of forfeiture was reversed because the trial court made no finding that the mother had the requisite knowledge that her son used the vehicle in a felony.\textsuperscript{120}

Without reference to its holding in the previous case, and without reference to, but probably because of, \textit{Byrom},\textsuperscript{121} the First District inexplicably cited \textit{Department of Law Enforcement} to support its holding that the presumption of title by co-ownership of a motor vehicle can be overcome by clear and convincing evidence.\textsuperscript{122} In this case, the court held that the pickup truck titled to a father and son jointly was not a true co-ownership and the innocent father had no standing because he was only a nominal owner.\textsuperscript{123} The district court remanded for a new hearing on the issue of the father's interest under a clear and convincing standard.\textsuperscript{124} The case is in a hopeless legal morass. Standing must be shown by the claimant not the agency. "\textit{O}nly persons who have standing can participate in a judicial proceeding."\textsuperscript{125} Furthermore, "standing is limited only to those persons who can show a recorded title or compliance with the requirements for

\textsuperscript{116} \textit{Id}. at 26-27. The court also noted that this requirement for standing is limited to property where the state requires a title or compliance with title requirements to show ownership. \textit{Id}. at 27 n.3. In other types of property, a party would only have to show he or she is a bona fide purchaser. \textit{Id}.
\textsuperscript{117} \textit{Id}. at 1322 (Fla. 1st Dist. Ct. App. 1992).
\textsuperscript{118} \textit{Id}. at 1323.
\textsuperscript{119} \textit{Id}. (citing \textit{Lamar}, 513 So. 2d at 137).
\textsuperscript{120} \textit{Id}. at 1325.
\textsuperscript{121} \textit{Byrom}, 609 So. 2d at 24.
\textsuperscript{122} \textit{In re Forfeiture of 1989 Isuzu Pickup Truck}, 612 So. 2d 695 (Fla. 1st Dist. Ct. App. 1993).
\textsuperscript{123} \textit{Id}. at 697.
\textsuperscript{124} \textit{Id}.
\textsuperscript{125} \textit{Byrom}, 609 So. 2d at 26 (citation omitted).
receiving title." The First District has remanded with directions for the trial court to require the wrong party to establish standing by the wrong standard of proof! The case should have been remanded with instructions to follow Byrom.

C. Notice Requirements

In State Department of Natural Resources v. 62 Ft. White De Vries Len Ketch Sailboat, the trial court dismissed a forfeiture for failure to give notice of right to a post seizure hearing where the agency had sent notice of the seizure prior to Department of Law Enforcement but did not send a supplemental notice advising of the right to post seizure hearing. The Third District reversed, holding that Department of Law Enforcement did not require a supplemental notice and even if it did, the omission was harmless since claimant knew of the right and did not request a hearing. In another case, where there was no notice at all, the Third District held that the notice requirement was not grounds for reversal because the seizure was prior to Department of Law Enforcement. The district court also held that neither the statute nor Department of Law Enforcement requires a warrant, consent or exigent circumstances to seize property for forfeiture. In a decision handed down this year, without citing Department of Law Enforcement, the Fifth District reversed a forfeiture of a co-owners interest in a 1973 Trojan boat because the rule to show cause was not directed to that co-owner and the sheriff failed to comply with the notice provisions of the forfeiture statute.

V. CONCLUSION

Since 1980, Florida contraband forfeiture law has been a dynamic force in the courts and in the Legislature. The use of forfeiture has gone from virtual nonoccurrence to a peak. More recently, the laws regarding

126. Id.
128. Id. at 774-75.
129. Id. at 775.
131. Id. at 338.
forfeiture have been redefined and limited to avoid unduly oppressive results against innocent owners.

Although federal statutes and the United State Supreme Court have permitted forfeiture of contraband property from innocent owners, Florida has always had innocent owner protection in its forfeiture law. Despite this protection, because forfeitures are not favored by the courts and are absolutely loathed by the fourth estate, the Florida Supreme Court and the Legislature have reacted by imposing numerous additional due process requirements since 1991. The 1992 amendments to the Act finally provided a procedural framework that was not in the original 1980 Act, an omission that caused much confusion and misunderstanding in the intervening twelve years.

Forfeiture will continue to be a useful vehicle to punish offending property owners and convert criminal assets to good public use. However, with the new clear and convincing standard of proof, forfeitures will have to be supported by stronger proof of illegal use. It is the foremost desire of the author that law enforcement agencies act responsibly and with great discretion in continuing to use this awesome law. The goose that laid the golden egg in 1980 was seriously wounded by the few excessive applications, the media exposure and the court and legislative response. Hopefully, the goose will fully recover and resume its productive life.

133. E.g., Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (forfeiture of a yacht worth over $100,000 because it contained one marijuana cigarette even though the owner had no knowledge of the violation).


Criminal Law and Procedure: 1993 Survey of Florida Law

Benedict P. Kuehne

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I. INTRODUCTION

Florida has remained in the forefront of developments in criminal law and procedure, and in many respects serves as an incubator for new approaches and ideas which facilitate the operation of our criminal justice system. With a Florida Constitution that provides protections in addition to those guarantees secured by the Bill of Rights, the Florida Supreme Court has not hesitated to utilize Florida law to promote individual freedoms. Under the leadership of Chief Justice Rosemary Barkett, the Florida Supreme Court continues to follow a judicial philosophy of recognizing the rights of both victims and defendants, promoting fairness in the relationship...

1. As the people of the State of Florida applaud the tremendous leadership of Chief Justice Rosemary Barkett, practitioners should note with both sadness and exhilaration that the Chief Justice will be leaving the Florida court system to become a Circuit Judge of the Eleventh Circuit Court of Appeals. She will, no doubt, carry her insight, concerns, and leadership to the federal bench.
between prosecution and defense, and looking beyond the technical requirements of the law to restore meaning to the justice system.

This article surveys Florida criminal law and procedural developments which occurred between September 1992 and September 1993. While the primary focus of this survey is an exploration of the pronouncements of the Florida Supreme Court, developments in the Florida Legislature and the district courts of appeal are analyzed as deemed necessary. The approach used throughout this article highlights important developments, analyzes legal precedent, and suggests future issues of concern for the criminal law practitioner. Although specialized issues which arise in capital and death penalty litigation are not included in this survey, the article is otherwise comprehensive.

During the past year, as Florida saw the continued growth of crime and the apparent lack of resources to control that escalation, the Florida Legislature made a serious effort to promote an effective and fiscally responsible criminal justice system. The result was the enactment of a comprehensive new criminal justice package known as the Safe Streets Initiative of 1994, which revised the sentencing guidelines to emphasize incarceration in state prison for violent and repeat offenders, and to utilize alternatives to incarceration for nonviolent and first time defendants. The Legislature also overhauled the control release laws, authorized the development of circuit pretrial intervention programs, revised DUI laws by lowering the blood alcohol level necessary for a conviction, and even added a change of venue law known as the “Lozano venue bill” in response to the highly charged debate about relocating high profile trials.

Juvenile justice issues also received substantial attention from the courts and the legislature. Law enforcement received authorization to release the names of juvenile offenders adjudicated guilty of certain offenses. Using or carrying weapons at bus stops and on school buses was prohibited, perhaps a surprise to all those who thought this was already illegal. With an eye toward promoting meaningful rehabilitation, the juvenile justice bill mandated comprehensive, community-based juvenile programs and services, and authorized pretrial intervention for certain juvenile crimes.

No survey of Florida criminal law and procedural developments for the past year would be complete without recognizing that the Florida justice system has responded to a number of unexpected crises this year. Images of just another fall season, suitable for watching sports on television or getting the children ready for school, were blown away with the unwel-

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The arrival of Hurricane Andrew on August 24, 1992. The first order of business for the Florida Supreme Court was to ensure the normal operation of the justice system in South Florida. On September 2, 1992, responding to a request by the Dade County State Attorney, the supreme court issued an order tolling “all time limits authorized by rule and statute affecting the speedy trial procedure in criminal and juvenile procedure” in Dade County for the two weeks after Hurricane Andrew. The court also acknowledged that Hurricane Andrew’s impact extended well beyond Dade County, and accordingly permitted a tolling of time limits in situations “where a party demonstrates that the lack of compliance with the requisite time periods was attributable to Hurricane Andrew.”

At the same time, the supreme court took action to protect the operation of our democratic form of government by approving a delay of the primary election in Dade County for one week because voters were still recovering from the damages caused by Hurricane Andrew. Both of these unprecedented decisions demonstrate the willingness of the Florida Supreme Court to utilize its considerable power to protect the people of the State of Florida, a philosophy which is evident in many of the court’s decisions.

II. SENTENCING

Because both the Florida Legislature and the courts expended considerable effort on sentencing law and corrections policy, we begin our examination of Florida law with that perspective.

A. Legislative Enactments

The 1993 legislative session was, in large measure, a response to the public outcry over an escalating crime rate. The legislative result was a unique balance of the expected “tough on crime” approach with the recognition that available resources must be used efficiently to address our most pressing needs. The final legislative solutions dealt harshly with violent crimes, enhanced existing offense classifications, mandated sentencing violent offenders to longer prison sentences, approved building more prison beds, and created new criminal offenses. The most anticipated

4. Id. at S579.

https://nsuworks.nova.edu/nlr/vol18/iss1/1
change, however, was the wholesale revision of the sentencing guidelines and the elimination of many minimum mandatory sentences.

1. Sentencing Guidelines Revision

The Florida Legislature designated the 1994 revision of the sentencing guidelines as the “Safe Streets Initiative of 1994.” It is one of the most comprehensive and sweeping revisions of sentencing law and policy in recent memory. The new guidelines are designed to emphasize incarceration in the state prison system for violent offenders and nonviolent offenders who have repeatedly committed criminal offenses and who have demonstrated an inability to comply with the less restrictive penalties previously imposed. The new law pays close attention to prison population limitations and requires that any legislation which creates a felony, enhances a misdemeanor offense to a felony, moves a felony from a lesser offense severity level to a higher offense severity level, or reclassifies an existing felony offense to a greater felony classification, provide that such change results in a net zero sum impact in the overall prison population. The zero impact may be avoided if the legislation contains a funding source sufficient to accommodate the change, or by the adoption of a statutory provision which specifically abrogates the application of this requirement.

The revised guidelines, effective January 1, 1994, are no longer procedural rules, but are contained in the statutes. They are intended to eliminate unwarranted disparity. They mandate the imposition of sentences within the guidelines, unless the court orders a departure within written guidelines. If a recommended sentence within the guidelines exceeds the maximum sentence otherwise authorized by law, the guidelines sentence must be imposed absent a departure. The court can order a departure sentence above or below the guidelines when sufficient statutory factors are proved by a preponderance of the evidence. The extent of a departure is not reviewable.

7. Id. § 5, 1993 Fla. Laws at 2917 (amending FLA. STAT. § 921.001 (Supp. 1992)).
8. Id.
9. Id. § 5, 1993 Fla. Laws at 2920 (to be codified at FLA. STAT. § 921.001). The Sentencing Guidelines Commission is required to prepare, adopt, and submit to the Florida Supreme Court for approval, procedures for implementing the revised guidelines.
10. Id. § 5, 1993 Fla. Laws at 2920 (amending FLA. STAT. § 921.001(5) (Supp. 1992)).
12. Id. § 5, 1993 Fla. Laws at 2920 (amending FLA. STAT. § 921.001(5) (Supp. 1992)).
The revised sentencing guidelines now group offenses into levels contained in an offense severity ranking chart. This chart is used to compute a sentence score, as opposed to the nine separate offense categories utilized under the existing sentencing guidelines. The ranking has ten levels, with “ten” being the most severe. Each crime is assigned a level based on offense severity. This ranking system allows greater flexibility in revising the recommended sentence because it allows individual offenses to be moved to another level without changing the punishment for other offenses. Prior offenses are now weighed according to their assigned severity, and are no longer a function of the category of the primary offense.

A major provision of the Safe Streets Initiative is the repeal of numerous minimum mandatory sentences, including the three-year minimum mandatory for purchase and possession of a controlled substance with intent to purchase or sell within 1,000 feet of a school, some of the minimum mandates for drug trafficking, the minimum mandates for violent offenses against law enforcement officers and related personnel, as well as the three-year minimum mandatory for an assault or battery on a person sixty-five years of age or older, among others. Some minimum mandatory penalties have been retained, including the minimum mandates for possession of firearms during the commission of certain felonies, the three-year minimum mandatory for sale of drugs within 1,000 feet of a school, and the fifteen and twenty-five year minimum mandates for trafficking in controlled substances.

Another substantial statutory change is the deletion of language which prohibited eligibility for parole or control release for certain drug offenses. Control release eligibility has been expanded, and with regard to drug defendants establishes an order of priority, beginning with minimum mandatory sentences, followed by habitualized offenders whose primary offense at conviction was not burglary, and then a consideration of habitual offenders whose primary offense was burglary. The Control Release

14. Id.
15. Id.
18. Id. § 775.0823.
19. Id. § 784.08.
20. Id. § 775.087.
21. Id. § 893.13.
Authority is mandated to maintain the state prison population at or below 97.5% to 99%, and establishes responsibilities for the Secretary of the Department of Corrections and the Chair of the Parole Commission when the state prison population exceeds 99.5% of lawful capacity. Basic gain time is abolished for all offenses committed on or after January 1, 1994, while incentive gain time has been expanded.

Another revision designed to reduce the prison population permits a sentencing court to place a defendant, whose presumptive guideline sentence is up to twenty-two months imprisonment, in a local jail as a condition of probation or community control for offense categories five through nine. The Legislature also expanded the definition of criminal restitution, permitted restitution orders to bear interest at 12%, to become liens as on real estate and continue for twenty years if not paid, and exempted restitution orders from discharge in bankruptcy.

2. Habitual Offenders

The operation of the habitual offender statute received legislative attention, due in part to increased concern that the statute was not being utilized against appropriate defendants and that the statute was being disproportionately applied against black offenders. The statute has been changed to prohibit habitual offender treatment if the felony for which the defendant is being sentenced, or one of the two prior felony convictions, is the purchase or possession of drugs. Also, prosecuting attorneys are now required to adopt uniform criteria for seeking habitual offender sentencing, with a case file explanation required for all deviations. Deviations from the criteria are not subject to appellate review.
B. *Sentencing Guidelines*

1. Single Scoresheet

Florida Rule of Criminal Procedure 3.701(d)(1) requires that "[o]ne guideline scoresheet shall be utilized for each defendant covering all offenses pending before the court for sentencing." The guidelines provide that a particular scoresheet must be used in the case of specific offenses, with category one used in all cases of murder or manslaughter except first degree murder and alcohol-related manslaughter charges, while a category nine scoresheet is used for any felony not otherwise contained in any category. The guidelines do not specify what scoresheet to use for the offense of solicitation of murder. The court addressed this issue in *Hayles v. State*. The defendant in *Hayles* claimed that because inchoate offenses, e.g., conspiracy and solicitation, are included within the category of the offense attempted, solicited, or conspired to, a category nine scoresheet should have been used for his sentencing, since category one does not apply to first degree murder. The supreme court disagreed, finding that solicitation to commit first degree murder requires use of a category one scoresheet for sentencing guidelines purposes, since the "solicitation was intended to effectuate a murder here, and so [the defendant] falls under category one of the guidelines."

2. Departure Sentences

During the survey period, the Florida Supreme Court announced several decisions which analyzed the propriety of departure sentences. The court adhered to prior decisions in holding that "advance planning and premeditation are permissible reasons for a departure in the context of sexual battery." In evaluating this ground for departure, the court explained that because premeditation and advance planning are not inherent components of the sexual battery offense, these factors constitute departure grounds in a sexual battery case if they are of a "heightened variety," which "consists

32. *Id*.
33. 608 So. 2d 13 (Fla. 1992).
34. Fla. R. Crim. P. 3.701(c) (Comm. Note).
35. *Hayles*, 608 So. 2d at 14.
36. *Id*.
of a careful plan or prearranged design formulated with cold forethought." The court carefully limited its holding to sexual offenses, and stressed "that heightened premeditation never can be a reason for departure in cases that inherently involve cold forethought, such as conspiracy or drug trafficking cases."

The temporal proximity of a defendant's crimes does not, by itself, provide a valid reason for departure from the sentencing guidelines without a finding of a persistent pattern of criminal conduct. A defendant's efforts to cover up a crime do not constitute proper grounds for a departure from the sentencing guidelines.

C. Habitual Offender Sentences

The habitual offender law was designed "to allow enhanced penalties for those defendants who meet objective guidelines indicating recidivism." In determining whether a defendant satisfies the criteria for habitual felony offender sentencing, the trial court must find by a preponderance of the evidence that the defendant qualifies as an habitual felony offender. It is the defendant's burden to assert a pardon or to set aside a prior conviction as an affirmative defense. When the state introduces copies of the defendant's prior convictions and the defendant concedes the validity of the convictions, the trial court's failure to make an express finding that the prior convictions were not pardoned or set aside constitutes harmless error. The habitual offender classification is permitted where the predicate offense for which the defendant was convicted occurred after the commission of the offense for which the defendant is being sentenced.

Although the state is required to provide notice of its intention to have the defendant sentenced as an habitual offender, the purpose of the

38. Id.
39. Id.
40. Cave v. State, 613 So. 2d 454, 455 (Fla. 1993).
41. State v. Varner, 616 So. 2d 988 (Fla. 1993); Smith v. State, 620 So. 2d 187 (Fla. 1993).
42. Eutsey v. State, 383 So. 2d 219, 223 (Fla. 1980).
43. Id. at 224.
44. Id. at 223.
45. State v. Rucker, 613 So. 2d 460, 462 (Fla. 1993); State v. Anderson, 613 So. 2d 465, 465 (Fla. 1993).
47. FLA. STAT. § 775.084(3)(b) (1991).
requirement of prior notice "is to advise of the state's intent and give the defendant and the defendant's attorney an opportunity to prepare for the hearing." Where the state fails to provide advance notice, but the defendant and counsel had actual notice in time to prepare for the sentencing hearing, the failure of the state to provide notice is a mere technical violation which constitutes harmless error. A mere technical violation does not rise to the level of actionable error.

A criminal defendant declared to be an habitual violent felony offender is subject to enhanced punishment pursuant to the habitual offender statute. The statute defines an "habitual violent felony offender" as a person who has "previously been convicted of a felony or an attempt or conspiracy to commit a felony and one or more of such convictions was for" one of the enumerated violent felonies listed in the statute. In Tillman v. State, and Reeves v. State, the supreme court upheld a defendant's sentence as an habitual violent felony offender even though the offense of conviction was a nonviolent felony. Since the defendant's prior conviction of a violent felony indicated the "incorrigible and dangerous character of the accused and establish[s] the necessity for enhanced restraint," the supreme court determined that the enhanced penalties met the statutory objective of punishing recidivism. The supreme court also held that the habitual violent felony offender provisions did not violate a defendant's constitutional rights concerning due process, double jeopardy, or ex post facto laws.

In considering what sentence to give an habitual offender, the supreme court resolved a conflict within the districts by declaring that a defendant convicted of a life felony is not subject to enhanced punishment as an habitual offender. Curiously, notwithstanding the legislative intent of

49. Id.
51. Id. § 775.084(1)(b).
52. 609 So. 2d 1295 (Fla. 1992).
53. 612 So. 2d 560 (Fla. 1992).
54. Tillman, 609 So. 2d at 1298.
55. This holding has been altered by Chapter 93-406 of the Laws of Florida, which prohibits habitual offender sentencing if the current offense or one of the prior felonies is the purchase or possession of drugs. Ch. 93-406, § 2, 1993 Fla. Laws 2911, 2913 (amending FLA. STAT. § 775.084 (1991)).
56. Tillman, 609 So. 2d at 1297-98; Merriweather v. State, 609 So. 2d 1299 (Fla. 1992).
severe punishment for habitual offenders, a trial judge has discretion to place an habitual felony offender on probation. 58

D. Youthful Offenders

In State v. Arnette, 59 the supreme court explained that a defendant sentenced to prison and community control as a youthful offender maintains that youthful offender status even upon a subsequent violation of community control. 60 Under the youthful offender statute, the maximum term of imprisonment for a violation of community control is six years. 61

E. Probation

A court is permitted to impose conditions of probation which are reasonably related to the defendant’s rehabilitation. 62 When a defendant challenges the relevance of a special condition of probation, the condition is invalid if it “(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality.” 63 Consequently, a condition of probation which prohibits the use or possession of alcoholic beverages is improper where the offense was not alcohol related and where the presentence investigation report contained no suggestion that the defendant had a negative propensity toward alcohol. 64

An uncounseled guilty plea to an offense will not support a revocation of probation unless the defendant knowingly waived the right to counsel in the earlier case. 65 In order to shift the burden to the state to prove that the convictions were counseled or that counsel was knowingly waived, a defendant must do more than state under oath that no counsel was provided in the prior proceedings. 66 Utilizing the holding of State v. Beach, 67 the court held:

58. McKnight v. State, 616 So. 2d 31 (Fla. 1993).
59. 604 So. 2d 482 (Fla. 1992).
60. Id. at 484.
63. Id. at 734-35.
64. Id. at 735.
66. Id.
67. 592 So. 2d 237 (Fla. 1992).
The defendant must assert four facts under oath in order to shift the burden to the State: (1) that the offense involved was punishable by more than six months of imprisonment or that the defendant was actually subjected to a term of imprisonment; (2) that the defendant was indigent, and thus, entitled to court-appointed counsel; (3) that counsel was not appointed; and (4) that the right to counsel was not waived.68

An indigent defendant cannot be held to have violated probation due to an inability to pay court-ordered restitution.69 If a probationer cannot pay restitution or the costs of supervision, a court is required to consider “alternative measures” of punishment other than imprisonment, such as community service or similar measures which do not amount to community control, probation, or imprisonment.70 A court has no ability to extend probation upon a defendant’s failure to pay, in the absence of finding that the defendant willfully violated the terms of probation.71

F. Restitution

When restitution is made an original condition of probation, a court is authorized to determine the amount of restitution at a later date, even beyond sixty days after sentencing.72 Setting the amount of restitution already authorized does not constitute the addition of a new condition of probation.73

Concern with the rights of crime victims continues to be an important issue for the courts. In Hodge v. State,74 the court held that restitution could be ordered for the reasonable value of the time necessarily spent and the costs incurred by a theft victim in determining and documenting the extent of loss as required by a fidelity bonding company.

68. Rock, 605 So. 2d at 458.
70. FLA. STAT. § 948.06(4) (1991).
71. Hewett, 613 So. 2d at 1307.
72. Gladfelter v. State, 618 So. 2d 1364, 1365 (Fla. 1993).
73. Id.
74. 603 So. 2d 1329 (Fla. 4th Dist. Ct. App. 1992).
III. DISCOVERY

A. Access To Information

Defining the limits of reciprocal discovery has been a vexing problem for prosecutors and defense lawyers alike. In *Llanes v. State,* the Third District held that a defendant does not elect to participate in discovery in a criminal case by engaging in discovery in a parallel administrative proceeding. The court noted that while Florida Rule of Criminal Procedure 3.220(a) provides that “the defendant’s taking of the deposition of any person . . . shall be an election to participate in discovery,” the rule requires “that the defendant must participate in the discovery process in the pending criminal case in order to trigger the defendant’s obligation to provide reciprocal discovery to the state . . . .” The rule does not apply “to discovery taken by the defendant in parallel administrative or civil proceedings.”

A discovery deposition is not ordinarily admissible as substantive evidence. However, Florida Rule of Criminal Procedure 3.190(j) governs the taking of depositions intended to perpetuate testimony. In *Rodriguez v. State,* the supreme court held that, unless a party complies with the requirements of Rule 3.190(j), a traditional discovery deposition is not admissible as substantive evidence, even though all parties participated in the deposition and the witness is otherwise unavailable at the time of trial. Without the safeguards found in Rule 3.190(j), which are designed to ensure that both parties have an opportunity and motive to fully develop the deposition testimony, a discovery deposition does not qualify for admission as evidence.

The *Rodriguez* decision may not end the “deposition as evidence” discussion. The supreme court “requested that the Rules of Criminal Procedure Committee consider and make recommendations as to whether the Criminal Rules should be amended to provide for the use of discovery depositions as substantive evidence subject to certain safeguards which

75. 603 So. 2d 1294 (Fla. 3d Dist. Ct. App. 1992).
76. FLA. R. CRIM. P. 3.220(a).
77. *Llanes,* 603 So. 2d at 1297-98.
78. *Id.*
79. FLA. R. CRIM. P. 3.190(j).
81. *Id.* at 498-99.
82. FLA. R. CRIM. P. 3.190(j).
would be provided in the rules." To date, the Rules of Criminal Procedure Committee has not acted on the court's referral.

B. Privacy Interests

Another of the more celebrated cases to reach the Florida Supreme Court this year was *Post-Newsweek Stations v. Doe,* which involved the Kathy Willets prostitution scandal. In July 1991, the Broward County Sheriff's Office obtained a search warrant for the home of Kathy Willets and her husband, Deputy Sheriff Jeffrey Willets, who were believed to be involved in a criminal prostitution scheme. The police seized various pieces of evidence, including a directory containing names and addresses, and other lists stating the names, amounts paid, and sexual preferences of Kathy's customers. When the state charged Kathy Willets with prostitution, and her husband with living off the proceeds of prostitution, the defense requested production of all materials seized during the search warrant, including Kathy's list. Nervously, numerous John Does filed motions in the trial court to deny public access to the pretrial discovery materials. Their concerns were that release of the information would invade their privacy and damage their personal and professional reputations. The trial court refused to withhold release of the discovery, stating that people named on a prostitute's client list have no reasonable expectation of privacy.

The Florida Supreme Court began its analysis by noting that the John Does possessed standing to challenge the release of the discovery materials. Florida Rule of Criminal Procedure 3.220(m) provides that "[u]pon request of any person, the court may permit any showing of cause for denial or regulation of disclosures, or any portion of such showing to be made in camera." In addition, Florida Rule of Criminal Procedure 3.220(l) allows the court to restrict disclosure of discovery to protect a witness from "harassment, unnecessary inconvenience or invasion of privacy."

Having allowed the John Does to litigate the disclosure, the court began an analysis of criminal procedure rules, the public records law, and the constitutional right to privacy. The public does not have a universal right to all discovery materials, and courts may act to protect the privacy interests

83. *Rodriguez,* 609 So. 2d at 499 n.2.
84. 612 So. 2d 549 (Fla. 1992).
85. *Id.* at 550.
86. *Id.*
87. FLA. R. CRIM. P. 3.220(m).
88. FLA. R. CRIM. P. 3.220(l).
89. *Post-Newsweek,* 612 So. 2d at 550-51.
of litigants and third parties. The party seeking to prevent disclosure bears the burden of proving that restricting access is necessary to prevent an imminent threat to privacy rights. When balanced against the policy that public records are to be open for public inspection and that access to pretrial discovery information should be limited only when necessary to protect the constitutional rights to a fair trial and due process, the supreme court concluded that the John Does had no substantial privacy interest in their names and addresses sufficient to negate production of the discovery. With the right of access to discovery materials now firmly entrenched in Florida jurisprudence, the moral of this case may well be that one must be careful lest one’s immorality becomes a public spectacle.

C. Discovery Violations

Discovery violations do not automatically mandate the imposition of sanctions. In a criminal case, a trial court must consider all pertinent circumstances before imposing sanctions for a discovery violation. When sanctions are ordered, the court must impose the least severe sanction necessary to address the violation. Excluding a witness as a sanction for the state’s failure to provide an address for the witness was found to be erroneous because the trial court did not consider less severe sanctions, such as ordering a continuance or directing the state to comply with the discovery request.

A defendant offering an alibi witness is required to furnish the prosecuting attorney with notice of an intent to call the witness, setting out the name and address of the witness, at least ten days before trial. When a defendant fails to provide advance notice, the trial court is required to conduct a hearing to determine the circumstances of the defendant’s failure

90. Id. at 553.
92. Post-Newsweek, 612 So. 2d at 553.
94. State v. Schwartz, 605 So. 2d 1000, 1001 (Fla. 2d Dist. Ct. App. 1992). The court was mindful that the criminal process is intended to be a search for the truth:
   In a system in which the search for truth is the principal goal, the severe sanction of witness exclusion for failure to timely comply with the rules of procedure should be a last resort and reserved for extreme or aggravated circumstances, particularly when the excluded testimony relates to critical issues or facts and the testimony is not cumulative.
Id. (quoting Austin, 461 So. 2d at 1381).
95. FLA. R. CRIM. P. 3.200.
to provide notice before ordering sanctions. As often as the courts have repeated this message, trial courts continue to impose sanctions without holding the required hearing, even though the few minutes needed for a hearing is so much more efficient than a subsequent retrial of the entire case.

IV. JUVENILE PROCEDURE

The courts, perhaps like many parents, are experiencing problems controlling unruly juveniles. Therefore, the authorized procedure for punishing a juvenile for contempt of court was an important issue for the court in A.A. v. Rolle, which involved a petition for writ of habeas corpus challenging the incarceration of six children in secure detention facilities for contempt of court. Chief Justice Barkett noted although juveniles can be found in contempt of court, “juveniles may not be incarcerated for contempt of court by being placed in secure detention facilities.” The majority opinion recognized that judges handling juvenile matters are often frustrated by the deficiencies of Florida’s juvenile justice system, and noted the deficiencies were the result of a lack of adequate and meaningful funding. The court noted the Legislature “has recognized the critical need to provide appropriate placements or services for such children, but these services have not been made available” to meet the needs of the children. This is an area which is ripe for continued judicial attention, and how involved the courts will become in overseeing the operation of Florida’s juvenile justice system is a serious question.

The Legislature also addressed some of the inadequacies of the juvenile justice system, as it ordered the development of comprehensive, community-based juvenile programs and services. The Legislature also

97. See Richardson v. State, 246 So. 2d 771 (Fla. 1971).
98. 604 So. 2d 813 (Fla. 1992).
99. Id. at 818-19.
100. Id. at 819.
101. Id.
103. Ch. 93-200, § 1, 1993 Fla. Laws 1799, 1800 (amending FLA. STAT. § 20.19 (Supp. 1992), to be codified at FLA. STAT. § 20.19(4)).
authorized the release of the names of juvenile offenders adjudicated guilty of capital, life, first, or second degree felonies involving a victim.\footnote{Ch. 93-230, § 23, 1993 Fla. Laws 2359, 2373 (amending FLA. STAT. § 39.045(9) (1991)).}

V. CONSTITUTIONAL LAW

A. Right to Counsel

The right of the police to record or to intercept conversations between a defendant and a co-defendant is severely restricted once the defendant has been arrested and obtained counsel. In Peoples v. State,\footnote{612 So. 2d 555 (Fla. 1992).} a defendant obtained the services of defense counsel shortly after being arrested. After the defendant was released on bail, the co-defendant, who had begun to cooperate with the police, received permission from the police to record his telephone conversations with the defendant. The recordings of these conversations were admitted in evidence during the defendant’s drug trafficking trial. The supreme court found that the recordings were obtained in violation of the defendant’s right to counsel as guaranteed by the Florida Constitution.\footnote{Id. at 556-67; see also FLA. CONST. art. I, § 16.} That right to counsel attaches at the earliest of three points, as indicated in Rule 3.111(a):\footnote{FLA. R. CRIM. P. 3.111(a).} “[w]hen [a defendant] is formally charged with a crime via the filing of an indictment or information, or as soon as feasible after custodial restraint, or at first appearance.” Plainly, the defendant’s constitutional right to counsel had attached and had been invoked by the time the taped telephone conversations were made. In order to avoid future confusion, the supreme court announced a bright line rule for this situation: “[o]nce the section 16 right to trial counsel attaches and is invoked, the State is barred from obtaining incriminating statements on a charged offense by knowingly circumventing an accused’s right to assistance of counsel during a crucial encounter with the State.”\footnote{Peoples, 612 So. 2d at 557; see Philips v. State, 612 So. 2d 557 (Fla. 1992) (right to counsel under Florida and United States Constitutions attached upon appointment of counsel at defendant’s first appearance prior to initiation of adversarial proceeding).} In this case, however, the introduction of the tape recordings at trial was deemed harmless error.

A trial court order prohibiting the defendant from speaking with
counsel during a recess immediately following direct examination of the
defendant, and prior to the defendant’s cross-examination, implicates
constitutional protections and constitutes clear error which requires reversal,
unless there is no reasonable possibility the error affected the jury ver-
dict.110

B. Confessions and Admissions

The decision in State v. Guess111 is convincing proof that Florida
courts are willing to utilize the Florida Constitution to guarantee rights
which are not protected by the United States Constitution. In Guess, the
supreme court held a trial court’s refusal to receive the defendant’s
testimony on the voluntariness of a statement outside the presence of the
jury was error that is not subject to the harmless error analysis.112 In so
holding, the Florida Supreme Court rejected the United States Supreme
Court holding in Arizona v. Fulminante,113 which employed the harmless
error rule in situations involving the admission of an unconstitutionally
obtained confession.114

The corpus delicti rule is a concept studied by every law student, but
promptly forgotten upon passing the Bar. Yet the rule is alive and well in
Florida, and is designed to limit the admission into evidence of a defen-
dant’s confession in the absence of independent, substantial evidence which
proves the crime was committed.115 The policy reason for the corpus delicti
rule is simple to understand: “[t]he judicial quest for truth requires that no
person be convicted out of derangement, mistake or official fabrication.”116
The rule is applicable to any statement by a defendant which tends to
establish or disprove a material fact in the case, including both confessions
and admissions against interest.117 Circumstantial evidence remains
sufficient as a foundation for proving corpus delicti.118

110. Amos v. State, 618 So. 2d 157, 161 (Fla. 1993).
111. 613 So. 2d 406 (Fla. 1992).
112. Id.
114. Guess, 613 So. 2d at 407.
115. See Burks v. State, 613 So. 2d 441, 443 n.2 (Fla. 1993).
117. See Burks, 613 So. 2d at 444.
118. Id. at 443.
C. Double Jeopardy

Traditionally, under a federal constitutional analysis, a defendant cannot be subjected to multiple punishments and successive prosecutions for two or more offenses which contain the same elements.\(^\text{119}\) This traditional test has been referred to as the "Blockburger test."\(^\text{120}\) Recently, in \textit{Grady v. Corbin},\(^\text{121}\) the Supreme Court added another element to the Blockburger test, holding that a subsequent prosecution must satisfy the "same conduct" test to avoid the double jeopardy bar.\(^\text{122}\) The "same conduct" test provides that "if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted," a second prosecution may not be had.\(^\text{123}\) Three years later, citing substantial dissatisfaction with the \textit{Grady} analysis, the Supreme Court overruled the "same conduct" test and reestablished the preeminence of the Blockburger test.\(^\text{124}\)

Another doctrine involving double jeopardy is that of "manifest necessity." A mistrial occasioned by "manifest necessity" enables a defendant to be retried without violating the prohibition against double jeopardy.\(^\text{125}\) However, if a jury is discharged, before reaching a verdict, for legally insufficient reasons and without the defendant's consent, the discharge precludes a subsequent trial for the same offense.\(^\text{126}\) In \textit{Perkins v. Graziano},\(^\text{127}\) one juror was erroneously dismissed after the jury had been sworn, based on the juror's misunderstanding that the trial had been canceled. The court thereafter declared a mistrial and discharged the jury without exploring the alternatives of continuing the case while attempting to locate the sixth juror or determining the availability of an alternate.

\(^{120}\) \textit{Id.}
\(^{121}\) 495 U.S. 508 (1990).
\(^{122}\) \textit{Id.} at 510.
\(^{123}\) \textit{Id.}
\(^{124}\) United States v. Dixon, 113 S. Ct. 2849, 2864 (1993). The majority opinion, written by Justice Scalia, is a fascinating exercise in distinguishing precedent and parsing meaning from other authority. Additionally, Justice Scalia's pointed comments demonstrating the errors of Justice Souter's analysis in \textit{Grady v. Corbin} deserve close reading. Portions of the discussion appear to suggest that Justice Souter actually miscited precedent. \textit{See id.} at 2860-63.
\(^{125}\) United States v. Perez, 22 U.S. 579 (1824).
\(^{126}\) State \textit{ex rel. Williams} v. Grayson, 90 So. 2d 710, 713 (Fla. 1956).
\(^{127}\) 608 So. 2d 532 (Fla. 5th Dist. Ct. App. 1992).
Because this situation did not constitute a "manifest necessity" for a mistrial, the subsequent trial was barred by the Double Jeopardy Clause.\footnote{Id. at 533.}

Application of the "manifest necessity" standard for determining whether a mistrial is appropriate requires a case-by-case analysis.\footnote{Id. at 533.} Courts have struggled with situations in which a trial participant or counsel becomes ill or is viewed as unable to continue with the trial.\footnote{Id. at 533.} In determining whether a particular trial event mandates the declaration of a mistrial, the "Florida Constitution requires a trial judge to consider and reject all possible alternatives before declaring a mistrial over the objection of the defendant . . . ."\footnote{Id. at 533.} So, when a trial judge, sua sponte and without considering and rejecting all possible alternatives, declared a mistrial based on the subjective impression that defense counsel was not competent to proceed with the trial because of illness, the defendant’s double jeopardy protection precluded a retrial.\footnote{Id. at 533.}

D. Search and Seizure

In Minnesota v. Dickerson,\footnote{Id. at 1236.} a case certain to spawn extensive litigation, the United States Supreme Court recognized the "plain feel" doctrine, which authorizes the seizure of contraband detected through the sense of touch during a patdown frisk. Using the analogy of the "plain view" doctrine, the Court explained that a police officer lawfully engaged in a patdown (where he or she can immediately identify an object as contraband) is entitled to seize that property without a warrant. The rationale is that there has been no invasion of the suspect’s privacy beyond that already authorized by the officer’s search for weapons.\footnote{Id. at 1236.} The approval of this doctrine did not, however, salvage the seizure in Dickerson because the police officer was unable to determine the incriminating character of the object upon an initial feel. Instead, the officer conducted a further exploratory search, which was not authorized by Terry v.
Because the further search was constitutionally invalid, the seizure of the cocaine was unconstitutional. Because the further search was constitutionally invalid, the seizure of the cocaine was unconstitutional.

Identifying the circumstances which result in a voluntary abandonment of property which is retrieved by the police was the subject of Hollinger v. State. Acknowledging the general rule that a seizure does not occur until a person is actually physically subdued by an officer or submits to an officer’s show of authority, the Florida Supreme Court held that where a reasonable person, when approached by police officers clad in masks and SWAT-team-type regalia, would not feel free to move, the subsequent dropping of cocaine is the fruit of the officers’ illegal seizure. Consequently, contraband seized in such a case is properly suppressed.

A similar situation resulted in a different conclusion in Perez v. State, which involved a defendant who was chased by the police after failing to heed a call to halt. The firearm which the defendant dropped during the chase was declared by the court to have been abandoned, and the recovery of the firearm was not an illegal seizure because the defendant was not seized until he was actually caught by the police. The rationale for the court’s decision is simple: a defendant who flees from the police is not subject to constitutional protections until apprehended, while a defendant who remains pursuant to the police show of authority is entitled to the protections of the Fourth Amendment.

Ohio. Because the further search was constitutionally invalid, the seizure of the cocaine was unconstitutional.

135. Ohio, 392 U.S. 1 (1968) (establishing a less intrusive “pat down” search as valid on less than probable cause).
137. 620 So. 2d 1242 (Fla. 1993).
139. Hollinger, 620 So. 2d at 1243.
140. 620 So. 2d 1256, 1257 (Fla. 1993).
141. Id. at 1258.
142. See id. Perez contains an interesting philosophical discussion of precedent and the nature of stare decisis. Perez held that the Florida Supreme Court “is bound to follow the United States Supreme Court’s interpretations of the Fourth Amendment and to provide no greater protection than those interpretations.” Id. Chief Justice Barkett and Justices Shaw and Kogan dissented, concluding that the 1982 amendment to article I, section 12 of the Florida Constitution incorporated only the existing opinions of the United States Supreme Court and not future opinions. Id. at 1266, 1270. Justice Kogan declared that in view of the “precipitous retreat from its own precedent that characterizes the . . . [Supreme] Court today,” no one envisioned that the Supreme Court would take away those rights which were recognized and approved by the precedent existing when the 1982 amendment was approved. Perez, 620 So. 2d at 1270. Curiously, Justice Overton, who first stated the view that the 1982 amendment applied only to existing Supreme Court precedent and not to future interpretations. Bernie v. State, 524 So. 2d 988, 994 (1988) (Overton, J., concurring in
When a motor vehicle is lawfully stopped by a law enforcement officer and the driver consents to a search of the vehicle, that consent extends to the search of a closed paper bag found within the vehicle. Further, the United States Supreme Court held in *United States v. Padilla* that the rule regarding standing to challenge the constitutionality of a search or seizure is not subject to a "co-conspirator exception." The Court rejected this exception, that "a co-conspirator obtains a legitimate expectation of privacy . . . if he has either a supervisory role in the conspiracy or joint control over the place or property involved in the search or seizure."  

VI. TRIAL ISSUES

A. Evidence

The psychotherapist-patient privilege is not applicable to situations involving child abuse or neglect, by action of the statutory requirement to report child abuse. The statute essentially waives the psychotherapist privilege with regard to communications concerning child abuse. Consequently, as part of the discovery process in a criminal case, a defendant is entitled to examine a psychotherapist or psychologist concerning communications he or she had with the victims of child abuse.

The accident investigation privilege is designed to ensure that accident information may be compelled from individuals involved in traffic accidents without compromising constitutional protections. But, the accident investigation privilege cannot be used to bar the introduction of a driver's statements regarding a traffic accident where the driver was never advised he was obligated to answer questions, and where the driver was given his

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143. State v. Hester, 618 So. 2d 1365, 1366 (Fla. 1993).
145. Id.
148. Id. at 928.
The accident investigation privilege can be summarized as follows: the accident investigation privilege is applicable if no Miranda warnings are given; if a law enforcement officer gives any indication to a defendant that the defendant must respond to questions concerning the investigation, the officer must clearly state that "this is now a criminal investigation," and follow immediately with Miranda warnings before any statement by the defendant may be admitted against that defendant at trial.

In prosecuting drug offenses, prosecutors often attempt to utilize expert testimony to explain the operation of drug organizations and the impact of certain conduct taken by the defendants. Prosecutors often seek to introduce this evidence in the form of expert opinion testimony. A limitation on the ability of the prosecution to introduce expert opinion testimony is the result of the decision in Ruth v. State. In a prosecution for maintaining an aircraft used for keeping or selling drugs, concealing aircraft registration numbers, and aircraft registration fraud, the state introduced the expert opinion of a customs agent that the aircraft was used to smuggle narcotics. This opinion regarding the purported use of the aircraft addressed a necessary element of the charged crime. The appellate court, recognizing the considerable impact opinion testimony can have, held the evidence was inadmissible because it constituted an opinion on the ultimate issue involved in the trial.

A defendant may not be convicted solely upon the basis of an expert opinion as to the actual commission of the ultimate act which constitutes the commission of the crime charged. Such a situation clearly runs afoul of the ultimate issue rule. Without evidence of the actual presence of drugs in connection with the use of the plane, it was error to admit [the customs officer's] opinion testimony.

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151. Norstrom, 613 So. 2d at 440-41. In State v. Riley, 617 So. 2d 340 (Fla. 1st Dist. Ct. App. 1993), the court certified the following question as one of great public importance:

WHETHER STATEMENTS MADE IN THE COURSE OF A POST-ACCIDENT INVESTIGATION BY AN INDIVIDUAL NOT IN POLICE CUSTODY AND NOT GIVEN WARNINGS PURSUANT TO MIRANDA V. ARIZONA ARE PRIVILEGED UNDER SECTION 316.066, FLORIDA STATUTES (1991).

Id. at 341.

153. Id. at 11.
154. Id.
The court also held that the opinion was "purely speculation" and was not based on facts or inferences supported by the evidence.\footnote{155} Without factual support for the opinion, the erroneous opinion evidence invaded the province of the jury. The defendant's conviction was, accordingly, reversed.\footnote{156}

Impeaching a witness through a prior felony conviction or a conviction for an offense involving moral turpitude should be a rather simple process. Yet, lawyers continue to attempt impeachment in a manner which informs the jury of the underlying crime, which is almost always error. An unsuccessful impeachment attempt occurred in \textit{Tampling v. State},\footnote{157} where the prosecutor cross-examined the defendant, asking whether the defendant had been convicted of jury tampering. As surprising as it might seem for a prosecutor to attempt that type of impeachment, it is inexplicable that the trial judge overruled defense counsel's objection.\footnote{158} As a result, the defendant's conviction was reversed, and the appellate court gave a lengthy explanation instructing the parties on the only permissible method for impeaching a witness by conviction of a prior crime:

\begin{quote}
[T]he prosecutor is permitted to attack the defendant's credibility by asking whether the defendant has ever been convicted of a felony or a crime involving dishonesty or false statement, and how many times. If the defendant admits the number of prior convictions, the prosecutor is not permitted to ask further questions regarding prior convictions, nor question the defendant as to the nature of the crimes. If, however, the defendant denies a conviction, the prosecutor can impeach him by introducing a certified record of the conviction. The prosecutor is not permitted to ask the defendant questions about prior convictions unless the prosecutor has knowledge that the defendant has been convicted of a crime and has evidence necessary for impeachment if the defendant fails to admit the number of convictions for such crimes. The proper method to impeach the witness who answers the question regarding his prior convictions incorrectly, is to offer a certified record of the witness's prior convictions, which will necessarily reveal the nature of the crimes. It is improper for the prosecutor or questioning party to name the specific crimes or to state the nature of the crimes.\footnote{159}
\end{quote}

\footnote{155} \textit{Id.} at 12.  
\footnote{156} \textit{Id.}  
\footnote{157} 610 So. 2d 100, 101 (Fla. 1st Dist. Ct. App. 1992).  
\footnote{158} \textit{Id.}  
\footnote{159} \textit{Id.} at 101-02; (quoting Gavins v. State, 587 So. 2d 487, 489-90 (Fla. 1st Dist. Ct. App. 1990)).
The supreme court had an opportunity to evaluate the admissibility of DNA test results in *Robinson v. State.* While the court did not give a green light to the admission of DNA evidence in every case, the court nevertheless found the prosecution presented sufficient evidence demonstrating the reliability of the DNA testing method, while the defendant produced neither evidence nor authority that questioned the general scientific acceptance of the testing. Consequently, the court held that the defendant had not demonstrated abuse of the trial court's discretion regarding the admissibility of DNA test results.

Meanwhile, as the Florida Supreme Court was reiterating traditional reliance on the "general acceptance" test for the admission of scientific evidence, the United States Supreme Court held that the Federal Rules of Evidence superseded the "general acceptance" test for admissibility of scientific evidence first established in *Frye v. United States.* In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Court noted that Rule 702 of the Federal Rules of Evidence did not incorporate a "general acceptance" standard as a prerequisite to admissibility. In determining whether scientific evidence is admissible, the Supreme Court set out the following standard:

Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue. We are confident that federal judges possess the capacity to undertake this review. Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test.

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160. 610 So. 2d 1288 (Fla. 1992).
161. Id. at 1291.
162. Id. DNA profile evidence introduced by the prosecution in a burglary and sexual battery offense obtained judicial approval in *Toranzo v. State,* 608 So. 2d 83 (Fla. 1st Dist. Ct. App. 1992), *review dismissed,* 613 So. 2d 9 (Fla. 1993).
164. 113 S. Ct. 2786 (1993).
165. Id. at 2794.
166. Id. at 2796 (footnotes omitted).
Among the factors considered important by the Court were whether the scientific methodology has been tested, whether the scientific theory has been subjected to peer review, the known or potential rate of error, and the level of support within the scientific community. The approach, the Court emphasized, is "a flexible one." 167

Given the similarity between Rule 702 168 and the Florida analog, 169 the relevant question after Daubert was whether the Florida Supreme Court would abandon the "general acceptance" test and move toward the more flexible approach espoused by the Supreme Court. That did not happen when the court was asked to approve "sexual offender profile evidence" in Flanagan v. State. 170 There, the Florida Supreme Court reaffirmed the "general acceptance" test in concluding that "sexual offender profile evidence" is not generally accepted in the scientific community and therefore does not meet the test of admissibility for use in a sexual battery prosecution. The court acknowledged the decision in Daubert, 171 but stated firmly that "Florida continues to adhere to the Frye test for admissibility of scientific opinions." 172

The admissibility of similar fact evidence in a sexual battery case led the supreme court to conduct a thorough analysis of the admissibility of other crimes evidence in Williams v. State. 173 There, the court acknowledged that evidence of other criminal activity may be prejudicial, but is subject to a "broad rule of admissibility based on relevancy..." 174 Especially in a sexual battery case, other nonconsensual sexual encounters which are factually similar may well be probative of the defendant's common plan or scheme to seek out particular victims and to rebut a defense of consensual sex. When admitted, the court noted, the evidence should not be "made the focal point of [the] trial" and "proper cautionary instructions" should be given. 175

167. Id. at 2797 (footnote omitted).
170. 18 Fla. L. Weekly S475 (Fla. Sept. 9, 1993).
171. 113 S. Ct. 2786 (1993).
172. Flanagan, 18 Fla. L. Weekly at S476 n.2.
173. 621 So. 2d 413 (Fla. 1993).
174. Id. at 414.
175. Id. at 417.
B. Jury Selection

In *State v. Aldret*, the supreme court explained that "the state has standing to object to a defendant's discriminatory use of peremptory challenges under both the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and . . . the Florida Constitution." In evaluating a claim of discriminatory peremptory challenges, a trial court has abundant discretion in fashioning the appropriate remedy in order to protect the constitutional rights of the parties.

It is now well settled that neither the state nor the defense is permitted to exercise a peremptory challenge in a discriminatory or biased manner. Appellate review of a trial court's ruling on peremptory challenges utilizes the abuse of discretion standard, so long as the lower tribunal's determination does not result from an incorrect application of the law.

Trial counsel must properly preserve the issue of alleged racial bias in the exercise of peremptory challenges. In *Joiner v. State*, the supreme court instructed lawyers that moving to strike the jury panel is not the only way to preserve a *Neil* objection for review. A party sufficiently preserves the issue by renewing the objection or by accepting a jury subject to an earlier *Neil* objection.

When a party raises an objection that a peremptory challenge is being utilized in a racially discriminatory manner, the trial court is required to conduct an inquiry during which the offending party must provide a racially neutral justification for exercising a peremptory strike. "[T]he proper remedy in all cases where a trial court errs in failing to hold a *Neil* inquiry is to reverse and remand for a new trial."

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176. 606 So. 2d 1156 (Fla. 1992).
177. Id. at 1458; see also Fla. Const. art. I, § 16.
178. Id. at 1157; Jefferson v. State, 595 So. 2d 38, 41 (Fla. 1992).
181. 618 So. 2d 174 (Fla. 1993).
182. State v. Neil, 457 So. 2d 481 (Fla. 1984) (holding that presumption of constitutional use of peremptory challenges may be rebutted by a timely objection followed by a showing that such challenge was based solely on race).
183. See *Joiner*, 618 So. 2d at 176.
185. Id. at 1322; see also Valentine v. State, 616 So. 2d 971 (Fla. 1993). In *Valentine*, the supreme court noted that "reversal would have been unnecessary if the trial court had
C. Speedy Trial

The supreme court finally adopted a speedy trial rule for civil traffic infractions in an attempt to remedy "the effect on an individual of outstanding pending civil traffic infractions for an unreasonable time." Rule 6.325 requires that "every defendant charged with a noncriminal traffic infraction shall be brought to trial within 180 days of the date the alleged infraction took place." If trial is not commenced within 180 days, the defendant is entitled to dismissal of the infraction charged.

When a trial date is set beyond the speedy trial time, and defense counsel does not lodge an objection to the date, the defendant has not waived the right to speedy trial. The defendant or counsel must make some affirmative statement in support of the trial date or request the particular setting in order to waive speedy trial rights.

While defense counsel's devotion to a client is absolutely essential to the proper operation of our criminal justice system, counsel must nevertheless play by the rules, even if fair play disadvantages the client. One such example of defense counsel's failure to stay within the limits of appropriate advocacy is found in State v. Reaves, in which that court determined that defense counsel played fast and loose in attempting to obtain a speedy trial discharge. Counsel filed a demand for speedy trial in a pleading entitled "Demand Pursuant To Rule 3.191(a)(2)" without including in the caption the phrase "Demand for Speedy Trial." As anticipated by defense counsel, the clerk of court, whose duty it is to notify the court of a speedy trial demand and set a date for a calendar call, did not recognize the motion as a speedy trial demand. The appellate court did not appreciate counsel's calculating efforts. To prevent such miscarriages of justice in the future, the court declared that Rule 3.191 "mandates the use of the phrase 'Demand for Speedy Trial' in the captioning of that demand." In reversing the trial simply followed Slappy's clear directive and resolved all doubt in favor of the objector. Our holding in Johans will hopefully minimize such costly and frustrating errors—where a lengthy and expensive trial is foredoomed at its very beginning for lack of a five-minute inquiry." Id. at 975 (citations omitted).

188. Id.
190. 609 So. 2d 701 (Fla. 4th Dist. Ct. App. 1992), review denied, 623 So. 2d 494 (Fla. 1993).
191. Id. at 708.
court's speedy trial discharge, the appellate court chastised defense counsel for violating both the letter and the spirit of the oath of attorneys, finding counsel had acted in a manner which subverted the cause of justice. The court did not consider it significant that defense counsel's actions initially led to the client's discharge.

D. 

Venue

Given the escalating number of high profile criminal cases in Florida, determining where a fair trial can be held requires considerable effort. Either the state or the defendant in a criminal case may move for a change of venue "on the ground that a fair and impartial trial cannot be had in the county where the case is pending for any reason other than the interest and prejudice of the trial judge." As a consequence of the notoriety associated with moving a criminal trial to another county, the Florida Legislature recently amended the law relating to venue in criminal cases. The amendment requires a court, after ordering a change of venue, to give priority to any county which closely resembles the demographic composition of the original venue.

The impetus for the change of venue legislation was the celebrated case of Lozano v. State, involving a Miami police officer who was tried for and convicted of two counts of manslaughter in connection with a highly publicized shooting. The third district reversed the convictions and ordered a new trial, holding that the failure to grant Lozano's motion for a change of venue denied him the right to a fair trial. On remand, the trial court granted a change of venue, ordering the case removed to Orlando. Then, sua sponte, the court reconsidered the venue change "in light of the widely publicized Los Angeles riots and the racial makeup of the Orlando area," and transferred the trial to Tallahassee.

This game of movable trials caused the chief judge of the Second Judicial Circuit to issue a sua sponte order removing and remanding the case back to Orlando. The Florida Supreme Court, concerned with the public's perception of the court system as a "ping-pong game" which undermined

192. Id. at 709.
194. Ch. 93-225, § 1, 1993 Fla. Laws. 2336, 2337 (amending FLA. STAT. § 910.03 (1991), to be codified at FLA. STAT. 910.03(2)).
196. Id. at 23.
confidence in the judicial function, declared that "absent extraordinary circumstances, a trial judge's order granting a change of venue may not be reviewed by a successor trial judge in the new venue. Once such an order has been issued, it must be honored in the new venue unless and until a proper appellate court rules otherwise." 198

E. Jury Instructions

Under Florida law, a party is entitled to an instruction on a permissive lesser included offense when both the accusatory pleading and the evidence support the commission of that offense. 199 In State v. Von Deck, 200 the court answered the question of whether aggravated assault on a police officer is a lesser included offense of the attempted murder of a police officer. In that case, the defendant objected to the state's requested instruction on the permissive lesser included offense of aggravated assault, arguing that all the elements of this offense were not contained in the information. The defendant was found guilty of aggravated assault and appealed. The supreme court held that the prosecution is obligated to allege a "putting in fear" element whenever it seeks an instruction on the permissive lesser included offense of aggravated assault. 201 Because the attempted murder information did not allege that necessary element, the trial court should not have instructed the jury on aggravated assault as a lesser included offense. 202

In Taylor v. State, 203 the supreme court explained the distinction between category-one "necessarily lesser included offenses" and category-two "permissive lesser included offenses." 204 When "the commission of one offense always results in the commission of another, the latter offense is a category-one necessarily lesser included offense." 205 If the lesser offense has at least one statutory element not contained in the greater, it cannot be a category-one necessarily lesser included offense, but may be a category-two permissive lesser included offense if all the required elements

198. Id. at 1294. The Lozano trial ultimately took place in Orlando, and resulted in an acquittal on all counts. The result caused no riots in any community.
200. 607 So. 2d 1388 (Fla. 1992).
201. Id. at 1389.
202. Id.
203. 608 So. 2d 804 (Fla. 1992).
204. Id. at 805.
205. Id. (citing State v. Weller, 590 So. 2d 923 (Fla. 1991)).
are alleged in the accusatory pleadings and proven at trial. In determining whether a defendant is entitled to a lesser included offense instruction, the trial court must analyze the charging document to see if the necessary elements of the lesser offense are included.

When a jury asks a question during deliberations, the trial judge must give counsel an opportunity to be heard before answering the jury’s question. The failure to observe this rule constitutes per se reversible error without regard to the harmless error rule. Similarly, it is per se reversible error when a trial court, in responding to a jury’s request for additional instructions, forwards the entire set of written instructions to the jury without providing prior notice to the parties.

F. Entrapment

In State v. Hunter, the supreme court held as violative of due process the practice in cases where the informant’s contingent fee was conditioned on the giving of testimony. In those instances, the defense of objective entrapment was permitted. The use of a paid confidential informant to solicit the defendant’s participation in criminal activity does not violate due process, however, where payments to the informant were not conditioned on the giving of trial testimony or on the obtaining of an arrest.

In Munoz v. State, the supreme court ruled that the objective entrapment test has been abolished by the Legislature. The court analyzed the subjective entrapment test still in use, and validated the two part test: (1) whether the government agent induced the charged offense, and (2) whether the accused was predisposed to commit the offense. The court acknowledged that while entrapment is ordinarily a jury question, a trial judge has the authority to rule on entrapment as a matter of law where the facts are

206. Id.
208. Id. at 1007 n.1 (citing Cherry v. State 572 So. 2d 521, 522 (Fla. 1st Dist. Ct. App. 1990)).
209. State v. Franklin, 618 So. 2d 171 (Fla. 1993).
210. 586 So. 2d 319 (Fla. 1991).
211. Id. at 321.
not in dispute and the state fails to muster sufficient evidence of predisposition.

In *Fruetel v. State*, the appellate court held that the state’s actions constituted entrapment as a matter of law when a defendant, with no prior criminal history, who was not the subject of an ongoing criminal investigation, was contacted by an informer whose sentence was subject to reduction if he provided evidence which would lead to a drug arrest. The informant in that case furnished the defendant with the money needed to purchase drugs and even advised the defendant on how to proceed with the drug transaction. The record revealed that the informant “acted in the drug transaction without supervision and the record does not contain any evidence that would show the police ‘utilized means reasonably tailored to apprehend only those already involved in ongoing criminal activity.’” Under those circumstances, the Fourth District did not hesitate to reverse the defendant’s drug convictions and order the defendant’s discharge. In light of the judicial concern with the possibility that informants might fabricate evidence in order to obtain a substantial personal benefit, law enforcement would be wise to develop criteria for strict control and supervision of a cooperating individual.

The illegal manufacture of crack cocaine by law enforcement officials for use in reverse-sting operations constitutes governmental misconduct which violates the due process clause of the Florida Constitution. Therefore, a conviction for purchasing drugs manufactured by law enforcement officers is improper. In such a case, the supreme court has expressed its concern with law enforcement officers who choose to use methods which “cannot be countenanced with a sense of justice and fairness.”

VII. SUBSTANTIVE CRIMINAL OFFENSES

A. Driving Offenses

While driving a motor vehicle is generally regarded as a privilege and

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215. Id. at 699.
216. Id. at 700.
217. Id.
218. State v. Williams, 623 So. 2d 462 (Fla. 1993).
219. Id. at 467.
not a right, most drivers consider driving to be a necessity. A suspension or revocation of driving privileges may have enormous practical consequences to a driver. The Department of Motor Vehicles has authority to seek review of an order reinstating the privilege to drive by petitioning for certiorari review from the order of the lower tribunal. The standard of review remains a determination of whether the court departed from the essential requirements of the law.

Defendants routinely challenge the admissibility of blood alcohol test results based on the failure of the Department of Health and Rehabilitative Services ("HRS") to promulgate rules establishing standards for the use, maintenance, testing, and upkeep of testing equipment. In Mehl v. State, the court found that HRS met the statutory requirement of providing an approved method of administration of the blood test. Nevertheless, in order to promote public knowledge of testing requirements, the supreme court declared that:

beginning at 12:01 a.m. on January 1, 1994, the State shall not be allowed the benefit of the presumptions established in § 316.1934, Florida Statutes (1989), unless (a) the State has established reasonable definite rules specifying the precise methods of blood alcohol testing that are approved for use in this State, and (b) the State and its agencies substantially comply with these rules. Of course, even when the presumption is not available, the State should still have the benefit of the Robertson analysis, upon a proper request.

Continued problems with blood alcohol testing may have led to the Mehl decision. For example, in Robertson v. State, the question before the court was whether the prosecution should be permitted to introduce into evidence test results of blood samples taken at the request of a law enforcement officer if the statutory requirements were not satisfied. The court held that even if the person conducting the blood test was not...
licensed by HRS, the test results are nevertheless admissible, provided that
the blood was drawn by a person authorized to do so by the implied consent
statute,\textsuperscript{225} and the prosecution can establish that the test was reliable, was
performed by a qualified operator with proper equipment, and an expert
provides competent testimony concerning the meaning of the test.\textsuperscript{226}

Drunk driving continues to have extraordinary consequences, beyond
what many casual drinkers may believe. A trial court has the power to
impose any valid condition of probation that serves a rehabilitative purpose.
For example, a condition of probation requiring the defendant to place and
pay for a newspaper ad consisting of the defendant’s mug shot, name, and
and the caption “DUI-convicted” was an allowable sanction.\textsuperscript{227}

Yet another example of the dangers of drugs and the serious conse-
quences for those caught in possession of drugs is found in \textit{Lite v. State}.\textsuperscript{228}
There, the supreme court upheld the constitutionality of section 322.055(1)
of the Florida Statutes,\textsuperscript{229} which requires the revocation of the driving
license of those persons convicted of possession, sale, or trafficking of
controlled substances. The law was declared to be constitutional against a
claim that it violated substantive due process.\textsuperscript{230}

\textbf{B. Burglary}

What constitutes possession of “burglary tools” was discussed by the
court in \textit{Green v. State}.\textsuperscript{231} There, the court considered the following
question: “[a]re items of personal apparel, such as common gloves, included
under the terms ‘tool, machine, or implement’ as used in section 810.06, [of
the] Florida Statutes?”\textsuperscript{232} The court held that while “[c]ommon household
objects, which . . . might have a useful and lawful purpose, may be
classified as burglary tools if they are used with the intent to commit a
burglary,” gloves and other items of personal apparel “are not objects which

\textsuperscript{225} FLA. STAT. § 316.1933(2)(a) (1987), includes a list of qualified health care
professionals. The Legislature amended the statute in 1991 to include other categories of
healthcare professionals. Ch. 91-255, §§ 2-3, 1991 Fla. Laws 2442, 2448 (amending FLA.
STAT. §§ 316.1932, 316.1933 (1989)).

\textsuperscript{226} Robertson, 604 So. 2d at 791.

\textsuperscript{227} Lindsay v. State, 606 So. 2d 652 (Fla. 4th Dist. Ct. App. 1992), review denied, 618
So. 2d 209 (Fla. 1993).

\textsuperscript{228} 617 So. 2d 1058 (Fla. 1993).

\textsuperscript{229} FLA. STAT. § 322.055(1) (Supp. 1990).

\textsuperscript{230} Lite, 617 So. 2d at 1059.

\textsuperscript{231} 604 So. 2d 471 (Fla. 1992).

\textsuperscript{232} Id. at 472.
actually facilitate the breaking and entering of a dwelling.” Consequently, the court gave a plain and ordinary meaning to the statute and declined to extend the definition of “tool, machine, or implement” to articles of clothing.

C. Kidnapping

A kidnapping conviction requires proof of the forced movement or confinement of the victim during the commission of another felony. In *Walker v. State*, the supreme court revisited the question of what constitutes movement in a kidnapping context. The court reiterated the existing rule that

for a kidnapping conviction to stand, the resulting movement or confinement (a) must not be slight, inconsequential, and merely incidental to the other offense; (b) must not be of the kind inherent in the nature of the other offense; and (c) must have some significance independent of the other offense in that it makes the other offense substantially easier to commit or substantially lessens the risk of detection.

The particular circumstances in *Walker* did not meet that test, because the limited movement of the robbery victims was slight and inconsequential, and was merely incidental to the robbery.

D. Hate Crimes

The continuing escalation of hate crimes throughout Florida and the country has led to the enactment of “hate crimes” statutes. The statutes are

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233. Id. at 473.
234. Id.
236. 604 So. 2d 475 (Fla. 1992).
237. Id. at 477.
238. Id. In *Walker*, the defendant entered a convenience store, took money from the cash register, and then ordered all occupants of the store to go to the back room and lie on the floor. Three victims moved a short distance away but did not lie down. The fourth victim moved a shorter distance after the defendant threatened to shoot. The defendant immediately left the store. The court noted that the victims were not bound, blindfolded, barricaded inside a room, or dragged from room to room. Id. at 476. But see Faison, 426 So. 2d at 965-66; Marsh v. State, 546 So. 2d 33 (Fla. 3d Dist. Ct. App. 1989); Johnson v. State, 509 So. 2d 1237 (Fla. 4th Dist. Ct. App. 1987).
designed to outlaw discrimination in the selection of a crime victim. The Florida "hate crimes" law enhances the penalties for the commission of any felony or misdemeanor which is motivated by bigotry and prejudice. In this term, the United States Supreme Court upheld the constitutionality of a Wisconsin statute. The statute provided for enhancement of a criminal sentence whenever the defendant intentionally selects the victim based on the victim’s race. The Court found that the statute did not violate free speech rights.

Although the Florida Supreme Court has yet to rule on the constitutionality of the similarly drafted Florida hate crimes law, the statute was ruled constitutional in Dobbins v. State. "[I]t is the act of discrimination against people because of their race, color or religion by making them victims of crime that is prohibited and punished, not the specific opinion that leads to that discrimination."

E. Fraud

The Florida statewide prosecutor is authorized by statute to prosecute certain crimes that occur within two or more judicial circuits. The prior version of the statewide prosecutor statute provided jurisdiction for offenses which included "criminal fraud" as an actionable crime. The court in State v. Nuckolls gave an expansive definition of criminal fraud for purposes of statewide prosecutor jurisdiction. The court held that the

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243. The Florida Supreme Court is considering the constitutionality of the Florida hate crimes law in State v. Stalder, 599 So. 2d 1280 (Fla. 1992). The parties presented oral argument on September 1, 1992.
244. 605 So. 2d 922 (Fla. 5th Dist. Ct. App.), review granted, 613 So. 2d 3 (Fla. 1992).
245. Id. at 925-26.
247. Id. Effective April 8, 1992, section 16.56 (1)(a) of the Florida Statutes, was amended to delete the reference to "criminal fraud" and substitute "any crime involving, or resulting in, fraud or deceit upon any person." Fla. Stat. § 16.56(1)(a) (Supp. 1992); Ch. 92-108, § 2, 1992 Fla. Laws 906, 907 (amending Fla. Stat. § 16.56 (1991)).
Legislature intended to incorporate a variety of violations which fell within the generic heading of criminal fraud, rather than limit the reach of the statute to a particular fraud crime.\(^{249}\)

**F. Lewd and Lascivious Conduct**

Florida law authorizes the prosecution of any person who "[k]nowingly commits any lewd or lascivious act *in the presence of* any child under the age of 16 years without committing the crime of sexual battery . . ."\(^{250}\)

The defendant in *State v. Werner*\(^{251}\) was charged with a violation of the lewd and lascivious conduct statute as a result of his act of masturbating in the presence of his 13-month-old daughter. At trial, the defense moved for a judgment of acquittal based on the state's failure to prove that the child victim was actually aware of the lewd and lascivious act, as opposed to merely being present when the act occurred.\(^{252}\)

The supreme court, in an exercise of statutory interpretation, determined that the meaning of "presence" as used in section 800.04(4), "encompasses sensory awareness as well as physical proximity."\(^{253}\) The court was of the view that incorporating an awareness element was legally correct and made practical sense. The court held that

\[\text{[a]pplying the legal as well as the common-sense meaning of the word 'presence' to section 800.04(4), leads us to the conclusion that, while the child need not be able to articulate or even comprehend what the offender is doing, the child must see or sense that a lewd or lascivious act is taking place for a violation to occur.}\(^{254}\)

The child victim in this case was too young to be aware of the father's masturbation.

**G. Public Corruption**

In a potential benefit to prosecutors pursuing public corruption cases, the Fourth District Court of Appeal construed the "official misconduct"
statute in Bauer v. State. The statute defining “official misconduct” contains a general intent element of knowing that the act was unlawful, and requires a specific intent only insofar as proving that the defendant intended to cause a benefit to himself or harm to another. In this type of public corruption case, a prosecutor need only prove that the defendant acted with knowledge that the actions taken were wrongful and unlawful, and that the defendant intended to reap a benefit or harm another. This statutory analysis is likely to expand the possible uses of the statute to prosecute public corruption cases.

H. Contempt

A direct criminal contempt results when offending conduct is committed in the actual presence of a judge. It may be punished summarily by the judge who saw or heard the conduct constituting the contempt. In contrast, indirect criminal contempt, defined by Rule 3.840, concerns conduct that has occurred outside the presence of the judge. The indirect criminal contempt procedure requires that all procedural aspects of the criminal justice process be accorded a defendant, including a charging document, an answer, the right to bail, an arraignment, and a hearing. A defendant is entitled to representation by counsel, may compel the attendance of witnesses, and may testify. In Gidden v. State, the court

255. 609 So. 2d 608 (Fla. 4th Dist. Ct. App. 1992), review denied, 613 So. 2d 1 (Fla. 1993).
256. Section 839.25 of the Florida Statutes provides:
(1) “Official misconduct” means the commission of the following act by a public servant, with corrupt intent to obtain a benefit for himself or another or to cause unlawful harm to another:
(a) Knowingly refraining, or causing another to refrain, from performing a duty imposed upon him by law; or
(b) Knowingly falsifying, or causing another to falsify, any official record or official document.
(2) “Corrupt” means done with knowledge that the act is wrongful and with improper motives.
(3) Official misconduct under this section is a felony of the third degree.

FLA. STAT. § 839.25 (1991). This statute was amended in 1991 by eliminating subsection (1)(a) as a form of official misconduct.
257. Bauer, 609 So. 2d at 610.
259. FLA. R. CRIM. P. 3.840.
260. Gidden, 613 So. 2d at 460.
261. Id.
held that the defendant may be charged with indirect criminal contempt for failing to appear as required by his conditions of bond.\textsuperscript{262}

In finding the defendant guilty of indirect criminal contempt, a court is required to, at a minimum, announce oral findings on the record.\textsuperscript{263} 
"[W]ritten findings are discretionary, not mandatory."\textsuperscript{264} This is in contrast to the exacting requirements of direct criminal contempt, which mandate that the "judgment of guilt of contempt \textit{shall} include a recital of those facts upon which the adjudication of guilt is based."\textsuperscript{265}

I. Concealed Weapons

Whether a firearm is "readily accessible for immediate use" within the meaning of the concealed weapon statute\textsuperscript{266} continues to be an elusive concept. In \textit{Ridley v. State},\textsuperscript{267} the police located a gun under the driver's seat of a car, and found ammunition for the gun and a fully loaded clip under the passenger's seat. This location and accessibility of the firearm and ammunition made the firearm readily accessible for immediate use for purposes of securing a concealed weapon conviction.\textsuperscript{268} This conclusion prompted a dissent from Justice Kogan, who analogized an empty gun to one which is carried in the vehicle while "securely encased."\textsuperscript{269} The carrying of a "securely encased" weapon in a vehicle is not a crime.\textsuperscript{270} Justice Kogan found the court's contrary conclusion to be inconsistent with the statutory rationale which favors the "lawful use, ownership, and possession of firearms and other weapons."\textsuperscript{271}

J. Loitering

Although municipalities typically utilize loitering statutes for the purpose of policing areas of the community, such ordinances are of questionable constitutionality. Three such ordinances, which prohibited

\begin{thebibliography}{99}
\item 262. \textit{Id.}
\item 263. \textit{Id.} at 459.
\item 264. \textit{Id.} (citing Gidden v. State, 593 So. 2d 294, 294-95 (Fla. 5th Dist. Ct. App. 1992)).
\item 265. FLA. R. CRIM. P. 3.830 (emphasis added).
\item 266. FLA. STAT. § 790.01(2) (1992).
\item 267. 621 So. 2d 409 (Fla. 1993).
\item 268. \textit{Id.} See Ashley v. State, 619 So. 2d 294 (Fla. 1993) (an unloaded gun in a car with no ammunition anywhere in the car is not readily accessible for immediate use, but an unloaded gun underneath the seat with bullets lying in open view is readily accessible).
\item 269. \textit{Ridley}, 621 So. 2d at 410 (Kogan, J., dissenting).
\item 270. \textit{Id.; see also} FLA. STAT. § 790.25(5) (1991).
\item 271. \textit{Ridley}, 621 So. 2d at 410 (Kogan, J., dissenting).
\end{thebibliography}
loitering for the purposes of engaging in drug-related activity, soliciting for prostitution, and illegally using a controlled substance were declared unconstitutional on the basis of vagueness, overbreadth, and a violation of substantive due process. In light of the court’s clear distaste for loitering ordinances, municipalities would do well to develop other methods of protecting the citizenry.

VIII. FORFEITURE

In a case having substantial consequences for the government in forfeiture cases, the supreme court precluded the RICO forfeiture of homestead property, finding that the constitutional provision exempting homesteads from forced sale was intended to guarantee that homestead property be preserved against any involuntary divestiture by the courts. This decision may make forfeiture much more difficult in Florida, especially in view of the generous definition given to homestead property in the Florida Constitution. Because forfeiture of property is a harsh sanction, the Florida Supreme Court has strictly construed the forfeiture statute. A person challenging a forfeiture must be in a position to demonstrate a recorded title or compliance with the requirements for receiving title. For example, in Byrom v. Gallagher, there was an attempted forfeiture of an airplane. Byrom asserted an interest in the airplane based on his prior purchase of the plane. Unfortunately for the claimant, the registration of Byrom’s ownership by the Federal Aviation Administration had not taken place as of the time the airplane was seized. Consequently, the circuit court found that Byrom lacked standing to contest the forfeiture. The district court affirmed, finding that because Byrom did not have title to the airplane, he did not have standing to contest the forfeiture.

The supreme court reversed, concluding that where seized property is subject to title laws, the claimant must hold title or show compliance with

274. Holliday v. City of Tampa, 619 So. 2d 244 (Fla. 1993).
279. Id. at 26.
title requirements in order to show ownership. A court should not defeat an owner's claim for technical reasons. Instead, the supreme court cautioned judges to conduct a searching inquiry in identifying individuals who have standing to contest a forfeiture:

Consequently, in determining whether a person has standing the trial judge should consider: (1) whether that person holds legal title at the time of the forfeiture hearing or has complied with the requirements for receiving title; and (2) whether that person is in fact a bona fide purchaser. The trial judge should consider the facts surrounding the sale to determine whether the transfer is in fact a bona fide purchase. The relationship of the parties, the date the instruments were executed, the value of the property, the sale price, and canceled checks or bank deposits to show actual payment and receipt of money are all factors which the trial court should consider in determining whether the transfer is a bona fide purchase.

In an effort to promote uniformity in the case style of forfeiture actions, the Fourth District ruled in *Fink v. Holt*, that the case caption in a forfeiture case must

identify the party seeking the forfeiture and the parties claiming an interest in [the seized property], if known. A description of the property to be forfeited should be used in the caption only where the owner or some lienor is unknown. Similarly, when there is an appeal from the forfeiture proceeding, the applicable rule of appellate procedure requires that the caption contain the name and designation of at least one party on each side.

Thus, forfeiture proceedings should be brought in the name of the seizing person or authority, and against the person claiming the property.

An owner or bona fide lienholder having an interest in property subject to forfeiture may defeat a forfeiture action by establishing, by a preponderance of the evidence, a lack of knowledge the property was being used in criminal activity. A certificate of title to a motor vehicle establishes

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280. Id.
281. Id. (emphasis added).
283. Id. at 1335.
presumptive ownership of the vehicle. The presumption can be overcome only by clear and convincing evidence. 285

IX. POST CONVICTION AND APPEAL

For those lawyers handling criminal appeals, knowing when a brief is due is a critical component of the practice of law, especially to keep malpractice rates low. In Kuznik v. State, 286 the circuit court, acting in its appellate capacity, dismissed an appeal due to the untimely filing of the record and initial brief, notwithstanding that a motion for extension of time was pending before the court. On certiorari review of the dismissal order, the Second District reinstated the appeal, holding that the "motion for extension tolled the time to file his brief." 287 The court previously cautioned, however, that a frivolous motion for extension will not toll the filing time. 288

Post-conviction proceedings and collateral attacks on criminal convictions continue to demand the attention of Florida courts, particularly the Florida Supreme Court in death penalty matters. What qualifies for post-conviction relief remains a source of uncertainty. Claims of ineffective assistance of counsel, both at the trial and appellate stages, are by far the most frequently litigated issue in post-conviction and habeas corpus proceedings, but meeting the standard is difficult.

In order to prevail on a claim of ineffective assistance of appellate counsel, the petitioner must show that counsel's performance fell below an objective standard of reasonableness and, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. 289

Ordinarily, a claim that defense counsel was ineffective is tested in a post-conviction proceeding in state or federal court. An unusual twist led the Florida Supreme Court to impose discipline in the form of a sixty day suspension for an attorney who failed to properly prepare a first degree

285. In re Forfeiture of 1989 Isuzu Pickup Truck, 612 So. 2d at 697.
287. Id. at 37.
murder case. In The Florida Bar v. Sandstrom, a defendant convicted of the first degree murder of his wife succeeded in obtaining a vacation of the conviction based upon allegations of ineffective assistance of counsel because defense counsel failed to properly investigate and present evidence that would have established the wife's death was attributable to medical malpractice. The Florida Bar charged the attorney with inadequate preparation and neglecting a legal matter, and sought disciplinary sanctions.

The referee agreed the defense counsel provided deficient representation, and that those deficiencies rose to the level of an unethical violation for inadequate preparation and neglect of a legal matter. The referee recommended a one year suspension. The supreme court concluded the defense counsel was guilty of violating the disciplinary rules, but found only a sixty day suspension was warranted. The court recognized that disciplinary action for ineffective representation is unusual, but that it was justified in this case:

We note that most cases of ineffective assistance of counsel do not rise to the level of a disciplinary violation. However, the circumstances of this case involved such a flagrant lack of preparation and such deficient performance by counsel as to warrant the finding that Sandstrom violated the disciplinary rules.

Counsel would be well advised to heed this warning when preparing cases.

Additionally, a conviction or a sentence may be set aside or vacated as a result of "newly discovered evidence." In an effort to define the circumstances in which a claim may be made, the Florida Supreme Court recently reiterated the basic standard of proof. To prevail on a claim of newly discovered evidence, a defendant must satisfy two requirements. First, the asserted facts "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence." Second,

290. 609 So. 2d 583 (Fla. 1992).
291. Id.
292. Id. at 584.
293. Id. at 584 n.1.
294. See Scott, 604 So. 2d at 465; Jones v. State, 591 So. 2d 911 (Fla. 1991).
295. Scott, 604 So. 2d at 468 (quoting Hallman v. State, 371 So. 2d 482, 485 (Fla. 1979). The Scott case involved a newly discovered evidence claim in a death penalty case. Id. at 468. A co-defendant's life sentence, imposed after appellate affirmance of the defendant's death sentence, constitutes newly discovered evidence for which post-conviction
“the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial.”

Post-conviction relief may also be granted when a defendant pleads guilty or no contest to criminal charges, relying on the incorrect advice and counsel of a defense lawyer. Defense counsel’s inaccurate non-record assurances to the defendant regarding sentencing consequences may undermine the voluntariness of the defendant’s plea, provided defense counsel “knew or should have known” the representations were inaccurate. It is for this reason trial courts should conduct a thorough and exacting inquiry when accepting a plea to ensure the defendant has no other understanding regarding the consequences of a plea.

The defense counsel must make every effort to correctly communicate the facts and merits of a plea bargain offered by the state to the client. The failure to do so may result in the granting of post-conviction relief, provided the defendant is in a position to prove (1) that the defense counsel failed to communicate a plea offer or misinformed the defendant concerning the penalty, (2) that had the defendant been correctly advised, the defendant would have accepted the plea offer, and (3) that the defendant’s acceptance of the plea offer would have resulted in a lesser sentence.

Uniformity of judicial decisions extends to treating co-defendants similarly for appellate purposes. A defendant is entitled to post-conviction relief in a situation in which the defendant raised errors which were not found to be reversible in his original appeal, although the very same errors were found reversible in the co-defendant’s later appeal by a different appellate panel of the same court. Post-conviction relief is necessary in order to avoid “diametrically opposite results [which] are ‘manifestly unjust, unfair and confound our search for uniformity.’”

Coram nobis, as an extraordinary writ, is rarely utilized. Its use is limited to cases in which a defendant is no longer in custody on the sentence which is collaterally attacked. The procedure for obtaining the writ is somewhat non-traditional. A petition for writ of error coram nobis relief is authorized, where both defendants were equally culpable and the evidence would enable the defendants to be treated similarly. Id. at 468-69.

296. Jones, 591 So. 2d at 915 (emphasis added).
301. Richardson v. State, 546 So. 2d 1037, 1039 (Fla. 1989).
must be filed in the original trial court if no appeal has been taken from the judgment and sentence sought to be vacated; otherwise, the petition must be filed with the appellate court which affirmed the conviction. The purpose of the writ of error coram nobis “is to correct fundamental errors of fact,” as opposed to errors of law. Because the coram nobis remedy is designed to correct a miscarriage of justice, no express time limitation exists to bar the filing of the petition. The passage of time between the conviction and the filing of a petition for writ of error coram nobis, standing alone, does not constitute the prejudice necessary to support a finding of laches as a reason for denying consideration of the writ. In the appropriate case, the writ of error coram nobis can be a useful and extremely potent tool for obtaining relief.

X. CONCLUSION

The Florida courts continue to chart out new territory in deciding criminal cases. This year, in a special effort to bring solutions to the ever growing crime problem, the Florida Legislature made the criminal justice system the focus of its attention. Rather than press a meaningless “tough on crime” approach, the Legislature addressed the principal cause of problems in the criminal justice system—a lack of funding—and prioritized the use of resources. The result is one of the most comprehensive and sweeping revisions of sentencing law and corrections policy. The courts and lawyers will be busy applying the new laws and resolving new problems.

The courts have not and cannot solve all the persistent issues which plague the system, but the Florida Supreme Court has used this past year as an opportunity to provide leadership and guidance to the courts and to litigants. The Florida courts continue on the path of using common sense and reason to safeguard individual rights and promote fairness to every participant in the criminal justice system. Litigants should recognize that fine line when attempting to apply legal precedent and when charting new waters.

304. Id. at 949.
305. Id.
Family Law: 1993 Survey of Florida Law

Cynthia L. Greene*

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This article reviews Florida cases in family law that were decided in 1992 and through the end of July, 1993.
I. INTRODUCTION

Unlike prior years in which the Florida Supreme Court was relatively silent with respect to marital and family law issues, the past two years brought a virtual torrent of family law opinions from the supreme court, twelve in all, most of which reaffirmed established legal principles, but several of which significantly altered the course of marital and family law in Florida.
At the appellate level, the past two years brought a series of decisions reflecting at least four apparent trends, and six areas of distinct conflict in the opinions of the various appellate courts.

II. AGREEMENTS

A. Antenuptial Agreements

The first trend that developed in the appellate decisions rendered during the survey period was a clear movement toward very literal and strict interpretation of the provisions of both antenuptial and postnuptial (settlement) agreements, such that the relief or remedies available to the parties entering into such agreements will be limited to what is precisely provided for by the terms of the agreement. In *Genunzio v. Genunzio*, the parties entered into an antenuptial agreement pursuant to which they agreed, in the first paragraph of the agreement, that the property owned by them at the time of the agreement would remain each person's separate property. The second paragraph of the agreement required that all property acquired during the marriage would be titled in a joint tenancy between them, and said property would be equally divided between them upon dissolution of

1. The four trends which appear in the decisional law are a line of opinions indicating that antenuptial and postnuptial agreements will be strictly and literally interpreted in accordance with the precise language used by the parties; the development of a factual standard for the award of permanent alimony; an inclination towards interpretation of the law so as to provide the maximum ability to enforce alimony and child support awards; and a tightening of the standards under which a trial court's imputation of income to a spouse in alimony and child support cases will be affirmed.

2. The six areas of distinct conflict in the opinions of the appellate courts concern the questions of whether a trial court may extinguish an obligor's temporary support arrearages by the entry of a final judgment; whether a requirement that a spouse maintain medical insurance on behalf of the other spouse or minor children must contain a specific dollar limitation as to the amount of the obligation; whether a child's conduct toward the parent owing a duty of support on behalf of the child may be so egregious as to warrant a termination of that parent's support obligation; whether the enhanced value of premarital or non-marital assets for equitable distribution purposes includes all of the enhanced value however caused or whether such value includes only that portion of the enhancement directly attributable to the marital labors or funds devoted thereto; when and under what circumstances may a party claim an entitlement to the fair rental value of property occupied exclusively by a co-tenant former spouse; and whether an income deduction order may be entered solely to enforce an alimony obligation where the case does not involve minor children.

their marriage. Following the execution of this agreement, the husband purchased a home with his separate funds, and titled the home in his sole name.

At the time of the dissolution of marriage, the trial court determined that the wife was entitled to a partial interest in the home purchased by the husband during the marriage. The Second District Court of Appeal reversed, holding that the wife was entitled to a fifty percent interest in the home, and not the partial interest awarded by the trial court. 4

In reversing, the district court held that the “plain meaning” of the antenuptial agreement was just that, and while the wife was to have no interest in the property of the husband owned at the time of the agreement, she was entitled to one-half of all property acquired during the marriage. 5 The district court based its decision upon a literal reading of the agreement, noting that the second paragraph of the agreement did not exclude from its operation property acquired by either party after the agreement with property owned at the time of the agreement, nor did the provisions of the agreement in this regard distinguish between property acquired with non-marital or marital funds. 6 The sole criterion for the operation of the paragraph was whether property was acquired during the marriage. The court expressed no hesitancy or reluctance in so interpreting the agreement. The court reasoned that, “[i]f the husband’s apparent decision not to except from paragraph 2 property purchased with nonmarital funds was unwise in hindsight, that is not something from which a court of law is entitled to protect him. We must construe the contract in accordance with its plain meaning.” 7

Following the decision in Genuzio, the Second District rendered its decision in Osborne v. Osborne, 8 again limiting the parties to an antenuptial agreement to the strict language of their agreement. In Osborne, the husband and wife married when they were both nineteen years of age. Less than two years after they married, the parties divorced, and pursuant to their settlement at the time, the wife received one-half of the equity in the home ($1,012.50), her car, and the household furniture. She received no alimony or other form of support although the husband did agree to pay her attorney’s fees of $150. Several years later, the parties decided to remarry but the husband, upset about how he had been “taken to the cleaners” in

4. Id. at 130.
5. Id. at 131.
6. Id.
7. Id.
their earlier divorce, demanded that the wife execute an antenuptial agreement. The wife did so.

The antenuptial agreement entered into by the parties provided that the wife would waive all of her rights to any property solely owned by the husband. With respect to alimony, the agreement provided that any alimony to be paid by the husband would be rehabilitative in nature, and would not exceed the sum of $1000 multiplied by the number of years of the marriage. The full amount of such alimony, as calculated under the formula set forth in the agreement, was to be paid to the wife in a lump sum provided that the husband possessed the ability to pay the amount in a lump sum payment. The determination of the husband's ability to pay was to be made solely by the husband, and the agreement provided that his decision as to his own ability to pay was to be "controlling and final." The agreement further provided that if the husband decided that he lacked the ability to pay the lump sum, then the alimony would be paid to the wife at the rate of $83.33 per month "for so long a period of time as the parties shall have been married at the time their marriage is dissolved."

Fifteen years after the execution of the antenuptial agreement, the parties divorced. The husband sought to restrict the wife's alimony award to the formula provided in the antenuptial agreement, but the trial court determined that, despite the detailed language of the agreement regarding the manner in which the wife's alimony entitlement was to be calculated, the agreement did not contain any type of waiver of the wife's right to seek modification of the amount of alimony provided for in the agreement, nor did the agreement contain a waiver of the wife's right to seek permanent alimony. As such, the trial court, noting that a substantial change in the circumstances of the parties occurred following the execution of the antenuptial agreement, awarded the wife substantially more alimony than the $83.33 per month as provided in the agreement. Additionally, the court awarded the wife permanent alimony. Moreover, the trial court awarded the wife the parties' former marital home which had been owned solely by the husband.

The Second District Court of Appeal reversed the award of the home to the wife, finding that the parties' antenuptial agreement clearly specified that the wife had waived any claim to the husband's solely owned property. However, the district court affirmed the trial court's alimony

9. Id. at 859.
10. Id.
11. Id. at 860.
12. Id.
awards, upholding the authority of the trial court to grant relief not specifically waived by the provisions of an antenuptial agreement. 13

Similarly, in Ryland v. Ryland, 14 the Fourth District Court of Appeal determined that the parties to an antenuptial agreement were bound by the express language of their agreement, but where the agreement did not specifically address a particular issue or waive a particular right, the trial court was free to act within the bounds of its discretion as to that issue or right. 15 The parties in Ryland had entered into a “homemade” antenuptial agreement which provided only that the wife waived any claims to the husband’s premarital property and if the parties divorced, the husband had the right of first refusal to purchase the wife’s interest in their home. In their subsequent divorce case, the trial court awarded the wife lump sum alimony, to be paid from the husband’s separate assets, and attorney’s fees. The district court reversed in part and affirmed in part, finding that the trial court had the authority to award both alimony and attorney’s fees to the wife because the antenuptial agreement neither mentioned nor waived the wife’s right to seek such relief. 16 The court opined that the specific language of the antenuptial agreement only precluded the wife from making a claim against the husband’s separate assets. 17 Therefore, the trial court was empowered to award the wife the relief she sought, provided that the court did not award relief to the wife specifically from the husband’s separate assets. 18

The foregoing trend continued to develop in the decisional law rendered during the first half of 1993. For example, in White v. White, 19 the trial court denied alimony to the wife on the basis that she had waived her claim to alimony in an antenuptial agreement. The Second District reversed, finding that nowhere in the agreement did the parties use the word “alimony,” and also, that the agreement lacked any express waiver of the wife’s right to seek future support. 20

Similarly, in Timble v. Timble, 21 the parties agreed in an antenuptial

13. Osborne, 604 So. 2d at 860.
15. Id. at 140-41.
16. Id. at 140.
17. Id.
18. Id.; In Porter v. Porter, 593 So. 2d 1120, 1121 (Fla. 4th Dist. Ct. App. 1992), the Fourth District reversed the trial court’s award to the wife finding that the award “deviated from [the terms of the parties’] contract.”
20. Id. at 734.
agreement that the husband would have "full rights, liberty [and] authority . . . to use, enjoy, . . . convey, bequeath, mortgage, grant, sell, invest, reinvest, alienate and dispose of . . . every part of any stock or other interest, or security he owns directly or indirectly, or may hereafter acquire" in a certain corporation.\textsuperscript{22} The wife, at the time of the dissolution of marriage, sought an award of the enhanced value of the husband's stock holdings, and the district court determined that the wife had clearly waived her right to an interest of any kind in the husband's stock holdings by the clear language of the agreement.\textsuperscript{23}

\textbf{B. Postnuptial (Settlement) Agreements}

The same trend towards strict and literal interpretation of agreements is found in the appellate decisions pertaining to postnuptial or settlement agreements, including one decision rendered by the Florida Supreme Court. In \textit{Pimm v. Pimm},\textsuperscript{24} the supreme court was called upon to answer a question certified by the Second District Court of Appeal, specifically:

\begin{quote}
[\textsc{\textit{[}I\textsc{]}s the postjudgment retirement of a spouse who is obligated to make support or alimony payments pursuant to a judgment of dissolution of marriage a change of circumstance that may be considered together with other relevant factors and applicable law upon a petition to modify such alimony or support payments?}^{25}\]
\end{quote}

The parties in \textit{Pimm} had entered into a settlement agreement which did not address the subject of the husband's possible or potential retirement. Rather, the agreement required the husband to make alimony payments to the wife until such time as either party died or the wife remarried. When the husband retired, many years after the execution of the agreement, he sought to reduce the amount of his alimony payments to the wife based upon a decrease in his income. The wife contended that the silence of the agreement upon the subject of retirement, coupled with the requirement that the alimony payments continue as long as she was unmarried, indicated that the husband had agreed to pay alimony regardless of his retirement. The supreme court disagreed, finding that although "it would be a better practice to incorporate consideration of retirement and what will happen in the event of retirement in an agreement," the silence of an agreement on the subject

\textsuperscript{22} Id. at 1189.

\textsuperscript{23} Id.

\textsuperscript{24} 601 So. 2d 534 (Fla. 1992).

\textsuperscript{25} Id. at 535.
will not preclude a trial court from considering a party’s retirement as part of the total circumstances in determining if sufficient changes in circumstances exist to warrant a modification.26

The silence of a settlement agreement as to a particular issue was also addressed by the Fourth District Court of Appeal in Reynolds v. Diamond.27 In Reynolds, the parties had entered into a settlement agreement pursuant to which the husband agreed to provide for the “costs of education” with respect to college, postgraduate and professional training for the parties’ two children. To be sure, twelve years after the execution of the agreement, the parties were before the trial court upon the issue of the meaning of the words “costs of education,” with the wife contending that the term included all expenses associated with higher education and the husband arguing that the term meant only tuition and related expenses.28

At the appellate level, the husband argued that had he intended to agree to pay for every expense attendant to a college education, such intent would have been set forth in the agreement. The district court, however, determined that the converse was true, reasoning that had the husband wished to limit his contribution, “such language could have been included [in the agreement] to make that intention clear.”29

The First District also so held in its 1993 decision of Maclaren v. Maclaren.30 Therein, the husband sought to terminate his permanent alimony obligation to the wife based upon his allegation that the wife had relocated to New Zealand and was living with a man who was substantially contributing to her support. The trial court denied the modification on the basis that the parties’ agreement did not mention cohabitation, and that such silence could be interpreted as precluding a reduction or termination of alimony upon such grounds. The First District refused to interpret the silence of the agreement as a waiver of relief, and remanded the case to the trial court for a determination of the merits of the husband’s claims.31

The Second District, in line with its decisions regarding antenuptial agreements, also determined, with respect to postnuptial agreements, that the clear and specific language used by the parties in a postnuptial agreement will be binding upon the parties. In Agliano v. Agliano,32 the parties were

26. Id. at 537.
27. 605 So. 2d 525 (Fla. 4th Dist. Ct. App. 1992).
28. Id. at 525-26.
29. Id. at 527.
31. Id. at 105-06.
divorced after twenty-seven years of marriage, and entered into a settlement agreement pursuant to which the husband agreed to pay the wife rehabilitative alimony for a period of fifteen years. The parties agreed that they both irrevocably waived any right to modify the alimony provisions of their agreement. After the divorce, the wife was diagnosed with incurable cancer. She sought a modification of the alimony provisions of the settlement agreement and contended that her agreement to accept rehabilitative alimony was impliedly conditioned upon her capacity to achieve a self-supporting status, which, because of her illness, was no longer possible. Although the trial court found that there was no question that the wife's illness had "exacted a financial toll not anticipated or foreseen at the time of the divorce," the court nevertheless dismissed the wife's request for modification. The Second District affirmed the dismissal, finding that the parties' agreement, "in unmistakable terms," defined the boundaries of the parties' financial relationship, and those "boundaries" included a complete waiver of either party's right to seek modification. The court noted that there was "no indication in the agreement" that any event would "devitalize" the mutual waivers of the right to modify the terms of the agreement, and, in very strong terms, held that the wife's illness, "however unanticipated, however unfortunate, does not detract from the unqualified terms of [the] agreement."

All of the foregoing decisions, when read together, appear to indicate a clear trend at the appellate level, with respect to the interpretation of antenuptial and postnuptial agreements that: (1) if the parties intend to place any limitations upon their rights or remedies, they must clearly state so; (2) mere silence in an agreement as to a particular issue will not be interpreted as a limitation or a waiver; and (3) if the parties specifically waive a right or remedy in an antenuptial or settlement agreement, that waiver will be upheld irrespective of the circumstances or conditions which may later occur.

III. ALIMONY

A. Permanent Alimony

The single most significant development in the case law rendered

33. Id. at 598.
34. Id.
35. Id.
during the past two years was the attempt made by several of the district courts of appeal to define the factual circumstances under which an award of permanent alimony is appropriate. In fact, decisions on this subject may have yielded a new "test" to be applied to determine whether permanent alimony should be awarded in a given case. Although a total of eight decisions were rendered addressing this issue during the survey period, nearly all of the decisions trace their antecedent to Geddes v. Geddes, a 1988 opinion of the Fourth District Court of Appeal.

In Geddes, the Fourth District affirmed the trial court's denial of alimony to the wife finding "no genuine inequities . . . created by [the] dissolution" of marriage without permanent alimony. In so finding, the Geddes court commented upon the fact that no minor children were born of the marriage, and that "no skills were lost" by the wife as a result of the marriage. This latter point subsequently became the standard for the award of permanent alimony in cases decided between 1991 and the present.

In Spencer v. Spencer, decided in December of 1991, the First District Court of Appeal reversed a rehabilitative alimony award following a four year marriage, finding that the evidence presented at the trial level did not establish "that the wife is without the means of self-support, as a result of anything that has transpired during the marriage."

Shortly thereafter, in LaHuis v. LaHuis, the Third District Court of Appeal, addressing the denial of rehabilitative alimony, affirmed the trial court's holding, noting that the wife's "earning potential after the marriage was not diminished."

Then, in early 1992, the Second District Court of Appeal rendered its decision in Kremer v. Kremer, and reversed the trial court's award of permanent alimony to a thirty-seven year old wife following a six year marriage. In reversing, the Second District, citing Geddes and Spencer, opined that there was no showing that the wife was without the means of self-support "as a result of anything that [had] transpired during the marriage." The court noted that although the parties' respective incomes

36. 530 So. 2d 1011 (Fla. 4th Dist. Ct. App. 1988).
37. Id. at 1018.
38. Id.
40. Id. at 554 (emphasis added).
41. 590 So. 2d 557 (Fla. 3d Dist. Ct. App. 1991).
42. Id. at 558.
44. Id. at 218.
45. Id. at 216 (emphasis added).
were disparate, that disparity did not result "in any substantial way from the marriage," because the parties' earnings levels were disparate before they married.  

Thereafter, the Fourth District Court of Appeal, in Wright v. Wright, reversed the trial court's permanent alimony award to a thirty-nine year old wife following a five year marriage. The court held, as in the prior decisions, that the evidence did not establish that the wife was unable to provide for her own support "as a result of anything that transpired during the marriage."  

Then, in Gregoire v. Gregoire, the Second District Court of Appeal attempted to explain the meaning of the term "transpired during the marriage" by comparing the factual circumstances therein to the factual circumstances of Kremer. According to the court, three specific factual circumstances distinguished the two cases and permitted the award of permanent alimony in Gregoire: (1) the parties had two minor children for whom the wife was responsible; (2) the parties had specifically agreed that the wife would stop working, permanently terminating her career, to become a full-time homemaker; and (3) the achievement by the husband of his substantial income producing ability was shown to have been directly attributable to the wife having financially supported the family while the husband's income was relatively minimal and he was beginning his employment. Thus, the wife's inability to provide for her own support and the disparity between the parties' earnings level were both the result of events and circumstances that transpired during the marriage.

In 1993, the Fourth District Court of Appeal decided the case of Cornell v. Smith. Tracing its decision therein back to Geddes, the court opined that "the courts of this state have consistently held that mere disparity in incomes is not sufficient to justify an award of permanent alimony where the wife is relatively young and her earning capacity has not been impaired as a result of the marriage."

Then, following a rendition of all of the above decisions of the various appellate courts, the Fifth District Court of Appeal determined, en banc, the

46. Id. at 215.
47. 613 So. 2d 1330 (Fla. 4th Dist. Ct. App. 1992).
48. Id. at 1333 (emphasis added).
49. 615 So. 2d 694 (Fla. 2d Dist. Ct. App. 1992).
50. Id. at 694-95.
51. Id. at 695.
52. 616 So. 2d 629 (Fla. 4th Dist. Ct. App. 1993).
53. Id. at 630 (emphasis added).
case of *Kennedy v. Kennedy*, 54 in which it reversed the trial court's permanent alimony award and adopted what it termed the "doctrine of comparable fairness." 55 In *Kennedy*, the Fifth District determined that "comparable fairness" can only be achieved if the trial courts specifically state the factors upon which they base alimony awards and the weight given to those factors, so that the appellate courts can ensure that similar results are obtained in similar cases. 56 In other words, the propriety and type of alimony award (permanent versus rehabilitative) should be decided by comparison with the specific facts of other cases in which alimony was either awarded or denied. 57

B. *Rehabilitative Alimony*

With respect to rehabilitative alimony, the cases yielded a series of decisions from every district court of appeal which reiterated certain well-established principles, the two most common being: (1) rehabilitative alimony is not appropriate where the recipient demonstrates no need for new training or new skills; and (2) rehabilitative alimony must not be awarded in the absence of an evidentiary showing that the recipient has some ability to become self-supporting following training or education.

In the first line of decisions, the appellate courts consistently reversed rehabilitative alimony awards in cases in which the recipient did not demonstrate an entitlement to any type of alimony in an attempt to reverse a tendency on the part of trial judges to use rehabilitative alimony awards as a means of providing the wife with "something" following a dissolution of marriage.

In *Spencer v. Spencer*, 58 the wife was unemployed and was receiving welfare benefits at the time of the parties’ marriage. When the parties

54. 622 So. 2d 1033 (Fla. 5th Dist. Ct. App. 1993).
55. *Id.* at 1033.
56. *Id.*
57. In reality, the doctrine of "comparable fairness" appears to describe that which the appellate courts have been doing for quite some time. For example, in *Gregoire*, the Second District went to great lengths to explain the difference between the facts therein (in which the trial court's award of permanent alimony was affirmed), and the facts in *Kremer* (in which the trial court's award of permanent alimony was reversed). *See Gregoire*, 615 So. 2d at 694-95. The significance of the *Kennedy* case is the Fifth District's insistence upon specific findings of fact as to the factors considered and the weight given those factors so that the same set of factors or weighing of factors will lead to the same or similar results in all cases. *See Kennedy*, 622 So. 2d at 1033.
58. 590 So. 2d at 553.
divorced four years later, the wife was employed on a full-time basis, yet the trial court awarded the wife "rehabilitative alimony." The First District Court of Appeal reversed the award, finding that the record failed to demonstrate any need on the part of the wife for the "redevelopment" of skills or for "training necessary to develop potential supportive skills."  

In Lozano-Ciccia v. Lozano, the Third District Court of Appeal affirmed the trial court's refusal to grant rehabilitative alimony following a short-term marriage to a wife who was a medical doctor in Peru but not licensed in the United States, and who voluntarily elected not to seek employment in this country. The district court affirmed the denial of alimony because the wife was found to have had a number of "marketable skills."  

In Mahaffey v. Mahaffey, the trial court's rehabilitative alimony award was reversed where the evidence established that the wife was a fully employed college graduate who was earning more at the time of the dissolution of marriage than she had earned during the marriage. Because the wife did not indicate the need or the intent to further her education or training, the rehabilitative alimony award was erroneous.  

In the second line of cases, the district courts attempted to correct another apparent tendency on the part of the trial courts to award rehabilitative alimony in circumstances where the more appropriate award would have been permanent alimony. The district courts have had to remind the trial courts that rehabilitative alimony is to be awarded only in cases where the evidence establishes that the recipient will be able to become self-supporting in the standard enjoyed during the marriage as a result of the use of the award to obtain job skills or training.  

In Lanier v. Lanier, the First District Court of Appeal reversed a rehabilitative alimony award to a forty-seven year old wife who had been married for twenty-five years, and was seeking to become employed as a teacher who would then earn approximately $20,000 per year. Noting that the husband earned $50,000 per year, the district court opined that the

59. Id. at 554.  
60. 599 So. 2d 718 (Fla. 3d Dist. Ct. App. 1992).  
61. Id. at 718.  
62. Id.  
63. 614 So. 2d 649 (Fla. 2d Dist. Ct. App. 1993).  
64. Id. at 650.  
65. Id.  
67. Id. at 810.
wife's potential teacher's salary would never permit her to "support herself at a standard of living commensurate with that established during the marriage," and, therefore, the award of rehabilitative alimony instead of permanent alimony was erroneous.68

In Grant v. Grant,69 the First District again reversed a rehabilitative alimony award where the trial record revealed "neither any previous skills the [wife] could redevelop nor the potential for developing new supportive skills."70 Finding that the evidence did not show any ability on the part of the wife to become self-supporting, "or any substantial capacity for rehabilitation," the court remanded the case for the entry of an award of permanent alimony.71

In Bible v. Bible,72 the Third District Court of Appeal reversed the trial court's award of rehabilitative alimony to a wife following a twenty-five year marriage, where, despite evidence of the wife's employment as a receptionist, the evidence also established that her earnings would never approach the husband's earnings level.73

Similarly, in Adams v. Adams,74 a rehabilitative alimony award following a twenty year marriage was reversed upon the basis that the wife's potential earnings as a teacher would not provide her a level of self-support commensurate with the standard of living established during the marriage, and permanent periodic alimony was awarded in its place.75

In Steinberg v. Steinberg,76 the trial court awarded rehabilitative alimony for a period of one year to a wife suffering from severe emotional problems who had been unemployed for over eight years. In reversing this award, the district court opined that "[o]nly if the wife is capable of establishing a standard of living commensurate with the standard set throughout the marriage . . . is an award of rehabilitative alimony proper."77

68. Id. at 811.
70. Id. at 68.
71. Id. at 68-69.
73. Id. at 361.
74. 604 So. 2d 494 (Fla. 3d Dist. Ct. App. 1992), review denied, 614 So. 2d 502 (Fla. 1993).
75. Id. at 496.
76. 614 So. 2d 1127 (Fla. 4th Dist. Ct. App. 1993), review denied, __ So. 2d __ (Fla. 1993).
77. Id. at 1129.
C. Temporary Alimony

An interesting development in the decisional law arose in 1992 with respect to whether a trial court may extinguish, in a final judgment, temporary alimony arrearages which accrued prior to the entry of the final judgment. Although two cases decided in 1992 held that the trial court may not do so, a third case held otherwise.79

In Grant v. Grant,80 the husband owed the wife substantial sums of money pursuant to the trial court's temporary support order. However, the trial court's final judgment relieved the husband of the arrearages. The First District Court of Appeal reversed, determining that an "unchallenged" temporary support order carries with it the presumption of an ability to comply with the order on the part of the payor. Inasmuch as the husband had never moved for modification of the terms of the temporary order, the district court held that the trial court erred in relieving the husband of his obligation to pay the accrued arrearages.81

Similarly, in Burdick v. Burdick,82 the Fourth District Court of Appeal held that the trial court erred in discharging, through the entry of a final judgment, the arrearages accrued pursuant to an agreed temporary support order prior to the entry of the final judgment.83 In Burdick, the husband had requested a modification of his temporary obligation and the trial court had granted the modification. The district court found no error in the trial court's granting of the requested modification, but held that the trial court erred in entering a final judgment which "effectively discharged" the arrearages that had accrued prior to the filing of the modification request.84

However, after deciding Burdick, the Fourth District decided the case of Allison v. Allison.85 Therein, at the time of the entry of the final judgment, the husband owed the wife the sum of $7,500 pursuant to the terms of a temporary support order. The trial court, in the final judgment, reduced the amount of the arrearages to $3,500. The district court affirmed,

78. See Grant, 603 So. 2d at 68; Burdick v. Burdick, 601 So. 2d 632 (Fla. 4th Dist. Ct. App. 1992).
81. Id. at 69.
82. 601 So. 2d 632 (Fla. 4th Dist. Ct. App. 1992).
83. Id. at 634.
84. Id.
85. 605 So. 2d 130 (Fla. 4th Dist. Ct. App. 1992), review denied, 618 So. 2d 208 (Fla. 1993).
finding that a trial court “can modify a temporary alimony award before final judgment is entered.”

Unfortunately, the Allison case recites few facts. The opinion does not indicate whether the husband had requested a modification of his temporary support obligation or whether the trial court modified the husband’s obligation upon its own findings from the evidence presented at the final hearing. Furthermore, the opinion does not indicate if, in fact, there was a request for modification by the husband, and whether such a request was made by written motion or by oral request at the time of the final hearing. Thus, from the language of the Allison opinion, it appears that the decision may conflict with both Grant and Burdick to the extent that the latter cases require that some type of request for a reduction in temporary support be made in order to authorize the trial court to reduce or eliminate temporary support arrearages in a final judgment.

D. Lump Sum Alimony

Although it is now established law that lump sum alimony may be awarded either for the purpose of equalizing a distribution of marital assets and liabilities, or as a means of providing support to the recipient spouse, one decision rendered in 1992 makes it clear that such purposes are the only two purposes for which such alimony may be awarded.

In Harvey v. Harvey, the trial court attempted to resolve a recurring problem which may, in fact, have no resolution, at least under the present status of our law. Therein, the wife contributed immeasurably to the husband’s career, enabling the husband to find and obtain employment that had the potential to double his salary over that which he had earned during the years in which the parties were married. The trial court, believing that the wife was entitled to be recompensed in some manner for her efforts on behalf of the husband (which would now benefit only the husband), awarded her the sum of $60,000 as lump sum alimony. The district court reversed, holding that the Florida courts recognize only two types of lump sum alimony: (1) that relating to support and requiring a showing of need

86. Id. at 131.
87. But cf. Handsel v. Handsel, 614 So. 2d 631, 631 (Fla. 3d Dist. Ct. App. 1993) (affirming an award of lump sum alimony made for the purpose of partially compensating the wife “for the overwhelming medical expenses incurred and anticipated because of the husband’s egregious behavior.”). Such an award, of course, can be viewed as serving a support purpose.
89. Id. at 1252.
and ability to pay; and (2) that pertaining to an equitable division of the parties' marital assets and liabilities. Because the lump sum alimony award in this case did not pertain to either recognized type of lump sum alimony, it was reversed.

E. Enforcement

In what appears to be another emerging trend in Florida law, the appellate courts, as a group, rendered a series of 1992 decisions liberally interpreting existing law in a manner calculated to provide maximum assistance to parties seeking to enforce alimony and child support awards.

With respect to alimony awards, the First District held that pre-judgment interest must be awarded on amounts due for alimony and child support arrearages; the Second and Fifth Districts held that the statute of limitations does not apply to proceedings to enforce alimony or child support orders; the Third District held that an equitable lien for the purpose of enforcing an alimony award could be applied to homestead property; and the Fourth District held that an income deduction order may be entered solely to enforce an alimony award, even in the absence of minor children, and that an incarcerated husband's assets may be sequestered to secure alimony and child support awards.

In Romans v. Romans, the trial court refused to award pre-judgment interest with respect to the alimony and child support arrearages which the wife was attempting to collect. The First District simply held that the wife was "entitled" to such interest as a matter of law.

In Frazier v. Frazier, the wife filed a petition for registration of the parties' twenty-seven year old Colorado divorce decree. The district court held that the husband's statute of limitations defense was inapplicable.

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90. Id.
91. Id.
93. See Frazier v. Frazier, 616 So. 2d 575, 579 (Fla. 2d Dist. Ct. App. 1993); Popper v. Popper, 595 So. 2d 100, 103 (Fla. 5th Dist. Ct. App.), review denied, 602 So. 2d 942 (Fla. 1992).
94. See Radin v. Radin, 593 So. 2d 1231, 1231-32 (Fla. 3d Dist. Ct. App.), review denied, 605 So. 2d 1265 (Fla. 1992).
98. Id. at 93.
because proceedings to enforce alimony and child support orders are equitable in nature, and therefore, not barred by a statute of limitations in Florida.\textsuperscript{100}

Similarly, in \textit{Popper v. Popper},\textsuperscript{101} the wife sought to enforce and collect alimony due her from 1972. The husband's alimony obligation was based upon the provisions of a settlement agreement which was incorporated into a final judgment several years after its execution. The husband defended on the basis that the wife's claim was barred by the statute of limitations. The Fifth District held that the wife's claims stemming from the agreement were, in fact, barred by the statute of limitations, but the claims arising after the incorporation of the agreement into a judgment were not so barred.\textsuperscript{102} The court opined that the enforcement of periodic alimony and child support orders are equitable proceedings in nature, and such obligations are not barred by the running of the statute of limitations.\textsuperscript{103}

In \textit{Radin v. Radin},\textsuperscript{104} the trial court, in order to enforce its earlier alimony award which had been unpaid by the husband, imposed an equitable lien against the husband's post-judgment separate property, which the husband was in the process of selling. The trial court specifically found that the husband had engaged in a "pattern of egregious conduct" represented by significant nonpayment of alimony for a period of nearly ten years. Although the district court reversed the trial court's order because the amount of the lien could not be determined from the face of the judgment, the court upheld the authority of the trial court to impose an equitable lien upon homestead property in order to enforce an alimony award.\textsuperscript{105}

In \textit{Coleman v. Coleman},\textsuperscript{106} the parties were divorced in 1964, at which time the husband was ordered to pay alimony. He did so until 1989, when he sought a modification which was ultimately denied. Eventually, the trial court entered a judgment against the husband, and then entered an income deduction order. The husband appealed, contending that an income deduction order is not proper when no minor children reside with the wife receiving alimony. The Fourth District held otherwise, opining that the "unmistakable language" of section 61.1301(1)(a) of the Florida Statutes, is

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100. \textit{Id.} The district court, however, noted that the husband could still raise the affirmative defense of laches. \textit{Id.}
101. 595 So. 2d 100 (Fla. 5th Dist. Ct. App. 1992).
102. \textit{Id.} at 103.
103. \textit{Id.}
104. 593 So. 2d 1231 (Fla. 3d Dist. Ct. App. 1992).
105. \textit{Id.} at 1232-33.
106. 614 So. 2d 532 (Fla. 4th Dist. Ct. App. 1993).
\end{flushright}
that the enforcement of any alimony obligation requires an income deduction order. In so holding, however, the Fourth District recognized conflict with the Second District’s opinion in Schorb v. Schorb. This conflict was resolved by the Florida Supreme Court, which approved the Fourth District’s holding in Coleman.

F. Security/Insurance

The single clearest area of conflict between the various appellate courts in Florida deals with whether a trial court must specify a dollar amount limitation upon the financial exposure of a spouse who has been required to maintain medical insurance on behalf of the other spouse, or to pay for the costs of uncovered medical expenses incurred by the other spouse. The decisions addressing this question appear to routinely confuse and overlap the two issues—maintaining medical insurance as distinct from providing for uncovered medical expenses—and the various districts are clearly in conflict.

With respect to medical insurance, the First District Court of Appeal has held, in Ginsburg v. Ginsburg, that “it is error for the court to require the husband [to] secure medical coverage [for the wife] without setting an amount or limitation on that obligation.”

In the Second District, in Kremer v. Kremer, the district court reversed the trial court’s order that the husband maintain medical insurance on behalf of his former wife for a period of three years, and held that the trial court was required to place “reasonable limitations on the maximum costs to the husband” regarding the insurance requirement.

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107. Id. at 533.
109. Coleman v. Coleman, 18 Fla. L. Weekly S546 (Fla. Oct. 21, 1993) (applying the plain meaning rule of statutory construction in finding that section 61.1301(1)(a) was not ambiguous, and that it was unnecessary, therefore, to look to legislative intent).
110. The following discussion addresses only the requirement that a party provide either medical insurance or the costs of medical expenses with respect to the other party as a form of alimony and not awards made as a form of child support.
112. Id. at 656-57.
114. Id. at 218. The Second District has consistently so held. For example, in Burgess v. Burgess, 576 So. 2d 1348 (Fla. 2d Dist. Ct. App. 1991), the court held that “the amount of money the husband should pay for . . . health insurance [for the wife] be limited to the amount the husband currently pays to maintain health insurance coverage for his spouse under his present insurance policy.” Id. at 1348.
In the Fourth District, the waters become quite muddy. Three medical expense and medical insurance cases were decided by the Fourth District in 1992: one dealing solely with a requirement that insurance be maintained, and two dealing with both a requirement that insurance be maintained and that the payor provide for uncovered medical expenses.

In *Blythe v. Blythe*, the trial court had ordered the husband to maintain medical insurance on the wife's behalf, of a type and an amount equal to the insurance that had been provided during the intact marriage by the husband's employer. On appeal, the husband contended that the order was erroneous because the trial court had failed to set a monetary limit on the cost of the health insurance. The Fourth District disagreed, finding that the trial courts are not required to limit a payor's responsibility to "a specific dollar amount."

Thereafter, in *Watford v. Watford*, where the trial court had ordered a husband to provide for both medical insurance and uncovered medical expenses, the Fourth District again held that no specific dollar limitation was required, and that a limitation "of reasonable and necessary medical expenses [is] an adequate limitation" as either party could apply for relief from such expenses should the circumstances require it.

However, in *Loss v. Loss*, a different panel of the Fourth District held contrary to both *Blythe* and *Watford*, finding that a limitation to "reasonable and necessary" was not sufficient, at least with respect to a requirement that a spouse pay for the medical expenses of the other. In *Loss*, the trial court had ordered the husband to maintain medical insurance on behalf of the wife and minor children, and to provide for the costs of any uncovered medical expenses. The Fourth District reversed the award, initially holding that earlier opinions of the Fourth District had established a requirement that a payor providing for medical expenses must, "at a minimum," be limited to those expenses which are "reasonable and necessary." However, the court then went further and opined that even if the trial court had imposed a "reasonable and necessary" restriction upon

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118. *Id.* at 355.
120. *Id.* at 1315.
122. *Id.* at 42.
123. *Id.*
the husband’s obligation to provide for medical expenses, “it would still be error” because “[s]uch an open-ended and unlimited financial liability is unenforceable.”

In Young v. Young, the Fifth District reversed the trial court’s requirement that a husband maintain medical insurance on behalf of the former wife, finding that the obligation “should have been limited to a specific sum commensurate with his current level of premium expense.”

With respect to medical expenses, as opposed to medical insurance, the First District held in Payne v. Payne, in accordance with their opinions dealing with medical insurance costs, that “open-ended” awards of medical expenses are error and must be reversed. The requirement therein that the husband pay “all reasonable and customary medical, hospital and dental bills” was reversed and the case remanded to the trial court “to determine the husband’s maximum liability” for such expenses.

In the Second District, there are no opinions on the subject of medical expenses during the survey period. The court’s 1991 decision in Gay v. Gay applied the Second District’s rule that the payor’s exposure be limited to a specific amount to both orders pertaining to medical insurance and to orders pertaining to the payment of medical expenses.

As the foregoing demonstrates, there is a clear conflict of opinion between the First, Second, and Fifth District Courts of Appeal and the Fourth District Court of Appeal with respect to whether the trial court must provide a specific dollar limitation when one spouse is required to provide medical insurance coverage on behalf of the other spouse. There is a possible further conflict between the First and Second Districts and the

124. Id. at 42-43.
125. 600 So. 2d 1140 (Fla. 5th Dist. Ct. App.), review denied, 613 So. 2d 13 (Fla. 1992).
126. Id. The Fifth District has also consistently so held. In Szemborski v. Szemborski, 530 So. 2d 361 (Fla. 5th Dist. Ct. App. 1988), the court opined that although a trial court has the power to order one party to obtain insurance coverage on behalf of the other, the requirement must be “reasonable in amount.” Id. at 361. Thereafter, in Marsh v. Marsh, 553 So. 2d 366 (Fla. 5th Dist. Ct. App. 1989), the language in Szemborski was interpreted to require the trial court to set a specific amount of the husband’s obligation. The court held that the trial court’s failure to “set a monetary limit on the costs of the ordered health insurance” was reversible error. Id. at 367 n.2.
128. Id. at 749.
129. Id. at 748-49.
131. Id.
Fourth District, as to whether a dollar limitation is required with respect to orders requiring one spouse to provide for the medical expenses of the other spouse. The Fifth District has required such a limitation with respect to medical insurance but has not, as yet, addressed the question of the cost of medical expenses. The Third District has not addressed either issue as of this date.

G. *Imputed Income*¹³²

Following several years in which appellate decisions affirming the trial court's imputation of income to a spouse were legion, the past two years have brought a series of decisions restricting the circumstances under which imputation of income will be deemed appropriate and requiring compliance with strict standards for such imputation of income. For example, in *Wendroff v. Wendroff*,¹³³ the trial court imputed income to the husband apparently based on a calculation of the amount of deposits made into his checking account over a seventeen month period. The district court reversed, however, holding that the trial court erred in imputing income without setting forth the amounts imputed and the sources of the alleged imputed income.¹³⁴

The Second District Court of Appeal rendered four "imputed income" decisions during the survey period which reversed the trial court's findings of imputed income, and one decision which affirmed the trial court's finding. In *Gildea v. Gildea*,¹³⁵ the parties had been married for twenty years during which time the husband was employed in medical sales. Six months after the dissolution action was commenced, the husband was fired from his position due to a general decline in the industry. He sought reemployment and interviewed regularly. The trial court based its alimony award upon the husband's prior earnings history. The district court reversed, holding that although a trial court may impute income to a party who has no income or is earning less than is available to him, it must do so based upon a showing that the party has the capacity to earn more by the use of his or her best efforts.¹³⁶ However, such a determination must be based upon a finding that the party to whom income is imputed has chosen

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¹³². The following discussion addresses the issue of imputation of income with respect to alimony awards. The issue of imputed income in child support cases is discussed in part VI, section D.


¹³⁴. Id. at 595.


¹³⁶. Id. at 1213.
to earn less and has the ability to remedy the situation. In this case, the husband had been involuntarily terminated from employment through no fault of his own and had sought reemployment without success. Thus, the imputation of income under the facts of this case was deemed erroneous.137

In _Kinne v. Kinne_,138 the husband had sought a modification of his alimony obligation because he had lost his job and began his own business, but was earning substantially less than he had earned when employed. The trial court denied the husband’s requested modification, finding that the husband was “underemployed” and was “capable of earning a greater income.”139 The district court disagreed and determined that the trial court failed to apply the good faith test in determining whether the husband needed to begin his own proprietorship.140 Absent bad faith on the part of the paying spouse, the district court opined that, “a court is not entitled effectively to decide what an ex-husband’s current employment should or should not be.”141

Thereafter, in _Brooks v. Brooks_,142 the Second District Court of Appeal again reversed an imputation of income in an alimony case. The evidence established that the husband had been diligently seeking employment, but failed to obtain work despite his best efforts.143 The district court noted that the husband had sent out over one hundred resumes, and that at least twelve rejection letters were introduced into evidence at the trial level.144 One of the rejection letters received by the husband indicated that over one hundred and fifty people had applied for the position in question. Under these circumstances, the district court held that there was no evidence establishing that the husband could have earned more than he was earning at the time of the dissolution of marriage.145

In _McCall v. McCall_,146 the trial court imputed income to the husband based upon the court’s assumption that the husband’s live-in girlfriend was, or should be, paying one-half of the husband’s living expenses. The district court reversed the imputation of income, noting first, that it is “improper”

137. _Id._
139. _Id._ at 192.
140. _Id._ at 194.
141. _Id._
143. _Id._ at 631.
144. _Id._
145. _Id._
146. 616 So. 2d 607 (Fla. 2d Dist. Ct. App. 1993).
for a trial court to treat a roommate’s income as though it belonged to the spouse, and second, that there was no evidence presented that the husband’s live-in companion actually contributed to the husband’s expenses.\textsuperscript{147}

Within the past two years, \textit{Ugarte v. Ugarte}\textsuperscript{148} was the sole decision rendered in which the trial court’s imputation of income was affirmed. This decision differed from the other decisions relating to imputed income in one significant way: the case involved a self-employed physician who, the court noted, was “able to control and regulate” his own income level.\textsuperscript{149} Thus, in \textit{Ugarte}, the trial court’s imputation of income to the husband was affirmed.\textsuperscript{150} The court noted that self-employed individuals, “in contrast to salaried employees,” may possess tax returns and business records which “may not reflect their true earnings, earning capacity, and net worth.”\textsuperscript{151} The \textit{Ugarte} case was the only imputed income case rendered in 1992, whether involving alimony or child support, in which an imputation of income by the trial court was affirmed.

The theme of the foregoing decisions is apparent in light of the fact that in five of the six decisions addressing imputed income in alimony cases rendered within the past two years, the trial court’s imputation of income was reversed. Therefore, it is clear that the appellate courts are developing strict standards with respect to imputation of income, and that those standards must be met in order for such imputation to be sustained on appeal.

\section*{H. Modification}

One of the two most significant decisions of 1992 rendered by the Florida Supreme Court involved the issue of modification of alimony. In \textit{Pimm v. Pimm},\textsuperscript{152} the supreme court responded to a question certified by the Second District Court of Appeal regarding the effect of the voluntary retirement of the payor on the payor’s alimony obligation. The supreme court responded that voluntary retirement could justify a reduction in a payor’s alimony obligation provided that such retirement was \textit{reasonable}.\textsuperscript{153} In determining whether a retirement is \textit{reasonable}, the supreme

\textsuperscript{147} \textit{Id.}
\textsuperscript{148} 608 So. 2d 838 (Fla. 3d Dist. Ct. App. 1992), \textit{cause dismissed}, 617 So. 2d 322 (Fla. 1993).
\textsuperscript{149} \textit{Id.} at 840.
\textsuperscript{150} \textit{Id.} at 839-40.
\textsuperscript{151} \textit{Id.}
\textsuperscript{152} 601 So. 2d 534 (Fla. 1992).
\textsuperscript{153} \textit{Id.} at 537.
court directed the trial courts to consider “the payor’s age, health, and motivation for retirement, as well as the type of work the payor performs and the age at which others engaged in that line of work normally retire.” The court further opined that the age of sixty-five “has become the traditional and presumptive age of retirement for American workers” and, therefore, a retirement prior to the age of sixty-five would place upon the payor “a significant burden” to show that earlier voluntary retirement is reasonable. The foregoing notwithstanding, the court cautioned that “[e]ven at the age of sixty-five or later, a payor spouse should not be permitted to unilaterally choose voluntary retirement if this choice places the receiving spouse in peril of poverty,” and directed the trial courts to “consider the needs of the receiving spouse and the impact a termination or reduction of alimony would have on him or her.”

The Pimm decision also addressed another issue which had been unresolved by earlier decisions of the various district courts of appeal: whether a party seeking a modification of the provisions of an agreement carries a heavier burden than a party seeking modification of the provisions of a final judgment. In Pimm, the Florida Supreme Court specifically held that “where the alimony sought to be modified was . . . set by the court upon an agreement of the parties, the party who seeks a change carries a heavier than usual burden of proof.”

I. Amount

Section 61.08(2) of the Florida Statutes specifies a list of criteria which the trial courts are required to take into consideration in determining whether alimony shall be awarded and, if so, the nature, type and amount of such alimony. In 1991, the Florida Legislature amended section

154. Id.
155. Id.
156. Id.
157. Pimm, 601 So. 2d at 537 (quoting Tinsley v. Tinsley, 502 So. 2d 997, 998 (Fla. 2d Dist. Ct. App. 1987)). See also Tietig v. Boggs, 602 So. 2d 1250 (Fla. 1992). In Tietig, the Florida Supreme Court made it clear that the heavy burden rule of Pimm is to be applied only to alimony modification cases, and that the substantial change in circumstances standard is to be applied to child support modification cases. Id. at 1251.
158. Fla. Stat. § 61.08(2) (1991). The statute requires the courts to consider all relevant economic factors, including, but not limited to:
(a) The standard of living established during the marriage.
(b) The duration of the marriage.
(c) The age and the physical and emotional condition of each party.
61.08 providing that, effective July 1, 1991, the trial courts “shall include findings of fact relative to the factors enumerated” therein supporting an award or denial of alimony. This amendment, and the case law interpreting the amendment, led to three decisions from the First and Fifth District Courts of Appeal, which reversed the trial courts' holdings for a failure to include such findings of fact within the final judgment of dissolution of marriage. These decisions mark the first time that such holdings have appeared in Florida law.

In *Walsh v. Walsh*, the First District Court of Appeal reversed the trial court’s final judgment in its entirety, finding itself unable to review the judgment because of the absence of findings of fact concerning the wife’s need for alimony and the husband’s ability to pay. The district court opined that the lack of findings made the award of alimony to the wife “impossible to review,” and, therefore, the case was reversed and remanded.

Similarly, in *Jacques v. Jacques*, the First District found themselves “unable to reach any reasoned decision” because the final judgment lacked written findings of fact to support the alimony award. Holding that the amendment to section 61.08(1) required such findings, the First District reversed the case, noting, “we are unable to discern the trial court’s determination as to the wife’s needs and the husband’s ability to provide for such needs.”

(d) The financial resources of each party, the non-marital and the marital assets and liabilities distributed to each.

(e) When applicable, the time necessary for either party to acquire sufficient education or training to enable such party to find appropriate employment.

(f) The contribution of each party to the marriage, including, but not limited to, services rendered in home-making, child care, education, and career building of the other party.

(g) All sources of income avoidable to either party.

Id.

159. Ch. 91-246, § 3, 1991 Fla. Laws 2408, 2410 (codified at FLA. STAT. § 61.08(1) (1991)).


162. Id. at 1223.

163. Id.


165. Id. at 75.

166. Id.
In Moreno v. Moreno, the Fifth District Court of Appeal reached the same conclusion. Upon the authority of section 61.08(1) of the Florida Statutes, as amended, the district court reversed the trial court’s alimony award for its failure to make findings of fact, commenting that such findings are necessary to “meaningful appellate review.”

All of the foregoing came to a head in the en banc decision of the Fifth District Court of Appeal in Kennedy v. Kennedy. Therein, the majority determined that, although the effective date of the statutory requirement for findings of fact regarding alimony awards was July 1, 1991, the requirement applied retroactively to cases in which decisions were rendered after such date. The majority also concluded that the requirement of findings of fact means written findings in the judgment and not merely oral statements in the record.

IV. ATTORNEY’S FEES, SUIT MONEY AND COSTS

A. Standards for Awards of Attorney’s Fees

Among the most significant decisions of 1992 were three cases addressing the question of attorney’s fee awards. The first, P.A.G. v. A.F., discussed the issue of attorney’s fee awards in child support modification actions brought in cases where the underlying child support award was entered in a paternity action rather than a dissolution of marriage action. The second case, Brown v. Dykes, determined the validity of section 742.031 of the Florida Statutes. A literal reading of the statute authorized an award of fees in paternity actions only to mothers against putative fathers. In the third, Sotolongo v. Brake, the Florida Supreme Court.

167. 606 So. 2d 1280 (Fla. 5th Dist. Ct. App. 1992).
168. Id. at 1281.
169. 622 So. 2d 1033 (Fla. 5th Dist. Ct. App. 1993).
170. Id. at 1034.
171. Id. Both Judge Sharp and Judge Diamantis, dissenting, did not agree. Id. at 1037-39 (Sharp, J., dissenting); Id. at 1040-46 (Diamantis, J., dissenting). Both opined that the finding of fact requirement of section 61.08(1) of the Florida Statutes may be met with findings in the record and that the statutory language does not specify that written findings are required. Kennedy, 622 So. 2d at 1038, 1044. Both also opined that the requirements of the statute apply only to cases filed after July 1, 1991, and to decisions rendered after July 1, 1991. Id. at 1139, 1043-44.
172. 602 So. 2d 1259 (Fla. 1992).
173. 601 So. 2d 568 (Fla. 2d Dist. Ct. App.), review denied, 613 So. 2d 2 (Fla. 1992).
174. 616 So. 2d 413 (Fla. 1992).
Court dealt with whether an attorney’s fee award may exceed the amount of fees provided for in the contract between the attorney and client.

In *P.A.G.*, the Fourth District Court of Appeal had certified the following question to the Florida Supreme Court: “Whether the Florida Statutes provide for an award of attorney’s fees in a postjudgment proceeding for modification of a child support obligation which was entered in a paternity action?”

The question had arisen because the portion of the paternity statute dealing with awards of attorney’s fees, Florida Statutes section 742.031, authorizes attorney’s fees only for the determination of paternity proceedings and does not address the award of attorney’s fees for subsequent proceedings.

The Florida Supreme Court answered the certified question in the affirmative, finding that the right to seek modification of a child support order is established by section 61.14 of the Florida Statutes, which pertains to “enforcement and modification of support, maintenance, or alimony agreements or orders.” The statute does not limit the court’s enforcement and modification authority to court-ordered payments arising from dissolution of marriage proceedings. Instead, the statute provides that, upon motion of either party, the circuit court has jurisdiction to modify an agreement, whether in connection with a dissolution or separate maintenance proceeding or with a voluntary property settlement. The court also has jurisdiction “when a party is required by court order to make any payments.” Thus, the fact that an order of child support is entered as a result of a paternity proceeding does not alter the fact that it is a “court order” for child support and, therefore, subject to modification pursuant to section 61.14. Because the modification action is brought under the authority of Chapter 61 and specifically section 61.14 of the Florida Statutes, the attorney’s fee provisions of Chapter 61, which apply to “any proceeding under this chapter,” apply to the action.

In *Brown v. Dykes*, the Second District Court of Appeal was called upon to determine whether the provisions of the Florida statute dealing with awards of attorney’s fees in paternity actions was invalid on equal protection grounds, in light of the fact that a literal reading of the statute would authorize the award of fees only on behalf of prevailing mothers in paternity

175. *P.A.G.*, 602 So. 2d at 1260.
176. *Id.* at 1261.
178. *P.A.G.*, 602 So. 2d at 1261.
179. *Id.*
cases. In order to find the statute valid, the Second District determined that either prevailing party—whether such party be the mother or the putative father—must be entitled to an award of attorney's fees.\textsuperscript{181}

The Second District noted that Florida’s paternity statutes were amended in 1986 in order to allow either party—the mother or putative father—to initiate an action for the determination of paternity.\textsuperscript{182} Prior to the amendment, only the mother of a child born out of wedlock could initiate a paternity proceeding under the paternity statutes and the putative father was left to resort to other legal remedies, such as an action for declaratory judgment. A number of constitutional challenges to the paternity statutes were brought by putative fathers, but the Florida Supreme Court consistently upheld the validity of the statutes on the basis that putative fathers had other legal remedies, such as declaratory relief, through which to seek a determination of paternity. The constitutional challenges eventually compelled the Florida Legislature to amend the statutes in 1986 to allow paternity actions to be initiated by either party or by the child.\textsuperscript{183} However, when the statute was broadened, the Legislature failed to amend the attorney’s fee portion of the statute (section 742.031) which authorizes the imposition of attorney’s fees against the father only.\textsuperscript{184}

The Second District concluded that a gender-based classification must be substantially related to the achievement of an important governmental objective to withstand constitutional challenge.\textsuperscript{185} The court opined that, “the validity of any such classification must be determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women.”\textsuperscript{186} However, the court further noted that when a statute treats a class of people covered by the statute unequally, as compared to a class not so covered, a court may make the choice of applying the statute to both classes or neither. Thus, the Second District elected to construe the statute as applicable regardless of gender and held that “a father may apply for attorney’s fees under section 742.031 of the Florida Statutes.”\textsuperscript{187}

\textsuperscript{181} Id. at 570.

\textsuperscript{182} Id. at 569.

\textsuperscript{183} See ch. 86-220, § 150, 1986 Fla. Laws 1611, 1723 (amending FLA. STAT. § 742.011 (1987)).

\textsuperscript{184} See FLA. STAT. § 742.031 (1991).

\textsuperscript{185} Brown, 601 So. 2d at 569.

\textsuperscript{186} Id.

\textsuperscript{187} Id. at 570.
In *Sotolongo v. Brake*, the wife had retained her counsel through a pre-paid legal services plan and contractually agreed to pay her attorney at the rate of $60 per hour. At the conclusion of the dissolution of marriage proceedings, the trial court required the husband to pay the wife’s attorney’s fees and the wife’s attorney sought a fee award at a higher hourly rate than called for by the contract with the wife. The supreme court determined that in cases involving pre-paid legal service contracts, the hourly rate specified in the contract is presumed to be reasonable and may not be exceeded in a fee award against the other party. Accordingly, the contract attorney is not entitled to compensation over and above the amount specified in the legal services contract. However, the court further opined that in cases not involving pre-paid legal service contracts, an attorney’s fee award may exceed the contract amount if the spouse seeking the fee award establishes that because of the spouse’s inferior economic status, the agreed upon fee was below the customary and reasonable rate charged for similarly situated clients. If the spouse seeking the fee award establishes such facts, then the burden will shift to the defending spouse to disprove the allegation. The failure of the defending spouse to disprove the allegation will justify the trial court enhancing the fee to compensate for the reduction below the customary and reasonable rate.

B. Miscellaneous

Although the foregoing decisions were the leading cases with respect to the issue of the standard for awards of attorney’s fees, several other significant decisions were rendered by the appellate courts.

In *Pyszka, Kessler, Massey, Weldon, Caitri, Holton & Douberley, P.A. v. Mullin*, the Third District Court of Appeal ordered the husband to pay the wife’s attorney’s fees with respect to a certiorari proceeding in which the husband was not a party. The court found that the basis of the wife’s claim in the appellate court arose from an order entered in a dissolution of marriage action and, therefore, the appellate proceeding could be considered a chapter 61 proceeding pursuant to which attorney’s fees may be awarded. In *Jacobson v. Jacobson*, the Fifth District Court

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188. 616 So. 2d 413 (Fla. 1992).
189. *Id.* at 413-14.
190. *Id.* at 414.
192. *Id.* at 957.
of Appeal held that, where the parties contract through a settlement agreement, the prevailing party in any enforcement proceeding shall be awarded his or her attorney's fees. Further, the trial court must enforce such an agreement and has no discretion to decline to award attorney's fees to the prevailing party.

In Cooper v. Kahn, the Third District Court of Appeal held that a guardian ad litem in a matrimonial matter must present the same type of evidence in support of an award of attorney's fees as is required of an attorney seeking such an award. The trial court must also enter a judgment setting forth the same type of findings of fact as are required in any other attorney's fee proceeding.

In Mishoe v. Mishoe, the First District Court of Appeal held that a trial court may not "reserve jurisdiction" to award attorney's fees at a subsequent time if the party to be ordered to pay lacks the ability to pay at the time of the proceedings. In Mishoe, the trial court found that the husband lacked the ability to pay attorney's fees at the time of the final hearing in the parties' divorce case. However, the court "reserved jurisdiction" to award such fees to the wife in the future, when the husband would presumably be financially better off. The First District held that once a trial court makes the factual finding that the husband lacked the ability to pay attorney's fees, any attempt to defer consideration "into the indefinite future" was "ineffectual." The test, according to the district court, is the parties' relative ability to obtain counsel at the time of the proceedings in question. The First District opined that if a court could reserve such a determination until years after the dissolution, it would stand to reason that if a party receiving an award of attorney's fees greatly improved his or her circumstances in the future, that party could be required to reimburse the payor spouse by the simple means of "reserving jurisdiction."

194. Id. at 293-94.
195. Id.; see also Rose v. Rose, 615 So. 2d 203 (Fla. 4th Dist. Ct. App. 1993). Of course, the parties must have specifically agreed to the use of a "prevailing party" standard because, absent such an agreement, a "prevailing party" basis for the award of fees in family law cases is erroneous.
197. Id. at 36.
199. Id. at 1101.
200. Id.
201. Id. The court distinguished the type of "reservation of jurisdiction" attempted by the trial court in Mishoe from the more customary situation in which the trial court determines an entitlement to attorney's fees and reserves jurisdiction to set the award at a
There were two decisions rendered in 1993 that are of most interest regarding the issue of the standard for awards of attorney's fees in dissolution of marriage actions.\textsuperscript{202} First, in \textit{Pelton v. Pelton},\textsuperscript{203} the First District Court of Appeal determined that the trial court must, in determining both "need" and "ability to pay," reduce the income of the payor spouse by the amounts required to be paid under the final judgment and increase the income of the recipient spouse by such amounts. Only after having done such calculations is the trial court permitted to determine the respective incomes of the parties for the purpose of awarding attorney's fees.\textsuperscript{204}

Second, in \textit{Steele v. Steele},\textsuperscript{205} the Second District determined that an award of attorney's fees in a dissolution of marriage action must pertain to the relief requested in the actual dissolution proceedings.\textsuperscript{206} In \textit{Steele}, as part of the dissolution of marriage action, the wife filed a constructive trust and partition action against the husband's parents who owned the former marital residence jointly with the husband. At the conclusion of the case, the trial court awarded the wife attorney's fees to be paid, in part, by the husband's parents. The Second District reversed, holding that there was no statute or case law permitting the award of attorney's fees in a constructive trust and partition case and, therefore, the husband's parents could not be made liable for the wife's attorney's fees.\textsuperscript{207}

C. Enforcement

Two significant attorney's fees enforcement cases were decided in 1992 and early 1993, specifically \textit{City of Tampa v. Hines},\textsuperscript{208} and \textit{Reyf v. Reyf}.\textsuperscript{209} In \textit{Hines}, a writ of garnishment for the collection of attorney's fees was issued against the city of Tampa with respect to a city employee, a police officer, who owed attorney's fees on behalf of his former wife. The city contended: that the garnishment statute, section 61.12 of the Florida Statutes, did not permit garnishment of a municipality because only states and counties are mentioned; that the statute does not mention

\textsuperscript{202} See Steele v. Steele, 617 So. 2d 736 (Fla. 2d Dist. Ct. App.), review denied, _ So. 2d __ (Fla. 1993); Pelton v. Pelton, 617 So. 2d 714 (Fla. 1st Dist. Ct. App. 1992).
\textsuperscript{203} 617 So. 2d 714 (Fla. 1st Dist. Ct. App. 1992).
\textsuperscript{204} \textit{Id.} at 717.
\textsuperscript{205} 617 So. 2d 736 (Fla. 2d Dist. Ct. App. 1993).
\textsuperscript{206} \textit{Id.} at 738.
\textsuperscript{207} \textit{Id.}
\textsuperscript{208} 596 So. 2d 160 (Fla. 2d Dist. Ct. App. 1992).
\textsuperscript{209} 620 So. 2d 218 (Fla. 3d Dist. Ct. App. 1993).
attorney's fees among the matters for which such garnishment may be obtained; that "as a matter of public policy, attorney's fees are not as important as child support" and, therefore, represent a "mere debt" for which garnishment should not lie; and that being subject to the writ would constitute an unreasonable burden on the city. The Second District Court of Appeal did not agree and held, with respect to three of the city's four arguments: that the statute has been construed as applicable to municipalities; that the words "suit money" which do appear in section 61.12 include attorney's fees; and that being subject to a writ of garnishment constitutes a "relatively small administrative inconvenience" to the city. With respect to the city's third argument (the public policy argument) the Second District, without commenting upon the accuracy of the city's "ranking" of the importance of the fee award, noted that, even if such an award were of lesser importance than a child support or alimony award, "such a ranking would not mean that attorney's fees do not justify garnishment." Without counsel, the court commented, "a spouse might well not be on an equal footing with the opposing spouse and be able to provide a court with the necessary evidence to support an award of all the alimony and child support he or she needs."

Hines dealt with an ordinary writ of garnishment. With respect to a continuing writ of garnishment, however, the Third District held, in Reyf v. Reyf, that such a writ is not available for the enforcement of an attorney's fee award.

V. CHILD SUPPORT

A. Age of Majority

The fact that for over twenty years the age of majority in Florida has been eighteen has not seemed to diminish the number of cases addressing the issue of the age of majority and child support issues. During the survey period, no less than eight cases rendered by the appellate courts dealt with this issue.

211. Id. at 161-62.
212. Id. at 162.
213. Id.
214. 620 So. 2d 218 (Fla. 3d Dist. Ct. App. 1993).
In *Haydu v. Haydu*, the trial court ordered the husband to maintain life insurance in order to secure the child support ordered paid on behalf of the parties’ minor children. The court did not specify, in the final judgment, however, that the husband would have the right to remove the children as beneficiaries as each child attained the age of majority. The First District reversed the trial court for having failed to include such a cancellation provision in the judgment, noting that "a father's duty of support expires when his children achieve their majority." 

Similarly, in *Harris v. Deeb*, the Second District, in a brief, one paragraph decision setting forth no facts, stated, "the ex-husband should not be required to provide life insurance to secure his obligation for support of a child who dies, marries, becomes emancipated, or reaches majority and its not thereafter entitled to support." 


In *Herron*, the father had been ordered to pay child support until each of his children were emancipated pursuant to a decree entered in Indiana where the age of majority is twenty-one. The father moved from Indiana to Florida but the children remained in Indiana. In an enforcement proceeding brought by the mother, the father contended that he was only obligated to pay support until the children attained the age of majority. Since he lived in Florida, such an order could only be enforced against him in Florida until his children attained Florida's age of majority or, in other words, the age of eighteen. Not surprisingly, the Second District Court of Appeal did not agree with the father's position and held that "[t]he mere fact that the father has moved to this jurisdiction which requires support only to eighteen will not defeat his obligation required under the law of the foreign jurisdiction which is now being enforced in Florida."

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216.  Id. at 657.
218.  Id.
221.  600 So. 2d 575 (Fla. 2d Dist. Ct. App. 1992).
223.  *Herron*, 592 So. 2d at 773 (quoting Gonzalez v. Gonzalez, 426 So. 2d 1106 (Fla. 3d Dist. Ct. App. 1983)).
McCauley v. McCauley, a Second District Court of Appeal was heard en banc for the purpose of resolving the conflict between two earlier decisions of the Second District, Thomasson v. Thomasson and Stultz v. Stultz. McCauley involved a husband who had been ordered to pay child support until his child had attained the age of eighteen despite the fact that at age eighteen the child would still be in high school. The wife appealed from the trial court’s decision to award child support only until age eighteen and the district court affirmed, holding that if a legal duty to provide post-majority support while a child remains in high school is to be created, the legislature “is the fountain out of which that legal duty is to spring.”

In the en banc decision in McCauley, the Second District noted that "there is no legal duty to pay child support beyond the age of eighteen—the age of majority in Florida—absent a finding of physical or mental deficiencies." In Monitzer v. Monitzer, the Second District addressed a case in which such deficiencies were, in fact, present. The evidence presented to the trial court in Monitzer established that the parties’ child, although she had attained the age of eighteen, remained “dependent” as a result of “a mental or physical incapacity which began prior to her reaching majority.” Despite evidence that the child would become independent at some time in the future, the child was dependent at the time of the hearing and had been dependent for years prior to attaining the age of

224. 562 So. 2d 428 (Fla. 2d Dist. Ct. App. 1990) (holding that trial court could properly find that an eighteen year old child who was still in high school was dependent and therefore entitled to continuing child support).

225. 504 So. 2d 5 (Fla. 2d Dist. Ct. App. 1986) (holding that a parent cannot be ordered to continue child support payments on behalf of a child still in high school despite fact that the child was economically dependent and required continuing support until graduation from high school).

226. McCauley, 599 So. 2d at 1003. The Second District did not mention the 1991 revision to section 743.07 of the Florida Statutes, which became effective on October 1, 1991, and allows for continuing child support if the child is dependent in fact, is between the ages of 18 and 19, and is still in high school performing in good faith with a reasonable expectation of graduation before the age of 19. Ch. 91-246, § 8, 1991 Fla. Laws 2408, 2416 (amending FLA. STAT. § 743.07 (1991)). In Walworth v. Klauder, 615 So. 2d 219 (Fla. 5th Dist. Ct. App. 1993), the Fifth District certified to the Florida Supreme Court the question of whether section 743.07 is violative of equal protection because of the seemingly arbitrary cut-off date of the age of 19.

227. McCauley, 599 So. 2d at 1002.


229. Id. at 575.
eighteen. As such, the Second District reversed the trial court’s refusal to order the husband to continue to pay support.\textsuperscript{230}

In the Third District, in \textit{Carbonell v. Carbonell},\textsuperscript{231} the trial court’s requirement that the husband continue to pay child support until such time as the child “graduates from high school, becomes nineteen years of age while still attending high school, dies, marries or becomes self-supporting,” was stricken. The court held that attending high school does not make a child dependent and that absent a statutory dependency, the obligation to provide child support ends upon the child attaining the age of majority.\textsuperscript{232}

The last of the post-majority child support cases decided by the Second District during 1992 involved a situation in which the parties’ twenty-six year old son sued the husband seeking to enforce the terms of his parents’ 1980 settlement agreement pursuant to which the husband had agreed to pay for the son’s college education. In \textit{Potts v. Potts},\textsuperscript{233} the district court reversed the trial court’s dismissal of the action for “failure to state a cause of action,” and held that the child was “entitled to maintain an action against his father on purely contractual grounds.”\textsuperscript{234}

In arguably the most interesting post-majority child support case of the year, at least from the perspective of family law practitioners, the Third District Court of Appeal in \textit{Krstic v. Krstic},\textsuperscript{235} affirmed an order of the trial court which “reserved jurisdiction” to order the husband to pay for his children’s college education “should that relief become available under Florida law.”\textsuperscript{236} The Third District opined that the order was not objectionable as it “simply left open the possibility that should the law change, such relief may be available for the children.”\textsuperscript{237}

In the Fifth District, a very unusual fact pattern emerged in the case of \textit{Department of Health & Rehabilitative Services v. Holland},\textsuperscript{238} which involved post-majority enforcement of post-majority arrearages. In \textit{Holland},

\begin{itemize}
\item \textsuperscript{230} \textit{Id.}
\item \textsuperscript{231} 618 So. 2d 326 (Fla. 3d Dist. Ct. App. 1993).
\item \textsuperscript{232} \textit{Id.} The Third District did not mention in this opinion the revisions to section 743.07 of the Florida Statutes, which became effective October 1, 1991.
\item \textsuperscript{233} 615 So. 2d 695 (Fla. 2d Dist. Ct. App. 1992).
\item \textsuperscript{234} \textit{Id.} at 697.
\item \textsuperscript{235} 604 So. 2d 1244 (Fla. 3d Dist. Ct. App. 1992).
\item \textsuperscript{236} \textit{Id.} at 1246.
\item \textsuperscript{237} \textit{Id.} The \textit{Krstic} case leaves open the question of whether attorneys should now seek to have included in final judgments a \textit{reservation of jurisdiction} with respect to all possible forms of relief which are not yet available under the existing law, but \textit{may be} in the future, and whether a failure to do so could constitute malpractice.
\item \textsuperscript{238} 602 So. 2d 652 (Fla. 5th Dist. Ct. App. 1992).
\end{itemize}
the father was obligated to pay support for the parties’ minor child beyond the child’s attaining the age of eighteen. After the child attained majority, child support arrearages accrued and, thus, when the Department of Health and Rehabilitative Services sought to collect the arrearages from the father on behalf of the mother, they were seeking post-majority arrearages through a post-majority enforcement action. The trial court determined that under such circumstances, only the child had standing to enforce the obligation and the district court affirmed. 239

The Fifth District began its discussion by noting that there are several sources for the duty to pay child support. 240 The duty can be strictly legal based on common law or statute, strictly contractual, or a confusion of both. The confusion arises from the fact that separation agreements appurtenant to dissolution of marriage actions are often a combination of both legal and contractual duties, blurred by two practices. The first practice is using agreements to contract as to the amount satisfactory to discharge a duty imposed by statute or common law. The second practice is having a court approve and order payment of purely contract based duties. Thus, confusion results from the practice of having a trial court approve an agreement relative to child support, and ordering payment, without distinction as to, or appreciation for, the difference between a support agreement merely quantifying the amount correctly necessary to discharge a legal (statutory or common law) duty, and an agreement establishing a purely contractual duty to pay an agreed amount of child support. 241

The foregoing notwithstanding, the Fifth District opined that

(1) under law only one cause of action exists in one entity or person at one time; (2) that a child for whom child support is due from a parent is the equitable and legal beneficiary and the real party in interest and in legal contemplation owns the cause of action to recover due monies for its support; (3) when a child is under legal disability of non-age or otherwise, the mother, or anyone else, who is the lawful custodial or legal guardian for the child or even a next friend, is entitled to collect child support money owed by the parent to discharge a legal duty for child support . . . ; (4) any non-volunteer stranger has a common law cause of action against either parent for the cost of necessities provided a child because of the parent’s neglect to meet his or her legal parental duties to support that minor child . . . ; (5) a child of lawful age and under no legal disability has the legal right to make the decision to

239. ld. at 653-54.
240. ld. at 654.
241. ld.
enforce, and when to enforce, or not to enforce, its own legal rights; and (6) one parent of a child, as such, does not have the legal right or standing to enforce the child's cause of action or to collect support money from the other parent after the child is of age and is under no other legal disability.\footnote{\textit{Id}. at 654-55.}  

B. Modification  

Six significant decisions regarding child support modification were rendered in 1992 and 1993, three of them by the Florida Supreme Court. In \textit{Pimm v. Pimm},\footnote{601 So. 2d 534 (Fla. 1992).} the Florida Supreme Court was called upon to respond to a question certified by the Second District Court of Appeal with respect to the effect of a payor's voluntary retirement upon the payor's alimony obligation. The court responded to the question by holding that voluntary retirement could, under circumstances in which the retirement was \textit{reasonable}, constitute a substantial change in circumstances for the purpose of decreasing the payor's alimony obligation. The court further noted, however, that the obligation to pay child support differs from the obligation to pay alimony and, therefore, "voluntary retirement cannot be considered a change of circumstances which would warrant a modification of child support."\footnote{\textit{Id}. at 537.}  

In reaching its decision in \textit{Pimm}, the supreme court also opined that a party seeking a modification of the terms of an agreement, as opposed to the terms of a judgment, faces a \textit{heavier burden} of proof with respect to such modification. Having so held, the supreme court found itself faced with the problem presented in \textit{Tietig v. Boggs},\footnote{602 So. 2d 1250 (Fla. 1992).} in which a husband seeking a downward modification of child support, had been denied the requested relief on the basis that he had failed to meet his \textit{heavier burden}. The \textit{Tietig} case then came before the Florida Supreme Court on the basis of conflict with \textit{Bernstein v. Bernstein},\footnote{498 So. 2d 1270 (Fla. 4th Dist. Ct. App. 1986).} in which the Fourth District Court of Appeal had held that the \textit{heavier burden} standard did not apply to child support cases because Florida's public policy does not permit the terms of a contract between parents to impinge upon the best interest of their children.\footnote{\textit{Id}. at 1273.
The supreme court resolved the apparent conflict between its decision in *Pimm*—that a party seeking a modification of the terms of an agreement bears a *heavier burden* than one seeking the modification of the terms of a judgment—and Florida’s public policy that prevents parents from contracting to the detriment of their children, by holding that in child support modification cases stemming from an agreement rather than a judgment, only the party seeking a reduction in the amount of child support to be paid bears a *heavier burden*. On the other hand, a party seeking an increase in the amount of child support required pursuant to the terms of an agreement does not bear such a “burden” and need only establish a substantial change in circumstances.248

In *Miller v. Schou*,249 the husband in a child support modification case stipulated to his ability to pay any reasonable increase in child support ordered by the court. Based upon this stipulation, the husband thereafter refused to file a financial affidavit, contending it was unnecessary. The trial court ordered him to do so. The Third District reversed, and the Florida Supreme Court determined that the husband was, in fact, required to submit a financial affidavit irrespective of his stipulated ability to pay.250 On the issue of the modification of child support itself, the supreme court opined that an increase in the financial ability of the paying parent is sufficient, in and of itself, to warrant an increase in child support.251

Two other decisions of import regarding child support modification were rendered in 1992: *Evans v. Evans*252 and *Manning v. Manning*,253 both from the First District Court of Appeal. In *Evans*, the parties had been divorced in 1987, at which time they agreed that the husband would be the

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248. Id. at 1271. *Contra* Landa v. Massie, 593 So. 2d 1146 (Fla. 3d Dist. Ct. App.), review denied, 602 So. 2d 942 (Fla. 1992). A request for an upward modification of child support was denied on the basis that the petitioner had a “heavier burden” of proof because the amount of child support was determined by an agreement between the parties. Id. at 1147. The *Landa* case, however, was rendered prior to the rendition of the supreme court’s opinion in *Tietig v. Boggs*.

249. 616 So. 2d 436 (Fla. 1993).

250. Id. at 438.

251. Id. at 437-38. But see Kersh v. Kersh, 613 So. 2d 585 (Fla. 4th Dist. Ct. App. 1993), in which the fact that the husband’s income had increased by twenty-five percent was held to be an insufficient basis upon which to order increased child support in which the husband did not stipulate to an ability to pay any award made, and the husband’s lifestyle had not improved as a result of his increased income as he also had increased expenses. Id. at 586.


primary residential parent of their minor children. There was no mention of child support in the parties' agreement or in the final judgment incorporating the agreement. Thereafter, the wife petitioned for modification of custody and the husband counter-petitioned for child support. The wife's petition for modification was denied and, again, no mention was made in any court order of child support. In 1990, the husband filed a petition for child support labeled “petition for modification.” The trial court denied the husband's request for child support on the basis that the original agreement and final judgment did not award any support, and that no support had been awarded in the parties' first modification case. The district court reversed, holding that neither the final judgment nor the order entered as a result of the first modification proceeding bore any indication that the issue of child support had been considered by the court and that neither a marital settlement agreement nor any other contract will serve to abrogate a parent's obligation to support minor children.

In Manning, the First District Court of Appeal expressly stated that the standard for a downward modification of child support is a substantial change in the circumstances of the payor that is "permanent in nature." The court noted that there is no set "time periods or particular circumstances" which in and of themselves will demonstrate "permanence"; rather, each case must be decided on a "reasonable examination of the facts" of the particular case.

C. Enforcement

In one of several Florida Supreme Court decisions rendered within the past two years addressing family law issues, the court determined that section 61.181(5) of the Florida Statutes, does not violate the Florida Constitution by pledging public credit. In Dixon, the clerk of the court of Polk County filed a declaratory action asserting that section 61.181(5) of the Florida Statutes, which requires the disbursement by the clerk of funds paid to the depository within four days, pledged the public credit because

254. Evans, 595 So. 2d at 988-89.
255. Id. at 990.
256. Manning, 600 So. 2d at 1275-76.
257. Id.; see also Freeman v. Freeman, 615 So. 2d 225 (Fla. 5th Dist. Ct. App. 1993). In Freeman, the Fifth District determined that the requirement that a change in circumstances be "permanent" does not require a showing that the change is "forever." Id. at 226. Rather, a showing of permanent change requires proof that the change is not temporary or transient, but rather encompasses an extended period of time.
the clerk was required to disburse the funds even if the check had not then cleared. The Florida Supreme Court stated that the statute did not require the pledging of public credit but, further noted, that even to the extent that it could be held to pledge the public credit, doing so served a strong public purpose:

It is a matter of national and state concern that children of broken marriages and children born out of wedlock constitute a large percentage of people living in poverty in the United States today. Not only is the amount of support ordered to be paid often inadequate, but also a large percentage of the ordered support is never paid. The efforts of the legislature to increase voluntary compliance with orders of support by allowing the convenience of payment by personal check, and by making the funds readily available to dependent spouses and children are sufficiently strong public purposes to support any incidental pledge of public credit.

Three other child support enforcement decisions rendered in 1992 are of interest to the extent that two imply and one holds directly that the Florida Supreme Court's decision in Putnam v. Putnam, rendered over fifty years ago, is no longer "good law."

In Putnam, the Florida Supreme Court had held that a child's refusal to visit with his or her father could serve as the basis of terminating the father's child support obligation or, in some cases, could serve as the basis of "forgiving" any child support arrearages that had accrued during the period of time during which the child refused to visit. Not surprisingly, Putnam continues to be cited as authority for these propositions sixty-four years after its rendition.

In Carroll v. Carroll, the Second District determined that the numerous changes in Florida law and Florida statutes over the past sixty years have overruled the holding in Putnam. The Second District reached this conclusion in a case where the parties' sixteen year old son petitioned the trial court, in his own name, to terminate his father's visitation rights.

259. Id. at 296.
260. Id. at 298-99 (footnotes omitted).
263. 186 So. 517 (Fla. 1939).
264. Id. at 518.
The trial court did so but also terminated the father’s child support obligation. The district court determined that it was unwilling to say that conduct of a child, not shown to be orchestrated by one of the parents, should relieve a parent of his or her duty to support the child because doing so "would punish only the other parent’s ability to pay for that child’s needs."\(^{266}\)

The Second District continued this line of reasoning in *Department of Health & Rehabilitative Services v. Lemaster*,\(^{267}\) in which the Department, on behalf of a mother who was owed child support, attempted to collect nearly twelve years of child support arrearages from the father. The father defended the enforcement proceeding by alleging that he had not seen his child during the entire period of time for which he owed child support. The trial court found that the father had not known the whereabouts of his child during the time in which the arrearages accrued and thus "forgave" approximately $9,400 of the $14,900 in child support arrearages due and owing to the mother. The district court reversed, holding that the obligation to pay child support and visitation rights are unrelated and that the inability to exercise visitation does not relieve the non-custodial parent from the obligation to pay child support.\(^{268}\)

These two decisions of the Second District Court of Appeal, particularly the decision in *Carroll*, appear to conflict with the earlier decision of the Fifth District Court of Appeal in *Riley v. Connor*,\(^{269}\) in which the Fifth District opined that "there may be conduct, on the part of a child who has reached an age of discretion, of such disrespectful and contumacious character, directed toward the obligor parent," which would justify the suspension of the duty of support.\(^{270}\) The Second District noted this apparent conflict in its *Carroll* decision, but felt that it was simply unable to agree with the Fifth District as to this point.\(^{271}\)

In *Parker v. Parker*,\(^{272}\) the parties’ child refused to visit with the husband (who had adopted the child at the age of four) because, according to the child, he felt that the husband “was making him do things he didn’t

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266. *Id.* at 1132-33.
267. 596 So. 2d at 1117.
268. *Id.* at 1118. The court further opined that it would have been “a simple matter" for the father to have “set aside each child support payment as it became due. Had he done so, he would not now find the twelve year accumulation of arrearages to constitute an intolerable lump sum for him to shoulder.” *Id.*
269. 509 So. 2d 1177 (Fla. 5th Dist. Ct. App. 1987).
270. *Id.* at 1178.
271. *Carroll*, 593 So. 2d at 1133.
want to do." The child had regained contact with his natural father and refused to continue to use his adoptive father's surname. The child threatened to run away if he were ordered to visit with the husband. The district court awarded child support over the husband's objection that the child's conduct was so disrespectful and offensive that any requirement that he pay child support would be an abuse of discretion. The district court affirmed the support award on the basis that the trial court, through mandatory counselling and structured visitation, was attempting to resolve the problems presented by the case.

D. Imputed Income

As with the imputed income decisions rendered in alimony cases over the past two years, the appellate courts have reversed every reported case in which income was imputed by the lower court with respect to child support awards. During the survey period there were five such cases: one from the First District Court of Appeal; two from the Second District Court of Appeal; and two from the Third District Court of Appeal.

In *Neal v. Meek*, the parties were before the trial court in a paternity action. The father was unemployed but received income from the estate of his late mother. The trial court determined that the father was "capable of [earning] additional income." The court, however, did not state any basis upon which it reached this conclusion nor state any presumed amount which the father was "capable" of earning. The First District Court of Appeal reversed, finding that the trial court failed to set forth findings of fact indicating that it had determined the father's "employment potential and probable earnings level" or his "recent work history, occupational qualifications, and prevailing earnings level in the community."

Similarly, the Second District Court of Appeal reversed the two imputed income cases it decided during 1992 based upon the trial court's

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273. *Id.* at 720.
274. *Id.*
275. *Id.*
280. *Id.* at 1045.
281. *Id.* at 1046.
failure to state the basis upon which the income was imputed. In *Braman v. Braman*, 282 the trial court imputed income to the wife for child support determination purposes despite the fact that the wife was unemployed at the time of the final hearing. The trial court nevertheless assumed that the wife was capable of earning the “minimum wage,” and imputed such income to her. The Second District Court of Appeal reversed, finding that although the trial court was empowered to impute income to the wife if it was determined that she was voluntarily unemployed, the trial court nevertheless erred in failing to disclose the manner in which it calculated the amount of the wife’s child support obligation. 283

Likewise, in *Wollschlager v. Veal*, 284 the First District reversed the trial court’s imputation of income to the father, a full time dental student who was not employed, because the trial court “failed to make sufficient factual findings as to imputation of income and deviation from the child support guidelines.” 285

Recently, the Third District Court of Appeal has also reversed two imputed income cases. In *Levine v. Best*, 286 the trial court’s imputation of income was reversed with a finding that the trial court erred in imputing income “without setting forth what amounts it imputed and the sources of this income.” 287 Similarly, in *Edwards v. Edwards*, 288 the trial court’s imputation of income was reversed where the evidence failed to demonstrate an ability on the husband’s part to pay the amount of the award made by the trial court. 289

VI. EQUITABLE DISTRIBUTION

A. *Marital versus Non-marital Assets*

All equitable distribution cases may be divided into three categories of issues: classification, valuation, and distribution. Classification is the question of which of the parties’ assets and liabilities are marital in nature and, therefore, subject to equitable distribution, and which of their assets and
Liabilities are the separate property of one spouse or the other. With respect to classification issues, nine significant decisions were rendered by the district courts of appeal during the survey period.

At first blush, it would appear that the determination of the marital or non-marital status of an asset or liability would be relatively simple to make under the provisions of section 61.075, Florida's equitable distribution statute. The statute provides that if an asset or liability was "acquired . . . during the marriage," then the asset or liability is "marital" unless it was acquired during the marriage by "noninterspousal gift, bequest, devise, or descent." The complicating factors, however, are the questions of commingling—the combination of non-marital or premarital assets with marital assets—and enhancement—the appreciation in value of a non-marital or premarital asset due to expenditure of marital labor or funds upon the asset.

On the subject of enhancement, six significant decisions were rendered during 1992 and 1993. Unfortunately, a clear conflict between these decisions is readily apparent. In Moon v. Moon, the husband was a participant in a profit sharing plan which had been commenced prior to the marriage but was also funded during the marriage. The district court opined that the portion of the plan funded during the marriage would be a marital asset. The court went on to state that when a premarital asset has been enhanced in value by the contribution of either marital funds or labors to the asset, then "further enhancement in value of such marital asset due to inflation or market conditions will become a marital asset." In other words, once appreciation in value has been shown, and once it has been established that marital labors or funds contributed in any way to that appreciation, then all of the enhanced value will be deemed a marital asset.

The First District repeated this principle in Glover v. Glover. Therein, the husband had owned a home prior to his marriage but subsequently transferred title jointly to himself and his wife during the marriage. In reversing the trial court's finding that the husband had a "special equity" in the home, the district court noted, that "[o]nce the threshold requirement of marital labor or funds has been established, increases in value attributable to marital labor, funds, inflation and market conditions will all apply."

292. Id. at 820.
293. Id. at 822 (citation omitted).
295. Id. at 233 (citation omitted).
Although nearly identical circumstances were present in *Young v. Young,* another decision from the First District, the decision substantially differs from the decisions in both *Glover* and *Moon.* In *Young,* the husband owned a home prior to his marriage but during the marriage a number of improvements were made to the home, involving both marital labor and marital funds. The trial court found that the home was entirely the husband’s non-marital property and the First District reversed, holding that the wife’s burden was only to show that marital funds or labors had been devoted to the non-marital property. Once the wife met that burden, the asset would be deemed marital in its entirety, unless the husband were able to show that “any part of the enhanced value was exempt from distribution because it was ‘unrelated to either party’s management, oversight or other contribution, but instead due solely to purely passive appreciation of the original asset.’”

Meanwhile, in *Dyson v. Dyson,* the husband owned ten acres of land prior to the parties’ marriage but during the marriage marital funds were used toward payment of the mortgage. The district court directed the trial court to use a four step “formula” in determining the marital value of the property, specifically: (1) determine the value of the property prior to the marriage; (2) determine the current value of the property; (3) determine the extent to which the value of the property “was enhanced by causes other than the parties’ contribution of marital funds and labor”; and (4) determine the extent to which the value of the property was enhanced by use of marital funds and labor.

In 1993, the Second District Court of Appeal “joined the fray” with the rendition of its opinion in *Straley v. Frank.* In *Straley,* the district court reversed the trial court’s determination that the appreciated value of certain property was a marital asset, finding the appreciation was not due to the expenditure of marital funds, but instead, was the result of “inflation and fortuitous market forces.” However, with respect to certain real estate partnerships owned by the husband prior to the marriage, the evidence

297. ld. at 1270.
298. ld. (citation omitted).
300. ld. at 324.
301. 612 So. 2d 610 (Fla. 2d Dist. Ct. App. 1992), review denied, __ So. 2d __ (Fla. 1993). Although *Straley* is technically an opinion of the Second District Court of Appeal, it was actually a decision of the Fifth District Court of Appeal, en banc, sitting as the Second District.
302. ld. at 612 (citation omitted).
established that marital funds had been used to make mortgage payments on the properties. The district court opined that, "[t]he appreciation in value of these two partnerships as a result of the infusion of marital funds was the amount by which [the husband's] share of the mortgage debt . . . was reduced during the marriage."\(^\text{303}\) In other words, even though marital funds had been used in the preservation of the asset, the amount of enhancement was determined to be only that attributable directly to the funds.

In *Sandstrom v. Sandstrom*,\(^\text{304}\) the Fourth District Court of Appeal, in a footnote, commented that the increased value of assets solely owned by one spouse prior to the marriage should be considered marital assets subject to equitable distribution under certain circumstances.\(^\text{305}\) The court stated that equitable distribution would apply *to the extent* the increased value of the assets was the result of either or both spouse's work efforts, or the expenditure of marital funds or earnings of the parties.\(^\text{306}\)

Three decisions on the subject of commingling of marital and non-marital assets were rendered during the survey period, *Amato v. Amato*,\(^\text{307}\) *Heinrich v. Heinrich*,\(^\text{308}\) and *Adams v. Adams*.\(^\text{309}\) In *Amato*, the parties had been married for thirty-five years and had four children. In 1983, one of the parties' adult children was killed in an automobile accident. Prior to his death he had obtained a life insurance policy through his employer and had designated his mother (the wife) as the beneficiary. Thus, upon his death, the wife received insurance proceeds totaling $70,000. The wife deposited the insurance proceeds into the parties' only bank account, a joint account, and over the years the parties regularly utilized the funds and deposited other funds into the account. At the time of the dissolution of marriage, the wife asserted a "special equity" in $70,000 of the funds maintained in the parties' joint bank account. The district court determined the insurance proceeds had lost "their separate identity" and had become "untraceable" because of the intermingling of funds for a several year period before the dissolution action.\(^\text{310}\) Thus the funds were marital assets.\(^\text{311}\)

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\(^\text{303}\) *Id*.
\(^\text{304}\) 617 So. 2d 327 (Fla. 4th Dist. Ct. App. 1993).
\(^\text{305}\) *Id*. at 329 n.2.
\(^\text{306}\) *Id*. (citation omitted).
\(^\text{307}\) 596 So. 2d 1243 (Fla. 4th Dist. Ct. App. 1992).
\(^\text{308}\) 609 So. 2d 94 (Fla. 3d Dist. Ct. App. 1992).
\(^\text{310}\) *Amato*, 596 So. 2d at 1244-45.
\(^\text{311}\) *Id*. Interestingly, this holding was not the original holding of the Fourth District when this case was first decided. See *Amato v. Amato*, 16 Fla. L. Weekly D2803 (Fla. 4th
In *Heinrich*, the husband established a trust with his non-marital, separate assets during the marriage. However, the husband then purchased additional trust assets while married with marital funds. The Third District held the commingling of marital and non-marital funds in the trust transformed the trust income into a marital asset and any assets purchased during the marriage with trust income were also deemed to be marital assets.\(^{312}\)

Similarly, in *Adams*, the Third District determined that commingling occurred where the husband used his separate non-marital stock as collateral for marital borrowing. The loans were then repaid with marital funds. According to the Third District, the use of separate property as collateral for marital loans causes the collateral to lose its “separate character.”\(^{313}\)

B. Valuation

Although valuation issues in equitable distribution cases are largely evidentiary matters involving the presentation of testimony as to the specific value of a specific asset, two issues of statutory interpretation were in the forefront of the decisional law in 1992. First, what is the proper date for valuation of assets in equitable distribution cases? Second, does the trial court have to make specific findings of fact as to its valuation of the parties’

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Dist. Ct. App. Nov. 6, 1991), *opinion superseded on grant of reh’g*, Amato v. Amato, 596 So. 2d 1243 (Fla. 4th Dist. Ct. App. 1992). Initially, the Fourth District determined that the insurance proceeds were the wife's separate property and that the husband had the burden to prove that the wife intended to make a gift to him when she deposited the funds into the parties' joint account. *Id.* at D2803. The district court first held that the funds in the joint account at the time of the dissolution were clearly “traceable” because the amount of insurance proceeds paid to the wife was known. *Id.* The Fourth District opined that once the wife was able to establish that a portion of the funds in the joint account was derived from a non-marital source, then the burden shifted to the husband to prove that the wife intended to make a gift to him when she deposited the funds into the joint account. *Id.* Judge Farmer dissented from the original opinion, noting that once the funds were deposited into the joint account, they became intermingled with marital funds and were no longer identifiable. *Id.* at D2804. Following the rendition of the original opinion in *Amato*, the Florida Supreme Court rendered its decision in Robertson v. Robertson, 593 So. 2d 491 (Fla. 1991), a case originating from the Fourth District. The supreme court held that section 61.075 of the Florida Statutes, creates a presumption that jointly titled property is a marital asset and the burden is upon the party seeking to have such property declared separate to prove that a gift was not intended when title was taken in joint names. *Id.* at 493-94. Thereafter, on rehearing, the Fourth District revised its opinion in *Amato*. See Amato v. Amato, 596 So. 2d 1243 (Fla. 4th Dist. Ct. App. 1992).

312. *Heinrich*, 609 So. 2d at 95-96.
313. *Adams*, 604 So. 2d at 496.
assets? In 1992, the case law on these two issues was entirely from the First District Court of Appeal.

Section 61.075 of the Florida Statutes directs trial courts to value marital assets at one of three points in time. The marital assets are valued as the parties enter into a valid separation agreement, or at another date expressly set forth in such a separation agreement, or as of the filing of the dissolution of marriage action. However, the statute further provides that the trial court may use another date if doing so would be just and equitable under the circumstances of the case. In *Moon v. Moon*, the First District determined that the trial court could value the parties' assets as of the date that their separation provided that the court established in the final judgment that such a date was "just and equitable under the circumstances." In *Dyson v. Dyson*, the First District further opined that the trial courts must state the date of valuation used in the written final judgment in order to allow for meaningful appellate review. Accordingly, the First District noted that,

> [u]nless the circuit court distributing marital assets in a final judgment of dissolution of marriage specifically identifies a valuation date of these assets that is different from the date of filing of the petition and also recites the specific circumstances and considerations that make use of this date just and equitable, we shall presume that for such valuation the circuit court used the date of filing the petition or the date the parties entered into a valid separation agreement, whichever is earlier, unless the record contains a specific written agreement executed and filed by the parties establishing a specific date of valuation.

The second issue with respect to valuation is whether the trial court must specifically recite the value of each marital asset and liability in the written final judgment. In a series of three cases: *Dyson v. Dyson*,

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316. Id. at 822 (citing Fla. Stat. § 61.075(4) (1989)).
318. Id.; see also Wendroff v. Wendroff, 614 So. 2d 590 (Fla. 1st Dist. Ct. App. 1993) (holding that the date of valuation should be the date of filing unless the court recites specific circumstances and considerations that make use of another date just and equitable); Barker v. Barker, 596 So. 2d 1187 (Fla. 1st Dist. Ct. App. 1992) (holding that compliance with section 61.075 of the Florida Statutes requires that the trial court specifically state the date of valuation in the written final judgment).
Walsh v. Walsh,320 and Nicewonder v. Nicewonder,321 the First District held that such specific valuation findings are required.

In Dyson, the district court concluded that it was unable “to adequately perform [its] appellate review function in determining whether the circuit court abused its discretion in distributing the parties’ assets” because the final judgment contained no findings of fact with respect to the value and amount of the parties’ various marital assets and liabilities.322 Similarly, in Walsh, the lack of findings as to valuation was deemed to have made the trial court’s distribution plan “impossible to review.”323

In Nicewonder, the First District concluded that, “[i]f the parties are to be accorded full and fair appellate review of the findings of fact and rulings made by the court below, that can be done only if the appealed order sets forth adequate findings of fact as to valuation assigned to the various properties by the court.”324

This particular problem was resolved by the 1991 amendments to section 61.075 of the Florida Statutes. Pursuant to section 61.075(3), “any distribution of marital assets or marital liabilities shall be supported by factual findings in the judgment or order based on competent substantial evidence . . . .”325 Further, the statute specifically requires written findings of fact with respect to the classification (identification) of marital and non-marital assets and liabilities, the valuation of each marital asset and liability and the party to whom each asset and liability is awarded.326

C. Distribution

The question of findings of fact pertaining to equitable distribution in written final judgments does not solely involve findings as to the date of valuation or the value of the assets and liabilities distributed. Rather, the question extends to the actual distribution of assets and whether the trial courts must specifically state the basis upon which a particular equitable distribution scheme was made. In 1992, the First, Second and Third Districts all held that specific findings of fact are required in any case in which the parties’ assets and liabilities are not equally distributed.

322. Dyson, 597 So. 2d at 323.
323. Walsh, 600 So. 2d at 1223.
324. Nicewonder, 602 So. 2d at 1356.
326. Id.
In *Barker v. Barker*, the First District reversed the trial court’s equitable distribution scheme because it was “unable to determine the basis upon which the trial court distributed the marital assets.” The court further noted “[i]t is appropriate to require explicit findings with respect to disputed facts that form the factual basis on which a trial court undertakes to award equitable distribution.”

In *Spillert v. Spillert*, the trial court distributed sixty-two percent of the parties’ assets to the wife. The First District first noted that the final judgment did not “set forth any findings in justification of [the] . . . unbalanced split of the marital assets” and then held that “[i]f the trial court decides to make an unequal division, the court should make findings which support its conclusion.”

In the Second District, in *Burston v. Burston*, a case very similar to *Spillert*, the trial court distributed the parties’ only asset—their home—to the husband without stating any basis for the award. The Second District held that although specific findings of fact as to the court’s rationale for distribution of assets are not required, the record must show “some logic and justification for the division.” In *Burston*, because the record did not indicate such “logic and justification,” the absence of written findings of fact was significant because, as the court noted, “without findings to support the final judgment we are unable to discern a proper basis therefor.”

Three cases from the Third District Court of Appeal addressed the issue of findings of fact with respect to the trial court’s equitable distribution scheme, if that scheme was such that the distribution of assets was not equal between the parties, specifically, *Sinclair v. Sinclair*, *Lozano-Ciccia v. Lozano*, and *Ibanez-Vogelsang v. Vogelsang*.

In *Sinclair*, although no facts are stated in the opinion, the trial court’s equitable distribution was reversed. The district court held that “no extraordinary showing renders the unequal division appropriate.”

328. Id. at 1187.
329. Id. (citation omitted).
331. Id. at 700. (citation omitted).
333. Id. at 901.
334. Id.
338. *Sinclair*, 594 So. 2d at 809 (citation omitted).
In both Lozano-Ciccia v. Lozano and Ibanez-Vogelsang v. Vogelsang, the trial court’s equitable distribution was clearly unequal and in favor of the husband. However, the Third District affirmed the unequal distribution in both cases because the trial court had made specific findings of fact regarding its justification for the disparate distribution.\(^{339}\)

D. Considerations of “Fault” in Equitable Distribution Cases

Two decisions of major significance were rendered by the Third District Court of Appeal in 1992 regarding the relevance of a party’s “fault” or “marital misconduct” with respect to equitable distribution. In Rosenfeld v. Rosenfeld,\(^{340}\) the trial court awarded all of the parties’ marital assets to the wife, finding that the husband had “wasted” assets during the marriage and, therefore, had “already received his equitable distribution.”\(^{341}\) The “waste” alleged by the wife included the husband having used marital funds (his income) to support his mother and sister, to pay alimony to his former wife and to pay attorney’s fees to his lawyer with respect to his divorce from his former wife. The district court reversed, finding that the wife’s allegations were essentially a request that the trial court “revisit the parties’ expenditures throughout the marriage, and should retroactively decide that certain of the expenditures should not have been made.”\(^{342}\) The Third District held that a judicial determination of “which spouse was the more prudent investor and spender” was not an appropriate nor a valid justification for a disparate distribution of marital assets.\(^{343}\)

In Heilman v. Heilman,\(^{344}\) the wife, after twenty-two years of marriage, left the husband to move in with a woman with whom she had fallen in love. The trial court denied the wife alimony and made no equitable distribution to her of the parties’ marital assets. The Third District reversed the denial of equitable distribution to the wife and held that “absent a showing of a related depletion of marital assets, a party’s misconduct is not a valid reason to award a greater share of marital assets to the innocent spouse.”\(^{345}\)

\(^{339}\) See Lozano-Ciccia, 599 So. 2d at 718; Ibanez-Vogelsang, 601 So. 2d at 1303.
\(^{340}\) 597 So. 2d 835 (Fla. 3d Dist. Ct. App. 1992).
\(^{341}\) Id. at 837.
\(^{342}\) Id.
\(^{343}\) Id. (citation omitted).
\(^{344}\) 610 So. 2d 60 (Fla. 3d Dist. Ct. App. 1992).
\(^{345}\) Id. at 61 (citation omitted).
VII. MARITAL HOME

A. Right To Credit

The right of a spouse to a credit at the time of sale, for mortgage and other related payments made upon the former marital residence following an exclusive possession award to the other spouse, remains one of the most confused and complex areas of marital and family law in Florida.

Although, generally speaking, the principles of real estate law applicable to tenancies in common apply, questions abound. Is an award of exclusive use and possession to one spouse an "ouster" of the other spouse? What is the effect of an agreement or a judgment which is silent upon the subject of credit? Is the spouse out of possession entitled to an award of the fair rental value of the home? Although a number of appellate courts attempted to resolve some of these issues in 1992, the questions remain.

There are three possible combinations of factual circumstances giving rise to the question of credit upon the sale of a residence following an exclusive possession award. First, the party in possession may pay for all of the expenses associated with the home during his or her occupancy. In such case, the party in possession would then seek a "credit" for having made the other co-tenant's payments during the time of his or her occupancy. Second, if the party in possession has provided for all of the expenses associated with the home, and seeks a credit for having done so on behalf of the other co-tenant, then the co-tenant out of possession may seek an "offset" against such a credit for the fair rental value of the home. Third, the co-tenants may equally pay for the expenses associated with the home during one co-tenant's exclusive occupancy but, at the conclusion of that exclusive occupancy, the co-tenant out of possession may seek reimbursement for the fair rental value of the home for the period of time in which he or she was out of possession. Various combinations of these factual circumstances arise on a regular and continuing basis in marital law because of the prevalence of awards of exclusive use and occupancy to one party in dissolution of marriage actions.

In *Adkins v. Adkins,* the First District opined that where one co-tenant has exclusive use of property, and uses the property for his or her own benefit and does not receive rents or profits from the use of the property, then the co-tenant in possession is not liable for rent to the co-tenant out of possession unless he or she holds the property adversely or

as a result of ouster or its equivalent.\textsuperscript{347} However, if the co-tenant in possession under such circumstances makes a claim for a contribution from the co-tenant out of possession for amounts expended in the improvement or preservation of the property, then the co-tenant out of possession is entitled to an offset against such claim for the reasonable rental value of the property.\textsuperscript{348} Thus, the First District answered one of the many questions surrounding exclusive use awards and credits upon the sale of the parties’ former marital residence as follows: the party out of possession will be entitled to an award of the rental value of the property only as an offset to a claim by the party in possession for reimbursement of his or her expenses associated with the property during the term of his or her exclusive occupancy.\textsuperscript{349}

Two conflicting opinions were rendered regarding entitlement to credit in cases where the judgment or agreement is silent upon the issue of credits.\textsuperscript{350} In \textit{Agerskov v. Gabriel},\textsuperscript{351} the parties’ agreement (which was incorporated into a final judgment) provided that the husband would pay the mortgage, taxes and insurance on the former marital residence until such time as it was sold, and upon the sale of the property would receive credit for any reduction in principal and interest paid, after which the net proceeds of the sale would be divided equally between the parties. The wife sought an offset against the husband’s credit for the rental value of the home. The trial court found that because the parties’ agreement was silent upon the issue, general real estate principles applied and, therefore, the wife was entitled to such an offset. The Second District reversed, holding that because the parties’ agreement made no mention of any entitlement on the part of the wife to rental value, the trial court could not “modify” the agreement by providing such a right to her.\textsuperscript{352}

However, in \textit{Leventhal v. Leventhal},\textsuperscript{353} the First District held that a party’s right to reimbursement for ownership expenses “exists apart from

\begin{itemize}
\item \textsuperscript{347} \textit{Id.} at 1033.
\item \textsuperscript{348} \textit{Id.} at 1033-34.
\item \textsuperscript{349} \textit{Id.; see also} Brisciano v. Byard, 615 So. 2d 213 (Fla. 1st Dist. Ct. App.) (holding that if the co-tenant in possession seeks contribution for amounts expended in improvement or preservation of property, including payments for mortgages, insurance, and taxes, that claim may be offset by the reasonable rental value of the property), \textit{review denied}, ___ So. 2d ___ (Fla. 1993).
\item \textsuperscript{351} 596 So. 2d 1172 (Fla. 2d Dist. Ct. App. 1992).
\item \textsuperscript{352} \textit{Id.} at 1172-73.
\item \textsuperscript{353} 606 So. 2d 1271 (Fla. 1st Dist. Ct. App. 1992).
\end{itemize}
any judgment or agreement. Such right is an implied term of any judgment
that is silent on the issue."\textsuperscript{354}

To be sure, there are distinctions between \textit{Agerskov} and \textit{Leventhal}. In
\textit{Agerskov}, the party out of possession was seeking a credit for the rental
value of the property while the credit to be received by the party in
possession was specifically addressed by the parties’ agreement. In
\textit{Leventhal}, the party in possession was seeking a credit for the payments
made by him upon the property during the time of his possession. The
distinction between: who is seeking the credit, the party in possession or the
party out of possession; and, for what entitlement, reimbursement for
expenses actually paid or the fair rental value of the property, may be of
significance.\textsuperscript{355}

\section*{B. Other Issues}

Two cases involving the propriety of the filing of a lis pendens in
dissolution of marriage actions were decided in 1992, specifically, \textit{Finkel-
stein v. Finkelstein},\textsuperscript{356} and \textit{Gay v. Gay}.\textsuperscript{357}

In \textit{Finkelstein}, the husband and wife entered into a settlement
agreement pursuant to which, in pertinent part, the wife was completely
absolved of any responsibility to pay child support. Thereafter, the husband
moved for modification and sought an award of child support from the wife.
The wife then petitioned to set aside the entire agreement which had also
required her to transfer her interest in the parties’ former marital residence
to the husband. The wife filed a lis pendens against the property and the
husband moved to dissolve the lis pendens upon the grounds that he was

\textsuperscript{354} Id. at 1272 (citation omitted).

\textsuperscript{355} The \textit{Agerskov} court noted an apparent conflict in the decisional law between the
Fourth District Court of Appeal, and the First and Third District Courts of Appeal. The
Fourth District held in both \textit{Brandt v. Brandt}, 525 So. 2d 1017 (Fla. 4th Dist. Ct. App. 1988)
and \textit{Goolsby v. Wiley}, 547 So. 2d 227 (Fla. 4th Dist. Ct. App. 1989), that the right to credit
for payments made upon property by one co-tenant is an implied term of any agreement or
judgment that is silent upon the issue. In \textit{Janer v. Janer}, 532 So. 2d 59 (Fla. 3d Dist. Ct.
App. 1988) and \textit{Everett v. Everett}, 561 So. 2d 1267 (Fla. 1st Dist. Ct. App.), \textit{review denied},
576 So. 2d 286 (Fla. 1990), the Third and First Districts held that the trial court cannot grant
a right to a credit if such right does not appear in an agreement or judgment, as doing so
would be an impermissible modification of the property terms of a judgment or agreement.
The Second District distinguished its opinion in \textit{Agerskov from Brandt} by opining that the
party seeking the credit in \textit{Brandt} was the party in possession whereas the party seeking the
credit in \textit{Agerskov} was the party out of possession. \textit{Agerskov}, 596 So. 2d at 1173.

\textsuperscript{356} 603 So. 2d 715 (Fla. 4th Dist. Ct. App. 1992).

\textsuperscript{357} 604 So. 2d 904 (Fla. 5th Dist. Ct. App. 1992).
attempting to secure refinancing and the existence of the lis pendens interfered with his ability to do so. The trial court discharged the lis pendens and the district court reversed, holding that the party moving for the discharge of a lis pendens has the burden of proving that the lis pendens was inappropriate to the circumstances and cause of action stated in the complaint, and that the party filing the lis pendens has an adequate remedy at law and would not suffer irreparable harm if the court were to discharge the notice.\footnote{358}

Of interest is the fact that the Fourth District’s holding in \textit{Finkelstein} appears to be in direct conflict with the holding of the Fifth District in \textit{Chiusolo v. Kennedy},\footnote{359} in which the Fifth District, en banc, held that the proponent of a notice of lis pendens bears the burden of proving irreparable harm, an inadequate remedy at law and a substantial likelihood of success on the merits.\footnote{360}

In any case involving the filing of a lis pendens, if the filing is not premised upon a duly recorded instrument or a mechanic’s lien, then the trial court may control and discharge the lis pendens in the same manner as the court may control and dissolve an injunction. In \textit{Gay}, the Fifth District was called upon to determine whether a deed to property held in the wife’s sole name entitled the husband in a dissolution of marriage action to file a lis pendens against such property based upon a “duly recorded instrument.”\footnote{361}

The wife, in \textit{Gay}, initiated dissolution of marriage proceedings and the husband filed a lis pendens with respect to two parcels of property that were titled in the sole name of the wife but conceded to be marital assets. Both properties were encumbered by a single mortgage which was delinquent and neither party had the ability to pay the note. The wife negotiated for the sale of the property and the husband objected to the sale alleging that he had not been consulted with respect to the negotiations and that the sales price was too low. The trial court dissolved the husband’s lis pendens in order to permit the wife to sell the property. On appeal, the husband contended that the trial court lacked the authority to dissolve the lis pendens because his underlying action (a counterclaim for dissolution of marriage) was founded upon a recorded instrument, specifically, the deed to the property which recited that the wife was “a married woman.”\footnote{362} The Fifth District

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\begin{itemize}
\item 358. \textit{Finkelstein}, 603 So. 2d at 715.
\item 359. 589 So. 2d 420 (Fla. 5th Dist. Ct. App. 1991).
\item 360. \textit{Id.} at 421.
\item 361. \textit{Gay}, 604 So. 2d at 905.
\item 362. \textit{Id.}
\end{itemize}
disagreed, holding that the husband’s action was founded upon the statutory provisions that allow the dissolution of an irretrievably broken marriage and that the award of marital assets in such a case is a collateral issue. The court further held that the existence of a deed reciting that the owner of the property in question was a “married woman” at the time she acquired the title to the property “did nothing to establish rights between the parties.”

VIII. MISCELLANEOUS

A. Jurisdiction

In one of the most talked about decisions of the past decade, the Florida Supreme Court abrogated the doctrine of interspousal immunity in Waite v. Waite. Therein, the supreme court determined that sufficient reason for the continuation of the doctrine no longer existed and that both public necessity and fundamental rights required judicial abrogation of the doctrine. In discussing the principles under which the continuation of the doctrine was formerly upheld, the court opined that there was no reason to believe that married couples are any more likely to engage in fraudulent conduct against insurers than anyone else; and, that there was also no reason to believe that the type of lawsuits prohibited by the doctrine, if allowed, are likely to foster unwarranted marital discord.

As to other jurisdictional issues arising in family law cases, a review of the case law reported during the survey period reflects that the district courts of appeal were called upon to address nearly every jurisdictional issue imaginable in dissolution of marriage actions, specifically: long-arm jurisdiction, the type of jurisdiction obtained when service is constructive rather than personal, and the definition and meaning of the residency requirement.

In McCabe v. McCabe, the husband was in the military throughout the parties’ marriage. He retained his legal residency in Florida, maintained

363. *Id.* Another interesting holding in *Gay* is that a trial court has the power to order a marital asset sold during the pendency of a dissolution of marriage action despite the objection of the other spouse. The district court opined that “a trial court should have the discretion to issue such orders as will preserve an asset or its proceeds for ultimate disposition for the benefit of both parties.” *Id.* at 907.

364. 618 So. 2d 1360 (Fla. 1993).

365. *Id.* at 1361.

366. *Id.*

367. 600 So. 2d 1181 (Fla. 5th Dist. Ct. App. 1992).
a Florida driver's license and filed federal income tax returns using a Florida address. The husband petitioned for dissolution of marriage in Florida and served the wife in North Carolina. The wife contested Florida's jurisdiction and filed an affidavit stating that the parties had lived in Maine throughout their marriage and, following the husband's discharge from the military, had taken up residency in North Carolina with the intent to remain there permanently. The trial court nevertheless determined that the wife was a resident of Florida. The district court reversed, finding the husband's allegations in his petition deficient for long-arm jurisdiction purposes because the husband did not allege that the parties had maintained a marital domicile in Florida at the time of the commencement of the action or that the wife had resided in Florida prior to the filing of the action. The husband's failure to so plead rendered the service of process upon the wife under the long-arm statute void.

McCabe also addressed a second jurisdictional issue—the meaning and definition of the residency requirement—as did two other decisions rendered in 1992: Anechiarico v. Thompson and Sragowicz v. Sragowicz.

In McCabe, the trial court relied upon the "general rule" that a wife's residency follows that of her husband, despite the fact that the wife filed an affidavit contesting the residency claims raised in the husband's petition for dissolution of marriage. The district court reversed, holding that the fact that the husband may be a resident of Florida does not "automatically confer upon the trial court personal jurisdiction over the wife because the residence of a wife does not necessarily follow that of her husband when facts pertinent to her particular case indicate otherwise."

In a case that may be read as a corollary to McCabe, the Fourth District, in Anechiarico, held that the trial courts are required to hold evidentiary hearings when jurisdictional issues are raised by either party.

368. Id. at 1184.
369. Id.
370. Id. at 1184-85. See also Bimbaum v. Bimbaum, 615 So. 2d 241, 243 (Fla. 3d Dist. Ct. App. 1993), in which the wife attempted to secure long-arm jurisdiction over the husband by alleging that the husband had committed a tortious act, physically abusing her, while the parties resided in Florida. The Third District held that the allegation of tortious acts of abuse cannot provide the basis for long-arm jurisdiction and, further, that long-arm jurisdiction based upon previous residence in the State of Florida may only be obtained where the residency in Florida "proximately preceded" the cause of action. Id.
373. McCabe, 600 So. 2d at 1184.
374. Anechiarico, 596 So. 2d at 514.
Lastly, in Sragowicz, the Third District determined that the claims of residency by a wife were insufficient to establish her residency for dissolution of marriage purposes. In this case, the wife came to Florida from Brazil for the purpose of visiting her mother and attending a wedding. The wife left all of her furniture, most of her clothing and most of the children's clothing and toys in Brazil. The wife came to Florida with one suitcase and did not register to vote or seek a homestead exemption with respect to the parties' Florida condominium. The district court determined that the evidence established that the wife had no intention of residing in Florida at the time she came to Florida and did not develop an intention to remain in Florida until sometime later when she and the husband had an altercation. As such, it was held that the wife failed to show "by clear and convincing evidence" that she had resided in Florida with the intention to make Florida her permanent residence six months prior to the filing of her dissolution of marriage action.

Meanwhile, the Second District Court of Appeal, in Steffens v. Steffens, determined the extent of jurisdiction obtained by resort to constructive service of process in a dissolution of marriage action. Therein, the husband was never personally served with process and the trial court obtained jurisdiction over the dissolution proceeding through publication of notice and constructive service. The husband never appeared and a default judgment was entered against him. The default judgment, however, purported to award the wife a sum in excess of $100,000 representing the "proceeds" of a certificate of deposit which was in the joint names of the parties and which the husband had cashed in when the parties separated. The default judgment further awarded the wife a series of "credits" against the husband's share of the certificate of deposit for certain costs, which the wife claimed to have incurred as a result of an attempted purchase of property which could not go forward following the parties' separation. Lastly, the default judgment also purportedly awarded the wife her attorney's fees, suit money and costs incurred in the proceedings. Ultimately, the husband moved to set aside the judgment. The district court determined that such relief was entirely proper because of the court's total lack of personal jurisdiction over the husband at the time of the entry of the judgment in question. Without such personal jurisdiction, the district

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375. Sragowicz, 591 So. 2d at 1084.
376. Id.
377. Id. at 1085.
379. Id. at 1157.
court opined, all of the relief granted in the judgment other than the basic
dissolution of marriage, was “void and unenforceable.”

Three interesting venue cases were decided during the survey period,
The Brown decision merely recited the established long
established rule that venue in a dissolution of marriage action lies in the county in which “the intact marriage was last evidenced by a continuing union of the parties who intended to remain married, indefinitely, if not
dependently.”

The Bowman case is unique because of the wife’s attempt therein to place a new slant to the firmly established rule as recited in Brown. In Bowman, the wife, with the husband’s consent and cooperation, moved from Tallahassee to Palm Beach. Five months later, the husband petitioned for dissolution of marriage and filed the action in Tallahassee. The wife sought a change in venue from Tallahassee to Palm Beach, contending that venue should lie in Palm Beach because the husband had agreed to her relocation to that county. The district court, in holding fast to the well established rule of venue in dissolution of marriage actions, held that it was unable to locate any case finding that one party’s consent to the other party’s relocation had any relevance to the issue of venue in a dissolution matter.

The Fifth District Court of Appeal addressed the issue of venue in Washington, a child support modification case. The court held that venue may lie either in the county of the court issuing the original decree, or in the county in which either party is residing when the modification petition is filed.

380. Id. at 1157. The wife in Steffens also claimed that the trial court had jurisdiction because it acquired “in rem” jurisdiction over the certificate of deposit which she claimed had been described in her pleadings. The district court, however, held that property over which such in rem jurisdiction is sought or obtained must be specifically described in the petition and notice of constructive service. Id. at 1158. In the Steffens case, however, the wife’s pleading only stated that the parties had owned a certificate of deposit and the husband had withdrawn the proceeds thereof several months before the filing of the action. Further, according to the wife’s petition, the whereabouts of the proceeds was unknown to her. As such, no property was described in the wife’s petition in a sufficient manner as to permit the court to acquire in rem jurisdiction over such property. Id.

381. 592 So. 2d 325 (Fla. 4th Dist. Ct. App. 1992).
383. 613 So. 2d 594 (Fla. 5th Dist. Ct. App. 1993).
384. Brown, 592 So. 2d at 326.
385. Bowman, 597 So. 2d at 399.
386. Washington, 613 So. 2d at 594-95.
B. Discovery and Privileges

Three very significant decisions regarding discovery issues in family law cases were rendered by the appellate courts within the past two years, specifically, Schouw v. Schouw,\textsuperscript{387} Pyszka, Kessler, Massey, Weldon, Catri, Holton & Douberley, P.A. v. Mullin,\textsuperscript{388} and Swift v. Swift.\textsuperscript{389}

In Schouw, the wife sought to compel the release of the husband’s psychological records, claiming that the husband was “mentally unstable” based upon circumstances which the wife claimed existed approximately six years earlier. The district court reversed the trial court’s order releasing the records and held that the wife’s “mere allegations” that the husband was “mentally unstable” were not sufficient to place the husband’s mental health in issue in the case and thereby overcome the psychotherapist-patient privilege.\textsuperscript{390}

Similarly, in Swift, the wife sought to depose the husband’s psychologist and to inquire about “any extramarital relationship” which the husband may have had during the parties’ marriage. The wife attempted to defend her discovery request by asserting that she was merely investigating the husband’s credibility because he had been asked in deposition whether he had been faithful to his wife. The trial court denied the husband’s request for protection and the district court reversed holding, first, that issues of “marital misconduct” are relevant in dissolution proceedings only where such misconduct is alleged to have caused or contributed to economic difficulties such that regardless of how the marital resources are divided, the parties will suffer economic hardship.\textsuperscript{391} As to the wife’s argument that the discovery related to issues of the husband’s credibility, the district court opined:

[T]here is no case law support for the proposition that the psychotherapist-patient privilege is waived simply when a patient answers a question by opposing counsel as to whether he engaged in any affairs. Neither is there any support for the contention that denying such a suggestion by counsel makes the issue suddenly relevant.\textsuperscript{392}

\textsuperscript{387} 593 So. 2d 1200 (Fla. 2d Dist. Ct. App. 1992).
\textsuperscript{388} 602 So. 2d 955 (Fla. 3d Dist. Ct. App. 1991).
\textsuperscript{389} 617 So. 2d 834 (Fla. 4th Dist. Ct. App. 1993).
\textsuperscript{390} Schouw, 593 So. 2d at 1201.
\textsuperscript{391} Swift, 617 So. 2d at 835.
\textsuperscript{392} Id.
In Mullin, the wife issued a subpoena to the law firm employing the husband, seeking to determine the husband’s interest in the law firm. The law firm was not a party to the dissolution proceedings but nevertheless filed an affidavit stating that the husband was a non-equity partner. The trial court refused to issue a protective order following the submission of the law firm’s affidavit despite the fact that the wife’s subpoena sought the production of extensive documentation regarding the assets and income of the law firm and the partners in the firm. The district court reversed, finding the wife’s discovery request overbroad, and limited the wife to discovery specifically pertaining to the husband and documents (such as the stock register) establishing the husband’s lack of ownership interest in the firm. 393

C. Judges and Masters

The past two years brought three significant decisions with respect to the role of masters in the family court: one from the Florida Supreme Court and two at the appellate level. 394 The decisions rendered at the appellate level indicate a clear pattern of the appellate courts advancing a rather “hard line” with respect to compliance with procedural requirements.

In Heilman v. Heilman, 395 the supreme court determined that a party’s consent is not required in order for a master to hear a child support enforcement proceeding because of the difference between Rule 1.490 and Rule 1.491 of Florida Rules of Civil Procedure. The wife, in Heilman, filed a motion for contempt against the husband with respect to the husband’s alleged failure to pay child support. The matter was referred to a hearing officer pursuant to Rule 1.491 of Florida Rules of Civil Procedure, and the husband objected to having the hearing held before a hearing officer. In order to preserve his objection, the husband refused to participate in the hearing. The trial court determined that the consent of both parties is not required in order for a child support enforcement proceeding to be heard by a hearing officer. 396 The Fourth District Court of Appeal affirmed, but certified the question to the Florida Supreme Court. The supreme court held that Rule 1.491 constitutes a distinct and separate process from Rule 1.490

393. Mullin, 602 So. 2d at 955.
395. 596 So. 2d 1046 (Fla. 1992).
396. Id. at 1046.
of Florida Rules of Civil Procedure, the latter of which addresses the power and authority of masters (general and special) and requires the consent of both parties to such a hearing, and the former of which provides for certain child support matters to be heard by “hearing officers” and does not expressly require the consent of the parties. 397

In *Petrakis v. Petrakis*, 398 the Third District Court of Appeal determined that the responsibility of ensuring that a written record of proceedings held before a master lies with the master, not with the parties. Therein, the trial court had denied the husband’s exceptions to a master’s report and recommendations upon the basis that the husband had failed to present a record of the proceedings to the trial court for review. The district court reversed, holding that Rule 1.490 of the Florida Rules of Civil Procedure requires that the evidence presented to a master be reduced to writing and filed with the master’s report. The burden of doing so, according to the Third District, is upon the master and it is not the burden or responsibility of the parties to create or produce the required written record. 399

Similarly, in *Gordin v. Gordin Int’l, Inc.*, 400 the Fourth District held that a master’s “sketchy, handwritten notations of the proceedings” were insufficient to comply with the requirement that the master file a written record of the evidence along with the report. 401 Thus, as in *Petrakis*, the district court placed the burden of creating, preparing and producing a written record of the proceedings upon the master, not upon either party.

In *Prater v. Lehmbeck*, 402 the Fourth District struck a trial court order that required a party to object to a referral to the general master within five days or be deemed to have waived any objection. The court held that “such a practice violates the above-cited rule and has been condemned in other cases.” 403 The court also held that where one party has filed a “blanket objection” to any and all referrals to the master, the trial court may not require that party to file a separate objection each and every time a referral is attempted. 404

On the subject of trial judges and disqualification, the last two years brought a number of decisions involving the impropriety of certain actions

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397. *Id.* at 1047.
399. *Id.* at 857-58.
401. *Id.* at 155.
402. 615 So. 2d 760 (Fla. 4th Dist. Ct. App. 1993).
403. *Id.* at 761.
404. *Id.*
and statements by trial judges in terms of the appearance of impartiality. However, the more interesting development was the discussion of the standards for disqualification of a trial judge where a previous disqualification had occurred in the case.

Pursuant to section 38.10 of the Florida Statutes, when a judge has been disqualified on the basis of alleged bias and prejudice in a given case, the second judge in the case "is not disqualified on account of alleged prejudice . . . unless such judge admits and holds that it is then a fact that he does not stand fair and impartial between the parties." In *Rodriguez-Diaz v. Abate*, a non-matrimonial case, the Third District described the distinction between a first and a later request for disqualification as requiring that a "more stringent standard" be applied to a second request for disqualification, specifically, a trial judge may not be disqualified for bias and prejudice in a case once a previous judge was so disqualified unless the judge specifically "admits and holds" that it is fact that he or she does not stand fair and impartial between the parties. In *Radin v. Radin*, the Third District applied this "more stringent standard" to a disqualification request in a matrimonial case.

**IX. PATERNITY**

**A. HLA Testing**

Although the past two years brought a number of cases dealing with what has become a rather "standard" issue in family law—the use of a denial of paternity to attempt to avoid enforcement of child support arrearages—the more interesting development in the law has been a line

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405. *See, e.g.*, *Loss v. Loss*, 608 So. 2d 39 (Fla. 4th Dist. Ct. App. 1992) (trial judge became overly involved in the parties' settlement negotiations); *Wayland v. Wayland*, 595 So. 2d 234 (Fla. 3d Dist. Ct. App. 1992) (trial judge was disqualified for advising the divorcing parties that she might know someone who would be interested in buying their house).


408. *Id.* at 198.


410. *See, e.g.*, *Schaffer v. Overby*, 613 So. 2d 128 (Fla. 3d Dist. Ct. App. 1993). The result in all such cases is consistent: The award of child support presumes that the putative father was determined to be the father of the child and such finding is res judicata and the father is estopped to deny paternity thereafter. *Id.*
of cases addressing the propriety of a party’s denial of paternity within a dissolution of marriage action. In 1993, the Florida Supreme Court addressed this issue for the first time in *Department of Health & Rehabilitative Services v. Privette*. 411

In *Privette*, a petition was filed on behalf of the mother of a minor child, alleging that the mother was unmarried and that Privette was the natural father of the child. In fact, the mother was married at the time of the birth of the child and the child’s birth certificate listed her husband as the father of the child. Privette objected to the court-ordered HLA testing and claimed an invasion of his privacy rights. The supreme court, however, was far more concerned with the rights of the minor child and the rights of the person presumed to be the child’s father to a continued relationship with the child he believed to be his own:

Once children are born legitimate, they have a right to maintain that status both factually and legally if doing so is in their best interests. The child’s legally recognized father likewise has an unmistakable interest in maintaining the relationship with his child unimpugned such that his opposition to the blood test and reasons for so objecting would be relevant evidence in determining the child’s best interests. 412

Thus, the supreme court opined, even if an HLA test were to show that a person other than the husband in an intact marriage in which a child is born is the natural father of a child, this fact, without more, would not constitute grounds to grant a paternity petition:

While there may be some cases where the child has had little contact with the legal father, other cases will be quite the contrary. It is conceivable that a man who has established a loving, caring relationship of some years’ duration with his legal child later will prove not to be the biological father. Where this is so, it seldom will be in the children’s best interests to wrench them away from their legal fathers. The law does not require such cruelty toward children. 413

Once HLA testing has been performed, the next question to arise is the manner in which, from an evidentiary perspective, the results are presented to the trial court. In *Department of Health & Rehabilitative Services v.

411. 617 So. 2d 305 (Fla. 1993).
412. Id. at 307-08.
413. Id. at 309.
HLA testing performed upon the putative father and the child indicated that the putative father was, in fact, the child’s father within a 99.9% degree of likelihood. The trial court, however, never knew of the results of the HLA testing because counsel for the mother was unable to lay a proper evidentiary predicate. When the father’s objections to the admission of the test results were sustained, counsel for the mother attempted to argue that the results should be admitted into evidence because, first, the father had not objected “in advance” of the trial and, second, because the test was performed at the father’s insistence. The Fifth District Court of Appeal opined that neither of such facts overcame the rules of evidence and there is no such things as “advance notice of the intent to adhere to the rules of evidence. . . .”

B. Other Issues

Without question, the three most talked about decisions from the Florida Supreme Court during the survey period are Mize v. Mize, Waite v. Waite, in which the court abrogated the doctrine of interspousal immunity in Florida; and B.J.Y. v. M.A., in which the Florida Supreme Court determined that the statute which eliminated the right to trial by jury in paternity cases was unconstitutional.

In B.J.Y., the Florida Supreme Court traced the history of paternity law in Florida, finding that the nature of such proceedings has not changed since 1828. Although the procedure for bringing such an action has changed somewhat, the proceeding and its purpose remain the same: to establish paternity for the purpose of providing for the support of the child. The Constitution provides for a right to a jury trial in situations where a jury trial was conducted as a matter of right prior to the adoption of the Constitution. The supreme court’s history of paternity actions established that at the time of the adoption of Florida’s constitution, paternity cases were tried by jury. Therefore, the constitution requires that the right to trial by jury in a paternity case be preserved and, as such, the statute which

415. Id. at 14
416. 621 So. 2d 417 (Fla. 1993).
417. 618 So. 2d 1360 (Fla. 1993).
418. 617 So. 2d 1061 (Fla. 1993).
419. Id. at 1062-63.
420. Id. at 1062.
eliminated the right to a jury trial in such cases was deemed unconstitutional.

Although B.J.Y. was clearly one of the most interesting cases of the last two years, one of the more compelling cases of the last two years, at least from a perspective of a lay person’s traditional view of “equity” was *Wollenschlager v. Veal.* At issue in this paternity case was a father’s claim that he should not be ordered to support the child that he fathered because he had been “defrauded” by the mother, who had assured him that she was taking birth control pills. According to the father, it would be “inequitable” to require him to bear the financial responsibility of a child who would never have been born except for the “fraud” committed upon him. This argument notwithstanding, the First District Court of Appeal held that there was nothing in the statutory history of the paternity statutes which would indicate that “the court should look at the question of which party was more responsible for conception or the factors leading up to the conception in determining the appropriate child support.”

A second common issue to arise in paternity proceedings is the appropriate surname to be given to the child. Within the past two years, two cases have addressed this issue.

In *Brown v. Dykes,* the trial court ordered that the child bear the surname of the mother, believing it was statutorily required to so order because custody had been awarded to the mother. The district court reversed, holding that section 382.013(6)(c) of the Florida Statutes permits the trial court, in a paternity action, to determine the appropriate surname for the child.

Similarly, in *Levine v. Best,* the Third District Court of Appeal held that the trial court has the power and authority to determine what shall be a child’s surname in a paternity case and that the basis for the trial court’s decision should be the “best interest of the child.”

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422. Id. at 277.
423. 601 So. 2d 568 (Fla. 2d Dist. Ct. App.), review denied, 613 So. 2d 2 (Fla. 1992).
424. Id. at 569.
426. Id. at 279.
X. SHARED PARENTAL RESPONSIBILITY

A. Relevant Factors

Because of the deference given to a trial court’s “custody” (now termed “primary residence”) decision, cases at the appellate level discussing the factors which may weigh in favor of one party or the other are somewhat rare. However, within the past two years three decisions have been rendered reversing the trial court’s custody decisions.

In *Wagler v. Wagler*, the trial court determined that both parties were “equally fit” despite the fact that the husband lived in a fine home and had enrolled the child in an excellent school in which the child was doing very well, and the wife lived in a “dirty, cluttered room,” had lived in twelve different residences in the three years prior to the final hearing, and, at the time of the final hearing, was on probation for selling drugs. Further, at the time of the final hearing, the wife had just completed an earlier probation from an adjudication, in three criminal cases, that she was guilty of passing worthless checks. The trial judge commented, “I’m still old fashioned enough to believe that a child of this age is best served in the custody of the mother." To be sure, the appellate court reversed this decision and remanded the case to the trial court so that the trial court could “explain on what basis it determined that the child’s interest would be equally served by the father or the mother.”

In *Braman v. Braman*, the Second District was similarly confronted with a situation in which the facts demonstrated the mother of the child to be a less than sterling moral example to others. In *Braman*, the wife engaged in “recurring episodes of . . . extramarital activity while the child was present in the home." Indeed, only one of the parties’ two children was fathered by the husband. The trial court awarded sole parental responsibility of the child to the father on the basis that the mother was “morally unfit” to share in the parental responsibility of the child. The district court of appeal reversed, holding that a trial court must consider all of the relevant factors set forth in section 61.13 of the Florida Statutes, in

428. Id. at 603.
429. Id. at 604. But see Murphy v. Murphy, 621 So. 2d 458 (Fla. 4th Dist. Ct. App. 1993) (holding that specific, written findings of fact regarding the basis upon which the trial court reached its custody decision are neither required nor favored). The *Wagler* case, of course, is somewhat exceptional because of its facts.
431. Id. at 683.
making a custody decision and may not base such a decision entirely upon just one of those factors.\(^{432}\)

In *Lane v. Lane*,\(^{433}\) the Fourth District addressed the factors to be considered by the trial courts in making a custody and/or visitation determination. The court held that it is the trial judge who must weigh the factors, gauge the appearance and demeanor of the parties and make the decision and the judge may not abdicate such decision-making to any other person be that person a parent or an expert.\(^{434}\) The parties stipulated in mediation that the question of whether the husband’s visitation with the minor child should be supervised or unsupervised would be made by a certain psychologist. The psychologist rendered a report recommending unsupervised visitation and the trial court reached its decision in the case by resort to the “novel time saver” of the case being submitted upon written submissions by each party setting forth each party’s position. The district court held that the type of decision made in custody and visitation cases is “too important to both the child and parents to restrict a determination to a reading of unemotional and dispassionate words on a printed page.”\(^{435}\)

B. *Third Party Custody*

Third party custody claims involve actions for custody of a child initiated by a person other than the mother or father of the child. Normally, such claims are initiated by a relative of the child and frequently that relative is the child’s grandparent. The standard for the determination of such custody claims is not the “best interest of the child” standard used in dissolution of marriage or other proceedings between the child’s natural parents, but rather, is a far stricter standard under which custody will not be denied a natural parent absent a showing that the parent is “unfit.”

In *In re Matzen*,\(^{436}\) the First District Court of Appeal reversed the trial court’s refusal to grant custody of a child to his natural father and award of custody to the child’s grandparent, holding that a natural parent’s right to fellowship and companionship with his or her offspring is “a rule older than the common law itself.”\(^{437}\) The trial court had determined, at the time of the parent’s divorce, that neither parent was “fit.” The minor

\(^{432}\) *Id.*

\(^{433}\) 599 So. 2d 218 (Fla. 4th Dist. Ct. App. 1992).

\(^{434}\) *Id.* at 219.

\(^{435}\) *Id.*

\(^{436}\) 600 So. 2d 487 (Fla. 1st Dist. Ct. App. 1992).

\(^{437}\) *Id.* at 488.
children were then living with the maternal grandmother which the trial
court continued in effect. The father later petitioned for modification of
custody, alleging that he was fit and able to assume the custody of his
children. The trial court denied the modification request and the district
court reversed, holding that a denial of custody to the natural parent may be
sustained only upon a finding by the trial court, supported by clear,
convincing and compelling evidence, that the natural parent is unfit or the
placement of the child with the parent will be detrimental to the welfare of
the child.\textsuperscript{438}

The number of such “third party custody cases” notwithstanding, there
remains a substantial question under Florida law regarding the manner in
which such “custody cases” are brought before the court. In \textit{In re C.M.},\textsuperscript{439}
the Fourth District Court of Appeal determined that there is no authority,
statutory or otherwise, which permits a non-parent to petition for “custody”
other than through a chapter 39 dependency proceeding.\textsuperscript{440}

C. \textit{Uniform Child Custody Jurisdiction Act}

Over the past several years the number of decisions interpreting and
implementing the Uniform Child Custody Jurisdiction Act have continued
to increase despite the fact that the Act has been law in the State of Florida
for nearly fifteen years. In 1992 and 1993, four significant appellate
decisions were rendered regarding the U.C.C.J.A.

In \textit{Lamon v. Rewis},\textsuperscript{441} the parties were divorced in Georgia in 1988.
The parties agreed that the husband would be the custodial parent of the
minor children. In 1989, the parties’ son, by mutual consent, began to live
with the wife in Florida. In 1990, the wife filed an action, in Georgia, to
modify the custody of the son from the husband to her. When the case was
called for hearing, however, the wife did not appear. On the day the
Georgia case was to have been heard, the wife filed a modification
proceeding in Florida. The husband moved to dismiss for lack of jurisdic-
tion over him, and the Florida court granted the motion but determined that
it would nevertheless proceed to adjudicate the custody issue at a future
date. Meanwhile, the Georgia court entered an order finding that it had

\textsuperscript{438} Id.
\textsuperscript{439} 601 So. 2d 1236 (Fla. 4th Dist. Ct. App. 1992).
\textsuperscript{440} Id.; accord \textit{Schilling v. Wood}, 532 So. 2d 12 (Fla. 4th Dist. Ct. App. 1988). \textit{But see} \textit{Waters v. Waters}, 578 So. 2d 874 (Fla. 2d Dist. Ct. App. 1991) (holding that a trial court
has “inherent jurisdiction” over minor children even when no underlying proceeding is
pending under either chapter 61 or chapter 39).
\textsuperscript{441} 592 So. 2d 1223 (Fla. 1st Dist. Ct. App. 1992).
jurisdiction over the parties and the subject matter and adjudicated the wife in contempt of court for wrongfully withholding the custody of the child from the husband. The Florida court then determined that it had jurisdiction and entered an order listing the reasons why the Florida court had “significant connections” with the minor child. The First District Court of Appeal reversed, holding: (1) only the court in the state where the initial custody order was entered should evaluate the contacts between the child and the states involved in determining whether the initial state should relinquish jurisdiction; (2) modification petitions should be addressed to the court which rendered the original decree even if a second state has become the “home state” of the child in the intervening period of time; (3) a second state may only exercise jurisdiction where the court of continuing jurisdiction (the court where the original custody decree was entered) expressly determines that its exercise of jurisdiction is no longer appropriate or where virtually all contacts with the state of continuing jurisdiction have ceased; (4) only when the child and all parties have moved away is the deference to another state’s continuing jurisdiction no longer required.442

In Greenfield v. Greenfield,443 the Fourth District was presented with the “reverse side” of Lamon v. Rewis, in which Florida was the state of continuing jurisdiction. In Greenfield, the parties were divorced in Broward County in 1982. Thereafter, in September of 1990, the Broward County court entered an agreed order as to child support which also provided that all other provisions of the final judgment (which included a retention of jurisdiction) remained in full force and effect. In October, 1990, the wife and minor child moved to Illinois. According to the wife, the move was temporary: she maintained her driver’s license, voter’s registration and vehicle registration in Florida and continued to own real property in Florida. In January of 1991, the wife secured employment in Florida but delayed her return until the child had finished the school year in Illinois. One month after the wife and child left Illinois, the husband entered an ex parte motion in Illinois for an order granting him temporary custody of the child. The order was granted. The wife then sought relief in Florida, and in August of 1991, the husband removed the child from Florida and took her to Illinois. Thereafter, the wife obtained, in Florida, a temporary order finding that Florida had jurisdiction and ordered the husband to return the child to the wife. The Florida trial judge then entered an order for communication between the two courts and found that Florida was the child’s “home state;”

442. Id. at 1224-25.
443. 599 So. 2d 1029 (Fla. 4th Dist. Ct. App.), review denied, 613 So. 2d 4 (Fla. 1992).
had "significant connections" with the child; and Illinois had no significant connections with the child. The district court affirmed the finding of continuing jurisdiction in the State of Florida. 444

The Fourth District also affirmed Florida's continuing jurisdiction in Rothman v. Rothman. 445 Therein, the parties' minor child travelled to Georgia in July of 1990 for visitation with the husband. In August, 1990, the Georgia court found the child to be "deprived" and ordered that the temporary custody of the child be with his grandparents. The wife attended the hearing in Georgia and consented to the child's placement with the grandparents. For the next year the child lived with the grandparents and then, in 1991, the Georgia court ordered the child placed in the custody of the Department of Family and Children Services for eventual placement with the husband. The Fourth District determined that the State of Florida continued to have jurisdiction over the issue of the child's custody, holding that Georgia had exercised only emergency jurisdiction and that such emergency jurisdiction did not give the State of Georgia the authority to render a final, permanent custody decision. 446

Lastly, in McCabe v. McCabe, 447 where throughout the parties' marriage the husband had been in the military but retained his legal residency in Florida, the Fifth District Court of Appeal reversed the trial court's finding of jurisdiction based upon the husband's residency in Florida. Instead of basing its jurisdiction upon the husband's legal residence in Florida, the district court opined that the trial court should have inquired as to whether Florida was the "home state" of the child or whether Florida had significant connections with the child. Because the trial court did not do so, the trial court failed to apply the proper standards to a determination of jurisdiction under the U.C.C.J.A. 448

D. Geographical Limitations and Relocation Cases

The most eagerly awaited decision rendered in marital and family law within the past decade was the Florida Supreme Court's 1993 decision in Mize v. Mize, 449 a decision which ended literally years of appellate court conflict upon the issue of parental relocation.

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444. Id. at 1030-31.
446. Id. at 261.
447. 600 So. 2d 1181 (Fla. 5th Dist. Ct. App. 1992).
448. Id. at 1186.
449. 621 So. 2d 417 (Fla. 1993).
In \textit{Mize}, the Florida Supreme Court adopted the approach enunciated by the Third District Court of Appeal in \textit{Hill v. Hill},\textsuperscript{450} and held that as long as a parent who has been granted the primary custody of the child desires to move for a well-intentioned reason and founded belief that the relocation is best for that parent’s, and it follows, the child’s well-being, rather than from a vindictive desire to interfere with the visitation rights of the other parent, the change in residence should ordinarily be approved. The trial courts were directed to determine the following with respect to any requested relocation: (1) whether the move would be likely to improve the general quality of life for both the primary residential spouse and the children; (2) whether the motive for seeking the move is for the express purpose of defeating visitation; (3) whether the custodial parent, once out of the jurisdiction, will be likely to comply with any substitute visitation arrangements; (4) whether the substitute visitation will be adequate to foster a continuing meaningful relationship between the child or children and the non-custodial parent; (5) whether the cost of transportation is financially affordable by one or both of the parents; and (6) whether the move is in the best interests of the child.\textsuperscript{451}

\textbf{XI. SPECIAL EQUITY}

The question of what is a “special equity” and when a “special equity” in property should be granted to a party in a dissolution of marriage action continues to be an issue plaguing the trial courts. Within the past two years, four decisions relative to “special equity” principles were rendered, three of which reverse findings of “special equity” made by the trial court and one of which contains a new statement of the law pertaining to “special equity.”

In \textit{Glover v. Glover},\textsuperscript{452} the husband owned a home prior to the parties’ marriage but during the marriage transferred title to the home from himself to he and the wife jointly. The trial court determined that the husband had established a “special equity” in the home and the First District Court of Appeal reversed, holding that, pursuant to section 61.075 of the Florida Statutes, the fact that property is titled in joint names raises a presumption that such property is a marital asset. Accordingly, the party

\textsuperscript{450} 548 So. 2d 705 (Fla. 3d Dist. Ct. App. 1989), review denied, 560 So. 2d 233 (Fla. 1990).

\textsuperscript{451} \textit{Id.} at 706.

\textsuperscript{452} 601 So. 2d 231 (Fla. 1st Dist. Ct. App. 1992).
seeking to establish otherwise has the burden to prove that a gift was not intended when title was taken in joint names.\textsuperscript{453}

The Third District held identically in \textit{Smith v. Smith},\textsuperscript{454} determining that there is a presumption that jointly held property is marital property regardless of who paid for it. Additionally, to establish a special equity the party attempting to overcome the presumption must prove that a gift was not intended when title was taken as tenants by the entireties.\textsuperscript{455}

However, the Third District also announced in \textit{Smith} a new statement of the law of special equity, specifically, that the burden of establishing the special equity is to prove same “beyond a reasonable doubt” and not merely by clear and convincing evidence. This statement of the law marks the first time that a traditionally criminal law standard of proof has been applied to relief in a dissolution of marriage action.

\section*{XII. CONCLUSION}

If one thing is clear from the family law decisions rendered during the survey period, it is that significant questions remain to be decided by Florida’s appellate courts. Issues continue to arise which will need resolution and the numerous conflicts between the appellate courts must be resolved. However, the direction in which family law appears to be moving is quite positive from both a social perspective and a legal perspective and the trends evidenced in the recent decisional law give every indication that such development will continue.

\footnotesize
\begin{quote}
\textsuperscript{453} \textit{Id.} at 233; \textit{see also} \textit{Young v. Young}, 606 So. 2d 1267 (Fla. 1st Dist. Ct. App. 1992). In \textit{Young}, the husband’s mother conveyed the property’s title to the husband and wife jointly and the trial court awarded the husband a “special equity” therein. The district court reversed, holding that the burden was upon the husband to establish that his mother had not intended to convey the property as a gift to both the husband and the wife. \textit{Id.}

\textsuperscript{454} 597 So. 2d 370 (Fla. 3d Dist. Ct. App. 1992).

\textsuperscript{455} \textit{Id.} at 371.
\end{quote}
Probate and Trust Law: 1993 Survey of Florida Law

Mary Sue Donohue*

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I. ATTORNEY'S FEES

During the last two years, attorney fees issues have arisen in both the public arena and the probate courts. One could see the dramatic change in

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attitude of the courts in the significant case of *Florida Patient's Compensation Fund v. Rowe* followed with more explication by *Standard Guaranty Insurance Co. v. Quanstrom.* The majority opinions in both cases determined that a reasonable fee for any lawyer, for nearly any service, is the reasonable number of hours multiplied by a reasonable hourly rate, called a *lodestar* method. Further, both *Rowe* and *Standard Guaranty* make it clear that testimony regarding fees must be taken and must cover specific areas, such as reasonable hourly rates and reasonable number of hours. A bald affidavit that may have sufficed in the past is no longer enough.

In *Rowe,* the factual situation centered on payments of attorney fees to attorneys representing claimants against the state-established Compensation Fund, which came from public funds. In *Standard Guaranty,* the case dealt with reasonable attorney fees when set by a court using a *lodestar* method. It is in the decision of *Standard Guaranty* that the Florida Supreme Court set the stage to review fee arrangements in probate matters when it referred to situations wherein there was already an assurance of collecting fees, and the attorneys involved would not be taking a risk of nonpayment. It was this lack of risk that separated probate and other similarly situated cases from the litigation risk that justified not only a reasonable hourly rate times a reasonable number of hours, but also a multiplier.

The Florida Probate Code outlines the criteria to be used in determining reasonable attorney fees. It is strikingly similar to the guidelines set forth in the lawyer's Rules of Professional Conduct. The statute is geared to the payment of attorney fees due the attorney for being the personal representative of the estate. It covers neither individual beneficiaries nor creditors paying their attorneys nor how that would be determined since the funds would not ordinarily be payable from the estate. Further, the

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1. 472 So. 2d 1145 (Fla. 1985).
2. 555 So. 2d 828 (Fla. 1990).
3. *Standard Guaranty,* 555 So. 2d at 835; *Rowe,* 472 So. 2d at 1151.
4. *Standard Guaranty,* 555 So. 2d at 834; *Rowe,* 472 So. 2d at 1150.
5. See *Rowe,* 472 So. 2d at 1150.
8. Id. at 835.
10. See FLA. BAR R. PROF. CONDUCT 4-1.5(b) (1991).
statute did not specify the importance to be placed on each of the criteria in its earlier versions. Traditionally, in the probate area, attorneys for the personal representative of an estate were paid on the basis of a percentage of the value of the estate. This may have made up for work done over the years for the family for which no charge would have been made.

A. The Platt Case

Then came the NCNB Trust Department, which took the position that taking three percent of a seven million dollar estate, for which they already served as guardian of the property and marshalled the assets, was eminently reasonable. In In re Estate of Platt,\textsuperscript{12} the Florida Supreme Court revised the way attorney fee disputes may be resolved in probate cases. There are actually two Platt decisions: one issued in April, 1991 ("Platt I")\textsuperscript{13} and the other issued in October, 1991 ("Platt II").\textsuperscript{14} The second was only a revision of the first.

At the time of Lester Platt’s death, the residuary beneficiaries of Mr. Platt’s estate declined to sign a contract sent to them by NCNB in which the bank stated that they intended to take a three percent fee. A proposed fee letter was also sent to the beneficiaries by the attorney for the estate, George Patterson, who also served as co-personal representative of the estate. Instead, the residual beneficiaries, who would bear the burden of the fees, requested both the bank and the attorney to maintain time records. The attorney complied with the request while the bank did not even attempt to do so.\textsuperscript{15} As disclosed in the appellate court opinion, there was a major evidentiary hearing involving several recognized expert witnesses. They testified as to reasonableness of the hourly rate for the attorney, his/her reputation, the custom in the community for charging, and presumably the other criteria to be used in properly determining attorney fees in a disputed probate case.\textsuperscript{16}

The Florida Supreme Court in Platt held the following: (1) in a dispute, attorney fees for the attorney for the personal representative shall be determined by multiplying a reasonable number of hours by a reasonable

\textsuperscript{12} 586 So. 2d 328 (Fla. 1991) (quashing and superseding the supreme court’s first opinion of In re Estate of Platt, 16 Fla. L. Weekly S237 (Fla. Apr. 4, 1991)).

\textsuperscript{13} 16 Fla. L. Weekly S237 (Fla. Apr. 4, 1991) [hereinafter Platt I].

\textsuperscript{14} In re Estate of Platt, 586 So. 2d at 328 [hereinafter Platt II].

\textsuperscript{15} Id. at 330.

\textsuperscript{16} Id. at 329-30.
hourly rate and may not be determined by a percentage of the estate assets;\(^\text{17}\) (2) the time and effort it takes for an attorney to recover his/her fees is not to be paid from the estate;\(^\text{18}\) and (3) unless agreed to by the customer, time and effort are to be the only considerations in determining the proper fees to be paid a corporate fiduciary serving as personal representative\(^\text{19}\) and such fees are not to be based on a percentage.\(^\text{20}\) The Supreme Court of Florida reversed the decision of the circuit court in awarding fees to the attorney and the bank based on a percentage of the estate, and directed the circuit court to take evidence and make a new determination of proper fees in light of their new means of awarding fees.\(^\text{21}\)

Subsequent to Platt II and its progeny, several cases have been decided that explicate Platt II or parts thereof. For example, in Carman v. Gilbert,\(^\text{22}\) the Second District Court of Appeal sent the issue of attorney fees back to the circuit court for further proceedings in a will contest, stating that the lodestar principles in Rowe had not been followed.\(^\text{23}\)

**B. New Statutes for Attorney and Personal Representative Fees**

In a decided effort to replace the holding of Platt II as the law that applies to probate cases in Florida, the Florida Legislature passed House Bill 1295 in the 1993 Legislature.\(^\text{24}\) Many parts of this particular legislation are covered elsewhere, but the portions relating to attorney fees and personal representative fees will be addressed here.\(^\text{25}\) Section 733.617 of the Florida Statutes, governing compensation of personal representatives, has been amended,\(^\text{26}\) and section 733.6171, a new section governing the compensation of attorneys for personal representatives, has been added\(^\text{27}\) to the Florida Probate Code. A provision is also explicitly made for payment of

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17. Id.
18. Id. at 336.
19. Platt II, 586 So. 2d at 337.
20. Id. at 336.
21. Id. at 337.
23. Id. at 704-05.
25. See infra text accompanying notes 204-216.
27. Id. § 4, 1993 Fla. Laws at 2503 (to be codified at Fla. Stat. § 733.6171).
fees from the assets of a revocable trust, even though such assets have not heretofore been considered subject to probate administration after *In re Estate of Katz*. Further, the Florida Legislature has returned to the past by statutorily setting fees for the compensation of personal representatives in case of a dispute. Such fees, called commissions, are to be based on a percentage of the value of the estate subject to probate administration. It is a graduated scale with three percent due for estates valued up to one million dollars, two and one-half percent due for estates valued between one million and five million dollars, two percent for estates valued between five million and ten million dollars, and one-and one-half percent for estates valued over ten million dollars. Additional fees are allowable in a dispute for certain extra efforts that may be involved, such as running the decedent’s business, sale of real or personal property, or litigation involved in the estate.

Two particular reasons for additional compensation may spawn litigation and definitely raise questions that are not resolved by the plain meaning of the statute. Section 733.617(3)(c) of the Florida Statutes allows extra commission for “[i]nvolve ment in proceedings for the adjustment or payment of any taxes.” In nearly every estate there will be a final federal income tax return (Form 1040) due and, in some estates, there will be more than one due. In many estates, where income is generated, an estate income tax return (Form 1041) is required. Occasionally, when real estate tax assessments are determined during the course of administering an estate, the personal representative is involved in determining the most beneficial assessment to the estate and in adjusting the amount of tax due. Considering the language in this statute, the question arises as to whether the mere filing of a return constitutes an “involvement in proceedings” that would justify payment of commissions in addition to the percentage.

28. *See id.*
29. 528 So. 2d 422 (Fla. 4th Dist. Ct. App. 1988).
31. Ch. 93-257, § 10, 1993 Fla. Laws 2500, 2507 (amending FLa. STAT. § 733.617 (1991)).
32. *Id.* (amending FLa. STAT. § 733.617 (1991), to be codified at FLa. STAT. § 733.617(3)(c)).
33. *See BASIC PRACTICE UNDER FLORIDA PROBATE CODE § 4.26 (1987).*
34. *Id.* (Obligation to File Tax Returns and Notices For Decedent and Estate).
35. *Id.*
 Nevertheless, despite all of the particular reasons the Florida Legislature has enunciated in section 733.617(3), the statute gives no basis for determining how much in additional fees should be paid. Is there an extra percentage, or would a court need to follow the directives of Platt II, Standard Guaranty, and Rowe? Is not the genuine involvement in revising a value for real estate within the estate context a better example of what would justify additional commissions?

In some estates where the gross value of all the assets exceeds $600,000, a federal estate tax return is due nine months after the decedent’s date of death. The return is extensive, usually requiring a great deal of explicit and accurate details, answers to numerous questions regarding many tax and estate decisions that affect the estate, the taxes paid, and the beneficiaries’ interests. Frequently, voluminous attachments are required with this return, which already contains thirty-three pages itself. While it is an absolute requirement in larger estates, the question remains as to whether this also would be considered “involvement in proceedings for the adjustment or payment of any taxes.” Frequently, there are situations in which a surviving spouse receives enough of the assets such that the combination of the marital deduction (no tax) and the unified credit amount ($600,000) result in no tax actually due, even though a Form 706 return is certainly due.

The other subsection, to be codified at section 733.617(3)(e), appears to be designed to allow courts to allow extra fees for situations not covered by the statute but which clearly exceed the customary efforts required of a personal representative. The personal representative’s regular duties—marshalling the assets, protecting and securing the decedent’s assets, determining and notifying creditors of their right to make claims against the estate, paying proper claims timely, distributing assets to the beneficiaries, filing any required tax returns, preparing an accounting, and closing the estate—all must be handled efficiently and expeditiously. However, many questions like the following still remain: Do “special services” cover taking care of a decedent’s cat or dog? If included in the standard fee, what period of care is covered? Do “special services” cover cleaning a decedent’s home or packing pictures for delivery to numerous beneficiaries? Do they cover collecting rents on several out of state properties that are not subject

36. Id.


to probate? Do they involve the time and effort involved in exhuming a body that was buried before the decedent's wishes were known in the will? Either the courts or the Legislature will be defining "special services" for us.

The Legislature recognized that some estates more than others can support more than one personal representative. The new legislation outlines the allocations to be made when there is more than one personal representative and if the estate is valued at less than $100,000. In particular, unless the estate is valued at less than $100,000, two personal representatives may each take a full commission. However, if the estate is valued at more than $100,000 and there are more than two personal representatives, then all of the personal representatives share in the fees to which two representatives would be entitled. In this situation, the personal representative holding the property or assets of the decedent and having primary responsibility for their administration is entitled to receive a full commission. The remaining personal representatives are entitled to a proportionate share of the second commission. For estates valued at less than $100,000 with multiple personal representatives, the one full commission normally allowed to a sole personal representative must be apportioned among the several personal representatives in proportion to their efforts.

What is not covered in House Bill 1295 is the compensation, if any, to be paid to the trustee of a revocable living trust, and the compensation, if any, to a personal representative for responsibility of transferring assets not technically within the probate estate. It is not clear why there is a distinction between compensation as a personal representative and for attorney fees paid on the same estate.

Additionally, according to current case and statutory law, an attorney may be compensated twice. First, he/she may be compensated for his/her work as a personal representative. Second, he/she may also be compensated for any legal services he/she may provide as the attorney for another

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40. Id.
41. Id. 2507 (amending Fla. Stat. § 733.617 (1991)).
42. See id. § 4, 1993 Fla. Laws at 2503 (to be codified at Fla. Stat. § 733.6171(2)).
43. See Platt II, 586 So. 2d at 331-32.
44. Id.
personal representative. This view was acknowledged as the law of Florida in Platt.

The particular provisions of House Bill 1295 concerning the effective date of the statutes pertaining to attorney fees are unusual. The new statute, instead of applying to situations based on a decedent’s date of death, as is common in changes in probate law, “appl[ies] to estates in which an order of discharge has not been entered prior to its effective date [October 1, 1993] . . . .”

The other major fee section of the new legislation is the new statute, to be numbered in the engrossed legislation as Florida Statutes, section 733.-6171, which explicitly outlines the compensation to be paid to an attorney for the personal representative which is presumed to be reasonable. The compensation package uses a combination of a percentage of the value of the estate with an hourly rate. It was encouraged in part by probate attorney Rohan Kelley and reflects the fact that there were fairness problems with both the full percentage and with the reasonable hourly rate multiplied by reasonable number of hours. Attorneys are still undeniably permitted and encouraged to enter into contracts with clients for payment of fees. Contracts signed by both the personal representative and any residuary beneficiaries are the strongest since both have something to say about attorney fees. The new statute sets forth a schedule for payment of fees from the estate to the attorney and no separate order is required. When there is a dispute about fees, the trial courts in resolving such disputes are directed to use as their criteria two percent of the estate inventory value and income earned during administration plus one percent of the balance of the gross estate when a federal estate tax return is due. This percentage appears to explicitly recognize that there is additional work on someone’s part when a federal estate tax return is due. In addition to the percentage, an attorney is allowed a reasonable hourly rate both for the attorney

45. Id.
46. Id. at 328.
47. Ch. 93-257, § 4, 1993 Fla. Laws 2500, 2505 (to be codified at Fla. Stat. § 733.6171(8)).
49. Platt II, 586 So. 2d at 333.
50. Ch. 93-257, § 4, 1993 Fla. Laws 2500, 2505 (to be codified at Fla. Stat. § 733.6171(6)).
51. Id. at 2503 (to be codified at Fla. Stat. § 733.6171(2)).
52. Id. (to be codified at Fla. Stat. § 733.6171(3)).
53. Id. (to be codified at Fla. Stat. § 733.6171(3)(a)).
and for others working for the attorney with special education, training, or experience. The language was certainly intended to cover paralegals but it covers more, such as investment advisors hired by an attorney.

While this two-part formula is certainly intended to be a guideline, the court may increase or decrease the sum paid and has specific additional criteria to use in increasing or decreasing such fees. These additional criteria, unlike the previous statute discussed in Platt I, appear to be specifically designed for the probate arena and not for civil litigation. Section 733.6171(4)(h) of the Florida Statutes provides one of the most interesting criteria: "any delay in payment of the compensation after the services were furnished." The message here is that slow-paying estates may not make their lawyers their bankers.

In another departure from the holding of Platt II, the Florida Legislature in section 733.6171(7) of the Florida Statutes explicitly allows that the litigation over attorney fees involving the personal representative's attorney does not mean the attorney must lose money in trying to collect his/her fee. Instead, trial court proceedings to determine compensation are part of the estate administration process and the court decides from what part of the estate such litigation costs should be paid. This appears to be a fairer solution to the growth in litigation over fees; attorneys do not automatically lose money if there is a contest about fees, and clients are not encouraged to litigate fee issues to reduce fees which have been agreed to previously.

Some questions are raised by the language of the new statute. The word "inventory" is not defined in the definition section of the Florida Probate Code, section 731.201, as a probate inventory. The word "inventory" must be defined in order to determine the "balance" noted in section 733.6171(3)(a) of the Florida Statutes. Some skeptics may argue that the provision that allows the attorney to receive a percentage of the income during the estate administration encourages prolonging of the estate process. Furthermore, the provision on contracts between attorneys and decedents in section 733.6171(6) leaves the issue unresolved whether such contracts are

54. Id. (to be codified at FLA. STAT. § 733.6171(3)(b)).
55. Ch. 93-257, § 4, 1993 Fla. Laws 2500, 2504 (to be codified at FLA. STAT. § 733.6171(4)).
56. Id. (to be codified at FLA. STAT. § 733.6171(4)(h)).
57. Id. (to be codified at FLA. STAT. § 733.6171(7)).
58. See id.
59. Id. (to be codified at FLA. STAT. § 733.6171(3)(a)).
binding on estates when the residual beneficiaries, those who bear the burden of the fees, are not parties.  

Again, the effective date of this section is October 1, 1993, and applies not to estates for decedents who have died as of that date, but to probates still open or in which attorney fees have not been determined.

C. Other Attorney Fees Issues

The cases on attorney fees most often center around the fees to be paid to the attorney acting for the estate and, in particular, the personal representative thereof. However, the Fifth District Court of Appeal in Dourado v. Chousa dealt with the obligation of the personal representative and beneficiary to make up the difference in attorney fees due if there is a deficiency.

II. HOMESTEAD AND EXEMPT PROPERTY

The concept of homestead under Florida law continues to be an enigma to lawyers and non-lawyers alike. While most lay persons think of homestead only as a $25,000 exemption from real estate taxes, Florida courts continue to wrestle with the concept of homestead as it relates both to the descent and distribution of property and to creditors’ claims on decedents’ property. Even though the change to the Florida Constitution was effective in 1984, recent years have also yielded a plethora of litigation spawned by homestead issues.

Two recent cases involve the descent of homestead property where the surviving spouse had validly waived his homestead rights. In Sun First National Bank Polk County v. Fry, the decedent was survived by a spouse and six adult lineal descendants. The decedent’s will had devised the homestead property to a testamentary trust rather than to the spouse or lineal descendants. Although the lineal descendants contended that the Florida Constitution and Florida Statutes as to homestead were violated by the decedent’s improper devise, the court held that since the surviving spouse

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60. Ch. 93-257, § 4, 1993 Fla. Laws 2500, 2505 (to be codified at FLA. STAT. § 733.6171 (6)).
61. Id. (to be codified at FLA. STAT. § 733.6171(8)).
had waived homestead and there were no minor children, the property could be freely devised even if there were adult children.\textsuperscript{64} Shorty thereafter, the Florida Supreme Court, in \textit{Hartwell v. Blasingame},\textsuperscript{65} came to the same conclusion where an adult child sought to be the heir to property that the decedent had devised to her former husband, the surviving spouse having previously waived his homestead rights in a prenuptial agreement. The court held the spouse's waiver to be binding;\textsuperscript{66} the spouse was deemed to have predeceased the decedent. Since there was no minor child, there was no constitutional restriction on the devise of the property by the decedent. The court cited its previous decision in \textit{City National Bank v. Tescher}\textsuperscript{67} as corroborating authority.\textsuperscript{68}

Even though a surviving spouse is entitled to at least a life estate in homestead property, in \textit{Breausche v. Prough}\textsuperscript{69} the surviving wife received more. The surviving wife claimed that she was misled by her husband into believing that their home was jointly owned and that she would receive the entire interest upon his death. She claimed that in reliance thereon she had contributed funds to the construction of the home and payments on the mortgage and had relinquished certain rights she had in other real estate. The court ruled that the surviving spouse could seek to impose a constructive trust on the homestead if she could produce admissible evidence in the trial court to prove her claim.\textsuperscript{70} Such evidence could include an affidavit by a disinterested party as to direct knowledge of the decedent's prior statements to his wife, which could overcome evidence otherwise barred by the Dead Man's Statute.\textsuperscript{71}

Creditors continue to attempt to assert claims and to force the sale of homestead property that passed from the debtor-decedent to devisees. Two cases involved whether the Florida constitutional protection from forced sale of homestead property inured to the benefit of devisees who were heirs of the decedent. In a decision favoring the rights of heirs, a district court in \textit{Bartelt v. Bartel}\textsuperscript{72} held that the protected "class designated 'heirs' does not exclude those who, but for the decedent's foresight in executing a will,
would have taken by the laws of intestate succession."\textsuperscript{73} While article X, section 4 of the Florida Constitution designates the exempt class of persons as the surviving spouse or heirs of the owner, "it does not mandate the technique by which the qualified person must receive title."\textsuperscript{74} To hold otherwise, said the court, would discourage the making of wills and encourage the passing of property by the less desirable process of intestacy.

To the same effect was the holding in \textit{HCA Gulf Coast Hospital v. Downing}.\textsuperscript{75} There the court determined the heir possessed an equitable or beneficial interest in real property through a spendthrift trust established by the decedent. The court stated that the heir could assert the homestead exemption from forced sale as though the property had passed directly from the decedent to the heir by devise or by intestacy.\textsuperscript{76} The homestead exemption, said the court, is to be construed liberally to accomplish its design to secure a homeowner protection from creditors and financial misfortune, and a court should go beyond mere technicalities in effectuating the intent of a decedent as expressed in a will or trust.\textsuperscript{77} The court cautioned, however, that in this case it might have decided otherwise if the trustee had exercised more than a supervisory interest in the homestead as the holder of legal title.\textsuperscript{78}

On the other hand, an heir to homestead property is not protected against certain creditors of the decedent. Where the decedent’s friend had lived with the decedent and claimed that she had provided funds used to purchase and improve the homestead property, she fit into the exception under article X, section 4 of the Florida Constitution. In \textit{Burns v. Cobb},\textsuperscript{79} the court held that her claim for equitable ownership in the property, if valid, would defeat the claims of the decedent’s heirs who took with notice of her possession of the property and her claim thereto.\textsuperscript{80} Furthermore, the court declared that she would have a defense to the heirs’ ejectment action (even if they had a future possessory interest) "if that equitable ownership interest is established as a legal title interest and includes a present possessory right."\textsuperscript{81} While upholding her right to pursue a counterclaim...
to the heirs’ ejectment action, however, the court held that she could not challenge this action in the probate court.\textsuperscript{82} The friend petitioned to reopen the estate and contest the heirs’ action in petitioning the probate court for determination of homestead and closing the estate. Since the petition to determine homestead did not constitute the opening and closing of a probate estate administration and she did not seek as a creditor or other interested person to open the administration of the estate, she could not move forward in that arena.\textsuperscript{83}

Where homestead property passes to minor children, it is not subject to claims of creditors because it is protected by article X, section 4 of the Florida Constitution. In \textit{In re Estate of Tudhope},\textsuperscript{84} the real property involved was encumbered by a mortgage, payments on which the children were unable to meet.\textsuperscript{85} As a consequence, the personal representative of the decedent’s estate was authorized to sell the property by court order. Claims were filed by decedent’s creditors in the probate proceeding (other than the mortgagee), and the issue was whether the sale proceeds could be reached by those creditors.\textsuperscript{86} The court held that since the property was devised to heirs and the will did not direct that the property be sold, the homestead estate was vested in the minor children prior to its sale.\textsuperscript{87} Therefore, the proceeds were still characterized as homestead and thus not subject to creditors. The court distinguished \textit{In re Estate of Price},\textsuperscript{88} in which the will had directed that the homestead be sold and the proceeds divided among the adult children, thus causing the proceeds to lose their homestead character and be subject to creditors’ claims.\textsuperscript{89}

Finally, in a recent case, the Fourth District Court of Appeal was faced with an issue of first impression on the homestead exemption. In \textit{Hubert v. Hubert},\textsuperscript{90} the court was called upon to decide whether an heir’s remainder interest in his deceased father’s homestead was exempt from the decedent’s estate creditors, where the property was subject to the life estate of a non-heir.\textsuperscript{91} The court relied on both the Florida Constitution and \textit{Bartelt} to declare that the homestead exemption inures to the interest of the son-heir

\begin{itemize}
\item \textsuperscript{82} Id.
\item \textsuperscript{83} Id. at 415.
\item \textsuperscript{84} 595 So. 2d 312 (Fla. 2d Dist. Ct. App. 1992).
\item \textsuperscript{85} Id.
\item \textsuperscript{86} Id. at 313.
\item \textsuperscript{87} Id.
\item \textsuperscript{88} 513 So. 2d 767 (Fla. 1st Dist. Ct. App. 1987).
\item \textsuperscript{89} Tudhope, 595 So. 2d at 313.
\item \textsuperscript{90} 622 So. 2d 1049 (Fla. 4th Dist. Ct. App. 1993).
\item \textsuperscript{91} Id. at 1049.
\end{itemize}
acquired either by devise or by intestate succession.\footnote{92} Even though the son had no current possessory interest in the property and the decedent’s homestead exemption would not inure to the non-heir’s life estate, it did inure to the heir’s remainder interest. The court was impressed with the heir’s arguments that since the vested remainder interest of a lineal descendant is protected by the homestead exemption in situations where the lineal descendant’s vested remainder comes from an intestate estate of a decedent who leaves a surviving spouse and a lineal descendant,\footnote{93} or where the decedent devised a life estate in his homestead to his wife with a remainder to a lineal descendant, it should be protected in this case. The court cited with favor the \textit{HCA Gulf Coast Hospital} statement that the homestead provision is to be construed liberally to effect its purpose, and stated that the resolution in the instant case “is consistent with carrying out the interest of the testator and the public policy of our homestead exemption.”\footnote{94} The court distinguished the cases which held that an heir’s future interest was not exempt from the heir’s creditors, since in those situations the heir was not in possession and thus could not claim that the future interest was exempt as the heir’s homestead.\footnote{95}

The court was also called upon to define the term “automobile” under section 732.402(2)(b), the exempt property statute. If automobiles are “held in the decedent’s name and regularly used by decedent or members of the decedent’s immediate family as their personal automobiles,” they pass to the surviving spouse and are exempt from all claims against the estate (except for perfected security interests).\footnote{96} \textit{In re Estate of Corbin}\footnote{97} involved a motor home and a travel trailer. In \textit{Corbin}, the court looked to the “regularly used” portion of the statute rather than focusing on what is an automobile. The court imposed this as a requirement and finding such evidence lacking, decided against the spouse.\footnote{98} The full definition of an automobile, therefore, remains in doubt and may not always be necessary to resolve cases.

\footnote{92} Id. at 1050 (citing the FLA. CONST. art. 7, § 4(b); \textit{Bartelt}, 579 So. 2d 282 (Fla. 3d Dist. Ct. App. 1991)).

\footnote{93} FLA. STAT. § 732.401(1) (1991). Both the spouse’s life estate and the vested remainder would be protected as homestead. The same result would follow from a devise in that form.

\footnote{94} \textit{Hubert}, 622 So. 2d at 1050 (citing \textit{HCA Gulf Coast Hosp.}, 594 So. 2d at 774).

\footnote{95} Id.

\footnote{96} FLA. STAT. § 733.402 (2)(b) (1991).

\footnote{97} 603 So. 2d 127 (Fla. 1st Dist. Ct. App. 1992).

\footnote{98} Id. at 129.
III. CLAIMS

Claims against estates which have substantially shorter time frames than civil litigation still warrant appellate attention. Additionally, the Supreme Court case of *Tulsa Professional Collection Services, Inc. v. Pope* and local statutes following Pope create more opportunities for appellate cases.

Section 733.702 of the Florida Statutes provides that the following are not binding on the estate, the personal representative, or on any beneficiary unless such a claim is filed within three months after the time of the first publication of the Notice of Administration: a claim or demand against a decedent's estate that arose before the death of the decedent; a claim for funeral or burial expenses; a claim for personal property in the possession of the personal representative; a claim for damages, including, but not limited to, an action founded on fraud or another wrongful act or omission of the decedent. As to any creditor required to be served with a copy of the Notice of Administration, the above stated claims are not binding unless the claim is filed thirty days after the date of service of such a copy of the notice on the creditor. This is the statute adopted by the Florida Legislature in response to the Pope case.

*Spohr v. Berryman* held that Florida Statutes section 733.702 is a statute of limitation, even though it is known as a statute of non-claim. The requirement in section 733.702 that a claim be filed within three months was not satisfied by filing a lawsuit within the non-claim period. Thus, probate procedures must be followed.

Section 733.702(3) of the Florida Statutes permits a circuit court to extend the time period during which a claim may be filed. Thus, cases frequently arise when the time within which to file a claim is enlarged. In *In re Estate of Myerson*, the court, in a per curiam decision, held that it was not an abuse of discretion for the trial court to extend the time for filing a probate claim. However, the trial court did err “in enjoining the disposition of any estate assets, without conducting a hearing on a request for temporary injunction and requiring the appellee to prove up her

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100. FLA. STAT. § 733.701(1) (1991).
101. 589 So. 2d 225 (Fla. 1991).
102. Id. at 227.
103. Id. at 227-28.
106. Id. at 533.
entitlement to injunctive relief.\textsuperscript{107}

\textit{Sireci v. Deal}\textsuperscript{108} dealt with extending the time to file an independent action after objection to the claim is filed.\textsuperscript{109} On September 4, 1989, Roger McClelland, an attorney, filed a Petition for Appointment for a Curator in the Estate of Donald M. Sparks. On September 15, 1989, Deal filed a caveat by creditor in the estate, which was treated as a claim against the estate. McClelland became curator and filed a Notice of Administration and an Objection to Deal's claim and notified Deal. Eventually, a formal estate was filed October 16, 1990, and Thomas J. Sireci, Jr. was appointed personal representative on November 30, 1990. On May 2, 1991, the personal representative filed a petition to bar Deal's claim. On August 26, 1991, the personal representative received an objection to the petition to bar the claim. The probate court denied the personal representative's petition to bar the claim and gave Deal ten days to amend his claim; however, the personal representative appealed from this order.\textsuperscript{110}

The appellate court upheld the trial court's ruling. In doing so, the court reasoned that the probate judge has broad discretion in determining when good cause exists to grant an extension for filing an independent action.\textsuperscript{111} The court further stated that it could only override the probate court's discretion if there is no factual basis for the probate court's conclusion.\textsuperscript{112} In this case, there was such a factual basis. During the trial court hearing, Deal's attorney presented several reasons why the independent action had not been filed.\textsuperscript{113} For example, Deal's long-time attorney from Pennsylvania testified that he believed the personal representative was representing Deal as a creditor and that the personal representative would therefore advise him of any formalities to make the claim valid.\textsuperscript{114} Furthermore, the Pennsylvania attorney testified he thought the petition to bar the claim was intended to place the matter in abeyance until a settlement could be reached among all the heirs.\textsuperscript{115}

Section 733.212(4)(a) of the Florida Statutes requires a personal representative to promptly make a diligent search to determine the names

\textsuperscript{107} Id. at 533-34.
\textsuperscript{108} 603 So. 2d 35 (Fla. 3d Dist. Ct. App 1993).
\textsuperscript{109} Id. at 35-36.
\textsuperscript{110} Id.
\textsuperscript{111} Id. at 36.
\textsuperscript{112} Id.
\textsuperscript{113} Sireci, 603 So. 2d at 36.
\textsuperscript{114} Id.
\textsuperscript{115} Id.
and addresses of creditors of the decedent who are reasonably ascertainable and to serve on those creditors a copy of the Notice of Administration within three months after the first publication of the Notice.\textsuperscript{116} Personal representatives usually need to review previously filed tax returns and checkbook registers.

The determination of ascertainable creditors has been the subject of several suits. \textit{Jones v. SunBank of Miami}\textsuperscript{117} concerned the sale of a gas station approximately four years prior to a decedent’s death. The appellate court affirmed the trial court’s decision. At trial, the claimant contended she should have received a Notice of Administration because she was a known or reasonably ascertainable creditor.\textsuperscript{118} The decedent had died August 15, 1989. Notice of Administration was published August 29, 1989 and the claims period expired November 29, 1989. The claimant, the gas station purchaser, filed suit against the decedent’s estate March 15, 1990, seeking damages for breach of contract and fraud for alleged environmental contamination to the premises. The trial court determined the claim was filed untimely and, as a result, the burden shifted to the claimant to seek an order enlarging time to file the claim.\textsuperscript{119} After a full evidentiary hearing, the trial court ruled that the claimant was not a known or reasonably ascertainable creditor who was entitled to receive a Notice of Administration.\textsuperscript{120} The appellate court noted that the trial court should have stricken the claim as untimely when there was no motion for enlargement of time to file.\textsuperscript{121}

In this instance, the trial court also rejected the claimant’s argument that gas stations often cause environmental damage, which, as a result, gives rise to a need to give actual notice to the purchaser upon decedent/seller’s death.\textsuperscript{122} Finally, the trial court concluded that it:

\begin{quote}
\textit{does not interpret [Tulsa Professional Collection Services, Inc. v.] Pope} to require that a personal representative determine the identities of persons or entities with whom a decedent had business dealings or other transactions during a given number of years prior to death and to serve a Notice of Administration upon each one merely because such person might possibly have some uncommunicated dissatisfaction with a matter.
\end{quote}

\textsuperscript{116} FLA. STAT. § 733.212(4)(a) (1991).
\textsuperscript{117} 609 So. 2d 98 (Fla. 3d Dist. Ct. App. 1992).
\textsuperscript{118} \textit{Id.} at 101.
\textsuperscript{119} \textit{Id.} at 100-01.
\textsuperscript{120} \textit{Id.} at 101.
\textsuperscript{121} \textit{Id.} at 102.
\textsuperscript{122} \textit{Jones}, 609 So. 2d at 101.
As to those persons, notice by publication is sufficient to afford due process.123

To the relief of many practitioners, there is a limit to the efforts that need to be made.

In *Burgis v. Burgis*,124 Lynn Burgis, the former wife of the decedent, filed a petition to require payment of her claim for past due alimony. The personal representative, who was the decedent's second wife, was alleged to have knowledge of Lynn's status as a creditor and of her claim for unpaid alimony.125 The Second District Court of Appeal held that due process required actual notice pursuant to *Tulsa Professional Collection Services, Inc. v. Pope*, and noted that Lynn's petition appeared to specifically meet the criteria of Florida Probate Rule 5.495, which was in effect at the time the petition was filed.126

The appellate court reversed the trial court's order which denied the petition because Lynn had previously filed an independent action which had been dismissed.127 The court noted that the issue to be determined was merely whether Lynn should be able to explain her status and the reason she untimely filed her claim.128 It did not rule upon the validity of Lynn's claim, which was not before the court.129

Further, the court also noted that Florida Probate Rule 5.495 was deleted effective October 1, 1991 because of the enactment of section 733.702 of the Florida Statutes.130 As amended, the statute provides for an extension of time in which a claim may be filed upon grounds of fraud, estoppel, or insufficient notice of the claims period.131

IV. PROCEDURAL ASPECTS OF WILLS

Florida's laws on the signing of wills have been on the books for many years. Certainly it is a far more settled area of the law than the law of

123. *Id.* at 102-03.
125. *Id.* at 595.
126. *Id.*
127. *Id.* at 596.
128. *Id.*
129. *Burgis*, 611 So. 2d at 596.
130. *Id.*; *see* FLA. STAT. § 733.702 (1991).
trusts; however, the procedural aspects of execution and proving of wills continue to engender controversy.

In *Simpson v. Williamson*, the testator had signed the self-proving affidavit but nowhere else on the will did his signature appear. In addition, a witness submitted an affidavit that one of the two witnesses to the will had not signed in the presence of both the testator and the other witness. The attorney who drafted the will, on the other hand, filed an affidavit that the testator, both witnesses, and he as the notary, all signed in the presence of each other.

The court, in holding that the lower court improperly granted summary judgment, stated that the testator had validly executed the will. The court also stated that the attorney’s signature on the self-proving affidavit could be used as another witness to validate the will since the determining factor is not where the witness’s signature appears but, rather, whether the signature was affixed under circumstances to indicate the person is an attesting and subscribing witness. In the end, the court favored saving the will.

What if a validly executed will is lost and an unsigned carbon copy is introduced into probate? Florida rules seem to indicate that it is not an uncontested event to have the copy of the will admitted; rather, it is automatically adversarial. In *Kero v. Di Legge*, the copy of the will was not signed by the decedent and only one of the two subscribing witnesses was available to testify as to the authenticity and execution of the will. The court held that this was a “correct” copy within the meaning of section 733.207(3) of the Florida Statutes, which requires the testimony of only one witness to prove “due execution.” The court reasoned that the necessary signatures are not required because the purpose of a correct copy is not to prove execution but rather the contents of the original will.

Two recently decided cases involve a testator’s attempt to revoke a will or a codicil. In *In re Estate of Dickson*, the court was called upon to decide whether the decedent’s intention to revoke was accompanied by the requisite physical act of revocation. The decedent had written on the self-

133. *Id.* at 545.
134. *Id.* at 547.
135. *Id.* at 546.
136. *Id.*
137. 591 So. 2d 675 (Fla. 4th Dist. Ct. App. 1992).
138. *Id.* at 677.
139. *Id.*
140. 590 So. 2d 471 (Fla. 3d Dist. Ct. App. 1991).
proof affidavit, which was the final page of the will: "March 16, 1987 I MYSELF DECLARE THIS WILL NULL AND VOID OF SOUND MIND" followed by his signature, and had written and circled the word "void" over the raised notarial seal. In finding this a sufficient physical act, the court stated that Florida Statutes section 732.506 did not require any specific degree of physical destruction, obliteration, or cancellation to accompany clear evidence of intent. The court also found that the self-proof affidavit had been incorporated into the will; thus, the physical act constituted a revocation of the entire will.

In re Estate of Tolin involved the following question, which was certified to the Florida Supreme Court as one of great importance:

MAY A CODICIL TO A WILL BE REVOKED BY DESTROYING A PHOTOGRAPHIC COPY IF THE TESTATOR BELIEVED THAT BY SUCH ACT HE WAS DESTROYING THE ORIGINAL AND THE TESTATOR INTENDED TO REVOKE THE CODICIL?

The court answered this question in the negative, stating that section 732.506 of the Florida Statutes requires that the document destroyed by a physical act must be the original document. However, because the intent of the testator to revoke the codicil was undisputed, the court imposed the equitable remedy of a constructive trust to prevent the unjust enrichment of the codicil's devisee as a result of the testator's mistake. The court also noted the importance of distinguishing an original document from a copy, and advised attorneys who prepare documents such as wills and codicils to consider specifically designating which documents are copies, since modern technology makes it difficult to distinguish them. Un-

141. Id. at 472.
142. Id.
143. Id. No mention was made of the doctrine of dependent relative revocation in this case. Under that doctrine, if a testator cancels a will with the intention of making a new one immediately and the new will is not made, it is presumed that the testator preferred the old will to no will and consequent intestacy, and the old will may be admitted to probate. Apparently, the testator in this case had not intended to make a new will immediately after destroying the old one.
144. 622 So. 2d 988 (Fla. 1993).
145. Id. at 989.
146. Id. at 990.
147. Id. at 990-91.
148. Id.
doubtedly this case has changed procedures for signing wills in many law offices.

In their interpretation of ambiguous provisions in wills, Florida courts attempt to ascertain the intent of the testator. This intent is gleaned from the context of the will and from parol evidence of the draftsman. In *In re Estate of Walker*, the decedent’s will left “all of my personal property” (as well as all real property) to named beneficiaries, but also contained a residuary clause devising the remaining property to a church. At issue was whether the term “personal property” should be interpreted to mean only tangible personal property; in this case, the intangible personal property would pass to the residual beneficiary. The court withdrew its prior decision in favor of a new opinion which upheld the admission of oral testimony by the will draftsman. The draftsman testified that the testator had intended to limit the nonresiduary devise to tangible personal property, thereby giving effect to the residuary clause which would otherwise have been insignificant. The interpretation made a difference to the Presbyterian Church, the residual beneficiary and to the malpractice carrier for the draftsman. The court rejected the contention that the testimony of the draftsman, who was also the personal representative violated the Dead Man’s Statute, since in this case the personal representative, would not gain or lose from either interpretation of the will.

Even in the absence of parol evidence, Florida courts will liberally construe the wording in a will to carry out the testator’s intent. In *In re Estate of Reese*, the trustees sought permission from the court to divide the trust created under decedent’s will into a generation-skipping-transfer-exempt trust and a nonexempt trust with the same dispositive provisions as the single trust. The decedent’s will directed the trustees “to reduce to the lowest possible amount the federal estate tax payable by reason of my death and any federal generation-skipping tax on any transfer with respect to which I am the deemed transferor . . . .” The court found the decedent’s expressed intent to be unequivocal and held that the trust could be so

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150. Id.
151. Id. at 625.
152. Id.
154. Walker, 609 So. 2d at 625-26.
156. Id. at 158.
divided as a matter of construction rather than by reformation of the will. 157

V. TRUSTS

Although the law on various aspects of wills is well-settled and explicitly stated in statutes, this is not the case with the other popular estate planning tool—the revocable living trust. Probably the most surprising decision involving living trusts in Florida was handed down by the Florida Supreme Court in 1993 in the case of Zuckerman v. Alter. 158 The question certified from the lower court was:

WHETHER PARAGRAPH 689.075(1)(g), FLORIDA STATUTES (1989), CREATES A SINGLE TEST, OR TWO ALTERNATIVE TESTS, FOR THE VALIDITY OF AN INTER VIVOS TRUST EXECUTED ON OR AFTER JULY 1, 1969, WHERE THE SETTLOR IS THE SOLE TRUSTEE? 159

The statute provides that an otherwise valid trust is not invalidated or an attempted testamentary disposition thwarted because the settlor is, at the time of execution of the instrument, or thereafter becomes, sole trustee; provided that at the time the trust instrument is executed it is either valid under the laws of the jurisdiction in which it is executed or it is executed in accordance with the formalities for the execution of wills required in such jurisdiction. 160

In affirming the lower court’s decision, the Florida Supreme Court held that the statute created two alternative tests and satisfaction of either test sustains the validity of the trust. 161 It had previously been thought by most Florida attorneys that a self-declaration of trust executed in Florida must conform to the Florida Statute of Wills. Such trusts, said the court, may be created by writing or parol, or partially in each, provided that the words used are sufficient to create a trust, which make a trust “otherwise

157. Id.
158. 615 So. 2d 661 (Fla. 1993).
159. Id. at 662.
160. FLA. STAT. § 689.075(1)(g) (1989).
161. Zuckerman, 615 So. 2d at 663.
valid.” Furthermore, the trust does not have to be executed with the formalities for the execution of wills (i.e., witnesses, notary, etc.).

In another case interpreting a trust, *NCNB National Bank of Florida v. Shanaberger*, the Second District Court of Appeal questioned language granting the trustee sole discretion to invade the principal for a beneficiary’s “care, maintenance, support, and medical attention.” Before invading the principal to satisfy a demand for nursing home and related medical expenses for the trust beneficiary, the trustee had requested information about other sources of income available to the beneficiary. The trust instrument provided no criteria for making the necessary determination to invade the principal other than for the trust purpose. The court stated that its only function was to determine whether the trustee had abused its discretion by its request for information of outside sources of income. The court held that there was no abuse of discretion and that even an unlimited invasion power is subject to accountability to remaindermen for an improper, an arbitrary, or a capricious exercise of discretion.

VI. GUARDIANSHIPS

Even though court statistics reveal an increase in guardianships and Florida has a recognized growing senior population, few guardianship cases end up in the appellate courts. Selection of an appropriate guardian is obviously a matter of great concern and was addressed in *Tagliabue v. Fraser*. The *Tagliabue* court held that appointment of a non-relative as guardian of property was inappropriate where the incapacitated person was the sole life beneficiary under a trust and the appointed guardian was sole residuary beneficiary under the same trust. According to the court, Florida Statutes section 744.309(2) prohibits the appointment of a non-relative as guardian where a conflict of interest may occur.

The issue of attorney fees has also received the appellate courts’ attention. Namely, *Department of Health & Rehabilitative Services v. Whaley* involved, *inter alia*, fees to be paid to a guardian ad litem.

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162. Id.
163. 616 So. 2d 96 (Fla. 2d Dist. Ct. App. 1993).
164. Id. at 97-98.
165. Id. at 98.
166. 576 So. 2d 401 (Fla. 5th Dist. Ct. App. 1991).
167. Id. at 401-02.
168. Id. at 402.
169. 574 So. 2d 100 (Fla. 1991).
Florida’s Department of Health and Rehabilitative Services ("HRS") was not held responsible for fees of an attorney who was appointed by the trial court as counsel for a guardian ad litem.\(^\text{170}\) Therefore, the court observed that HRS has no responsibility for or control over the guardian ad litem program. This is a different statute than that required for appointment of an attorney under guardianship laws in chapter 744 of the Florida Statutes, over which the courts have jurisdiction to order payment of attorney fees from a ward’s assets.

Also concerning fees is *In re Bockmuller*,\(^\text{171}\) where the ward was adjudicated incapacitated November 9, 1989, although she retained the rights to vote and to marry.\(^\text{172}\) After the ward was placed in a retirement home, she told an attorney she wanted to go home and would hire someone to assist her. The attorney filed an appearance and petitioned for restoration of capacity and restoration of additional rights. The trial court found as a matter of law there was no conflict, adverse interest, or any other basis for removal of the guardians. However, the attorney continued to attempt to remove the woman’s guardians until her death on February 6, 1991. Later, the attorney petitioned the trial court for attorney fees and costs, which were to be paid from the ward’s guardianship assets. Appeal was taken from the trial court’s order awarding attorney fees and costs.\(^\text{173}\)

The appellate court ruled that a ward’s right to contract or hire an attorney was removed by the order determining her incapacity.\(^\text{174}\) The court stated that counsel for a ward must be contracted by one of the guardians or appointed by the court.\(^\text{175}\) Further, a ward has no power to contract with an attorney to represent her in any proceeding.\(^\text{176}\) The appellate court also found that the attorney’s fees charged for time spent in his continued efforts to remove the guardians served only to deplete the ward’s estate and served no benefit to the ward or her estate.\(^\text{177}\) The order authorizing payment of attorney fees and costs was vacated and set aside.\(^\text{178}\)
The case of *Metzger v. First National Bank of Clearwater*\(^{179}\) concerned fees incurred by a party other than the guardian of the property. The ward’s husband unsuccessfully petitioned the court to partition jointly held bank accounts for himself and the ward. The ward’s daughter was guardian of the person and a bank was guardian of the property. The guardian of the person opposed the husband’s petition for partition and defended the trial court’s order on appeal. The guardian of the person requested attorney fees, asserting that her efforts benefitted the guardianship estate in the trial court and appellate courts.

The appellate court ruled that attorney fees for services beneficial to the ward may be awarded even though those services were not rendered by the ward’s guardian.\(^{180}\) "[E]ven if [a person] is motivated by thoughts of perhaps eventually inheriting what was left of the joint accounts if [ward survived husband], the existence of such a motive is irrelevant to the determination whether her efforts benefitted the guardianship estate."\(^{181}\)

The Fourth District Court of Appeal in *Midland National Bank & Trust v. Comerica Trust Co.*\(^{182}\) held that upon the death of an incapacitated ward, unpaid administrative expenses and debts of a guardianship, as well as debts of the ward which pre-existed creation of the guardianship but which the court had ordered paid, are promptly payable from the ward’s guardianship estate prior to the guardian making distribution to the ward’s probate estate.\(^{183}\) The court observed that the guardianship is a unique entity that must, to the extent of its assets, satisfy or discharge all guardianship administrative expenses, as well as obligations incurred by the guardian for the ward, before the net assets remaining are distributable to the persons entitled to them.\(^{184}\)

*In re Brown*\(^{185}\) involved the court’s jurisdiction over the guardian. The Fourth District Court of Appeal determined that there was no merit to the guardian’s contention that the lower court had no jurisdiction over her in her capacity as the trustee of an inter vivos trust.\(^{186}\) The court found that the guardian had petitioned the court for appointment as guardian and,

\(^{180}\) Id. at 373 (citing *In re Dean*, 319 So. 2d 589 (Fla. 2d Dist. Ct. App. 1975)).
\(^{181}\) *Metzger*, 585 So. 2d at 374.
\(^{182}\) 616 So. 2d 1081 (Fla. 4th Dist. Ct. App. 1993).
\(^{183}\) Id. at 1086.
\(^{184}\) Id.
\(^{185}\) 611 So. 2d 1342 (Fla. 4th Dist. Ct. App. 1993).
\(^{186}\) Id.
in doing so, "clearly submitted herself individually to the court’s jurisdiction."\textsuperscript{187}

The guardian’s power to act was the issue in \textit{Goeke v. Goeke}.\textsuperscript{188} Here, the court held that a guardian, with the approval of the court, has the statutory power, pursuant to section 744.441 of the Florida Statutes, to establish and modify IRA trusts or IRA custodial accounts for the ward.\textsuperscript{189} This includes the authority to designate the ward’s estate or family members as beneficiaries for the IRA contract. The court noted that designation of a beneficiary in an IRA agreement is not equivalent to writing or amending a will for the ward. The guardian’s exercise of this power must be appropriate for, and in the best interest of, the ward.\textsuperscript{190}

\section*{VII. Elective Share}

The elective share of a surviving spouse continues to plague the courts in their attempt to follow the Florida Statutes.\textsuperscript{191} The manner of election was the focus in \textit{Harmon v. Williams}.\textsuperscript{192} In \textit{Harmon}, the surviving spouse’s attorney had, within the elective share time limits, signed and filed a "Notice of Intention to Petition for Elective Share" but no formal election was ever filed. In holding the purported elective share election invalid, the court stated that it was not signed either by the surviving spouse or by her guardian, as required by the statute.\textsuperscript{193} The court conceded that an attorney-in-fact under a durable power of attorney may be authorized to make such election; however, that factual situation was not presented before the court.\textsuperscript{194} Furthermore, the election was held to be invalid because the petition was merely a notice that a petition to determine the elective share would be filed later, without stating any statutory grounds for the delay.\textsuperscript{195}

In \textit{In re Estate of Palmer},\textsuperscript{196} the court held that the "surviving spouse is entitled to interest on [the] elective share from the date of the order

\begin{enumerate}
  \item[187.] \textit{Id}.
  \item[188.] 613 So. 2d 1345 (Fla. 2d Dist. Ct. App. 1993).
  \item[189.] \textit{Id} at 1347.
  \item[190.] \textit{Id}.
  \item[192.] 596 So. 2d 1139 (Fla. 2d Dist. Ct. App. 1992).
  \item[193.] \textit{Id} at 1142.
  \item[194.] \textit{Id} at 1143.
  \item[195.] \textit{Id} at 1142.
  \item[196.] 600 So. 2d 537 (Fla. 4th Dist. Ct. App. 1992).
\end{enumerate}
The personal representative of the estate had withheld payment of the elective share because of additional estate taxes from the decreased marital deduction resulting from the election. In the previous related case of *Tarbox v. Palmer*, the court had held that the election of the elective share by the surviving spouse had not increased estate taxes but merely accelerated their time for payment by the residuary beneficiaries of the QTIP trust for the spouse; therefore, the surviving spouse was not to bear any additional tax.

This elective share and burden of estate taxes issue has arisen again in the controversy over the estate of Joe Robbie. In his estate plan, Joe Robbie left assets in a QTIP trust for his wife. The assets included the Miami Dolphin football team and part of Joe Robbie Stadium. Elizabeth Robbie, Joe Robbie’s surviving spouse, and mother of his eleven children, filed for an elective share, which could result in accelerating approximately twenty-five million dollars in estate taxes. If the entire QTIP trust principal had been held at her death, the estate taxes would have been deferred until that time. As of the writing of this article, the issue is unresolved. A literal reading of section 732.215 of the Florida Statutes could, in some cases if not this one, eliminate the spouse’s entire elective share if the present increase in estate taxes is charged against it. Also unresolved at this time is whether a surviving spouse (in this case Elizabeth Robbie) who files for an elective share would forfeit his or her right to benefits from the remaining estate assets which pour over into a revocable trust created by the deceased spouse which names the surviving spouse as an income and/or principal beneficiary. Florida law may be clarified if the Robbie case is resolved by a court rather than settled out of court. In any event, it should prompt more attorneys to provide appropriate language in revocable trusts as to the effect of a spouse filing an elective share.

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197. *Id.* at 538 (citing *Price v. Florida Nat’l Bank*, 419 So. 2d 389 (Fla. 3d Dist. Ct. App. 1982)).
198. 564 So. 2d 1106 (Fla. 4th Dist. Ct. App. 1990).
199. *Id.* at 1108.
VIII. STATUTORY CHANGES

A. Creditors' Claims Post-Pope

In the last two years, the Florida Legislature has responded to state and national case law and consumer concerns by adopting specific legislation. Chapters 731 through 733 are considered the "Florida Probate Code" and chapter 737 includes the limited Florida statutes on trusts. A significant case decided by the United States Supreme Court, *Tulsa Professional Collection Services, Inc. v. Pope*\(^1\) dealt with the proper notice required for creditors of a probate estate under the Fourteenth Amendment Due Process Clause of the United States Constitution. In that case, the widow of a decedent was appointed by an Oklahoma probate court to be the executrix of her husband's estate. Under Oklahoma law, with which she complied, she was required to publish notice in a local legal newspaper and to give creditors of her husband's estate up to sixty days within which to file claims against the estate. The collection company had been assigned the claim for decedent's hospital expenses from the hospital in which Mr. Pope died. The company claimed that they should have received actual notice of the claim period since, certainly under the circumstances of this case, the hospital was a known or ascertainable creditor. The Supreme Court left it to the various states to make specific provisions for creditors' claims periods and the procedures to be followed. As a result, Florida modified section 733.212 of the Florida Statutes.

In Florida, the personal representative of the estate is now obliged to send notice to known and ascertainable creditors of the decedent.\(^2\) An affidavit of the mailing must be signed and filed with the court by the personal representative, who must make a diligent search for creditors.\(^3\) The search usually includes a review of the preceding two or three years of check registers, tax returns, and finally, the mail arriving after the death.

B. House Bill 1295

A composite bill changing several unrelated provisions of trust and probate statutory law was passed by the 1993 Florida Legislature and, by a

\(^{203}\) *Id.*
whisker, became law absent the Governor's signature. House Bill 1295
covered four topics: creditors' rights and revocable living trusts; fees for
attorneys and personal representatives in the event of disputes; changes in
the prudent investor rule; and the application of certain rules of construction
found in the Probate Code to trust agreements.\footnote{204}

One of the efforts of the bill was to make trust administration more
similar to probate administration. There has not been a reported case on the
specific obligation of a trustee holding assets of a decedent to notify the
decedent's creditors of the existence of the trust nor any case requiring
payment from trust corpus to a decedent's creditors. This is in contrast to
specific probate statutes and case law.\footnote{205} While a trustee taking over as
trustee from a grantor/decedent has always had the obligation to notify
beneficiaries of a change of trustee,\footnote{206} this author believes that only
professional trustees commonly carry out this notice requirement. Under the
most recent law passed, a trustee has an obligation to publish a notice to
creditors in a local newspaper for two consecutive weeks and consequently
delay distributing trust assets until the three month creditor period has
elapsed.\footnote{207}

In addition to the notice for claimants, a trustee is obliged to pay any
administrative expenses and timely filed enforceable creditors' claims from
trust funds upon certification by the personal representative that there are
insufficient funds in the probate estate with which to pay them.\footnote{208} The
new statute does not address the fairly common situation as to who certifies
if there is no certification. It also does not provide a procedure for creditors
whose claims are denied by a trustee where there is no probate estate.
There is no mention of taxes, either because of an oversight on the part of
the authors or because the Internal Revenue Code already provides that the
tax obligation follows the assets. The various circuit courts and clerks will
need to establish procedures and filing fees for this additional function,
although the clerks may have to steel themselves for the abundance of
individual trustees who will be attempting to do this on their own without
an attorney. This statutory change diminishes the difference between the
revocable living trust and the probate process for many individuals in
Florida, making such trusts less attractive.

\footnote{204}{Ch. 93-257, 1993 Fla. Laws 2500.}
\footnote{205}{See supra text accompanying notes 103-31.}
\footnote{206}{FLA. STAT. § 737.303 (1991).}
\footnote{207}{Ch. 93-257, § 15, 1993 Fla. Laws 2500, 2510 (to be codified at FLA. STAT.
§ 737.3057(1)(a)(c)).}
\footnote{208}{Id. § 14, 1993 Fla. Laws at 2509 (to be codified at FLA. STAT. § 737.3056(1)).}
Another change contained in this composite bill addresses the old “prudent investor” rule enunciated many years ago by Justice Putnam in *Harvard College v. Amory.* As modern portfolio theory evolved, more investment options became available, and this new world had trouble fitting in with the quaint language. The new law amends sections 518.11, 660.431, 733.212, 733.607, 733.617, 733.707, and 737.302 and creates section 518.112 of the Florida Statutes.

There are two main parts to the changes adopted in the prudent investor rule. The first is that the fiduciary (trustee, personal representative, guardian) is obliged to consider not just the individual investments in a vacuum, but rather the entire portfolio taken as a whole. The fiduciary must consider the needs of the beneficiaries, wards, and the goal of the trust agreement. Diversification is specifically encouraged.

The second major change applicable to investment duties of fiduciaries is that for the first time under Florida statutory law, the investment function can be delegated. If a fiduciary wishes to assign both the duty and the responsibility of investments in a particular fiduciary account to anyone else, including an investment manager or a bank, the trustee can do so without fully resigning as trustee. There is a specific procedure to be followed of notifying the beneficiaries of any trust or seeking court approval in the case of a guardianship and then delegating. Many current trust agreements allow for the hiring of investment advisors by the trustee, but the trustee is expected to retain full power and responsibility in such a situation.

Chapter 737 is the part of the Florida Statutes that addresses trusts in Florida. There is very little statutory law contained therein. Some rules of construction which have been found in the Florida Probate Code will now be found in the chapter on trusts. For example, a willful slayer, that is one who kills the grantor or another person upon whose death such beneficiary’s interest depends, cannot recover anything as a beneficiary of a trust. The language is not identical to the language in the existing probate statute on killers not being entitled to revenue from an estate. Appar-
ently, if you intend to kill someone and expect to be convicted of intentional murder, make sure your victim has a revocable trust. Another section adopted in the trust law is the assumption that any distribution is on a "per stirpes" basis.\textsuperscript{215} It would have been more useful if the "antilapse" statute\textsuperscript{216} had been adopted as part of the 1993 amendments to chapter 737.

IX. JOINT BANK ACCOUNTS

The question of how joint bank accounts are held has been the subject of several cases and a new statute passed by the 1992 Florida Legislature. Prior to July 3, 1992, the ownership of joint bank accounts depended on the type of financial institution in which the account was opened. For savings banks and savings and loan associations, there was a \textit{conclusive} presumption that, in the absence of fraud or undue influence, a savings account held in the names of two or more people constituted a joint tenancy with rights of survivorship. However, for commercial banks and credit unions, in the absence of fraud or undue influence, there was a \textit{rebuttable} presumption of survivorship rights by proving contrary intent by "clear and convincing evidence." Many cases introduced clear and convincing evidence of such contrary intent: (1) the form and the language on the account card itself and signature cards; (2) the age and physical condition of an owner; (3) the relationship of the parties; (4) the use of the account; (5) the knowledge of the surviving tenants; (6) the source of the deposits; (7) the control of any passbook; and (8) the relationship of the account to the owner's estate plan. If the action involving ownership was brought by a co-tenant rather than a survivor, the statutory presumptions did not apply.

In a leading case, \textit{In re Estate of Combee},\textsuperscript{217} the Second District Court of Appeal applied the statutory presumption to joint commercial bank accounts opened by the decedent with two other persons as signatories. The contractual language on the bank's signature contract card clearly expressed a right of survivorship. The trial court had allowed parol evidence but excluded the testimony of the surviving tenants as self-serving. In the absence of clear and convincing proof of a contrary intent to rebut the

\begin{thebibliography}{9}
  \bibitem{215} Ch. 93-257, § 16, 1993 Fla. Laws 2500, 2511 (to be codified at \textit{FLA. STAT.} § 737.624).
  \bibitem{216} \textit{FLA. STAT.} § 732.603 (1991).
  \bibitem{217} 583 So. 2d 708 (Fla. 2d Dist. Ct. App. 1991).
\end{thebibliography}
statutory presumption, the bank accounts were held to be survivorship accounts and the surviving co-tenants became the account owners.\textsuperscript{218}

The distinction between financial institutions holding joint bank accounts was abolished by chapter 655 of the Florida Statutes in July, 1992.\textsuperscript{219} "Unless otherwise expressly provided in a contract, . . . signature card, . . . [or the like], a deposit account in the names of two or more persons \textit{shall be presumed} to have been intended by such persons to provide that, upon death of any one of them, all rights . . . vest in the survivor."\textsuperscript{220} The rebuttable presumption may be overcome by proof of fraud or undue influence or by clear and convincing proof of a contrary intent.\textsuperscript{221} True convenience accounts are excepted from this rule, and \textsl{Totten} trust accounts are still recognized. As a practical matter, a customer must aggressively demand a convenience account if that is desired.

Between husband and wife, jointly held real property is presumed to be held as tenancy by the entireties, but the presumption does not apply to personal property owned by a husband and wife together. "[T]he intention of the parties must be proven unless the instrument creating the tenancy clearly bears an express designation that the tenancy is one held by the entireties."\textsuperscript{222} The distinction is important since creditors wishing to attach the joint bank accounts of a husband and wife to satisfy the debt of one spouse may reach the account if held as joint tenants with rights of survivorship but not if held as tenants by the entireties.\textsuperscript{223} The Florida courts have been concerned with ascertaining the spouses' intent in establishing and using a joint bank account. Bank signature cards have been examined, although they typically refer to such accounts as joint with right of survivorship and do not mention a tenancy by the entirety. Also, whether the joint bank account was created from jointly owned funds and whether it was used for the spouses' joint expenses were other considerations in the courts' attempts to ascertain the spouses' intentions.

In \textsl{Terrace Bank of Florida v. Brady},\textsuperscript{224} the court seemed to shift its focus from the intent of the depositor-spouses to an examination of the

\textsuperscript{218} \textit{Id.} at 712-13.
\textsuperscript{219} \textsc{Fla. Stat.} §§ 655.001-655.954 (Supp. 1992).
\textsuperscript{220} \textit{Id.} § 655.79(1) (emphasis added).
\textsuperscript{221} \textit{Id.} § 655.79(2).
\textsuperscript{222} \textsl{First Nat'l Bank of Leesburg v. Hector Supply Co.,} 254 So. 2d 777, 781 (Fla. 1971).
\textsuperscript{224} 598 So. 2d 225 (Fla. 2d Dist. Ct. App, 1992).
bank’s policies and regulations as to joint bank accounts being held as tenants by the entireties, including whether the bank offered such accounts and whether they were specifically requested by the spouses upon creation. The court also stated that the burden of proof required of a married couple attempting to shield their bank account from the claims of a spouse’s creditor meet the “clear and convincing” standard of evidence. The Florida Statutes now impose the same standard to all joint bank accounts. Consequently, husbands and wives desiring protection from individual liability should take appropriate action to clearly and convincingly designate and treat their joint bank accounts as “tenancy by the entirety” accounts.

X. CONCLUSION

Probate and trust law in Florida continues to evolve. The Florida Legislature has attempted to codify many aspects, particularly in the trust law area. However, it is certain that the most recent statute will be amended in the next legislative session and we will see additional codification in this area. Also certain will be the continued plethora of cases as the parties and courts attempt to deal with these new statutes as well as aspects not covered by them. It is such activity that makes the attorney’s practice in probate and trust law interesting and (hopefully) rewarding.

225. Id. at 228.
226. Id.
Real Property: 1993 Survey of Florida Law

Ronald Benton Brown*

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* Professor of Law, Nova University Shepard Broad Law Center. The author would like to express his appreciation for the untiring assistance of Mr. Terence Nolan, class of 1994.
I. INTRODUCTION

This survey presents recent developments in the law that should be of particular interest to the real estate lawyer or real estate professional. It includes decisions of the Florida Supreme Court, the district courts of appeal, and statutes, from the period of August 1, 1992 to July 31, 1993.

II. FLORIDA SUPREME COURT DECISIONS

A. Attorney’s Fees

Ganz v. HZJ, Inc. Chief Justice Barkett and Justices Overton, Shaw, Grimes, Kogan, and Harding concurred in this per curiam decision. Justice McDonald dissented without an opinion.

A delinquent taxpayer, HZJ, Inc., had sued to prevent the sale of tax certificates on its land by the Dade County tax collector. After the trial court found the suit to be without merit, the tax collector filed a motion for attorney’s fees based upon section 57.105(1) of the Florida Statutes, which provided: “The court shall award a reasonable attorney’s fee . . . in any civil action in which the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the complaint or defense of the losing party . . . .” Because the tax collector had not specifically pleaded that he was entitled to attorney’s fees in his answer to the complaint as required by the supreme court’s 1991 opinion in Stockman v. Downs, the motion was denied.

The supreme court, however, ruled that a claim for attorney’s fees need not be pleaded specifically. Such a requirement would make little sense because:

[i]t is only after the case has been terminated that a sensible judgment can be made by a party as to whether the adverse party raised nothing but frivolous issues in the cause, and, if so, to file an appropriate mo-

1. This article does not include a discussion of family law issues, such as the distribution of property upon divorce, of probate and trust law issues, or of the significant legislative amendments to the planning and growth management process encompassed in Chapter 93-206 of the Florida Laws.
2. 605 So. 2d 871 (Fla. 1992).
3. Id. at 872.
5. 573 So. 2d 835 (Fla. 1991).
6. Ganz, 605 So. 2d at 872-73.
B. Condominiums

Falk v. Beard. This unanimous per curiam decision involved review of a final order of the Florida Public Service Commission ("PSC").

A condominium management company was contractually obligated to provide, inter alia, for electric service to the common areas of a condominium community. The contract provided that if the electric rate charged by the local electric company increased by at least five percent, the management company was then entitled to distribute that additional cost to the unit owners. A condominium unit owner challenged the increase by complaining to the PSC that the management company was involved in the sale of electricity.

The PSC made a preliminary finding that it had jurisdiction to investigate the complaint. When the management company sought to enjoin the PSC, the supreme court held that the circuit court did not have jurisdiction. After completing its investigation, the PSC concluded that the management company was not in the business of selling electricity and, therefore, it had no regulatory role over the management fee. The condominium owner challenged the conclusion as arbitrary and capricious based upon the contention that it contradicted the original finding of jurisdiction. The supreme court gave short shrift to this argument. It was one matter to conclude that the PSC had jurisdiction because a sale of electricity might be involved and a completely different matter to decide after a full investigation whether a sale of electricity was in fact involved.

The unit owner further challenged the conclusion based upon the evidence. The supreme court pointed out that its role in reviewing findings of the PSC was to simply determine if the order was supported by competent, substantial evidence. The record included evidence that: (1) the
management company had to absorb any rate increase that was less than the 
triggering five percent; 16 (2) there was no separate charge for the use of the 
recreational facilities; 17 (3) there was no separate charge for electricity 
consumed in using the recreational facilities; 18 and (4) the maintenance fee 
increase was related to an electric rate increase rather than a consumption 
increase. 19 The fact that the increase was due to a rising electric rate and 
not a consumption increase made this case easily distinguishable from 
Fletcher Properties, Inc. v. Florida Public Service Commission. 20 In 
Fletcher, the manager wanted to charge tenants for water based on their 
individual consumptions as determined by meters.

In addition, in Falk, the unit owner claimed that the Florida Administrative Code 21 required a contrary finding. The supreme court reiterated 
that the court’s role in reviewing a PSC interpretation of rules that apply to 
the PSC is merely to determine if the interpretation was clearly erroneous. 
Without going into a detailed analysis, the court simply stated that under the 
circumstances, the court could not rule that the PSC’s interpretation was 
erroneous or unauthorized. 22

C. Eminent Domain

City of Ocala v. Nye. 23 This was a per curiam opinion. Justice 
Kogan dissented without writing an opinion.

In order to widen a street, the city brought a condemnation action to 
acquire part of a tract of land. The tenants of the property made a claim for 
the special damages to their business. Pursuant to section 73.071(3)(b) of 
the Florida Statutes, these damages would be available only if part of a 
landowner’s property is condemned, not if the entire tract had been con-
demned. After determining that paying the business damages was more 
expensive than taking the entire property, the city amended its petition to 
seek condemnation of the entire property. The Fifth District Court of

16. Id. at 1087.
17. Falk, 614 So. 2d at 1088.
18. Id.
19. Id.
20. 356 So. 2d 289 (Fla. 1978).
22. Falk, 614 So. 2d at 1089.
23. 608 So. 2d 15 (Fla. 1992). The facts are all taken from the Florida Supreme Court 
opinion.
Appeal held that condemning the entire property when only part is needed exceeded the city’s condemnation authority.\textsuperscript{24}

The Florida Supreme Court reached a different conclusion. The court observed that the Florida Constitution expressly granted every municipality authority “to conduct municipal government, perform municipal functions and render municipal services . . . .”\textsuperscript{25} Except when that power is expressly limited by law,\textsuperscript{26} the only requirement is that the powers be used solely in the furtherance of “municipal purposes.”\textsuperscript{27} Section 166.021(2) of the Florida Statutes defines municipal purpose as “any activity or power which may be exercised by the state or its political subdivisions.”\textsuperscript{28} The Department of Transportation had been expressly granted the power to acquire entire tracts of land for the purpose of minimizing acquisition costs\textsuperscript{29} and the counties had been expressly given similar powers of eminent domain.\textsuperscript{30} Logically, saving the taxpayers money was also a valid municipal purpose.\textsuperscript{31} Thus, the lack of statutory authorization for the city to take more property than it needed for this project did not prohibit it from doing so in order to minimize the costs.

\textit{Florida Department of Revenue v. Orange County.}\textsuperscript{32} Justice Kogan wrote the unanimous decision. Chief Justice Barkett and Justices Overton, McDonald, Shaw, Grimes, and Harding concurred.

Threatened with condemnation proceedings, a landowner agreed to sell its property to the county. Under the sale agreement, the county was to pay any documentary stamp tax that might be owed, although both parties believed the transaction was immune from such tax. The Department of Revenue disagreed and claimed the tax with interest and penalties.

The district court certified a question that narrowly focused upon the facts of this case, i.e., it included the contractual provision that the county was obligated to pay the tax if one was owed.\textsuperscript{33} The supreme court

\textsuperscript{24} Nye v. City of Ocala, 559 So. 2d 360, 362 (Fla. 5th Dist. Ct. App. 1990).
\textsuperscript{25} Nye, 608 So. 2d at 16 (quoting \textit{FLA. CONST.} art. VIII, § 2(b)).
\textsuperscript{26} \textit{Id.} at 17 (relying upon \textit{FLA. STAT.} § 166.021(1) (1991)).
\textsuperscript{27} \textit{Id.} (quoting \textit{State v. City of Sunrise}, 354 So. 2d 1206, 1209 (Fla. 1978)).
\textsuperscript{28} \textit{FLA. STAT.} § 166.021(2) (1989).
\textsuperscript{29} \textit{Id.} § 337.27(2).
\textsuperscript{30} \textit{See id.} § 127.01(b).
\textsuperscript{31} Nye, 608 So. 2d at 17.
\textsuperscript{32} 620 So. 2d 991 (Fla. 1993).
\textsuperscript{33} Orange County v. Florida Dep’t of Revenue, 605 So. 2d 1333 (Fla. 5th Dist. Ct. App. 1992). The Fifth District certified the following question:
rephrased the question to be: "Is a property transfer immune from the documentary stamp tax if it occurs as a result of an out-of-court settlement in a condemnation proceeding?" The supreme court answered this rephrased question affirmatively.

The court noted that in the absence of a contrary contractual provision, the seller would be obligated to pay the tax. However, if the seller must pay the tax out of its sale proceeds, then the seller would not be fully compensated for the lost land as is required by the Florida Constitution. That logic had led earlier to an administrative rule that the documentary stamp tax could not be assessed when the transfer was pursuant to a condemnation judgment. The public policy of encouraging parties to settle rather than to litigate would be defeated if settlement was subject to a tax that would not be imposed on a judgment. Consequently, the court prohibited the assessment of the documentary stamp tax on a conveyance made under threat of condemnation proceedings.

D. Ethics

The Florida Bar v. St. Laurent. This was an unanimous per curiam opinion.

St. Laurent, an attorney, was the president, director, and sole shareholder of a company that developed and marketed a time share condominium. The Florida Bar filed two complaints against St. Laurent, alleging that he

WHEN A PROPERTY OWNER CONVEYS PROPERTY TO A COUNTY UNDER THREAT OF CONDEMNATION AND IN LIEU OF EMINENT DOMAIN PROCEEDINGS AND THE COUNTY IS CONTRACTUALLY BOUND TO PAY ANY DOCUMENTARY STAMP TAX ASSESSED BY THE DEPARTMENT OF REVENUE ON THE TRANSACTION, IS THE TRANSACTION IMMUNE FROM SUCH TAXATION EVEN THOUGH THE DEPARTMENT OF REVENUE IMPOSES THE TAX DIRECTLY UPON THE PROPERTY OWNER?

Id. at 1335.

34. Florida Dep’t of Revenue, 620 So. 2d at 992.
35. Id.
36. Id. (relying on Fla. Const. art. X, § 6). Article X, section 6 of the Florida Constitution provides: "(a) No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner." Fla. Const. art. X, § 6(a) (emphasis added).
38. Florida Dep’t of Revenue, 620 So. 2d at 992.
39. 617 So. 2d 1055 (Fla. 1993).
Brown

prepared and executed time-share warranty deeds purporting to transfer clear titles to properties that were actually encumbered, that he misused escrow funds, and that he failed to use the funds received to pay off the underlying mortgages. He pleaded “no contest” to the allegations and the referee recommended he be given a public reprimand and a forty-five day suspension, followed by two years of probation. The Bar wanted him disbarred and appealed.

The conduct at issue did not involve the practice of law. However, because he was a member of the bar at the time, he was subject to discipline for violating the rules of professional responsibility. Because the attorney had no experience in real estate law, had no previous disciplinary record, had suffered severely during the pendency of the proceeding, which had taken four years, had shown remorse, and the misconduct was based, at least in part, on an honest mistake, the supreme court decided on a ninety-one day suspension followed by probation, rather than disbarment.

E. Homestead

Butterworth v. Caggiano. Chief Justice Barkett wrote the majority opinion in which Justices Overton, McDonald, Shaw, Kogan, and Harding joined. Justice Grimes wrote a dissenting opinion.

After Mr. Caggiano was convicted of racketeering, the state initiated forfeiture proceedings against his residence. Caggiano’s defense was that the property was his homestead and thus was exempt from forfeiture because article X, section 4(a) of the Florida Constitution provides that homestead property:

shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty . . .

Although the trial court rejected this argument, the Second District Court of Appeal reversed in Caggiano’s favor. The appellate court certified the question, “Whether forfeiture of homestead under the RICO Act is forbidden

40. Id. at 1055.
41. Id. at 1056, 1057.
42. 605 So. 2d 56 (Fla. 1992).
43. FLA. CONST. art. X, § 4(a).
by article X, section 4 of the Florida Constitution?" The supreme court agreed with the appellate court that the question should be answered in the affirmative and approved the district court's decision.

Because the constitutional provision does not deal explicitly with forfeiture, the court applied the tools of statutory and constitutional construction to reach its conclusions. First, words are to be given their usual and obvious meaning unless the text suggests they have been used in a technical sense. The language used in the homestead exemption appeared to be broad and nonlegal. Therefore, the term "forced sale" should not be used in a narrow, technical sense. Moreover, by statute, all forfeited property is sold by the state, so forfeiture does result in a forced sale.

Second, the homestead provision is to be liberally construed, leading to the conclusion that forfeiture should be included, in the event of doubt, within the term "forced sale." Third, using the purpose approach, the homestead provision was intended to protect the family and to benefit the public by providing families with greater security in their homes. This purpose would best be furthered by protecting the homestead from forfeiture to the state, as well as from levying creditors. In addition, forfeiture provisions are to be strictly construed, leading to the conclusion that they should not apply in the event of ambiguity.

Furthermore, article X, section 4 of the Florida Constitution provides three express exceptions to homestead protection from forced sale. Forfeiture is not included. Invoking the rule, expressio unius est exclusio alterius, the logical conclusion is that forfeiture was not intended to be one of the exceptions and, therefore, was to be included in the protection. Accordingly, homestead property cannot be the subject of a RICO forfeiture.

In his dissent, Justice Grimes pointed out that a RICO forfeiture does not precisely fit the homestead provision because there is "no judgment, decree, or execution which purports to be a lien on the property." The history of the homestead provision demonstrates a purpose of protection from economic misfortune. However, forfeiture is not caused by economics,

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45. Caggiano, 605 So. 2d at 57.
46. Id. at 58 (quoting City of Jacksonville v. Continental Can Co., 151 So. 488, 489-90 (Fla. 1933)).
47. Id. at 59.
48. Id. at 60.
49. Id. at 58.
50. The expression of one thing is the exclusion of others.
51. Caggiano, 605 So. 2d at 61.
but by misconduct. Florida courts have long imposed equitable liens on homesteads based on the owner's fraud or reprehensible conduct. Logically, this protection should not extend to a criminal's homestead that was being used as an instrument of crime, as occurred in the instant case. No innocent persons were in need of protection in this case because the owner did not even have a family.

_Palm Beach Savings & Loan Ass'n v. Fishbein._ Justice Grimes wrote the majority opinion with which Justices Overton, McDonald, and Harding concurred. Justice Shaw wrote a dissenting opinion with which Chief Justice Barkett and Justice Kogan concurred.

Mr. Fishbein owned a valuable home, which was subject to several mortgages. Although it knew that the Fishbeins were involved in marriage dissolution proceedings, Palm Beach Savings & Loan loaned $1,200,000 to Mr. Fishbein on the security of a mortgage that appeared to have been executed by both Mr. and Mrs. Fishbein. Although witnessed and acknowledged, Mrs. Fishbein's signature was a forgery. Mr. Fishbein used $930,000 of the loaned money to pay off the existing mortgages and the property taxes.

When the bank brought foreclosure proceedings, Mrs. Fishbein claimed the property as homestead. The circuit court, however, allowed the bank an equitable lien for the $930,000 which Mr. Fishbein had used to pay the existing mortgages and property taxes. The circuit court stayed foreclosure proceedings for six months to allow Mrs. Fishbein to try to effect a sale. The Fourth District Court of Appeal rejected the equitable lien based upon Mrs. Fishbein's innocence of any wrongdoing. The supreme court, finding that the district court failed to look at the constitutional language, reversed and reinstated the circuit court's order.

The court reiterated that equitable liens can be imposed upon homesteads "where equity demands it" even though it is not expressly provided for by the constitution. In this case, equity demanded it, regardless of Mrs. Fishbein innocence, in order to avoid her being unjustly enriched.

52. _Id._ at 62.
53. _Id._ at 61.
54. _Id._ at 62.
55. 619 So. 2d 267 (Fla. 1993).
57. _Fishbein_, 619 So. 2d at 270, 271.
58. _Id._ at 270.
Allowing an equitable lien to the extent that the money was used to pay existing mortgage debts and tax burdens would not place Mrs. Fishbein in a worse position than she had been before Mr. Fishbein acquired the loan. Conversely, denying the equitable lien would result in Mrs. Fishbein receiving a windfall of $930,000.

Justice Shaw, in his dissenting opinion, noted that there are three express exceptions to homestead protection from the imposition of a lien: "the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty . . . ." These must be strictly construed. A careful analysis of case law revealed that virtually every precedent was based upon one of the express exceptions. Since the bank could not claim to fit within one of the express exceptions, it should not have been able to get an equitable lien on the property.

F. Leases

_The Florida Bar re Advisory Opinion-Nonlawyer Preparation of and Representation of Landlord in Uncontested Residential Evictions._ This was an unanimous per curiam opinion.

A petition presented the following question to The Florida Bar Standing Committee on the Unlicensed Practice of Law:

Whether it constitutes the unlicensed practice of law for a property manager, with or without a power of attorney, to draft and serve a Three Day Notice, draft and file a Complaint for Eviction and Motion for Default and obtain a Final Judgment and Writ of Possession for the landlord in an uncontested residential eviction and, if so, whether the practice should be authorized.

When the Committee produced a proposed advisory opinion, the petitioner objected.

The supreme court concluded that, under current law, a property manager could draft and serve a three-day eviction notice. It was, however, unlicensed practice of law for a nonlawyer to draft and to file a complaint.

59. _Id._ at 271.
60. _Fla. Const._ art. X, § 4(a).
61. _Fishbein,_ 619 So. 2d at 271-72.
62. _Id._ at 272.
63. 605 So. 2d 868 (1992).
64. _Id._ at 869.
for eviction or a motion for default, or to obtain a final judgment and writ of possession. The court decided to conduct an experiment. For one year, it would allow property managers to do these things, for example file a complaint, in uncontested residential evictions based upon the nonpayment of rent if the court-approved forms were used. The court invited comments on the practice to be filed with its clerk during that year. It will be interesting to hear the outcome of this experiment. Perhaps allowing property managers to handle simple uncontested residential evictions will save money, which will result in a savings to landlords and tenants. However, this author suspects that the savings will not trickle down very far.

G. Lis Pendens

Chiusolo v. Kennedy. This was a per curiam opinion in which Chief Justice Barkett and Justices Overton, McDonald, Shaw, Grimes, and Kogan concurred. Justice Harding wrote an opinion expressing his concurrence in part and his dissent in part.

Louis Chiusolo claimed that he was to have received stock in a corporation in exchange for having advanced money to the corporation for the purchase of some land. When the stock was not delivered, Chiusolo filed suit seeking a resulting and constructive trust on the property. With the suit, he filed a notice of lis pendens, but the circuit court discharged it.

The district court reversed, quashed and remanded and held that the proponent of the challenged lis pendens has two burdens: (1) demonstrating that the claim affects the real property; and (2) that there is a substantial likelihood of success on the merits. The second requirement was based upon section 48.23(3) of the Florida Statutes. Section 48.23(3) provides:

> When the initial pleading does not show that the action is founded on a duly recorded instrument or on a lien claimed under part I of chapter 713 [i.e., a mechanic’s or construction lien], the court may control and discharge the notice of lis pendens as the court may grant and dissolve injunctions.

65. See The Florida Bar re Approval of Forms Pursuant to Rule 10-1.1(b) of The Rules Regulating The Florida Bar, 591 So. 2d 594 (Fla. 1991).
66. 614 So. 2d 491 (Fla. 1993).
67. Id. at 492.
The supreme court accepted the case based upon conflict jurisdiction and rejected the second burden. The court pointed out that the doctrine of lis pendens serves not only to protect a plaintiff from intervening liens, but also to protect future purchasers and encumbrancers from "buying" a lawsuit, even a lawsuit that they would win. The court concluded that the statutory reference to injunctions existed to allow a court to impose a bond as a condition of a continuation of the lis pendens, just as it could impose a bond as a condition of granting an injunction. Consequently, "the lis pendens cannot be dissolved if, in the evidentiary hearing on request for discharge, the proponent can establish a fair nexus between the apparent legal or equitable ownership of the property and the dispute embodied in the lawsuit."

Justice Harding's point of dissent was with the court's having placed the burden of proving a fair nexus on the proponent of the lis pendens. He would place the burden of showing the lack of a fair nexus on the one challenging the lis pendens. However, proving the lack of a connection means negating all possibilities. This may impose an impossible burden, and for that reason, this author concludes that the court was correct.

H. P.U.D. Litigation

_Londono v. Turkey Creek, Inc._ Justice Harding wrote the unanimous decision.

Dissident homeowners in a planned unit development filed an unsuccessful suit over its operation against the developer who was awarded its costs in the final judgment. The developer subsequently brought this action seeking damages for malicious prosecution, tortious interference with contractual rights, tortious interference with an advantageous business relationship, civil conspiracy, and slander of title. The questions presented to the supreme court were: (1) whether the developer's election to tax costs in the earlier suit barred it from bringing this malicious prosecution suit; (2) whether the developer's complaint had failed to state a claim for tortious interference claims or civil conspiracy; and (3) whether the developer's...
claim for slander of title was a compulsory counterclaim in the earlier action.76

The first issue provided the court with its conflict jurisdiction.77 The court distinguished its holding in Cate v. Oldham78 with the case at bar. Cate prohibited a state official, who had been sued only in his or her official capacity and had recovered costs, from bringing a malicious prosecution suit. That holding would bar the official from a double recovery because
the official could seek no more than the recovery of costs. However, the situation in Londono was different. The Londono developer was seeking compensatory and punitive damages, plus interest and costs.79 These damages were different from and additional to the costs it had recovered in the first action; therefore, the damages were not barred by the developer’s election to seek costs in the first action.

The tortious interference and civil conspiracy counts were based on allegations that the homeowners made numerous intentional and malicious false statements to third parties and local government officials for the purpose of harming the developer’s economic interests. The homeowners, joined by the Attorney General as amicus curiae, argued that the homeowners’ complaints to zoning officials were protected by the First Amendment and that this suit was an intimidation suit. Because the developer was a private person, in Nodar v. Galbreath80 the court required the plaintiff to show that the defendant had acted with express malice. However, the complaint was facially sufficient when the allegations were accepted as true and in the light most favorable to the plaintiff, which was the appropriate standard in determining whether the complaint stated a cause of action upon which relief could be granted.81 Consequently, the trial court should not have dismissed the complaint.

The third issue in Londono was whether the claim was barred under the Florida Rules of Civil Procedure because the slander of title claim was a compulsory counterclaim in the earlier action.82 The question turned on

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76. Id. at 16.
77. The district court decision, Turkey Creek, Inc. v. Londono, 567 So. 2d 943 (Fla. 1st Dist. Ct. App. 1990), was in conflict with Cypher v. Segal, 501 So. 2d 112 (Fla. 4th Dist. Ct. App. 1987), giving the supreme court conflict jurisdiction under article V, section 3(b)(3) of the Florida Constitution.
78. 450 So. 2d 224 (Fla. 1984).
79. Id. at 224.
80. 462 So. 2d 803 (Fla. 1984).
81. Id.
82. Londono, 609 So. 2d at 19. The Florida Rules of Civil Procedure provide:
the "logical relationship test," but the court pointed out that "stating this test is far easier than determining if a claim passes [it]." The test was:

[A] claim has a logical relationship to the original claim if it arises out of the same aggregate of operative facts as the original claim in two senses: (1) that the same aggregate of operative facts serves as the basis of both claims; or (2) that the aggregate core of facts upon which the original claim rests activates additional legal rights in a party defendant that would otherwise remain dormant.

The claims in the homeowners' initial suit were based upon their allegations that the developer had mismanaged the development. The claims focused upon the developer's alleged misconduct. In this suit, the claims were based upon the developer's allegations that the homeowners had intentionally and maliciously spread false and defamatory information about the developer and the development, i.e., it focused upon the homeowners' alleged misconduct. Consequently, this was not a compulsory counterclaim because it failed the logical relationship test.

I. Tax Certificates and Deeds

_Dawson v. Saada._ Justice Harding wrote the unanimous opinion. Following a tax sale, a tax deed to the Saadas' property was issued to the Dawsons who subsequently brought this action to quiet their title. The Saadas defended on the basis that the notice of the sale had not been served by the sheriff, as required by section 197.522(2) of the Florida Statutes. The question certified to the supreme court was:

WHETHER FAILURE TO COMPLY WITH THE NOTICE REQUIREMENTS OF SECTION 197.522, FLORIDA STATUTES, INVALID-

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A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, provided it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction.

FLA R. CIV. P. 1.170(a).

83. _Londono_, 609 So. 2d at 20.
85. 608 So. 2d 806 (Fla. 1992).
86. _Id._; see also FLA. STAT. § 197.522 (1987).
DATES THE ISSUANCE OF A TAX DEED NOTWITHSTANDING THE LANGUAGE IN SECTIONS 197.404 AND 65.081(3), FLORIDA STATUTES? 87

In Dawson, there had been compliance with section 197.522(1), which required that the clerk, by certified mail with return receipt requested, notify all the persons listed in the tax collector's statement twenty days prior to the tax sale. The court concluded that the notice given to the Saadas was sufficient to satisfy the requirements of due process. 88 Furthermore, the plain language in section 197.522(2) indicated that the Legislature intended that its notice provision was to be directory only, not mandatory. 89 Consequently, failure to give that notice did not invalidate the tax deed. 90

The court went on to provide some interesting dicta in order to completely answer the certified question. Both section 197.404 and section 65.081(3) of the Florida Statutes seemed to provide that the tax deed could not be attacked due to lack of notice. Section 65.081(3) provided:

No defense to the action [in chancery to quiet the title to land included in a tax deed] or attack upon the tax deed shall be made except the defense that the taxes assessed against the property had been paid by the former owner before issuance of the tax deed. 91

Section 197.404 had provided:

A sale or conveyance of real or personal property for nonpayment shall not be held invalid except upon proof that: (1) The property was not subject to taxation; (2) The taxes had been paid before the sale of personal property; or (3) The tax certificate on the real property had been redeemed before the execution and delivery of a deed based upon a certificate issued for nonpayment of taxes. 92

The court concluded that these sections must be read in light of the constitutional requirement of notice. These statutes could not preclude an attack on a tax deed that was void for lack of notice required by section 197.522(1) because that notice was constitutionally required.

87. Dawson, 608 So. 2d at 807.
88. Id.
89. See id. at 810.
90. Id.
91. FLA. STAT. § 65.081(3) (1987).
As that notice had been provided in this case, the validity of the tax deed was upheld. Therefore, the certified question would have to be answered both “yes” and “no.” Although failure to comply with the notice requirements of section 197.522(1) of the Florida Statutes would invalidate the issuance of a tax deed, notwithstanding the language in sections 197.404 and 65.081, the failure to comply with the notice requirements of section 197.522(2) does not.

Walker v. Palm Beach Commerce Center Associated. Justice Kogan wrote the majority opinion in which Chief Justice Barkett, and Justices Overton, Shaw, Grimes, and Harding concurred. Justice McDonald wrote an opinion concurring in part and dissenting in part.

When Palm Beach Commerce Center contested the 1990 tax assessment valuation of its property, it sought a temporary injunction against the issuance of tax certificates. The trial court denied the temporary injunction on the ground that the Center had failed to establish the likelihood that it would ultimately succeed on the merits. On appeal, the district court disagreed. It held that section 194.211 of the Florida Statutes required only that the taxpayer make a good faith payment of the estimated taxes due as the taxpayer had done here.

The court rephrased the certified question, breaking it into two parts. The first part asked:

MAY A TAXPAYER SEEKING TO ENJOIN THE SALE OF TAX CERTIFICATES PENDING A CHALLENGE TO THE ASSESSED VALUATION OF ITS PROPERTY PROCEED UNDER SECTION 194.211?

The Florida Supreme Court answered this question in the affirmative. The statute did not explicitly apply to the sale of tax certificates. The tax appraiser had argued that, based upon the history of the statute, a temporary
injunction should be available only to prevent sale of the property two years after the sale of the tax certificates, and not to prevent the sale of the tax certificates. The court, however, rejected the tax appraiser’s argument.

Having answered the first part in the affirmative, the court proceeded to the second part of the question, which was:

WHAT SHOWING IS NECESSARY FOR THE ISSUANCE OF THE TEMPORARY INJUNCTION?97

Relying on the plain language of the statute,98 the court concluded that the traditional requisites for a temporary injunction need not be established when seeking relief under this statute. A taxpayer is entitled to a temporary injunction if he has made “a showing of a substantial likelihood of success in the underlying tax suit” as well as having made a good faith payment of the taxes due.99 The unfortunate taxpayer here lost because he had only done the latter.

In *Hotelerama Associates v. Bystrom*,100 the third district had reached the opposite conclusion. Consequently, it was overruled “to the extent it conflicts with this decision.”101

Although Justice McDonald concurred in the result, his rationale differed in the following way.102 First, he pointed out that section 194.211 applied to the sale of property but the issuance of a tax certificate merely imposed a lien on property. Consequently, this section should not provide a basis for an injunction against the issuance of a tax certificate. Second, the Legislature explicitly provided an adequate remedy at law, i.e., the cancellation of tax certificates under sections 197.443 and 197.444. Third, the general requirements for obtaining a preliminary injunction should apply because there was nothing to indicate that the Legislature intended otherwise

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96. Actually two years after April 1 of the year of issuance, if the tax certificate has not been redeemed by the landowner. FLA. STAT. § 197.502(1) (Supp. 1992).
97. *Walker*, 614 So. 2d at 1098.
98. “In any tax suit, the court may issue injunctions to restrain the sale of real or personal property for any tax which shall appear to be contrary to law or equity . . . .” FLA. STAT. § 194.211 (1991).
99. *Id.*
100. 449 So. 2d 836 (Fla. 3d Dist. Ct. App.), review denied, 458 So. 2d 271 (Fla. 1984).
102. *Id.*
and these requirements included, *inter alia*, the unavailability of an adequate remedy at law. 103

*Securities & Exchange Commission v. Elliott.* 104 Justice Shaw wrote the majority opinion in which Justices Overton, Kogan, and Harding concurred. 105 Chief Justice Barkett wrote a dissenting opinion in which Justices McDonald and Grimes joined. 106

Charles Elliott tendered tax certificates, endorsed in blank before a notary public, as collateral for loans. When Elliott’s assets were placed in receivership, the lenders discovered that the tax certificates had been frozen by court order. The receiver claimed that the lenders were unsecured creditors because the lenders had not perfected their security interest in the certificates by filing with the Secretary of State as required for security interests in general intangibles by Article 9 of the Uniform Commercial Code. 107

The United States Court of Appeals for the Eleventh Circuit posed the following question to the Florida Supreme Court:

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)? 108

The majority answered the question in the affirmative and held that Article 9 did not govern. Under section 197.102(3), a tax certificate is a lien on real property. However, Article 9 does not apply “to the creation or transfer of a . . . lien on real estate . . .” 109 The plain language of these sections would seem to exclude the creation of a security interest in a tax certificate from Article 9. Moreover, section 679.102(2) provides that Article 9 does not generally apply to statutory liens. The majority rejected the claim that commercial lenders might be harmed by finding Article 9 inapplicable, because that had not occurred in this case, and any lender considering the land as collateral would know of the existence of the tax certificate and its implications.

103. *Id.*
104. *620 So. 2d 159 (Fla. 1993).*
105. *Id.*
106. *Id.*
107. *Id.; see also Fla. Stat. § 679.102 (1991).*
108. *Elliott, 620 So. 2d at 159.*
The dissent considered that a tax certificate being used to secure a loan was analogous to a mortgage being used to secure a debt. It relied, as did the majority, on the official comment to section 679.102 to justify the conclusion, although the official comment fails to support clearly either the majority or the dissent.

*Capital City Country Club, Inc. v. Tucker.* Justice Grimes wrote the opinion in which Chief Justice Barkett and Justices Overton, Shaw, Kogan, and Harding concurred. Justice McDonald was recused.

The court was presented with two certified questions. The first certified question asked:

**IS LAND OWNED BY A MUNICIPALITY EXEMPT FROM REAL ESTATE TAXATION IF IT WAS LEASED TO A PRIVATE PARTY PRIOR TO APRIL 15, 1976, AND IS USED FOR NONGOVERNMENTAL PURPOSES?**

The Florida Supreme Court answered this question in the negative. The golf course was leased from the City of Tallahassee under a ninety-nine year lease. It was admittedly not being used for public or municipal purposes, so it did not fit within the tax exemption provided by article VII, section 3 of the Florida Constitution. Nor did the court find that it fit within the exemption provided by Florida Statute section 196.199(4).

The second certified question presented to the court was:

**IF THE LAND IS SUBJECT TO REAL ESTATE TAXATION, SHOULD THE VALUE OF THE LEASEHOLD INTEREST BE EXCLUDED FROM THE APPRAISAL IN ORDER TO ARRIVE AT A LEGAL ASSESSMENT?**

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110. 613 So. 2d 448 (Fla. 1993).
111. Id. at 450.
112. Section 196.199(4), Florida Statutes, provides:

Property owned by any municipality, agency, authority, or other public body corporate of the state which becomes subject to a leasehold interest or other possessory interest of a nongovernmental lessee other than that described in paragraph (2)(a), after April 14, 1976, shall be subject to ad valorem taxation unless the lessee is an organization which uses the property exclusively for literary, scientific, religious, or charitable purposes.

**FLA. STAT. § 196.199(4) (1991).**
113. *Tucker*, 613 So. 2d at 450.
This was also answered in the negative.\(^{114}\)

The taxpayer had argued that failing to subtract the value of the lease from the valuation of the property to arrive at the real property tax assessment would subject it to unconstitutional double taxation because it was also being taxed on the leasehold under the intangible tax. The court rejected this argument. The intangible tax was imposed upon the lessee’s interest and would be collected by the state. The real estate tax was imposed on the land itself and would be collected by the county. The only reason that the lessee was obligated to pay the real estate tax was that it had contractually obligated itself to make that payment.

### III. DISTRICT COURT OF APPEAL DECISIONS

#### A. Caveat Emptor

*Haskell Co., v. Lane Co.*\(^ {115}\) The roof of a commercial building collapsed during a severe rainstorm, injuring two shoppers as well damaging the property of the tenant. The district court felt required by existing law to hold that the tenant and the successor landlord could not recover from the original landlord due to the doctrine of *caveat emptor.* Noting that *caveat emptor* has been abrogated in residential real estate transactions, the court agreed that a similar change might be due, perhaps by adopting section 353 of the Restatement (Second) of Torts,\(^ {116}\) in the law of commercial real

\(^{114}\) *Id.* at 452.

\(^{115}\) 612 So. 2d 669 (Fla. 1st Dist. Ct. App. 1993).

\(^{116}\) Restatement (Second) Torts, section 353, provides:

Undisclosed Dangerous Conditions Known to Vendor.

(1) A vendor of land who conceals or fails to disclose to his vendee any condition, whether natural or artificial, which involves unreasonable risk to persons on the land, is subject to liability to the vendee and others upon the land with the consent of the vendee or his subvendee for physical harm caused by the condition after the vendee has taken possession, if

(a) the vendee does not know or have reason to know of the condition or the risk involved, and

(b) the vendor knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to believe that the vendee will not discover the condition or realize the risk.

(2) If the vendor actively conceals the condition, the liability stated in Subsection (1) continues until the vendee discovers it and has reasonable opportunity to take effective precautions against it. Otherwise the liability continues only until the vendee has had reasonable opportunity to discover the
estate, but that such a change should come from the Florida Supreme Court. Accordingly, the court certified the following question:

SHOULD THE COMMON LAW DOCTRINE OF CAVEAT EMPTOR CONTINUE TO APPLY TO COMMERCIAL REAL PROPERTY TRANSACTIONS; AND, IF NOT, WITH WHAT LEGAL PRINCIPLES SHOULD IT BE REPLACED?117

This author urges the supreme court to consider the question. It is time to eliminate the double standard. The same principles of good faith, duty to disclose, and implied warranties should apply equally to commercial property transactions.

B. Condominiums

*BB Landmark, Inc. v. Haber.*118 Under section 718.503(1)(a) of the Florida Statutes (1989), a buyer could avoid a contract to purchase a new condominium after receiving notice that the developer has amended the offering in a way that “materially alters or modifies the offering in a manner which is adverse to the buyer.” In this case, the developer unilaterally increased the cost of extras from $10,384 to $17,122. In response, the buyers sent proper written notice of their intent to cancel the contract. The developer, however, tried to avoid cancellation by announcing that it would honor the original price.

The court was faced with a case of first impression. It found the meaning of the statute to be clear and unambiguous and, therefore, the plain meaning of the terms should govern. A cost increase would be adverse to the buyer’s interest, and a 65% increase in the cost of the extras would be material. Once the developer had so amended the offering, the buyer had fifteen days to exercise the right to cancel. That right could not be extinguished by the developers taking the unilateral action of abandoning the proposed modifications. Consequently, the decision of the trial court was affirmed.

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117. Haskell, 612 So. 2d at 676.
118. 619 So. 2d 448 (Fla. 3d Dist. Ct. App. 1993).
Carlandia Corp. v. Rogers & Ford Construction Corp. 119 The district court was faced with a case of first impression in deciding whether a unit owner could maintain an action against the developer to recover for construction defects in the common elements or common areas. Under Florida Rule of Civil Procedure 1.210(a), a real party in interest may sue in his own name. 120 A unit owner does own an undivided share in the common elements, so it is a real party in interest. Additionally, there is nothing in the statute, authorizing the condominium association to bring suits, that would preclude a unit owner from bringing such a suit. Recognizing that this conclusion may produce “practical difficulties,” the court certified the following question to the supreme court:

MAY AN INDIVIDUAL CONDOMINIUM UNIT OWNER MAIN- TAIN AN ACTION FOR CONSTRUCTION DEFECTS IN THE COMMON ELEMENTS OR COMMON AREAS OF THE CON- DOMINIUM? 121

However, the practical problems created for the court by such litigation are probably slight compared to the practical problems encountered by a unit owner trying to bring such a suit. The lack of precedent reveals how infrequently this situation arises and indicates that the supreme court’s time is probably better spent on other issues.

C. Construction (Mechanic’s) Liens

Coppenbarger Homes, Inc. v. Williamson. 122 A subcontractor is sued to foreclose on a construction lien. The contractor posted a transfer bond and the landowner was dropped from the suit. The judgment entered was greater than the amount of the bond and the court allowed the excess to be an unsecured judgment against the contractor. The district court agreed, pointing out that the mechanism for increasing the transfer bond 123 was not intended to limit the amount of the judgment, but to provide a method by which a lienholder might preserve the adequacy of its security.

120. Florida Rule of Civil Procedure 1.210(a) provides that “[e]very action may be prosecuted in the name of the real party in interest . . . .” FLA R. CIV. P. 1.210(a).
121. Carlandia, 605 So. 2d at 1016.
123. Id.; see also FLA. STAT. § 713.24(3) (1991).
Brown

Davis Water & Waste Industries Inc. v. Embry Development Corp.\textsuperscript{124} A supplier claimed a construction lien on abutting land under Florida Statute section 713.04 regarding subdivision improvements. However, the developer’s land was not actually contiguous with the land on which the materials were installed. The court concluded that the meaning of the statute was plain and that the supplier was not entitled to the lien.\textsuperscript{125}

Meyerowich v. Carrere General Contractors.\textsuperscript{126} In order to protect against the possibility of multiple suits when the materials are supplied by a partnership, all the partners are indispensable parties to a construction lien foreclosure. However, the court concluded that a partner whose claim has become barred by the statute of limitations is not indispensable. The contractor had raised nonjoinder of the materialman’s partner at the close of the evidence. In response, the partner sought to intervene, but the trial court denied the motion even though the partner did not seek to introduce any new evidence.\textsuperscript{127} Then the trial court dismissed for failure to join an indispensable party.\textsuperscript{128} The district court held that the trial court had erred in both decisions.\textsuperscript{129}

Taylor v. T.R. Properties, Inc.\textsuperscript{130} The court held that a lienholder, who was defending his priority in foreclosure action brought by another lienholder, must, in its answer, make a demand for attorney’s fees unless the opposing party has waived such demand. This is a logical extension of the current train of thought regarding claims for attorney’s fees.

D. Covenants

Palm Point Property Owners’ Ass’n v. Pisarski.\textsuperscript{131} The Association’s membership was made up of property owners who individually could have sued to enforce the restrictive covenants. However, the Association was apparently not itself a property owner. It was not a direct successor of the developer or of any its interests. And its existence was not contemplated in

\begin{itemize}
  \item \textsuperscript{124} 603 So. 2d 1357 (Fla. 1st Dist. Ct. App. 1992).
  \item \textsuperscript{125}  \textit{Id.} at 1359.
  \item \textsuperscript{126} 611 So. 2d 41 (Fla. 4th Dist. Ct. App. 1992).
  \item \textsuperscript{127}  \textit{Id.} at 41.
  \item \textsuperscript{128}  \textit{Id.}
  \item \textsuperscript{129}  \textit{Id.}
  \item \textsuperscript{130} 603 So. 2d 1380 (Fla. 5th Dist. Ct. App. 1992).
  \item \textsuperscript{131} 608 So. 2d 537 (Fla. 2d Dist. Ct. App. 1992), \textit{approved by} 18 Fla. L. Weekly S547 (Fla. Oct. 21, 1993).
\end{itemize}
the development scheme. These are the typical bases for finding that an association has standing to enforce the deed restrictions, so the Association's standing was challenged when it attempted to enforce the covenants against a landowner.

The district court noted that the Florida Supreme Court had adopted Rule 1.221 to give condominium associations the standing to sue, and Rule 1.222 to give mobile homeowners' associations the standing to sue. It would make sense to give a property owners' association similar standing but, absent such a rule, the district court felt obligated to conclude that it had no standing. However, the district court invited the supreme court to consider such a rule by certifying as a question of great public importance:

**ABSENT 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 SUE TO MAINTAIN AN ACTION TO ENFORCE RESTRICTIVE COVENANTS?**

Denying standing to this homeowners' association accomplished little other than wasting the time and resources of the litigants and the courts. If asked, this author would have urged the district court to reach a different conclusion. The supreme court should adopt a rule giving homeowners' associations standing where that will promote judicial efficiency and lessen the obstacles to enforcing valid restrictions.

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132. Id. at 538.
133. Florida Rule of Civil Procedure 1.221 provides in pertinent part: "After control of a condominium association is obtained by unit owners other than the developer, the association may institute, maintain, settle or appeal actions or hearings in its name on behalf of all unit owners concerning matters of common interest . . . ." FLA. R. CIV. P. 1.221.
134. Florida Rule of Civil Procedure 1.222 provides that "[a] mobile homeowners' association may institute, maintain, settle, or appeal actions or hearings in its name on behalf of all homeowners concerning matters of common interest . . . ." FLA. R. CIV. P. 1.222.
135. *Palm Point Property Owners' Ass'n*, 608 So. 2d at 539.
136. Id.
E. Developer Liability

Robinson v. Palm Coast Construction, Inc.137 The purchasers of a new condominium unit discovered that they could not park two regular sized automobiles in their garage even though the condominium covenants required that the garage be big enough to do just that. The garage did, however, conform to the dimensions on the plans. The court was faced with the issue of "whether . . . purchasers of new condominium units from the developer, can have any cause of action where the units are built in accordance with the plans and specifications but violate the construction standards of the condominium's restrictive covenants."138 While the purchaser could not recover on the theory of negligence under the economic loss rule, the district court concluded that the condominium developer had an implied duty to build in compliance with the condominium's restrictive covenants. Failure to do so would be a breach of contract even if the condominium never tried to enforce the covenants.

F. Eminent Domain

Patel v. Broward County.139 The reasonable probability of obtaining rezoning is a factor that may be considered when the value of condemned land is being determined. But in this case, the government submitted evidence that severance damages should be reduced because the condemnee could relocate and reconstruct its lost parking facilities if it received a variance. The condemnees argued that based upon two first district cases,140 the evidence should not have been admitted. The court, however, noted that the distinction between rezoning and the granting of a variance has become somewhat clouded, to say the least, and that such evidence would be admissible in at least two other states.141 Consequently, it certified the following question to the Florida Supreme Court as being of great public importance:

MAY THE GOVERNMENT SUBMIT EVIDENCE THAT THE SEVERANCE DAMAGES OF A CONDEMNEE MAY BE CURED OR LESSENED BY ALTERATIONS TO THE CONDEMNEE'S

137. 611 So. 2d 1351 (Fla. 5th Dist. Ct. App. 1993).
138. Id. at 1353.
139. 613 So. 2d 582 (Fla. 4th Dist. Ct. App. 1993).
141. Patel, 613 So. 2d at 583. The two states are New York and Connecticut.
PROPERTY WHEN THOSE ALTERATIONS REQUIRE THE
GRANT OF A VARIANCE FROM THE APPROPRIATE GOVERN-
MENTAL ENTITY HAVING ZONING JURISDICTION OVER THE
PROPERTY?

This author suggests that the question is worthy of the supreme court’s attention. It seems illogical to allow the admission of evidence regarding the effects of possible rezoning but not similar evidence regarding the effects of a variance that might be obtained. If the latter should be excluded because it is based upon speculation, then so should the former. Perhaps the Legislature can create a means for the government to obtain the rezoning or variance for the landowner. Absent that, it seems wrong to reduce the landowner’s severance damages based on either rezoning or a variance, which might not materialize.

G. Licenses and Easements

_Tatum v. Dance._143 In a package deal, Dance bought parcel A from the architect who designed Dance’s car dealership. Even though Dance did not expressly acquire a drainage easement, the dealership was designed to drain onto parcel B, which was still owned by the architect. Parcel B was later sold to Tatum who sold it to Dance. Tatum took back a purchase money mortgage that was the subject of this foreclosure action in which Dance sought a declaration recognizing his drainage rights. The district court affirmed the trial court’s holding that an irrevocable license had been created by the construction of the automobile dealership in such a way that it drained onto parcel B. The court relied upon _Albrecht v. Drake Lumber Co._144 for the propositions that: (1) an irrevocable license is created when a permanent structure is constructed in reliance upon a parol license; and (2) an irrevocable license can not be revoked by the licensor’s successor who took title with notice of the licensee’s use.145

What caused a problem, however, was that _Albrecht_ had also included the statement that an irrevocable license “becomes an easement.”146 However, a more recent case, _Moorings Ass’n v. Tortoise Island Communi-

142. _Id._
143. 605 So. 2d 110 (Fla. 5th Dist. Ct. App. 1992), _review granted sub nom._ Dance v. Tatum, 617 So. 2d 318 (Fla. 1993).
144. 65 So. 98 (Fla. 1914).
145. _Id._ at 100; _Tatum_ 605 So. 2d at 112.
146. _Albrecht_, 65 So. at 100.
had held that easements could not be created without a signed writing. Logically, that would lead to the conclusion that an irrevocable license could not have been created here, as there was no writing. But the Tatum court decided that Tortoise Island dealt only with implied easements, not irrevocable licenses. It reasoned that an irrevocable license is the product of equitable relief. It is not an easement, although in some circumstances it may be the functional equivalent of an easement. Because it is the product of equitable relief which is personal, the benefit of the license would not be transferred to a vendee of the land, as the trial court had suggested. However, the district court did certify the following question:

**WHETHER, IN LIGHT OF MOORINGS ASSOCIATION, INC. V. TORTOISE 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.**

Judge Sharp wrote a special concurrence. She concluded that the license, which was created upon the construction of the dealership, was extinguished by merger when Dance acquired the servient land, parcel B. However, easements by necessity could still be created without a writing after Albrecht. So, when Tatum later acquired title to parcel B at the foreclosure sale, his title was subject to a newly created easement by necessity. Moreover, consistent with Albrecht, an easement could have been created without a writing by the construction of the dealership because performance would take that transaction out of the Statute of Frauds. Consequently, she suggested that the certified question should have been:

**WHETHER MOORINGS ASSOCIATION, INC. V. TORTOISE ISLAND COMMUNITIES . . . EXTINGUISHES THE CREATION OF ORALLY CREATED EASEMENT RIGHTS IN ALL SITUATIONS OTHER**

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147. 460 So. 2d 961 (Fla. 5th Dist. Ct. App. 1984), quashed sub nom. Tortoise Island Communities, Inc. v. Moorings Ass’n, 489 So. 2d 22 (Fla. 1986) (approving the dissent below).
148. Id. at 969.
149. Tatum, 605 So. 2d at 112.
150. Id. at 113 (citations omitted).
151. Id. at 114 (Sharp, J., concurring specially).
152. Id. at 115.
THAN THOSE CREATED BY "NECESSITY" OR WHETHER AN
EASEMENT CAN STILL BE CREATED BY EXECUTION, EXPEND-
DITURES IN IMPROVEMENTS, AND RELIANCE ON AN ORAL
LICENSE GIVEN BY THE SERVIENT LANDOWNER AS IN
ALBRECHT V. DRAKE LUMBER CO. ... 153

This author agrees with Judge Sharp's analysis. It would allow
successors in ownership to parcel A to benefit from the drainage easement
unless, of course, they should fall victims to estoppel. However, the
supreme court should consider taking the case to eliminate any confusion
about the continued existence of irrevocable licenses under Florida law.

H. Mortgages

Carteret Savings Bank v. Weiner. 154 This involved the question of
what is the effect of closing a home equity account. A line of credit had
been given to a husband and wife. First the husband closed the account, but
later reopened it and drew money. The wife then asked that the account be
closed. When the account was reopened at the husband's insistence, the
wife drew money. On default, the lender sought foreclosure. The defense
was that reopening the account was a new agreement that could not
cumber entireties property without the participation of both spouses.

The district court pointed out that neither party had pleaded or proved
that a novation had occurred when the account was closed and subsequently
reopened. The bank could not be barred from foreclosing as a matter of law
by allowing the account to be repeatedly closed and reopened by one spouse
because it had not been notified that the husband and wife were experienc-
ing marital difficulties. 155 Consequently, attorneys should advise their co-
borrower clients that, when closing a home equity line of credit, they should
make sure that the lender acknowledges in writing that the closing is
permanent and the account cannot be reopened without the agreement of
both co-borrowers.

Citibank Mortgage Corp. v. Carteret Savings Bank. 156 Citibank's
predecessor in interest obtained a judgment against Omni in 1987 and
recorded a certified copy of the judgment in Palm Beach County. In 1988,

153. Id. (citations omitted).
155. Id. at 1312.
156. 612 So. 2d 599 (Fla. 4th Dist. Ct. App. 1992), review granted sub nom. Carteret
Omni become a joint venturer in developing a parcel of land acquired with part of the proceeds of a loan from Carteret. Carteret foreclosed and claimed priority, as a purchase money lender, over Citibank's judgment lien. The trial court agreed, but the Fourth District Court of Appeal held that Carteret was entitled to priority as a purchase money lender only to the extent that the loan proceeds had been used to acquire the property.\(^{157}\) That amount included funds used to pay off what the seller still owed on the land.

Noting that this was a case of first impression in Florida, the court certified the following question as being of great public importance:

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 OVER A GENERAL JUDGMENT CREDITOR OF THE MORTGAGOR?\(^{158}\)

The district court was correct in its application of the law and, therefore, the certified question should be answered in the negative. However, there is no conflict of authority in Florida, so there is no reason for the supreme court to consider this case.

\textit{Commercial Laundries, Inc. v. Tiffany Square Investors Ltd. Partnership.}\(^{159}\) After the mortgagee bought a large residential complex at a foreclosure, the operator of the coin operated laundry machines on the premises tendered a rent check. Seven years were left on its ten year unrecorded lease of the laundry facilities. To eliminate the lease, the foreclosure buyer brought this reforeclosure action. The district court correctly held that leasehold interests were subject to reforeclosure actions, even if the tenant was innocent of any misconduct and even if the buyer had notice of the lease's existence. Furthermore, the acceptance of rent by the buyer did not necessarily preclude the buyer from reforeclosing.

\(^{157}\) \textit{id.} at 602.  
\(^{158}\) \textit{id.}  
\(^{159}\) 605 So. 2d 116 (Fla. 5th Dist. Ct. App. 1992), \textit{review denied}, 614 So. 2d 504 (Fla. 1993).
Howell v. Gaines.\textsuperscript{160} Three mortgages had a provision for the appointment of a receiver to collect the rents in the event of the mortgagor's default. Following the foreclosure sales in which the mortgagees had been the successful bidders, they sought the rents held by the receiver based upon the deficiency between the mortgagees' bids and the amounts of the foreclosure judgments. However, the mortgagor also claimed the rents, because the fair market value of the properties exceeded the amounts of the foreclosure judgments. The Third District Court of Appeal agreed with the mortgagor. The mortgagee was entitled to the rents only to the extent that it would be entitled to a deficiency judgment and the court may deny a deficiency judgment when the fair market value of the property exceeds the debts owed.\textsuperscript{161}

Truitt v. Metropolitan Mortgage Co.\textsuperscript{162} A borrower sued her mortgage broker, alleging that the broker had required her to pay for insurance and appraisals by companies in which the broker had a substantial ownership interest. The trial court dismissed the complaint based upon the statute of limitations, but the district court reversed. The complaint was based upon the mortgagee's alleged breach of the fiduciary duty by failing to disclose any information adverse to the mortgagor's interest. That would, if proved, have amounted to the fraudulent concealment of the information that would have tolled the statute of limitations. Consequently, the trial court erred in dismissing the complaint.

Wells Fargo Credit Corp. v. Martin.\textsuperscript{163} At a foreclosure sale, an experienced representative of the mortgagee was given written instructions to make a bid of $115,500. Unfortunately, the instructions were not written clearly. She misread them and instead bid only $15,500. The winning bid was $20,000. After the clerk announced that the property was sold, the representative realized her mistake and tried, unsuccessfully, to have the sale stopped. The mortgagee then moved to have the judicial sale set aside.

\textsuperscript{160} 608 So. 2d 64 (Fla. 3d Dist. Ct. App. 1992).
\textsuperscript{161} The Third District Court of Appeal failed to mention section § 702.06, Florida Statutes, which provides in pertinent part: "In all suits for the foreclosure of mortgages heretofore or hereafter executed the entry of a deficiency decree for any portion of a deficiency, should one exist, shall be within the sound judicial discretion of the court . . . ." FLA. STAT. § 702.06 (1991).
\textsuperscript{162} 609 So. 2d 142 (Fla. 4th Dist. Ct. App. 1992).
\textsuperscript{163} 605 So. 2d 531 (Fla. 2d Dist. Ct. App. 1992).
The sale was confirmed and the Second District affirmed, holding that the trial court had not abused its discretion in denying the mortgagee relief under these circumstances. Furthermore, the court refused to certify that any conflict existed between the districts, because the decisions of the Third and Fourth Districts were factually distinguishable. In those cases, the mortgagees did not even make bids; the winning bids were for nominal amounts; and, most important, the trial courts had exercised their discretion to grant the mortgagees relief. The court correctly recognized that the critical point was the limited role of an appellate court in supervising the exercise of judicial discretion.

I. Recording

*First American Title Insurance Co. v. Dixon.* This was a case of first impression. The Fourth District Court of Appeal decided that a court clerk, who failed to properly index a document that might affect title to land, was not protected by sovereign immunity against a negligence claim. The court reasoned that the clerk had a statutory duty to index every such document, and the clerk was required by statute to post a bond to cover all of his or her duties. Consequently, the Legislature must have intended the purpose of the indexing duty was to protect the limited class of persons who would rely upon the public records. Therefore, those harmed by the clerk’s negligence could seek redress.

J. Restraints on Alienation

*Camino Gardens Ass’n v. McKim.* The declaration of restrictions in a development provided that: (1) property in the subdivision could not be purchased or leased by anyone who was not a member in good standing of the homeowners’ association; (2) that the association could, in the event of mortgage foreclosure, redeem the property from the mortgagee or purchase at the foreclosure sale for the amount due on the mortgage; and (3) that a
mortgagee would have to give notice to the association before accepting a deed in lieu of foreclosure. Therefore, when the mortgagee took a deed in lieu of foreclosure, and then sold the property to buyers who had yet been admitted to membership, the association sued. Both the trial court and the district court had little difficulty recognizing that the first two provisions were invalid restraints on alienation.

Restraints on alienation are invalid if they are absolute or unreasonable. The first clause prohibited subsequent transfers without the prior approval of the association. That amounted to an absolute restraint on alienation. The second was essentially an option to purchase at the amount of the defaulted debt, which could be far below the fair market value. Because that would affect the willingness of lenders to make mortgage loans, it would affect the ability to develop and to sell the property. Consequently, it was an unreasonable restraint on alienation.

The trial court had also held the third provision invalid. The district court affirmed, although the reason for the affirmance is less clear. The court stated that "because the trial court declared the provision regarding purchase rights to be void, the court properly concluded that the declaration could not require the mortgagee to give any notice to the Association and its members before accepting a deed in lieu of foreclosure."\(^{170}\) This seems only to indicate that the notice provision is inextricably connected to the other two provisions in this case. That is not a blanket statement that such a provision would necessarily be void. It is too bad that the court did not elaborate.

K. Zoning

*Jensen Beach Land Co. v. Citizens for Responsible Growth.*\(^{171}\) This case involved a challenge to a zoning order's consistency with the comprehensive plan. The district court held that such a challenge must be made to the entity that entered the order before it could be brought to a court.\(^{172}\) This implicitly recognized that the agency has primary jurisdiction in such matters. Moreover, the challenger must exhaust its administrative remedies before resorting to the courts. The exception would be if the challenger was merely seeking a temporary restraining order to avoid immediate and irreparable harm.

\(^{170}\) *Id.* at 642.

\(^{171}\) 608 So. 2d 509 (Fla. 4th Dist. Ct. App. 1992).

Caliente Partnership v. Johnston. 173 A developer proposed an amendment to the county's comprehensive plan in order to accommodate its proposed development. The amendment was submitted to the Department of Community Affairs. It had forty-five days to determine whether to issue a notice of intent to contest the amendment, but the notice arrived two days late. 175 The district court decided that the Department's having missed the deadline would not result in the amendment being approved by default. The developer must resort to other remedies. This conclusion eliminates the possibility of the plan being amended by administrative inaction, which could undermine the concept of comprehensive planning.

Lee County v. Sunbelt Equities, II. 176 A developer had requested rezoning of land it owned from agricultural to commercial use. The court concluded that the site-specific, owner-initiated rezoning requests were quasi-judicial proceedings that could be reviewed by the court. Moreover, the fact that the rezoning request was consistent with the comprehensive plan did not necessarily mean that the rezoning request must be granted.

IV. STATUTES

A. Leases

The Legislature appears to have provided tenants with a new remedy if the premises have become uninhabitable. The tenant may withhold the rent. 177 However, there are an overwhelming number of conditions to be met before the tenant is entitled to this remedy. The leased premises must have become "wholly untenantable." 178 The lease must "affirmatively and expressly" place the obligation for maintenance and repairs on the landlord. 179 The landlord must have failed to make the needed repairs after being given at least twenty days written notice of the problem. 180 And the notice must include the threat to withhold rent. 181 Moreover, if the repairs

175. Johnston, 604 So. 2d at 887.
178. id.
179. id.
180. id.
181. id.
ever do get made, the tenant must pay the landlord the entire rent withheld. This author predicts that this remedy will be, for all practical purposes, illusory.

The Legislature also created a procedure for paying the claimed rent into the registry of the court in any action for eviction. Also, the landlord’s acceptance of the full amount of rent that is past due will constitute waiver of any claim for eviction based on nonpayment of rent if the landlord knew of the breach when accepting the payment.

Part II of chapter 83 is the Florida Residential Landlord and Tenant Act. Section 83.49(3) governs the rights and responsibilities regarding the return of security deposits. It has been amended to provide that enforcement personnel “shall look solely to this subsection to determine compliance.” This should cut off complaints to the Florida Real Estate Commission that brokers or salespeople have violated other statutes or rules by complying with this one.

Section 83.49(3) was also amended to require that landlords give at least twelve hours notice of the intent to enter and to make repairs and that such repairs are to be made between 7:30 a.m. and 8:00 p.m. Moreover, tenants with waterbeds will now be required to carry insurance against personal injury and property damage to the dwelling unit with a loss payable clause to the building owner. Perhaps most interesting, the act allows a landlord, who has given notice of his intent to terminate a tenant’s lease, to petition the county or circuit court for an injunction prohibiting the tenant from intentional damage or destruction of the property.

Part III of chapter 83 is the Self-storage Facility Act, which concerns the lease of space for the storage of personal property. The Legislature expanded this act to include the lease of a “self-contained storage unit,” which is defined as:

182. Ch. 93-70 § 2, 1993 Fla. Laws 424 (to be codified at FLA. STAT. § 83.201).
183. Id. § 5, 1993 Fla. Laws at 425 (to be codified at FLA. STAT. § 83.232).
184. Id. § 3, 1993 Fla. Laws at 424-25 (to be codified at FLA. STAT. § 83.202).
186. Ch. 93-255 § 2, 1993 Fla. Laws 2494 (amending FLA. STAT. § 83.49(3) (1991)).
187. Id. § 4, 1993 Fla. Laws at 2494 (amending FLA. STAT. § 83.53(2) (1991)).
188. Id. § 5, 1993 Fla. Laws at 2495 (amending FLA. STAT. § 83.535 (1991)).
189. Id. § 8, 1993 Fla. Laws at 2496 (to be codified at FLA. STAT. § 83.681). This required amending section 34.011, Florida Statutes, to give the county court this limited equity jurisdiction. Id. § 9, 1993 Fla. Laws at 2497 (amending FLA. STAT. § 34.011 (1991)).
not less than 600 cubic feet in size, including, but not limited to, a trailer, box, or other shipping container, which is leased by a tenant primarily for use as storage space whether the unit is located at a facility owned or operated by the owner or at another location designated by the tenant.\footnote{Brown}{191}

The rights and remedies of a lessor and tenant of a self-contained storage unit are removed from the coverage of Article 2A of the Uniform Commercial Code,\footnote{Brown}{192} which otherwise governs leases of personal property.

\section*{B. Mortgages}

The statutory procedure for mortgage foreclosure has been modified as of October 1, 1993.\footnote{Brown}{193} The mortgagor's right of redemption has been clarified by the addition of a new section. It provides that the mortgagor may redeem the property until the filing of the certificate of sale by the court clerk or the time specified in the foreclosure decree, whichever is later.\footnote{Brown}{194} This should eliminate any suggestion that Florida has any form of "statutory redemption." That term is commonly used to indicate a right to redeem during a statutory period that does not begin until the foreclosure sale is complete.\footnote{Brown}{195}

It is, however, unfortunate that the phrase "cure the indebtedness" was used.\footnote{Brown}{196} That may cause confusion over whether the Legislature intended to allow a mortgagor in default to de-accelerate the mortgage debt by curing the default, i.e., catching up on the missed payments. It is highly unlikely that the Legislature intended de-acceleration. This would be a significant change in redemption rights. If intended, this should be accomplished in unambiguous terms.

Statutes have been amended to add new technical details such as requiring that the creditor's current address be in a judgment or a recorded

\begin{thebibliography}{99}
\footnote{Brown}{191}{Ch. 93-238 § 1, 1993 Fla. Laws 2409 (amending FLA. STAT. § 83.803 (Supp. 1992)).}
\footnote{Brown}{192}{FLA. STAT. ch. 680 (1991) ("Uniform Commercial Code—Leases").}
\footnote{Brown}{193}{Ch. 93-250, 1993 Fla. Laws 2466.}
\footnote{Brown}{194}{Ch. 93-250 § 2, 1993 Fla. Laws at 2467-68 (to be codified at FLA. STAT. § 45.0315).}
\footnote{Brown}{195}{See GEORGE E. OSBORNE, MORTGAGES § 307 (2d ed. 1970); see also GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW § 8.4 (2d ed. 1985).}
\footnote{Brown}{196}{Ch. 93-250 § 2, 1993 Fla. Laws at 2468 (to be codified at FLA. STAT. § 45.0315).}
\end{thebibliography}
affidavit in order to obtain a judgment lien, and providing details of the method of obtaining in rem or quasi in rem jurisdiction over a person outside the state of Florida. It also appears that a number of amendments are intended to speed up foreclosures. For example, foreclosure sales are now to be held no later than thirty-five days after the judgment of foreclosure; the defendant is to file its written defenses within thirty days of the first publication of the notice of the foreclosure; and notices of the foreclosure need be published for only two consecutive weeks, rather than four. Most important, a mortgagee may now request an order to show cause why a final judgment of foreclosure should not be entered once the verified complaint has been filed. Two acts deal with modification of the assignment of rents statute. Only a few different phrases distinguish the two acts. They provide that an assignment of rents is valid and that it is perfected against third parties when recorded. The assignee has the right to the rents if the mortgagor defaults and the mortgagee makes a written demand for the rents. In a foreclosure action, the court may require the rents deposited into the court registry and used to pay the mortgage or to operate and to preserve the property. This should clarify and simplify the law regarding assignment of rents in Florida.

C. Time Shares

A number of amendments were made to chapter 721, the Florida Vacation Plan and Time-Sharing Act. "Incidental benefits" have been defined and subjected to statutory regulation. Most important, the

197. Id. § 10, 1993 Fla. Laws at 2471 (amending Fla. Stat. §§ 55.10(1)-55.10(3) (1991)).
199. Id. § 1, 1993 Fla. Laws at 2467 (amending Fla. Stat. § 45.031 (1991)).
200. Id. § 7, 1993 Fla. Laws at 2470 (amending Fla. Stat. § 49.09 (1991)).
201. Ch. 93-250 § 8, 1993 Fla. Laws at 2470-71 (amending Fla. Stat. § 49.10 (1991)).
205. The Florida Statutes provide the following definition: "Incidental benefit" means an accommodation, product, service, discount, or other benefit which is offered to a prospective purchaser of a time-share plan or to a purchaser of a time-share plan prior to the exchange of his initial 10-day voidability period pursuant to s. 721.10; which is not an exchange program as defined in subsection (15); and which complies with the provisions of s. 721.075. The term shall not include an offer of the use of accommodations and
act has been expanded by the addition of a Part II, called the “Florida Vacation Club Act,”207 to this chapter to deal with the unique problems of multi-site plans. It attempts to protect time-share buyers from: (a) the developer's creditors; (b) misrepresentations of the developer; and (c) mismanagement (or malfeasance) of the developer. Multi-site time shares will be governed by both Parts I and II, with the latter controlling in the event of a conflict.208 It appears to be a worthwhile expansion but only time will tell if this approach is workable.

D. Uniform Land Sales Practices Law

The Florida Uniform Land Sales Practices Law209 was designed:

to provide safeguards regulating the disposition of any interest in subdivided lands, including financial operations entered into by companies and persons regulated by the Florida Uniform Land Sales Practices Law, to prevent fraudulent and misleading methods and unsound financing techniques which could detrimentally affect not only remote land purchasers, but also the land sales industry, the public, and the state's economic wellbeing.210

The law covers “subdivisions” and “subdivided lands,” which it defines as having fifty or more “lots, parcels or units which are offered as part of a common promotional plan,”211 but it also provides that certain acts are unlawful even in the offering for sale of twenty-five or more lots, units or interests. The Legislature has added two more types of prohibited conduct to the list: making or using false, fictitious or fraudulent statements, representations or documents; or falsifying, concealing or covering up by trick, scheme or device any material fact.212 The Legislature also added requirements for obtaining exemptions213 and requirements for purchase contracts.214 The purchaser will now be given a seven day period in

facilities of the time-share plan on a free or discounted one-time basis.

Ch. 93-58 § 2, 1993 Fla. Laws at 349 (amending FLA. STAT. § 721.05 (1991)).

206. ld. § 5, 1993 Fla. Laws at 353 (to be codified at FLA. STAT. § 721.075).

207. ld. § 12, 1993 Fla. Laws at 360 (to be codified at FLA. STAT. § 721.50).

208. ld.


210. ld. § 498.113(3).

211. ld. § 498.005(19).

212. Ch. 93-190 § 2, 1993 Fla. Laws 1710 (amending FLA. STAT. § 498.022 (1991)).


214. ld. § 5, 1993 Fla. Laws at 1716 (to be codified at FLA. STAT. § 498.028).
which to chancel a purchase contract and, in the event of cancellation, all funds must be refunded to the purchaser within twenty days. This is a right which buyers may actually decide to exercise after reading the contract carefully because the agreement, if title is not to be conveyed to the buyer within 180 days, must contain the following ominous warning:

YOU MAY NOT RECEIVE YOUR LAND UNDER THIS CONTRACT IF THE SUBDIVIDER FILES FOR BANKRUPTCY PROTECTION OR OTHERWISE IS UNABLE TO PERFORM UNDER THE TERMS OF THIS CONTRACT PRIOR TO YOUR RECEIVING A DEED EVEN IF YOU HAVE MADE ALL THE PAYMENTS PROVIDED FOR UNDER THE CONTRACT. IF YOU HAVE ANY QUESTIONS ABOUT THE MEANING OF THIS DOCUMENT, CONSULT AN ATTORNEY.

Let us hope that prospective buyers take this warning seriously.

V. CONCLUSION

This has been an interesting, if not earth-shattering, year in property law. The courts and the Legislature have been active. It appears that good common sense and consumer protection are the prevailing themes.

215. Id.
216. Id.
Workers Compensation Law: 1993 Survey of Florida Law

Ellen Fell Baig

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I. INTRODUCTION

Workers compensation law is a statutory replacement for tort remedies between employer and employee. In exchange for the protection of an exclusive remedy, employers agree to provide benefits to workers injured during the course and scope of their employment. State statute determines whether an employer's liability must be covered by insurance, who is covered under the definition of employee, the benefits to be awarded, the mechanism for administrative review, and other elements necessary to the implementation of the workers compensation system. When an employer's liability under workers compensation law may or must be covered by insurance, the insurance contract must be filed with and approved by the State. At present, forty-two states and the District of Columbia utilize a standard Workers Compensation and Employers Liability Insurance Policy ("WC-ELIP").

2. See Cartier v. Florida Power & Light Co., 594 So. 2d 755, 756 (Fla. 3d Dist. Ct. App.), review denied, 602 So. 2d 941 (Fla. 1992). In Cartier, the court held that a provision of workers compensation insurance, in this case self-insurance on behalf of an independent contractor, provided the employer with the exclusive remedy of workers compensation law and precluded a tort action against the employer by the injured employee. See id.
3. See id.
4. In Florida, workers compensation law is governed by chapter 440 of the Florida Statutes.
6. Id. § 627.410. In most states, filing of workers compensation policy forms and endorsements is made by a rating or advisory organization on behalf of its members and subscribers. The National Council on Compensation Insurance ("NCCI") acts as such an organization in thirty-one states and the District of Columbia. Thirteen states have independent rating bureaus which make filings on behalf of their members and subscribers, and six states plus Puerto Rico and the United States Virgin Islands provide workers compensation insurance through monopolistic funds.
7. In its capacity as a licensed rating or advisory organization, NCCI filed a revised WC-ELIP to become effective April 1, 1992. Florida, and 29 other states in which NCCI files policy forms on behalf of its members and subscribers, approved the revised WC-ELIP. As of this writing, only one state in which NCCI is the rating or advisory organization has not approved the 1992 policy revision.
Florida law provides that jurisdiction for appeals of decisions of the Judges of Compensation Claims is vested in the First District Court of Appeal.¹ This paper will examine the workers compensation decisions of the First District Court of Appeal issued between January 1992 and October 1993 within the framework of the WCELIP.

The standard WCELIP contains a General Section followed by six parts:² Part One (Workers Compensation Insurance) provides statutory Workers Compensation Coverage; Part Two (Employers Liability Insurance) provides coverage to employers which is not governed by statute; Part Three (Other States Insurance) provides the ability to elect coverage in states in which the employer may have temporary and incidental exposure; Part Four (Your Duties If Injury Occurs) outlines the insured’s duties in the event of injury; Part Five (Premium) contains the premium provisions; and Part Six (Conditions) contains the policy conditions not shown elsewhere in the policy.³ Also included as part of the policy are the Information Page and endorsements selected by the insured to exclude or provide specialized coverages.⁴

II. GENERAL SECTION

A. The Policy (General Section A)

This policy includes at its effective date the Information Page and all endorsements and schedules listed there. It is a contract of insurance between you (the employer named in Item 1 of the Information Page) and us (the insurer named on the Information Page). The only agreements relating to this insurance are stated in this policy. The terms of this policy may not be changed or waived except by endorsement issued by us to be part of this policy.⁵

10. GUIDE, supra note 9, at 5-23.
11. Id. at 24. The WCELIP is a contract for the provision of insurance. The endorsements attached to the policy serve as addenda which modify the basic insuring contract.
12. THE NATIONAL COUNCIL ON COMPENSATION INSURANCE, WORKERS COMPENSATION AND EMPLOYERS LIABILITY INSURANCE POLICY—WC 00 00 00 (effective April 1, 1984) [hereinafter POLICY]. The revised WCELIP—WC 00 00 00 A became effective April 1, 1992 and is not the insuring contract for the cases interpreted by the First District Court of Appeal.
The Information Page of a WCELIP contains the data that determines who is insured, for what liability, in what states, and for what premium. General Section A serves to incorporate the data on the Information Page into the WCELIP. Material misrepresentation of data regarding workers compensation applications, claims, and premium calculation is grounds in some jurisdictions for recision of the policy and/or for civil or criminal liability. Almost every jurisdiction allows for recalculation of the premium to meet the actual employer data that should have been reported. While litigation frequently occurs over the calculation of the premium and the conditions of coverage, this paper deals with issues between the employer/carrier and the employee, and generally refrains from discussing issues between the employer and the carrier under state insurance laws.

during the time period covered by this paper.

13. The WCELIP names the insured as the business entity insuring its employees. GUIDE, supra note 9, at 2. Individual officers of the company are not covered when acting in their personal capacity. Id. In Florida, however, a civil suit may be filed against corporate officers upon a showing of gross negligence. FLA. STAT. § 440.10(1) (1991). If found guilty of gross negligence, the WCELIP does not provide coverage or a defense for these officers. In Langton v. De Cenzo, 592 So. 2d 318, 319 (Fla. 3d Dist. Ct. App. 1991), the court determined that the claimant's estate had not established that the corporate officers were guilty of gross negligence, and thus limited the claimant's estate to a workers compensation remedy.


15. See, e.g., CAL. INS. CODE §§ 11760, 11880 (Deering 1993) (civil penalty of not less than $2,000 and not more than $5,000, plus an assessment of not more than three times the amount of the medical treatment expenses paid for the willful misrepresentation of facts in order to obtain compensation insurance, and for knowingly making false or fraudulent oral or written statements in support of a claim for compensation); CONN. GEN. STAT. § 31-290c (1992) (establishes penalties for the fraudulent claim or receipt of benefits); FLA. STAT. § 440.37 (Supp. 1992) (provides penalties for fraudulent activities and misrepresentation); 1993 LA. ACTS 828 (stipulates that the willful misrepresentation by an employer to an employee regarding compensation insurance shall be punishable by imprisonment of no less than one year and not more than 10, or a fine of not more than $10,000 or both); MD. CODE ANN. § 10-141 (1993) (stipulates that a person, who knowingly received benefits not entitled to them, repay the full amount plus interest at a rate of 1.5 percent per month from the date the commission notifies the individual); OR. REV. STAT. § 656.758 (1991) (provides civil penalties for misrepresentation, and failure or refusal to keep employment data).

16. See, e.g., COLO. REV. STAT. § 8-45-114 (Supp. 1993), which allows recalculation of premium for misrepresentation. Most other jurisdictions allow recalculation of the premium in even years after the policy effective period. This is accomplished by means of a policy provision which permits the final premium to be determined by an audit after the expiration of the WCELIP. See discussion infra at note 463 and accompanying text.
The Information Page identifies the employer during a policy term, and thus determines which employer is responsible for payment of claims found to be compensable under the policy. In *Devilling v. Rimes, Inc.*, the plaintiff appealed a decision of the Judge of Compensation Claims ("JCC"), which held that injuries suffered by the claimant, though compensable, had occurred while the plaintiff was in the employ of a business other than Rimes, Inc. The JCC held that Rimes, Inc. and its insurance carrier were not liable for treatment of the original job-related injury. The claimant's injury did not occur within the course and scope of employment with Rimes, Inc. and the court determined that the request for benefits from Rimes, Inc. was a means by which the claimant could avoid the two-year statute of limitations for making a claim under the workers compensation statute of Florida. The court examined the medical care provided to the claimant and held that not all medically recommended care is the type of treatment that would extend the statute of limitations.

The Information Page also determines the policy period for which the insurer is responsible. In *Marriott Hotel v. Restrepo*, the court examined carrier responsibility for a compensable injury and determined that further findings of fact were necessary to determine whether the claimant had reached maximum medical improvement ("MMI") following the third incident in a series of three separate industrial accidents. Only after the determination of MMI was made for the third accident, would the JCC be able to decide the benefits to be paid by the carrier of record as of the date of each accident.

By defining the insured, the insurer and the policy period to be covered, the Information Page serves to clarify the party responsible for the payments to injured workers. In *Entenmann's Bakery v. Nunez*, the court examined which WCELIP was required to respond to an injured claimant. The appellants in *Nunez* were the insurance carriers who provided coverage for Entenmann's Bakery during different policy periods. The court's

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18.  id. at 305.
19.  id.
20.  id.
21.  id.
23. Maximum medical improvement is the threshold that must be reached to determine the degree of compensation due an employee.  id.
24.  id.
26.  See id.
determination was based upon consideration of the policy period in relation to the type and timing of compensable injuries sustained by the claimant. 27 *Nunez* demonstrates the underlying concern for the needs of the injured worker by providing benefits to the injured worker while placing the burden on carriers to demonstrate who is responsible for payments under the workers compensation law. 28

Florida's workers compensation law permits the apportionment of responsibility for payment of claims for multiple accidents among carriers who insured the employer for different policy periods. 29 The allocation of responsibility between carriers is based upon the extent to which each accident contributed to the claimant's need for medical care and disability benefits. 30 In the event subsequent injuries are determined to be the direct and natural result of the original industrial injury, the carrier of record at the time of the original injury will be held responsible for the payment of benefits to the claimant. 31

Apportionment may also be based upon the existence of a preexisting, nondisabling, and asymptomatic condition. In *Tejada v. Collection Chevrolet, Inc.*, 32 the court noted that "when a preexisting condition is not producing any disability at the time of the compensable accident, only that portion of the claimant's current disability that is attributable to the normal progress of the preexisting disease and thus would have occurred without the aggravating accident may be apportioned." 33 The court observed that there was no evidence in the record to support a finding that the claimant would have suffered a disability based on the preexisting condition, independent of the compensable heart attack which formed the basis of claimant's request for benefits. 34 The court, therefore, concluded that apportionment was not appropriate in this case and that compensability for the entire claim was to be borne by the carrier of record at the time of the heart attack. 35

27. *Id.* at 1161.
28. Florida workers compensation law allows for the application of apportionment principles as prescribed by statute.
31. *Id.*
33. *Id.* at 341 (citing Evans v. Florida Indus. Comm'n, 196 So. 2d 748 (Fla. 1967)).
34. *Id.*
B. Who Is Insured (General Section B)

You are insured if you are an employer named in Item 1 of the Information Page. If that employer is a partnership, and if you are one of its partners, you are insured, but only in your capacity as an employer of the partnership's employees.36

The employer named on the Information Page is the insured entitled to payment to its employees of benefits under the workers compensation law of Florida should an injury by accident or by disease occur within the course and scope of employment.37 The insured is identified by its entity status, and payment of claims is premised on employment by the entity named in Item 1 of the Information Page.38 Multiple business entities may be insured under the same policy provided they are under common majority ownership.39

Florida amendments to the workers compensation law have established a class of employer known as "statutory employer."40 Statutory employer status was denied to a condominium association that entered into a contract with a professional company to perform certain management and maintenance duties.41 The court noted:

The concept of statutory employer, for worker's [sic] compensation purposes, is that a contractor who sublets all or any part of its contract work is the employer not only of its own employees but also of the employees of any subcontractor to whom all or any part of the principal contract has been sublet. It is absolutely basic, therefore, that one cannot be a "contractor" (and thus a statutory employer) within the meaning of this statute unless the "contractor" has a contractual obligation, a portion of which is sublet to another.42

Since the condominium association could not demonstrate a contractual obligation that was sublet to another, statutory employer status was denied to the condominium association.43

36. POLICY, supra note 12.
38. See GUIDE, supra note 9, at 24.
39. id. at 3.
42. Id. at 1304 (citing Jones v. Florida Power Corp., 72 So. 2d 285 (Fla. 1954)).
43. Id. at 1304-05. See also Marco Polo Hotel v. Popielarczyk, 622 So. 2d 104 (Fla. 3d Dist. Ct. App. 1993); Miami Herald Publishing Co. v. Hatch, 617 So. 2d 380 (Fla. 1st
Florida workers compensation law allows corporate officers to exempt themselves out of the workers compensation law. Corporate officers who elect this exemption are not entitled to benefits should they suffer an occupational injury or disease. In Weber v. Dobbins, the Supreme Court of Florida affirmed that a corporate officer who makes such an election does not forfeit the right to exclusive remedy protection. The court decision came in response to a question certified by the First District Court of Appeal. The question affirmed was:

DO THE IMMUNITIES PROVIDED BY SECTION 440.11, FLORIDA STATUTES (1983), EXTEND TO A CORPORATE OFFICER WHO ELECTS, PURSUANT TO SECTION 440.05, TO EXEMPT HIMSELF FROM COVERAGE UNDER THE PROVISIONS OF CHAPTER 440?

The Supreme Court of Florida upheld the intent of the WCELIP to provide insurance for the employees of the named insured, even when that named insured is not entitled to workers compensation benefits.

1. Exclusive Remedy

Employer status and compliance with the workers compensation law of a state provides the employer with immunity from civil suit. An employer may be subject to civil liability if an act of gross negligence led to the injury. The 1988 amendments to the Florida Workers Compensation Act expanded the concept of statutory employee while raising the level of intent from gross negligence to culpable negligence. The constitutionality of the level of intent required to impose immunity is discussed later in this article. The expansion of the statutory employer definition is examined first.

44. FLA. STAT. § 440.05 (1991).
45. 616 So. 2d 956 (Fla. 1993).
46. Id. at 957.
48. Weber, 616 So. 2d at 957.
49. Id.
50. See Larson, supra note 1, § 65.11.
52. See FLA. STAT. § 440.11(1) (Supp. 1988).
53. See discussion infra note 56 and accompanying text.
In *Madaffer v. Managed Logistics Systems, Inc.*, the court determined that a genuine issue of material fact existed as to whether the defendant/appellee, Managed Logistics Systems, Inc. ("MLS"), committed an intentional tort, thereby removing the applicability of the exclusive remedy of workers compensation. The court also noted that due to the 1988 law change, which might offer exclusive remedy protection to managers and policy makers of MLS, the issue of whether the individual appellees held those types of positions would need to be addressed on remand. The determination of the court demonstrates the tension between the statutes governing workers compensation and the policy contract providing insurance coverage for liability under such statutes. The policy intent is to cover the named insured within the scope of its entity status as delineated on the Information Page. The 1988 Florida law change provides:

The same immunity provisions enjoyed by an employer shall also apply to any sole proprietor, partner, corporate officer or director, supervisor, or other person who in the course and scope of his duties acts in a managerial or policy-making capacity and the conduct which caused the alleged injury arose within the course and scope of said managerial or policy-making duties and was not a violation of a law, whether or not a violation was charged, for which the maximum penalty which may be imposed exceeds 60 days imprisonment as set forth in s. 775.082.

Thus, it is possible that the intent of the policy will be overridden by state law if that section of the statute, which expands the immunity from suit for individuals who are identified by the statute, passes constitutional muster without the culpable negligence provisions. Such an expansion of immunity would limit the recovery of injured workers to the remedy available under workers compensation law even when the injury is the result of the actions of individuals who are not named insureds under the policy.

55. Id. at 1329.
56. The constitutionality of the 1988 law change was challenged in *Shova v. Eller*, 606 So. 2d 400 (Fla. 2d Dist. Ct. App. 1992), on the basis that it raised the degree of negligence required to maintain a civil tort action against a co-employee in a supervisory/managerial position from gross negligence to culpable negligence. The law change was deemed unconstitutional because it limited an injured employee's access to the courts. An appeal to the Supreme Court of Florida is expected.
57. *Madaffer*, 601 So. 2d at 1329.
Statutory immunity can be extended to subcontractors when the contractor sublets part or all of his contract work to a subcontractor or subcontractors. Under such a circumstance,

all of the employees of such contractor and subcontractor or subcontractors engaged on such contract work shall be deemed to be employed in one and the same business or establishment; and the contractor shall be liable for, and shall secure, the payment of compensation to all such employees, except to employees of a subcontractor who has secured such payment.

In Walker v. United Steel Works, Inc., the court applied this provision to preclude a civil remedy to Walker against the subcontractor by whom he was employed at the time of injury. Walker’s claim was found to lie within the exclusive remedy provisions of the workers compensation law.

Similarly, the employee of a subcontractor was found to be limited to the exclusive remedy of workers compensation where the workers compensation coverage of the subcontractor immunized the contractor. Absent a showing that the contractor’s conduct was so outrageous as to be considered an intentional tort, the claimant was limited to a workers compensation remedy.

Where a worker was injured while installing a door in a motel which remained open to the public during renovations, the court determined that the motel owner was not a “contractor” or “employer” and that the injured worker was not an employee. The motel owner was not statutorily required to provide workers compensation insurance and, therefore, was not entitled to the exclusive remedy of workers compensation. The court determined that the motel owner owed an independent duty of care to persons legitimately on the premises to maintain the premises in a reasonably safe condition.

The exclusive remedy was found to provide immunity where an employee was killed, during an armed robbery, while employed as a security.
The court reviewed allegations of intentional tort on the part of the employer and determined that the employee must show a deliberate intent to injure or to engage in conduct that is substantially certain to result in injury or death before the exclusive remedy shield can be broken.\textsuperscript{69} When, as here, the exclusive remedy of workers compensation is upheld and narrowly construed, the intent of workers compensation law is accurately and fairly interpreted to the benefit of all parties. When the exclusive remedy doctrine is eroded, the workers compensation system fails and employers are exposed to liability, which was not intended by the no-fault workers compensation system. The decisions of Florida courts have served to support the exclusive remedy doctrine while acknowledging the erosion granted by the Legislature.\textsuperscript{70}

While the decisions of the Supreme Court of Florida have generally supported the exclusive remedy doctrine, the court found that the exclusive remedy did not apply in \textit{Commercial Coatings of Northwest Florida, Inc. v. Pensacola Concrete Construction Co.}\textsuperscript{71} However, the court limited its findings to the unique facts of the case.\textsuperscript{72} The injured worker had been awarded workers compensation benefits and then filed a suit in tort against the company which had loaned his employer a dangerous instrumentality.\textsuperscript{73} The employee was awarded damages against the third party tortfeasor which then sought indemnification from the employer.\textsuperscript{74} The court noted that the question before it was whether the contractor whose employees used the instrumentality negligently should pay the judgment, or whether the non-negligent owner of the instrumentality should pay.\textsuperscript{75} The court held the negligent employer liable for indemnification due to principles of equity and common law, but noted that under workers compensation principles the


\textsuperscript{70} See discussion supra notes 50-58 and accompanying text.

\textsuperscript{71} 616 So. 2d 960 (Fla. 1993).

\textsuperscript{72} Id. at 963.

\textsuperscript{73} Id. at 960.

\textsuperscript{74} Id. at 961; see \textit{Pensacola Concrete Constr. Co. v. Commercial Coatings of N.W. Fla., Inc.}, 595 So. 2d 145, 146 (Fla. 1st Dist. Ct. App. 1992), \textit{approved}, 616 So. 2d 960 (Fla. 1993).

\textsuperscript{75} \textit{Commercial Coatings}, 616 So. 2d at 963.
employer should not have been subject to both judgments. The unusual facts in this case and the language of the decision should limit the applicability of this decision and should not represent a threat to the exclusive remedy doctrine in Florida.

There are times when a claimant will seek to avoid the exclusive remedy in order to proceed with a suit against the corporate officers. In Tomlinson v. Miller, claimant sought to establish gross negligence on the part of the corporate employers. The claimant worked in a convenience store in a remote area and was abducted and raped. The court determined that the claimant failed to allege facts which would establish a clear and present risk of injury, and affirmed the summary judgment entered by the trial court. In a special concurrence, Judge Cobb noted that precedent and applicable law at the time of the occurrence led to the summary judgment for the defense. Accordingly, the claimant could recover under workers compensation law for the bodily injury by accident, but did not have a remedy in tort. Recent law changes, however, now place a greater burden on the employer, and future decisions might therefore be different. Similarly, a claimant’s estate was denied a tort remedy where the claimant was kidnapped by a former employee and forced to open the company safe before being stabbed to death. The court found that the injury was the direct result of the employment and was compensable under workers compensation law.

Corporate officers, however, do not always escape personal liability when an injury arises in the course and scope of employment. In Foreman v. Russo, a jury found three of the corporate defendants grossly negligent and not entitled to the exclusive remedy of workers compensation. Russo was severely injured when a vehicle ran into his stopped garbage truck. His complaint of gross negligence included the removal of lights from the truck, addition of a winch to the truck which necessitated the removal of the lights,
a uniform provided by the company which was the same color as the truck, failure to provide cones, flares or warning devices to be placed around the garbage truck and requiring Russo to make known illegal pickups. The court on appeal affirmed the decision below.84

Workers compensation while designed as a no-fault system, was not meant to provide a shelter for employers who show wanton disregard for the welfare and safety of their employees. The system works when employers and employees are aware of their responsibilities to each other and each acts with the intent of providing a safe workplace.

C. Workers Compensation Law (General Section C)

Workers Compensation Law means the workers or workmen’s compensation law of each state or territory named in Item 3.A. of the Information Page. It includes any amendments to that law which are in effect during the policy period. It does not include the provisions of law that provides nonoccupational disability benefits.85

This section of the policy is intended to provide a definition of workers compensation that limits the coverage of the policy to the workers compensation laws of the states and that excludes coverage under federal acts and under acts that provide non-occupational disability benefits.86 The exclusion of coverage for non-occupational disability benefits is based on the laws of several states87 which require that employers provide short term disability benefits to employees who are injured in non-job related accidents or by non-job related diseases.88

84. Id. at D1963.
85. POLICY, supra note 12.
86. Federal coverages are available by endorsement for the Longshore and Harbor Workers Act, the Coal Mine Health and Safety Act, the Defense Base Act, the Federal Employers Liability Act, the Outer Continental Shelf Act and the Nonappropriated Funds Instrumentalities Act. Maritime coverage is available, although this is generally limited to the deductible limits of the P&I Policy. The P&I Policy is the accepted insurance mechanism for providing maritime coverage.
87. The states are Hawaii, New Jersey, New York, and Rhode Island. See LARSON, supra note 1, § 65.11.
88. See id. § 96.40.
D. State (General Section D)

State means any of the United States of America, and the District of Columbia.89

This section of the policy is intended to delineate the geographic limitations of WCELIP statutory applicability. It is the laws of the states and the District of Columbia that serve as the statutory basis for the provision of coverage. Coverage for United States territories is governed by the laws of those territories. Puerto Rico and the United States Virgin Islands provide workers compensation by means of monopolistic funds, and private insurers may not issue policies in these territories.90 American Samoa and Guam provide for the issuance of WCELIPs by private insurers.91 Since state law governs the coverage available by means of the WCELIP, the applicability of the WCELIP in foreign countries is governed by the extra-territorial provisions of state workers compensation law.

E. Locations (General Section E)

This policy covers all your workplaces listed in Item 1 or 4 of the Information Page; and it covers all other workplaces in Item 3.A. unless you have other insurance or are self-insured for such workplaces.92

While state statutes vary, most require that the full liability of employers, under workers compensation laws, be insured under one policy.93 In Florida, full coverage is based upon the decision in Nationwide Mutual Insurance Co. v. Ed Soules Construction Co.94 A recent filing95 by the National Council on Compensation Insurance permits less...

89. POLICY, supra note 12.
90. GUIDE, supra note 8, at 4.
91. Id.
92. POLICY, supra note 12.
93. See generally LARSON, supra note 1, § 93.00.
95. The National Council on Compensation Insurance filed Items B-1210 and B-1265 on behalf of its members and subscribers. Florida implemented employee leasing rules in February 1990. It was the first state to implement such rules. Florida adopted the filing of the National Council on Compensation Insurance to replace its original rules effective April 1, 1990. To date, no litigation has reached the appellate level of review in regard to the employee leasing rules.
than the full liability of the employer to be covered by a WCELIP in those instances in which employees are leased.96

III. PART ONE—WORKERS COMPENSATION INSURANCE

A. How This Insurance Applies (Part One A)

This workers compensation insurance applies to bodily injury by accident or bodily injury by disease. Bodily injury includes resulting death.

1. Bodily injury by accident must occur within the policy period.

2. Bodily injury by disease must be caused or aggravated by the conditions of your employment. The employee's last day of last exposure to the conditions causing or aggravating such bodily injury by disease must occur during the policy period.97

This section of the policy sets the period within which the injury must occur in order for the policy to respond to a claim. While it is fairly clear that an injury by accident must occur within the term of the policy, and this is a relatively easy matter to prove, injury by disease poses different problems. An injury by disease does not necessarily manifest itself within the policy term. It is, therefore, necessary to establish during which policy period there was exposure to the conditions that caused or aggravated the disease.

Benefits under workers compensation law are payable to an employee involved in an accident arising out of and in the course of employment that causes disabling injury. In Wright v. Douglas N. Higgins, Inc.,98 the court determined that where an employee relationship did not exist, the passive acceptance of workers compensation benefits was not an election of remedies.99 The injury occurred following a job interview and try-out

96. Employee leasing is a methodology that permits employers to utilize workers who are employees of a firm that specializes in the placement of workers. The leasing firm generally hires, fires, and provides benefits for leased workers. Since the workers compensation premium system is premised on a loss sensitive program, it is important that the loss experience of the utilizing employer be applied to the base premium. In order to accomplish this end, while allowing leasing companies to provide services to the utilizing employer, multiple coordinated policies are used.
97. POLICY, supra note 12.
98. 617 So. 2d 460 (Fla. 3d Dist. Ct. App.), review denied, __ So. 2d __ (Fla. 1993).
99. See id. at 462.
work period while the claimant was awaiting a hiring decision. During this time the claimant assisted employees in need of help, but did so voluntarily and without direction or request. The court determined that an employee relationship was not established (therefore the injury could not arise out of or occur in the course of employment) and that a civil remedy was available to the claimant. The amount paid to the claimant in workers compensation benefits would be deducted from any award received by the claimant. The employee was not entitled to receive additional workers compensation benefits while awaiting a civil settlement.

B. We Will Pay (Part One B)

We will pay promptly when due benefits required of you by the workers compensation law.

This statement represents the basic insuring agreement. It is this statement that obligates the insurer to pay the benefits required under the workers compensation law of each state or territory listed in Item 3.A. of the Information Page. An examination of the cases adjudicated by the First District Court of Appeal provides insight into the workers compensation law of Florida.

1. Rulemaking Authority

Primary to any analysis of a statute is the basis of the rulemaking authority by which the statute is implemented. The Workers Compensation Rules of Procedure are established under the rulemaking authority of the Supreme Court of Florida. The rulemaking authority of the Supreme Court of Florida was challenged in Reddick v. Charles W. Infinger Construction, which sought review of Amendments to Florida Rules of Procedure.
Workers' Compensation Procedure on the premise that the Supreme Court of Florida had incorrectly established its rulemaking authority by means of article V, section 2(a) of the Florida Constitution and that workers compensation hearings before judges of compensation claims are not conducted in article V courts. The First District Court of Appeal noted that the rulemaking authority of the Supreme Court of Florida is based upon that court's "unequivocal" textual reliance on section 440.29(3) of the Florida Statutes, and therefore found that section 440.13(2)(k) of the Florida Statutes does not impermissibly encroach upon the supreme court's rulemaking authority under article V.

2. Jurisdiction

In addition to rules by which to function, jurisdiction must be vested in a tribunal in order for a claim to be heard in that forum. The 1990 amendments to Florida's Workers Compensation law created changes in the jurisdiction of the judges of compensation claims. In *Terners of Miami Corp. v. Freshwater*, the decision of a JCC as to the fees to be paid to a treating physician was overturned on the basis of the 1990 amendments. Prior to the amendments, jurisdiction to resolve a fee dispute was vested with the judges of compensation claims. The amendments vested the authority for resolution of such conflicts in the Division of Workers Compensation. Although the fee dispute arose and was filed prior to the amendments to the workers compensation law, the dispute was not placed before the judge of compensation claims until after jurisdiction

108. 603 So. 2d 425 (Fla. 1992), review denied, ___ So. 2d ___ (Fla. 1993).
110. Fla. Stat. § 440.29(3) (1991). "The practice and procedure before the judges of compensation claims shall be governed by rules adopted by the Supreme Court, except to the extent that such rules conflict with the provisions of this chapter." *Id.*
111. *Id.* § 440.13(2)(k). This section provides that an employer, carrier, self-insurer, health care provider, or rehabilitation provider shall not refer an injured worker to a facility in which the entity has an ownership or financial interest unless full disclosure of the interest has been made in writing to the employer and the injured worker. *Id.*
112. *Reddick*, 617 So. 2d at 724.
115. *Id.* at 675.
116. *See id.*
117. *Id.* at 674.
no longer existed. The JCC, therefore, lacked jurisdiction to hear the claim.

Within the jurisdiction of the First District Court of Appeal is the right to determine the evidence which may be presented to the JCC. In Ogden Allied Services v. Panesso, the court addressed the admission of surveillance video tapes made after plaintiff’s request for production and following the employer/carrier’s request for a postponement. While the court allowed the admission of the video tapes, it did so only after examination of the current Florida Rules of Workers Compensation Procedure. The court noted that the rules result in “trial by ambush” and requested that the Workers Compensation Rules Committee of the Florida Bar address the problem.

In the process of hearing the issue in Ogden, the court was extensively briefed prior to oral argument. The court received notices of supplemental authority as late as the morning of the oral argument. On its own motion the court struck the last notice of supplemental authority and noted that in the future it would take the same action when confronted with an abuse of the rules of procedure relating to notice of supplemental authority.

Where a claimant does not request a specific type of benefit, and the benefits awarded were not clearly placed at issue, the court reversed the order of the JCC. Due process requires that the parties have notice of the issues to be heard so that they may present an adequate defense. When the issues are not clearly presented, the JCC lacks jurisdiction to hear the matter and an award cannot be made.

In Wolk v. Jaylen Homes, Inc., the court examined whether the JCC has the jurisdiction to consider claims for medical benefits when such benefits have been terminated due to an employer/carrier’s determination of overutilization. The court determined that overutilization is a matter within the jurisdiction of the JCC and that unilateral termination of treatment

118. Id. at 675; see also Napp-Deady Assocs. v. Ramsey, 599 So. 2d 228 (Fla. 1st Dist. Ct. App. 1992).
119. Terners of Miami Corp., 599 So. 2d at 675.
120. 619 So. 2d 1024 (Fla. 1st Dist Ct. App. 1993).
121. Id. at 1026-27.
123. Id.
125. Id. at 334.
without good cause is a violation of the review procedures of the Florida Statutes.127

3. Statute of Limitations

Florida statute provides that a workers compensation claim must be filed within two years of the time of injury, the date of the last payment of compensation, or of the date of the last remedial treatment furnished by the employer.128 In Lee v. City of Jacksonville,129 a claimant argued that continued use of a transcutaneous electrical nerve stimulator unit to relieve pain in an injured knee constituted continued remedial treatment by the employer, sufficient to allow continued benefits.130 The court noted that decisions in other cases appeared to place the burden on the claimant to prove that the employer had knowledge of the claimant’s use of a prescribed medical device in order to toll the statute of limitations.131 Based upon prior decisions, the court affirmed the JCC’s dismissal of the claim on the ground that it was barred by the statute of limitations.132 The court certified the following question as being of great public importance:

WHETHER THE LIMITATIONS PERIOD OF SECTION 440.19 (1)(A), FLORIDA STATUTES, IS TOLLED BY THE CLAIMANT’S ROUTINE USE OF A DEPENDENCY-INDUCING MEDICAL DEVICE FURNISHED BY THE EMPLOYER AND PRESCRIBED BY THE AUTHORIZED PHYSICIAN FOR AN INDEFINITE PERIOD OF TIME WITHOUT SUPERVISION, EVEN THOUGH THE EMPLOYER DID NOT HAVE ACTUAL KNOWLEDGE THE CLAIMANT CONTINUED TO USE THE DEVICE BEYOND THE TIME THE PHYSICIAN SHOULD HAVE INSTRUCTED THE CLAIMANT TO DISCONTINUE USE OF THE DEVICE, AND NO SUCH INSTRUCTION WAS GIVEN.133

127. Id. at 1060.
129. 598 So. 2d 296 (Fla. 1st Dist. Ct. App. 1992), approved, 616 So. 2d 37 (Fla. 1993).
130. Id. at 296.
131. Id. at 297. The court relied on its decisions in Devilling v. Rimes, Inc., 591 So. 2d 304 (Fla. 1st Dist. Ct. App. 1991), and Taylor v. Metropolitan Dade County, 596 So. 2d 798 (Fla. 1st Dist. Ct. App. 1992), to support its holding in Lee.
132. Lee, 598 So. 2d at 296.
133. Id. at 297.
The Supreme Court of Florida answered the certified question in the negative and approved the decision of the district court. Effectively, the supreme court determined that actual knowledge on the part of the employer is essential to the establishment of treatment "furnished by the employer."

In *Bell v. Commercial Carriers*, the court examined whether an employer has to voluntarily intend remedial treatment in order to revive the statute of limitations. The claimant had suffered a 1981 back injury and was receiving ongoing treatment when a second back injury occurred in 1989. The JCC accepted the treatment as remedial to the 1989 injury, but not remedial to the 1981 injury, thus barring the claim. The court reversed the findings of the JCC and requested that the claim be heard on its merits.

In another case, the court reversed the decision of the JCC, which had ordered the employer/carrier to provide remedial attention for replacement or removal of a surgical staple in the claimant's right shoulder. The court determined that the staple was not a prosthetic device, and that the two year statute of limitations had therefore run. The court, however, certified the following question as one of great public importance:

WAS THE FIXATION STAPLE INSERTED INTO CLAIMANT'S SHOULDER A "PROSTHETIC DEVICE," AS THAT TERM IS USED IN SECTION 440.19(1)(b), FLORIDA STATUTES (1985)?

The Supreme Court of Florida answered the certified question in the negative, thus affirming the decision of the district court. This decision barred the workers compensation remedy since the statute of limitations had run.

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134. Lee v. City of Jacksonville, 616 So. 2d 37 ( Fla. 1993).
135. Id. at 38.
137. Id. at 685.
138. Id. at 684.
139. Id. at 685.
140. Id.
142. Id. at 158.
143. Id.
145. Id. at 448.
The court also addressed the statute of limitations in *Timmeny v. Tropical Botanicals Corp.* The *Timmeny* court determined that where the employer/carrier had failed to notify the claimant of an entitlement to benefits the employer/carrier was estopped from asserting the statute of limitations as a defense. The court took the view that the conduct of the employer/carrier severely prejudiced the claimant. The employer/carrier was aware that the employee was exposed to pesticides which were among the possible causes of the claimant's aplastic anemia. Nonetheless, the employer/carrier did not share this information with the claimant. The employer/carrier's breach of its statutory duty requires that the statute be tolled until the claimant received actual notice that his disease was compensable.

4. Standard of Review

Review of workers compensation cases by the First District Court of Appeal is generally based upon a standard of competent substantial evidence. The court in *Lagenfelder v. Regina* utilized this standard to find that a claimant was entitled to permanent total disability benefits and costs. At the same time, the court determined there was a lack of competent substantial evidence to support an award for attendant care benefits. The court found that there was no need for lengthy presentation of the facts in the case, as these would be of little precedential value. In essence, the court implied that it knows competent substantial evidence when it sees it.

The decision of the JCC, as to a good faith work search by a claimant and the award of permanent total disability benefits, was found to be lacking for want of competent substantial evidence where the court found the

146. 615 So. 2d 811 (Fla. 1st Dist. Ct. App. 1993).
147. *Id.* at 816.
148. *Id.*
149. *Id.* at 817.
152. *Id.*
153. *Id.*
154. *Id.*; see also Allied Bendix Galactic v. Al-Hafiz, 596 So. 2d 1177 (Fla. 1st Dist. Ct. App.), review denied, 605 So. 2d 1262 (Fla. 1992).
evidence to be "vague and general."\textsuperscript{155} Although the court reviews the facts of the case, it does not examine or explain what constitutes competent substantial evidence. Thus, the decision typically turns on the whim of the court, with no true standard to guide the practitioner in determining the evidence that should be entered into the record.\textsuperscript{156}

In some instances the court provides somewhat more insight into what constitutes competent substantial evidence. Where the JCC failed to determine that medical treatment was of an emergency nature, the First District Court of Appeal reversed and remanded for further findings.\textsuperscript{157} Even though the carrier may control the medical treatment of the injured employee by the selection of the treating physician, an injured worker may not be denied compensation for medical treatment which, although unauthorized, is of an emergency nature.\textsuperscript{158}

In another instance, however, the court upheld an average weekly wage ("AWW") award which included fringe benefits of pass flights to the employee where the court found competent substantial evidence in the record to establish the value of this benefit.\textsuperscript{159} The JCC found that the pass flights could be valued at 8.1 cents per mile and thus included the value of the pass in the AWW calculation. In a dissenting opinion, Judge Miner took issue with the analysis of the certified public accountant who presented the testimony as to this benefit.\textsuperscript{160} The majority accepted the validity of the evidence as presented to and reported by the JCC, while the dissent attempted to reevaluate the evidence. Reevaluation of the evidence is outside the scope of review of competent substantial evidence.\textsuperscript{161}

\textsuperscript{156} The court is somewhat more prone to offer explanation of what is not competent, substantial evidence then it is to provide an affirmative guideline. See, e.g., Jackson v. Columbia Pictures, 610 So. 2d 1349 (Fla. 1st Dist. Ct. App. 1992); Townsend & Bottom v. Bonds, 610 So. 2d 619 (Fla. 1st Dist. Ct. App. 1992); Jackson Manor Nursing Home v. Ortiz, 606 So. 2d 422 (Fla. 1st Dist. Ct. App. 1992).
\textsuperscript{157} Machacon v. Velda Farms Dairy, 619 So. 2d 380 (Fla. 1st Dist. Ct. App. 1993).
\textsuperscript{158} Id. at 382.
\textsuperscript{159} Eastern Airlines, Inc. v. Michaelis, 619 So. 2d 383 (Fla. 1st Dist. Ct. App. 1993).
\textsuperscript{160} Id. at 383-84. (Miner, J., dissenting).
\textsuperscript{161} Other cases in which the First District Court of Appeal reviewed findings of the JCC on the basis of competent substantial evidence include: Ullman v. City of Tampa Parks Dep't., 18 Fla. L. Weekly D2043 (Fla. 1st Dist Ct. App. Sept. 15, 1993) (affirming that there was competent substantial evidence that there was no industrial accident); WPOM Partners v. Lovell, 623 So. 2d 823 (Fla. 1st Dist. Ct. App. 1993) (affirming wage loss award because record contains competent substantial evidence of claimant's loss of earnings and his compensable injury); Orange County Sch. Bd. v. Perkins, 619 So. 2d 1 (Fla. 1st Dist. Ct.
In the event that a JCC has departed from the essential requirements of law, and a party will suffer an injury that cannot be remedied by appeal, a petition for certiorari may be filed with the court. In *Spaulding v. Albertson's, Inc.*, the court reviewed the evidence necessary to determine whether the JCC had complied with the essential requirements of law for the purpose of establishing attorney’s fees. The court held that the JCC erred in finding that the statutory fee guidelines in section 440.34(1) of the Florida Statutes was the appropriate place to begin the determination of appellate attorney’s fees in workers compensation cases. While the court noted that an award of appellate attorney’s fees does not lend itself to any hard and fast rule, it took pains to note that claimant’s attorney’s fees should not be governed by evidence of the hourly rate charged by defense
lawyers. The court also noted that there are inherent differences between the practice of the defense bar, which begin with fixed hourly rates for defense counsel based upon repetitive employment and virtual guarantees of payment from solvent insurance companies, and handling appeals for workers compensation employers. The court’s comments appear at odds with recent changes to the legislative intent of the workers compensation law, which is now to be construed in a fair and balanced manner in regard to application to employee and employer.

The court also accepted a petition for a writ of certiorari in All Weather Control, Inc. v. Wawerczyk. Here the court examined an order for out-of-state medical care and determined that the petition should be granted since, once the fee for out-of-state medical care was paid, there was no statutory method for reimbursement. Thus, the petitioner would suffer an injury that could not be remedied by an appeal from the final order.

The court also found a departure from the essential requirements of law in a petition for a writ of certiorari where there was no evidence presented to the JCC. The petition for a writ of certiorari sought review of an order of a JCC which granted the employer/carrier’s motion to compel treatment with a medical representative of the employer/carrier, and denied a motion to require the presence of claimant’s attorney at all meetings between the medical representative and the claimant.

An order compelling disclosure of a company’s workers compensation file on two employees was found to depart “from the essential requirements of law,” and to present a possibility of “irreparable harm that cannot be remedied by way of appeal” in Adjustco, Inc. v. Sibley. The court determined that the party seeking production failed to show that there was no other means to obtain the substantial equivalent of the materials without undue hardship. In the remand instructions, respondent was given the

165. Id. at 723-24.
166. Id. at 724.
169. Id. at 518.
170. Id.
172. Id.
174. Id.
opportunity to present evidence that the material was not available by other means without undue hardship.\textsuperscript{175}

In a consolidated case, the court denied petitioner's request for a writ of certiorari, which tested the provisions of Florida law pertaining to disclosure of medical records.\textsuperscript{176} The court applied the provisions of the 1991 amendments to the Act because the statutory disclosure provisions related to matters that did not alter or amend the parties substantive rights.\textsuperscript{177} Additionally, the court noted that the language of the 1989, 1990, and 1991 amendments was not significantly different.\textsuperscript{178} The petitions sought review of an order of the JCC prohibiting petitioners or their representatives from \textit{ex parte} communication with respondents' medical providers.\textsuperscript{179} The court determined that petitioners had not met their burden of proving that the order departed from the essential requirements of law, and that they would suffer material harm that could not be remedied on appeal.\textsuperscript{180}

In \textit{Fuentes v. Caribbean Electric},\textsuperscript{181} the First District Court of Appeal addressed the issue of unrebutted medical testimony. The court noted that a JCC may not reject unrebutted medical testimony without a reasonable explanation.\textsuperscript{182} Here, no explanation for the rejection was offered and, therefore, the appellate court reversed and remanded the case for proceedings consistent with its opinion.\textsuperscript{183}

\textit{Amendments to Florida Rules of Workers' Compensation Procedure}\textsuperscript{184} provides for discretionary review of non-final venue orders in workers compensation cases.\textsuperscript{185} A petition for a writ of certiorari was granted in regard to a venue order of the JCC in \textit{Lockheed Space Operations v. Pham}.\textsuperscript{186} Procedurally, the court received this case as an appeal of a non-final order. The court determined that, although it did not have jurisdiction to hear such an appeal, it was within the power of the court to

\textsuperscript{175} Id.
\textsuperscript{177} Id. at 497.
\textsuperscript{178} Id.
\textsuperscript{179} Id. at 496.
\textsuperscript{180} Id. at 496-97.
\textsuperscript{181} 596 So. 2d 1228 (Fla. 1st Dist. Ct. App. 1992).
\textsuperscript{182} Id. at 1229.
\textsuperscript{183} Id.
\textsuperscript{184} 603 So. 2d 425 (Fla. 1992).
\textsuperscript{185} Id.
\textsuperscript{186} 600 So. 2d 1261, 1264 (Fla. 1st Dist. Ct. App. 1992).
view the appeal as a petition for a writ of certiorari. The court then proceeded to vacate the order of the JCC transferring venue.

In *Florida Mining & Materials v. Perkins*, the court found that the JCC utilized the wrong evidentiary standard to determine that there was a lack of evidence to support a finding of reliance upon a misrepresentation in the hiring process. The employer asserted that there was a direct causal relationship between the injury and the misrepresentation on the part of the claimant.

The court was asked to accept a petition for a writ of certiorari in regard to a non-final order on venue in *Hines Electric v. McClure*. The court determined that the non-final order was appealable and exercised its jurisdiction by accepting the jurisdiction and determining that the answers it had received were answer briefs. The appellant was subsequently given twenty days to forward a reply brief to the court.

5. Arising Out Of, And In the Course and Scope of, Employment

The payment of workers compensation benefits is dependent on an injury arising out of, and in the course and scope of, employment. In *Darling v. Conley Buick, Inc.*, the court reversed an order of the JCC, finding that injuries sustained in an automobile accident were not compensable under workers compensation. The employee, a used car salesman, was delivering vehicle documents to a customer at the employer's request when the accident occurred. Although the JCC found these actions to be within the course and scope of employment, the JCC determined that by driving five miles beyond the destination of the customer's residence, the claimant had substantially deviated from the course and scope of employment. The JCC concluded the claim was not compensable. The appellate court held that the JCC's determination was not supported by
competent and substantial evidence, and reversed and remanded the case for further proceedings. 198

The finding that the claimant was in a position unique to employment and that the injury was not the result of an idiopathic condition was upheld in *City of Plantation v. Seaman.* 199 Although the claimant passed the necessary threshold of establishing that the injury was compensable because it arose out of and occurred within the course and scope of employment, the case was remanded to the JCC for review of compliance with statutory procedures relating to reporting requirements. 200

In the case of individuals who are municipal or other specified employees, statutory presumptions may apply. 201 In *State of Florida, Department of Corrections v. Clark,* 202 the court determined that a fireman did not show that he was a fireman for a "fire control district" within the meaning of the Florida Statutes. 203 The claimant asserted he was entitled to the presumption of compensability contained in section 112.18(1) of the Florida Statutes. 204 The presumption states:

> Any condition or impairment of health of any Florida municipal, county, port authority, special tax district or fire control district fireman caused by tuberculosis, heart disease, or hypertension resulting in total or partial disability or death shall be presumed to have been accidental and to have been suffered in the line of duty unless contrary be shown by competent evidence. 205

Workers compensation law has long recognized that injuries which occur during travel to and from work do not arise out of, and in the course and scope of, employment. Over the years, exceptions have been carved out of the going and coming rule which would allow recovery in those instances in which a "special hazard" exists. In Florida, the "special hazard" rule was adopted by the Supreme Court of Florida in *Naranja Rock Co. v. Dawal Farms.* 206 The rule states that "(w)here there is a special hazard on a

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198. *Darling,* 594 So. 2d at 816.
200. *Id.* at 1-2; see also *FLA. STAT.* § 440.13 (1991) (for billing and reporting requirements).
203. *Id.* at 586.
204. *Id.* (citing *FLA. STAT.* § 112.18(1) (1991)).
206. 74 So. 2d 282, 286 (Fla. 1954).
normal route used by the employee as a means of entry to and exit from his place of work, the hazards of that route under appropriate circumstances become hazards of the employment." The special hazard rule was found not to apply where an employee slipped and fell in a parking lot on her way to work. The court noted that for a claimant to be entitled to compensation under the special hazard rule, the "claimant must demonstrate the existence of a special hazard at a particular off-premises location which is on the usual or expected means of access to the claimant's place of employment." The claimant in the instant case was unable to make such a showing.

Similarly, a "travelling employee" exception has been established which provides that when an employee is away from home, injuries may be compensable for daily living events. However, the court declined to extend workers compensation benefits to employees who were injured while being transported by a co-employee who was voluntarily transporting the other employees in a privately owned vehicle, between the employees' place of work and their temporary residence, while working for the employer away from their normal place of residence. The court thus restricted its decision to the original intent of workers compensation law, which was to provide compensation for injuries arising out of and in the course and scope of employment.

6. Employee v. Independent Contractor

Workers compensation law is designed to provide medical and wage replacement benefits to injured employees. The common law test applicable to master/servant law is traditionally the "control test." In Buncy v. Certified Grocers, the court determined that a claimant's wages should include compensation as a confidential informant. The court

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207. Id. (citations omitted).
209. Id. at 793.
210. Id. at 793-94.
213. See generally LARSON, supra note 1, § 1.00.
214. RESTATEMENT (SECOND) OF AGENCY § 220(2)(a) (1958). In determining whether an individual is an independent contractor or employee, "the extent of control which, by agreement, the master may exercise over the details of the work" is one factor considered. Id.
215. 592 So. 2d 336 (Fla. 1st Dist. Ct. App. 1992)
noted that the degree of control exercised over appellant’s activities was reflected in the record and constituted competent substantial evidence that claimant was an employee, even when working as a confidential informant. 216

In Fleitas v. Today Trucking, Inc., 217 the court affirmed a JCC’s decision that the claimant was an independent contractor who was entitled to limited benefits under a contractual relationship with Today Trucking, Inc. The claimant was injured in an automobile accident while driving for the defendant, Today Trucking, Inc. The claimant had entered into an agreement with the company, which agreement established that the claimant was not an employee, but would be entitled to workers compensation payments in the amount of $240.00 per week. The court found that Florida’s workers compensation statute prohibits contractual limitation of the benefits due an employee. 218 At the same time, there is no statutory prohibition in regard to establishing limits for benefits to be paid to individuals who are not employees, yet are extended voluntary benefits by the employer. 219 Thus, the claimant in the instant case was only entitled to limited benefits. 220

7. Causal Relationship

Compensability for an injury is premised on the understanding that the employment was causally related to the injury. 221 In Finney v. Agrico Chemical Co., 222 the court reversed a determination of noncompensability and remanded for further proceedings where the testimony of two doctors was improperly rejected by the JCC. 223 The claimant in Finney was working as an electrical technician trainee when he slipped and fell on his back, striking his head on the floor. 224 The claimant filed a timely report, but did not immediately seek medical treatment. 225 The court determined

216. Id. at 337-38.
218. Id. at 254.
219. Id.; see also Fort Pierce Tribune v. Williams, 622 So. 2d 1368 (Fla. 1st Dist. Ct. App. 1993).
220. Fleitas, 598 So. 2d at 254.
221. See generally Larson, supra note 1, at § 20.00.
223. Id. at 1361.
224. Id. at 1360.
225. Id.
that reversal was necessary where the rejected medical evidence, if accepted, would provide legally sufficient grounds for establishing the claim.\textsuperscript{226}

The court also reversed and remanded for further findings the decision of the JCC as to a causal relationship where there was uncontradicted testimony that the condition was causally related to the employment.\textsuperscript{227} In addition to rejecting the uncontradicted medical testimony of two doctors, the JCC used the claimant’s failure to conduct an adequate job search as the basis for finding lack of causation.\textsuperscript{228} The court, however, did not comment on the use of an inadequate work search as the basis for finding lack of a causal relationship.\textsuperscript{229} The court did note that the claimant had not been informed by the carrier of the need to perform a work search and, thus, the claimant was excused from the need to have made such a search.\textsuperscript{230}

The court also reversed and remanded the decision of a JCC in regard to causal relationship where the claimant worked as a night auditor for a motel chain and filed a claim in connection with a hand and wrist injury.\textsuperscript{231} The court determined that, in order to rule against the causal connection, the JCC had to find as uncontested the testimony of medical experts. The court found, however, that the testimony was clearly conflicting.\textsuperscript{232} During claimant’s delivery of a baby, claimant’s wrists were strapped. Medical testimony indicated that the strapping “could be something of significance to cause carpal tunnel” and that subsequent lifting of the child “could cause tenosynovitis.”\textsuperscript{233} Since this testimony was in

\textsuperscript{226} Id. at 1361.
\textsuperscript{228} Cozzens, 596 So. 2d at 137.
\textsuperscript{229} Id.
\textsuperscript{230} Id.
\textsuperscript{231} Fritz v. Courtyard By Marriott, 592 So. 2d 1167 (Fla. 1st Dist. Ct. App. 1992). \textit{See also} Aetna Life & Casualty Co. v. Schmitt, 597 So. 2d 938 (Fla. 1st Dist. Ct. App. 1992) (affirming the decision of the JCC finding Aetna responsible for the claimant’s treatment, but determining that the reason for the liability was Aetna’s provision of insurance during the time in which claimant suffered her last repeated action which led to the need for remedial treatment); Schafrath v. Marco Bay Resort, Ltd., 608 So. 2d 97 (Fla. 1st Dist. Ct. App. 1992) (JCC was reversed and the cause remanded where the claimant suffered an injury to her elbow as the result of being hit by a swinging door and the JCC applied an incorrect burden of proof to establish claimant’s right to benefits).
\textsuperscript{232} Fritz, 592 So. 2d at 1168.
\textsuperscript{233} Id. at 1171.
conflict with that of other doctors who testified that claimant’s work activities were the source of the injury, the JCC’s decision was not upheld.\textsuperscript{234}

The determination of a JCC that a claimant’s injury was not causally related to employment was upheld by the court in \textit{Molnar v. Bob Evans Restaurants}.\textsuperscript{235} The claimant presented evidence of a slip and partial fall while working as a waitress.\textsuperscript{236} Claimant experienced back pain and numbness in the legs, and was admitted to the hospital.\textsuperscript{237} Conflicting testimony was presented as to whether the claimant’s injuries resulted from the slip and fall or from an infection, transverse myelitis.\textsuperscript{238} The court affirmed that the JCC had competent substantial evidence to support the finding that the infection was a logical cause of the claimant’s injury and that the injury was not causally related to employment.\textsuperscript{239}

A determination of causal relationship was rejected by the court where the JCC based the determination on the doctor’s statement that the claimant said the injury occurred at work and the claimant suffered from a neck injury.\textsuperscript{240} The court pointed out that it is up to the claimant to prove the causal relationship between the employment and the injury.\textsuperscript{241} Here, the court determined that the testifying doctor did not present evidence of a relationship and that the finding below should be reversed.\textsuperscript{242}

In \textit{Body Works, Inc. v. Chavez},\textsuperscript{243} the court accepted the finding of causality in relation to medical treatment and attendant care for a cardiac problem, but rejected the finding of causality in relation to a hearing loss.\textsuperscript{244} The rejection of a causal relationship between the work and the hearing loss was premised on the testimony of a doctor responding to a hypothetical question regarding causal relationship.\textsuperscript{245} Timely objection was made to the hypothetical and to the response. Since, however, no other

\begin{thebibliography}{1}
\bibitem{234} \textit{Id.} at 1170.
\bibitem{235} 592 So. 2d 742 (Fla. 1st Dist. Ct. App. 1992).
\bibitem{236} \textit{Id.}
\bibitem{237} \textit{Id.} at 742-43.
\bibitem{238} \textit{Id.} at 743-44.
\bibitem{239} \textit{Id.} at 744.
\bibitem{241} \textit{Id.}
\bibitem{242} \textit{Id.}
\bibitem{243} 606 So. 2d 1273 (Fla. 1st Dist. Ct. App. 1992).
\bibitem{244} \textit{Id.} at 1274.
\bibitem{245} \textit{Id.}
\end{thebibliography}
evidence relating to the hearing loss was presented, the court reversed the order as to the compensability of the hearing loss.246

The court noted in Fincannon v. Eastern Airlines,247 that “[a] claimant seeking workers compensation benefits is not required to show her compensable injury was the sole cause of her disability.”248 In Fincannon, the claimant was an airline reservationist who developed hoarseness, laryngitis and trouble talking, which was diagnosed to be the result of polyps on the vocal chords. The claimant was fifty-nine years of age, a heavy smoker, and subject to severe allergies.249 The court commented:

There is no real dispute that immediately after claimant’s surgery, she ceased smoking until January 8, 1987. When claimant’s surgery and voice therapy and cessation of smoking failed to prevent the return of nodules on her voice chords, it was recommended that she not return to employment that required much voice usage. She had previously attempted to return to Eastern but that resulted in voice failure. She subsequently attempted retraining and reentry into the labor market but her efforts, to date, have failed. This evidence restricting claimant’s employment to jobs which require very little voice usage supports a finding of permanent impairment.250

Thus, the court is willing to find permanent disability, causally related to employment, even where there are intervening factors that may impact on the claimant’s disability. It is the initial causal relationship that provides the claimant with the right to compensation.

Where the parties have stipulated that an injury is causally related to the work and is, therefore, compensable, the JCC must make specific findings as to the continued viability of the stipulation prior to overturning the stipulation.251 During a hearing the JCC determined that the claimant had committed fraud and misrepresentation by working and earning money while he was allegedly unable to work.252 The court noted that a JCC is not required to follow a stipulation that is refuted by competent substantial

246. Id.
248. Id. at 30.
249. Id. at 29.
250. Id. at 30-31 (citing Dayron Corp. v. Morehead, 509 So. 2d 930 (Fla. 1987); Jackson v. Publix Supermarkets, Inc., 520 So. 2d 50 (Fla. 1st Dist. Ct. App. 1987)).
252. Id.
evidence. However, the JCC must give notice to the parties that the JCC is considering rejecting the stipulation. The failure to give due notice requires that the case be remanded for further findings in regard to entitlement for benefits.\(^{253}\)

Where a claimant’s hepatitis was found not to be causally related to the industrial accident, a subsequent medical opinion to establish causation was found not to be reasonably required.\(^{254}\) The claimant was originally injured when he fell from a scaffold in the course and scope of employment. The claimant developed hepatitis following surgery for the original injury. Competent substantial evidence supported the finding that claimant had a prior history of hepatitis and of alcohol consumption. The claimant’s doctor stated that there was a low probability of a causal connection between the hepatitis and the industrial accident. That portion of the claimant’s injury which related to the industrial accident was compensable, while that part of claimant’s condition that was not causally related was not subject to coverage under the policy.\(^{255}\)

8. Compensability/Benefits

The JCC examines each claim presented to determine whether a compensable injury has occurred, and if so, what benefits should be paid. The determination of the JCC must be based on an analysis of the law and supported by competent substantial evidence.

In *Whiskey Creek Country Club v. Rizer,*\(^{256}\) the JCC found, and the court upheld, an award of benefits for an employee’s illness and subsequent death by determining that there was competent substantial evidence from the testifying doctors.\(^{257}\) At the same time, the court reversed the award for penalties and interest on the funeral expenses awarded by the JCC.\(^{258}\) The court based its determination on section 440.20 of the Florida Statutes, which provides penalties and interest for the late payment of compensation.\(^{259}\) The court reasoned that funeral and medical expenses are not compensation, and therefore, are not subject to penalties and interest.\(^{260}\)

\(^{253}\) *Id.*


\(^{255}\) *Id.*

\(^{256}\) 599 So. 2d 734 (Fla. 1st Dist. Ct. App. 1992).

\(^{257}\) *Id.* at 735.

\(^{258}\) *Id.*

\(^{259}\) *Id.* (citing FLA. STAT. § 440.20(7), (9) (1991)).

\(^{260}\) *Id.*
A claimant’s appeal from an order denying temporary disability wage loss benefits, alternative medical care, penalties, and interest arising out of a knee injury that aggravated a preexisting arthritic condition was reversed on all three points raised on appeal. The claimant first contended that the JCC erred in establishing the date of maximum medical improvement. All parties had stipulated to the date and the court found no basis upon which to overturn the stipulation. The claimant also contended that the record lacked competent substantial evidence to support the JCC’s finding that the claimant’s medical symptoms were solely the result of the preexisting medical condition. The court agreed with this contention based upon the deposition of claimant’s doctor indicating that, taken as a whole, a twisting accident constituted an aggravating cause of claimant’s condition. The claimant’s third contention was that the order denying temporary wage-loss and partial disability benefits based upon a failure to conduct a good faith work search was in error. The court found that the employer/carrier failed to notify the claimant of the need to make a good faith work search.

The claimant’s request that the court find internal cardiovascular conditions compensable absent a finding of preexisting condition was denied based on earlier case law decisions. Although there are instances in which heart attacks are compensable, the claimant was requesting that a new standard be established. The court found no legal support that would permit it to make the changes suggested by claimant. An award of temporary partial disability benefits for a three year period was reversed by the court where the claimant appeared to have exaggerated the extent of disability following an incident in which claimant’s employment was terminated. The claimant was terminated from his position for refusal to clean-up frozen turkeys, which fell after being stacked too high. There was a difference of opinion as to whether the claimant had

262. Id. at 243-44.
263. Id. at 244.
264. Id.
266. See, e.g., Popiel v. Broward County Sch. Bd., 432 So. 2d 1374 (Fla. 1st Dist. Ct. App.), review denied, 438 So. 2d 831 (Fla. 1983).
267. Zundell, 609 So. 2d at 1368.
268. Id.
270. Id. at 1344.
been terminated because of his back problem or because of insubordination. Therefore, the case was remanded to the JCC for further findings on the question of whether claimant voluntarily limited his income. Should the JCC find that the claimant was terminated for insubordination, the claimant will have failed to satisfy his burden of showing that his change in employment status was the result of a compensable injury. 271

Where an order of the JCC ignored or overlooked evidence that the claimant voluntarily limited his income, the court reversed an award for wage-loss benefits and remanded the case for further findings. 272 The claimant rejected the city’s offer of sedentary employment following an injury within the course and scope of employment. 273 On remand, the JCC will have the option of accepting further evidence in order to make a determination on wage loss benefits. 274

The court found that a JCC erred in finding a hernia repair noncompensable where the claimant had a preexisting hernia. 275 The claimant was diagnosed as having an inguinal hernia in 1987 and declined surgery. The hernia did not interfere with claimant’s ability to perform his job. In 1989, the claimant was involved in an altercation with one of his employers, and was taken to the hospital with a fractured hip and an inguinal hernia. 276 The court determined that since the claimant was not “disabled” from working until the time of his work-related accident, the aggravation to the preexisting condition made that condition compensable. 277

The court affirmed the principle that where a claimant suffers from an idiopathic condition that is not aggravated by the work situation, no compensation is due the employee. 278 The claimant in Hillsborough County School Board v. Williams, 279 suffered from a preexisting L5-S1 bulge, and claimed that bending to pick up a paper on the school bus floor aggravated the back problem. The court upheld the decision of the JCC, which found that the claimant suffered injury solely as the result of normal

271. Id. at 1345.
273. Id. at 458.
274. See id.
276. Id.
277. Id. at 661.
278. See Southern Bell Tel. and Tel. Co. v. McCook, 355 So. 2d 1166, 1168 (Fla. 1977) (establishing the principle that an idiopathic condition that is not aggravated by the work situation does not “arise out of” the employment).
Based upon this finding, the injury was not compensable.\textsuperscript{281}

In \textit{Gilreath v. Charlotte County Board of County Commissioners},\textsuperscript{282} the court found that where an employee was injured while charging the battery of his car, the injury arose out of the employment and was, therefore, compensable.\textsuperscript{283} The employer/carrier presented no evidence that the claimant had deviated from his duties. The court rejected the employer/carrier's contention that section 440.091 of the Florida Statutes requires affirmance that the claimant was acting within the course of employment.\textsuperscript{284} The statutory section referenced by the court establishes that an employee of a municipality, state, or political subdivision is deemed an employee acting within the course of employment so long as the employee "was not engaged in service for which he was paid by a private employer, and he and his public employer had no agreement providing workers compensation coverage for that private employment."\textsuperscript{285} Additionally, the court noted that a claimant's status as a law enforcement officer does not diminish the claimant's rights under the workers compensation law.\textsuperscript{286}

In \textit{City of Holmes Beach v. Grace},\textsuperscript{287} the Florida Supreme Court addressed the following question as one of great public importance:

\textbf{WHETHER SECTION 440.02(1), FLORIDA STATUTES (1985), DEFINING "ACCIDENT" EXCLUDES A MENTAL OR NERVOUS INJURY WHERE THE INJURY SUFFERED BY THE CLAIMANT RESULTS IN ONLY MINOR PHYSICAL CONSEQUENCES?}\textsuperscript{288}

The court chose to reword the question to:

\textbf{WHETHER SECTION 440.02(1), FLORIDA STATUTES (1985), DEFINING "ACCIDENT," EXCLUDES A MENTAL OR NERVOUS INJURY WHERE THE PHYSICAL INJURY SUFFERED BY THE}

\begin{footnotesize}
\begin{enumerate}
\item Id. at 625.
\item Id.
\item Id.
\item Id., p. 88 (Fla. 1st Dist. Ct. App. 1992).
\item Id. at 89.
\item Id. (citing FLA. STAT. § 440.091 (1991)).
\item FLA. STAT. § 440.091(3) (1991).
\item Gilreath, 610 So. 2d at 89.
\item 598 So. 2d 71 (Fla. 1992).
\item Id. at 72.
\end{enumerate}
\end{footnotesize}
CLAIMANT WAS NOT A CAUSE OF THE MENTAL OF NERVOUS INJURY? 289

The supreme court answered the latter question in the affirmative and quashed the decision of the court below, which had found that where a policeman was struck by the elbow of a suspect, the subsequent psychiatric illness of the policeman was compensable. 290 The need to create a direct link between a physical injury and a psychiatric illness limits the scope of mental illness and stress claims to those based upon a physical injury. This limitation serves to reduce the number and severity of stress and psychiatric claims that are filed.

In Nationwide Insurance v. McGee, 291 the court determined that a JCC erred in finding that the claimant suffered a compensable injury. 292 The court noted that the record clearly established that all of claimant’s injuries were psychiatric. 293 Section 440.02(1) of the Florida Statutes has been construed as precluding compensation for mental or emotional injury, unless the claimant establishes that such mental or emotional injury was the direct and immediate result of a physical injury. 294

Where a claimant’s case was dismissed with prejudice for failure to attend an independent medical examination (“IME”), the court reversed the finding of the JCC. 295 The court based its decision on the fact that the IME was not ordered by the JCC and that dismissal with prejudice was too harsh a sanction for failure to attend an IME not ordered by the JCC. 296

Where a carrier limited a claimant’s award of hydrotherapy to membership in a health club, the court reversed the finding of the JCC. 297 The court found that the claimant was entitled to payment for a jacuzzi hot tub and for the balance of the purchase price of claimant’s first hot tub. 298 The claimant’s first hot tub had suffered a crack and was not usable, thus

289. Id. at 74.
290. Id.
292. Id. at 358.
293. Id.
294. Id. (interpreting section 440.02(1) of the Florida Statutes, 1989, which provides, “A mental or nervous injury due to stress, fright or excitement only . . . shall be deemed not to be an injury by accident arising out of the employment.”).
296. Id.
298. Id. at 138-39.
necessitating the need for the jacuzzi hot tub. The court noted that there was competent substantial evidence that the claimant did not have a public facility available to him, and the employer/carrier did not introduce any evidence to the contrary.299

The scope of benefits available to an injured employee may range from lifetime medical care, prosthetic devices, wage-loss benefits, attendant care, homes, and vehicles to accommodate disabilities. Many of the benefits, while necessary to ensure a quality of life for the injured worker, are so costly they serve to drive up the cost of workers compensation insurance.300

299. Id. at 138.

300. See Edenfield v. B&I Contractors, Inc., 18 Fla. L. Weekly D2105 (Fla. 2d Dist. Ct. App. Sept. 22, 1993) (reversing a summary judgment which denied a claim for wrongful termination based upon the filing of a workers compensation claim); Meek v. Layne-Western Co., 18 Fla. L. Weekly D2041 (Fla. 1st Dist. Ct. App. Sept. 14, 1993) (reversing where the JCC utilized the incorrect formula for the calculation of wage loss); Robinson v. Shands Teaching Hosp., 18 Fla. L. Weekly D2029 (Fla. 1st Dist. Ct. App. Sept. 14, 1993) (affirming an award of psychiatric treatment by a physician selected by the employer); Belcher v. Dade County Sch. Bd., 623 So. 2d 826 (Fla. 1st Dist. Ct. 1993) (reversing where claimant was denied certain household items, the cost of a maid and bathtub rails); Jones v. Petland Orlando S., 622 So. 2d 1114 (Fla. 1st Dist. Ct. App. 1993) (reversing a determination that Rogaine treatment was experimental); Fawaz v. Florida Polymers, 622 So. 2d 492 (Fla. 1st Dist. Ct. App.) (reversing where the JCC erred in applying the misrepresentation defense and claimant was denied temporary partial disability benefits); Tumberly Assocs., Inc. v. Pierre, 618 So. 2d 777 (Fla. 1st Dist. Ct. App. 1993) (reversing an award of psychiatric treatment where no claim for such treatment was made); Turner v. Rinker Materials, 622 So. 2d 80 (Fla. 1st Dist. Ct. App. 1993) (reversing the denial of temporary partial disability and wage loss benefits where the claimant was not made aware of reporting requirements); Deep South Products v. Beach, 616 So. 2d 156 (Fla. 1st Dist. Ct. App. 1993) (affirming an award of temporary partial disability, wage-loss, attendant care benefits, costs and attorneys fees following claimant's incarceration for DUI); Arizona Chemical Corp. v. Hanlon, 605 So. 2d 938 (Fla. 1st Dist. Ct. App. 1992) (awarding the claimant biodetoxification treatment, both past and future, travelling expenses to obtain treatment and an in-home hot tub); Town & Country Farms v. Peck, 611 So. 2d 63 (Fla. 1st Dist. Ct. App. 1992) (affirming an award of a hospital bed and acupuncture treatments); Rodriguez v. Prestress Decking Corp., 611 So. 2d 59 (Fla. 1st Dist. Ct. App. 1992) (affirming the denial of death benefits where the claimant was over the statutory age at the time of her brother's death); Bristol Myers Co. v. Clark, 599 So. 2d 775 (Fla. 1st Dist. Ct. App. 1992) (reversing an order denying attendant care and making the award retroactive); Value Rent A Car v. Liccardo, 603 So. 2d 680 (Fla. 1st Dist. Ct. App. 1992) (affirming an order to include gratuities in the calculation of AWW even though the employer had no policy in regard to the reporting of gratuities and the employee failed to provide the employer with a contemporaneous written report of gratuities); Maranjé v. Brinks of Florida, Inc., 610 So. 2d 1293 (Fla. 3d Dist. Ct. App. 1992) (awarding the claimant a two bedroom home with an in-ground heated pool and, because he was denied this home during a fifteen month appeal, he was entitled to monetary damages which would make him whole for the period he was without the home); Southeast Environmental
Many of the reform measures proposed for the workers compensation system relate to limitations on benefits. Labor activists object to reform efforts which concentrate on the reduction of benefits and highlight those instances where there is employee claim fraud and employer fraud in relation to proper premium as the real cost drivers in workers compensation.\textsuperscript{301}

9. Occupational Disease

Section 440.151 of the Florida Statutes provides for several alternative theories in relation to occupational disease.\textsuperscript{302} If a disease is classified as an occupational disease, rather than one fitting the prolonged exposure theory, the carrier of record at the time of the last exposure is liable for all benefits payable to the claimant.\textsuperscript{303} If, on the other hand, prolonged exposure theory is found to be the basis of the claim, carriers are entitled to contribution from each carrier of record for the period of time the carrier issued the policy.\textsuperscript{304} The claimant is entitled to the same benefits under either theory of recovery, however, the source of the benefits may vary.

\textsuperscript{301} On November 10, 1993, the Florida Legislature passed Senate Bill 12C, which reforms workers compensation by reducing certain benefits and providing premium reduction credits for employers. In response to this legislation, "Labor unions, trial lawyers, and some legislators say that some of the most seriously injured workers are big losers." Tim Nickens, Scoring Workers' Comp, Miami Herald, Nov. 11, 1993, at 1C, 3C.

\textsuperscript{302} See generally FLA. STAT. § 440.151 (1991).

\textsuperscript{303} \textit{id.} § 440.151(5); see also Eastern Airlines, Inc. v. Crittenden, 596 So. 2d 112 (Fla. 1st Dist. Ct. App. 1992).

\textsuperscript{304} Crittenden, 596 So. 2d at 113.
The court addressed a repeated trauma claim in the case of a worker who cut, chopped, stirred and lifted in the role of oriental chef. The court determined that exposure and repeated trauma cases should be governed by the same principles as "repeated accidents." It is the combination of the repeated accidents that leads to a compensable injury. In *Tokyo House, Inc.*, the court found that a repeated trauma occurred during the two year period before the claim was filed and found that the compensation to the employee was due from the carrier of record during that time.

There are times when the link between industrial accident and a separate normally noncompensable disease interact to create the need for greater benefits to the employee. In *Urban v. Morris Drywall Spray*, the court determined that the claimant’s compensable injury was aggravated by preexisting diabetes. The court's determination was based upon an earlier decision, which established the principle that where a preexisting condition is aggravated by a compensable accident, the exacerbation of the preexisting condition is itself compensable. The court also found that it was necessary to treat claimant’s diabetic condition in order to render effective treatment of claimant’s compensable injuries.

In *Martin County School Board v. McIntosh*, the court examined the medical testimony supplied to the JCC and determined that there was competent substantial evidence to support a finding of disabling occupational disease without the need for further medical tests. The court found that the claimant suffered from an occupational disease within the meaning of Florida law by exhibiting the symptoms of chromate sensitivity and resulting allergic reactions caused by concrete during the course of his employment. The court determined that a claimant need not "present evidence of a positive patch test to satisfy the requirements of section

306. *Hsin Chu*, 597 So. 2d at 351.
307. *Id.*
308. *Id.* at 352.
309. 595 So. 2d 60 (Fla. 1st Dist. Ct. App. 1991)
310. *Id.* at 61 (citing *Castro v. Florida Juice Division*, 400 So. 2d 1280 (Fla. 1st Dist. Ct. App. (1981))).
311. *Id.*
312. 605 So. 2d 166 (Fla. 1st Dist Ct. App. 1992).
314. *McIntosh*, 605 So. 2d at 166.
440.151 [of the Florida Statutes] so long as the medical evidence is otherwise legally sufficient to establish causation . . . .\textsuperscript{315}

In another case, a claim for occupational disease benefits by a claimant who developed pneumonia was reversed by the court.\textsuperscript{316} The claimant was employed to wash buses and claimed that he developed pneumonia from washing buses in inclement weather. The employer/carrier took the deposition of an expert witness to challenge the causal relationship.\textsuperscript{317} The doctor, however, was paid more than the statutory rate\textsuperscript{318} and the claimant moved to strike the doctor’s testimony.\textsuperscript{319} The JCC and those present at the hearing on the merits engaged in dialogue that called into question the veracity of the doctor and that indicated a bias on the part of the JCC against the doctor’s testimony.\textsuperscript{320} The court vacated the order of the JCC and remanded the case for a new hearing on the merits.\textsuperscript{321} The dissent noted that, even though the JCC’s comments lacked judicial decorum, there was no evidence of bias and the findings of the JCC could be upheld because they were supported by competent substantial evidence.\textsuperscript{322}

10. Average Weekly Wage

Under the 1989 provisions relating to the determination of average weekly wage ("AWW"), the JCC found, and the First District Court of Appeal affirmed, that a claimant injured while working as a camp counselor was not entitled to an average weekly wage calculation, which included earnings from a newspaper delivery route.\textsuperscript{323} The court stated that the

\begin{footnotes}
\item[315] ld. at 167.
\item[317] Id.
\item[318] The Florida Statutes limits the fee payable to a health care provider as compensation for a deposition to $200. FLA. STAT. § 440.13(2)(l) (1991).
\item[319] Phillips, 613 So. 2d at 57.
\item[320] ld. at 57-58.
\item[321] ld.
\item[322] ld.
\item[323] City of Port Saint Lucie v. Chambers, 606 So. 2d 450 (Fla. 1st Dist. Ct. App. 1992), review denied, 618 So. 2d 208 (Fla. 1993). The 1991 Amendments to chapter 440 eliminate the concurrent earnings provisions and limit the claimant to recovery from the employment ongoing at the time of injury. FLA. STAT. ch 440 (1991). The constitutionality of this provision is currently on appeal before the First District Court of Appeal. \textit{But see} Ciancio v. North Dunedin Baptist Church, 616 So. 2d 61 (Fla. 1st Dist. Ct. App. 1993) (claimant failed to meet the heavy burden of establishing that the provision is unconstitutional and the denial of benefits for concurrent wages is affirmed).
\end{footnotes}
wages from concurrent earnings are generally included (prior to the 1991 amendments) in the calculation of average weekly wage, but that the wages of independent contractors were specifically excluded because such contractors are not included in the definition of employee under section 440.02(12)(d)(1), Florida Statutes.324

Florida statute provides that where a claimant voluntarily limits earnings, a JCC may apply a deemed earnings provision to the calculation of average weekly wage.325 In Avellino v. Pantry Pride Enterprises, Inc.,326 the court overturned a JCC’s determination that the employer should be allowed an offset because the claimant voluntarily limited earnings. The court noted that the application of section 440.15(3)(b)(2) involves the shifting of burdens of proof.327 Once the compensability of the injury is established, the burden of proof shifts to the employer to demonstrate that the claimant voluntarily limited his or her earnings.328 In this case, the employer/carrier failed to meet its burden and to establish, by competent substantial evidence, that the claimant voluntarily limited earnings. Therefore, the findings of the JCC were reversed and the cause remanded for further proceedings.329

In PLM Florida Hotels, Inc. v. DeMarseul,330 the court reversed a modification of the AWW award to a claimant who sustained a slip and fall accident in the course and scope of employment. The claimant was awarded a modification in AWW and the court found this error on the part of the JCC.331 A modification is granted where the claimant makes a showing of mistake of fact or where material evidence becomes available after the order.332 The court determined that no new evidence was presented and, therefore, the claimant was not entitled to a modification of AWW.333

Average weekly wage awards are determined by statutory dictate.334 In Stanley Steemer International v. Prescott,335 the court found that the

324. Chambers, 606 So. 2d at 451 (citing FLA. STAT. § 440.15(3)(b)(2) (1991)).
327. Id. at 348 (citing FLA. STAT. § 440.15(3)(b)(2) (1991)).
328. Id.
329. Id.
330. 611 So. 2d 1360 (Fla. 1st Dist. Ct. App.), review denied, 620 So. 2d 760 (Fla. 1993).
331. Id. at 1362.
332. Id.
333. Id. at 1362-63.
335. 615 So. 2d 211 (Fla. 1st Dist. Ct. App. 1993).
JCC erred in selecting the section of the statute applicable to the determination of AWW. The claimant was employed as a “piece worker” delivering subpoenas. The JCC determined that the statute would “punish” the claimant “for demonstrating perseverance, motivation, and initiative.” The court withheld comment on whether there was a punishing effect in the statute, but noted that the claimant’s salary was most analogous to a commission and this was the basis upon which the AWW calculation should be made.

11. Special Disability Trust Fund

Special disability trust funds are designed to assist in the hiring of workers who are disabled whether or not the disablement occurred as the result of an industrial accident. In Florida, a second injury or disease that merges with previous permanent physical impairment and results in substantially greater disability than from the second injury alone entitles the employer to reimbursement for sixty percent of impairment benefits, sixty percent of wage loss benefits during the first five years after maximum medical improvement and seventy-five percent thereafter.

In Special Disability Trust Fund v. Stephens, Lynn, Chernay & Klein, the court upheld an order awarding the employers, in a consolidated case, reimbursement from the Special Disability Trust Fund for supplemental permanent total disability benefits paid pursuant to section

336. Id.
337. Id. Other cases discussing AWW include: Efficient Sys., Inc. v. Florida Dep’t of Labor & Employment Sec., 18 Fla. L. Weekly D2035 (Fla. 1st Dist. Ct. App. Sept. 14, 1993) (remanding for recalculation of AWW where the JCC calculated the AWW based on prior employment); Waldorf v. Jefferson County Sch. Bd., 622 So. 2d 515 (Fla. 1st Dist Ct. App. 1993) (affirming the selection of methodology for calculating AWW where the JCC determined the claimant’s AWW should be based solely on the number of weeks he actually worked during the term of his contract); Pishotta v. Pishotta Tile & Marble, Inc., 613 So. 2d 1373 (Fla. 1st Dist. Ct. App. 1993) (claimant was an active partner in the business enterprise and sought an AWW award based upon the duties performed); Brownell v. Hillsborough County, 617 So. 2d 803 (Fla. 1st Dist. Ct. App. 1993) (affirming the JCC’s award of AWW minus the cost of uniforms supplied to the claimant); and Cardinal Indus. v. Pauley, 610 So. 2d 93 (Fla. 1st Dist. Ct. App. 1992) (remanding for explanation from the JCC of factors used to calculate the AWW).

339. Id. The Second Injury Fund is based on a pro rata annual assessment of net premiums of insurers and self-insurers. The assessments must equal the sum of the immediate past three years’ disbursements. Id.
440.15(1)(e)(1) of the Florida Statutes. The court reviewed the legislative history of the statute to reach its conclusion, but noted that the Legislature may not have accomplished its objective in the 1984 amendment process. The court, therefore, certified the following question as one of great public importance:

IS THE SPECIAL DISABILITY TRUST FUND, PURSUANT TO SECTION 440.49(2)(C), FLORIDA STATUTES, REQUIRED TO REIMBURSE EMPLOYERS FOR SUPPLEMENTAL PERMANENT TOTAL DISABILITY BENEFITS PAID PURSUANT TO SECTION 440.15(1)(E)(1), FLORIDA STATUTES?

In Hillsborough County School Board v. Special Disability Trust Fund, the court reversed a finding of the JCC denying reimbursement from the Special Disability Trust Fund, thereby affirming its decision in Avellino, and again certified the same question as one of great public importance.

The court also reversed the finding of the JCC in regard to reimbursement from the special disability fund in Breakers Hotel v. Special Disability Trust Fund. The court found that there was no collusion between the employee and the carrier as to the settlement for attorney’s fees and that the employer should be entitled to reimbursement for an appropriate percentage of the total settlement amount.

In Florida Employers Insurance Service Corp. v. Special Disability Trust Fund, the Florida Employers Insurance Service Corporation (“FEISCO”) sought a declaratory statement from the court as to its right to reimbursement from the special disability trust fund. FEISCO was prepared to separate its payment of benefits into two checks, one for attorneys fees and one payable to the claimant. The court determined that FEISCO did not

341. Id. at 209 (citing Fla. Stat. § 440.15(1)(e)(1) (1991)).
342. Id.
343. Id.
345. Id.
347. Id. at 1133. The Special Disability Trust Fund does not reimburse attorney fees, and here the settlement did not separate the attorney’s fees from the benefits paid to the claimant.
jeopardize its right to reimbursement by issuing two checks in the manner specified.349

12. Payment of Compensation Premiums

Among the basic principles of workers compensation law is the payment of premiums by the employer for benefits to be paid to the employee. In 1989, the Supreme Court of Florida consolidated and addressed the common issue presented in the cases of Barragan v. City of Miami and Giordano v. City of Miami,350 both involving a City of Miami ordinance that permitted the city to collect contributions from employees for the payment of workers compensation benefits.351 Since 1989, there have been numerous cases that have tested the retroactivity of the supreme court's decision in Barragan.352 The First District Court of Appeal has firmly

349. Id. at 861.
350. Barragan v. City of Miami, 545 So. 2d 252 (Fla. 1989) (consolidating on review and quashing the decisions below in the cases of City of Miami v. Barragan, 517 So. 2d 99 (Fla. 1st Dist. Ct. App. 1987) and Giordano v. City of Miami, 526 So. 2d 737 (Fla. 1st Dist. Ct. App. 1988)).
351. Id. at 254.
352. See City of Miami v. Bell, 606 So. 2d 1183 (Fla. 1st Dist. Ct. App. (1992), review granted, 621 So. 2d 431 (Fla. 1993). In Bell, the First District affirmed the JCC's award of additional benefits and certified the following question as one of great public importance: IS SECTION 440.20(7) APPLICABLE UNDER THE CIRCUMSTANCES OF THIS CASE, AND IF SO, CAN THE CITY OF MIAMI, BE LEGALLY EXCUSED FROM PAYING A PENALTY PURSUANT TO THAT SECTION ON THE AMOUNT OF PENSION OFFSET MONIES WITHHELD IN THE PAST BECAUSE THE CITY DID SO IN GOOD FAITH RELIANCE ON THE VALIDITY OF THE CITY ORDINANCE AUTHORIZING THE PENSION OFFSET IN VIEW OF THE APPELLATE DECISIONS APPROVING ITS VALIDITY?

Id. at 1189. The following cases certified the same question, and have been consolidated for review to the Florida Supreme Court with Bell: City of Miami v. Arostegui, 606 So. 2d 1192 (Fla. 1st Dist Ct. App. 1992) (award of additional benefits upheld); City of Miami v. Hickey, 614 So. 2d 1116 (Fla. 1st Dist. Ct. App. 1992) (upholding the award of additional benefits); City of Miami v. McLean, 605 So. 2d 953 (Fla. 1st Dist. Ct. App. 1992). In addition to recertifying the question above, the court in McLean also certified the following questions as one of great public importance:

Whether an increase in workers' compensation benefits, awarded pursuant to section 440.21 to offset illegal deductions from an employee's pension fund, in accordance with Barragan v. City of Miami, 545 So.2d 252 (Fla. 1989), constitutes "compensation" for purposes of section 440.20, Florida Statutes?

Id. at 954; see also City of Miami v. Paredes, 614 So. 2d 1163, 1164 (Fla. 1st Dist. Ct. App.) (certifying the same question as certified in Bell, but not consolidated for review), review
held to the position of retroactive application and has sought guidance from the Supreme Court of Florida in regard to several questions certified as being of great public importance. The position of the First District Court of Appeal supports the long held premise that payments of workers compensation premiums are the responsibility of the employer.

13. Attorney’s Fees

In *Leather Shop v. Mills*, the court reviewed an award of attorney’s fees made after an accident in 1986. The pertinent Florida statute provides: “A claimant shall be responsible for the payment of his own attorney’s fees, except that a claimant shall be entitled to recover a reasonable attorney’s fee from a carrier or employer.” The two issues presented were whether the JCC erred in awarding attorney’s fees absent a showing of bad faith and whether the JCC erred in awarding attorney’s fees based on temporary total disability. The court noted that it requires the order of a JCC to specifically state whether an award of attorney’s fees is based on bad faith. In the instant case, the order from the JCC was silent on this matter. Therefore, the appellate court reversed the decision for entry of the particular grounds upon which fees were awarded.

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354. *Id.* at 745.
356. *Leather Shop*, 592 So. 2d at 745.
357. *Id.* at 746.
358. *Id.*
In Sawyer v. Dover Cylinder Head Co., the court reversed an award of attorney’s fees with instruction to calculate the attorney’s fee on the total stipulated amount of permanent total disability benefits and supplemental benefits obtained for claimant by virtue of his attorney’s effort. The court noted that the attorney had expended time and effort on behalf of the claimant in order to establish the right to permanent total disability benefits and was, therefore, entitled to a fee based on these efforts.

In Royal Services, Inc. v. Smith, the court reversed and remanded an award of $25,000 in attorney’s fees. The award was reversed due to the failure of the JCC to establish the basis upon which the JCC departed from the statutory fee formula. Although the JCC may depart from the statutory fee formula, an analysis of the factors that led to the departure must be included in the order.

C. We Will Defend (Part One C)

We have the right and duty to defend at our expense any claim, proceeding or suit against you for benefits payable by this insurance. We have the right to investigate and settle these claims, proceedings or suits. We have no duty to defend a claim, proceeding or suit that is not covered by this insurance.

Each workers compensation claim brought before the JCC is brought in the name of the injured employee and the employer/carrier. The carrier provides defense from the moment of notification of the claim and may have established procedures for the employer to follow to ensure timely reporting and payment. In the event that the employer/carrier does not respond as required, a claimant may proceed with an additional claim for bad faith.

The Supreme Court of Florida addressed the following question certified as being of great public importance:

WHEN AN EMPLOYEE CLAIMS INJURY ARISING FROM THE ALLEGED FRAUDULENT ACT OF AN EMPLOYER/CARRIER

360. Id. at 282.
361. Id. at 281.
363. Id. at 589.
364. See id.
365. POLICY, supra note 12.
COMMITTED IN THE COURSE OF A PROCEEDING INITIATED
PURSUANT TO CHAPTER 440 [OF THE FLORIDA STATUTES] IS
A CRIMINAL ADJUDICATION OF GUILT PRESCRIBED IN
SECTION 440.37 A CONDITION TO THE MAINTENANCE OF AN
INDEPENDENT TORT ACTION?366

The court answered the question in the negative and quashed the decision of the district court.367 To reach this conclusion, the Supreme Court of Florida noted that the Florida Workers Compensation Act was not meant to bar recovery for intentional tortious conduct.368 Intentional tortious conduct is also excluded from coverage under the Employers Liability Insurance portion of the policy. As a matter of public policy, employers are held liable for their own intentional acts and the WCELIP does not provide coverage or a defense for such acts.

In Wackenhut Corp. v. Schisler,369 the court found that an admission of bad faith in regard to payment of one claim did not constitute an admission of bad faith in regard to subsequent claims.370 To reach this conclusion, the court examined the facts and decided that the employer/carrier timely paid the claim for permanent disability benefits when notified of the claim.371 The court cited to prior decisions in which it had enunciated the principle that the nonpayment of claims immediately upon the taking of the claimant’s doctor’s deposition was not grounds for a bad faith award of attorney’s fees.372

Even when an award of attorney’s fees for bad faith handling of a claim is upheld, the court has determined that the fees awarded should follow the statutory fee formula unless there are compelling reasons for departure from this standard.373 The court specifically noted, however,

367. Id.
368. Id.
369. 606 So. 2d 1250 (Fla. 1st Dist. Ct. App. 1992) (involving a wrap-up policy between Wackenhut and Florida Power and Light). A wrap-up policy is used to provide coverage for individuals who might otherwise “slip through the cracks” on large projects. Generally, the wrap-up policy is the policy of last resort for a workers compensation claimant. The policy is used when there is overlapping or no coverage for an individual who has performed work for the parties but who may not be able to establish employee status.
370. Id. at 1253.
371. Id.
372. Id. at 1252 (citing Doctor’s Hosp. of Sarasota v. Taylor, 576 So. 2d 1364 (Fla. 1st Dist. Ct. App. 1991)).
that where warranted and supported by competent substantial evidence the JCC would be justified in departing from the statutory fee formula. 374

In Woolworth's Restaurant v. Cubillos, 375 the court reversed an award of penalties. 376 The court noted:

Penalties should not be imposed where the e/c [employer/carrier] timely file a notice to controvert . . . . Although the record in the instant case does not contain a notice to controvert, a portion of the JCC's order states that "[t]his claim was totally controverted." Because no explanation is offered, we must reverse the award of penalties and remand the case for clarification of the JCC's order . . . . On remand, the JCC should state explicitly whether the e/c sufficiently controverted the claim, or, if the claim was not timely controverted, whether the e/c have a valid excuse for not doing so. 377

The decision continues a chain of cases in which the court requires a determination by the JCC that the employer/carrier has failed to meet its obligations before an award of penalties or attorney's fees will be made for bad faith. 378

The court reversed an order denying bad faith attorney's fees where the record showed that the employer/carrier had never sought to take the deposition of the doctor whose testimony was essential to establishing the claim. 379 The claim for attorney's fees was made on the ground that the employer/carrier acted in bad faith by not timely accepting the claimant as permanently totally disabled. 380 The employer/carrier testified that permanent total disability benefits were awarded when claimant's doctor's deposition was taken. 381 The court's position was that the deposition was scheduled by claimant's counsel, and that the employer/carrier had not sought the information, which could have resolved the claim seventeen months earlier. 382 Accordingly, the evidence used to deny bad faith

374. See id. at 553.
375. 608 So. 2d 895 (Fla. 1st Dist Ct. App. 1992).
376. Id.
377. Id.
380. Id. at 1260.
381. Id.
382. Id.
attorney's fees was not competent to justify the delay in the carrier's response. 383

Where a carrier accepted an injury as compensable and began compensation payments that were later reduced, the court reasoned that an award of penalties, interest, and costs was required. 384 The carrier had reduced payments in order to recoup what it believed were overpayments to the claimant. In doing so, however, it recouped more than the amount it believed the claimant owed. The claimant prevailed on many of her claims in the proceedings below and the court remanded the case for the entry of an award of penalties, interest, costs, and attorney's fees. 385

D. We Will Also Pay (Part One D)

We will also pay these costs, in addition to other amounts payable as insurance, as part of any claim, proceeding or suit we defend:

1. reasonable expenses incurred at our request, but not loss of earnings;
2. premiums for bonds to release attachments and for appeal bonds in bond amounts up to the amount payable under this insurance;
3. litigation costs taxed against you;
4. interest on a judgment as required by law until we offer the amount due under this insurance; and
5. expenses we incur. 386

This is a listing of various costs and expenses that the insurer is obligated to pay in connection with the defense of any claim made against the insured. These costs are in addition to any costs that the insurer is required to pay pursuant to other sections of the policy. 387

E. Other Insurance (Part One E)

We will not pay more than our share of benefits and costs covered by this insurance and other insurance or self-insurance. Subject to any limits of liability that may apply, all shares will be equal until the loss

383. Id. at 1261.
385. Id. at 354.
386. POLICY, supra note 12.
387. GUIDE, supra note 9, at 6.
is paid. If any insurance or self-insurance is exhausted, the shares of all remaining insurance will be equal until the loss is paid.\textsuperscript{388}

As noted previously, it is possible that more than one policy and/or insurer may be liable for the benefits to claimant. This section of the policy provides that only the portion of the claim that is tied to the policy under which the claim is made will be paid by that policy. This section is becoming more significant as a greater number of insureds retain a portion of the responsibility (deductible plans) or self-insure for part or all of their liability.\textsuperscript{389} The National Council on Compensation Insurance has filed a Benefits Deductible Endorsement-WC 00 06 03,\textsuperscript{390} which has been approved for use in Florida. Individual carriers may also file large deductible plans with state regulators.

\section*{F. Payments You Must Make (Part One F)}

You are responsible for any payments in excess of the benefits regularly provided by the workers compensation law including those required because:

1. of your serious and willful misconduct;
2. you knowingly employ an employee in violation of law;
3. you fail to comply with a health or safety regulation; or
4. you discharge, coerce or otherwise discriminate against any employee in violation of the workers compensation law.

If we make any payments in excess of the benefits regularly provided by the workers compensation law on your behalf, you will reimburse us promptly.\textsuperscript{391}

This section gives notice to the insured of the payments that are not insured or insurable under the policy contract.\textsuperscript{392} In some states, not including Florida, benefit payments may be doubled if the employer knowingly hires a minor child.\textsuperscript{393} In such an instance, the carrier would make the payment on behalf of the employer but would retain the right to reclaim the excess payment from the employer.\textsuperscript{394}

\textsuperscript{388.} POLICY, supra note 12.
\textsuperscript{389.} GUIDE, supra note 9, at 7.
\textsuperscript{390.} POLICY, supra note 12.
\textsuperscript{391.} Id.
\textsuperscript{392.} GUIDE, supra note 9, at 7.
\textsuperscript{393.} Id. at 8.
\textsuperscript{394.} Id.
We have your rights, and the rights of persons entitled to the benefits of this insurance, to recover our payments from anyone liable for the injury. You will do everything necessary to protect those rights for us and to help us enforce them.\(^{395}\)

This provision of the policy provides for subrogation against another person or policy which may be responsible for all or part of the claim. An employer may elect to waive the right of subrogation by requesting that the carrier attach the Waiver of Our Right to Recover From Others Endorsement—WC 00 03 13\(^{396}\) to the policy. This endorsement was filed as an advisory endorsement, which means that each carrier using the endorsement must file it with the state regulator and gain approval in accordance with the laws of the state. The endorsement has limited use in the assigned risk market, since it will only be reinsurable if attached to a policy for which waiver of subrogation is required by contract.\(^{397}\)

In *Commercial Union Insurance Co. v. Fallen*,\(^{398}\) a case of first impression, the Fifth District Court of Appeal considered section 440.39(3)-(a) of the Florida Statutes to determine whether an award of post-judgment interest was proper on a judgment against a third-party tortfeasor.\(^{399}\) The case arose following the payment of workers compensation benefits to two employees who had successfully pursued claims against third parties. The insurer, however, held subrogation liens on the judgment.\(^{400}\) The issue before the court was whether Florida statute required that post-judgment interest be paid on the pro rata share to the insurance company.\(^{401}\) The court found that the statute does not directly address the issue of post-judgment interest, but stated that both logic and equity dictate that the

\(^{395}\) POLICY, *supra* note 12.

\(^{396}\) NCCI, POLICY FORMS MANUAL, 1984.

\(^{397}\) FLORIDA WORKERS COMPENSATION INSURANCE PLAN (1984) ("FWCIP"). The FWCIP contains the rules which govern workers compensation assigned risk policies in Florida. The Plan is filed with the state regulator and is applied to all employers who are unable to obtain voluntary insurance or who do not qualify for self insurance. On November 10, 1993, the Florida Legislature passed Senate Bill 12C, which abolishes the FWCIP and its reinsuring mechanism. The bill will become effective December 31, 1993 provided that it is signed by the governor. The Florida Join Underwriting Association ("JUA") will come into effect on January 1, 1994, and will assume the insurance and reinsurance responsibilities.

\(^{398}\) 603 So. 2d 610 (Fla. 5th Dist. Ct. App. 1992).

\(^{399}\) *Id.* (citing FLA. STAT. § 440.39(3)(a) (1991)).

\(^{400}\) *Id.*

\(^{401}\) *Id.* at 612.
insurer is entitled to its pro rata share of the post-judgment interest collected from the tortfeasors.\textsuperscript{402}

In *Tarmac of Florida v. Gwaltney*,\textsuperscript{403} the Fifth District Court of Appeal considered whether a trial court has the discretion to limit a carrier's lien on future benefits to indemnity benefits, to the exclusion of medical benefits.\textsuperscript{404} The appellate court noted the literal wording of section 440.39(3)(a) of the Florida Statutes, which expressly states that the term "benefits" includes both compensation and medical benefits and provides that the carrier's pro rata recovery applies against each.\textsuperscript{405} The court concluded that the pro rata recovery applies to future, as well as past, benefits. While the court reversed the decision of the trial court in this matter, it acknowledged a conflict with an opinion the Second District Court of Appeal issued on the same matter.\textsuperscript{406}

H. *Statutory Provisions (Part One H)*

These statements apply where they are required by law:

1. As between an injured worker and us, we have notice of the injury when you have notice.

2. Your default or the bankruptcy or insolvency of you or your estate will not relieve us of our duties under this insurance after an injury occurs.

3. We are directly and primarily liable to any person entitled to the benefits payable by this insurance. Those persons may enforce our duties; so may an agency authorized by law. Enforcement may be against us or against you and us.

4. Jurisdiction over you is jurisdiction over us for the purposes of the workers compensation law. We are bound by decisions against you under that law, subject to the provisions of this policy that are not in conflict with that law.

5. This insurance conforms to the parts of the workers compensation law that apply to:
   a. benefits payable by this insurance;
   b. special taxes, payments into security or other special funds, and assessments payable by us under that law.

6. Terms of this insurance that conflict with the workers compensation law are changed by this statement to conform to that law.

\textsuperscript{402} Id.

\textsuperscript{403} 604 So. 2d 907 (Fla. 5th Dist. Ct. App. 1992).

\textsuperscript{404} Id.

\textsuperscript{405} Id. at 908 (interpreting FLA. STAT. § 440.39(3)(a) (1991)).

\textsuperscript{406} Id. (citing Payless Oil v. Reynolds, 565 So. 2d 737 (Fla. 2d Dist. Ct. App. 1990)).
Nothing in these paragraphs relieves you of your duties under this policy.\textsuperscript{407}

This section of the policy lists provisions which may be required by one or more workers compensation laws. This provision allows the policy contract to be adapted to the law of the state in which the insurance is issued.

IV. PART TWO—EMPLOYERS LIABILITY INSURANCE

A. How This Insurance Applies (Part Two A)

This employers liability insurance applies to bodily injury by accident or bodily injury by disease. Bodily injury includes resulting death.
1. The bodily injury must arise out of and in the course and scope of the injured employee’s employment by you.
2. The employment must be necessary or incidental to your work in a state or territory listed in Item 3.A. of the Information Page.
3. Bodily injury by accident must occur during the policy period.
4. Bodily injury by disease must be caused or aggravated by the conditions of your employment. The employee’s last day of last exposure to the conditions causing or aggravating such bodily injury by disease must occur during the policy period.
5. If you are sued, the original suit and any related legal actions for damages for bodily injury by accident or by disease must be brought in the United States of America, its territories or possessions, or Canada.\textsuperscript{408}

The employers liability section of the WCELIP is applicable to common law or other damages payable by the insured.\textsuperscript{409} This provision differs from Part A which involves the statutory coverage mandated by a state’s workers compensation law. In Florida, the jurisdiction for claims made under Part Two of the policy lies in the circuit court. Claims under this section of the policy arise from common law torts that fall outside the scope of the workers compensation laws. At the same time, the coverage

\textsuperscript{407} POLICY, supra note 12.
\textsuperscript{408} Id.
\textsuperscript{409} GUIDE, supra note 9, at 9.
provided relates to bodily injury by accident or bodily injury by disease that arises out of, and in the course and scope of, employment. 410

B. We Will Pay (Part Two B)

We will pay all sums you legally must pay as damages because of bodily injury to your employees, provided the bodily injury is covered by this Employers Liability insurance.
The damages we will pay, where recovery is permitted by law, include damages:
1. for which you are liable to a third party by reason of a claim or suit against you by that third party to recover the damages claimed against such third party as a result of injury to your employee;
2. for care and loss of services; and
3. for consequential bodily injury to a spouse, child, parent, brother or sister of the injured employee; and

provided that these damages are the direct consequence of bodily injury that arises out of and in the course of the injured employee’s employment by you; and

4. because of bodily injury to your employee that arises out of and in the course of employment, claimed against you in a capacity other than as the employer. 411

This is the basic indemnity provision of the employers liability section of the policy. This insurance generally provides for “damages” in contrast to “benefits.” Damages are “[a] pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property, or rights, through the unlawful act or omission or negligence of another.” 412 While workers compensation is a no-fault system, employer’s liability insurance is payable as the result of a judgment or settlement for damages. The damages payable fall into three general categories.

1. Third Party Over

A “third party over” suit involves an employer who must pay workers compensation benefits and who impleads a third party whose negligence was responsible for the injury to the worker. A third party over suit may occur

410. Id.
411. POLICY, supra note 12.
on a large construction project where the employee of one contractor is injured due to the negligence of another contractor. The first contractor is responsible for workers compensation payments to the injured worker, but may implead the second contractor for contribution or indemnification.413

2. Familial Suits

Some states permit a cause of action for close relatives of the injured worker. Such actions would be outside the jurisdiction of the JCC and would fall within the jurisdiction of the circuit court. Familial suits may be brought on the basis of loss of consortium or where a family member has been injured in the course of caring for an injured employee. While attendant care by a family member caring for a disabled worker is covered by Florida’s Workers Compensation Law,415 and is covered, therefore, under Part One of the policy, an injury to the family member while caring for the injured worker would fall under Part Two of the policy.


414. Ferriter v. Daniel O’Connell’s Sons, Inc., 413 N.E.2d 690 (Mass. 1980) (forming the basis for inclusion of this coverage within the WCELIP).

415. See, e.g., Attitudes & Trends v. Arsuaga, 616 So. 2d 1103 (Fla. 1st Dist Ct. App. 1993) (affirming an award of attendant care rendered prior to a physician’s prescription for such care); Frederick Electronics v. Pettijohn; 619 So. 2d 14 (Fla. 1st. Dist. Ct. App. 1993) (partially affirming and reversing an award of attendant care by limiting the hours required to meet the claimant’s needs); Southern Indus. v. Chumney, 613 So. 2d 74 (Fla. 1st Dist. Ct. App. 1993) (affirming an award of maid service where claimant suffered respiratory problems and required a dust free environment); Timothy Bowser Constr. Co. v. Kowalski, 605 So. 2d 885 (Fla. 1st Dist. Ct. App. 1992) (affirming an award of attendant care by claimant’s parents); Buena Vida Townhouse Ass’n v. Parciak, 603 So. 2d 26 (Fla. 1st Dist. Ct. App. 1992) (affirming the award of attendant care by family member, and examining the appropriate rate of pay); Bojangles v. Kuring, 598 So. 2d 250 (Fla. 1st Dist. Ct. App. 1992) (reversing and remanding an award of attendant care to claimant’s husband where award was a “blanket award”); Standard Blasting & Coating v. Hayman, 597 So. 2d 392 (Fla. 1st Dist. Ct. App. 1992) (reversing an order denying a motion to reduce attendant care benefits to injured employee’s wife based upon the “nonprofessional status” of the wife); Gator Tire v. Casteel, 595 So. 2d 210 (Fla. 1st Dist. Ct. App. 1992) (affirming an award of attendant care and noting that failure of the employer/carrier to raise the applicability of statutory changes in regard to attendant care in the court below precluded the issue from being raised on appeal); Merritt Sea Wall v. Revels, 594 So. 2d 855 (Fla. 1st Dist. Ct. App. 1992) (affirming an award of attendant care by claimant’s wife, but reversing the payment for attendant care at prevailing wage and establishing that the wage should be federal minimum wage).
3. Dual Capacity Doctrine

The dual capacity doctrine allows recovery, in some states, where the employer may have two roles in the injury to the employee. This situation arises when the employer is also the manufacturer of equipment that was involved in the injury to the employee. The employee may then be entitled to workers compensation benefits and may be able to make a claim against the employer as the manufacturer of a defective product. True no-fault compensation laws, such as the Longshore and Harbor Workers Compensation Act and the Black Lung Benefits Act, are not covered by Part Two of the policy because of their no-fault nature. Coverage for compensation under the various federal acts is obtained by endorsement to Part One of the policy.

C. Exclusions (Part Two C)

This insurance does not cover:
1. liability assumed under a contract. This exclusion does not apply to a warranty that your work will be done in a workmanlike manner;
2. punitive or exemplary damages because of bodily injury to an employee employed in violation of law;
3. bodily injury to an employee while employed in violation of law with your actual knowledge or the actual knowledge of any of your executive officers;
4. any obligation imposed by a workers compensation, occupational disease, unemployment compensation, or disability benefits, or any similar law;
5. bodily injury intentionally caused or aggravated by you;
6. bodily injury occurring outside the United States of America, its territories or possessions, and Canada. This exclusion does not apply to bodily injury to a citizen or resident of the United States of America or Canada who is temporarily outside these countries;
7. damages arising out of coercion of any employee.

416. GUIDE, supra note 9, at 11.
417. See LARSON, supra note 1, § 72.00.
420. GUIDE, supra note 9, at 11.
421. POLICY, supra note 12.
This section of the policy lists the exclusions from coverage. It is applicable only to Part Two of the policy since Part One coverage is governed by statutory mandate. Exclusions are a common part of insurance policies since the insurer is attempting to clarify what is and what is not covered. The Fourth District Court of Appeal cited, with favor, to a Minnesota appellate decision interpreting a policy exclusion, which stated: "[u]nless ambiguous, the language used in an insurance contract must be given its plain and ordinary meaning." At the same time, it is an established principle of law that an insurance contract will be liberally construed in favor of the insured.

D. We Will Defend (Part Two D)

We have the right and duty to defend, at our expense, any claim, proceeding or suit against you for damages payable by this insurance. We have the right to investigate and settle these claims, proceedings and suits.

We have no duty to defend a claim, proceeding or suit that is not covered by this insurance. We have no duty to defend or continue defending after we have paid our applicable limit of liability under this insurance.

This provision is similar to the duty to defend provision discussed under Part One. The main difference in the duty to defend under Part Two is that employers liability insurance is subject to a policy limit (workers compensation insurance is not so limited by statute) and, therefore, the duty to defend under Part Two will exist to the point where the insurer has paid the applicable limit of liability under the insurance.

E. We Will Also Pay (Part Two E)

We will also pay these costs, in addition to other amounts payable under this insurance, as part of any claim, proceeding, or suit we defend:

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423. See Larson, supra note 1, § 93.00-93.10. Conflicts as to the meaning of policy terms fall within the jurisdiction of the circuit court and require separate examination from the issue of workers compensation law.

424. POLICY, supra note 12.

425. GUIDE, supra note 9, at 13.
1. reasonable expenses incurred at our request, but not loss of earnings;
2. premiums for bonds to release attachments and for appeal bonds in bond amounts up to the limit of our liability under this insurance;
3. litigation costs taxed against you;
4. interest on a judgment as required by law until we off the amount due under this insurance; and
5. expenses we incur. 426

This is an explanatory section of the policy which outlines the costs which will be borne by an insurer in defending an employer's liability action. These costs and expenses are not necessarily part of the defense. 427

F. Other Insurance (Part Two F)

We will pay no more than our share of damages and costs covered by this insurance and other insurance or self-insurance. Subject to any limits of liability that apply, all shares will be equal until the loss is paid. If any insurance or self-insurance is exhausted, the shares of all remaining insurance and self-insurance will be equal until the loss is paid. 428

This section mimics the rights of the insurer to pay only its fair share of any claim that is found in Part One E of the policy. The difference in language is indicative of the payment of damages under Part Two and benefits under Part One. 429

G. Limits of Liability (Part Two G)

Our liability to pay for damages is limited. Our limits of liability are shown in Item 3.B. of the Information Page. They apply as explained below.

1. Bodily Injury by Accident. The limit shown for “bodily injury by accident-each accident” is the most we will pay for all the damages covered by this insurance because of bodily injury to one or more employees in any one accident.

426. POLICY, supra note 12.
427. GUIDE, supra note 9, at 13.
428. POLICY, supra note 12.
429. GUIDE, supra note 9, at 13.
A disease is not bodily injury by accident unless it results directly from bodily injury by accident.

2. Bodily Injury by Disease. The limit shown for “bodily injury by disease-policy limit” is the most we will pay for all damages covered by this insurance and arising out of bodily injury by disease, regardless of the number of employees who sustain bodily injury by disease. The limit shown for “bodily injury by disease-each employee” is the most we will pay for all damages because of bodily injury by disease to any one employee. Bodily injury by disease does not include disease that results directly from a bodily injury by accident.

3. We will not pay any claims for damages after we have paid the applicable limit of our liability under this insurance. 430

Unlike workers compensation insurance, employer’s liability insurance is subject to limits of liability. 431 The standard limits of liability are $100,000 for bodily injury by accident, $100,000 for bodily injury by disease, and an aggregate of $500,000 for the policy. 432 It is possible for employers to purchase additional coverage under this section of the policy or obtain coverage by means of an excess or “umbrella policy.” 433 Some states, not including Florida, provide for unlimited employers liability under the WCELIP. 434

H. Recovery From Others (Part Two H)

We have your rights to recover our payment from anyone liable for an injury covered by this insurance. You will do everything necessary to protect those rights for us and to help us enforce them. 435

This section of the policy is similar to the subrogation section of the workers compensation portion of the policy (Part One C). It provides that the insurer has the right to step into the shoes of the insured to recover from a third party when possible.

430. POLICY, supra note 12.
431. GUIDE, supra note 9, at 13.
432. Id.
433. Id.
434. Id. at 14.
435. POLICY, supra note 12.
I. Action Against Us (Part Two I)

There will be no right of action against us under this insurance unless:
1. You have complied with all the terms of this policy; and
2. The amount you owe has been determined with our consent or by actual trial and final judgment.

This insurance does not give anyone the right to add us as a defendant in an action against you to determine your liability. 436

This section is the opposite of the provision in Part One H.3., which allows a party to join the insurer in any suit for workers compensation benefits. Under this section of the policy, there is no right of direct action until the insurer’s liability has become fixed by judgment or settlement. 437

V. PART THREE—OTHER STATES INSURANCE

A. How This Insurance Applies (Part Three A)

1. This other states insurance applies only if one or more states are shown in Item 3.C. of the Information Page.
2. If you begin work in any one of those states and are not insured or are not self-insured for such work, the policy will apply as though that state were listed in Item 3.A. of the Information Page.
3. We will reimburse you for the benefits required by the workers compensation law of that state if we are not permitted to pay the benefits directly to persons entitled to them. 438

B. Notice (Part Three B)

Tell us at once if you begin work in any state listed in Item 3.C. of the Information Page. 439

Part Three of the policy provides for extraterritorial coverage for workers compensation benefits. The coverage may be extended to any state in which the employer has no ongoing work at policy inception, but for

436. Id.
437. GUIDE, supra note 9, at 14.
438. POLICY, supra note 12.
439. Id.
which temporary and incidental exposure may occur during the policy term. Which temporary and incidental exposure may occur during the policy term. Other states’ insurance presents one of the most contentious sections of the policy. High mobility of workers has created a situation in which workers travel frequently and wish to elect the higher paying benefits of the state of injury to those of the state of employment. Florida has dealt with the issue of travelling employees through amendment to the workers compensation law. The Legislature has also left intact the extraterritorial provisions of Florida’s workers compensation law, which provides:

Where an accident happens while the employee is employed elsewhere than in this state, which would entitle him or his dependents to compensation if it had happened in this state, the employee or his dependents shall be entitled to compensation if the contract of employment was made in this state, or the employment was principally localized in this state. However, if the employee shall receive compensation or damages under the laws of any other state, nothing herein contained shall be construed so as to permit a total compensation for the same injury greater than provided herein.

The First District Court of Appeal reviewed one case, deciding whether a worker injured in another state could claim Florida workers compensation benefits. The court determined that the worker was not within the jurisdiction of the Florida workers compensation law by analyzing the employment contract and determining that the union official who negotiated the contract in Florida was without hiring authority. Since the contract of hire was not entered into in Florida, Florida did not have jurisdiction over the claim for benefits.

VI. PART FOUR—YOUR DUTIES IF INJURY OCCURS

Tell us at once if injury occurs that may be covered by this policy. Your other duties are listed here.

440. GUIDE, supra note 9, at 15-16.
442. Id. § 440.09(1).
444. Id. at 1017.
445. Id. at 1018.
1. Provide for immediate medical and other services required by the workers compensation law.
2. Give us or our agent the names and addresses of the injured persons and of witnesses, and other information we may need.
3. Promptly give us all notices, demands and legal papers related to the injury, claim, proceeding or suit.
4. Cooperate with us and assist us, as we may request, in the investigation, settlement or defense of any claim, proceeding or suit.
5. Do nothing after an injury occurs that would interfere with our right to recover from others.
6. Do not voluntarily make payments, assume obligations or incur expenses, except at your own cost.446

This section of the policy outlines the duties of the employer in the case of injury. The primary obligation of the employer is to provide for immediate medical and other services needed by the injured employee. The employer is then required to give notice to the insurer of the injury and to cooperate in the investigation, defense, and settlement of any claim, proceeding, or suit.

VII. PART FIVE—PREMIUM

A. Our Manuals (Part Five A)

All premium for this policy will be determined by our manuals of rules, rates, rating plans and classifications. We may change our manuals and apply the changes to this policy as authorized by law or a governmental agency regulating this insurance.447

Each insurance carrier448 or rate service organization449 is required to file its manual of classifications, rates, every rating plan, and every modification of these that it proposes to use. Members of a rate service organization may fulfill their filing requirements through the filings of the rate service organization.450 Once approved by the regulator, these

446. POLICY, supra note 12.
447. Id.
449. See id. § 627.091(4).
450. see id.
manuals establish the method for determining the rates for each employer within the state. In addition to the filing of rates for each of the employment classification codes, employers are subject to having their rates modified by their loss experience expressed as an experience modification factor.

B. Classifications (Part Five B)

Item 4 of the Information Page shows the rate and premium basis for certain business or work classifications. These classifications were assigned based on an estimate of the exposures you would have during the policy period. If your actual exposures are not properly described by those classifications, we will assign proper classifications, rates and premium basis by endorsement to this policy.

Classification codes are filed by the rate service organization or by the insurer in order to establish fairness in the rating process. The classification codes allow for similar employments to be placed within the same rating structure. Each classification code carries a detailed description, allowing the employer to review the codes assigned to his business. The purpose of classification is to reflect the actual exposure of the employer.

C. Remuneration (Part Five C)

Premium for each work classification is determined by multiplying a rate times a premium basis. Remuneration is the most common premium basis. This Premium basis includes payroll and all other remuneration paid or payable during the policy period for the services of:

1. all your officers and employees engaged in work covered by this policy; and
2. all other persons engaged in work that could make us liable under Part One (Workers Compensation Insurance) of this policy. If you do not have payroll records for these persons, the contract price for their services and materials may be used as the premium basis.

451. See id. § 627.101.
452. See id. § 627.291. This section of the statute establishes an aggrieved person remedy for any employer who seeks review of the rates or rating plans used to develop that employer’s rates. Among the factors that may be reviewed is the experience modification factor, which is calculated based upon a filing by the rate service organization or the carrier.
453. POLICY, supra note 12.
This paragraph 2 will not apply if you give us proof that the employers of these persons lawfully secured their workers compensation obligations.455

Remuneration is determined by rules filed and approved by the regulator.456 The purpose of determining remuneration is to establish the amount of payroll, which forms the basis for the calculation of premium.457

D. Premium Payments (Part Five D)

You will pay all premium when due. You will pay the premium even if part or all of a workers compensation law is not valid.458

This provision of the policy establishes that all premiums are due and payable by the insured. Historically, this provision remains from a time when part or all of workers compensation laws were found to be unconstitutional takings or a denial of access to the courts.459 Today, reform of workers compensation laws reopens the challenge to the constitutionality of such laws. In both Florida and Texas, recent reform efforts have met with determinations of unconstitutionality.460

E. Final Premium (Part Five E)

The premium shown on the Information Page, schedules, and endorsements is an estimate. The final premium will be determined after this policy ends by using the actual, not the estimated, premium basis and the proper classifications and rates that lawfully apply to the business and work covered by this policy. If the final premium is more than you paid to us, you must pay us the balance. If it is less, we will refund the balance to you. The final premium will not be less than the highest minimum premium for the classifications covered by this policy. If this policy is canceled, final premium will be determined in the following way unless our manuals provide otherwise.

455. POLICY, supra note 12.
457. NATIONAL COUNCIL ON COMPENSATION INSURANCE, BASIC MANUAL OF WORKERS COMPENSATION AND EMPLOYER LIABILITY INSURANCE (1984) [hereafter BASIC MANUAL].
458. POLICY, supra note 12.
459. GUIDE, supra note 9, at 20.
1993] Baig 493

1. If we cancel, final premium will be calculated pro rata based on the time this policy was in force. Final premium will not be less than the pro rata share of the minimum premium.

2. If you cancel, final premium will be more than pro rata; it will be based on the time this policy was in force, and increased by our short-rate cancellation table and procedure. Final premium will not be less than the minimum premium.\(^ {461}\)

The policy language establishes that the premiums for workers compensation are an estimate. The actual premium will be determined on audit following the policy term. This permits the calculation of premiums to be based on the actual payroll of the employer.

F. Records (Part Five F)

You will keep records of information needed to compute premium. You will provide us with copies of those records when we ask for them.\(^ {462}\)

By the terms of the policy contract, the insured has the obligation of keeping records which will enable the carrier to establish a final premium. The insured is also obligated to provide the insurer with copies of the information upon request.

G. Audit (Part Five G)

You will let us examine and audit all your records that relate to this policy. These records include ledgers, journals, registers, vouchers, contracts, tax reports, payroll and disbursement records, and programs for storing and retrieving data. We may conduct the audits during regular business hours during the policy period and within three years after the policy period ends. Information developed by audit will be used to determine final premium. Insurance rate service organizations have the same rights we have under this provision.\(^ {463}\)

This section of the policy establishes the insurer’s right to audit the employer’s records for a period up to three years following the policy term.

\(^ {461}\) POLICY, supra note 12.
\(^ {462}\) Id.
\(^ {463}\) Id.
The right to audit is also extended to the rate service organization by this provision.

VIII. PART SIX—CONDITIONS

A. Inspection (Part Six A)

We have the right, but are not obliged to inspect your workplaces at any time. Our inspections are not safety inspections. They relate only to the insurability of the workplaces and the premiums to be charged. We may also recommend changes. While they may help reduce losses, we do not undertake to perform the duty of any person to provide for the health or safety of your employees or the public. We do not warrant that your workplaces are safe or healthful or that they comply with laws, regulations, codes or standards. Insurance rate service organizations have the same rights we have under this provision.464

The insurer, by this provision, retains the right to inspect the employer’s premises. The inspection may be part of the audit process or may be conducted for other reasons. Liability for a warranty of safety is specifically disclaimed.465

B. Long Term Policy (Part Six B)

If the policy period is longer than one year and sixteen days, all provisions of this policy will apply as though a new policy were issued on each annual anniversary that this policy is in force.466

This provision relates to a rule in one of the filed and approved manuals.467 This rule states that a policy may be issued for any period not longer than three years. If the policy is issued for a period not longer than one year and sixteen days, it is treated as a one year policy. For any term

464. Id.
466. POLICY, supra note 12.
467. BASIC MANUAL, supra note 457, at Rule III.C.
longer than this, the policy is divided into one year units and a unit less than twelve months is treated as a short term policy.\footnote{468}{GUIDE, supra note 8, at 22.} 

\section*{C. Transfer of your Rights and Duties (Part Six C)}

Your rights or duties under this policy may not be transferred without our written consent. If you die and we receive notice within thirty days after your death, we will cover your legal representative as insured.\footnote{469}{POLICY, supra note 12.}

This provision prevents the assignment of the policy without the consent of the insurer. A minor exception is made in the event the insured dies. In that instance, the policy may be held for thirty days by the executor or administrator of the insured’s estate provided the insurer is given notice within thirty days of the death. Nonassignability is essential to ensure that the liability and exposure under the policy is not changed.

\section*{D. Cancellation (Part Six D)}

1. You may cancel this policy. You must mail or deliver advance written notice to us stating when the cancellation is to take effect.
2. We may cancel this policy. We must mail or deliver to you not less than ten days advance written notice stating when the cancellation is to take effect. Mailing that notice to you at your mailing address shown in Item 1 of the Information Page will be sufficient to prove notice.
3. The policy period will end on the day and hour stated in the cancellation notice.
4. Any of these provisions that conflict with a law that controls the cancellation of the insurance in this policy is changed by this statement to comply with the law.\footnote{470}{Id.}

Cancellation of a workers compensation policy is subject to the policy terms and to statutory requirements.\footnote{471}{See FLA. STAT. § 627.4133(1) (Supp. 1992); FLA. STAT. § 440.42(2) (1991).} In \textit{Curtis-Hale, Inc. v. Geltz},\footnote{472}{610 So. 2d 558 (Fla. 1st Dist. Ct. App. 1992).} the court examined whether cancellation of a policy had been accomplished with due regard for the requirements of law. The original policy issued to Geltz was through the assigned risk plan and was assigned by the plan.
administrator to Aetna Casualty Company in August 1987.\textsuperscript{473} By November 1987, Aetna had notified the insured of its intent to cancel for non-payment of premium. The policy was reinstated on receipt of payment, and was canceled when later payments did not clear the bank. Aetna requested assistance from the Division of Insurance as to how to proceed with cancellation and was advised that thirty days notice was required. The policy was canceled on May 14, 1988 and the claim for which Geltz sought coverage occurred in September of 1988. Geltz sought coverage from another carrier two days after the occurrence of the industrial accident. The court construed these facts as competent substantial evidence that the policy had been canceled in accordance with law, and that the employer had been provided with the notice that was the intent behind the law.\textsuperscript{474} In the event the policy had not been properly canceled, the insurer would have had an obligation to provide coverage for the industrial accident.

E. **Sole Representative (Part Six E)**

The insured first named in Item 1 of the Information Page will act on behalf of all insureds to change this policy, receive return premium, and give or receive notice of cancellation.\textsuperscript{475}

This provision is intended to allow the first named insured on the information page to act on behalf of any other named insured. This provision is necessary when there is more than one named insured since only one legal entity at a time may carry out transactions with the carrier.\textsuperscript{476}

**IX. CONCLUSION**

The Workers Compensation and Employers Liability Insurance Policy—WC 00 00 00 is the basic insuring contract for workers compensation and employers liability during the survey period. The revisions to the policy are unlikely to impact any of the decisions rendered by the JCC’s, the First District Court of Appeal, or the Supreme Court of Florida in the immediate future.

\textsuperscript{473} Id. at 559.
\textsuperscript{474} Id. at 562.
\textsuperscript{475} POLICY, \textit{supra} note 12.
\textsuperscript{476} GUIDE, \textit{supra} note 9, at 23.
Of great significance to the adjudicatory decisions, however, are the legislative amendments to the workers compensation laws. At this time, many legislatures are reforming workers compensation systems. Nonetheless, the workers compensation and employers liability insurance policy is a stable contract capable of accommodating the reform legislation and the changing requirements of the workplace.

Workers compensation law is at a crossroads. The costs of maintaining a no-fault insurance system for a highly mobile and diversified workforce increases exponentially each year. Industrial accident costs for medical and indemnity benefits have risen significantly and an already overburdened system struggles to respond. Clearly, the introduction of reform legislation has been directed at driving down the cost of workers compensation insurance in order to ensure that a remedy that has provided benefits to injured workers for over ninety years continues to do so into the next century.

Condominium, Cooperative and Homeowner Association Law: 1993 Leading Cases and Significant Developments in Florida Law

Paul L. Wean

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I. INTRODUCTION

In 1991 and 1992, the Florida Legislature enacted over 130 pages of amendments to the Florida Condominium Act¹ and made comparable changes to the Florida Cooperative Act.² In 1992, the Florida Legislature also enacted a short addition to the Florida "Corporations Not for Profit" Statute³ which for the first time provided a regulatory framework, albeit of limited applicability, for so-called homeowner associations.

Because of the difficulty of assimilating the sheer volume of these changes and perhaps in part, out of sheer exhaustion, the 1993 Florida Legislature made no further direct changes to either the Condominium Act or the Cooperative Act. It also failed to adopt proposals by various groups to correct technical errors in the fledgling Homeowners Association Act.⁴

While the 1993 legislative session did make significant changes to other related substantive areas affecting the operation of all types of community associations, the main developments in community association law during 1993 occurred in the administrative and judicial forums. These changes perpetuate the turbulence and confusion that surrounds common ownership and common use communities in Florida.

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² Compare Fla. Stat. §§ 719.101-719.622 (Supp. 1990) with Ch. 92-49, 1992 Fla. Laws (containing more than 60 pages of new additions to the Florida Cooperative Act, most of them mirroring the new condominium provisions).
II. Significant Legislative Action and Inaction

A. Timeshare and Interval Ownership

One area of legislative activity in 1993 was passage of substantial additions to an already complicated Florida Vacation and Time-Share Act.\(^5\) The changes introduce new concepts into the Act and provide greater protection for unwary consumers while giving developers, associations, and managers needed flexibility in such areas as promotions, exchange programs, and amenities.\(^6\) For example, section 721.03 of the Florida Statutes was amended to give the Act effect outside the state of Florida when time-share interests are offered for sale outside the state.\(^7\) However, as long as specified disclosures are made, the Act does not apply to sales offerings made outside the United States.\(^8\) Additionally, the Act does not apply when the total financial obligations of a purchaser will not exceed $1,000 during the life of the plan.\(^9\)

The Act now defines an “incidental benefit”\(^10\) and excludes such benefits from most regulations in the Act.\(^11\) This allows developers and other sellers to offer perks, such as free use of the facilities on a one-time basis, as sales tools without having such usage regulated as part of the time-share estate. The definitions of both “developer” and “seller” have been changed to exclude parties dealing in blocks of eight or more time-share periods.\(^12\) The Act further requires developers to structure the allocation of common expenses so that all interests, including those retained by the developer, pay a proportionate share and allow collection of an administrative late fee on delinquent assessments.\(^13\)

The Legislature also enacted an adjunct to the Florida Vacation and Time-Share Act called the Florida Vacation Club Act.\(^14\) This new Act

5. See Ch. 93-58, 1993 Fla. Laws 345.
8. Ch. 93-58, § 1, 1993 Fla. Laws 345 (to be codified at Fla. Stat. § 721.03(8)).
9. Id. (to be codified at Fla. Stat. § 721.03(9)).
10. Id. § 2, 1993 Fla. Laws at 346 (to be codified at Fla. Stat. § 721.05(17)).
11. Id.
12. Id. (amending Fla. Stat. § 721.05(9)(c) (1991)); Ch. 93-58, § 2, 1993 Fla. Laws 197 (amending Fla. Stat. 721.05(23) (1991), to be codified at Fla. Stat. § 721.05(26)).
regulates exchange programs and other multiple site time-share plans and sets forth required disclosures and provisions governing the operation and management of reservations systems.\textsuperscript{15}

B. \textit{Other Significant Actions}

1. Removal of Applicability of Chapter 607

In a deceptively simple but obscure move, the Legislature also amended section 617.1908 of the Florida Statutes.\textsuperscript{16} This short provision changes established law by preventing the provisions of chapter 607, the Florida Business Corporations Act,\textsuperscript{17} from supplementing those of chapter 617, the Corporations Not for Profit Statute.\textsuperscript{18} In the past, a practitioner looked to chapter 607 to supply the rule of law in the frequent instances when chapter 617 was silent. This change may leave homeowner associations in doubt as to many issues; it certainly creates confusion in condominiums and cooperatives. In fact, the Florida Condominium Act continues to provide: “The powers and duties of the association include those set forth in this section and, except as expressly limited or restricted in this chapter, those set forth in the declaration and bylaws and chapters 607 and 617, as applicable.”\textsuperscript{19} The extent to which chapter 607 continues to apply, if at all, to condominiums and cooperatives remains unclear.

2. Modifications to Lien Foreclosure Procedures

The Legislature also made substantial changes to the method by which mortgage foreclosures are conducted in Florida.\textsuperscript{20} Because section

\textsuperscript{15} Id.

\textsuperscript{16} Ch. 93-281, § 76, 1993 Fla. Laws 2670 (amending FLA. STAT. § 617.1908 (1991)). The provision in its entirety now reads: “The provisions of chapter 607, the Florida Business Corporation Act, shall not apply to any corporations not for profit.” Id. This section was enacted as part of a large package of amendments that included many new sections to fill in the gaps left by removal of chapter 607. Only time will tell how many unanticipated gaps remain.


\textsuperscript{18} Id. §§ 617.001-617.306.

\textsuperscript{19} FLA. STAT. § 718.111(2) (Supp. 1992) (emphasis added). In 1992, the Florida Legislature inserted an almost identical provision into the Florida Cooperative Act. See id. § 719.104(9).

\textsuperscript{20} See Ch. 93-88, 1993 Fla. Laws 294 (amending Chapter 697 (1991 & Supp. 1992)). Discussion of the substantive changes made by this enactment, however, is beyond the scope of this article.
718.116(6)(a) of the Condominium Act provides that liens for unpaid assessments are foreclosed "in the manner a mortgage of real property is foreclosed," these changes will also apply to lien foreclosures.\textsuperscript{21}

C. \textit{Significant Inaction—Failure to Approve "Glitch Bill"}

The main area of legislative inaction in 1993 was the failure to enact a so-called glitch bill, such as the one proposed by The Florida Bar Association.\textsuperscript{22} This bill would correct technical errors and omissions in the operation of the homeowner association provisions that were engrafted into chapter 617 in 1992.\textsuperscript{23}

III. \textit{Significant Administrative Actions}

A. \textit{Procedures of Electing, Removing, and Replacing Directors}

The Division of Florida Land Sales, Condominiums, and Mobile Homes ("Division") is the primary administrative agency regulating both condominiums and cooperatives.\textsuperscript{24} The 1993 Legislature transferred the Division to the newly consolidated Department of Business and Professional Regulation.\textsuperscript{25} This resulted in a wholesale renumbering and relocation of

\begin{itemize}
\item \textsuperscript{21} See FLA. STAT. § 718.116(6)(a) (Supp. 1992). For cooperatives, section 719.108(5) provides that liens for unpaid rents and assessments are foreclosed "in like manner as a foreclosure of a mortgage on real property." FLA. STAT. § 719.108(5) (1991). The exact effect of these changes on homeowners' associations is unclear. Often the governing documents of such associations reference the provisions of the Construction Liens Statute, chapter 713, as governing lien foreclosures. FLA. STAT. §§ 713.01-713.3471 (1991 & Supp. 1992). Often there is no reference to any controlling law.
\item \textsuperscript{22} Fla. H.B. 1351 (1992).
\item \textsuperscript{23} FLA. STAT. §§ 617.301-617.306 (Supp. 1992). The confusing procedure for electing directors is the principle difficulty with section 617.301 to section 617.306. See \textit{id}. Section 617.306(4) indicates that proxies may not be used to elect directors. See \textit{id}. § 617.306(3). Instead, a separate ballot must be cast by the homeowner, either at the meeting or on an absentee basis. See \textit{id}. However, the statute fails to prescribe a method for establishing the identity of all candidates in advance of the annual meeting. See \textit{id}. §§ 617.301-617.306. Nor does it prohibit nomination of additional candidates from the floor at the annual meeting. FLA. STAT. §§ 617.301-617.306 (Supp. 1992). Thus, members voting by absentee ballot are not given any guarantee they are considering \textit{all} candidates when voting. \textit{id}. §§ 617.301-617.306.
\item \textsuperscript{24} See \textit{id}. §§ 718.501, 719.501.
\item \textsuperscript{25} Ch. 93-220, § 2(3), 1993 Fla. Laws 2312.
\end{itemize}
the Division's administrative regulations within the Florida Administrative Code.\textsuperscript{26}

Starting in 1992 and continuing throughout 1993, the Division embarked on an ambitious campaign to rewrite and update existing administrative regulations and to add new, more detailed regulations covering heretofore unregulated areas.\textsuperscript{27} New regulations effective on December 20, 1992, revised administrative rules adopted earlier in 1992 governing the complicated procedure for electing directors to condominium boards of administration.\textsuperscript{28} Also effective at that time were new rules governing two separate procedures for recalling the same directors.\textsuperscript{29} The election procedure contained in the rule supplements the statute\textsuperscript{30} by delineating such matters as how, when, and by whom election ballots may be processed in advance of the election, and under what circumstances ballots must be disregarded.\textsuperscript{31}

The two recall processes set out in the rules also supplement the statutory provisions\textsuperscript{32} and address several likely scenarios, such as how to recall and replace a developer representative on the board when both unit owner and developer representatives are on the board.\textsuperscript{33} There are two separate and distinct methods of recalling unit owner directors: first, by vote of the members at a recall meeting,\textsuperscript{34} and second, by written joinder or agreement of the members without a meeting.\textsuperscript{35} A comparative review of the two provisions leaves the clear impression that action by written agreement without a meeting is the least complicated procedure and is to be

\begin{itemize}
\item \textsuperscript{26} See, e.g., FLA. ADMIN. CODE ANN. r. 61B-23.001-23.0028 (1993) (changing chapter designation from 70 to 61B but retaining the same numbering).
\item \textsuperscript{27} See, e.g., id.
\item \textsuperscript{28} See id.
\item \textsuperscript{29} Id.
\item \textsuperscript{30} Id.
\item \textsuperscript{31} FLA. STAT. § 718.112(2)(d) (Supp. 1992).
\item \textsuperscript{32} FLA. ADMIN. CODE ANN. r. 61B-23.0021(10)(b) (1993). The rule provides for the following: (1) when all candidates are not listed on the official ballot; (2) when the exterior envelope (containing a smaller ballot envelope and the completed election ballot) is not signed by the "eligible" voter (for example, the voter may be specified on a voting certificate previously supplied to the association, if required by the governing documents of the association); and (3) when the inner ballot envelope is found to contain more than one ballot. Id. Although not stated in the rule, a ballot must also be disregarded if it contains more votes than the number of available seats. Id.
\item \textsuperscript{33} FLA. STAT. § 718.112(2)(k) (Supp. 1992).
\item \textsuperscript{34} FLA. ADMIN. CODE ANN. r. 61B-23.0026 (1993).
\item \textsuperscript{35} Id. r. 61B-23.0027.
\end{itemize}
recommended. It also has the advantage of avoiding the need for a stormy and emotionally charged recall meeting.

The recall rules also distinguish instances when less than a majority of the unit owner board is recalled (in which case replacement directors are appointed by the remaining board members) from instances when all or a majority of the board is recalled (in which event a slate of replacement candidates is proposed and voted on by the members in an expedited fashion, without benefit of the double envelope procedures).36

B. Evolving Arbitration Procedures

On January 17, 1993, the Division also issued a set of rules governing arbitration of disputes arising from recalls.37 These rules are separate and distinct from other extensive procedural rules adopted by the Division on April 1, 1992, to govern mandatory, non-binding arbitration of “disputes”38 between unit owners and the association under the authority of section 718.1255 of the Florida Statutes.39

C. Financial, Accounting, Budgeting, and Reserve Rules

On July 11, 1993, the Division adopted a series of revised, relocated, and expanded financial rules.40 These rules place greater emphasis on the proper operation and financial record-keeping of multiple condominiums and

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36. Id. r. 61B-23.0027, 61B-23.0028.
37. See id. r. 61B-50.101-61B-50.141. Although some of the provisions of this rule previously existed, the rule has been substantially rewritten with many new provisions.
38. Section 718.1255(1) defines “disputes” subject to arbitration as:
   (a) The authority of the board of directors, under any law or association document to:
      1. Require any owner to take any action, or not to take any action, involving that owner’s unit.
      2. Alter or add to a common area or element.
   (b) The failure of a governing body, when required by law or an association document, to:
      1. Properly conduct elections.
      2. Give adequate notice of meetings or other actions.
      3. Properly conduct meetings.
      4. Allow inspection of books and records.
39. FLA. ADMIN. CODE ANN. r. 61B-45.001-45.048 (1993). While these rules were originally adopted on April 1, 1992, they were amended on February 2, 1993.
the associations that operate them. Multiple condominiums are communities which are composed of more than one condominium, though they are all operated by a single corporate association.\textsuperscript{41} The rules make it clear that accounting records must be separately kept for each condominium and each association.\textsuperscript{42} Moreover, certain actions related to financial matters, such as waiving or reducing reserve funding, must be accomplished by a vote of each condominium for which separate reserves are kept.\textsuperscript{43} The rules further require that separate records be kept for each "ancillary operation" conducted by a condominium association.\textsuperscript{44} Such operations include rental programs, laundry facilities, vending machines, convenience markets, golf courses and the like.\textsuperscript{45}

Another area of expanded regulation is reserve funding. The Condominium Act defines certain types of deferred maintenance and capital improvement accounts as so-called statutory reserves.\textsuperscript{46} The rules continue to require that funds for each category of statutory reserve be the subject of separate financial records.\textsuperscript{47} However, new rules expand upon the statutory definition of "reserves" by including all funds for deferred maintenance or capital improvements which are restricted as to use by either the Condominium Act, the associations' governing documents, or the associations' actual administrative practices.\textsuperscript{48} This means that the stringent accounting requirements and budgetary disclosure requirements for reserves now apply to an expanded group of funds.\textsuperscript{49} The same is true for reserve disclosures contained in annual financial reports.\textsuperscript{50} Both the budget and the financial report must give certain reserve disclosures, now calculated as of the starting date of the budgetary period covered.\textsuperscript{51} Rule 61B-22.001(4) of the Florida Administrative Code also creates a new category of funds that are not subject to the same stringent requirements governing other reserves.\textsuperscript{52} This new category is termed "contingency reserves" and is, by definition, \textit{not} a

\textsuperscript{41} Id. r. 61B-15.001 (1993).
\textsuperscript{42} Id. r. 61B-22.002(2)(a).
\textsuperscript{43} Id. r. 61B-22.0053(1).
\textsuperscript{44} FLA. ADMIN. CODE ANN. r. 61B-22.002(c) (1993).
\textsuperscript{45} Id.; see, e.g., id. r. 61B-22.001.
\textsuperscript{46} See FLA. STAT. § 718.112(2)(f) (Supp. 1992).
\textsuperscript{47} Id.
\textsuperscript{48} FLA. ADMIN. CODE ANN. r. 61B-22.001(4) (1993).
\textsuperscript{49} See id. r. 61B-22.002(1)(b); see also id. r. 61B-22.003(1)(e).
\textsuperscript{50} See id. r. 61B-22.006(3).
\textsuperscript{51} Id. r. 61B-22.003(1)(c), r. 61B-22.006(3)(a).
\textsuperscript{52} See FLA. ADMIN. CODE ANN. r. 61B-22.001(4) (1993).
Any deferred maintenance or capital improvement funds that are not restricted as to use fall within this new category. Such contingency funds are not subject to the reserve requirements otherwise imposed by the rules. Furthermore, the rules revise existing practices related to developer guarantees of assessments and to turnover of control of the association from the developer to the owners.

D. Cooperatives Governed by Separate, Specific Rules

The Division has also embarked on an attempt to codify the operation of cooperatives as well. In addition to administrative regulations promulgated by the Department of Legal Affairs, the Division has started adopting cooperative rules comparable to the rules for condominiums.

IV. Significant Case Law Developments

A. Determining Circuit and County Court Subject Matter Jurisdiction in Lien Foreclosure and Covenant Enforcement Matters

The two cases decided during 1993 having the greatest daily impact on community associations and their attorneys are Nachon Enterprises v. Alexdex Corp. and Spradley v. Doe. These cases are the first to address the changes made in 1990 by the Florida Legislature to section 34.01 of the Florida Statutes. That section grants county court judges equitable powers over all matters within the monetary limits of the county courts' jurisdiction. The Legislature's failure to simultaneously amend existing section 26.012 of the Florida Statutes created a conflict between them because the latter recites that the circuit court jurisdiction in equity cases is "exclusive." Neither the Nachon nor the Spradley court had

53. Id. r. 61B-22.001(4).
54. Id.
55. Id. r. 61B-22.004.
56. Id. r. 61B-22.003.
58. Id. r. 61B-75.005-61B-75.008.
59. 615 So. 2d 245 (Fla. 3d Dist. Ct. App. 1993), review granted, ___ So. 2d ___ (Fla. 1993).
60. 612 So. 2d 722 (Fla. 1st Dist. Ct. App. 1993).
61. See FLA. STAT. § 34.01 (1991).
62. Id.
difficulty in determining that the Legislature’s actions were effective to
grant equitable powers to the county courts. The Nachon case, which
involved the foreclosure of a small construction lien, determined that such
actions did not involve "the title and boundaries of real property." A
contrary finding would have kept subject matter jurisdiction over lien
foreclosures within the exclusive jurisdiction of the circuit courts.

Based on these decisions, most judicial circuits have issued administra-
tive orders either transferring assessment lien foreclosure cases to county
court or retaining them in circuit court. Attorneys and clients alike have
been frustrated by time delays and redundancies caused by this caseload
migration. Questions have also arisen over how to determine whether other
matters sounding in equity, such as covenant enforcement matters, fall
within the jurisdictional amount of the county court.

B. Applicability of Section 718.116(1)(A) to Existing Mortgages

On the subject of liens, a continuing battle is being waged between first
mortgagees and condominium associations over whether the 1992 amend-
ments to section 718.116(1)(a) of the Florida Statutes apply to pre-existing
mortgages. Because the amounts in controversy are usually small, there
have been no reported appellate decisions on the issue, though there are

65. Fla. Stat. § 34.011(1)(c) (1991). This statute provides that the jurisdictional amount
for county courts is $15,000 or less for all actions accruing on or after July 1, 1992. Id. It
has been suggested by my colleague (and Nova Law graduate), Michael R. Whitt, Esq., that
community associations can find a new benefit to using their available fining powers to
establish a monetary value with some certainty in an otherwise purely equitable matter.
66. Id. § 718.116(1)(a) (Supp. 1992). This statute provides in relevant part:

A first mortgagee who acquires title to the unit by foreclosure or by deed in lieu
of foreclosure is liable for the unpaid assessments that become due prior to the
mortgagee’s receipt of the deed. However, the mortgagee’s liability is limited
to a period not exceeding 6 months, but in no event does the first mortgagee’s
liability exceed 1 percent of the original mortgage debt. The first mortgagee’s
liability for such expenses or assessments does not commence until 30 days after
the date the first mortgagee received the last payment of principal or interest.
In no event shall the mortgagee be liable for more than 6 months of the unit’s
unpaid common expenses or assessments accrued before the acquisition of the
title to the unit by the mortgagee or 1 percent of the original mortgage debt,
whichever amount is less.

Id.
some written circuit courts opinions that have found no impairment to existing first mortgages when enforcing the current version of the Act. 67

C. Limits on Associations' Ability to Assess Members

On the subject of administration of community associations, a new and disturbing case is Mead v. Ocean Trail Unit Owners Ass'n, 68 limiting the ability of an association to assess unit owners to correct errors made by the board of directors. 69 In a very convoluted set of facts, the association had originally assessed its owners to purchase adjoining property. 70 When some of the owners brought suit, the court ruled that purchase of the property was outside the powers of the board. 71 After recovering funds paid to the seller and settling with its own insurance carrier, the association still found itself short of funds to repay the original assessment to all the owners, the costs and fees due the prevailing owners, and its own defense costs. 72 Therefore, using the only fundraising source available to it, the association again assessed its owners and was again sued by the owners challenging the new assessment. The Fourth District Court of Appeal also found this assessment to be improper as the "direct product of the first unauthorized act." 73 The court went on to state:

It is immaterial that this second assessment was not used to make the purchase itself, but instead merely to pay costs and expenses directly related to the fact of the purchase. It was a natural and entirely foreseeable consequence of the directors' folly. Directors cannot be at once unauthorized to do some act and at the same time authorized to impose assessments to pay for the consequences of the unauthorized act. . . . To state it as simply and directly as we can, an association's power to impose assessments on unit owners for common expenses is limited to authorized expenses, and does not extend, as is the case here, to unauthorized acts by the directors. 74

69. See Ocean Trail Unit Owners Ass'n v. Levy, 489 So. 2d 103 (Fla. 4th Dist. Ct. App. 1986), for the underlying decision.
70. Id.
71. Id.
72. Id.
73. Mead, 18 Fla. L. Weekly at D464.
74. Id.
It is indeed unfortunate that the court neglected to consider section 718.111(3) of the Florida Statutes, which grants condominium associations the power to sue and be sued, and section 718.115(1), which provides that common expenses include the costs of carrying out the powers and duties of the association. While the court correctly stated that the propriety of an assessment is tied to the purposes for which it is made, the court failed to appreciate the difference between an assessment for an ultra vires purpose and an assessment in furtherance of the association’s statutory power to defend itself. As a result, this decision leaves an association board with no source of funds to protect itself beyond available insurance, thereby both unduly limiting the exercise of business judgment and making the volunteer directors insurers of last resort of association actions.

D. Limits on Recovery of Attorney’s Fees

Another unsettling result came from a later decision in the same litigation. In Ziontz v. Ocean Trail Unit Owners Ass’n, the Fourth District Court of Appeal considered the amount of the attorney’s fee awarded by the trial court in this litigation. The court, seemingly in derogation of existing precedent, stated:

This obsession with hours and rates has apparently caused judges and lawyers to lose sight of a truth they formerly accepted almost universally: viz., that there is an economic relationship to almost every legal service in the market place. . . . Trial judges and lawyers used to accept a priori the idea that, no matter how much time was spent or how good the advocate, the fair price of some legal victories simply could not exceed—or, conversely, should not be less than—some relevant sum not determined alone by hours or rates. Since Rowe, that all seems lamentably forgotten.

The court applied the “manifest justice rule” as expressed by Miller v. First American Bank & Trust to determine that the fees awarded by the trial court were too disproportionate to the economic value of the right

76. Mead, 18 Fla. L. Weekly at D464.
77. See id.
80. Ziontz, 18 Fla. L. Weekly at D1147.
sought to be vindicated. The limits of this standard are, at best, vague and overly subjective.

E. Construction Defect Claims

1. Date that Statute of Limitations Commences to Run

Three significant cases were decided in late 1992 and 1993 in the area of construction defects litigation. The first, *Seawatch at Marathon Condominium Ass’n v. Charley Toppino & Sons, Inc.*[^82^] addressed the relationship between sections 718.124 and 718.203 of the Florida Statutes.[^83^] While the Third District Court of Appeal ultimately certified the question[^84^] to the Florida Supreme Court as one of great public importance, it held that the former section operates to toll any statute of limitations time period created by the latter section until such time as non-developer unit owners assume control of the condominium association.[^85^] While the result is both logical and favorable to condominium associations, one is nevertheless prompted to question the court’s treatment of section 718.203 of the Florida Statutes, as a statute of limitations. That section is entitled “Warranties,” and all time periods referred to in that section appear to be warranty periods. Generally, warranty periods and statutes of limitation are not equivalent: the warranty period is the maximum time during which a cause of action may accrue (by discovery or reasonable opportunity to discover the defect),[^86^] while statutes of limitations set the time during


[^83^]: Id. at 472. Section 718.203 of the Florida Statutes sets forth the maximum time that warranties exist on various components of the condominium, including three years on the roof and structural components, as measured from the date of issuance of the certificate of occupancy. Fla. Stat. § 718.203 (Supp. 1992). Section 718.124 provides:

The statute of limitations for any actions in law or equity which a condominium association or a cooperative association may have shall not begin to run until the unit owners have elected a majority of the board of administration.


[^84^]: *Seawatch*, 610 So. 2d at 471. The court certified the following issue:

Does section 718.124, Florida Statutes (1991), grant a condominium association an extended period of time in which it may assert a cause of action for damage to common elements in condominium buildings, beyond the time granted in section 718.203, Florida Statutes (1991), after unit owners have elected a majority of the members of the board of administration?

Id.

[^85^]: Id.

which an accrued cause must be asserted. For example, actions based upon breach of warranty under section 718.203(2)(a) of the Florida Statutes may accrue during the three year period after issuance of the certificate of occupancy, and the condominium association would then have four years from the date the owners assume control of the association to assert their claim for breach of warranty.

2. Standing of Unit Owners to Bring Claims

The second case in this substantive area is Carlandia Corp. v. Rogers & Ford Construction Corp. Once again, a district court of appeal certified the question raised by this case as being of great public importance, this time after holding that an individual condominium unit owner has standing to assert a claim for construction defects against a party involved in the construction process. The court’s decision relied on the fact that a unit owner, though analogous to a shareholder in a business corporation, also owns an undivided portion of the common elements and as an owner is deemed a real party in interest under Rule 1.210(a) of the Florida Rules of Civil Procedure. Additionally, though condominiums are purely creatures of statute, section 718.111(3) of the Florida Statutes specifically reserves to each owner all statutory and common law rights they may have. The court recognized that its ruling could easily create quagmires in many areas, such as valuation of damages to a single owner and the possibility of multiple and inconsistent adjudications, and accordingly chose to certify the question.

87. ld. § 3.
89. 605 So. 2d 1014 (Fla. 4th Dist. Ct. App. 1992), review granted, 618 So. 2d 1369 (Fla.), aff’d, 1993 WL 458443 (Fla. Nov. 10, 1993).
90. ld. at 1015.
91. ld. (citing FLA. R. CIV. P. 1.210(a)).
92. ld.
93. ld. at 1016. The certified question was as follows:

MAY AN INDIVIDUAL CONDOMINIUM OWNER MAINTAIN AN ACTION FOR CONSTRUCTION DEFECTS IN THE COMMON ELEMENTS OR COMMON AREAS OF THE CONDOMINIUM?

Carlandia, 605 So. 2d at 1016.
3. Economic Loss Rule

The landmark case of *Casa Clara Condominium Ass’n v. Charley Toppino & Sons, Inc.* represents the extension of the "Economic Loss Rule" into the area of condominium construction defect cases. The owners in this condominium had brought suit against many parties involved in building their condominium, including the concrete supplier. The concrete used to build the structures contained too high a salt content, causing the reinforcing steel bars to prematurely corrode, allowing the concrete to crumble away. The suits brought by the owners sounded *inter alia* in common law warranty, negligence and products liability. The Florida Supreme Court followed a very strict interpretation of the rule, so much so that it neglected to look at whether the plaintiffs had a contractual remedy available. In fact they did not, since they were neither in privity with the concrete supplier nor third party beneficiaries to the contract between the developer and the supplier. The effect of this application of the Economic Loss Rule was to deprive innocent third party owners of a tort remedy based on defective products. As a result, the "Economic Loss Rule" drastically limits negligence claims in many typical construction litigation cases where the main developer is not available or viable.

F. Fair Housing Act Decisions

Finally, additional cases have further clarified the impact of the Fair Housing Amendments Act of 1988 on community associations. In *Seniors Civil Liberties Ass’n v. Kemp*, the provisions of the Act banning

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94. 620 So. 2d 1244 (Fla. 1993).
95. Id. at 1245. The Economic Loss Rule is the principle that distinguishes claims in tort from claims in contract and holds that there can be no recovery in tort for a defective product unless there exists either personal injuries or damage to property other than to the defective product itself. In instances where a purchased product is defective and damages itself only, the interest to be compensated is the contractually bargained-for expectation interest, and remedies for harm to life, health, and property are not involved. Id.
96. Id.
97. Id.
98. *Casa Clara*, 620 So. 2d at 1248 (Shaw, J., concurring in part and dissenting in part).
100. See Seniors Civil Liberties Ass’n v. Kemp, 965 F.2d 1030 (11th Cir. 1992).
101. Id.
discrimination based on "familial status"\textsuperscript{102} were found constitutional against arguments that they were constitutionally vague, that they violated First Amendment rights of freedom of association, and that they violated rights of privacy.\textsuperscript{103} Furthermore, the provisions of the Act were found constitutional against arguments that they violated Fifth Amendment rights by both discriminating against the plaintiffs and depriving them of contract and property rights without due process\textsuperscript{104} and that they violated the Tenth Amendment sovereignty of Florida.\textsuperscript{105}

In \textit{HUD v. Paradise Gardens},\textsuperscript{106} a condominium association's rules prohibited children under the age of five from using the swimming pool and also limited the hours of pool use of children between ages five and sixteen.\textsuperscript{107} Although the condominium cited health and safety concerns as the justification for both rules, the presiding administrative law judge found that the proof adduced failed to support these concerns.\textsuperscript{108} Associations desiring to adopt and enforce this common type of rule should seek expert guidance before doing so.

\section*{V. Conclusion}

Ownership of a home is a traditional and primary indicia of the American dream. As the most recent legislative waves wash ashore and subsidiary waves of administrative and judicial "clarification" begin to crest, many citizens fortunate enough to own a home are quickly finding themselves inundated. The tide engendered by complicated and constantly increasing regulation has turned many forms of home ownership into a very bad dream.

\begin{thebibliography}{99}
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\bibitem{104} \textit{Id.} at 1035.
\bibitem{105} \textit{Id.} at 1034.
\bibitem{107} 2 Fair Housing-Fair Lending (P-H) at ¶ 25,037.
\bibitem{108} \textit{Id.}
\end{thebibliography}
Elder Law: 1993 Leading Cases and Significant Developments in Florida Law

Jerome Ira Solkoff

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I. INTRODUCTION

The term "elder law" came into vogue in 1989 when the National Academy of Elder Law Attorneys ("NAELA") was founded. The term is not widely understood. Traditional estate planning involved only the provision for the orderly disposition of assets after death through the use of trusts, wills and other mechanisms. Elder law attorneys broaden the definition of estate planning.

Elder law practitioners believe that the main focus of estate planning should be to meet one’s lifetime needs and, once those needs are properly addressed, to utilize the more traditional estate planning methods. Lifetime needs of the elderly include the following: access to and the ability to refuse health care; access to insurance and government benefits; freedom from physical, emotional, and financial abuse; freedom from age discrimination; access to public facilities and courts; preservation of privacy, independence, control, autonomy, lifestyle, and wealth; and financial security.

A holistic approach is requisite to the practice of elder law. The attorney acts not only as a preparer of documents but truly as a "counselor at law." Often, the services of experts in other disciplines such as geriatric care managers, gerontologists, social workers, psychologists, psychiatrists and family counselors are utilized.

Thus, elder law attorneys concern themselves with a broad range of issues. With that in mind, this article now turns to four areas of the practice that have undergone significant changes in the past year. These developments are in the areas of probate matters, trust administration, powers of attorney, and Medicaid.

II. PROBATE MATTERS

A. Attorneys’ Fees

The Florida Supreme Court decision, In re Estate of Platt, radically changed the determination of attorneys’ fees in probate matters. Prior to this decision, courts had consistently upheld judicial awards of attorneys’

2. 586 So. 2d 328 (Fla. 1991).
fees based on percentages of the probate estate. In Platt, however, the Florida Supreme Court found the use of a sliding percentage scale not to comport with section 733.617(1) of the Florida Statutes in its call for "reasonable" fees based upon certain enumerated factors. The decision left many unanswered questions and even more disturbing results. For example, probate attorneys could no longer precisely estimate their legal fees for the purpose of the estate's deductibility on the Federal Estate Tax Return. Even more damaging was the potential for obscenely high fees resulting from the mandated "lode-star" approach.

In response to the difficulties implied by Platt, the Florida Legislature enacted section 733.6171, which became effective October 1, 1993. Computations and collection of attorneys' fees on or after that date will be strictly governed by the new legislation. While reasonable compensation may be payable from the assets of the estate without court order, the determination of what is "reasonable" is based on new criteria. Such compensation may now be determined under several formulas:

1. Based on agreement between the attorney, personal representative and heirs; or
2. Based on a manner disclosed in a petition for discharge or final accounting provided there is no objection filed thereon pursuant to existing section 733.901; or
3. As set by a court after hearing; or
4. Based on written agreement between the attorney and decedent disclosed to the personal representative prior to engagement of the attorney and served on all interested persons. (Such agreement may not mandate that the personal representative engage such attorney.); or
5. Based on the following statutory prescription for "ordinary" services:

3. See, e.g., In re Estate of Platt, 546 So. 2d 1114 (Fla. 4th Dist. Ct. App. 1989), quashed, 586 So. 2d 328 (Fla. 1991); see also In re Estate of Warwick, 543 So. 2d 449 (Fla. 4th Dist. Ct. App. 1989), quashed, 586 So. 2d 327 (Fla. 1991).
4. In re Estate of Platt, 586 So. 2d at 335-36; see FLA. STAT. § 733.617(1) (1989).
5. See In re Estate of Platt, 586 So. 2d at 328.
6. Id. at 329-30.
7. Ch. 93-257, § 4, 1993 Fla. Laws 2500, 2503 (to be codified at FLA. STAT. § 733.6171(4)).
a) For “professional responsibility”—two percent of the monetary value of the estate assets plus one percent of the balance of the gross estate as finally determined for federal estate tax provisions; plus

b) For “professional time expended”—by multiplying the “reasonable hours” expended by a “reasonable” hourly rate.9

These means of determining fees are flexible. Any interested person may seek an increase or decrease in the “ordinary” compensation by court petition and hearing, and, of course, agreements may change the prescription.10 In addition, no expert testimony will be required by the court to determine “reasonable compensation,” but persons can offer such testimony after notice to interested persons.11 Costs of such expert witness fees and attorneys fees, including that of the personal representative, are to be paid out of the estate assets as determined by the court.12

The prescription of “ordinary” fee computations has caused much controversy among attorneys. Some attorneys fear that the courts will use the prescription to impose an unreasonable “cap” on fees, despite the fact that other ways to determine fees are set forth in the statute. The outcome of the legislation certainly would be to force attorneys to give special heed when preparing retainer agreements. Perhaps explicit provisions as to attorneys’ fees will become more common in wills.

B. Personal Representatives’ Fees

In addition to the above changes, Florida Statutes section 733.617 has been substantially revised as to computations of personal representatives’ fees.13 The new provisions affect estates of decedents who die on or after October 1, 1993.14

Florida Statutes section 733.617, as revised, provides that ordinary service fees may be payable from estate assets without a court order, and are to be determined in one of several ways:

9. Ch. 93-257, § 4, 1993 Fla. Laws 2500, 2504 (to be codified at Fla. Stat. § 733.6171(4)).
10. Id. § 4, 1993 Fla. Laws at 2504 (to be codified at Fla. Stat. § 733.6171(4), (5)).
11. Id. § 5, 1993 Fla. Laws at 2507 (to be codified at Fla. Stat. § 733.6171(5)).
12. Id.
1. Based on will provisions which will act as a "cap" on fees paid;\(^{15}\) or
2. Based on written contract with the decedent;\(^{16}\) or
3. Based on percentages set forth in the statute, with leeway for the court
to award greater compensation for extraordinary services such as for
sale of realty, litigation, tax proceedings and conduct of the decedent's
business.\(^{17}\) The statute prescribes percentage fee formulas for "ordi-
nary" services unless there is agreement otherwise. The prescriptions
are:
   a) Three percent of the first $1 million;\(^{18}\)
   b) Two and one-half percent of the next $4 million;\(^{19}\)
   c) Two percent of the next $5 million;\(^{20}\) and
   d) One and one-half percent of the excess over $10 million.\(^{21}\)

Obviously, the fees earned by the personal representative can be much
more than that earned by the attorney for the estate. If there are two
personal representatives, each is entitled to full commissions unless the
estate is worth less than $100,000.\(^{22}\) In such smaller estates, only one
commission is to be paid, "apportioned" between the two personal
representatives based on services rendered by each.\(^{23}\) If there are more
than two personal representatives, two full commissions are to be paid and
apportioned amongst them.\(^{24}\) However, the one who had "possession of
and primary responsibility for administration of assets" can receive one of
the two full shares.\(^{25}\) If the estate is worth less than $100,000, only one

\(^{15}\)  Id. § 10, 1993 Fla. Laws at 2508 (amending FlA. STAT. § 733.617(3) (1991), to be
codified at FlA. STAT. § 733.617(4)).

\(^{16}\)  Id.

\(^{17}\)  Id. (amending FlA. STAT. § 733.617(1) (1991), to be codified at FlA. STAT. §
733.617(3)).

\(^{18}\)  Ch. 93-257, § 10, 1993 Fla. Laws 2500, 2507 (amending FlA. STAT. § 733.617
(1991), appearing at FlA. STAT. 733.617(2)(a)).

\(^{19}\)  Id. (amending FlA. STAT. § 733.617 (1991), appearing at FlA. STAT. § 733.617-
(2)(b) (1993)).

\(^{20}\)  Id. (amending FlA. STAT. § 733.617(1991), appearing FlA. STAT. § 733.617(2)(c)
(1993)).

\(^{21}\)  Id. (amending FlA. STAT. § 733.617 (1991), appearing at FlA. STAT. § 733.617-
(2)(d) (1993)).

\(^{22}\)  Id. at 2508 (amending FlA. STAT. § 733.617 (1991), appearing at FlA. STAT. §
733.617(5) (1993)).

\(^{23}\)  Ch. 93-257, § 10, 1993 Fla. Laws 2500, 2508 (amending FlA. STAT. § 733.617
(1991), appearing at FlA. STAT. § 733.617(5)).

\(^{24}\)  Id.

\(^{25}\)  Id.
full commission is to be paid and apportioned amongst the multiple personal representatives based on the services that each render. 26 A member of The Florida Bar who serves the dual function of personal representative and attorney for the estate can receive both attorney and personal representative fees. 27

III. TRUST ADMINISTRATION

Sweeping changes in the administration of ordinary living trusts were made this past year by the Florida Legislature. The changes effect trusts of decedents who die on or after October 1, 1993, 28 but provisions as to payment of estate expenses and obligations by trusts do not become effective until January 1, 1994. 29

A. Personal Representative May Claim Trust Assets

Section 733.607(2) of the Florida Statutes was enacted to allow personal representatives of an estate to reach trust assets when the probate estate is insufficient to pay expenses of administration and proper creditor claims. 30 To do so, the personal representative must certify in writing to the trustee that the probate estate is insufficient, and serve a copy of the notice of administration on the trustee of the trust. 31

B. Some Trusts are Exempt from Claims

Not all trusts are subject to the claims of personal representatives and/or creditors. Only personal living trusts, which are revocable and are created to benefit the settlor during his or her lifetime, and which upon revocation would revert to the settlor, are subject to such claims. 32 Claims of a personal representative do not apply to: (1) insurance proceeds payable

26. Id.
27. Id. (amending Fla. Stat. § 733.617 (1991), to be codified at Fla. Stat. § 733.617(6)).
29. Id. § 14, 1993 Fla. Laws at 2509 (to be codified at Fla. Stat. § 737.3056).
31. Id.
directly to a trust;\textsuperscript{33} (2) a trust in which the settlor had provided that the assets would go to another upon revocation;\textsuperscript{34} (3) retirement plans;\textsuperscript{35} or (4) to Qualified Domestic Relations Orders described in section 414(p) of the Internal Revenue Code.\textsuperscript{36}

C. Trustees’ Duties as to Claims

Florida Statutes section 737.3056 expressly states that the duty of the trustee is to pay estate administration expenses and claims.\textsuperscript{37} If there is a probate proceeding, the trustee must be served with a copy of the notice of administration before trust assets will be subject to the claim of a personal representative.\textsuperscript{38} However, if there is no probate proceeding, the trustee must pay creditors directly.\textsuperscript{39}

Contribution from others cannot be demanded by the trustee unless the settlor expressly so provided in the trust agreement.\textsuperscript{40} For example, the settlor may provide that a summer home go to A, and may state that A should pay all claims and expenses arising out of the existence, care, management, mortgage and taxes of such home. The settlor also may direct which trust assets are to be used to pay such claims; the direction can be made in the settlor’s will or trust document.

If no express direction is made, claims are to be paid out of the trust assets in the following order: 1) out of the trust residuary;\textsuperscript{41} 2) out of assets not to be distributed as specified property;\textsuperscript{42} and, 3) out of assets distributed as specified property.\textsuperscript{43} Specified property, barring a directive otherwise, is not to be utilized to pay claims unless the other assets are

\begin{itemize}
\item \textsuperscript{33} Ch. 93-257, § 11, 1993 Fla. Laws 2500, 2509 (amending FLA. STAT. § 733.707 (1991), appearing at FLA. STAT. § 733.707(3)(c)).
\item \textsuperscript{34} Id.
\item \textsuperscript{35} Id. (amending FLA. STAT. § 733.707 (1991), appearing at FLA. STAT. 733.707(3)(a) (1993)).
\item \textsuperscript{36} Id. (amending FLA. STAT. 733.707 (1991), appearing at FLA. STAT. 733.707(3)(b) (1993)).
\item \textsuperscript{37} Id. § 14, 1993 Fla. Laws at 2509 (appearing at FLA. STAT. § 737.3056).
\item \textsuperscript{38} Ch. 93-257, § 14, 1993 Fla. Laws 2500, 2509 (to be codified at FLA. STAT. § 737.3056(1)).
\item \textsuperscript{39} Id.
\item \textsuperscript{40} Id.
\item \textsuperscript{41} Id. (to be codified at FLA. STAT. § 737.3056(2)(a)).
\item \textsuperscript{42} Id. (to be codified at FLA. STAT. § 737.3056(2)(b)).
\item \textsuperscript{43} Ch. 93-257, § 14, 1993 Fla. Laws 2500, 2510 (to be codified at FLA. STAT. § 737.3056(2)(c)).
\end{itemize}
insufficient. The shares of all persons in a class of trust beneficiaries are to be used to satisfy claims so as to treat all equally.

For example, a trust may provide that XYZ corporate stock is to go to the daughter, each grandchild is to receive five thousand dollars, and the remainder of the trust estate is to go to the son. Barring a directive otherwise, the son’s share will be accessed first to pay claims. If the son’s share is exhausted, then the grandchildren’s shares will be accessed. Only when those shares are exhausted will the stock be used to pay claims. Obviously, this may be contrary to the settlor’s intent of leaving the bulk of the estate to the son while providing less to the daughter.

Prior to payment of claims and expenses of probate administration from trust assets, all costs and expenses of trust administration, including trustee fees and attorneys’ fees, are to be paid. This poses the question of whether a trustee may hold back anything to cover additional anticipated trustee and attorneys’ fees.

D. Notice to Creditor

Section 737.3057 of the Florida Statutes states that a trustee must notify creditors when there is no probate administration. The notice provisions are similar to those presently used when there is probate administration. Moreover, a trustee, like a personal representative, must make diligent efforts to discover creditors and to notify them.

One reason why persons enter into trust agreements is to avoid the time and expense of probate proceedings, and to avoid the need to pay attorneys’ fees in the future. This new legislation will add time and expense to trust administration and may force a trustee to consult with attorneys more often. Perhaps another reason persons enter into trust agreements is to avoid creditors’ claims. However, this no longer seems a valid reason for the creation of trusts. Creditors will have claim rights and are to be paid by trustees. Depending upon one’s point of view, Florida Statutes section 737.3057 may be either a boon or a bane in that settlors may not so easily hide their assets from creditors.

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44. Id. (to be codified at Fla. Stat. § 737.3056(3)).
45. Id.
46. Id. (to be codified at Fla. Stat. § 737.3056(4)).
47. Id. § 15, 1993 Fla. Laws at 2510 (to be codified at Fla. Stat. § 737.3057).
48. Ch. 93-257, § 15, 1993 Fla. Laws 2500, 2511 (to be codified at Fla. Stat. § 737.3057(1)(c)).
IV. POWERS OF ATTORNEY

Two significant events will impact powers of attorney in the near future. The first change, one leading toward a greater efficiency of powers of attorney, has nothing to do with new case law or legislative law. Rather, the Real Property, Probate and Trust Law Section of The Florida Bar recently modified Uniform Title Standard 18.4.\footnote{49} Under the modification, homestead property can be conveyed or encumbered through the use of a power of attorney, durable or otherwise.\footnote{50} Moreover, the homestead property does not have to be described in the power.\footnote{51}

The change is important to elder law attorneys because durable powers of attorney can now be more acceptable tools to alienate real estate interests of a disabled elderly client. This will give more leeway for families to sell property, to raise funds for the health care of the elderly client, and/or to prepare for Medicaid planning. No longer shall the family be burdened with on-going homestead expenses while the elder disabled client is institutionalized.

Second, and on the horizon, extensive changes in the powers of attorney law\footnote{52} are being drafted by the Real Property, Probate and Trust Law Section of The Florida Bar.\footnote{53} Many banks and other third parties fear the liabilities that may arise by honoring the use of powers of attorney. Thus, many banks currently do not permit their use. This proposed legislation would free third parties from liability in certain circumstances.\footnote{54} Significantly, the proposal would also subject third parties to suits for attorneys' fees should they unreasonably refuse acceptance of a power of attorney.\footnote{55} While putting the "power" back in powers of attorney, such legislation could, however, also portend the increased financial exploitation of the elderly population. Any legislation, no matter how necessary, that makes it easier for others to interpose their decisions for those of the elderly, has inherent dangers.

\footnotesize

\begin{itemize}
\item \footnote{49}{\textsc{Real Property, Probate \& Trust Law Section, Florida Bar, Uniform Title Standards} 18.4 (1992).}
\item \footnote{50}{\textit{Id.}}
\item \footnote{51}{\textit{Id.}}
\item \footnote{52}{See generally \textsc{Fla. Stat.} §§ 709.01-709.11 (1991).}
\item \footnote{53}{\textsc{Real Property, Probate \& Trust Law Section, Florida Bar, Preliminary Draft of Proposed Litigation} § 709.08 (on file with author); see also \textsc{Real Property, Probate \& Trust Law Section, Florida Bar, Uniform Title Standards} (1992).}
\item \footnote{54}{\textsc{Real Property, Probate \& Trust Law Section, Preliminary Draft of Proposed Litigation} § 709.08(4)(d) (on file with author).}
\item \footnote{55}{\textit{Id.} § 709.08(11).}
\end{itemize}
V. MEDICAID

Perhaps the most important new legislation affecting the elder law practice is the Omnibus Budget Reconciliation Act of 1993 ("OBRA"),56 enacted and signed into law on August 10, 1993. Far-reaching changes were made in the Medicaid law by OBRA.

A. History

Medicaid is a federal and state program that, among other things, provides nursing home costs for persons sixty-five years of age or older. Prior to OBRA, in order to qualify for those benefits in Florida, one must have met at least five tests:

1) The applicant must be over sixty-five years of age and "medically needy;"
2) The applicant must be a United States and Florida citizen or reside in Florida under color of law;
3) The applicant’s income from all but a few sources must be $1302 or less per month ("income cap"); and,
4) The applicant can only have $2000 or less in assets, excluding certain types of assets.
5) For married persons, the "community spouse" of the Medicaid applicant can only hold $70,740 in assets, excluding certain assets ("community spousal resource allowance").57

The "income gap" and the "community spousal resource allowance" figures were adjusted each January due to cost of living increases or decreases. Therefore, to qualify for Medicaid benefits as early as possible, one needed to plan ahead to meet the income and assets cap requirements. Three principal methods had been employed in Florida for one to plan ahead to meet those requirements.

First, a person could have "spent down" funds on health care, a home, furnishings, a car, and/or prepaid funeral arrangements.58 Under certain

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58. See Roger A. McEowen & Neil E. Harl, Estate Planning for the Elderly and Disabled: Organizing the Estate to Qualify for Federal Medical Extended Care Assistance,
circumstances those assets would not have been counted to determine Medicaid eligibility. Second, one could have invested funds in non-countable assets such as specially designed annuities. Third, and most common, a person could have transferred assets to family, friends, or an irrevocable, carefully worded trust. Federal and state laws, rules, and regulations, differing widely from state to state, provide guidelines for such transfers. For any uncompensated transfer, there is a disqualification period involved before the one who transfers could qualify for Medicaid benefits.

The Medicare Catastrophic Coverage Act of 1988 ("MECCA"), stated that the maximum disqualification period is thirty months from the date of transfer. Federal and state regulations have modified procedures whereby one may reduce that waiting time with the use of certain transfer procedures. In Florida, there were four principal methods of accomplishing uncompensated transfers to qualify a person for Medicaid benefits. The Florida Department of Health and Rehabilitative Services ("HRS") set forth the regulations allowing the transfers in Manual HRS:165-22.

First, one could transfer assets thirty-one months ahead of time. Second, a lesser disqualification period was allowed by dividing the uncompensated value by a factor set by HRS that was purported to reflect the average monthly costs of a nursing home. The factor in Florida is an unrealistically low $2,400. As a practical matter, the author cannot provide the name of a single nursing home that will charge such a low monthly rental. Thus, if one were to transfer $60,000 in assets, dividing that amount by $2,400 would mean a twenty-five month disqualification period beginning the first day of the month of transfer.

A third method was to do transfers in stages. For example, Ella Der needs to transfer $45,600 in assets to qualify for Medicaid benefits. If Ella does the transaction in one lump sum, she must wait nineteen months before Medicaid entitlement. However, if Ella were to transfer $24,000 in one
month,\textsuperscript{67} and then transfer another $21,600 the next month,\textsuperscript{68} she would cut the waiting period from nineteen months to ten months. Such a cut in the waiting period would occur because each transaction would stand on its own, and the separate disqualification periods would run concurrently.

However, the most common method of transfers in Florida has been the “joint account route” in which each person whose name is on a joint account, is deemed to own one hundred percent of that account. Therefore, if a son, as a joint account holder, withdrew the funds, he is deemed to have withdrawn his own monies. Thus, there would be no disqualification period because the Medicaid applicant or spouse did not make the transfer.

Once transfers were made, it was most common to have the funds or assets held in an irrevocable special needs trust created by persons other than the Medicaid applicant and his or her spouse. The trust would protect the elders from possible financial abuse, provide strict standards for the trustees to follow, avoid some tax problems, and avoid claims of the children’s (or others’) creditors.

B. The New Law

Most of the methods of doing uncompensated transfers are now disallowed.\textsuperscript{69} No longer is there a thirty month “look back” period.\textsuperscript{70} Any transaction done within thirty-six months will trigger a disqualification period.\textsuperscript{71} Moreover, if one’s assets were put into a trust, under some circumstances, the “look back” period is sixty months.\textsuperscript{72} The “look back” period ends when the individual is institutionalized and applies for Medicaid benefits.\textsuperscript{73} Thus, if one were to enter a nursing home January 1, 1994 and apply for benefits that day, the authorities would check for transactions going back to January 1, 1991. If one transfers assets thirty-seven months prior to institutionalization and applies for Medicaid benefits without a prohibited trust involved, there will be no disqualification period.

\textsuperscript{67} $24,000 \div 2400 = 10.$
\textsuperscript{68} $21,600 \div 2400 = 9.$
\textsuperscript{71} Id.
\textsuperscript{72} Id.
Unlike the old law, the disqualification period under OBRA is open-ended and can be longer than the previous thirty month cap. The disqualification period is computed by dividing the value of the uncompensated transfer by the $2,400 factor. Thus, similar to the old law, if one transfers assets worth $60,000, the disqualification period would still be twenty-five months. But if one transfers $120,000 in assets, the period will be fifty months, not thirty. Furthermore, the disqualification period commences on the first day of the month the uncompensated transfer is made.

Trusts that were created by the Medicaid applicant or were funded with the assets of the applicant or his or her spouse would be governed by the new stringent rules. The assets would be counted as available to the individual if the trust were revocable. If irrevocable, the income or corpus used to generate that income would be counted if any portion of income and/or principal could be used for that individual.

Certain trusts created for someone under sixty-five and disabled, or which consist of only pension monies, and in which provisions are made for the State to receive full reimbursement for benefits paid after the death of the applicant, will not be counted as available to an individual. Annuities can be considered trusts. The “joint account route” and transactions whereby others change ownership or control of the Medicaid applicant’s assets are now treated as transfers made by the applicant or spouse, and trigger a disqualification period.

The new legislation also mandates strict recovery procedures whereby states are to be reimbursed for benefits paid, after the death of the Medicaid

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76. *See id.*
77. *See id.*
81. *Id.*
recipient, out of certain insurance proceeds, probate assets, and other assets. 83

C. Outcome

The result of OBRA 1993 is the elimination of many options persons can use to plan ahead for Medicaid qualifications. The following options are still allowed: (1) transfers thirty-seven months in advance of need; (2) transfers of some assets triggering a disqualification period while holding back funds sufficient to cover the nursing home costs during the disqualification period; and (3) the implementation of "spend-down" theories. New trusts must be carefully drafted to provide no income or principal allowances to the Medicaid applicant or spouse and must be funded with assets of other persons.

The true and complete meaning of OBRA cannot be determined until the United States Health Care Finance Administration and Florida's Department of Health and Rehabilitative Services have promulgated rules and regulations interpreting the law. Regardless, OBRA provides ample latitude for many interpretations of its provisions, which will create controversy in the future. OBRA awaits many tests in the courts.

83. Id.
Evidence: 1993 Leading Cases and Significant Developments in Florida Law

Don Beverly*

Steven J. Clarfield**

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I. INTRODUCTION

While the Florida Legislature has made no significant or earth shattering modification to the Florida Evidence Code in 1993, there have been at least two recent evidentiary cases which the trial practitioner should find important. This article will review these two cases and examine their impact upon the trial lawyer.

II. THE EROSION OF THE BUSINESS RECORDS EXCEPTION: LOVE V. GARCIA

On April 3, 1986, sometime after 11:00 p.m., a woman was walking along Sunset Strip in Fort Lauderdale, Florida. The woman, who was wearing dark clothing, was spotted by a City of Sunrise Police Officer who, after being flagged down by the woman, drove up along side of her. The woman, who was noticeably upset and appeared to have been crying, requested that the police officer give her a ride to a local gas station from where she could make a telephone call. The police officer obliged and dropped her off at the station.

Shortly after being dropped off at the gas station, the woman was seen walking in the median strip near the intersection of University Drive and Sunset Strip by another pedestrian. The pedestrian noted that the woman had hesitated in the median and then began to cross the intersection against the red light.

At the same time, an orthopedic surgeon was travelling along University Drive on his way home from the hospital. Upon seeing the doctor's vehicle approaching, the pedestrian shouted to the woman in an attempt to warn her of the oncoming vehicle. When he yelled to her, the

1. 611 So. 2d 1270 (Fla. 4th Dist. Ct. App.), review granted, 623 So. 2d 494 (Fla. 1993).
2. Initial Brief of Appellant at 3, Love (No. 89-3259).
3. Id.
4. Id. at 4.
woman looked at him, put her head down, and continued walking into the intersection. Needless to say, the woman was struck by the doctor's vehicle and suffered significant and extensive injuries. She required more than seven weeks of hospitalization, including more than two weeks of intensive care, as well as several surgeries.

On September 23, 1986, the woman, Luz Maria Garcia Rennes, filed a complaint against the doctor, Douglas J. Love. Rennes claimed the doctor negligently operated his automobile causing it to strike her, resulting in her injuries and damages. The doctor's key defense was that the woman was intoxicated at the time of the accident, and that her intoxication caused or contributed to her injuries.

To support his defense, the doctor sought to introduce the results of two blood alcohol tests which suggested the woman was intoxicated. The first blood alcohol test was taken at the request of the police officer who accompanied the woman to the hospital; it was taken shortly after the accident and was analyzed by SmithKline Laboratory. The blood test revealed that the woman had a blood alcohol level of .23, more than twice the legal limit. The second blood test was taken a couple of hours after the woman was admitted to Florida Medical Center. That blood sample was evaluated by the hospital's laboratory and revealed that the woman had a blood alcohol level of .14.

The driver properly disclosed his intentions to introduce these blood alcohol tests in his pretrial exhibit list. The doctor also disclosed his intention to call the records custodians from the SmithKline Laboratory and the Florida Medical Center to authenticate these documents under the business records exception to the hearsay rule. Through a pretrial motion in limine, the plaintiff sought to exclude this evidence on the grounds that the doctor had failed to disclose any witnesses who could "lay a proper predicate" to establish a chain of custody from the collection of the blood

5. Id.
6. Appellee's Answer Brief at 4, Love (No. 89-3259).
7. Id.
8. Initial Brief of Appellant at 1, Love (No. 89-3259).
9. Id.
10. Id.
11. Id. at 5.
12. Id.
13. Initial Brief of Appellant at 5, Love (No. 89-3259).
14. Id.
15. Id. at 1.
sample through the testing procedure and creation of the document. Apparently, the trial court granted the motion in limine, excluding the test results because the driver did not disclose witnesses who could establish this chain of custody.

The case proceeded to trial and resulted in a jury verdict for the plaintiff for two million dollars in damages, which was reduced to one million dollars after finding each party to be fifty percent (50%) at fault. The doctor appealed the exclusion of the blood alcohol tests to the Fourth District Court of Appeal, which affirmed the exclusion. The case is presently on appeal to the Florida Supreme Court.

A. Erosion of the Business Records Exception in Medical Records Cases

The Florida Business Records Exception to the hearsay rule states:

90.803 Hearsay Exceptions; availability of declarant immaterial. - The provision of s. 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:

(6) RECORDS OF REGULARLY CONDUCTED BUSINESS ACTIVITY.—

(a) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances show lack of trustworthiness. The term “business” as used in this paragraph includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(b) No evidence in the form of an opinion or diagnosis is admissible under paragraph (a) unless such opinion or diagnosis would be

17. Love, 611 So. 2d at 1272.
18. Id. at 1271.
19. Appellee’s Answer Brief at 1, Love (No. 89-3259).
20. Love, 611 So. 2d at 1270.
21. See infra notes 38-39 and accompanying text.
admissible under ss. 90.701-90.705 if the person whose opinion is recorded were to testify to the opinion directly.  

When seeking to introduce documents pursuant to the Business Records Exception, one typically solicits the testimony of the records custodian to authenticate the document pursuant to the requirements of section 90.803(6). However, the Love decision places a severe restraint upon a practitioner seeking to introduce medical records through a records custodian. The Love majority explained that the rationale behind the Business Records Exception is the inherent trustworthiness of such documents. However, with regard to medical records, the court stated that such records are inherently trustworthy only if the records were actually used by a physician to aid in diagnosis or treatment of the patient. Thus, a party seeking to introduce a particular medical document would necessarily have to provide testimony of the treating physician, who would state that he relied on the particular document sought to be introduced in his treatment of the patient. Of course, there may be numerous routine documents in a patient’s medical file that are not directly relevant to the patient’s particular ailment and that may not necessarily be relied upon in the treatment of that patient. Under Love, it would seem impossible to introduce routinely prepared documents that were not relied upon for a patient’s treatment since they would not be inherently trustworthy. As the court stated, “[i]n a medical records case, the trustworthiness element—the only basis for business records admissibility—relates to whether the health care providers relied on the test result in the course of treatment.”

In Love, the plaintiff’s two blood tests indicated a blood alcohol level in excess of the legal limit. The first blood test was ordered by the police officer who accompanied the woman to the hospital, and that test was examined by a laboratory outside of the hospital. The second blood test was taken after the woman was admitted to the Florida Medical Center and that test was evaluated by the hospital’s laboratory several hours later. However, after being hit by the doctor’s car, the woman had massive injuries requiring seven weeks of hospitalization, had six surgeries requiring

23. Love, 611 So. 2d at 1272.
24. Id. at 1275.
25. Id.
26. See Initial Brief of Appellant at 5, Love (No. 89-3259).
27. Love, 611 So. 2d at 1275.
28. Id.
general anesthesia, and was required to wear a cast on her right leg for almost two years. 29 When this woman was admitted to the hospital, it may not have been the emergency room physician’s most immediate concern as to whether the patient had an elevated blood alcohol level. Therefore, the physician may not have relied upon that elevated blood alcohol level in forming his or her diagnosis when rendering emergency treatment. The fact that the doctor may not have relied upon that particular blood test should not prohibit its introduction pursuant to section 90.803(6), 30 but rather that reliance or lack of reliance should be admissible on cross-examination to attack the credibility of the report. 31

In Love, there was apparently no physician to testify regarding his reliance on the blood alcohol tests and, in the absence of such testimony, the plaintiff’s objection was that the defendant did not list any witnesses who could document the chain of custody of the blood samples, the testing procedures, and the test results. 32 There was apparently no other grounds for objection established or set forth during the trial. 33 Again, and as the court noted, “gaps in the chain of custody or other uncertain circumstances in the administration or interpretation of a test result are ordinarily thought to go to the weight and credibility of the evidence, not its admissibility.” 34 However, for blood alcohol tests, the court makes an exception to the business records rule set forth in section 90.803(6) of the Florida Statutes. 35 Keeping in mind that the objection in this case was to the “chain of custody,” the court rendered the following ruling:

[We] now hold that when medical record entries are sought to be admitted under FEC [Florida Evidence Code] section 90.803(6), if properly challenged by the opponent with a sufficient showing that relates to the accuracy, reliability or trustworthiness of the entry, the trial court may in its discretion decline to admit them unless the proponent of the evidence lays the proper predicate for the entry. By a proper predicate, we mean evidence as to the drawing of the blood,

29. See Appellee’s Answer Brief at 4, Love (No. 89-3259).
31. See Love, 611 So. 2d at 1276 (citing Thomas v. Hogan, 308 F.2d 355, 361 (4th Cir. 1962)).
32. Id. at 1272.
33. Id.
34. Id. at 1276 (citing Thomas, 308 F.2d at 361).
35. Id.
Pursuant to this holding, in the absence of expert medical testimony, when challenging the trustworthiness of the document, an opponent of the medical record need only object to "chain of custody," or question the testing procedure, or any other aspect of the method of formulating the document sought to be introduced to place a severe hurdle in the path of the proponent of the document. Thereafter, the proponent would be required to produce the testimony of each person involved in the test procedure, from the nurse or technician who drew the blood, to the person interpreting the test. This is quite a heavy burden in light of the fact that section 90.803(6) of the Florida Statutes merely requires the testimony of a records custodian. Thus, at least in the Fourth District Court of Appeal, the business records exception has been severely limited in its application to the introduction of medical record evidence.

B. Love's Impact on the Trial Lawyer

A trial lawyer who anticipates the entry of certain medical records must prepare his or her pre-trial case adequately, and must list properly each person involved in the "chain of custody" in the pretrial witness list if the attorney intends to introduce such documents. Of course, this will increase the time and costs of preparation of a case involving medical records. If the case is a contingency fee case, and if it is document-intensive, these added requirements may affect an attorney's decision to take the case.

The case is currently on appeal to the Florida Supreme Court. As of the date of this article, the Appellant's Initial Brief has been filed with the Supreme Court of Florida.

III. Meeting the Threshold Requirement in Automobile Negligence Cases: The Easkold Decision

A. The Threshold Requirement

To recover damages for pain, suffering, or mental anguish arising from
the negligent operation of an automobile, section 627.737(2) of the Florida Statutes requires the plaintiff to prove that his or her pain, suffering, and mental anguish is the result of permanent injury. More specifically, section 627.737(2) states that such damages are appropriate only in the event that the injury or disease consists in whole or in part of:

(a) Significant and permanent loss of an important bodily function;
(b) Permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement;
(c) Significant and permanent scarring or disfigurement;
(d) Death.

The most common and controverted cases involve subsection (b), which concerns permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement. A determination of whether a party has sustained permanent injury within a reasonable degree of medical probability requires a medical diagnosis and, therefore, medical expert testimony in order to establish that such permanent injury does exist. Under these circumstances, parties typically present a battle of the experts. In such cases, it is no stretch of the imagination to understand that the jury is free to render its verdict upon the expert testimony that it deems the most credible. However, where the plaintiff establishes permanent injury within a reasonable degree of medical probability through uncontradicted expert testimony, may the jury disregard the expert testimony and find that the plaintiff has failed to meet the threshold requirement? Surprisingly, the answer may be yes.

B. The Easkold Decision

The Florida Supreme Court recently had an opportunity to consider this issue in the case of *Easkold v. Rhodes*. Following an automobile accident that occurred in July, 1988, the Rhodes' filed suit against Donna Easkold seeking damages as a result of Easkold's negligent operation of her automobile. The case was tried before a jury in 1990. To establish that she sustained a permanent injury as defined in section 627.737(2) of the

40. FLA. STAT. § 627.737(2) (Supp. 1992).
41. Id. (emphasis added).
42. 614 So. 2d 495 (Fla. 1993).
43. Id. at 495.
44. Id. at 496.
Florida Statutes, the plaintiff presented the depositions of three medical experts.\textsuperscript{45}

The first expert, an orthopedic surgeon, examined the plaintiff shortly after the accident.\textsuperscript{46} He testified that the plaintiff had sustained permanent injuries to her left knee, back, and neck and that such injuries were related to the automobile accident, since the plaintiff denied having any pre-existing injuries.\textsuperscript{47}

The second medical expert performed an independent medical examination ("IME") of the plaintiff.\textsuperscript{48} After taking a history from the plaintiff, wherein she essentially denied any prior injuries, the doctor performed an IME on Rhodes and testified that the plaintiff had sustained permanent injuries to her neck, lower back, and left knee as a result of the July, 1988, automobile accident.\textsuperscript{49}

The third and final physician was the plaintiff's "regular physician."\textsuperscript{50} This doctor's medical chart revealed that on several occasions between 1975 and 1986, prior to the July, 1988 automobile accident, the plaintiff had been examined by him for "various conditions, including numbness in her left leg and toes, pain in her back, numbness and pain on the left side of her head and neck, left leg pain, and pain in the ears and back."\textsuperscript{51}

The supreme court's opinion also indicates that the plaintiff had admitted to being injured prior to the accident after being "hit in the leg with a buffer," in the course of her employment.\textsuperscript{52} The defendant, Easkold, presented no medical testimony to contradict that which was presented by the plaintiff.\textsuperscript{53} Furthermore, the defendant did not establish that the information concerning the plaintiff's pre-existing injuries would have affected the physicians' medical opinions regarding the permanency of the plaintiff's injuries.\textsuperscript{54}

Following a jury trial, a verdict was rendered finding the defendant, Easkold, negligent and awarding the plaintiff, Rhodes, $37,000 for medical expenses, both past and future, and for loss of earning ability.\textsuperscript{55} The jury,
however, found that the plaintiff did not sustain permanent injuries as a result of the July, 1988 accident and, therefore, awarded no damages for pain and suffering.\(^{56}\) The verdict was reversed by the First District Court of Appeal upon the authority of \textit{Morey v. Harper}.\(^ {57}\)

In \textit{Morey}, the First District Court of Appeal considered a similar factual situation.\(^ {58}\) There, the plaintiff failed to disclose preexisting injuries to her medical experts, who testified at trial that the plaintiff sustained permanent injuries as a result of the accident.\(^ {59}\) The defendant presented no expert medical testimony to contradict or rebut the plaintiff’s evidence.\(^ {60}\) Further, neither of the plaintiff’s experts testified that the undisclosed information concerning preexisting injuries would have affected their opinion concerning the plaintiff’s permanent injuries.\(^ {61}\) Thus, the court found that the expert’s opinions were materially uncontradicted.\(^ {62}\) The court, in reversing the jury’s verdict that the plaintiff did not sustain permanent injuries, reasoned that since the determination as to what constitutes a permanent injury necessarily requires expert medical testimony, the jury cannot disregard the uncontradicted medical evidence.\(^ {63}\)

Without expressly overruling \textit{Morey}, the Florida Supreme Court in \textit{Easkold} concluded that “the jury is free to ‘accept or reject the testimony of a medical expert just as it may accept or reject that of any other expert.’”\(^ {64}\) However, the \textit{Easkold} court also recognized that a jury’s discretion in disregarding uncontroverted expert testimony is limited, as some basis for disregarding the evidence must appear in the record.\(^ {65}\) The court stated:

\begin{quote}
As we explained in \textit{Shaw}, “even though the facts testified to by [the medical expert] were not within the ordinary experience of the members of the jury, the jury was still free to determine their credibility and to
\end{quote}

\(^{56}\) \textit{Id.}
\(^{57}\) 541 So. 2d 1285 (Fla. 1st Dist. Ct. App.), \textit{review denied}, 551 So. 2d 461 (Fla. 1989).
\(^{58}\) \textit{Id.} at 1286.
\(^{59}\) \textit{Id.} at 1286-87.
\(^{60}\) \textit{Id.} at 1288.
\(^{61}\) \textit{Id.}
\(^{62}\) \textit{Morey}, 541 So. 2d at 1288.
\(^{63}\) \textit{Id.}
\(^{64}\) \textit{Easkold}, 614 So. 2d at 497 (quoting \textit{Shaw v. Puelo}, 159 So. 2d 641, 644 (Fla. 1964)).
\(^{65}\) \textit{Id.}
decide the weight to be ascribed to them in the face of conflicting lay evidence.\textsuperscript{66}

Thus, even though a plaintiff presents uncontradicted medical expert testimony establishing the threshold required by section 627.737 of the Florida Statutes, that testimony may not satisfy a jury that the plaintiff has sustained a permanent injury.

In \textit{Easkold}, the court held that the jury was "justified in determining that the opinion testimony was flawed by reason of the materially untruthful history given [to the doctors] by the claimant."\textsuperscript{67} The court reached this conclusion even though none of the medical experts testified that the information they had not been provided would have affected their opinion.\textsuperscript{68} Thus, the medical expert testimony was uncontroverted in this case.\textsuperscript{69}

While the Florida Supreme Court’s ruling in \textit{Easkold} may have provided a just result, one can only ponder the potential effects that this ruling may have on other cases in which a plaintiff fails to provide his doctor with information concerning prior injuries thought to be unconnected with the damages sought through the lawsuit. Under a strict interpretation of the \textit{Easkold} decision, it may be that a jury can disregard uncontroverted medical testimony that the plaintiff’s injury is permanent based solely upon an omission in the plaintiff’s history of injuries unconnected with those at issue and without the defendant having to present medical testimony in rebuttal.

C. \textit{Easkold’s Impact Upon the Trial Lawyer}

Pursuant to the Florida Supreme Court decision in \textit{Easkold}, it appears that while it is not within the province of a lay person to determine whether a party has sustained permanent injuries to a reasonable degree of medical probability, a jury has considerable discretion in either accepting or rejecting the required medical expert testimony.\textsuperscript{70} Therefore, apparently, it is no longer necessary in all automobile negligence cases to have a "battle of experts." If the defendant can establish some grounds from which a lay person could conclude that the jury should not accept the expert testimony

\begin{footnotes}
\item[66.] \textit{Id.} (quoting Shaw, 159 So. 2d at 644).
\item[67.] \textit{Id.} at 498 (citing Rhodes v. \textit{Easkold}, 588 So. 2d 267, 269 (Fla. 1st Dist. Ct. App. 1991) (Wolf, J., dissenting)).
\item[68.] \textit{Id.}
\item[69.] \textit{Easkold}, 614 So. 2d at 497.
\item[70.] \textit{Id.} at 498.
\end{footnotes}
of a physician, whether or not those grounds would affect the physician's opinion, then a jury verdict finding that the plaintiff failed to meet the threshold requirement will be permitted to stand, notwithstanding the lack of contradictory medical testimony.

In deciding whether to accept an automobile negligence case, in light of the *Easkold* decision, the attorney should consider a review of the potential client's medical records and should discuss those records with the plaintiff's physicians prior to accepting the case.

**IV. CONCLUSION**

While 1993 has seen no significant modification to the Florida Evidence Code, it as been a year of significant cases in the evidence arena. In *Love v. Garcia,* the Fourth District Court of Appeal rendered an opinion that significantly erodes the business records exception to the hearsay rule, at least in cases which are medical records intensive. The *Love* decision is one which both the plaintiff's lawyer, as well as the defense attorney, will want to keep an eye on as it is currently on appeal to the Florida Supreme Court.

In *Easkold v. Rhodes,* the Florida Supreme Court has given greater deference to the jury in an auto negligence case in determining whether a plaintiff has met the threshold requirement of permanent injury or scaring. *Easkold* apparently stands for the proposition that a jury may accept or reject the testimony of an expert witness, even though that expert's testimony is uncontradicted and unrebutted, just as the jury may do with any other witness.

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71. 611 So. 2d 1270 (Fla. 4th Dist. Ct. App.), *review granted*, 623 So. 2d 494 (Fla. 1993).
72. 614 So. 2d at 495.
Juvenile Law: 1993 Leading Cases and Significant
Developments in Florida Law

Michael J. Dale*

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I. INTRODUCTION

The Florida courts have recently made significant decisions on major
issues involving the rights of children. During the past year, the Kimberly
Mays¹ case in Sarasota and the Gregory K.² case in Orlando generated
national interest.³ In the Mays case, the trial court ruled that the fourteen-
year-old youngster's natural parents, Ernest and Regina Twigg, could have

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University, 1967; J.D., Boston College Law School, 1970. The author thanks Elizabeth
Zsakany for her assistance in the preparation of this article. This article will cover cases
decided through September 30, 1993.

1. Twigg v. Mays, No. 88-4489-CA-01, 1993 WL 330624 (Fla. 12th Cir. Ct. Aug. 18,
1993).
3. See Ellen Goodman, The Changing Form—and Often Conflicting Views—of the
no visitation with the child. An appeal is pending. In the Gregory K. case, Florida’s Fifth District Court of Appeal recently ruled on the procedural question of the youngster’s right to proceed on his own behalf in a termination of parental rights case. While the court found that he could not, it upheld the trial court’s decision to terminate parental rights on other grounds. The Gregory K. case is fully discussed later in this article.

These cases follow on the heels of several Florida Supreme Court decisions which demonstrate a pattern of attention to the rights of children. The supreme court cases include: Padgett v. Department of Health & Rehabilitative Services, which established the doctrine of prospective neglect; A.A. v. Rolle, which limited the use of secure detention for contempt; In re T.W., which supported a minor’s right to privacy in an abortion situation; and Hermanson v. State, which upheld the defense of religious practices against the charge of criminal child abuse.

The Florida appellate courts continued a tradition described in earlier survey articles in which they manifested assiduous attention to careful interpretation of Chapter 39 of the Florida Statutes (Florida’s Juvenile Code), and maintained a long standing policy of holding trial courts accountable for strict compliance with the mandates of Chapter 39.

This survey reviews the major case law for the past year, focusing on dependency, delinquency, and termination of parental rights cases, together with a detailed discussion of the Gregory K. case.

4. Mays, 1993 WL 330624, at *6; see also Mays v. Twigg, 543 So. 2d 241 (Fla. 2d Dist. Ct. App. 1989). The trial court, on remand from the Second District Court of Appeal, found that any forced visitation or contact between the Twiggs and Kimberly Mays would be detrimental to Kimberly, and therefore the Twiggs had no legal interest in or right to visit Kimberly Mays. Mays, 1993 WL 330624, at *6.

5. Kingsley, 623 So. 2d at 780.

6. See infra text accompanying notes 25-47.

7. 577 So. 2d 565 (Fla. 1991).

8. 604 So. 2d 813 (Fla. 1992).

9. 551 So. 2d 1186 (Fla. 1989).

10. 604 So. 2d 775 (Fla. 1992).

II. DEPENDENCY

A. Trial Issues

Issues of confidentiality in dependency proceedings, contrasting with the public’s right to know, continue to arise in proceedings in Florida. Last year’s Survey of Juvenile Law briefly discussed Department of Health & Rehabilitative Services v. A.N., a notorious case regularly covered by the South Florida media. In A.N., the parents and the guardian ad litem of A.N. agreed to allow the media full access to the dependency proceedings and records. The Department of Health & Rehabilitative Services (“HRS”) appealed. The Third District Court of Appeal concluded that Florida law does not prohibit a guardian ad litem from waiving the benefit of sections 39.411(3) and (4) of the Florida Statutes. The appellate court thus found that the circuit court was acting within its discretion when it decided that disclosure would correct speculation, rumor, or innuendo about the family that was the subject of the proceedings, as well as serve the best interests of

13. See, e.g., Liz Balmaseda, It’s Best to Settle Nogues Case for Children’s Sake, MIAMI HERALD, May 16, 1992, at 1B; Andres Viglucci, Dade Judge Recuses Himself From Tragic Child-Abuse Case, MIAMI HERALD, July 18, 1992, at 1B; Liz Balmaseda, Children Paying Highest Price As Case Drags On, MIAMI HERALD, Sept. 16, 1992, at 1B; Liz Balmaseda, A Mother’s Unwavering Commitment, MIAMI HERALD, Nov. 28, 1992, at 1B.
14. A.N., 604 So. 2d at 11. Section 39.411(3) of the Florida Statutes provides in relevant part:

All court records required by this part shall not be open to inspection by the public. All records shall be inspected only upon order of the court by persons deemed by the court to have a proper interest therein, except that, subject to the provisions of s. 63.162, a child and the parents or legal custodians of the child and their attorneys, law enforcement agencies, and the department and its designees shall always have the right to inspect and copy any official record pertaining to the child.

FLA. STAT. § 39.411(3) (1991). Section 39.411(4) provides in relevant part:

All information obtained pursuant to this part in the discharge of official duty by any judge, employee of the court, authorized agent of the department, correctional probation officer, or law enforcement agent shall be confidential and exempt from the provisions of s. 119.07(1) and shall not be disclosed to anyone other than the authorized personnel of the court, the department and its designees, correctional probation officers, law enforcement agents, and others entitled under this chapter to receive the information, except upon order of the court.

Id. § 39.411(4).
the children at the same time. As a result of this ruling, the case made front page news throughout the spring and summer of 1993.

A very different kind of confidentiality issue arose in Jett v. State. The defendant argued on appeal in this criminal case that he was denied the ability to question a psychotherapist and psychologist concerning their communications with the child victims whom he allegedly assaulted. The Fifth District Court of Appeal, sitting en banc, held that Florida Statutes section 415.512, which governs waivers of privileged communications, is available to an alleged perpetrator in a criminal case. The significance of the waiver is that it not only applies in any situation involving known or suspected child abuse or neglect (typically dependency proceedings), but also in any judicial proceeding relating to child abuse or neglect. The appellate court’s view was expansive in this regard by including criminal cases within the definition of judicial proceedings relating to child abuse and neglect.

The four dissenters argued that the section does not apply as extensively as the majority would allow. At the heart of the difference between the judges is the question of what particular effect an expansive waiver of privilege will have. For example, Judge Sharp, in his dissent, commented that children may not speak freely to therapists, resulting in the loss of diagnosis and treatment, whereas child abusers and rapists will benefit from the interpretation. Not discussed in the opinion is the question of balancing the child’s right to privacy and to privileged communication with medical providers against the criminal defendant’s right to confrontation.

The issue of standing in termination of parental rights cases was the subject of two recent appellate decisions. The first is the well-known Gregory K. case which is actually entitled Kingsley v. Kingsley.

15. A.N., 604 So. 2d at 11.  
18. Id. at 928.  
19. Id.  
20. See id.  
21. See id. at 929-33.  
22. Jett, 605 So. 2d at 930 (Sharp, J., dissenting).  
23. Kingsley, 623 So. 2d at 780.
second case is *In re C.G.* 24 In the Gregory K. case, the child appealed the trial court’s order denying the child’s motion for summary judgment regarding the applicable burden of proof. 25 The mother of the child also appealed, challenging the trial court’s order that terminated her parental rights and granted an adoption petition filed by the child’s foster parents. The case originated in June, 1992 when Gregory, then eleven years old, filed a petition for termination of parental rights in the juvenile division of the circuit court. His foster parents filed a separate complaint for declaration of rights and adoption in the civil division of the circuit court. The latter matter was transferred to the juvenile division. The trial court ruled that Gregory had standing to initiate the action for termination of parental rights. 26 Subsequent to the initial filings, which the trial court accepted, the court appointed one of the child’s attorneys as his attorney ad litem. 27 Thereafter, the child’s foster parents filed a petition for adoption. The foster father, the guardian ad litem, HRS, and the foster mother filed four additional petitions for termination of parental rights on the child’s behalf.

The matter proceeded to trial in September, 1992. Over the mother’s objection, the trial court simultaneously tried the termination of parental rights proceeding and the adoption proceeding. After the parties presented their evidence, the trial court orally terminated parental rights and proceeded immediately to grant the adoption petition, also from the bench. 28 It subsequently filed a *nunc pro tunc* written judgment.

The district court of appeal found first and emphatically that the child lacked the capacity to bring a termination of parental rights case himself. 29 Because Gregory was an unemancipated minor, he could not sue in his own right pursuant to Rule 1.210(b) of the Florida Rules of Civil Procedure. 30

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26. *Id.*
27. The trial court observed that the roles of guardian ad litem and attorney ad litem were distinct. *Id.*
28. *Id.* at 783.
29. *Id.*
30. *Kingsley*, 623 So. 2d at 783. Rule 1.210(b) of the Florida Rules of Civil Procedure provides:

   Infants or Incompetent Persons. When an infant or incompetent person has a representative, such as a guardian or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant.
The court held that representation by counsel in and of itself was not sufficient.\textsuperscript{31} Rather, a guardian ad litem or next friend must represent the child.\textsuperscript{32} According to Florida state law, which tracks the Federal Rules of Civil Procedure, a next friend can bring the suit with the minor as the real party in interest.\textsuperscript{33}

The appellate court recognized that within the dependency provisions of Chapter 39, a number of persons can commence a dependency or termination of parental rights proceeding.\textsuperscript{34} The court stated that an attorney may commence the proceeding by filing the termination petition; however, the attorney must do so as next friend of the child. The court concluded that the error made below in allowing Gregory to bring a termination of parental rights suit was procedural and not jurisdictional.\textsuperscript{35} Thus, the continuation of the proceedings through a next friend or guardian ad litem rectified the trial court's error and rendered it harmless.\textsuperscript{36}

Gregory and his foster father appealed, arguing that the burden of proof should be by a preponderance of the evidence and not a clear and convincing standard. They argued that the child had a fundamental liberty interest equal to that of the parent. Therefore, the standard of clear and convincing evidence should not apply when the action is brought on behalf of the child. The appellate court simply and expediently disposed of this incongruous argument in light of the 1982 United States Supreme Court ruling in \textit{Santosky v. Kramer},\textsuperscript{37} and held that the standard must be clear and convincing evidence as a matter of procedural due process.\textsuperscript{38}

\begin{itemize}
\item \textsuperscript{31} \textit{Kingsley}, 623 So. 2d at 784.
\item \textsuperscript{32} \textit{Id}.
\item \textsuperscript{33} \textit{Id}. The court defended the capacity to sue as being "the right to come into court which exists if one is free of general disability, such as infancy or insanity." \textit{Id}. at 783 (citing Earls v. King, 785 S.W.2d 741, 743 (Mo. Ct. App. 1990)); \textit{see also} FED. R. CIV. P. 17(c).
\item \textsuperscript{34} \textit{Kingsley}, 623 So. 2d at 784; \textit{see} FLA. STAT. § 39.461(1) (Supp. 1992); \textit{see also} Lupinek v. Firth, 619 So. 2d 379 (Fla. 5th Dist. Ct. App. 1993) (holding that a child's guardian ad litem has authority to file a petition to terminate parental rights).
\item \textsuperscript{35} \textit{Kingsley}, 623 So. 2d at 785.
\item \textsuperscript{36} \textit{Id}.
\item \textsuperscript{37} 455 U.S. 745 (1982). Among the problems with the child's (Gregory) argument is that it fails to take into account the situation that arises when the child wishes to remain with the parent and claims a protected liberty interest in staying with the natural parent. \textit{See, e.g.}, Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 846-47 (1977).
\item \textsuperscript{38} \textit{Kingsley}, 623 So. 2d at 785.
\end{itemize}
Finally, the court dealt with the natural mother's claim that the trial court erred in trying the termination of parental rights and adoption cases simultaneously, which violated her procedural due process rights. The court agreed and reversed the trial court's decision. The appellate court relied upon Rule 8.275(a) of the Florida Rules of Juvenile Procedure and section 39.473(3) of the Florida Statutes, both of which obviously contemplate trying the matters separately. The appellate court recognized that trying both matters together might cause "an impermissible comparison between the natural parent's parenting skills and those of the prospective parents," which is violative of the natural parent's fundamental interest in the care and custody of the child. However, because there was no emphasis on such comparisons at the trial level, the appellate court held that the error was harmless under the facts of the case. On the other hand, the appellate court found that the trial court was without subject matter jurisdiction to grant the foster parents' petition for adoption. According to the appellate court, this was reversible error, and the matter was remanded for further proceedings.

Chief Judge Harris concurred in part and dissented in part. He found the intermixing of the adoption proceeding with the termination case to be reversible error. He reasoned that mixing the issue in the adoption case, establishing the manifest best interests of the child, with the standard for termination of parental rights unfairly prejudiced the mother because the standard in the case at bar required that there be a finding of abandonment before the best interests of the child were taken into account. In his view, the trial strategy employed by the attorneys for the child caused the

39. Id.
40. Id. Rule 8.275(a) states:
   Termination of Parental Rights. The taking of an appeal shall operate as a
   supersedeas in cases involving a petition for termination of parental rights, but
   the child shall continue in the custody of the agency under the order until the
   appeal is decided.

FLA. R. JUV. P. 8.275(a). Section 39.473(3) of the Florida Statutes provides that:
[A] termination of parental rights order with placement of the child with a
licensed child-placing agency or the department for subsequent adoption shall
be suspended while the appeal is pending, but the child shall continue in custody
under the order until the appeal is decided.

41. Kingsley, 623 So. 2d at 788.
42. Id. at 789.
43. Id. at 792.
45. Kingsley, 623 So. 2d at 790.
trial court to fail to keep the two-step process separate. As Chief Judge Harris stated, "[c]learly the adoption testimony was presented along with the testimony relating to the termination proceedings when the only relevant issue was whether the mother's conduct justified termination." He also perceptively stated:

This rather ordinary termination of parental rights case was transformed into a cause celebre by artful representation and the glare of klieg lights. It is the judge's obligation, however, to look beyond the images created by light and shadow and concentrate on the real-life drama being played out on center stage. Florida recognizes no cause of action that permits a child to divorce his parents.

Contrasted with the notoriety of the Gregory K. case is In re C.G., another important opinion that deals with the issue of standing in the dependency area. In C.G., the adoptive parents of a child wished to intervene in a dependency proceeding involving the child's natural half sister and to become the foster parents of the half sister. The Fourth District Court of Appeal ruled that adoptive parents had standing to petition to intervene in the dependency proceeding. The court held that the adoptive parents of the half-sibling had standing to petition for modification of placement under section 39.41(1)(a)7 of the Florida Statutes. The appellate court read sections 39.41 and 30.45 of the Florida Statutes, together with section 63.022(1) of the Florida Adoption Act, to conclude that sibling groups should be kept together; thus, persons who have an interest in causing that to occur should be able to intervene. By interpreting the various statutes in combination, the court found that the Legislature had intended to allow such persons to participate in placement proceedings.

B. Appellate Issues

The Florida Supreme Court addressed two important issues of appellate
practice in dependency proceedings in late 1992. The question in In re E.H.\textsuperscript{53} was whether a parent is entitled to a belated appeal in a termination of parental rights case based upon the claim of ineffective assistance of counsel for failure to timely file the notice of appeal. In an opinion written by Justice McDonald, the court allowed the belated appeal, asserting that it was not deciding the case on precedent but rather "on the significant policy interest in ensuring that a parent and child are not separated without a thorough review of the merits of the case."\textsuperscript{54} In E.H., the mother’s lawyer had filed a notice of appeal one day after the deadline for filing appeals. The district court dismissed for lack of jurisdiction.\textsuperscript{55}

The Florida Supreme Court reasoned that Florida has a strong public policy of protecting parent/child relationships, that termination of parental rights permanently severs the relationship, and that the lawyer in the particular case had been appointed to represent the parent at both the trial and appellate levels.\textsuperscript{56} The court held that the mistake should not be imputed to the mother when the consequence was the permanent loss of the children.\textsuperscript{57} The court concluded that there were extenuating circumstances to allow the appeal.\textsuperscript{58}

The supreme court went to great lengths to justify the non-precedential value of its opinion. Nevertheless, it appears to have failed. By recognizing the significant public interest in allowing these appeals, it has set out a test of "exceptionality" wherein belated appeals will be allowed. Finally, the court ruled on the proper procedure for handling such appeals.\textsuperscript{59} It ruled that a petition for a writ of habeas corpus is the proper procedural vehicle for seeking the appeal, and that the petition should be filed with the trial court.\textsuperscript{60}

In its second opinion on appellate practice in dependency cases, Department of Health & Rehabilitative Services v. Honeycutt,\textsuperscript{61} the court defined limitations on appeals from non-final orders. Honeycutt involved an appeal by HRS from a trial court order in a dependency proceeding. The trial court had denied a motion to extend the time of shelter placement,
pending the completion of the adjudicatory hearing. HRS argued to the supreme court that a Chapter 39 child dependency proceeding falls within the definition of domestic relations matters for purposes of appeals from non-final orders under Florida Rule of Appellate Procedure 9.130(a)(3)(C)(i-ii). The supreme court held that dependency proceedings under Chapter 39 do not fall within the traditional definition of domestic relations matters. Although there is a concern for the expeditious resolution of child placement issues, the court was unwilling to expand the definition of domestic relations to include dependency proceedings. Oddly, it included as part of its rationale the fact that to expand the definition would place a severe burden on the case load of the district courts of appeal. This failure to open the doors of the appellate courts seems somewhat inconsistent given the supreme court’s clear interest in protecting children in substantive contexts.

In In re T.M., the First District Court of Appeal ruled on the question of what is a final order in a dependency proceeding. The father had appealed from an adjudicatory order reaffirming a prior dependency finding that had terminated his parental rights. He did not appeal from a subsequent disposition order in the same case, which reaffirmed the dependency adjudications and the termination of parental rights. The district court rejected HRS’ motion to dismiss the appeal. The court held that orders in Chapter 39 proceedings do not always fit neatly into the traditional categories of final and non-final orders. It held that the initial order of reaffirmation of dependency and termination of parental rights was sufficiently final on the question of the father’s parental rights to be appealable.

62. Id.
63. Id. at 597. Florida Rule of Appellate Procedure 9.130(a)(3)(C)(iii) states that reviews from final orders may be heard if they involve the “right to immediate monetary relief or child custody in domestic relations matters.” FLA. R. APP. P. 9.130(a)(3)(C)(iii).
64. Honeycutt, 609 So. 2d at 597.
65. Id.
68. Id.
69. Id.
C. Child Abuse Reporting Issues

Section 415.504 of the Florida Statutes governs mandatory reporting of abuse and neglect cases. The statute contains reporting requirements, establishes a central abuse registry and tracking system, and provides for due process protection for alleged perpetrators. Cases dealing with the reporting system regularly come before the appellate courts.

In A.S. v. Department of Health & Rehabilitative Services, the appellate court reversed a final order of HRS denying a request to expunge an individual's name from a confirmed report of child neglect. The Second District Court of Appeal determined that the facts agreed to by the parties did not constitute child abuse or neglect as defined by section 415.503 of the Florida Statutes. The court thus reversed on the facts. In dictum, however, it raised the much more serious question of the constitutionality of section 415.503(9)(e), which defines abuse or neglect for purposes of reporting to include the situation where "the parent or other person responsible for the child's welfare; . . . (e) [f]ails to provide the child with supervision or guardianship by specific acts or omissions of a serious nature requiring the intervention of the department or the court . . . ."

The court was unable to determine what words like "serious nature" or "requiring the intervention of the department or the court" mean. Similarly, the court stated that while it understood the term to mean more than "mere investigation of reports," it was nonetheless vague because the court was unable to determine what more was required. Lacking any definitive standards, the court would have held the statute unconstitutional.

73. 616 So. 2d 1202 (Fla. 2d Dist. Ct. App. 1993).
74. Id. at 1203.
75. Id. at 1207. Child abuse or neglect is defined by that section as, "[h]arm or threatened harm to a child's physical or mental health or welfare by the acts or omissions of a parent . . . ." Id. (citing FLA. STAT. § 415.503 (1991)).
76. Id. at 1206 (citing FLA. STAT. § 415.503(9)(e) (1991)).
77. A.S., 616 So. 2d at 1206.
78. Id.
as against a challenge to its facial validity. Because the issue was not raised, it reversed and remanded the case to the trial court.

III. DELINQUENCY

A. Detention Issues

Because substantial numbers of children are placed in secure detention in Florida, significant issues of the conditions of confinement as well as proper interpretation of the legislation related to detention arise. Cases involving detention regularly reach the appellate courts. In H.L. v. Woolsey, for example, a juvenile filed a petition for a writ of habeas corpus to challenge predispositional hearing detention on the grounds that the child failed to meet detention criteria and that detention was not indicated by the risk assessment instrument as required by Florida Statutes, sections 39.044(2) and 39.044(3). The appellate court rejected the child’s argument, determining that sections 39.044(2) and 39.044(5)(c), provisions not relied upon by the state, must be read to allow the trial court to detain a child for a limited time after adjudication but before a dispositional hearing is held. Without any explanation, the court simply cited to language in section 39.044(5)(c), which states:

No child shall be held in secure, nonsecure, or home detention care for more than 15 days following the entry of an order of adjudication

79. Id.
80. Id. at 1206-07. For more technical issues decided by the appellate courts this year, see R.M. v. Department of Health & Rehabilitative Services, 617 So. 2d 810 (Fla. 5th Dist. Ct. App. 1993) (holding that HRS must review the record of a hearing officer before rejecting the officer’s factual findings that support expunction of a child abuse report); E.V. v. Department of Health & Rehabilitative Services, 615 So. 2d 251 (Fla. 3d Dist. Ct. App. 1993) (holding that an imprisoned parent who refuses to sign papers to have a child placed in the care of a responsible adult because he legitimately questioned his paternity cannot be found to have abandoned a child under section 415.503(9)(d)); Kelly v. Department of Health & Rehabilitative Services, 610 So. 2d 1375 (Fla. 2d Dist. Ct. App. 1992) (holding that a conviction of child abuse without more is not conclusive proof as a matter of law that the alleged abuse actually took place).
83. 618 So. 2d 268 (Fla. 1st Dist. Ct. App. 1993).
84. Id. at 269.
unless an order of disposition pursuant to s. 39.054 has been entered by 
the court or unless a continuance, which shall not exceed 15 days, has 
been granted for cause.\textsuperscript{85}

Apparently, the appellate court was suggesting that the detention 
criteria do not apply during the fifteen day period after adjudication and 
before disposition. The court's argument seems to be that the earlier section 
does not apply. However, both provisions are contained within the larger 
sub-division entitled "Detention." More significantly, the grounds for 
detention contain no limitation. The court's opinion is, therefore, lacking 
an analytic foundation.

The issue of juvenile contempt continues to frustrate the Florida 
juvenile courts in light of the supreme court's decision in \textit{A.A. v. Rolle},\textsuperscript{86} 
in which the court limited the punishment for contempt by precluding secure 
detention facilities as a place to hold children for contempt. In \textit{M.L.B. v. 
State},\textsuperscript{87} the First District Court of Appeal held that a juvenile arraignment 
citation does not constitute a court order for purposes of holding a child in 
criminal contempt. The court concluded that the arraignment citation is not 
the same as a notice to appear, which is issued pursuant to Rule 8.045 of the 
Florida Rules of Juvenile Procedure.\textsuperscript{88} Because that document provides a 

\begin{itemize}
\item space for the child's signature and promise to appear in court at the
\item appointed time, it is thus enforceable.\textsuperscript{89}
\item Most significant to the court's ruling was the fact that there was no order for the child to violate because
\item there was never any way to prove that the child received notice.\textsuperscript{90}
\end{itemize}

In a separate detention-related case, \textit{C.J. v. Rolle},\textsuperscript{91} a juvenile brought 
a writ of habeas corpus claiming that he could not be held in detention 
under the detention statute. The child had been charged with a second 
degree felony while on release status after having been charged with a prior 
second degree felony. Pursuant to section 39.044(2)(d)3 of the Florida 
Statutes, a child may be held in secure detention when charged with a 
second degree felony involving a violation of Chapter 893 (the charge in the 

case at hand) and where he had already been detained or released and was 
awaiting final disposition of his case.\textsuperscript{92} The crucial issue was the defini-

\textsuperscript{85}. \textit{Id.} (citing \textsc{Fla. Stat.} § 39.044(5)(c) (1991)).
\textsuperscript{86}. 604 So. 2d 813 (Fla. 1992).
\textsuperscript{87}. 604 So. 2d 1257 (Fla. 1st Dist. Ct. App. 1992).
\textsuperscript{88}. \textit{Id.} at 1259-60.
\textsuperscript{89}. \textit{Id.} at 1259.
\textsuperscript{90}. \textit{Id.} at 1260.
\textsuperscript{91}. 608 So. 2d 117 (Fla. 3d Dist. Ct. App. 1992).
\textsuperscript{92}. \textit{Id.} at 118 (citing \textsc{Fla. Stat.} § 39.044(2)(d)(3) (1991)).
tion of the word *final* disposition. The child argued that final disposition meant a disposition hearing. The appellate court rejected this contention indicating that final disposition meant from the time of being charged with a crime to final disposition of the case. It therefore upheld the detention.

The appellate frustration with the *A.A. v. Rolle* case is further evidenced in *T.R.A. v. State*. In *T.R.A.*, a child contumaciously told the trial court judge to “screw off,” whereupon the judge placed the child in secure detention. Reluctantly relying on *Rolle*, the appellate court granted the petition but referred to Justice Overton’s dissent by suggesting that the Legislature overrule the supreme court opinion in *Rolle*.

B. **Appellate Issues**

The issue of the appealability of an order waiving juvenile jurisdiction and certifying a juvenile for trial as an adult came before the Fourth District Court of Appeal in *In re D.W.* The appellate court ruled that an order of involuntary waiver by the trial court is not a final order from which an appeal will lie. The court looked to the Florida Rules of Appellate Procedure. Although a petition for a common law writ of certiorari was a possibility, under the facts of the case, the court could find no essential departure from the law, nor irreparable harm from that final order, and no complete and adequate relief that would not result from the final order, so as to allow the interim order to be otherwise appealable.

In *State v. D.V.S.*, the state brought a petition for writ of certiorari challenging the trial court’s order that appointed the public defender to represent a juvenile in an appeal from a delinquency disposition. The state argued that the trial court had not obtained an affidavit of indigency from the child’s father. The trial court also failed to make a determination of probable expense and burden of defending the case as required by Florida Statutes sections 27.52 and 27.56. While the child and his mother filed affidavits of insolvency, the father did not file one. Nor was there any

93. *Id.*
94. *Id.* at 118-19.
95. *Id.* at 813.
96. *604 So. 2d* at 813.
98. *Id.* at 552.
99. *Id.*
100. *Id.*
indication that he refused to furnish necessary legal services. Thus, on the facts the appellate court reversed.\textsuperscript{102}

C. Dispositional Issues

The Florida Juvenile Justice Act,\textsuperscript{103} passed in 1990, provides a variety of dispositional alternatives that contain elements of rehabilitation, deterrence, and punishment. The dispositional alternatives include commitment to HRS and community control, which are known in most jurisdictions as probation and restitution. Interpreting the powers of the trial court in the dispositional context remains a focus for a substantial number of appellate court rulings.

A question of First Amendment freedom of religion arose recently in the second reported opinion in \textit{L.M v. State}.\textsuperscript{104} \textit{L.M} involved an appeal from a remand and subsequent decision by the trial court imposing a condition of community control that required the child to obey all lawful and reasonable demands of his mother including participation in church youth programs. In a split decision, the majority first held that it was not an improper delegation of judicial authority to L.M.'s mother to determine which particular programs or activities the child must attend.\textsuperscript{105} The court distinguished between complying with lawful demands of a probation officer delegated with judicial authority and requiring a child to obey parental directions.\textsuperscript{106} The court added that if the mother's demands were not lawful or were unreasonable, the matter could be decided when a dispute arose between the mother and child resulting in a violation of the condition.\textsuperscript{107}

The court also concluded that the condition requiring participation in church programs chosen by the parent did not violate the child's First Amendment right of free exercise of religion.\textsuperscript{108} The child argued that this order directly violated the appellate court's prior holding in \textit{L.M v. State}.\textsuperscript{109} The court appeared to skirt this issue by indicating that the

\textsuperscript{102} \textit{Id.} at 1164.
\textsuperscript{103} FLA. STAT. § 39.001(1) (1991).
\textsuperscript{104} 610 So. 2d 1314 (Fla. 1st Dist. Ct. App. 1992).
\textsuperscript{105} \textit{Id.} at 1317-18.
\textsuperscript{106} \textit{Id.} at 1318.
\textsuperscript{107} \textit{Id.}
\textsuperscript{108} \textit{Id.} at 1319.
\textsuperscript{109} \textit{L.M.}, 610 So. 2d at 1318. The prior holding in \textit{L.M v. State} held that an order requiring a juvenile placed under community control to submit to a course of religious instruction violates the First Amendment. \textit{L.M v. State}, 587 So. 2d 648, 649 (Fla. 1st Dist.
extent to which a court can or should have authority to enforce parental
directions when the child refuses to obey, as in the case of religious training,
need not be decided because that issue was not yet present. The court
appeared to avoid this issue, indicating that the extent of its authority to
enforce parental directions is limited to when the child refuses to obey the
parental order. In the L.M. v. State case, no violation had as yet oc-
curred. Thus, the issue of whether the condition of religious training
was violative of the youth's constitutional rights was not before the court.
The court determined that such community control provisions are presumptu-
atively valid and that it may decide this issue when raised by the child in
response to a violation of the community control petition. Judge Allen
dissented, finding that the court's ruling was a matter of a "game of
semantics to accomplish the very result which was disapproved in In re L.M.
v. State." Two other dispositional matters—restitution and specific written
findings—determining whether a child shall be treated as an adult or juvenile
for dispositional purposes, require brief analysis. Florida's provision for
restitution in juvenile delinquency cases has been the subject of substantial
appellate review based upon the generally inexplicable failure of the trial
courts to comply with the restitution requirements of Florida law. For
example, in C.S. v. State, the appellate court affirmed the adjudication
but vacated the restitution order on the grounds that the state had failed to
carry its burden of proving the amount of restitution. The state neglect-
ed to present testimony of a witness with knowledge of the amount of
damages in repairs or to present uncontested documentary evidence. Under

110. L.M., 610 So. 2d at 1319.
111. Id.
112. Id.
113. Id. (Allen, J., dissenting). Interestingly, neither the majority nor the dissent raised
the issues discussed by the United States Supreme Court in both Wisconsin v. Yoder, 406
U.S. 205 (1972) (the dissenting opinion by Justice Douglas specifically addresses childrens'
independent First Amendment rights to freedom of religion) and Tinker v. Des Moines Indep.
Community School District, 393 U.S. 503 (1969) (which dealt with the child's independent
First Amendment constitutional rights to freedom of religion and speech).
114. See FLA. STAT. § 39.052(3)(f) (1991); see also Michael J. Dale, Juvenile Law:
restitution cases).
116. Id. at 864.
the facts of the case, the state attorney simply stood up and advised the court of the amount involved. Incredibly, the trial court accepted this over the defense’s objection, but the appellate court vacated the order and remanded for a new restitution hearing.117

In F.A. v. State,118 the appellate court vacated the order because the trial court ordered restitution and payment for services of the public defender but failed to provide the appellant notice or an opportunity to be heard.119 The trial court also failed to make an inquiry as to the appellant’s ability to pay.120

In In re F.P.,121 the state’s attorney conceded error when the trial court ordered the appellant to pay $730 in restitution for losses caused by a burglary for which the appellant was not charged.122

In L.A.D. v. State,123 the mother of the child appealed from an order directing her to pay restitution in the event that the child failed to do so and ordering her to pay attorney’s fees for court appointed counsel.124 The state conceded that the victim’s damages were caused by a collision with the child’s car and were not in any way attributable to the child’s act of leaving the scene of the accident for which the child had been charged. Thus, the court vacated the portion of the order directing the mother to pay restitution. Further, the court reversed the assessment of the attorney’s fee lien because the mother was not afforded prior notice, nor notice of the right to a hearing to contest the amount.125

Finally, in In re B.S,126 the state again conceded. The appellate court modified the trial court’s order of restitution to provide that the children, because they were presently unemployed, would be obligated to begin paying restitution only upon obtaining earnings from employment that would permit them to comply with the condition.127

The inability of the trial courts to comply with state law is even more evident in the context of the requirement that the trial court make specific

117. Id.
118. 616 So. 2d 1092 (Fla. 4th Dist. Ct. App. 1993).
119. Id. at 1093.
120. Id.
121. 615 So. 2d 214 (Fla. 1st Dist. Ct. App. 1993).
122. Id.
123. 616 So. 2d 106 (Fla. 1st Dist. Ct. App.), review denied, 624 So. 2d 268 (Fla. 1993).
124. Id. at 107.
125. Id.
126. 616 So. 2d 1231 (Fla. 4th Dist. Ct. App. 1993).
127. Id.
written findings and reasons for the imposition of an adult sentence, as opposed to a juvenile sentence, pursuant to Florida Statutes, section 39.059(7)(d). Recent cases demonstrating the trial court's failure to do just this include Mathews v. State, Kelly v. State, Hill v. State, Trueblood v. State, Petithomme v. State, and Orange v. State. For years, this problem has reoccurred.

Similarly, trial courts regularly fail to determine whether there was a knowing and intelligent waiver of the child's right to findings under section 39.059(7). In the absence of such a knowing and intelligent waiver, it is reversible error for the trial court to impose adult sanctions on the youngster without making the required statutory findings.

The more difficult question is whether a child who enters a negotiated plea agreement that allows the court to consider the imposition of adult or juvenile sanctions necessarily waives his or her right to have the court make findings and give reasons for the imposition of adult sanctions. The supreme court held recently, in Pittman v. State, that without an intelligent and knowing waiver that is "manifest on the record," a youngster who enters a negotiated plea agreement does not waive any rights under section 39.111.

IV. FAMILIES AND CHILDREN IN NEED OF SERVICES

Part IV of Chapter 39 of the Florida Statutes was passed in 1987 and governs families in need of services and children in need of services. Its purpose is to provide families "with an array of services designed to

129. 614 So. 2d 1230 (Fla. 4th Dist. Ct. App. 1993).
130. 605 So. 2d 990 (Fla. 5th Dist. Ct. App. 1992).
134. 619 So. 2d 1033 (Fla. 3d Dist. Ct. App. 1993).
136. See Hill v. State, 596 So. 2d 1210, 1211 (Fla. 1st Dist. Ct. App. 1992) (reversing sentence for failure of record to reflect manifest waiver by juvenile or written findings of fact to support adult sanctions).
137. Pittman, 620 So. 2d at 1232.
preserve the unity and the integrity of their family." Prior to this year there had only been one reported opinion interpreting the statute since its passage in 1987. This year, a second reported opinion interpreted the statute.

In *Department of Health & Rehabilitative Services v. Superintendent of Schools for Seminole County*, the state welfare department appealed a trial court adjudication of a child in need of services, arguing that the school board lacked standing to commence a child in need of services proceeding. The school board had filed a petition alleging a second grader was chronically truant. The court rejected HRS's argument and relied upon Florida Statutes, section 232.19(3)(a), which provides that in the case of habitual truancy, the school administration may file a child in need of services complaint. HRS argued that the 1987 changes in Chapter 39, which created the child in need of services classification, preempted section 232.19(3). While recognizing that the coordination of the two laws "is certainly no model of clarity," the court held that the legislative intent was to have section 232 continue to be in force since the Legislature revised section 232 after the passage of the 1987 amendments to Chapter 39 governing children in need of services.

V. CONCLUSION

The appellate courts in Florida decided a number of important cases during the survey period. While the Gregory K. case may be more titillating to the public and the media than it is to practitioners, the intermediate appellate court's decision nonetheless clarifies some important procedural issues. In addition, the supreme court clarified some issues of appellate practice this year and the lower appellate courts continued to

141. 618 So. 2d 331 (Fla. 5th Dist. Ct. App. 1993).
142. Id. at 332-33. Section 232.19(3)(a) of the Florida Statutes provides in relevant part, "[i]n case a child becomes a habitual truant the school administration shall file with the circuit court a complaint alleging the facts and the child shall be dealt with as a child in need of services . . . ." FLA. STAT. § 232.19(3)(a) (1991).
143. Superintendent of Sch. for Seminole County, 618 So. 2d at 332.
144. Id. The decision is correct although the court's syntax isn't.
145. Id. at 332-33.
carefully interpret Chapter 39 and hold the trial courts responsible for strict compliance with the 1990 juvenile code.
Local Government: 1993 Survey of Florida Law

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I. INTRODUCTION

While Hurricane Andrew occupied much of South Florida’s attention during the survey period, with the exception of case law affecting elections held in the aftermath of such a natural disaster, the litigation it generated has yet to hit the appellate courts. Because of Florida’s burgeoning and unfettered growth over the past several decades, local government regulation for the protection of the health, safety, and welfare of its residents intensified. This article discusses decisions of the Florida courts, as well as a decision of the United States Supreme Court, during the survey period of

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July 1992 through July 1993. These decisions relate to increased regulation which impacts local governments in the area of election law, police powers, eminent domain, and sovereign immunity.

II. ELECTION LAW

In the aftermath of Hurricane Andrew, elections for state and local offices had not yet been held. Because of the impossibility of operating many of the polling places due to the destruction and devastation caused by Andrew, the Dade County Attorney’s Office sought an emergency injunction from the state circuit court in order to postpone the election, as well as to enjoin the state from announcing results of statewide races until Dade’s elections were held. On expedited appeal, the Florida Supreme Court affirmed the postponement of the election, but reversed enjoining the announcement of the results from the rest of the state.

III. POLICE POWERS

The ability of local governments to regulate through its police powers is frequently defined as that power of government, inherent in sovereignty, to provide for the public order, peace, health, safety, welfare, and morals. The police power enables a local government to regulate anything that it deems reasonably necessary and appropriate in the best interest of the public to secure not only the public order and peace, but for the prosperity, comfort, and quiet convenience of the general public.

A local government’s power to regulate through its police powers is also derived from the Florida Constitution. Non-charter counties have all the powers of self-government as provided by general or special state law. Non-charter counties may also enact ordinances that are not inconsistent with general or special law, but if such an ordinance conflicts with a municipal ordinance, the ordinance is not effective within the municipality.
to the extent that the ordinances conflict. On the other hand, charter counties have all the powers of local self-government not inconsistent with general or special law approved by the vote of the electors or enacted by their governing body. A charter county can designate in its charter which shall prevail in the event of conflict between county and municipal ordinances.

Under the Florida Constitution, a municipality may be established by charter, and is thereby granted the authority to “exercise any power for municipal purposes except as otherwise provided by law.” Although the powers residing in local governments are extensive, the courts are the final arbiters of what is the proper subject of the police powers, and whether the exercise of such power is within constitutional limits.

A. Public Health, Safety, and Welfare

Some important cases in the area of local government law arose out of the enactment of ordinances regulating adult oriented uses of land and inhibiting religious practice. Undoubtedly, one of the most interesting cases of the survey period arose out of the enactment of four ordinances by the City of Hialeah. The City of Hialeah attempted to prohibit, among other things, the unnecessary killing of animals in a public or private ritual or ceremony, unless the primary purpose was for consumption. The United States Supreme Court held that the ordinances were void because they were contrary to the principles of the Free Exercise Clause of the United States Constitution.

Although the city claimed that the purpose of the ordinances was to protect the public health and prevent cruelty to animals, the Court found that

7. Id.
8. Id. § 1(g).
9. Id.
10. FLA. CONST. art. VIII, § 2(a), (b).
11. 10 FLA. JUR. 2D Constitutional Law § 201 (1979).
12. See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2223 (1993). The following ordinances were enacted: (1) Ordinance 87-40 incorporates the Florida animal cruelty laws and punishes anyone who kills an animal unnecessarily or cruelly; (2) Ordinance 87-52 defines sacrifice and prohibits the possession or slaughter or sacrifice of an animal if killed in a ritual and where there is no intent to use the animal for food (the ordinance goes on to exempt licensed food establishments); (3) Ordinance 87-71 prohibits the sacrifice of animals; and, (4) Ordinance 87-52 defines the term “slaughter” and prohibits slaughtering animals outside areas zoned for slaughterhouses, but then exempts small numbers of hogs and/or cattle if exempt by state law. Id. at 2224.
13. Id. at 2231.
the ordinances were underinclusive to meet those ends in that they failed to
prohibit nonreligious conduct that endangered those same interests. The
Court determined that the city's only interest was to regulate conduct
motivated by religious belief and that:

A law burdening religious practice that is not neutral or not of general
application must undergo the most rigorous of scrutiny. To satisfy the
commands of the First Amendment, a law restrictive of religious
practice must advance 'interests of the highest order' and must be
narrowly tailored in pursuit of those interests.

The Court found that the ordinances were not narrowly tailored to
accomplish their purpose and held that all four of the ordinances were
overbroad or underinclusive because they were all aimed at limiting the
religious practices of the Santeria religion. In so holding, the Court
stated that the ordinances seek "not to effectuate the stated governmental
interests, but to suppress the conduct because of its religious motivation."
The Court went on to state that if the city's intent was to address the
improper disposal of animals, the city should have enacted an ordinance
regulating the disposal of organic garbage; however, the ordinances were
aimed at the sacrifice itself as the "harm to be prevented."

Any restrictions or regulations proffered by a local government must
be narrowly tailored to meet the required ends. When and if those
regulations infringe on constitutional rights, the courts may determine the
regulations to be of no force and effect.

In the area of regulation of adult-oriented uses, the courts have been
more deferential to local governments and the ability to regulate those uses
through their police powers in order to protect the health, safety, and
welfare of their residents.

14. Id. at 2232. The Court pointed out that the ordinances did not prohibit the killing
of fish, the extermination of mice and rats, nor the euthanasia of stray or abandoned animals
and was, therefore, underinclusive. Id.

15. Lukumi, 113 S. Ct. at 2233 (citing McDaniel v. Paty, 435 U.S. 628 (1978)).

16. Id. Santeria means "the way of the saints." The Santeria faith teaches that each
individual has a destiny that is handed down from God. In order to fulfill that destiny, one
needs the aid of the Orishas, which are spirits. The followers of Santeria believe the Orishas,
although powerful, are not immortal, and therefore require sacrifices for survival. Id.

17. Id. at 2229.

18. Id. at 2220.

19. See Lukumi, 113 S. Ct. at 2233.

20. Many local governments began enacting ordinances regulating the distance between
adult-oriented establishments and licensing (i.e. time, place, and manner) of adult-oriented
During the survey period, ordinances regulating adult-oriented establishments have withstood numerous challenges. For instance, in *T.J.R. Holding Co. v. Alachua County*, the owner of Cafe Risque sought to enjoin enforcement of an Alachua County ordinance that banned nudity and sexual conduct where alcoholic beverages were served. The challenge to the ordinance was based on the allegation that the ordinance affected the use of land and should have been enacted in accordance with section 125.66(6) of the Florida Statutes. The First District Court of Appeal determined that the ordinance was “intended to regulate . . . specifically described conduct within establishments serving alcoholic beverages” and did not affect the “owner’s ‘use of the land’ on which the establishment was located,” and therefore did not require the enactment to be in accordance with section 125.66(6).

In *T-Marc, Inc. v. Pinellas County*, the United States District Court for the Middle District of Florida upheld the validity of an ordinance that: (1) relied on the studies conducted by other cities; (2) required patrons and entertainers to maintain a three foot distance from each other; (3) implemented a one year amortization period; and, (4) established licensing and recordkeeping requirements. However, the court issued an injunction enjoining the enforcement of a provision requiring the disclosure of anything beyond the names, aliases, and dates of birth of employees of such an establishment.

uses in 1976, when the United States Supreme Court found that such ordinances were not violative of the Constitution of the United States so long as the ordinances were content-neutral and not aimed at suppressing any First Amendment rights. See Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976); see also Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986). But see FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990) (ordinance will not be upheld if unbridled discretion is given to licensing authority and there is no limit on the time within which the local government must issue the license).

22. *Id.* at 799. The ordinance was enacted as a general ordinance under Florida Statutes, section 125.66(1) and (2), with one public hearing. Florida Statutes, section 125.66(6), requires that any ordinance which affects the “use of land” must be adopted at two public hearings to be held approximately two weeks apart after 5:00 p.m. *Id.* at 800 n.1.
23. *Id.*
25. *Id.* at 1503.
26. *Id.* at 1506.
27. *Id.* at 1504.
28. *Id.* at 1505.
The court also stated conclusively that a city does not have to actually experience the detrimental effects it is attempting to avoid before regulating establishments which have nude entertainment, but “may rely on the secondary effects suffered by other cities.”

Due to the proliferation of adult-oriented establishments, local governments all across the United States will continue to enact ordinances regulating these establishments in order to attempt to diminish the secondary effects that consistently flow from such uses.

Recently, local governments have been regulating in the area of health warnings. In *Hillsborough County v. Florida Restaurant Ass'n*, the Second District Court of Appeal upheld the county’s enactment of an ordinance requiring vendors of alcoholic beverages to post health warning signs that included warnings about birth defects, addiction and intoxication, not drinking before driving or operating machinery, and not mixing alcohol with other drugs. A complaint for declaratory and injunctive relief was filed by the Florida Restaurant Association, a statewide association with 154 members in Hillsborough County, on behalf of thirty-seven members that serve alcoholic beverages on the premises of their public food establishments. On summary judgment, the trial court entered a permanent injunction finding the ordinance unconstitutional.

On appeal, the court addressed the issues raised by the county, such as standing, preemption (both express and implied), and inconsistency with general law. In determining that the Association had standing to challenge the ordinance, the court granted relief based on the three-prong test for standing enunciated in *Florida Home Builders Ass’n v. Department of Labor & Employment Security*. This test requires: (1) a substantial number of the association’s members, although not necessarily a majority, to be substantially affected by the challenged rule; (2) the subject matter of the rule to be within the association’s general scope of interest and activity; and,

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30. *Id.* at 1504.
31. Whereas clauses prefacing these ordinances cite the secondary effects as crime, drugs, prostitution, and the spread of communicable diseases.
34. *Id.* at 592.
35. *Id.* at 589.
36. *Id.* at 588.
37. *Id.* at 588-89 (citing *Florida Home Builders Ass’n v. Department of Labor & Employment Sec.*, 412 So. 2d 351 (Fla. 1982)).
(3) the relief requested to be the type appropriate for a trade association to receive on behalf of its members.\textsuperscript{38}

On the issue of express preemption, the court found that the state regulating scheme\textsuperscript{39} was not so pervasive that the county could not enact such an ordinance under its police powers and that there was no express preemption relating to consumer warning signs.\textsuperscript{40} Likewise, as to implied preemption, the court found that the state's interest in the conduct, management, and operation of the manufacturing, packaging, distribution, and sale of alcoholic beverages was not so pervasive as to preclude consumer warning signs.\textsuperscript{41} In determining there was no implied preemption, the court indicated that no danger of conflict existed between the action of the junior and senior legislative bodies and that the legislative scheme of the Florida statutes did not completely occupy the field.\textsuperscript{42}

The last argument asserted by the Association to be rejected by the court was that the county, pursuant to its charter, enacted an ordinance inconsistent with general law.\textsuperscript{43} The court applied the rationale in \textit{State ex rel. Dade County v. Brautigam}, where it was held that an ordinance is inconsistent with general law if it is "contradictory in the sense of legislative provisions which cannot coexist."\textsuperscript{44} The court found, after applying this rationale, that Hillsborough County's warnings were a proper exercise of the county's broad residual power of self-government granted to it by article VIII, section 1(g) of the Florida Constitution.\textsuperscript{45} Thus, it appears that regulations enacted pursuant to a local government's police powers will be upheld if a local government can show that it has a substantial interest in protecting its residents' health, safety, and welfare.

B. Land Use Regulation

The courts have faced many different issues in the domain of land use

\textsuperscript{38} \textit{Hillsborough County}, 603 So. 2d at 589 n.1.
\textsuperscript{39} See Fla. Stat. § 381.061(9) (1989). Subsequently, this section of the statute was repealed and the provisions transferred to section 381.0072. \textit{Hillsborough County}, 603 So. 2d at 590.
\textsuperscript{40} \textit{Hillsborough County}, 603 So. 2d at 589.
\textsuperscript{41} \textit{Id.} at 591.
\textsuperscript{42} \textit{Id.} (citing Tribune Co. v. Cannella, 458 So. 2d 1075, 1077 (Fla. 1984), \textit{appeal dismissed sub nom.} Desperte v. Tribune Co., 471 U.S. 1096 (1985)).
\textsuperscript{43} \textit{Id.} at 592.
\textsuperscript{44} \textit{Id.} at 591 (quoting \textit{State ex rel. Dade County v. Brautigam}, 224 So. 2d 688, 692 (Fla. 1969)).
\textsuperscript{45} \textit{Hillsborough County}, 603 So. 2d at 592.
regulation. These issues relate to granting variances, adopting comprehensive plans, interpreting zoning regulations, and determining whether land use issues should be resolved through quasi-judicial or legislative proceedings.

In *Herrera v. City of Miami*, the court concluded that the trial court erred in affirming the granting of a variance where there were no findings that, without the variance, it would be virtually impossible to use the land as it had been presently zoned. The property developer sought a variance from the City of Miami in order to construct a 100-unit federally sponsored project for the elderly. The appellants, owners of single-family residential properties located across the street, argued that the project would create overflow parking with "unsightly clutter and congestion." The city zoning ordinances provided for the granting of a variance under certain conditions. While the city staff and Zoning Board opposed the granting of the variance, the City Commission, in a three-to-two vote, rejected the staff's recommendation and reversed the denial of the variance. The circuit court, sitting in its appellate capacity, reviewed the record and found "there was competent and substantial evidence to support the City Commission's finding . . . ."

In reversing the circuit court's decision, the appellate court, with one judge dissenting, offered three reasons why the variance was inappropriate:

1. the petitioner for the variance [was] the developer; the landowner made no claim or demonstration of hardship; 2. the only argument of hardship was that the specific 100-unit federally sponsored project for the elderly might not qualify for financing without the variance; and (3) there was no showing whatever that the project could not be reduced in size to satisfy zoning conditions or that the land could not yield a reasonable return if used as authorized by present zoning restrictions for another project.

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46. 600 So. 2d 561 (Fla. 3d Dist. Ct. App. 1992).
47. *Id.* at 562-63.
48. *Id.* at 562.
49. Section 1901 of the City of Miami Zoning ordinance provides:
A variance is relaxation of the terms of the ordinance where such action not be contrary to the public interest and where, owing to conditions peculiar to the property and not the result of actions of the applicant, a literal enforcement of this ordinance would result in unnecessary and undue hardship on the property.
*Id.* at 563 n.1 (quoting MIAMI, FLA., CODE § 1901 (1992)).
50. *Herrera*, 600 So. 2d at 562.
51. *Id.*
52. *Id.* at 563.
Under existing land use case law, a variance seeker must demonstrate an exceptional and unique hardship to the individual landowner not shared by other property owners in the area, and a variance is not justified unless no reasonable use can be made of the land without the variance. Applying these principles, the court quashed the order granting the variance because the factual findings made by the circuit court for the record did not satisfy the legal requirements for a variance.

In another case, *Joynt v. Orange County*, the court concluded that the circuit court and the county’s Code Enforcement Board applied the wrong law in finding that the Joynts, doing business as “Don’s Auto Recycling Company,” violated the Orange County Zoning Code because access to their property was by “ingress and egress through a Residentially zoned area . . . .” The record of the code enforcement hearing showed that there was access to the property by an easement that the Joynts used for their vehicles, but that their customers, who brought scrap metal to the yard for recycling, were using the residential streets. The Fifth District Court of Appeal held that the circuit court erred in applying the code in this instance because the zoning code did not prohibit the use of residential streets, it only required industrial zoning to have access to a major street through nonresidential districts, and the facts indicated that access to a major street was available.

On a different note, several cases pertaining to comprehensive land use planning were decided in 1992. In *B & H Travel Corp. v. Department of Community Affairs*, the court held that the Department of Community Affairs acted within its discretion in finding the Town of Redington Beach’s comprehensive plan in compliance, notwithstanding the Town’s Local Planning Board’s failure to recommend the plan’s adoption to the City.

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53. Nance v. Town of Indialantic, 419 So. 2d 1041, 1041 (Fla. 1982).
55. *Herrera*, 600 So. 2d at 563.
56. 603 So. 2d 568 (Fla. 5th Dist. Ct. App. 1992).
57. Section 38-1004 of the Orange County Zoning Code provides: “Each I-4 general industrial district shall be located on a major street as designated on the major street plan of the county, or shall have access to a major street by a public street without passing through or alongside any residential district . . . .” *ld.* at 569 (quoting ORANGE COUNTY, FLA., CODE § 38-1004 (1992)).
58. *Id.* at 569-70.
59. *Id.*
60. *Id.* at 570.
61. 602 So. 2d 1362 (Fla. 1st Dist. Ct. App.), review denied, 613 So. 2d 1 (Fla. 1992).
Citing Florida Statutes, section 163.3184(9)(a), the court found that the plan "shall be determined to be in compliance if the . . . determination of compliance is fairly debatable." The standard applied by the court is a "deferential one that requires affirmance of the local government's action if reasonable persons could differ as to its propriety."

The court rejected the appellant's argument that "the planning board's failure to formally recommend the proposed plan to the Commissioners renders the plan finally adopted by that body inconsistent with Rule 9J-5.005(8)(b) & (c) [of the Florida Administrative Code] . . . because a plan must be 'consistent with' Rule 9J-5 in order to be in compliance with the [Growth Management] Act . . . ." The court found that there was a "de facto recommendation of the plan" because, in fact, the planning board and the public had an active role in the adoption process and "local government bodies 'often proceed in an informal, free-form manner.'"

One of the more important issues facing local governments in the area of land use is whether the site specific modifications to comprehensive plans, rezonings, and proposed site plans are quasi-judicial or legislative in nature. If such plans are quasi-judicial in nature, any determination of the governing body would have to be through hearings that afford all parties the opportunity to present evidence, take sworn testimony,

62. Id. at 1363.
63. Once the state land planning agency issues a notice of intent to find the comprehensive plan in compliance, then any affected person has 21 days from the date of publication to file a formal protest. Fla. Stat. § 163.3184(9)(a) (1991).
64. B & H Travel, 602 So. 2d at 1365.
65. Id. (quoting Environmental Coalition of Fla., Inc. v. Broward County, 586 So. 2d 1212, 1215 n.4 (Fla. 1st Dist. Ct. App. 1991)).
67. B & H Travel, 602 So. 2d at 1366 (quoting Leon County v. Parker, 566 So. 2d 1315 (Fla. 1st Dist. Ct. App. 1990)).
68. See City of Melbourne v. Puma, 616 So. 2d 190 (Fla. 5th Dist. Ct. App.), juris accepted, 624 So. 2d 264 (Fla. 1993) (holding that site specific amendments to a comprehensive plan are quasi-judicial).
69. See Snyder v. Board of County Comm'rs, 595 So. 2d 65, 74-75 (Fla. 5th Dist. Ct. App. 1991), juris accepted, 605 So. 2d 1262 (Fla. 1992) (holding that site specific rezonings are a quasi-judicial function).
70. See Park of Commerce v. City of Delray Beach, 606 So. 2d 633, 634 (Fla. 4th Dist. Ct. App. 1992) (holding that proposed site plans for development of owner's property are not legislative in nature).
and cross-examine witnesses. If the plans are legislative, then no formalized evidentiary proceedings would be necessary.

Until 1991, when the Fifth District Court of Appeal issued its opinion in *Snyder v. Board of County Commissioners*, most local governments in Florida made legislative determinations on whether to approve or reject site specific modifications to comprehensive plans, rezonings, and site plans. The *Snyder* decision, thus far, has led to disparate opinions among the district courts of appeal within the state. Therefore, the Florida Supreme Court's ruling in the next survey period will be significant.

C. Environmental Law

In some instances, the actions of one governmental body are challenged by another governmental body, especially when a location within its jurisdiction may be jeopardized. The Department of Environmental Regulation faced a number of challenges to its decisions affecting local governments. Two of those decisions, one affecting Dade County and another affecting Monroe County, are examined in this survey.

In one case, Metropolitan Dade County intervened in an administrative action in order to challenge the findings of a hearing officer of the Florida Department of Environmental Regulation ("DER"). In this instance, the hearing officer granted a dredge and fill permit to a developer in North Dade to expand an existing marina from 99 slips to 346 slips.

71. 595 So. 2d 65 (Fla. 5th Dist. Ct. App. 1991). The appellate court also adopted a higher standard of review that has never been a requirement in previous zoning cases. This higher standard forces a local government to substantiate its zoning determination by clear and convincing evidence. Therefore, supreme court approval of this higher standard could severely impact how a local government conducts its day-to-day activities. Moreover, if *Snyder* is read in conjunction with *Jennings v. Dade County*, 589 So. 2d 1337, 1341 (Fla. 3d Dist. Ct. App. 1991), which prohibits *ex parte* communications in quasi-judicial proceedings, applicants and residents will have limited access to their elected officials. In addition, those same applicants and residents will bear the burden of conducting costly quasi-judicial proceedings.

72. *See Lee County v. Sunbelt Equities*, 619 So. 2d 996, 1007 (Fla. 2d Dist. Ct. App. 1993) (holding site specific rezoning is quasi-judicial, requiring a local government to show by substantial competent evidence that the zoning was enacted in furtherance of some legitimate public purpose); *Board of County Comm’rs v. Monticello Drug Co.*, 619 So. 2d 361, 365 (Fla. 1st Dist. Ct. App. 1993) (rezoning is a legislative action which should be reviewed under the traditional "fairly debatable" standard of review).

73. *Snyder* was argued before the Florida Supreme Court in March of 1993.


75. Id. at 644-45.
In *Coscan*, DER and Coscan entered into a settlement stipulation requiring phased construction with specific conditions to protect water quality and the manatees. The county opposed the granting of the permit, stating that the terms of the stipulated settlement agreement would not protect the already degraded water quality and the granting of the permit violated section 403.918 of the Florida Statutes, which requires that (1) there be reasonable assurances that the water quality standards will not be violated, and (2) the project is not contrary to the public interest.

First, the applicant was required to show that the activities would not materially aggravate an existing problem. Second, the project could not be contrary to the public interest. In this instance, the court agreed with the county that because the settlement agreement stated the developer’s proposed system had only a “sufficient possibility of operating successfully,” the agreement was clearly not reasonable assurance as required by the statute which “contemplates . . . a substantial likelihood that the project be successfully implemented.”

The court also agreed with the county’s argument that the hearing officer failed to fully consider the significant impact the additional boat traffic from the expanded marina would have on manatees, since the project would bring boats into the marina across a manatee migratory area. In its analysis, the court found the hearing officer erred by applying the weaker federal standard rather than the more stringent state standard, which affords greater protection to endangered species in determining whether the project would adversely affect manatees.

In reversing and remanding the case, the court placed the burden on the applicant to “show entitlement to the permit” and suggested that the hearing officer failed to fully consider the significant impact the additional boat traffic from the expanded marina would have on manatees, since the project would bring boats into the marina across a manatee migratory area. In its analysis, the court found the hearing officer erred by applying the weaker federal standard rather than the more stringent state standard, which affords greater protection to endangered species in determining whether the project would adversely affect manatees.

In reversing and remanding the case, the court placed the burden on the applicant to “show entitlement to the permit” and suggested that the hearing officer failed to fully consider the significant impact the additional boat traffic from the expanded marina would have on manatees, since the project would bring boats into the marina across a manatee migratory area. In its analysis, the court found the hearing officer erred by applying the weaker federal standard rather than the more stringent state standard, which affords greater protection to endangered species in determining whether the project would adversely affect manatees.

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76. *Id.* at 645.
77. *Id.* at 646.
78. *Id.*
79. *Coscan*, 609 So. 2d at 646.
80. *Id.* at 648.
81. *Id.* at 649. The court, recognizing that the manatee is an endangered species, cited Florida Statutes, section 403.918(2)(a)(2) (requiring consideration be given as to “[w]hether the project will adversely affect the conservation of fish and wildlife, including endangered or threatened species or their habitats . . . .”). *Id.*
82. *Id.* at 650. The hearing officer relied on a “U.S. Fish and Wildlife Service report [which determined] that the project will not jeopardize the continued existence of the manatee” as “persuasive evidence that any incremental impact of the project on the manatee is acceptable.” *Coscan*, 609 So. 2d at 650 (emphasis added).
officer consider more stringent conditions to avoid further adverse impact to an already declining area.\(^\text{83}\)

In a different scenario, Monroe County challenged DER's denial of a permit to trim mangroves at the Key West International Airport in order to comply with Federal Aviation Administration regulations requiring "clear zones" adjacent to airport runways.\(^\text{84}\) The county filed an action for declaratory and injunctive relief, alleging that its actions were exempt under the Florida statute as a "governmental function."\(^\text{85}\) After the court granted the county's motion for temporary relief, DER entered into a stipulation with the county allowing it to trim the mangroves to the same extent as they had been trimmed previously.\(^\text{86}\) Subsequently, DER filed an answer and counterclaim, stating that the trimming by the county was "far in excess" of what was agreed upon and "what was required to protect the public safety," and further alleging that the wetlands had been filled without a permit as the county did not remove the mangrove cuttings in the wetlands.\(^\text{87}\)

The lower court granted summary judgment in favor of the county, finding the county was exempt from obtaining a dredge and fill permit as required by the statute.\(^\text{88}\) On appeal, the court agreed that the county is exempt from DER's jurisdiction when performing a governmental function;\(^\text{89}\) however, the court correctly found summary judgment improper since questions of fact had not been addressed by the lower court, specifically, whether the trimming was, in fact, accomplished in compliance with federal regulations or whether it was excessive; and whether the cuttings were placed on dry land as the county alleged or onto protected wetlands.\(^\text{90}\)

\(^{83}\) Id. at 650-51. The court suggested that limiting the marina expansion to sailboats might be a suitable alternative. Id. at 651.

\(^{84}\) State of Florida Dep't of Envtl. Regulation v. Monroe County, 610 So. 2d 697 (Fla. 3d Dist. Ct. App. 1992).

\(^{85}\) Id. at 698. Section 403.932(1) of the Florida Statutes permits the "alteration of mangrove trees by ... a federal, state, county, or municipal agency ..., when such alteration is done as a governmental function of such agency." FLA. STAT. § 403.932(1) (1991).

\(^{86}\) Monroe, 610 So. 2d at 698.

\(^{87}\) Id. DER asserted that the filling of wetlands without a permit was a violation of Florida Statutes, section 403.913(1). This section provides: "[N]o person shall dredge or fill ... without a permit ... unless exempted by [state] statute." Id.

\(^{88}\) Id.

\(^{89}\) Id.

\(^{90}\) Monroe, 610 So. 2d at 698-99.
IV. POWERS OF EMINENT DOMAIN

The power of eminent domain is "the power of a sovereign to take private property, or to authorize its taking, for a public use or purpose without the owner's consent, on the payment of just compensation." The power to take private property without compensation is limited by article I, section 9 of the Florida Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. The state, its agencies, and political subdivisions may exercise its power of eminent domain through powers derived from the Florida Constitution.

The power of eminent domain is clearly distinguishable from a local government's police power. Under the power of eminent domain, after payment of compensation, the physical possession and use of property is taken from a private owner for the use and benefit of the public or a public agency. Under the police powers, the government may destroy or regulate the use of private property in the interest of the public welfare without compensation.

In 1990, in the case of Joint Ventures, Inc. vs. Department of Transportation, the Florida Supreme Court held that Florida Statutes, section 337.241, which prohibited the construction of any improvements on future rights-of-way once a surveyed map of reservation was recorded, was simply a means of preventing increases in the cost of property earmarked for condemnation under the state's eminent domain powers. Consequently, the court invalidated the maps of reservation.

Since Joint Ventures, there has been much confusion among the district courts of appeal as to whether property owners with property inside the boundaries of the invalidated maps of reservation are entitled to per se declarations of taking and jury trials to determine just compensation.
More important for local governments, based on the holding in *Joint Ventures* invalidating the maps of reservation, is the Fourth District Court of Appeal's invalidation of Palm Beach County's thoroughfare map, which was created pursuant to the Local Government Comprehensive Planning and Land Development Regulation Act ("Growth Management Act"). The court found trafficways maps indistinguishable from the maps of reservation in *Joint Ventures*.

Palm Beach countered that trafficways maps are merely utilized as long-range planning tools and, historically, the ability of a community to plan for orderly development through the implementation of such regulations is within its police powers. Palm Beach asserted that, unlike *Joint Ventures*, the trafficways map does not involve a situation in which a property owner is prevented from selling or developing property.

The Fourth District Court of Appeal erred by applying the analysis used in *Joint Ventures*, since, in that case, once the property was surveyed and a map of reservation was recorded, the statute imposed a moratorium which, in effect, prevented a property owner from initiating any new construction or renovating an existing structure. However, a trafficways map is part of the planning process required not only as an element of the Growth Management Act, but as a common sense approach to efficient and systematic development. Because the preparation of a trafficways element is a requirement of the Growth Management Act, and not an issue

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99. Palm Beach County v. Wright, 612 So. 2d 709, 710 (Fla. 4th Dist. Ct. App. 1993).
101. Wright, 612 So. 2d at 710. The court, recognizing that the "decision passes on a question of great public importance," certified the question to the Florida Supreme Court whether 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* . . ." *Id.*
102. The Traffic Circulation Element is a required element set forth in the Florida Administrative Code:

[T]o establish the desired and projected transportation system in the jurisdiction and particularly to plan for future motorized and non-motorized traffic circulation systems . . . and . . . depicted on the proposed traffic circulation map or map series within the element.

FLA. ADMIN. CODE ANN. r. 9J-5.007 (1992).
of eminent domain, many local governments are concerned with the outcome of this case.

In a recent Broward County case, *Test v. Broward County*, 103 because the county did not condemn adjacent industrial or commercial properties, the plaintiffs challenged the county’s condemnation of their residential property in connection with expansion of the airport. The county presented evidence that while the property was not needed for immediate expansion, the county wanted to limit residential use of the property because of the noise problem. 104 In affirming the trial court’s order approving the condemnation, the Fourth District Court of Appeal held that the decision should not be disturbed on appeal if the “taking is supported by good faith considerations of cost, safety, environmental protection, and long-term planning.” 105

The court also determined that, pursuant to Florida Statutes, section 333.02, 106 certain types of activities would not be compatible with airport operations and would adversely affect residents within the vicinity of the airport. Since an incompatible use in a residential area is a raised noise level as defined by statute, 107 the court determined the condemnation was a valid public purpose that met the incompatible use test. 108

V. SOVEREIGN IMMUNITY

The doctrine of sovereign immunity arises out of the concept that “the king can do no wrong,” a concept which has never been completely accepted by the courts. 109 The doctrine of governmental immunity, which holds that a local government is not liable for some or all of its tortious acts is, more often than not, deemed to be contrary to the fundamental theory of

103. 616 So. 2d 111 (Fla. 4th Dist. Ct. App. 1993).
104. Id. at 113.
105. Id. (citing School Bd. of Broward County v. Viele, 459 So. 2d 354 (Fla. 4th Dist. Ct. App. 1984), review denied, 467 So. 2d 1000 (Fla. 1985)).
106. Section 333.02 provides that local governments can expend public funds to acquire land or property interests in the immediate vicinity of the airport when it is in the best interest of the public health, safety, and general welfare of its residents. FLA. STAT. § 333.02 (1991).
107. See id. Noise level defined in the statute exceeding “part 150” is incompatible as a residential use. Id. § 333.03(2)(c).
108. *Test*, 616 So. 2d at 114.
tort law that liability follows negligence, and that every person is entitled to a legal remedy for injuries incurred. In keeping with the spirit of the ideology of the constitution, that each person has a right to redress, the Florida Legislature enacted the Tort Claims Act, which waives sovereign immunity in tort actions on behalf of the state and its agencies or subdivisions. The Tort Claims Act permits a private individual to impose liability on the state, and its agencies and subdivisions, for tort claims, both negligent and intentional, if committed within the scope of the employee’s office or employment, but only to the extent permitted under the act. The following cases represent the distinct ways in which the appellate courts have applied the doctrine of sovereign immunity during the survey period.

In Birge v. City of Eagle Lake, the Second District Court of Appeal was asked whether damages could be assessed by the plaintiffs against the City of Eagle Lake. The facts indicated that sewage had backed up into the plaintiffs’ home when lightning struck the transformer that powered the city’s sewage pumping station. The plaintiffs alleged the city had a duty to install a warning system at the pumping station. The court, basing its decision on Trianon Park Condominium Ass’n v. City of Hialeah, held the city was not liable for failing

110. Id.
111. FLA. STAT. § 768.28 (1991) (effective July 1, 1974).
112. Id. Section 768.28 reads, in pertinent part:
(1) In accordance with s. 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act . . . .
(2) As used in this act, “state agencies or subdivisions” include the executive departments, the Legislature, the judicial branch . . . and the independent establishments of the state; counties and municipalities . . . .

113. Id. § 768.28(1).
114. 614 So. 2d 550 (Fla. 2d Dist. Ct. App.), review denied, 623 So. 2d 493 (Fla. 1993).
115. Id. at 551.
116. Id.
117. 468 So. 2d 912 (Fla. 1985). In this case, the district court certified the following question to the Florida Supreme Court, which answered in the negative:
Whether a governmental entity may be liable in tort to individual property owners for the negligent actions of its building inspectors in enforcing provisions of a building code enacted pursuant to the police powers vested in that governmental entity.

Id. at 914. In a lengthy opinion, the Florida Supreme Court clarified in what functions or activities a local government engages and placed the activities in four categories: “(I) legislative, permitting, licensing, and executive officer functions; (II) enforcement of laws and
to install the warning system because it is a judgmental, planning-level function for which no duty exists and which is, therefore, not actionable.\textsuperscript{118}

In another case, \textit{Nanz v. Southwest Florida Water Management District},\textsuperscript{119} the court took a different view of the provision of services to a resident by a local government. Southwest Florida Water Management District ("SWFWMD") issued permits to Hillsborough County for the construction and maintenance of a drainage system. Plaintiffs sued SWFWMD and Hillsborough County.\textsuperscript{120} The court dismissed SWFWMD, holding that it was immune from suit based on the Florida Statutes.\textsuperscript{121} However, the court held the county liable because, although the county had no duty to provide such a service, once it assumed such a responsibility, it had a duty to act with reasonable care.\textsuperscript{122}

The case of \textit{Hill v. City of North Miami Beach}\textsuperscript{123} addresses the issue of sovereign immunity in another context. In \textit{Hill}, the plaintiff went to a recreational facility owned by the city to play ping-pong with other people also visiting the park. When one of the games was over, the plaintiff asked another visitor at the park, Dailey, who lost the game, if he could have the paddle so that he could challenge the winner. Dailey, seemingly without provocation, attacked the plaintiff and broke his jaw.\textsuperscript{124}

The plaintiff sued the city, claiming the city owed a duty to invitees to keep the park safe from known dangerous conditions. The city’s records indicated that Dailey, a known troublemaker, previously attacked a park employee and had to be ejected by the police.\textsuperscript{125} The city stated it had no duty to protect the plaintiff; however, the court determined the opposite was true—the city did owe a duty to the plaintiff because, as a landowner, it has

\begin{footnotes}
118. \textit{Birge}, 614 So. 2d at 551.
119. 617 So. 2d 735 (Fla. 2d Dist. Ct. App. 1993).
120. \textit{id.}
121. \textit{id.} at 736; \textit{see also} \textit{Fla. Stat.} § 373.443 (1991). Section 373.443 provides, in pertinent part: "No action shall be brought against the state or district . . . for the recovery of damages caused by partial or total failure of any stormwater management system . . . by virtue of . . . approval of the permit for construction or alteration . . ." \textit{id.}
122. \textit{Nanz}, 617 So. 2d at 736.
123. 613 So. 2d 1356 (Fla. 3d Dist. Ct. App. 1993).
124. \textit{id.} at 1357.
125. \textit{id.}
\end{footnotes}
a duty to protect an invitee from criminal attack that is reasonably foreseeable.\textsuperscript{126}

In a personal injury case, \textit{Frawley v. City of Lake Worth},\textsuperscript{127} the plaintiff was injured when he was extricated from an overturned truck by a paramedic, and a police officer from another jurisdiction, who was on administrative assignment in the city in which the accident occurred. The lower court granted summary judgment in favor of the Village of Palm Springs, where the police officer was employed, based on the Good Samaritan Act which the Village asserted entitled it to immunity.\textsuperscript{128}

Because the police officer was acting in his individual capacity and not within the scope of his employment, the Village alleged it should not be held liable. The court agreed with the Village and determined the police officer did not have a duty to stop and render assistance and when he did so, "he was acting in his individual capacity and not within the scope of his employment . . . ."\textsuperscript{129}

VI. CONCLUSION—A LOOK TO THE FUTURE

The foregoing is just a sampling of case law that affected local government operations during this past year. Although there were no dramatic decisions during the survey period, the coming year should bring a final determination of the \textit{Snyder} and \textit{Palm Beach v. Wright} cases which, depending on the outcome, will undoubtedly impact day-to-day activities in the area of local government land use regulation.

\textsuperscript{126} \textit{Id.} at 1357-58.

\textsuperscript{127} 603 So. 2d 1327 (Fla. 4th Dist. Ct. App. 1993).

\textsuperscript{128} \textit{Id.} at 1327-28 (citing section 768.13(2)(a) of the Florida Statutes, which states that a person who "gratuitously and in good faith renders emergency care or treatment at the scene of an emergency" shall not be held liable. \textit{Fla. Stat.} § 768.13(2)(a) (1991)).

\textsuperscript{129} \textit{Frawley}, 603 So. 2d at 1329.
I. INTRODUCTION

Effective January 1, 1993, the Florida Legislature revised the law in Florida relating to negotiable instruments by replacing former Florida Statutes, chapter 673, with a new chapter 673 of the Florida Statutes,
entitled "Negotiable Instruments." Revised chapter 673 incorporates revised Article 3 of the Uniform Commercial Code within the Florida Statutes. Further, the law also amended, renumbered, and repealed parts of former chapter 674 of the Florida Statutes pertaining to bank deposits and collections ("amended chapter 674"), as well as various other Florida Uniform Commercial Code sections. Because the revisions apply to transactions entered on or after January 1, 1993, no Florida appellate court as of the time this article was submitted had interpreted the revisions. Moreover, there were no amendments to the revised chapters during the 1993 Florida Legislative Session.

II. BACKGROUND

The revisions to the Uniform Commercial Code were originally promulgated by the American Law Institute and the National Conference of Commissioners on Uniform State Laws in 1990 for adoption by the various states to modernize the law of negotiable instruments. The American Bar Association, as well as twenty-three states, including Florida, had approved the revisions by August 1993.

Former Article 3 of the Uniform Commercial Code on commercial paper and former Article 4 on bank deposits and collections were both drafted in the early 1950s, and were written largely for a paper-based system. These former sections were essentially a revision of the Uniform Negotiable Instruments Law. In turn, the Uniform Negotiable Instruments Law was based primarily upon the British Bill of Exchange Act of 1882, which was a codification of case law from the eighteenth and nineteenth centuries. Thus, former Articles 3 and 4 were very old law in substance, and were created when business transactions were fewer in number and often conducted on a face-to-face basis. No major revisions of either

2. FLA. STAT. §§ 673.101-673.805 (Supp. 1992) (repealed existing sections and created new sections within, designated parts to, and reitled Florida Statutes, chapter 673).
3. Id.
4. Id. §§ 674.101-674.504; chapter 674 incorporates Revised Article 4 of the Uniform Commercial Code within the Florida Statutes.
5. U.C.C. § 3 (1990).
6. States that have enacted the Article 3 and 4 Uniform Commercial Code Revisions as of the date this article was submitted include: Alaska, Arizona, Arkansas, California, Connecticut, Florida, Hawaii, Illinois, Indiana, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, Pennsylvania, Utah, Virginia, Washington, and Wyoming.
articles have been undertaken since their inceptions. Changes in technology, in business and financial practices, in federal responses to the consumer protection movement, and in interpretive ambiguities in the various sections of the existing law have created difficulties in the application of the original code. The revisions do not radically change the basic rules of negotiable instruments law contained in former Articles 3 and 4, but do modify that law in several significant respects. The revisions attempt to make the substance of both Article 3 and 4 more relevant to the way in which business is done today.

For example, former chapter 674 was prepared at the beginning of the automated processing for the collection of checks. As a result, banks and other institutions faced many problems that did not have clear answers under Florida law. An example is the Magnetic Ink Character Recognition ("MICR") process which is now in universal use. In this process, a check’s face amount is magnetically encoded so that it can be "read" by a computer. Often, banks were precluded from recovery if they made an error in the encoding processing. Revised chapter 674 accommodates the realities of the automated processing system to provide for encoding warranties to give banks a basis for recovery, and takes into account check truncation 7 in its scheme for distributing rights and liabilities.

The revisions also attempt to clarify the language and rules by removing ambiguous and confusing language found in former Article 3. An example is the deletion of the phrase "with whom the holder has not dealt" in section 673.3051(2) of the Florida Statutes which states the defenses of any party to the instrument from which a holder in due course took free. 8

Federal law, in some instances, preempts revised chapter 674 of the Florida Statutes. For example, the Competitive Equality Banking Act of 1987, 9 and Regulation CC, 10 control all aspects of the check collection system and supersede many state law check collection provisions.

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7. Check truncation refers to the process of check collection whereby items are not physically returned to the payor bank from the collecting bank.
10. Regulation CC of the Board of Governors of the Federal Reserve System, located at 12 C.F.R. § 229 (1990), implements the Expedited Funds Availability Act. The Expedited Funds Availability Act was passed by Congress in 1987 and is designed to limit the hold periods depositary banks can impose on customer accounts with respect to checks deposited in those accounts and grants the Federal Reserve Board extensive regulatory powers over any aspect of the payment system. See FLA. STAT. § 673.3051(2) (Supp. 1992).
This article addresses the revisions' impact on Florida law, and briefly discusses various details of their provisions and underlying policy.

III. SCOPE AND COVERAGE OF REVISIONS

Both former and revised chapter 673 cover negotiable instruments. The former chapter had no provision stating its scope, while revised chapter 673 affirmatively states that it applies to "negotiable instruments." Although they have many forms, there are only two types of negotiable instruments: drafts, which include checks, and notes, which include certificates of deposit. One of the aims that the drafters hoped to accomplish was to recognize that notes and drafts have different functions meriting different treatment.

Nearly all of the instruments that were negotiable remain negotiable under revised chapter 673, thus allowing the transferee of the negotiable instrument to become a holder in due course. However, a few items that were not negotiable under the former chapter will become so under the

11. Fla. Stat. § 673.1021(1) (Supp. 1992). The chief effect of an instrument being negotiable is that one who takes such paper for value, in good faith, and without notice that it is overdue, or contains an unauthorized signature or has been altered or that there is a claim or defense, becomes the owner of the paper free of the defenses and equities that exist between the original parties to the contract.


15. Id. § 673.3021. To become a holder in due course under section 673.3021 a party must meet a two-pronged requirement. First, an instrument, when issued or negotiated to the holder, must not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete so as to call it into question. Second, the holder must take the instrument for value, in good faith, and without notice of four matters: (a) that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series; (b) that the instrument contains an unauthorized signature or has been altered; (c) of any claim to the instrument described in section 673.3061 (which includes a right to rescind a negotiation); and (4) that any party has a defense or claim in recoupment described in section 673.3051(1). Id. A holder in due course is a super-plaintiff who takes the negotiable instrument free of most of the ordinary contract defenses and claims to that instrument. See id.
revision. In recent years, lenders have used notes containing variable interest rates to evidence their loans. Courts have held that these notes are not negotiable instruments because such notes are not considered to contain an unconditional promise to pay a sum certain, which is required in order for former chapter 673 to apply. As a result, banks and other holders of such instruments discovered that they could be subject to defenses to payment arising out of the transaction that generated the note, and about which the bank may know little. The revised section rejects this approach and allows variable interest rate notes to be considered promises to pay a sum certain and therefore negotiable. Under revised chapter 673 the requirement of a "fixed amount of money" applies only to the principal amount.

Under the former law, if a check lacked words of negotiability such as "order" or "bearer," there could be no holder in due course. Under the revision, the definition of a check deletes the provisions that it must be payable to "bearer" or to "order" and thus checks that omit words of negotiability are treated as fully negotiable. The rationale for this change is that it is good policy to treat checks, which are payment instruments, as negotiable instruments whether or not they contain words of negotiability, especially since these words are almost always preprinted on the check form. All other instruments, however, require words of negotiability.

Ordinary money orders now are classified in the revision as checks rather than bank obligations, so as to preserve the right to stop payment if the instrument is lost or there is a problem in the transaction. Therefore, in Florida, ordinary money orders are subject to dishonor, overruling Unger v. NCNB National Bank. Further, revised Florida Statutes, section 673.4111 improves the acceptability of bank obligations like cashier's checks and teller's checks as cash equivalents by discouraging wrongful dishonor of these items. Subsection three provides that if an obligated bank wrongfully refuses to pay, it may be liable for consequential damages.

22. 540 So. 2d 246, 247 (Fla. 4th Dist. Ct. App. 1989) (money orders are akin to cashier's checks and not subject to dishonor).
23. Section 673.1041(8), Florida Statutes defines a "teller's check" as a draft drawn by a bank and is usually drawn on another bank. FLA. STAT. § 673.1041(8) (Supp. 1992).
24. Id. § 673.4111(3).
One of the most important changes from existing law under revised section 673.1041 is that all non-negotiable instruments (other than checks) are excluded from chapter 673.25 Thus, a promise or order (other than a check) which includes a conspicuous statement that it is not negotiable or is not covered by chapter 673 will be excluded from this chapter. However, the official comments to revised section 673.1041 provide that parties to an instrument that are not included in chapter 673 may agree to apply its rules to their contract.26

A. Definitional Changes

The revisions make several significant changes in definitions. The first is “good faith.” Under former law, “good faith” was defined as “honesty in fact in the conduct or transaction concerned.”27 Revised chapter 673 redefines it, for both chapters 673 and 674 purposes, to include both honesty in fact and the observance of reasonable commercial standards of fair dealing.28 The latter phrase refers to the fairness of conduct, not the care with which an act is performed.29 Thus, the so-called pure heart, empty head test doctrine is displaced. The change brings the chapter 673 definition in accord with the prevailing standard under chapter 672—Sales with respect to merchants, which prevails in Article 2A—Leases, and which has been incorporated in Article 4A—Funds Transfers. The drafters provide no guidance for interpreting fairness of conduct or what might constitute reasonable commercial standards.

The definition of “ordinary care” is another change in the revisions. It is defined in amended chapter 674, without substantive change from former chapter 674, and is further defined in revised chapter 673 (and applicable to amended chapter 674) to mean

in the case of a person engaged in business, . . . observance of reasonable commercial standards, prevailing in the area in which the person is located, with respect to the business in which the person is engaged. In the case of a bank that takes an instrument for processing for collection or payment by automated means, reasonable commercial standards do not require the bank to examine the instrument if the failure to examine does not violate the bank’s prescribed procedures and

25. Id. § 673.102(1).
the bank's procedures do not vary unreasonably from general banking usage not disapproved by this chapter or chapter 674.\textsuperscript{30}

The latter phrase attempts to facilitate the automated processing of checks on a risk/benefit analysis, that is, it does not require signature review until the point at or just before which it is economically prudent to do so. Further, the revisions make the issue of ordinary care one of fact.

The definition of "bank" for purposes of chapters 673 and 674 is expanded to include savings banks, savings and loans associations, credit unions, and trust companies.\textsuperscript{31} The question of whether an institution is or is not a "bank" is an important one because it determines whether the institution is subject to the provisions of chapter 674. The aforementioned institutions had been omitted from the definition of a bank in the past because they had not been permitted to offer checking services and thus did not qualify under state or federal banking law as a bank. However, as a consequence of recent federal legislation, savings and loan associations, and other institutions are now engaged in the check collection process much like traditional banks. Moreover, with this new expanded definition of "bank," chapter 674 now conforms to Regulation CC\textsuperscript{32} which includes these institutions within the definition of banks.

IV. ACCORD AND SATISFACTION

Accord and satisfaction deals with an informal method of dispute resolution carried out by use of a negotiable instrument. In the typical case, there is a dispute concerning the amount that is owed on a claim. For example, if the drawer\textsuperscript{33} includes a legend on an instrument stating that payment of the check constitutes full satisfaction of the underlying obligation, the payee\textsuperscript{34} runs the risk that the drawer's obligation will be satisfied if it voluntarily cashes or presents the check and is paid. Many payees attempted to legend their indorsement with the words "reservation of rights" or "under protest" or "without prejudice" in an effort to counter the

\textsuperscript{30} FLA. STAT. § 673.1031(g) (Supp. 1992).
\textsuperscript{31} Id. §§ 673.1031(3), 674.104(2), 674.105(1); FLA. STAT. ANN. § 673.1031 cmt. 4 (West Supp. 1993).
\textsuperscript{33} A drawer is defined in section 673.1031(1)(c), as "a person who signs or is identified in a draft as a person ordering payment." FLA. STAT. § 673.1031(1)(c) (Supp. 1992).
\textsuperscript{34} The payee is the person to whom a draft or note is made payable.
drawer's "full payment" legend. Because the former law did not include specific language concerning accord and satisfaction, there was an enormous amount of confusion and litigation regarding the "full payment" checks. Many courts relied on the common law to hold that if the payee cashed the check, the consumer's obligation was satisfied. However, some courts have held that the language of former UCC section 1-207 supports the payee's argument that the debt was not discharged if the payee indicated he or she had taken the instrument under protest. Florida courts were split on this issue.\textsuperscript{35} Now, the revisions clarify the rules pertaining to accord and satisfaction.

First, as part of the revision of chapter 673, revised section 671.207 has been amended to add subsection two which provides that section 671.207 "does not apply to an accord and satisfaction."\textsuperscript{36} Second, the revisions add a section entitled "Accord and satisfaction by use of instrument."\textsuperscript{37} This section contains provisions concerning satisfaction of disputed claims through tendering of "instruments." It sets out the specific requirements that must be met for payment of an instrument to constitute accord and satisfaction.\textsuperscript{38} Thus, if the person seeking the accord and satisfaction proves that the requirements of subsection (a) are met and the "conspicuous" statements are given, the claim is discharged unless revised section 673.3111(3) applies. This subsection is intended to address the problems faced by entities that receive and process a large number of checks.\textsuperscript{39} Under subsection three such entities can avoid an inadvertent accord and satisfaction if they both notify the debtor that any full satisfaction check must be sent to a designated location, and are able to prove the instrument in question was not sent to that location.

V. Signatures by Agents

Under former law, if an agent failed to sign a note in a manner that fully disclosed both his representative capacity and the name of his principal, the agent could personally be liable even though the principal was not. The former law provided that no person is liable on an instrument

\textsuperscript{36} FLA. STAT. § 671.207(2) (Supp. 1992).
\textsuperscript{37} Id. § 673.3111.
\textsuperscript{38} Id. § 673.3111(1), (2).
\textsuperscript{39} Id. § 673.3111(3).
unless his or her signature appeared, which had been interpreted to mean that an undisclosed principal was not liable on a negotiable instrument. This was an exception to the general principle of agency law that binds an undisclosed principal on a contract. Revised section 673.4021 returns to general agency principles and states that "the represented person would be bound if the signature were on a simple contract." However, under 673.4021(2)(b) of this section, both the agent and the principal are liable on such an instrument to a holder in due course that took the instrument without notice that the agent was not intended to be liable on the instrument.

Subsection three, however, changes the law and provides that an agent who has signed an instrument without adequate indication of representative status may show that the parties did not intend individual liability. This rule is not effective against a holder in due course. Moreover, under subsection three, an authorized representative will not be personally liable, even if the signature does not indicate agency status as long as the check is drawn on the corporate account and the corporation is identified on the check. Therefore, in Florida, the agent does not have to disclose his or her capacity on a preprinted check bearing the principal’s name to avoid liability. Section 673.4031(2) makes it clear that a signature of an organization is considered unauthorized if more than one signature is required and a signature is missing.

VI. ALLOCATION OF LOSS

A. Comparative Negligence Standard is Adopted

A major issue in negotiable instruments law is the proper balance between imposing loss on the employer, drawer or maker, and imposing loss on third parties, including payor or depositary banks, for theft, forgery, and unauthorized signatures. Much of the former statute’s common theme was to allocate the loss to the party that was in the best position to avoid the

42. ld.
43. ld.
44. ld. § 673.4021(2)(b).
45. ld. § 673.4021(3).
46. FLA. STAT. ANN. § 673.4021(3) (West Supp. 1993).
47. ld. § 673.4031(2).
loss. However, determining which party is in the best position to prevent
the loss was a difficult and uncertain process, especially in complex fact-
sensitive settings. As a result, no provisions of the former law were more
heavily litigated than the fraud allocation rules, particularly with respect to
forged drawer’s signatures and forged indorsements. The revisions adopt
a balancing rationale to allocating loss. All parties in the payment and
collection process have a responsibility to exercise ordinary care. Failure
by any party to fulfill that responsibility should result in that party bearing
an appropriate share of the resulting loss. For instance, under the former
code, a payor bank, which in good faith paid a forged check, could shift the
loss to the customer if the customer’s “negligence” substantially contributed
to the forgery, unless the bank was contributorily negligent.48

The prior negligence preclusion rule, now phrased in terms of failure
to exercise ordinary care, is continued in revised section 673.4061(1).
However, contrary to the prior rule stated above, the negligence of a bank
will not prevent it from asserting the negligence of the customer that
substantially contributed to a forged signature or to an alteration. In the
case where both the bank’s customer and the bank are negligent, the loss
will be allocated proportionately according to the degree of failure of each
to exercise ordinary care.49 The intent of the drafters in moving to this
comparative fault is that it will reduce litigation and settlements will be
encouraged by parties who realize that the jury may find both the customer
and bank are both to blame in allowing the malefactor to succeed in his or
her wrongdoing.

B. Fraudulent Indorsements Made by Employees

Another policy issue that was unclear under the former statute is the
extent to which an employer, rather than a depositary or payor bank, should
bear the loss caused by a dishonest employee who misappropriates
negotiable instruments payable to, or drawn by, the employer. The revision
imposes more responsibility on the employer for employee wrongdoing than
former chapter 673. Former section 673.405 dealt only with certain limited
frauds practiced by dishonest employees of drawers. The former section did
not specifically address a situation where the malefactor is an employee not
of the drawer but instead, is employed by the payee.50 Fraudulent indorse-
ments by an employee of the payee are now effective under the revisions

49. FLA. STAT. ANN. § 673.4061(2) (West Supp. 1993).
against the payee as long as the employee had the requisite responsibility with respect to the instrument. Revised section 673.4051, titled “Employer’s responsibility for fraudulent indorsement by employee,” adopts the principle that the risk of loss for “responsible” employee fraud in connection with the employer’s checks should fall on the employer, because “the employer is in a far better position to avoid the loss by care in choosing employees, in supervising them, and in adopting other measures to prevent forged endorsement on instruments payable to the employer or fraud in the issuance of instruments in the name of the employer.”

Under this new statute, the loss is shifted to employers by making the endorsement of the employer’s name effective if made by an employee “entrusted . . . with responsibility with respect to the instrument.” The term “responsibility” is defined to include the authority to sign or indorse instruments, to process instruments received, to process or prepare instruments to be issued, to supply names or address of payees, to control the disposition of instruments or to act in a responsible capacity. Thus, if an employee, who has authority to process incoming checks for bookkeeping purposes, steals a check, forges his or her employer’s endorsement, and absconds with the proceeds, the employer is per se negligent and assigned the loss because it has been defrauded by a “responsible employee.” However, the revised statute allows the employer to “shift the loss to the bank” to the extent the bank’s failure to use ordinary care contributed to the loss.

C. Direct Suits on Forged Indorsements

Revised section 673.4201 clarifies several issues with respect to a forged indorsement. Under the former law, the owner of a check was denied the right to hold a depositary bank liable for conversion when it collected a check with a forged indorsement and paid the proceeds to a person not entitled to them. The revised section changes the law in this area by permitting the owner of an instrument to proceed in a direct action against either the depositary or payor bank on a forged indorsement. Thus, this section eliminates the requirement that the owner of the check

53. Id. § 673.4051(1)(c).
54. Id. § 673.4051(2).
bring multiple actions against the various payor banks and that those banks then assert warranty rights against the depositary bank.\textsuperscript{57}

However, a depositary bank is not subject to a direct suit by a drawer on a forged indorsement. Under former law the courts were divided on whether the drawer of a check with a forged indorsement could assert rights against a depositary bank that took the check.\textsuperscript{58} Revised section 673.4201 (1)(a) resolves the conflict by providing that the drawer of a check cannot sue the depositary bank in conversion, since the check represents the obligation of the drawer rather than the drawer's property.\textsuperscript{59} The drawer retains its remedy against the payor bank for recredit of the drawer's account based on unauthorized payment.\textsuperscript{60}

Moreover, the revised section clarifies the rights of the payee in a situation in which a thief steals or obtains possession of an instrument in an unauthorized manner and forges the payee's indorsement so the thief can obtain payment at a depositary or drawee bank.\textsuperscript{61} Section 673.4201(1)(b) provides that a payee who did not receive either direct delivery of the instrument or indirect delivery through an agent or co-payee may not bring an action for conversion. The rationale behind this is that until the payee has possession of the instrument, the instrument does not belong to the payee such that a conversion action is proper.\textsuperscript{62}

\section*{VII. Customer's Duty to Discover Unauthorized Signature or Alteration}

Revised section 674.406 extends duties to customers to examine their bank statements and to promptly report reasonably discoverable unauthorized signatures or alterations.\textsuperscript{63} Under former section 674.406, a bank normally sent its customers the statement of account accompanied by a paid or canceled check.\textsuperscript{64} After the bank made the statement and the checks available, the customers had a duty to discover any unauthorized signature

\begin{itemize}
\item \textsuperscript{57} See id.
\item \textsuperscript{58} Compare Jett v. Lewis State Bank, 277 So. 2d 37 (Fla. 1st Dist. Ct. App. 1973) (drawer has no basis for suit) with Wymore State Bank v. Johnson Int'l Co., 873 F.2d 1082 (8th Cir. 1989) (drawer may sue).
\item \textsuperscript{59} See Fla. Stat. § 673.4201(1)(a) (Supp. 1992).
\item \textsuperscript{60} See id. § 673.4201(3).
\item \textsuperscript{61} See id. § 673.4201(1)(b).
\item \textsuperscript{63} Fla. Stat. § 674.406(3) (Supp. 1992).
\item \textsuperscript{64} See Fla. Stat. § 674.406(1) (1991).
\end{itemize}
or alteration and promptly notify the bank of this discovery.\textsuperscript{65} To facilitate truncation and the existing state of technology, revised section 674.406 extends to the customer the responsibility to discover alterations and unauthorized signatures even when the customer only receives the statement and not the checks.\textsuperscript{66} However, the statement must contain "sufficient information" to allow the customer to reasonably identify the items paid.\textsuperscript{67} "Sufficient information" can be as little as information concerning the item number, amount, and date of payment.\textsuperscript{68} Thus, under this revised definition, a bank is not required to provide the customer with the name of the payee or the date the check was written. While this rule may appear fair on its face and may result in reduced processing costs for the bank, consumers may suffer. Many consumers do not keep meticulous records; if the consumer receives only the check number, amount, and date of payment, it may be difficult to determine whether a check has been misdirected to an improper payee or has been altered.

Revised section 674.406 changes the allocation of loss between the parties.\textsuperscript{69} Under former section 674.406, customers could be held responsible for an unauthorized signature if they failed to promptly examine the statement and checks, and such failure to examine and notify caused the loss.\textsuperscript{70} Under the former section, the customer would not be responsible if the customer successfully established that the bank failed to exercise ordinary care in paying the check.\textsuperscript{71} Under the revised Florida Uniform Commercial Code, if the customer fails to promptly notify the bank of "relevant facts," the customer not only must prove the bank failed to exercise ordinary care, but he or she also must prove that "the failure substantially contributed to the loss."\textsuperscript{72} Even if the customer provides the necessary proof, the bank may not bear the entire loss because revised section 674.406(5) provides a comparative negligence test for allocating loss between the customer and bank.\textsuperscript{73} However, this subsection also provides that if the customer proves the bank did not pay the check in good faith, the

\begin{footnotesize}
65. Id.
67. Id. § 674.406(1).
68. Id.
69. See id. § 674.406(4), (5).
71. Id. § 674.406(3).
73. Id.
\end{footnotesize}
The new definitions of good faith and ordinary care may also prove a major change in the operation of this section. Under former law, good faith was defined as "honesty in fact." The definition of "good faith" is expanded under revised section 673.1031(1)(d) to require both honesty in fact and "observance of reasonable commercial standards of fair dealing." The official comment to revised section 673.1031 attempts to clarify the meaning of observance of reasonable commercial standards of fair dealing by expressing concern for fairness of conduct rather than the care with which an act is performed. One must determine fair dealing "in light of reasonable commercial standards." The drafters provide no guidance for interpreting fairness of conduct or what might constitute reasonable commercial standards. This new definition of good faith, however, should impose a higher duty upon banks, and should benefit consumers by making it clear that banks have an obligation to observe objective standards of fairness and commercial reasonableness in handling consumer accounts.

The term "ordinary care" used in the revision specifically provides that sight examination by a payor bank is not required if its procedure is reasonable and is commonly followed by other comparable banks in the area. The official comment states the intent is to reject those cases that hold failure to use sight reviews constitutes lack of ordinary care as a matter of law. Therefore, this new provision for ordinary care under section 674.406 should benefit banks because the determination of whether a bank has failed to exercise ordinary care will now be left to the jury who will measure the bank's conduct against what its peers do in its market area. This section also increases the maximum time from fourteen days to thirty days for a customer to report successive forgeries or alterations. Further, revised section 674.406(2) states a new rule whereby a bank truncating

74. Id. § 674.406(5).
75. Id. § 673.1031(1)(d).
79. Id.
83. Id. § 674.406(4)(b).
checks must retain the item or have the capacity to furnish legible copies for seven years.\textsuperscript{84}

VIII. CONCLUSION

The amendments to Florida Statutes, chapters 673 and 674 should lower costs to banks by providing for modern technologies such as check truncation and automated processing. Further, the amendments should help provide certainty for the financial community and its users by removing the numerous ambiguities that existed in the former provisions. Moreover, by clarification of troublesome issues, and by the provisions of sections 673.4041 to 673.4061, which reform rules for allocation of loss from forgeries and alterations, the revisions should reduce litigation. Consumers receive some added protections and benefits from the revisions, including an expanded statutory obligation for banks to act in good faith. However, consumers will now be confronted with extra duties placed on them in connection with unauthorized signatures or alterations of checks.

\textsuperscript{84} Id. § 674.406(2).
I. INTRODUCTION

The Florida Supreme Court's adoption of amendments to the Rules of Professional Conduct from 1991 to date significantly impact the manner in which Florida lawyers practice the business of law. The scope of this article will address those amendments adopted by the Florida Supreme Court relating to chapter 4 of the Rules Regulating the Florida Bar, known as the Rules of Professional Conduct (the "Rules").

Reported cases during this same time period are replete with decisions imposing discipline on lawyers who deviate from these Rules. Because this article must be practically limited in its scope and length, it does not seek to review every appellate case affected by the Rules during the relevant time period. Rather, the author intends to review those cases that are particularly noteworthy for their unique (and sometimes outlandish) fact pattern, departure from historical interpretation of a particular Rule or, in some cases, for the precedent they set.

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II. AMENDMENTS TO THE FLORIDA BAR RULES OF PROFESSIONAL CONDUCT: 1991-1993

In 1991, the Florida Supreme Court ruled on The Florida Bar's petition for an amendment to the Rules relating to professional advertising.1 The court approved The Florida Bar's proposal to amend the Rules regulating advertising with some modifications.2 The decision was based on the doctrine first espoused in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,3 holding that commercial speech is protected by the First Amendment of the Constitution.4 This doctrine was subsequently adopted and made applicable to the practice of law by the United States Supreme Court in Bates v. State Bar.5 The Florida Supreme Court also adopted chapter 15 of the Rules, which created The Florida Bar's Standing Committee on Advertising.6 Prior to the decision, issues of professional advertising were addressed by The Florida Bar's Professional Ethics Committee.

The Florida Bar re: Amendment to Rules Regulating the Florida Bar7 approved a new rule, Rule 4-1.17, regarding the sale of a law practice. The supreme court adopted the Rule as proposed by The Florida Bar. The Rule delineates the procedures and restrictions for the sale of the practice.8 In the decision, other Rules were also amended.9

In re Amendments to Rules Regulating The Florida Bar—1-3.1(a) and Rules of Judicial Administration—2.065 (Legal Aid)10 is significant for its impact on members of The Florida Bar as well as for its giving substance to the message of Rule 4-6.1 Pro Bono Public Service. In this decision, the Supreme Court of Florida considered the recommendations contained in the Report of the Florida Bar/Florida Bar Foundation Joint Commission on the

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2. Id.
4. Id. at 770.
7. 605 So. 2d 252 (Fla. 1992).
8. Id. at 253, 342-44.
9. Id. at 253-54. Other rules that were amended include: Rule 4-5.4(a) Professional Independence of a Lawyer; Rule 4-5.6 Restrictions on Right to Practice; Rule 4-7.2(n) Advertising; Rule 4-7.5 Evaluation of Advertisements; and Rule 4-7.8 Lawyer Referral Services.
10. 598 So. 2d 41 (Fla. 1992).
Delivery of Legal Services to the Indigent in Florida ("Joint Commission"), filed March 21, 1991. Although the Joint Commission made thirty-one recommendations, the one controversy and subject of the supreme court’s ruling was Recommendation No. 24, entitled "Voluntary Pro Bono Legal Services." After a recitation of the importance of legal representation to the citizens of our state and the role of the lawyer in a free society as a vehicle for challenge to the constitution, the court recognized that to further this end, the underrepresented segments of our society must not only be represented by government paid lawyers, but by private lawyers as well. The court went on to approve Recommendation No. 24 with modifications as set forth in the decision. While the court in an earlier decision held that every lawyer in the State of Florida has an obligation to perform pro bono services, the 1992 decision reaffirmed the court’s reluctance to mandate pro bono services. Several elements of Recommendation No. 24 also directly relate to amending Rule 4-6.1 to incorporate the voluntary pro bono plan in detail.

As directed by the Florida Supreme Court, the Florida Bar Commission proposed pro bono rules and, in Amendments to Rules Regulating The Florida Bar—1-3.1(a) and Rules of Judicial Administration—2.065 (Legal Aid), the proposed rules were adopted by the supreme court, with modifications. Consistent with its previous ruling, the supreme court emphasized that "the rules are aspirational rather than mandatory, and the failure to meet the aspirational standards set forth in the rules will not constitute an offense subject to discipline." However, an attorney’s

11. Id. at 41.
12. Id.
13. Id. at 43.
14. Id.
15. In re Amendments to Rules Regulating The Fla. Bar—1-3.1(a) and Rules of Judicial Admin.—2.065 (Legal Aid), 573 So. 2d 800, 801 (Fla. 1990).
16. In re Amendments to Rules Regulating The Fla. Bar—1-3.1(a) and Rules of Judicial Admin.—2.065 (Legal Aid), 598 So. 2d 41, 47 (Fla. 1992). Both Chief Justice Barkett and Justice Kogan dissented with opinions favoring mandatory pro bono service. Justice Kogan’s dissent is especially noteworthy for its historical perspective. See id. at 55 (Kogan, J., dissenting).
17. Id. at 47.
18. Id. at 44.
20. Id.
21. Id.
failure to complete the report form provided for in the Rules will constitute an offense subject to discipline. As a result of this decision, Rule 4-6.1 was deleted and the new Rule 4-6.1 Pro Bono Public Service was adopted in its place. This decision also amended the Comments to Rule 4-6.2 and added Rule 4-6.5 Voluntary Pro Bono Plan. The reader is urged to review this historic and controversial decision in detail.

In The Florida Bar re: Amendments to Rules Regulating The Florida Bar, The Florida Bar and sixty individual practitioners petitioned the court to amend the Rules to include provisions relating to improper discrimination. The basis for the petition was the study conducted by the Florida Supreme Court Racial and Ethnic Bias Study Commission and the Florida Supreme Court Gender Bias Study Commission (together or singularly the “Bias Study Commission”). The Bias Study Commission found numerous problems faced by minorities and women in the legal profession. Based upon these findings, The Florida Bar and the individual petitioners jointly recommended to the court an amendment to Rule 4-8.4(d) to prohibit discriminatory practices by members of the Bar. In adopting the amendment to Rule 4-8.4(d), the court recognized that the proscribed conduct must be limited to the lawyers’ practice of law in order to “ensure that the First Amendment rights of lawyers are not unduly burdened.” The amendment to Rule 4-8.4(d) takes effect January 1, 1994.

The Florida Bar also petitioned for a new rule, Rule 4-8.7, and the individual petitioners submitted for consideration a new rule, Rule 4-8.4(h), the thrust of both such proposed rules being the prohibition of discriminato-

22. Id. The court stated that “accurate reporting is essential for evaluating this program and for determining what services are being provided under the program.” Id.
24. Id. at S352. Rule 4-6.5 authorizes and outlines the requirements and responsibilities in connection with the development of various Pro Bono Legal Service committees under Rule 4-6.5 of the Rules Regulating The Florida Bar. See id.; see also FLA. BAR R. PROF. CONDUCT 4-6.5 (1993).
25. 18 Fla. L. Weekly S393 (Fla. July 1, 1993).
26. Id.
27. Id.
28. Id.
29. Id.
employment practices by the lawyer.\textsuperscript{31} Both proposed rules were rejected by the supreme court on several grounds, including the court’s lack of jurisdiction over the subject matter of employment practices and the fact that both federal and state laws already provide for adequate protections and procedures relating to employment discrimination.\textsuperscript{32}

In \textit{The Florida Bar re: Amendments to Rules Regulating The Florida Bar},\textsuperscript{33} the supreme court adopted a new rule, Rule 3-4.8, which requires a member of The Florida Bar to respond to grievance investigations, subject to assertion by the attorney of the doctrine of privilege, immunity or disability, as applicable.\textsuperscript{34} The supreme court also approved a new rule, Rule 3-5.1(j), known as the Disciplinary Resignation Rule, which provides that an attorney may resign from The Florida Bar in lieu of defending against allegations of disciplinary violations.\textsuperscript{35} Further amendments to chapter 3 were made to conform the Rules to the Disciplinary Resignation Rule.\textsuperscript{36}

In the same decision, the supreme court adopted an amendment to Rule 4-7.2 Advertising with respect to disclosures to be contained within lawyer referral service advertisements.\textsuperscript{37} Also, Rule 4-8.4(g) was created to conform to the new Rule 3-4.8 as the former defines misconduct as a lawyer’s failure to respond in writing to disciplinary proceedings.\textsuperscript{38}

III. OVERVIEW OF CASE LAW

The following review of cases is by no means an exhaustive account of every reported case dealing with an ethical violation or with the interplay between the Rules and civil causes of action. This review is intended, however, to discuss those decisions that provide Florida lawyers with guidance as to ethical issues that commonly confront them in daily practice.

In Pressley v. Farley,\textsuperscript{39} the court affirmed previous decisions that held that a violation of the Rules of Professional Conduct does not create legal
duties on lawyers nor do they constitute negligence per se. 40 The court did state, however, that a violation of the Rules of Professional Conduct can be used as evidence of negligence. 41 In another case involving the interplay between professional negligence and the Rules of Professional Conduct, The Florida Bar v. Morse, 42 the supreme court, in affirming a referee’s recommended discipline against an attorney, stated that an attorney who participates in a scheme to hide his partner’s malpractice from their client is guilty of an ethical violation. 43 In addition, the opinion cautions that when an attorney discovers there has been malpractice committed, a conflict of interest arises and accordingly, the attorney must advise the client to seek other legal counsel. 44 The decision further instructs the lawyer to advise a client that malpractice has been committed by the lawyer or one within the lawyer’s firm. 45

In The Florida Bar v. Littman, 46 the court based its holding on a premise that is the converse of Pressley. In Littman, a disciplinary case, the supreme court reversed its long-standing line of demarcation between negligent conduct serving as the basis for a malpractice cause of action and as a basis for a disciplinary action under the Rules. 47 The supreme court questioned its previous decision of Littman in The Florida Bar v. Neale, 48 “in light of present public policy and the black letter rules adopted in 1987,” and found Littman guilty of a violation of Rule 4-1.1 based upon professional negligence. 49

In the Littman case, the attorney’s negligence was the failure to include an affidavit in his motion to change residential custody in a domestic

40. Id. at 161; Oberon Invs., N.V. v. Angel, Cohen & Rogovin, 492 So. 2d 1113, 1114 n.2 (Fla. 3d Dist. Ct. App. 1986), quashed on other grounds, 512 So. 2d 192 (Fla. 1987).
41. Pressley, 579 So. 2d at 161.
42. 587 So. 2d 1120 (Fla. 1991).
43. Id. at 1121.
44. Id.
45. Id.
46. 612 So. 2d 582 (Fla. 1993).
47. Id.
48. 384 So. 2d 1264 (Fla. 1980). In Neale, the court drew a line between negligence and violation of the then Code of Professional Responsibility on the basis that disciplinary action could not be used as a substitute for a malpractice action. Id. at 1265.
49. Littman, 612 So. 2d at 582 n.3. The current version of Rule 4-1.1 states: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.
FLA. BAR R. PROF. CONDUCT 4-1.1 (1993).
The client dismissed Littman, retained the services of another attorney, and obtained temporary custody of his daughter. Accordingly, the court noted that the negligent actions of Littman did not result in any real damages to his client. However, in finding that Littman was guilty of violating Rule 4-1.1, and given his prior disciplinary record, the court affirmed the referee's recommendation of a public reprimand. This case is especially noteworthy not only for its ruling, but also for the fact that the negligence of the attorney in question was minor in nature resulting in no real damage to the client, whereas, the previous Neale case involved an attorney whose negligent conduct resulted in irreparable damage to his client. While the Littman case was decided under different disciplinary guidelines than Neale, the Littman case is stunning, nonetheless, for its strict interpretation of Rule 4-1.1 and its willingness to impose discipline for conduct that, in a malpractice action, may not even yield the client an award for damages.

In Halberg v. W.M. Chanfrau, the court provided an interesting analysis of the application of Rule 4-1.5, the Rule relating to division of fees between lawyers of different firms. The court analyzed the language of a written fee referral agreement and provided insight into the enforceability of referral agreements based upon compliance with the Rule.

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50. Littman, 612 So. 2d at 582.
51. Id.
52. Id. at 583.
53. In a separate matter, the attorney failed to send copies of documents to opposing counsel before sending them to the trial judge and misrepresented factual matters resulting in a report of minor misconduct. Id. at 582 n.2.
54. Id. at 583.
55. Littman, 612 So. 2d at 583.
56. Neale, 384 So. 2d at 1265. In Neale, the attorney, Neale, misinterpreted a statute of limitations to be longer than it was, took a voluntary non-suit, and thus foreclosed his client's ability to refile the action. As referred to previously, the supreme court, however, declined to characterize this act of negligence as a disciplinary violation. Id.
57. The Neale case was decided based upon the previous Code of Professional Responsibility, disciplinary Rules 6-101(A)(2) and 6-101(A)(3), which stated, "[a] lawyer shall not: . . . (2) Handle a legal matter without preparation adequate in the circumstances. (3) Neglect a legal matter entrusted to him." Id. at 1264 n.1. However, it may be argued that there is little substantive distinction between the Rules under the former Code of Professional Responsibility and Rule 4-1.1, as both seek to address incompetent representation by a lawyer. See id.
58. Littman, 612 So. 2d at 583.
59. 613 So. 2d 600 (Fla. 5th Dist. Ct. App. 1993).
60. Id.
61. Id. at 602.
In *Halberg*, the referring attorney brought an action against the receiving attorney to recover fees. The circuit court granted summary judgment against the referring attorney. The district court reversed and remanded based upon its interpretation of Rule 4-1.5(g). The subject of the case was a written agreement that gave the referring attorney twenty-five percent (25%) and the receiving attorney seventy-five percent (75%) of the fees. In the lower court, the decision turned on an interpretation of this provision in light of the language of Rule 4-1.5(g)(1). Even though the attorneys' written agreement did not precisely track the language of Rule 4-1.5(g)(2)(a), the court decided that the referral agreement constituted a written agreement with the client where disclosure of the division of fees was made and that the language of the agreement was sufficient to prove that the referring attorney had assumed a legal responsibility for the representation of the client. Therefore, because the agreement fell within the purview of Rule 4-1.5(g)(2)(a), there was no requirement that the referring lawyer actually perform compensable legal services.

In *Lee v. Florida Department of Insurance & Treasurer*, the court adopted the rationale found in *Pressley* that a violation of the Rules of

62. Id. at 601.
63. Id. at 602.
64. Halberg, 613 So. 2d at 602. The current Rule 4-1.5(g) states:
Subject to the provisions of subdivision (f)(4)(D), a division of fee between lawyers who are not in the same firm may be made only if the total fee is reasonable and:
(1) the division is in proportion to the services performed by each lawyer; or
(2) by written agreement with the client:
(A) each lawyer assumes joint legal responsibility for the representation and agrees to be available for consultation with the client; and
(B) the agreement fully discloses that a division of fees will be made and the basis upon which the division of fees will be made.
FLA. BAR R. PROF. CONDUCT 4-1.5 (1993).
65. Halberg, 613 So. 2d at 601.
66. The controversial language in the agreement was as follows: “Provided, however, that said fees ‘may’ be readjusted between CHANFRAU & CHANFRAU and REFERRING ATTORNEY based upon the extent of time and services rendered or to be rendered to said client; . . .” Id. (emphasis added). The lower court interpreted the word “may” to mean “shall” and therefore concluded that the fee agreement was not enforceable because the evidence failed to establish that the referring attorney rendered any service to the client. Id. at 601-02.
67. Id.
68. Id.
Professional Conduct does not create any civil cause of action.\textsuperscript{70} In Lee, an appeal from an administrative order, the court disqualified an attorney representing the Florida Department of Insurance and Treasurer. This disqualification was based upon an agreement signed by the attorney’s former law firm that set forth that the firm could not represent the Department of Insurance against the petitioner, Lee.\textsuperscript{71}

The Department of Insurance argued that the restricting agreement was against public policy.\textsuperscript{72} The hearing officer in the administrative proceeding cited Rule 4-5.6 in support of the decision to deny the motion to disqualify counsel. The court stated that neither Rule 4-5.6\textsuperscript{73} nor any other Rule could be used as a basis for invalidating a private contractual provision.\textsuperscript{74} The court determined that the ethical issue was whether the attorney, who was a former associate of the law firm restricted in its representation of the Department of Insurance, could ethically (and legally) represent the Department in light of the presumptively valid agreement which prevented the law firm from disclosing any confidences it had learned from its client.\textsuperscript{75} This issue and its related concern is expressly recognized and supported by the Rules.\textsuperscript{76}

In rendering its decision, the court moved the focus of its rationale from Rule 4-5.6 to Rules 4-1.7, 4-1.9 and 4-1.10, all of which deal with client confidences and the obligations regarding such being imputed to any employee of a law firm.\textsuperscript{77} Accordingly, the court enforced the terms of the agreement based upon the clear intent of such agreement to prevent the use or disclosure of confidential information gained during the lawyer’s previous employment.\textsuperscript{78}

\textsuperscript{70.} Id. at 1188.
\textsuperscript{71.} Id. at 1187.
\textsuperscript{72.} Id.
\textsuperscript{73.} Presently, Rule 4-5.6 states:
A lawyer shall not participate in offering or making:
(a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or
(b) an agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a controversy between private parties.
\textsuperscript{FLA. BAR R. PROF. CONDUCT 4-5.6 (1993).}
\textsuperscript{74.} Lee, 586 So. 2d at 1188.
\textsuperscript{75.} Id.
\textsuperscript{76.} Id. at 1189 nn.4-5 (citing FLA. BAR R. PROF. CONDUCT 4-1.6, 4-1.9 (1990)).
\textsuperscript{77.} Id. at 1188-90.
\textsuperscript{78.} Id. at 1190.
In *Dean v. Dean*, the issue turned on whether an attorney-client relationship was established to permit the attorney to invoke the privilege provided by section 90.502 of the Florida Statutes. Recognizing that both section 90.502 and Rule 4-1.6 codify the common law rule of privilege, the court also considered Rule 4-1.6 in its ruling. Finding that an attorney-client relationship had been established, the court recited a historical review of the doctrine of privilege and the cases dealing with same. The court concluded that, notwithstanding that a fee was not paid

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80. *Id.* at 497. See also section 90.502 of the Florida Statutes, which currently provides in pertinent part:

(1) For purposes of this section:
(a) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.
(b) A "client" is any person, public officer, corporation, association, or other organization or entity, either public or private, who consults a lawyer with the purpose of obtaining legal services or who is rendered legal services by a lawyer.
(c) A "communication" between a lawyer and client is "confidential" if it is not intended to be disclosed to a third person other than:
   1. Those to whom disclosure is in furtherance of the rendition of legal services to the client.
   2. Those reasonably necessary for the transmission of the communication.


81. *Dean*, 607 So. 2d at 497 n.4. Rule 4-1.6 now sets forth in pertinent part:

(a) A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client consents after disclosure to the client.
(b) A lawyer shall reveal such information to the extent the lawyer believes necessary:
   (1) to prevent a client from committing a crime; or
   (2) to prevent a death or substantial bodily harm to another.
(c) A lawyer may reveal such information to the extent the lawyer believes necessary:
   (1) to serve the client's interest unless it is information the client specifically requires not to be disclosed;
   (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;
   (3) to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved;
   (4) to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
   (5) to comply with the Rules of Professional Conduct.

FLA. BAR R. PROF. CONDUCT 4-1.6 (1993).

82. *Dean*, 607 So. 2d at 496-99.
and that the attorney in question did not use normal procedures in opening a client file, an attorney-client relationship had been established.\textsuperscript{83} The existence of this relationship was based upon the evidence that the client sought out the attorney for legal advice and that the legal advice was sufficient to establish the relationship, regardless of whether there was a controversy or court proceeding.\textsuperscript{84}

While most practitioners would not countenance an uncooperative nature in responding to a grievance complaint, at least one attorney in 1992 did so and was disciplined as a result. In \textit{The Florida Bar v. Vaughn},\textsuperscript{85} Vaughn petitioned for a review of a referee’s finding of guilt and sanctions against him.\textsuperscript{86} It is interesting to note that the referee recommended that the attorney be found not guilty as to alleged violations of three substantive Rule violations, which were the initial subject of the disciplinary proceedings.\textsuperscript{87} However, because of the attorney’s lack of cooperation in the disciplinary proceedings, the referee found Vaughn guilty of a violation of Rule 4-8.1(b).\textsuperscript{88} Vaughn argued that unless the referee found him guilty of the substantive Rule violations, the Bar could not issue sanctions against him because of his failure to cooperate.\textsuperscript{89} Vaughn’s failure to cooperate included failing to respond to the Bar’s request to reply to the complaint, failing to appear at a hearing, failing to communicate with the Bar that he was involved in a criminal trial during the grievance hearing, and failing to appear in person for the Referee Trial.\textsuperscript{90}

\begin{itemize}
\item \textsuperscript{83} \textit{Id.}
\item \textsuperscript{84} \textit{Id.} at 499-500.
\item \textsuperscript{85} 608 So. 2d 18 (Fla. 1992).
\item \textsuperscript{86} \textit{Id.} at 18.
\item \textsuperscript{87} \textit{Id.} at 19.
\item \textsuperscript{88} \textit{Id.} Currently, Rule 4-8.1 states in pertinent part:
\begin{quote}
An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:
\end{quote}
\begin{quote}
(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 4-1.6.
\end{quote}
\item \textsuperscript{89} \textit{Vaughn}, 608 So. 2d at 19.
\item \textsuperscript{90} \textit{Id.} at 20. However, Vaughn did attend the hearing by telephone after he was contacted by the referee. \textit{Id.}
\end{itemize}
The *Vaughn* case was one of first impression as the court itself acknowledged. The court held that, based upon the evidence of a continuing pattern of not cooperating or participating in the disciplinary proceedings, Vaughn was guilty of a violation of Rule 4-8.1(b). The court did go on to note that the obligation to cooperate is subject to the guarantees of the Fifth Amendment of the United States Constitution, but if an attorney was going to use the Fifth Amendment as a reason for non-cooperation, then the attorney should do so by way of a response to the Bar’s inquiries. In expressing the opinion that an attorney has a “professional duty to respond courteously and to cooperate with a bar disciplinary proceeding,” the court supports the position that the integrity of the disciplinary proceedings mandates cooperation by the professional, which in turn furthers the public’s confidence in the self-regulation of the profession. The court did, however, reduce the discipline recommended by the referee from a suspension to a public reprimand.

Of course, Vaughn would have been cited for a violation of the new Rule 4-8.4(g) had the case been decided after the adoption of the new Rule on July 1, 1993. The adoption of the new Rule makes it unequivocal that failure to cooperate in disciplinary proceedings is a violation of the Rules.

There is perhaps no more fertile ground for ethical violations than the conflict-of-interest Rules. The temptation of representing more than one client in a transaction or more than one party in litigation is ever present for many practitioners and, then again, some practitioners are “knee-deep” in a conflict before it becomes apparent. The number of reported cases involving conflict issues bears out the fact that these issues are some of the most frequently litigated. These cases often deal with motions to disqualify opposing counsel, and may not invoke the Rules in the decision.

91. *Id.*
92. *Id.* at 21; see also *Fla. Bar R. Prof. Conduct* 4-8.1(b) (1993).
94. *Id.* at 21.
95. *Id.*
97. *Id.* 4-1.7 to 4-1.10 (1993).
98. *See, e.g.*, Spinelli v. Rodes-Roper-Love Ins. Agency, Inc., 613 So. 2d 504 (Fla. 5th Dist. Ct. App. 1993) (deciding that the law firm that caused the conflict resulting in its disqualification would not charge a former client for contesting such disqualification because the law firm itself caused the conflict by hiring a lawyer who had previously worked on the case for the opposing party); Bartholomew v. Bartholomew, 611 So. 2d 85 (Fla. 2d Dist. Ct. App. 1992) (focusing on the issue of when an attorney-client relationship is established for purposes of disqualification); General Elec. Real Estate Corp. v. S.A. Weisberg, Inc., 605 So.
However, in another case involving a motion to disqualify a law firm, *Birdsall v. Crowngap, Ltd.*, the court invoked Rule 4-1.10(b) in its decision, quashing the trial court's order, which denied the petitioner's Motion to Disqualify the respondent's law firm. The rationale of *Pressley v. Farley* is present in *Birdsall*, as the Rules were referred to for their guidance in the court's decision involving a civil action motion to disqualify an attorney. The *Birdsall* case is also interesting to note because the disqualified attorney was in fact isolated from his new law firm's representation of the party opposing his previous client. The court analyzed the "wall of isolation," also known as the "Chinese wall," exception contained in Rule 4-1.11(a), which deals with government attorneys, and the justification for the distinction between Rule 4-1.11(a) and Rule 4-1.10(b). The court, in following previous decisions, rejected the theory that the "Chinese wall" employed by the law firm in isolating the attorney from the action was adequate to prevent the disqualification.

2d 955 (Fla. 4th Dist. Ct. App. 1992) (deciding that an attorney cannot be disqualified based merely on an opponent's subjective thoughts that the attorney's firm had been representing him).


100. Rule 4-1.10 currently provides:

   When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 4-1.6 and 4-1.9(b) that is material to the matter.

**FLA. BAR R. PROF. CONDUCT 4-1.10 (1993).**


103. *Birdsall*, 575 So. 2d 232.

104. Rule 4-1.11 presently states:

A lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue to represent in such a matter unless:

1. the disqualified lawyer is screened from participation in the matter and is directly apportioned no part of the fee therefrom; and
2. written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

**FLA. BAR R. PROF. CONDUCT 4-1.11(a) (1993).**

105. *Birdsall*, 575 So. 2d 232.

106. *Id.*
The decision is also consistent with the comment to Rule 4-1.10, which indicates that application of the Rule must be based on a "functional analysis" involving issues of confidentiality and adverse positions.\textsuperscript{107}

Another case in which the court analyzed whether a law firm acquired confidential information from a new attorney who represented an opposing party in the same case is \textit{Nissan Motor Corp. v. Orozco.}\textsuperscript{108} In \textit{Nissan}, the appellate court denied the defendant's petition for certiorari and, in so doing, deferred to the circuit court's factual determination that the lawyer's firm did not acquire confidential information from his former law firm's client that would in turn be imputed to the balance of the lawyer's new firm.\textsuperscript{109}

After a careful analysis of the distinctions between Rule 4-1.9\textsuperscript{110} and Rule 4-1.10,\textsuperscript{111} the court concluded that the irrebuttable presumption that confidences are disclosed to an attorney during the course of the attorney-client relationship is applicable only to Rule 4-1.9 and is not applicable to Rule 4-1.10, which deals with imputed disqualification.\textsuperscript{112} The analysis in \textit{Nissan} is consistent with both \textit{Birdsall} and the comment to Rule 4-1.10.\textsuperscript{113}

In \textit{The Florida Bar re Advisory Opinion—Nonlawyer Preparation of Living Trusts},\textsuperscript{114} the Florida Supreme Court addressed an unauthorized practice of law issue involving corporations and non-lawyers who draft

\textsuperscript{107} \textit{FLA. BAR R. PROF. CONDUCT 4-1.10 cmt. (1993).}

\textsuperscript{108} 595 So. 2d 240 (Fla. 4th Dist. Ct. App.), \textit{review denied}, 605 So. 2d 1265 (Fla. 1992).

\textsuperscript{109} \textit{Id. at 241.}

\textsuperscript{110} Rule 4-1.9 now provides:

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or substantially related matter in which that person's interest are materially adverse to the interests of the former client unless the former client consents after consultation; or

(b) use information relating to the representation to the disadvantage of the former client except as Rule 4-1.6 would permit with respect to a client or when information has become generally known.

\textit{FLA. BAR R. PROF. CONDUCT 4-1.9 (1993).}

\textsuperscript{111} In its present form, Rule 4-1.10 discusses the following topics: (a) "Imputed Disqualification of All Lawyers in Firm;" (b) "Former Clients of Newly Associated Lawyer;" (c) "Representing Interests Adverse to Clients of Formerly Associated Lawyer;" and (d) "Waiver of Conflict." \textit{FLA. BAR R. PROF. CONDUCT 4-1.10 (1993).}

\textsuperscript{112} \textit{Nissan Motor Corp.}, 595 So. 2d at 242.

\textsuperscript{113} The comment recognizes and dismisses a per se rule of disqualification of a law firm in the instances when lawyers move between firms, recognizing that the court must analyze the issues of imputed disqualification based upon the facts of each case. \textit{FLA. BAR R. PROF. CONDUCT 4-1.10 cmt. (1993)}

\textsuperscript{114} 613 So. 2d 426 (Fla. 1992).
living trusts. The court recognized that a lawyer who works for the corporation selling the living trusts may have an inherent conflict of interest based on Rule 4-1.7(b) and Rule 4-1.8(f). Accordingly, the court admonished that any lawyer who reviews, oversees the execution of, and funds a living trust document should be independent counsel paid by the client for whom the trust is prepared and not employed by the corporation seeking to sell the living trusts.

In *The Florida Bar v. Kramer*, the Florida Bar brought a disciplinary proceeding against an attorney who had loaned his client money to conclude a purchase at a foreclosure sale. Rather than securing the loan with a note and mortgage on the property, the attorney had the client execute a deed. The attorney failed to advise the client of the nature of the transaction, the client possessed only a limited reading ability and, further, the client thought that he was giving his attorney a mortgage, not a deed. The court held that the attorney had violated Rules 4-1.7(b), 4-1.7(c) and 4-1.8(a) and issued a public reprimand. *Kramer* is important for its lesson to practitioners that any business dealing between a lawyer and the lawyer’s client is inherently subject to conflict-of-interest problems, notwithstanding the integrity and best intentions of the lawyer in dealing with the client.

Perhaps the most telling example of a strict interpretation of the Rules is found in *The Florida Bar v. Belleville*. In this case, Belleville was the only attorney in a business transaction between his client and another individual, Mr. Cowan, who was an elderly man with little education. Belleville’s client retained him to close on an agreement for the purchase of property owned by Mr. Cowan. It was undisputed that the terms of the

115. Id. at 428. The current version of Rule 4-1.7 proscribes the duty of lawyers to avoid limitations on their independent professional judgment. FLA. BAR R. PROF. CONDUCT 4-1.7(b) (1993). Rule 4-1.8 dictates the conditions under which a lawyer is permitted to accept compensation for one other than the client. Id. 4-1.8(f).

116. The Fla. Bar re Advisory Opinion—Nonlawyer Preparation of Living Trusts, 613 So. 2d at 428; see also Jenkins v. Harris Ins., Inc., 572 So. 2d 1011 (Fla. 1st Dist. Ct. App. 1991) (providing a basic analysis of Rule 4-1.9, the former client conflict of interest rule).

117. 593 So. 2d 1040 (Fla. 1992). *Kramer* provides illustrations of the results of a practitioner’s entering into a business agreement with a client and the potential conflict of interest such an agreement produces.

118. Id. at 1040.

119. Id. at 1042.

120. Id. at 1041.

121. 591 So. 2d 170 (Fla. 1991).
agreement overwhelmingly favored Belleville’s client. The documents prepared by Belleville provided for the sale of Mr. Cowan’s residence, notwithstanding the fact that both Belleville’s client and Mr. Cowan had negotiated only for the sale of an apartment building.\(^\text{122}\)

*Belleville* is interesting because the trial court was undecided as to whether Belleville knowingly participated in the egregious actions of his client or merely followed his client’s instructions without question.\(^\text{123}\) Belleville drafted the documents and included Mr. Cowan’s residence in the sale. The promissory note for payment received by Mr. Cowan of the purchase price was unsecured by a mortgage. The note also contained other favorable terms for Belleville’s client. Furthermore, the facts substantiated that the significance of the documents were not explained to Cowan and that Belleville did not attend the closing, having sent a paralegal in his place. Subsequent to the closing, Belleville’s client attempted to evict Mr. Cowan from his home.\(^\text{124}\)

In the disciplinary proceedings, the referee recommended no discipline because Belleville was not the attorney for Mr. Cowan.\(^\text{125}\) The Board of Governors of The Florida Bar appealed the decision of the referee.\(^\text{126}\) In finding Belleville guilty of an ethical violation, the court made several analyses that should bode as a warning to all practitioners.\(^\text{127}\) The court found that Belleville should have been suspicious about the documents because they were so one-sided and held that when an attorney is the only attorney in a transaction, the attorney must explain that he is representing the other party and must further explain the material terms of the documents that the attorney has drafted.\(^\text{128}\) Specifically, the court stated that “[w]hen the transaction is as one-sided as that of the present case, counsel preparing the documents is under an ethical duty to make sure that an unrepresented party understands the possible detrimental effect of the transaction and the fact that the attorney’s loyalty lies with the client alone.”\(^\text{129}\) The court concluded that Belleville’s violations were especially serious in light of the

\(^{122}\) *Id.* at 171.
\(^{123}\) *Id.*
\(^{124}\) *Id.*
\(^{125}\) *Id.*
\(^{126}\) *Belleville*, 591 So. 2d at 171.
\(^{127}\) *Id.* at 172.
\(^{128}\) *Id.*
\(^{129}\) *Id.*
fact that he had previously been disciplined for an ethical violation and therefore the court suspended Belleville for thirty days.\textsuperscript{130}

Practitioners may draw some small comfort in the footnote to Belleville that the court is limiting its decision to the facts of the case and does not intend to require an attorney who prepares closing documents to be present to explain documents to the parties.\textsuperscript{131} In Belleville, because the documents were so favorable to the attorney’s client, the court believed it necessary for the attorney to explain the legal ramifications of the documents.\textsuperscript{132} However, Belleville offers little guidance to the sole practitioner in a transaction who, in explaining the “possible detrimental effect of the transaction” to the unrepresented party, may in fact be violating the attorney’s duty of loyalty to his own client. At the very least, the Belleville case once again illustrates how imperative it is for the attorney to obtain a written acknowledgment by the unrepresented party that the attorney is only representing the attorney’s own client and that the unrepresented party has the right to seek independent legal counsel.\textsuperscript{133}

The foregoing overview of the cases since 1991 is not intended to be an exhaustive review of each and every case involving a violation of the Rules. Unfortunately, the published cases involving discipline of Florida practitioners are far too numerous. The reader is urged to periodically review the Rules and their comments and the practitioner is cautioned that when in doubt about one’s own actions, guidance may further be delivered by The Florida Bar’s Professional Ethics Committee and its capable counsel.

\textsuperscript{130} Id.
\textsuperscript{131} Belleville, 591 So. 2d at 172 n.2.
\textsuperscript{132} Id. at 172.
\textsuperscript{133} See id.
Denial of Access to Courts for Latent Injuries

Robert L. Trohn* 
Jonathan B. Trohn**

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I. INTRODUCTION

The idea that courts are available to seek redress for injuries for those who have been wronged is fundamental to American jurisprudence. Most attorneys are familiar with the legal axiom, "[f]or every wrong, there is a remedy."1 This principle, so simply and plainly stated, has long been part of Florida’s Constitution. Article I, section 21 states that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."2 "This provision, dating from our 1838 constitution . . . guarantees to every person the right to free access to the courts on claims of redress of injury free of unreasonable burdens and restrictions."3 However, statutes of limitation and statutes of repose can extinguish a litigant’s cause of action before the litigant is even aware that a problem exists.


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2. Id. (quoting FLA. CONST. art. I, § 21).
3. Id.
It is not difficult to envision situations in which a person's injuries or damages do not readily show themselves. The example that most often comes to mind is a disease such as AIDS, which has a long latency period wherein the person does not know he is afflicted. Such situations give rise to constitutional challenges based on the access to courts provision in the Florida Constitution. Where latent injuries or damages are concerned, however, Florida courts have eroded that principle in their more recent pronouncements. This article examines the trend away from free access to the courts and argues that these decisions pose an unfair and unprecedented threat to those whose damages do not manifest themselves in the time required to bring suit.

II. STATUTES OF LIMITATION AND REPOSE

Recently, the majority of decisions from the Florida Supreme Court in this area construed the medical malpractice statute. That statute states the following:

An action for medical malpractice shall be commenced within 2 years from the time the incident giving rise to the action occurred or within 2 years from the time the incident is discovered, or should have been discovered with the exercise of due diligence; however, in no event shall the action be commenced later than 4 years from the date of the incident or occurrence out of which the cause of action accrued . . . . In those actions covered by this paragraph in which it can be shown that fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the injury within the 4-year period, the period of limitations is extended forward 2 years from the time that the injury is discovered or should have been discovered with the exercise of due diligence, but in no event to exceed 7 years from the date the incident giving rise to the injury occurred.

4. Another example could be a building whose design or construction flaws are not apparent until after a limitations period has run. In public construction projects, there is often a one-year statute of limitations for the owner to make a claim on an available bond. See Fla. Stat. § 255.05 (1991) ("Little Miller Act").
7. See, e.g., Kush v. Lloyd, 616 So. 2d 415 (Fla. 1992); see also infra notes 9-13 and accompanying text.
The above statute contains a two-year statute of limitations and a four-
year statute of repose. A statute of limitation begins to run upon the accrual of a cause of
action except where there are provisions which defer the running of the
statute in cases of fraud or where the cause of action cannot be
reasonably discovered. On the other hand, a statute of repose, which is
usually longer in length, runs from the date of a discrete act on the part
of the defendant without regard to when the cause of action accrued.

In contrast to a statute of limitation, a statute of repose precludes a right
of action after a specified time which is measured from the incident of
malpractice, sale of a product, or completion of improvements, rather
than establishing a time period within which the action must be brought
measured from the point in time when the cause of action accrued.

When statutes of limitation or repose present a constitutional threat to
one's access to courts, courts look to the test enunciated by the Florida
Supreme Court in Kluger v. White. In Kluger, the court devised a test
that, in general, prohibits the Legislature from abolishing a person's right
of action unless an overpowering public necessity is shown. The court
initially used the Kluger test liberally to grant relief to those plaintiffs whose
injuries were latent and undiscoverable.

9. See id.
10. Kush, 616 So. 2d at 418.
12. 281 So. 2d 1, 4 (Fla. 1973).
13. Id. The court's test in Kluger reads as follows:

[W]here a right of access to the courts for redress for a particular injury has
been provided by statutory law predating the adoption of the Declaration of
Rights of the Constitution of the State of Florida, or where such right has
become a part of the common law ... pursuant to Fla. Stat. § 2.01, F.S.A., the
Legislature is without power to abolish such a right without providing a reason-
able alternative to protect the rights of the people of the State to redress for
injuries, unless the Legislature can show an overpowering public necessity for
the abolishment of such right, and no alternative method of meeting such public
necessity can be shown.

Id.

14. See, e.g., Diamond v. E.R. Squibb & Sons, Inc., 397 So. 2d 671 (Fla. 1981); see
also infra notes 23-25, 33 and accompanying text.
III. DIAMOND'S RULING

In the case of Diamond v. E. R. Squibb & Sons, Inc., the supreme court was faced squarely with the constitutionality of depriving a plaintiff of her cause of action when her injuries were undiscoverable. In Diamond, the plaintiff alleged that while yet unborn, a drug manufactured by the defendant was administered to her. This drug was later found to be a cause of cancer in those children whose mothers were treated with the drug. The defendant moved for summary judgment based on the statute of repose that existed for products liability suits. That statute, section 95.031(2) of the Florida Statutes, provided that no products liability action could be brought within twelve years after delivery of the product "regardless of the date the defect in the product or the fraud was or should have been discovered." In this case, the effect of the ingestion of the drug did not materialize until after the plaintiff reached puberty. As pointed out in Justice McDonald's concurrence,

[The plaintiff] had an accrued cause of action but it was not recognizable, through no fault of hers, because the injury had not manifested itself. This is different from a situation where the injury is not inflicted for more than twelve years from the sale of the product. When an injury has occurred but a cause of action cannot be pursued because the results of the injury could not be discovered, a statute of limitation barring the action does, in my judgment, bar access to the courts and is constitutionally impermissive.

The court held that the statute of limitation, as applied in that case, violated the plaintiff's guarantee of access to courts. Although the court did not specifically use the Kluger test, it was influenced by an earlier decision that applied the test wherein the plaintiff was allowed to sue a building contractor after the statute of repose had run.

15. 397 So. 2d at 671.
16. Id. at 672.
17. Id. at 671.
18. Id.
19. Id.
20. Diamond, 397 So. 2d at 672 (citing Fla. Stat. § 95.031(2) (1977)).
21. Id.
22. Id. (McDonald, J., concurring).
23. Id.
24. Id. (citing Overland Constr. Co. v. Sirmons, 369 So. 2d 572 (Fla. 1979)); see American Liberty Ins. Co. v. West & Conyers, Architects & Eng'rs, 491 So. 2d 573 (Fla. 2d
IV. DELAYED "INJURY" VS. DELAYED "DISCOVERY OF INJURY"

A critical distinction must be drawn between factual situations wherein the plaintiff has, in fact, been injured but her injuries remain undiscovered, and those situations wherein the plaintiff does not become injured until after the statute of limitation or repose has run. The Florida Supreme Court recognized this distinction when it passed on the constitutionality of the products liability statute of repose in *Pullum v. Cincinnati, Inc.* In *Pullum*, the plaintiff was injured while operating a press brake machine in 1977, and subsequently filed suit against the manufacturer in 1988, which was past the statute of repose then governed by Florida Statutes section 95.031(2). In affirming summary judgment for the defendant, the court found that the Legislature, in enacting the statute of repose, reasonably decided that perpetual liability places an undue burden on manufacturers. However, in an important footnote, the Florida Supreme Court recognized the critical distinction between the injuries in *Pullum*, and those suffered in *Diamond*. Specifically, the court stated:

In *Diamond*, we held that the operation of section 95.031(2) operated to bar a cause of action before it accrued and thereby denied the aggrieved plaintiff access to the courts. But *Diamond* presents an entirely different factual context than existed in either *Battilla* or the present case where the product first inflicted injury many years after its sale. In *Diamond*, the defective product, a drug known as diethylstilbestrol produced by Squibb, was ingested during plaintiff mother's pregnancy shortly after purchase of the drug between 1955-1956. The drug's effects, however, did not become manifest until after plaintiff daughter reached puberty. Under these circumstances, if the statute applied, plaintiffs' claim would have been barred even though the injury caused by the product did not become evident until over twelve years.
after the product had been ingested. The legislature, no doubt, did not contemplate the application of this statute to the facts in *Diamond*. Were it applicable, there certainly would have been a denial of access to the courts. 28

Despite the *Diamond* decision and the *Pullum* footnote, the court in recent decisions dealing with the medical malpractice statute of limitation and repose has apparently ignored, or overlooked, the distinction to be drawn by these cases.

V. RECENT DECISIONS

The Florida Supreme Court upheld the constitutionality of the medical malpractice statute of repose in *Carr v. Broward County*. 29 In *Carr*, the parents of a brain-damaged newborn child brought suit after the statute of repose had run. 30 Plaintiffs alleged that, despite due diligence, they were unable to discover the circumstances surrounding the prenatal and obstetrical care rendered during birth. 31 The court upheld the defendant's motion to dismiss based on the statute of repose and specifically ruled that the statute was constitutional under the *Kluger* test. 32 The court cited the extensive preamble to the Medical Malpractice Reform Act of 1975 wherein the requisite public necessity was expressed. 33

28. *Id.* at n.*.
29. 541 So. 2d 92 (Fla. 1989). *Contra* Public Health Trust v. Menendez, 584 So. 2d 567 (Fla. 1991).
30. *Carr*, 541 So. 2d at 93.
31. *Id.*
32. *Id.* at 94.
33. *Id.* A portion of the preamble states:
   WHEREAS, the cost of purchasing medical professional liability insurance for doctors and other health care providers has skyrocketed in the past few months; and
   WHEREAS, the consumer ultimately must bear the financial burdens created by the high cost of insurance; and
   WHEREAS, without some legislative relief, doctors will be forced to curtail their practices, retire, or practice defensive medicine at increased cost to the citizens of Florida; and
   WHEREAS, the problem has reached crisis proportion in Florida, NOW THEREFORE . . .
Id. (quoting Medical Malpractice Reform Act of 1975, ch. 75-79, § 7, 1975 Fla. Laws 13, 20 (codified at FLA. STAT. § 95.11(4)(b))).
Most recently, the Florida Supreme Court passed on the constitutionality of the statute of repose in *Kush v. Lloyd*. In *Kush*, the parents of a deformed child were referred by their physician for genetic testing. The parents were subsequently assured that they possessed no genetic abnormalities and that their first son's impairment was an accident of nature, not a genetic defect. However, the results of an important study were never transmitted, and the parents eventually had another deformed child. The parents filed suit after the statute of repose had run. The court held that the statute of repose begins to run from the date of the negligence, not from the date of birth.

More important, neither the *Kush* decision nor the *Carr* decision involved injuries that were latent. In both cases, the injuries were readily apparent and the issue involved the time of discovering negligence, as opposed to the time of discovering the injuries. Therefore, neither the *Kush* nor the *Carr* decision overruled or even confronted the *Diamond* decision. Nevertheless, recent decisions in the district courts have relied on the *Kush* and *Carr* decisions in precluding from suit those plaintiffs who did not realize they were injured during the period of repose.

In *Whigham v. Shands Teaching Hospital & Clinics, Inc.*, the plaintiff received AIDS tainted blood during a transfusion administered by the defendant. After the four-year medical malpractice statute of repose had run, the plaintiff discovered that he had been infected with the AIDS virus. The plaintiff was completely asymptomatic until that point. The First District Court of Appeal affirmed the trial court's dismissal of the action, based on the statute of repose. The court relied on *Carr, Kush*, and other recent Florida Supreme Court decisions upholding the constitutionality of the medical malpractice statute of repose. The supreme court's *Diamond* decision was specifically not followed, as the court was

34. 616 So. 2d 415 (Fla. 1992).
35. *Id.* at 417.
36. *Id.*
37. *Id.*
38. *Id.* at 418.
39. See supra notes 30-39 and accompanying text.
40. See supra notes 30-39 and accompanying text.
41. 613 So. 2d 110 (Fla. 1st Dist. Ct. App.), review granted, 623 So. 2d 496 (Fla. 1993).
42. *Id.* at 111.
43. *Id.*
44. *Id.* at 114.
45. *Id.* at 112-13.
more inclined to follow the "more recent pronouncements from the Supreme Court." 46

Under a similar fact situation, Doe v. Shands Teaching Hospital & Clinics, Inc., the First District Court of Appeal again ruled that the plaintiff was not denied constitutional access to courts. 47 In Doe, the First District Court of Appeal considered the applicability of Diamond to the case. 48 The court reasoned that Diamond was inapplicable as the statute of repose in that case was not effective at the time the plaintiff ingested the drug. 49 The court reasoned that Kush had the opportunity to address Diamond but did not and, therefore, Diamond might be limited to its facts. 50

The district court overlooked the more likely reason that Diamond was not confronted in the latest Florida Supreme Court cases, namely, the fact that Kush is factually distinguishable from Diamond. As Justice Kogan observed in his dissent of the Kush decision, prior decisions have failed to focus adequately on the distinction between delayed discovery and delayed injury. 51 In Kush, the injury was delayed until after the repose period had run. 52 In Diamond, the injuries were immediate, but discovery of the injuries was delayed until after the repose period had run. 53 Diamond is the only Florida Supreme Court decision with facts which are similar to those presented in Whigham and Doe. 54 The First District Court's reliance on cases that are factually distinguishable is misplaced, thus resulting in decisions which are unprecedented. 55 Furthermore, in his dissent in Doe, Judge Ervin felt that a judicial determination of overpowering public necessity could not be made under the factual situation wherein a plaintiff neither knows nor was able to know of the injury until after the repose period had elapsed. 56

46. Whigham, 613 So. 2d at 113.
47. 614 So. 2d 1170 (Fla. 1st Dist. Ct. App.), review denied, _ So. 2d _ (Fla. 1993).
48. Id.
49. Id. at 1171.
50. Id.
51. Kush, 616 So. 2d at 426 (Kogan, J., dissenting).
52. See supra notes 35-37 and accompanying text.
53. See supra notes 15-21 and accompanying text.
54. See supra notes 15-24 and accompanying text.
55. Doe, 614 So. 2d at 1172 (Ervin, J., dissenting).
56. Id. at 1177.
VI. CONCLUSION

In *Diamond v. E.R. Squibb & Sons, Inc.*, a statute of repose that barred a cause of action to a plaintiff who was unaware of his injury prior to the expiration of the repose period was held to be unconstitutional by the Florida Supreme Court.\(^57\) Despite the fact that no subsequent supreme court decision has receded from *Diamond*, recent district court opinions have mistakenly found that persons with latent injuries, discovered after the statute of repose has expired, have not been denied their access to the courts. These decisions rely on supreme court cases that are factually distinguishable from *Diamond*. Although the public necessity for a repose period in the medical malpractice context may be shown, the Legislature has not expressed an overpowering public necessity as it relates to people with latent or undiscoverable injuries. As the supreme court has stated, "[t]he legislature, no doubt, did not contemplate the application of this statute to the facts in *Diamond*."\(^58\) Until the Florida Supreme Court decides differently, district courts should follow the ruling in *Diamond* and allow these litigants to pursue their claims as guaranteed by the Florida Constitution.

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\(^{57}\) *Diamond*, 397 So. 2d at 672.

Deductibles and Florida No-fault Automobile Insurance: "We regret to inform you . . . ."

Michael Flynn

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I. INTRODUCTION

Insurance is purposefully made mysterious to exclude you [the consumer] from any role other than to sign a check.¹

There are more than 12,000,000 registered owners of automobiles in the state of Florida.² As in most states, Florida law requires all registered automobile owners to purchase a minimum of $10,000 in no-fault personal injury protection ("PIP") insurance.³ Florida's PIP insurance is cheap. The cost for PIP insurance can be as little as $36 per year, per registered

² Florida Drivers License Bureau Statistics, August, 1991. This is an estimate based on the Bureau's January 1, 1991, figure of 11,612,402 registered automobile owners and drivers. The Bureau estimate takes into account the annual percentage increases in the number of registered drivers in Florida from the prior year.


² Florida Drivers License Bureau Statistics, August, 1991. This is an estimate based on the Bureau's January 1, 1991, figure of 11,612,402 registered automobile owners and drivers. The Bureau estimate takes into account the annual percentage increases in the number of registered drivers in Florida from the prior year.
automobile owner. In addition, most registered automobile owners select

4. The lowest recorded rate is $18 per six months of coverage as offered by USAA in Jacksonville. The rate a particular driver pays depends on a variety of factors. These factors include age, sex, marital status, driving record, use of the car, number of miles the car is driven, the make and model year of the car, and the area where the driver lives. See FLORIDA DEP’T OF INS., 1988 AUTOMOBILE INSURANCE SHOPPERS’ GUIDE 13 (1988).

Here is a sample of the various rates which the top insurers in Florida, by area, charge their customers. The rates shown in the following chart are only the PIP portion of the premium charged to the insured every six months.

<table>
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<tr>
<th>Company Name</th>
<th>Alachua</th>
<th>Ft. Lauderdale</th>
<th>Hillsborough</th>
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<tbody>
<tr>
<td>1. Allstate</td>
<td>$61</td>
<td>$151</td>
<td>$81</td>
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<tr>
<td>2. Allstate Indemnity</td>
<td>$68</td>
<td>$212</td>
<td>$85</td>
</tr>
<tr>
<td>3. GEICO</td>
<td>$48</td>
<td>$124</td>
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<tr>
<td>4. Liberty Mutual Fire</td>
<td>$57</td>
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<tr>
<td>5. Nationwide Mutual Fire</td>
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<td>$89</td>
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<tr>
<td>6. State Farm Mutual</td>
<td>$48</td>
<td>$95</td>
<td>$64</td>
</tr>
<tr>
<td>7. State Farm Fire &amp; Casualty</td>
<td>$59</td>
<td>$120</td>
<td>$79</td>
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<td>9. FJUA</td>
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<table>
<thead>
<tr>
<th>Company Name</th>
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<th>Orange</th>
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<tbody>
<tr>
<td>1. Allstate</td>
<td>$145</td>
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<td>$65</td>
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<tr>
<td>2. Allstate Indemnity</td>
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<td>3. GEICO</td>
<td>$129</td>
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<tr>
<td>4. Liberty Mutual Fire</td>
<td>$128</td>
<td>$58</td>
<td>$64</td>
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<td>5. Nationwide Mutual Fire</td>
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<td>6. State Farm Mutual</td>
<td>$84</td>
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<td>$52</td>
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<td>7. State Farm Fire &amp; Casualty</td>
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<td>$65</td>
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<td>9. FJUA</td>
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<table>
<thead>
<tr>
<th>Company Name</th>
<th>Lee</th>
<th>Pensacola</th>
<th>Volusia</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Allstate</td>
<td>$77</td>
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<tr>
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</tr>
<tr>
<td>3. GEICO</td>
<td>$76</td>
<td>$61</td>
<td>$66</td>
</tr>
<tr>
<td>4. Liberty Mutual Fire</td>
<td>$54</td>
<td>$66</td>
<td>$61</td>
</tr>
<tr>
<td>5. Nationwide Mutual Fire</td>
<td>$71</td>
<td>$70</td>
<td>$85</td>
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<td>6. State Farm Mutual</td>
<td>$67</td>
<td>$51</td>
<td>$59</td>
</tr>
<tr>
<td>7. State Farm Fire &amp; Casualty</td>
<td>$83</td>
<td>$63</td>
<td>$74</td>
</tr>
<tr>
<td>8. USAA</td>
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<td>$28</td>
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<td>9. FJUA</td>
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<table>
<thead>
<tr>
<th>Company Name</th>
<th>Leon</th>
<th>Pinellas</th>
<th>W. Palm Beach</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Allstate</td>
<td>$45</td>
<td>$73</td>
<td>$83</td>
</tr>
<tr>
<td>2. Allstate Indemnity</td>
<td>$60</td>
<td>$80</td>
<td>$104</td>
</tr>
</tbody>
</table>
a $2,000 deductible which further reduces the cost of PIP insurance. The deductible obligates the insured to pay the amount of the deductible before the insurance company’s obligation to pay PIP benefits ripens. Consequently, for a small price, PIP insurance provides $10,000 worth of peace of mind in the event of an automobile accident. That is what an insured expects. That is what Susan Arnone expected, too.

<table>
<thead>
<tr>
<th>Insurer</th>
<th>Premium 1</th>
<th>Premium 2</th>
<th>Premium 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>GEICO</td>
<td>$41</td>
<td>$73</td>
<td>$85</td>
</tr>
<tr>
<td>Liberty Mutual Fire</td>
<td>$49</td>
<td>$63</td>
<td>$85</td>
</tr>
<tr>
<td>Nationwide Mutual Fire</td>
<td>$50</td>
<td>$78</td>
<td>$97</td>
</tr>
<tr>
<td>State Farm Mutual</td>
<td>$37</td>
<td>$60</td>
<td>$77</td>
</tr>
<tr>
<td>State Farm Fire &amp; Casualty</td>
<td>$46</td>
<td>$74</td>
<td>$96</td>
</tr>
<tr>
<td>USAA</td>
<td>$16</td>
<td>$21</td>
<td>$31</td>
</tr>
<tr>
<td>State Farm Fire &amp; Casualty</td>
<td>$68</td>
<td>$96</td>
<td>$117</td>
</tr>
</tbody>
</table>

*Id.*

Insurers specifically use a combination of factors to determine the cost of PIP insurance including the risk potential of insuring a particular driver. For instance, Allstate refers to the method of determining risk as the “cost-based pricing” system where the factors include the type of car, the driver, use of the car, and location of the car. See Allstate Auto Communications, How Auto Insurance Rates Are Set (1991).

5. Telephone Interview with Miriam Meister, Representative of the Professional Insurance Agents Trade Association (Aug. 26, 1991). According to the trade organization representing auto insurance agents, the primary concern of the insurance consumer is cost. While there is no national collection of information from all auto insurers, common sense indicates that more consumers would choose the highest deductible. By selecting the highest deductible, the insured is lowering the premium cost. For many insureds, the selection of the highest deductible is a choice forced by economic considerations. A consumer survey by the Insurance Information Institute, a media relations group funded by insurers, reveals that “Americans are frustrated with automobile costs: Roughly three out of four insured vehicle owners nationwide reject the idea that automobile insurance costs are about right.” Insurance Info. Inst., Insurance Pulse ch. 3 (1990). Further, most consumers cite low premiums as the number one reason for choosing a particular insurance company. *Id.*

6. FLA. STAT. § 627.739(2) (1991). Florida, Hawaii, Massachusetts, Minnesota, and New York require the insurance companies to offer authorized deductible amounts which are established by either a statute or the state insurance department. Delaware, Kentucky, Michigan, New York, Oregon, and Pennsylvania allow the insured to choose any amount of deductible. See Irwin E. Schermer, Automobile Liability Insurance § 3.07, at 3-65 (2d ed. 1991).

The glossary in the 1991 version of the Automobile Insurance Shoppers’ Guide gives the definition of a deductible as “[t]he amount which a policyholder must pay, per claim or accident, before an insurance company pays its share.” Florida Dep’t of Ins., 1990-1991 Automobile Insurance Shoppers’ Guide 22 (1990).

In the 1988 Guide, the deductible is explained by the following paragraph: “By law, you are allowed to buy a PIP policy with a deductible of up to $2,000. A deductible is the amount you must pay from your own pocket before your insurance starts paying.” Florida Dep’t of Ins., Automobile Insurance Shoppers’ Guide 4 n.4 (1988).
Susan Amone purchased a $10,000 PIP insurance policy, which carried a $2,000 deductible, from International Bankers Insurance Company. Unfortunately, Ms. Amone was injured in an automobile accident. Susan Amone's medical bills exceeded her $10,000 PIP policy limit and were much more than she could afford to pay. Ms. Amone properly paid her $2,000 deductible and requested her insurance company to pay the $10,000 policy limit of her PIP insurance. Her insurance company refused. Instead, the insurer advised that it would pay only $8,000 under Susan Amone's $10,000 PIP insurance policy. The insurance company reasoned that because Ms. Amone chose a $2,000 deductible, she purchased only $8,000 worth of PIP coverage.7

The Supreme Court of Florida, in the consolidated cases of International Bankers Insurance Co. v. Arnone and Great Oaks Casualty Insurance Co. v. Kelly,8 agreed with the insurance company's calculations. The Florida Supreme Court ruled that despite the statutory requirement that registered automobile owners in Florida must obtain $10,000 worth of no-fault PIP insurance, the insurance company would not be obligated to pay PIP benefits equal to the required policy limits of $10,000.9

The Arnone decision released insurance companies, who have issued over twelve million $10,000 PIP insurance policies in Florida, from the payment of as much as twenty-four billion dollars in PIP insurance benefits.10 Was Florida’s PIP statute intended or expected to provide this windfall for insurance companies?

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8. 552 So. 2d 908 (Fla. 1989).
9. Id. at 911 (holding that the authorized deductible amounts must be subtracted from the lesser of 80% of the eligible medical benefits or the statutorily mandated coverage limit of $10,000).
10. See Florida Drivers License Bureau Statistics, supra note 2 and accompanying text. The $24 billion windfall discussed in the text does not account for the actual percentage of drivers who did not purchase PIP insurance, the exact percentage of insureds who select a $2,000 deductible, and for the exact amount of PIP benefits paid out by insurers during any calendar year. The $24 billion figure represents the theoretical maximum windfall to insurers.

The top three auto insurers in Florida are: State Farm with 21.5% of the insureds; Allstate with 17.8% of the insureds; and GEICO with 3.6% of the insureds. Corrections, SUN-SENTINEL, Aug. 20, 1991, at 3D. The 10 largest auto insurers in the nation are: State Farm with 20.41% of the insureds; Allstate with 12.14%; Farmers with 5.32%; Nationwide with 3.82%; USAA with 2.74%; Aetna with 2.67%; GEICO with 1.99%; Liberty Mutual with 1.77%; Travelers with 1.7%; and California State Automobile Assoc. with 1.66%. Andy Dorsett, Largest Insurers, SUN-SENTINEL, Aug. 18, 1991, graphic at 1D.
The purpose of this article is to examine and evaluate the relationship between deductibles and Florida’s mandatory, no-fault PIP insurance. First, this article will examine the purpose of no-fault insurance statutes and, in particular, the typical no-fault insurance system as evidenced by Florida’s Motor Vehicle No-Fault Law. Next, this article will describe how insurance companies sell and how consumers purchase no-fault automobile insurance. Then, this article will examine Florida case law interpreting the no-fault law, and the relationship of deductibles to the payment of required PIP insurance benefits. Finally, this article will comment on Florida case law and its impact on consumers, and suggest a revision to the Florida PIP insurance statute.

II. THE PURPOSE OF NO-FAULT AUTOMOBILE INSURANCE

Several states have some form of no-fault automobile insurance statute.11 The term “no-fault insurance” means that the insured/injured party receives insurance benefits regardless of who was at fault in causing the automobile accident.12 No-fault insurance is the result of public dissatisfaction with the cost and delay involved before compensation for automobile accident injuries is received.13 No-fault insurance operates on the premise that prompt payment of compensation by the insured’s own insurance carrier serves the public interest better than the costs and delays traditionally encountered in attempting to recover damages from the person at fault.14

Florida is a typical example of a pure, no-fault jurisdiction. Four elements characterize a pure, no-fault system: (1) no-fault insurance is required in order to own and operate an automobile; (2) there is a statutory level of benefits afforded to any person covered by no-fault insurance; (3) the “at fault” party is immune from suit for any losses covered by a no-fault insurance policy; and (4) there is a limitation on the availability of non-

11. Twenty-four jurisdictions have some form of no-fault automobile insurance law. The majority are compulsory but a few are optional. See Josephine Y. King, Survey: State No-Fault Systems Attorney’s Guide to Statutory Provisions; The Statutory Architecture of State No-Fault Systems, 4 PACE L. REV. 297 (1984); see also SCHERMER, supra note 6, § 1.02, at 1-12.
economic damages, including pain and suffering.\textsuperscript{15} Florida is one of sixteen jurisdictions utilizing a pure, no-fault system.\textsuperscript{16} States which have not adopted a pure, no-fault insurance law still require a modified version of no-fault insurance which provides a minimum amount of insurance coverage.\textsuperscript{17}

Section 627.731 of the Florida Statutes states that the purpose of Florida's no-fault insurance law is:

[t]o provide for medical, surgical, funeral, and disability insurance benefits without regard to fault, and to require motor vehicle insurance securing such benefits, for motor vehicles required to be registered in [Florida] . . . and, with respect to motor vehicle accidents, a limitation on the right to claim damages for pain and suffering, mental anguish, and inconvenience.\textsuperscript{18}

The intended result of a no-fault law is to guarantee that an injured party receives prompt and definite financial assistance after an automobile accident.\textsuperscript{19} In theory, no-fault insurance reduces the uncertainty of receiving financial assistance, court congestion and delay, and also reduces the premium cost for all types of automobile insurance.\textsuperscript{20} In \textit{Lasky v. State Farm Insurance Co.},\textsuperscript{21} the Florida Supreme Court emphasized that the legislative purpose of PIP insurance is to provide a mandatory minimum of insurance benefits to protect an injured party from financial hardship and to avoid swelling the public relief roles.\textsuperscript{22}

The nucleus of Florida's no-fault insurance law requires that:

\begin{footnotesize}
\begin{enumerate}
\item See King, \textit{supra} note 11, at 299.
\item \textit{Id.} The other pure no-fault jurisdictions include Colorado, Connecticut, District of Columbia, Georgia, Hawaii, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Dakota, Pennsylvania, and Utah. \textit{See generally id.} at 301-72.
\item See id at 377-97. Jurisdictions utilizing a no-fault system which is not pure are designated as quasi no-fault systems. In these systems there is no threshold limitation imposed on the traditional tort recovery system nor is tort immunity granted, and first party benefits are expanded. The quasi no-fault states are Arkansas, Delaware, Maryland, Oregon, South Carolina, South Dakota, Texas, and Virginia. \textit{Id.}
\item FLA. STAT. § 627.731 (1991).
\item Lasky v. State Farm Ins. Co., 296 So. 2d 9, 16 (Fla. 1974).
\item \textit{Id.}
\item \textit{Id.} at 9.
\item \textit{Id.} (involving a constitutional challenge to the Florida no-fault law in which the validity of the limitation of tort recovery was upheld).
\end{enumerate}
\end{footnotesize}
Every insurance policy... shall provide personal injury protection to the named insured, relatives residing in the same household, persons operating the insured motor vehicle, passengers in such motor vehicle, and other persons struck by such motor vehicle, and suffering bodily injury to a limit of $10,000 for loss sustained by any such person as a result of bodily injury, sickness, disease, or death arising out of the ownership, maintenance, or use of a motor vehicle...  

Under Florida law, PIP insurance pays for: 1) eighty percent of all reasonable expenses for necessary medical, surgical, x-ray, dental, and rehabilitative services; 2) sixty percent of loss of gross income and earning capacity; and 3) a death benefit of $5,000 per individual. The key element of Florida's PIP insurance statute, which is typical of most no-fault insurance statutes, is that a PIP insurance policy must provide a minimum benefit.

---

24. See id. § 627.736(1)(a)-(c).
25. State no-fault insurance laws may differ as to the total amount no-fault benefits available, but most states by 1982 had placed a cap on no-fault benefits, ranging from $2,000 in Massachusetts to $62,975 in Colorado. See Emmett J. Vaughan, Fundamentals of Risk and Insurance 473 (3d ed. 1982). Three states have no minimum benefit: Michigan, New Jersey, and Pennsylvania. See id.

The following chart shows the breakdown of the various states employing updated no-fault insurance statutes:

<table>
<thead>
<tr>
<th>STATE</th>
<th>BENEFITS</th>
<th>TYPE OF NO-FAULT LAW</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arkansas</td>
<td>$25,000</td>
<td>Optional First Party</td>
</tr>
<tr>
<td>Colorado</td>
<td>$25,000</td>
<td>Compulsory</td>
</tr>
<tr>
<td>Connecticut</td>
<td>$20,000</td>
<td>Compulsory</td>
</tr>
<tr>
<td>Delaware</td>
<td>$15,000</td>
<td>Compulsory</td>
</tr>
<tr>
<td>D.C.</td>
<td>$10,000</td>
<td>Compulsory</td>
</tr>
<tr>
<td>Florida</td>
<td>$10,000</td>
<td>Compulsory</td>
</tr>
<tr>
<td>Georgia</td>
<td>$15,000</td>
<td>Compulsory</td>
</tr>
<tr>
<td>Hawaii</td>
<td>$25,000</td>
<td>Compulsory</td>
</tr>
<tr>
<td>Kansas</td>
<td>$25,000</td>
<td>Compulsory</td>
</tr>
<tr>
<td>Kentucky</td>
<td>$10,000</td>
<td>Compulsory</td>
</tr>
<tr>
<td>Maryland</td>
<td>$20,000</td>
<td>Compulsory</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>$10,000</td>
<td>Compulsory</td>
</tr>
<tr>
<td>Michigan</td>
<td>$20,000</td>
<td>Compulsory</td>
</tr>
<tr>
<td>Minnesota</td>
<td>$25,000</td>
<td>Compulsory</td>
</tr>
<tr>
<td>New Jersey</td>
<td>$15,000</td>
<td>Compulsory</td>
</tr>
<tr>
<td>New York</td>
<td>$10,000</td>
<td>Compulsory</td>
</tr>
<tr>
<td>North Dakota</td>
<td>$25,000</td>
<td>Compulsory</td>
</tr>
<tr>
<td>Oregon</td>
<td>$25,000</td>
<td>Compulsory</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>$10,000</td>
<td>Compulsory</td>
</tr>
<tr>
<td>South Carolina</td>
<td>$15,000</td>
<td>Compulsory</td>
</tr>
</tbody>
</table>
Consequently, mandatory PIP insurance differs from the voluntary purchase of other types of automobile insurance because Florida law, rather than the insured, dictates the type and amount of insurance coverage. In conjunction with the purchase of PIP insurance, Florida mandatory no-fault law requires an insurer to offer each potential insured or policyholder a deductible in the amount of $250, $500, $1,000 or $2,000. The purpose of requiring insurance companies to offer a deductible was noted by the Florida Supreme Court in *Industrial Fire & Casualty Insurance Co. v. Kwechin.* In *Kwechin,* the supreme court explained the election of a deductible avoids requiring redundant, duplicate, and therefore, uncollectible insurance benefits. The court ruled that by allowing for a deductible, an insured can purchase the minimum PIP insurance coverage of $10,000 and avoid, to a certain extent, any overlap with other insurance coverage. The majority of Florida insureds, typical of most jurisdictions,

<table>
<thead>
<tr>
<th>State</th>
<th>Benefit Amount</th>
<th>Type</th>
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<tbody>
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<td>$15,000</td>
<td>Optional First Party</td>
</tr>
<tr>
<td>Texas</td>
<td>$20,000</td>
<td>Optional First Party</td>
</tr>
<tr>
<td>Utah</td>
<td>$20,000</td>
<td>Compulsory</td>
</tr>
<tr>
<td>Virginia</td>
<td>$25,000</td>
<td>Compulsory</td>
</tr>
</tbody>
</table>

*Id.* (supplying each state’s type of no-fault law); see King, *supra* note 11, at 297 (supplying updated benefit amounts); see also *SCHERMER,* *supra* note 6, § 1.02, at 1-12.

27. See *NADER & SMITH,* *supra* note 1, at 81. “Most of the terms in a no-fault insurance policy remain the same as in a fault policy. The major difference is the personal injury protection coverage, known as PIP. The PIP portion of the insurance policy pays for the no-fault benefits that are mandated by state laws.” *Id.*

“Liability insurance is designed to protect you against the costs of being sued.” *Id.* “[M]edical payments coverage . . . is designed to pay for some of the medical consequences that can result [from an] accident.” *Id.* at 89. “The part that protects the value of your vehicle . . . from an impact with another vehicle or object . . . is called collision coverage.” *Id.* at 91-92. “Loss caused by flying objects, fire, theft, windstorm, hail, malicious mischief, riot, hitting an animal, etc. is . . . commonly called comprehensive coverage.” *NADER & SMITH,* *supra* note 1, at 92.

In Florida, one may drive without comprehensive auto insurance coverage; however, one may not drive without PIP insurance coverage. Automobile owners who fail to purchase PIP coverage may have their vehicle registration revoked. See FLA. STAT. § 627.733(6) (1991).

29. 447 So. 2d 1337 (Fla. 1983).
30. *Id.* at 1339.
31. *Id.* “To require payment for coverage which is redundant, therefore uncollectible, would be inequitable. Hence, section 627.739 provides for a deductible to prevent overlapping coverage.” *Id.*
choose the highest deductible amount of $2,000 to maximize the reduction in premium cost and justify such deductible in light of collateral insurance coverage. The up-shot of choosing a deductible is that the higher the deductible, the lower the premium cost for PIP insurance. Furthermore, the Kwechin court ruled that insurance agents, acting on behalf of an insured, possess a heightened duty to fully disclose and inform the insured what the deductible means, how the deductible effects PIP insurance coverage, and whether the insured's collateral insurance coverage warrants choosing a deductible.

III. THE MAKING OF A NO-FAULT INSURANCE CONTRACT

The typical applicant buys [insurance] 'protection' much as he buys groceries.

Under Florida's and most states' no-fault insurance law, the consumer has no choice but to purchase PIP insurance upon buying or leasing an automobile. However, the consumer does have a choice of insurance

32. See supra notes 4, 5 and accompanying text. A recent survey asked insured automobile owners the following question: "When did you last discuss with your insurance agent or insurance company the possibility of raising the amount of your deductible?" The owners answered as follows:

<table>
<thead>
<tr>
<th>Scenario</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>When I last bought a car</td>
<td>25%</td>
</tr>
<tr>
<td>When I last changed insurance companies</td>
<td>10%</td>
</tr>
<tr>
<td>When my insurance was last renewed</td>
<td>29%</td>
</tr>
<tr>
<td>Never—I have always had the same deductible</td>
<td>29%</td>
</tr>
<tr>
<td>Don't Know</td>
<td>7%</td>
</tr>
</tbody>
</table>

INSURANCE INFO. INST., supra note 5, at ch. 3. These answers reveal that most automobile owners prefer to have a higher deductible, and that some owners have no idea about their deductible. See id.

33. Kwechin, 447 So. 2d at 1337-40. Prior to a 1982 amendment, the insurer was required to explain to the insured that a deductible could be obtained only where there was collateral coverage. See FLA. STAT. § 627.739 (1981).

In writing the dissenting opinion in Kwechin, Justice Boyd remarked that the court's holding imposes an inequitable duty on "insurance agents . . . to inquire into the financial affairs of all persons selecting one of the optional deductibles available with personal injury protection coverage and to counsel with such individuals concerning the coverage and deductible selected." Kwechin, 447 So. 2d at 1340 (Boyd, J., dissenting).

34. 7 WALTER H.E. JAEGGER, WILLISTON ON CONTRACTS § 900, at 34 (3d ed. 1963) [hereinafter JAEGGER].

35. See generally King, supra note 11. Most states require proof of no-fault insurance in order to register a car. See COLO. REV. STAT. § 10-4-702 (1992); CONN. GEN. STAT.
companies. Consumers tend to pick a PIP insurer two ways: Either they choose the company with whom they already have obtained other types of insurance or "open the yellow pages to the insurance listings, close their eyes, and point." In either case, insurance companies know the consumer's primary concern is cost. Armed with this knowledge, the experienced PIP insurance underwriter simply waits for the consumer to inquire and then pitches the product.

The consumer's inquiry usually begins with a phone call or a visit to an insurance agent. In either case, the insurance companies equip their

Arkansas is an optional no-fault state. OR. REV. STAT. § 742.520 (1991). South Dakota is an optional no-fault state in which insurers must offer "supplemental coverage" as an option. S.D. CODIFIED LAWS ANN. § 58-23-7 (1992). In Texas, an automobile owner must have liability insurance which includes no-fault coverage unless rejected by the insured. TEX. INS. CODE ANN. art. 5.06-3(a) (1993).

36. NADER & SMITH, supra note 1, at 21.
37. Id. at 63. Smith and Nader have noted that:

Now, because of the tremendous increases in the price of auto insurance in many parts of the country, the topic is one that generates anger, controversy, and resentment—even before the envelope containing the bill is opened. ... For one thing, auto insurance is mandatory in many states. That means that consumers can't 'Just Say No,' thereby reducing the incentives of the companies to keep the prices low.

Id.

38. When it comes to getting information before purchasing auto insurance, the top source for most consumers is an insurance agent. The next best sources for information regarding insurance, according to most Americans, is friends or relatives. INSURANCE INFO. INST., supra note 5, at ch. 1.

When asked about what kinds of information concerning insurance would be most helpful, consumers responded as follows:

- Explanations on the different types of insurance: 39%
- How to shop for insurance: 21%
- How to choose a good insurance agent: 13%
- What to do if you have a complaint: 9%
agents with the tools necessary to close a deal. Most agents give a prospective consumer a pamphlet which summarizes the coverages and the premiums. If the consumer inquires over the phone, the agent tells the

<table>
<thead>
<tr>
<th>How to file a claim</th>
<th>7%</th>
</tr>
</thead>
<tbody>
<tr>
<td>(None of these)</td>
<td>6%</td>
</tr>
<tr>
<td>(Don't know)</td>
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*Id.* at ch. 131.

39. In a personal visit by the author to Florida State Discount Insurance and Auto Tags, Inc., in Fort Lauderdale, Florida, the agent provided a summary of coverages and a premium statement which can be used to figure the amount of insurance which is being purchased. See *FLORIDA STATE DISCOUNT INSURANCE AND AUTO TAGS, INC., SUMMARY OF COVERAGES AND PREMIUM* (1991).

In talking to a representative of Knight Auto Insurance in Davie, Florida, the author was provided with a packet of standard forms, referred to as the "Mickey Mouse forms" which are kept on file with the insured's application. The agent is able to help with the application process through the use of computers. After the applicant is accepted, the insured pays the first premium payment which is sent to the insurer. The agent has constant contact with the insurer and thus can answer any questions which the applicant might ask. See *KNIGHT AUTO INSURANCE, ELECTION OF PERSONAL INJURY [sic] PROTECTION WITH A DEDUCTIBLE* (1991). The following is a reproduction of the "Mickey Mouse forms" which a prospective insured must fill out prior to leaving the agent's office:

**ELECTION OF PERSONAL INJURY [sic] PROTECTION WITH A DEDUCTIBLE**

I hereby certify that I fully understand that if I or my dependent relatives are injured in an accident under which Personal Injury Protection benefits would be payable by the ___________ Insurance Company, my other medical/disability/loss of use insurance must pay for the first $ ___ of the medical/disability/loss of use benefits before my Personal Injury Protection purchased from . . . [Insurance] Agency will start paying benefits. If I or my dependent relatives have no other medical/disability/loss of use insurance, I or my dependent relatives must personally be responsible for the first $ ___ of the loss and will hold the . . . [Insurance] Agency and the ___ Insurance Company completely harmless.

I certify that I have read and understood the above paragraph.

Witness ___________ Insured ___________

*Id.* It is interesting to note that the original "Mickey Mouse form" which the insured must fill out contained a spelling error in its title ("infury" instead of "injury"). This form notifies the insured of the deductible, and there is a power of attorney on the bottom of the form in order to insure payment of the premium. See *id.*

The back of a typical application for auto insurance contains the following explanation of the PIP deductible:

**$10,000 NO-FAULT COVERAGE (EXPLANATION & OPTIONS)**
consumer what the pamphlet says. The typical insurance company pamphlet contains one paragraph describing PIP insurance. This

With reference to my application for auto insurance through the ____ Auto Insurance Agency, I understand that Personal Injury Protection (PIP) benefits pay for MEDICAL AND REIMBURSEMENT FOR LOSS OF INCOME. Deductibles which reduce the amount of PIP benefits paid to me and/or my resident dependent relatives, are available in amounts of $250, $500, $1,000 and $2,000. A WORD OF CAUTION: Most PIP is carried without a deductible of any amount and DEDUCTIBLES ARE NOT RECOMMENDED. I hereby select a PIP deductible by marking the appropriate box below with an “X.” I agree that the ____ Auto Insurance Agency has no responsibility to advise me as to the provisions or conditions of any OTHER INSURANCE that I may have and that I understand that any OTHER INSURANCE may also exclude coverage for the personal injury deductible. In consideration of the ____ Auto Insurance Agency offering the PIP deductible elected by me, I hereby agree to indemnify the ____ Auto Insurance Agency from all claims, loss, damage, injury, liability, costs and expenses whatsoever kind or nature (including attorney’s fees), howsoever, the same may be caused resulting directly or indirectly from my election of a deductible on personal injury protection. I acknowledge the price, indicated to the right of this explanation of personal injury protection benefits to eliminate any deductible that I have elected, has been quoted to me.

See id.

40. In the USAA pamphlet a variety of insurance products are available. The range of products is wide, from life to auto insurance. There are even a few related non-insurance products such as credit cards and new car price lists. See YOUR GUIDE TO USAA SERVICES (1990). For each product which may interest a consumer, there is an “800” number to call in order to obtain assistance with information. For example, auto insurance is advertised on page seven of the guide with a corresponding number to call. Id. at 7.

41. Allstate’s brochure only has one paragraph which refers to no-fault insurance in general. Under a section boldly labeled as “NO-FAULT COVERAGE,” the brochure provides, “coverage for injury, death, loss of services, and loss of income suffered by you, your covered passengers, or covered family members. (No-Fault Coverage is not available in every state. Ask an Allstate agent for details.)” See ALLSTATE INS. Co., ALLSTATE... MORE VALUE FOR YOUR AUTO INSURANCE DOLLAR! (1990) [hereinafter INSURANCE DOLLAR]. Allstate does publish a brochure concerning the no-fault insurance system, but the publication is meant more as a political statement on the position of the insurance company concerning legislation which could affect no-fault. See ALLSTATE INS. Co., THE NO-FAULT SYSTEM—HOW DOES IT WORK IN FLORIDA? (1989) [hereinafter NO-FAULT SYSTEM]. The consumer is told that higher rates are the only logical result if the system is not changed. Yet, this comprehensive explanation of the Florida no-fault system has no information concerning how the election of a deductible affects the amount of benefits received. See id.

The State Farm brochure also fails to give a person the full details of how the deductible affects the amount of PIP benefits received. The brochure states under the “limits of liability” section that “[t]he most we pay under No-Fault for each insured for all losses and expenses from one accident is $10,000 (less any deductible... $250 up to $2,000).” STATE FARM INS. CO., LIKE A GOOD NEIGHBOR, STATE FARM IS THERE (1989) [hereinafter GOOD NEIGHBOR]. While the State Farm brochure provides more information than most, this statement still does not inform the applicant of the “double deductible” effect. See id. For
paragraph informs the consumer of the mandatory minimum amount of PIP insurance coverage required by Florida law. In addition, insurers supply their insurance agents with brochures containing the most frequently asked questions and answers about PIP insurance. The insurance agent usually offers the brochures if the prospective consumer asks the questions. The consumer does not have the opportunity to read or even look at the actual PIP insurance policy until much later.

From the foregoing information, the consumer must decide whether to apply for PIP insurance with that particular insurance company. Although a prospective consumer may have a choice of insurers, the consumer does not have a choice of the actual terms of a PIP insurance policy. Florida statutes and the Florida Department of Insurance prescribe the content of a PIP insurance policy. Consequently, the consumer’s choice of PIP insurance companies primarily involves a comparison of premium rates for standardized coverage.

To be considered for coverage, the consumer must then fill out an application for PIP insurance either in person or over the phone. The

42. See INSURANCE DOLLAR, supra note 41; NO-FAULT SYSTEM, supra note 41; GOOD NEIGHBOR, supra note 41.
43. Typical of the question and answer brochures are ones dealing with rates or payment of the auto insurance premium. The question and answer format is used by both Allstate and State Farm in their publications. See ALLSTATE AUTO COMMUNICATIONS, HOW AUTO INSURANCE RATES ARE SET—A GUIDE TO ANSWER YOUR QUESTIONS ABOUT AUTO INSURANCE COSTS (1991) [hereinafter ALLSTATE AUTO COMMUNICATIONS]; STATE FARM INSURANCE CO., Q. WHAT CAN I EXPECT FROM STATE FARM’S MONTHLY PAY PLAN? A. LOOK INSIDE FOR DETAILS (1991) [hereinafter STATE FARM INSURANCE].
44. The brochures were obtained by the author on August 15, 1991 only after asking a series of questions to which the insurance agent did not know the answer. See ALLSTATE AUTO COMMUNICATIONS, supra note 43; STATE FARM INSURANCE, supra note 43.
45. “The agent in fact prepares the contract when he writes the application, because the policy, which the applicant does not see until delivered and does not sign, follows an acceptance as a matter of course.” JAEGER, supra note 34, at 39.
46. Section 624.05 defines “Department” as Department of Insurance. FLA. STAT. § 624.05 (1991). For a discussion of the role that the department plays in approving rates and insurance policy coverage, see State Farm Mut. Auto Ins. Co. v. Chapman, 415 So. 2d 47 (Fla. 5th Dist. Ct. App. 1982), review denied, 426 So. 2d 29 (Fla. 1983). In Chapman, a rule that the Department had set forth regarding the definition of a motor vehicle was found to be in violation of the Florida statutes despite the reliance of the insurer on the rule promulgated by the Department. Id. at 48-49.
47. “In writing the application, the agent does what the company sent him to do. He negotiates for the company, asks questions for the company, writes down answers for the company, and makes the return for the company.” JAEGER, supra note 34, at 30.
application requires the prospective consumer to choose a deductible, if any, and quotes the premium cost for mandatory $10,000 of PIP insurance. The insurance agent then sends the application along with the first month, quarter or semi-annual premium to the insurance company. Upon receipt of the application and the required premium, the insurance company must decide to accept or reject the prospective insured’s application. Upon rejection, the consumer is notified and the premium is refunded. Upon acceptance, the insurance company issues a PIP policy which states the date coverage begins. Only upon issuance of the PIP policy does the insured have the opportunity to read and review the exact terms of the PIP insurance policy. The typical PIP policy provides as follows:

Regardless of the number of persons insured ... the total aggregate limit of personal injury protection benefits available under the Florida Motor Vehicle No-Fault Law, as amended, from all sources combined, including this policy, for all loss and expense incurred by or on behalf of any one person who sustains bodily injury as the result of any one accident shall be $10,000. ... Regardless of whether payments are made under the Florida Motor No-Fault Vehicle Law, as amended, or under Extended Personal Injury Protection, the $10,000 limit indicated in the preceding paragraph shall be the maximum payable under this endorsement.

Accordingly, the insured believes that a Florida no-fault PIP insurance policy obligates payment of the mandatory $10,000 insurance benefits required by Florida law. Yet the insurance companies believe that a Florida

49. With the advance in communications and computers, an agent at Florida State Discount Insurance and Auto Tags, Inc., can obtain the acceptance or rejection right within minutes; however, receipt of the actual policy is delayed by the mail. See supra note 39.
50. In obtaining insurance from USAA, after the application was filled out by the agent over the phone at the “800” number, the actual policy detailing the coverage was sent to the insured after a few weeks. See supra note 40.
51. See Nader & Smith, supra note 1, at 42. Under a boldly stated section labeled as a “consumer alert,” the authors’ note that
[f]requently you will not receive the actual policy until after you have decided to buy. You will also often have the right to inspect the policy and cancel. When you receive your policy, read it to make sure the promises about the terms of the policy made to get you to buy were actually kept in the contract itself. Few of us do this, but we should.
Id. at 42. (emphasis added).
no-fault PIP insurance policy only obligates payment of the mandatory $10,000 of insurance benefits less the amount of any deductibles for insureds who select a deductible. 53 This conflict concerning the payout of mandatory no-fault insurance benefits has only surfaced in Florida under Florida’s version of a typical no-fault insurance law. Since there is no legislative history directly on point, both insureds and insurers have had to look to the Florida courts to resolve the issue of the amount of PIP benefits payable to insureds with a deductible. 54

IV. COMPUTATION OF NO-FAULT INSURANCE BENEFITS UNDER FLORIDA LAW

Section 627.739 of the Florida Statutes regarding no-fault PIP insurance deductibles states that:

Insurers shall offer to each applicant and to each policy holder . . . deductibles, in amount, of $250, $500, $1,000 and $2,000, such amount to be deducted from the benefits otherwise due each person subject to the deduction. 55

The application of this provision to the Florida statutory $10,000 PIP insurance requirement is crucial in carrying out the purposes of the no-fault law. For over ten years, Florida courts have struggled with the application of the deductible in relation to the payment of the required PIP benefits. This struggle has produced a peculiar series of court opinions unique to Florida and to this issue.

Industrial Fire & Casualty Insurance Co. v. Cowan 56 presented the Florida Third District Court of Appeals with this issue. In Cowan, the plaintiff was injured in an automobile accident and incurred medical expenses and other losses of approximately $40,000. 57 Cowan’s PIP policy provided for the $5,000 of PIP insurance coverage required by Florida law at the time. 58 The insured selected a deductible of $1,000. 59 Cowan claimed that upon his payment of the deductible, the insurance company was

54. See id.
56. 364 So. 2d 810 (Fla. 3d Dist. Ct. App. 1978).
57. Id. at 811.
58. Id.
59. Id.
obligated by law to pay $5,000 in PIP insurance benefits. The insurance company countered that the insured, by choosing a $1,000 deductible, reduced the coverage limits of the PIP insurance policy by $1,000, the amount of the deductible. Consequently, the insurance company argued that it was only obligated to pay a maximum of $4,000 in PIP benefits to Cowan. The Third District Court of Appeal sided with the insurance company. Relying on the Florida PIP statute in effect at the time, the court ruled that the amount of any deductible was "to be deducted from the amounts otherwise due each person subject to the deduction . . . ." Based on this statutory language, the court calculated that the "amount otherwise due" under the Cowan PIP policy equaled the required $5,000 PIP policy limits and then subtracted the $1,000 deductible to conclude that the maximum liability of the insurance company was $4,000. The court did refer to the section of the Florida statute that required Cowan to obtain $5,000 worth of PIP insurance. However, the court did not address any argument regarding the legislative purpose or intent behind this requirement, and merely inserted the $5,000 PIP policy limits as the "amount 'otherwise due'" referenced in the PIP statute. In sum, the court equated the "amount otherwise due" with the statutorily required policy limits for Florida PIP insurance.

Two years after Cowan, the Fifth District Court of Appeal was presented with the same issue in Thibodeau v. Allstate Insurance Co. Thibodeau incurred over $8,000 in medical expenses from injuries she sustained as a passenger in an automobile accident. Under the Florida PIP law in effect at the time, Thibodeau was covered under a $5,000 PIP

60. Id.
61. Cowan, 364 So. 2d at 811.
62. Id.
63. Id. The Third District Court of Appeal reversed the trial court decision which held that the plaintiff was entitled to $5,000, the maximum PIP benefits, because the amount of the insured’s PIP covered expenses was $40,000. Id.
64. Id. (quoting FLA. STAT. § 627.739 (Supp. 1976)). The only policy language that the court considered concerning the deductible stated: "This Policy Contains $1,000 Deductible on Personal Injury Protection." Id. No policy language was cited by the court indicating the insured was informed that the selection of a deductible altered the maximum payable PIP benefits.
65. Cowan, 364 So. 2d at 811.
66. Id. The court referred to section 627.736 of the Florida Statutes, which is the section requiring PIP insurance coverage. Id. (citing FLA. STAT. § 627.736 (1975)).
67. Id. The court stated: "The amount 'otherwise due' under the policy is $5,000.00." The court then cites as its authority section 627.736(1) of the Florida Statutes. Id.
68. 391 So. 2d 805 (Fla. 5th Dist. Ct. App. 1980).
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insurance policy which included a $4,000 deductible. Thibodeau claimed that after payment of the $4,000 deductible, the insurance company was obligated to pay $5,000 in PIP insurance benefits. The insurance company, relying upon Cowan, argued that the insurance company’s maximum PIP liability was $1,000 because of Thibodeau’s $4,000 deductible. Thibodeau argued that Florida’s PIP statute was ambiguous and misleading. Thibodeau further argued that any person reading Florida’s PIP insurance law and Thibodeau’s PIP policy would conclude that $5,000 of PIP insurance would require the insurance company to pay $5,000 in PIP insurance benefits after payment of any deductible. The court acknowledged that Thibodeau’s argument was “appealing.” The court also confessed that the insurance company’s argument clearly bestows the deductible with a double effect; a reduction of the PIP insurance policy limits as well as a threshold to payment of any PIP insurance benefits. However, the court, without legislative history for guidance, passed Thibodeau’s argument to the Legislature and ruled, consistent with Cowan and the insurance company’s argument, that the “amount otherwise due” language of the Florida PIP statute means the statutorily required PIP insurance policy limits.

The question of computing PIP insurance benefits under a PIP insurance policy with a deductible laid dormant for six years until the Fourth District Court of Appeal was presented with the issue in International Bankers Insurance Co. v. Govan. In Govan, the insured purchased $10,000 in PIP insurance as required by Florida law at the time. Govan also selected a $2,000 deductible. The insured incurred over $5,000 in medical expenses from injuries sustained in an automobile accident. At issue was whether the payment of eighty percent of Govan’s medical bills, as required by Florida’s PIP insurance statute, should be computed before

69. Id. at 806. “The appellant argues the [insurance] policy statement of ‘$5,000 coverage’ is ambiguous and misleading because under no circumstances is $5,000 ever payable if it is subject to a deduction.” Id.
70. Id. “[T]he general public assumes, upon reading such a statement, that there is $5,000 coverage after the insured pays the first $4,000.” Id.
71. Thibodeau, 391 So. 2d at 806.
72. Id.
73. Id. “If the result is contrary to public policy or understanding and expectation, the legislature should revise [Florida Statute] section 627.739(1).” Id.
74. 502 So. 2d 913 (Fla. 4th Dist. Ct. App. 1986), aff’d, 521 So. 2d 1086 (Fla. 1988).
75. Id. Govan’s total medical bills were $5,887.45 which was below the $10,000 maximum limit of PIP benefits mandated in Florida Statute § 627.736(1)(a). Id.
or after the deductible is subtracted from the total medical bills. In ruling that the insurance company’s obligation to pay 80% of the insured’s medical expenses should be based on the total medical bills before subtraction of any deductible, the Fourth District Court of Appeal took issue with the Cowan and Thibodeau decisions. The Govan court held that the “benefits [amounts] otherwise due” language of the Florida PIP statute meant the total amount of medical expenses incurred by the insured before application of the deductible. The court noted its conflict with the Cowan and Thibodeau decisions and criticized those decisions by stating:

Those cases appear to hold that “benefits otherwise due” refers to the no-fault benefit limits, such as the $10,000 limit involved herein. If

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76. _Id._ at 913-14. The issue breaks down mathematically as follows:

The insurer claimed that Govan’s total medical bills should be multiplied by 80%, the maximum amount payable under Florida law, and then that sum should be further reduced by the deductible to arrive at the amount of PIP benefits payable to Govan. The math looks like this:

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<thead>
<tr>
<th>TOTAL MEDICAL BILLS</th>
<th>$5,887.45</th>
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<tbody>
<tr>
<td>80% PAYABLE (x) .80</td>
<td></td>
</tr>
<tr>
<td>DEDUCTIBLE (-) $2,000.00</td>
<td>$4,709.96</td>
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<tr>
<td>BENEFITS PAYABLE</td>
<td>$2,709.96</td>
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Govan claimed that the total of his medical bills should first be reduced by the deductible and then that sum should be multiplied by 80% to reach the total amount of PIP benefits payable by the insurer. The math looks like this:

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<td></td>
</tr>
<tr>
<td>BENEFITS PAYABLE</td>
<td>$3,109.96</td>
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Note that the $400 difference between the insurance company’s and Govan’s formula remains constant regardless of the insured’s deductible amount. See also Govan v. International Bankers Ins. Co., 521 So. 2d 1086, 1087 (Fla. 1988) (breaking down the figures graphically in its opinion).

77. See _Govan_, 502 So. 2d at 914.

78. _Id._
that were true, the “deductible” would not be a deductible at all in the manner that word is normally used, i.e., as an amount to be deducted from the claim, but rather would simply be a means of providing for lower policy limits. We do not believe the legislature would have authorized lower policy limits in such an indirect and unusual fashion, especially since [Florida Statutes] section 627.736(1)(a) specifically mandates coverage in the amount of at least $10,000.00. We are not aware of any statutory provision authorizing lesser limits. 79

The court also noted that the Govan PIP insurance policy language regarding deductibles paralleled the Cowan and Thibodeau PIP insurance policy terms. 80 The court expressed some concern that the PIP policy provisions regarding deductibles could be construed to support the use of a PIP deductible twice; first, to reduce the PIP policy limits and second, as a threshold to payment of PIP benefits. 81 However, the court declined to comment further on the policy language because that issue was not before the court and regardless of the policy language, the court based its decision on the “plain meaning” of the language of the Florida PIP statute. 82

The Fourth District Court of Appeal’s decision in Govan was affirmed on appeal by the Florida Supreme Court in Govan v. International Bankers Ins. Co. 83 In sum, the Florida Supreme Court in Govan equated the “amounts [benefits] otherwise due” language of Florida’s PIP insurance law with 80% of the insured’s total medical expenses rather than the PIP insurance policy limits. 84 Pursuant to the Supreme Court’s ruling in Govan, insurance companies would be obligated to pay out the statutorily required PIP insurance policy limits of $10,000 in benefits when 80% of the insured’s medical expenses minus any deductible equals or exceeds $10,000. 85

79. Id.
80. Id.
81. Id.
82. Govan, 502 So. 2d at 914.
83. 521 So. 2d 1086, 1087 (Fla. 1988). The court used a plain-meaning analysis to rule that the PIP statute required that 80% of the medical benefits must be computed first, and then the amount of any deductible should be subtracted to arrive at the total amount of PIP benefits payable by the insurer. Id. at 1088. The court dismissed Govan’s argument that Florida’s PIP statute was vague and ambiguous in an interesting footnote where a failure of the Legislature to amend section 627.739(2) of the Florida Statutes results in a “plain reading” of the statute. Id.
84. Id. at 1087-88.
85. See id. For example, if Govan’s medical expenses were $15,000 or more, then the insurance company would be obligated to pay $10,000 in PIP benefits. The math looks like this:
The Fourth District Court of Appeal’s decision in *International Bankers Insurance Co. v. Arnone* was predictably consistent with the same court’s opinion in *Govan*. The Fourth District Court of Appeal in *Arnone* extensively cited the *Govan* opinion in concluding that Ms. Arnone’s $2,000 deductible acted as a threshold to the payment of the PIP insurance policy limits in the event that eighty percent of the covered medical expenses equaled or exceeded the required $10,000 PIP policy limits. Under the facts of the *Arnone* case, eighty percent of her covered medical bills minus the $2,000 deductible did exceed her $10,000 PIP insurance policy limits. The court rejected the insurance company’s argument that a deductible reduces the face amount of a PIP insurance policy because Florida law requires $10,000 worth of PIP insurance coverage.

The appeal of the Fourth District Court of Appeal’s decision in *Arnone* presented the Florida Supreme Court with the opportunity to clarify the calculation of no-fault PIP insurance benefits subject to a deductible. The supreme court in *Arnone* reaffirmed the *Govan* method of computing PIP insurance benefits whereby eighty percent of the insured’s total medical expenses must be computed before subtracting the amount of any deductible. In doing so, the supreme court quashed the Fourth District Court of Appeal’s decision, and ruled that under the facts of *Arnone*, the “benefits [amounts] otherwise due” language of the Florida PIP statute means the lesser of eighty percent of the insured’s medical expenses minus any deductible, or the statutory PIP insurance policy limits minus any deductible. Consequently, because eighty percent of Susan Arnone’s medical expenses minus her $2,000 deductible is greater than her mandated

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86. 528 So. 2d 917 (Fla. 4th Dist. Ct. App. 1988).
87. *Id.* at 918-19.
88. *Id.* at 918. “We do not believe the legislature would have authorized lower policy limits in such an indirect and unusual fashion, especially since [Florida Statute] section 627.736(1)(a) specifically mandates coverage in the amount of a least $10,000.00. We are not aware of any statutory provision authorizing lesser limits.” *Govan*, 502 So. 2d at 914.
90. *Id.* at 911.
91. *Id.*
$10,000 PIP policy limits minus her $2,000 deductible, Ms. Amone’s $10,000 PIP policy with a $2,000 deductible only obligates the insurance company to pay out $8,000 in PIP benefits. In effect, the supreme court’s ruling in *Arnone* sanctions the use of a deductible not only as a threshold to the payment of PIP insurance benefits, but also as a reduction of the amount of statutorily required PIP insurance. As support for its ruling, the supreme court mentioned the Florida Department of Insurance’s interpretation of the Department approved standard PIP insurance policy provision concerning deductibles and the “internal consistency” rule of statutory construction.92 The supreme court did not expound a further explanation of these bases for its ruling, nor did it make any reference to legislative intent or legislative history to support its ruling and did not address any other issues regarding Florida’s no-fault PIP insurance law.93 In sum, the Florida Supreme Court’s decision in *Arnone* means that an insurance company will never be obligated to pay PIP insurance benefits to a Florida insured equal to the statutorily required $10,000 policy limits if the insured selects a deductible.

V. THE IMPACT OF THE FLORIDA SUPREME COURT’S DECISION IN *ARNONE*

An insurance coverage dispute between an insured and an insurer is not uncommon.94 Courts have traditionally relied on finding an ambiguity in the insurance contract or on the doctrine of unconscionability to resolve coverage disputes in favor of an insured.95 Conversely, courts have

92. *Id.* at 910. “Reading these sections in pari materia, it is plain that the statutorily defined ‘required benefits’ are the benefits otherwise due from which the deductible amount is to be subtracted.” *Id.* at 911.


94. There have been thousands of cases where the insured is at variance with the insurer. *See ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW § 6.1(a), at 614 (1988).*

95. *See id.* “The doctrine that ambiguities in contract documents are resolved against the party responsible for the drafting is a well recognized principle of contract interpretation. This doctrine was one of the first, and continues to be one of the most widely used approaches, which courts employ to ameliorate harsh effects that would otherwise result from insurance policy terms.” *Id.* at 628-29. “In some cases, for example, the unambiguous language of an insurance policy provision provides so little coverage that it would be unconscionable to permit the insurer to enforce it.” *Id.* at 638.
traditionally relied on the plain meaning rule and the sanctity of contract doctrine to hold in favor of an insurer. 96 However, no-fault PIP automobile insurance differs from other types of traditional insurance. 97 No-fault PIP insurance is a creation of statute. 98 Consequently, absent specific legislative history to the contrary, courts must consistently decide PIP insurance coverage disputes based on statutory language drafted and designed to accomplish a specific legislative purpose. 99 Accordingly, the Florida courts must forgo decision making that undermines or disregards the Legislature's intended purpose in enacting a no-fault PIP insurance statute. 100 The Florida Supreme Court twice failed its task in Arnone.

The supreme court initially failed to provide a consistent interpretation of the "benefits otherwise due" provision of Florida's PIP insurance statute. The court, by affirming Govan, ruled that for insureds who chose a deductible, the "benefits otherwise due" language of the PIP statute means that payable PIP insurance benefits equal eighty percent of the total medical expenses minus the deductible. 101 The court later ruled in Arnone that for


98. See King, supra note 11, at 299; see also SCHERMER, supra note 6, § 1.02 at 1-12.

99. 49 FLA. JUR. 2D Statutes § 114 (1984); see also White v. PepsiCo, 568 So. 2d 886, 889 (Fla. 1990) (service of process statute); Byrd v. Richardson-Greenshields Sec. Inc., 552 So. 2d 1099, 1102 (Fla. 1989) (workers' compensation statute); Tampa-Hillsborough County v. K.E. Morris Alignment Serv., 444 So. 2d 926, 928-29 (Fla. 1983) (eminent domain statute); State v. Webb, 398 So. 2d 820 (Fla. 1981); Wakulla County v. Davis, 395 So. 2d 540, 542-43 (Fla. 1981) (statutory attorney fee statute); Schultz v. State, 361 So. 2d 416 (Fla. 1978); State ex rel. Triay v. Burr, 84 So. 61 (Fla. 1920).

100. See infra note 114.

101. Govan, 502 So. 2d at 914.
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insureds who chose a deductible, the “benefits otherwise due” language of the PIP statute means the mandatory PIP insurance policy limits minus the deductible. The two formulas for calculating no-fault insurance benefits are inconsistent. Under the Govan formula, if eighty percent of the insured’s covered medical bills minus the deductible equals or exceeds the $10,000 statutorily required policy limits, then the insured’s PIP insurance benefits would equal $10,000. Under the Arnone formula, the insured’s PIP insurance benefits would never be more than the $10,000 statutorily required policy limits minus the amount of the deductible. The Arnone opinion belies the court’s stated allegiance to its guideline of internal consistency in statutory interpretation.

The court’s failure to be consistent and pick one formula for the computation of PIP insurance benefits raises other questions. Why did the court concoct two formulas and two interpretations for the “benefits otherwise due” statutory language? The only difference between Govan and Arnone is the amount of medical expenses. In Govan, the insured incurred over $5,000 in medical expenses, while in Arnone, the insured had over $10,000 in medical bills. However, the common thread in both of these cases was that the insurance company won. Consequently, the supreme court’s inconsistent interpretations of the Florida PIP insurance law produces a consistent result: the insurance companies pay out less in PIP insurance benefits—a potential multi-billion dollar windfall.

The supreme court also failed to follow its own prior court opinions and the express legislative purpose of Florida’s PIP insurance law. The court’s ruling in Arnone prohibits any insured who chooses a deductible from receiving the statutory minimum $10,000 of PIP insurance benefits. Regardless of the Florida Department of Insurance’s interpretation of the deductible provisions of the PIP statute, the court must look to the legislative history (nonexistent for this issue), the Legislature’s expressed purpose for the statute, the actual language used in the statute, and prior precedent for guidance in statutory interpretation. The court in Kwechin

102. Arnone, 552 So. 2d at 910-11.
103. See Govan, 502 So. 2d at 914.
104. See Arnone, 552 So. 2d at 911.
105. See id.
106. Govan, 502 So. 2d at 913.
107. Arnone, 552 So. 2d at 909.
108. See supra note 10 and accompanying text.
109. See Arnone, 552 So. 2d at 911.
110. See id. at 910-11; see also FLA. STAT. § 627.736(1) (Supp. 1992); Heredia v. Allstate Ins. Co., 358 So. 2d 1353, 1354-55 (Fla. 1978) (PIP case); Van Pelt v. Hilliard, 78
clearly stated that the legislative purpose of an insurance deductible was to avoid requiring duplicate and uncollectible insurance benefits; not to reduce insurance policy limits.\textsuperscript{111} Furthermore, the court in \textit{Lasky} ruled that the legislative purpose of Florida's PIP statute was to provide a mandatory $10,000 of no-fault PIP insurance benefits.\textsuperscript{112} Finally, the court in \textit{Praetorians v. Fisher}\textsuperscript{113} stated that the Florida statutes governing insurance contracts must be liberally construed so as to protect the public.\textsuperscript{114} The court in \textit{Arnone} disregarded not only the explicit language of the PIP statute requiring $10,000 of PIP insurance benefits, but also its own precedent to the detriment of Florida automobile owners, drivers and passengers.

The supreme court's reluctance to provide a single formula for the computation of PIP insurance benefits for insureds who choose a deductible requires legislative repair. The primary goal of any legislative remedy must be to clearly disclose the amount of PIP insurance benefits an insured purchases when choosing a deductible. There have been several attempts, spearheaded by The Academy of Florida Trial Lawyers, to legislatively correct the Florida Supreme Court's \textit{Arnone} decision.\textsuperscript{115} The 1993 Regular Session of the Florida Legislature yielded House Bill 2139, which included an amendment to the Florida PIP statute designed to override the \textit{Arnone} decision.\textsuperscript{116} House Bill 2139 merely adds the following language to the text of section 627.739(2) of the Florida Statutes after the "benefits otherwise due" language of this section:

\begin{quote}
After the deductible is met, an insured shall be eligible to receive up to the $10,000 in total benefits described in s. 627.736(1).\textsuperscript{117}
\end{quote}

\textsuperscript{111} \textit{Industrial Fire & Casualty Ins. Co. v. Kwechin}, 447 So. 2d 1337, 1339 (Fla. 1983).
\textsuperscript{112} \textit{Lasky v. State Farm Ins.}, 296 So. 2d 9, 16 (Fla. 1974).
\textsuperscript{114} \textit{Id. at 333.}
\textsuperscript{115} The Academy of Florida Trial Lawyers ("AFTL") Proactive Legislation Summaries from 1989 through 1993 indicate that AFTL has proposed legislation to overrule the \textit{Arnone} case. \textit{See ACADEMY OF FLORIDA TRIAL LAWYERS, AFTL PROACTIVE LEGISLATION SUMMARIES (1993).}
\textsuperscript{116} Fla. HB 2139, § 12 at 18-19 (1993). Fla. SB 1044 (1993) was the identical bill considered by the Florida Senate. This article will only reference Fla. HB 2139, § 12 at 18-19.
\textsuperscript{117} \textit{Id.}
This proposed amendment explicitly requires insurance companies to pay out PIP insurance benefits equal to the statutorily mandated PIP policy limits of $10,000 after the insured satisfies any deductible. The proposed amendment would overrule the Florida Supreme Court's decision in Arnone. House Bill 2139 was not enacted by the Florida Legislature during the 1993 Regular Session, but will be re-introduced in the 1994 Regular Session of the Florida Legislature. The proposed amendment is appealing to consumers and unappealing to insurance companies because the amendment increases the pay out of PIP benefits. The sponsors and supporters premise this proposed amendment on the Legislature's express statutory language to provide $10,000 in PIP benefits under Florida's no-fault law and on common sense. Could the Florida Legislature have been so gripped by nonsense that it would enact a PIP statute requiring $10,000 of PIP insurance coverage, and then never require insurance companies to pay out $10,000 in PIP benefits? Putting aside the debate over the propriety of the Govan formula for computing PIP benefits, the proposal to require the insurance companies to pay out PIP benefits to the extent of the face value of the required PIP insurance policy limits merits adoption by the Florida Legislature. By adopting the proposed amendment, the Legislature would reinstate the mandatory $10,000 of PIP insurance benefits for insureds who chose a deductible and eliminate the insurance companies' windfall. In addition, the Legislature would send a message to the

118. Id.
119. Senate Bill 1044 passed the Florida Senate, but the Florida House of Representatives failed to act on the bill before the close of the 1993 regular legislative session. House Bill 2139 was not reported out of the Appropriations Committee of Florida House of Representatives and therefore, never voted on by the Florida House of Representatives. Report of Legislation, 1993 regular session of the Florida Legislature.
121. The answer to this rhetorical question is "no." However, the answer given by the Florida Supreme Court in Arnone was "yes." The Florida Supreme Court's answer violates one of the traditional rules of statutory construction: a statute must be construed so as to avoid an unreasonable, illogical, ridiculous or abused result. 49 Fla. Jur. 2d Statutes § 121 (1984); see also Fla. Stat. § 627.736(1) (Supp. 1992); Tyson v. Lanier, 156 So. 2d 833 (Fla. 1963); City of St. Petersburg v. Siebold, 48 So. 2d 291 (Fla. 1950); State v. Sullivan, 116 So. 255 (Fla. 1928); McLellan v. State Farm Mut. Auto. Ins. Co., 366 So. 2d 811 (Fla. 4th Dist. Ct. App. 1979); State Farm Mut. Auto. Ins. Co. v. O'Kelley, 349 So. 2d 717 (Fla. 1st Dist. Ct. App. 1977), cert. denied, 357 So. 2d 188 (Fla. 1978) (PIP statute); Gracie v. Deming, 213 So. 2d 294 (Fla. 2d Dist. Ct. App. 1968).
122. See Govan, 502 So. 2d at 913.
124. See Florida Drivers License Bureau Statistics, supra note 2.
Florida Supreme Court and the Florida Department of Insurance that Florida's PIP insurance law means what it is supposed to mean. The Legislature would also send a message to insurance companies that if an insured purchases $10,000 in PIP insurance, then insurance companies better be prepared to pay out $10,000 in PIP insurance benefits. Finally, the Legislature would send a message to Florida consumers that the puzzling words of a no-fault, PIP insurance policy and the clever sales efforts by insurance agents will not amount to a reduction in the required no-fault PIP insurance benefits.

VI. CONCLUSION

The insurance contract is carefully prepared by the insurance company with over two centuries of experience. The insured is a neophyte... Under these circumstances the law... must become avowedly pragmatic. The first step in the administration of justice is the recognition that man is not made for the law, but that the law is made for the man.

Despite the best of intentions, Florida's no-fault automobile insurance seems to have sunk into the same interpretive quagmire of most other types of insurance. Perhaps, it is time for Florida to put aside the favorite "It is an insurance case!" rationale to explain away court opinions like Arnone. Otherwise, it is just a matter of time before all of us reach into our mailbox only to find a letter from our insurance company that says "We regret to inform you..."

125. See Allstate Auto Communications, supra note 43; Jaeger, supra note 34, at 30, 39; see also Jaeger supra notes 45, 47 and accompanying text; Nader & Smith, supra note 1, at 63; State Farm Insurance, supra note 43;
128. See Keeton & Widiss, supra note 94, at 614.
129. Id. at 615 n.1. The generalization was used to explain these one-time unpredictable insurance cases where there was a variance between the policy provisions and the insured's position. Id.
130. Nader & Smith, supra note 1, at xvii.
Murthy v. N. Sinha Corp.—Does Florida’s Construction Contracting Statute Create a Private Cause of Action Against Individual Qualifying Agents?

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I. INTRODUCTION

When the Murthys sought damages for injuries that chapter 489, Florida’s construction contracting statute, was enacted to prevent, the court had to decide whether the Legislature intended the statute’s expressed penalties and disciplinary enforcement provisions to be exclusive.1 Because implied recovery or denial is attributable to the legislation, not to the court’s independent policy choice,2 the Murthys’ claim stands or falls with the statute under which it was asserted: chapter 489.3 Still in the devastating aftermath of Hurricane Andrew,4 consumers such as the Murthys do not

3. See Murthy, 618 So. 2d at 309.
care that the Construction Industry Licensing Board ("CILB") may discipline and penalize incompetent and unscrupulous contractors under the statute. It may be "cold comfort" to them that the wrongdoer will be disciplined if the discipline excludes liability for damages to injured consumers. The courts should not presume that legislative silence implies such a policy choice.

The series of cases discussed in this comment debate the existence, within chapter 489, of an implicit private right of action against qualifying agents. Conflicting interpretations of the statute prompted the Third District Court of Appeal to request resolution from the Florida Supreme Court. Accordingly, in Murthy v. N. Sinha Corp., the Third District Court of Appeal noted the conflict of its decision and the Finkle v. Mayerchak decision with the decisions from the First and Fifth Districts and certified the following question to the Florida Supreme Court: "Does chapter 489, Florida Statutes (1991), the licensing and regulatory chapter governing construction contracting, create a private cause of action against the individual qualifier for a corporation acting as a general contractor?"

Upon closer examination, however, a conflict exists only between the First and Third Districts. Specifically, the Third District Court of Appeal's decisions in Finkle and Murthy, conflict with Gatwood v. McGee, decided by the First District Court of Appeal. In the other two cases to which the Murthy court cites, Hunt v. Department of Professional Regulation and Alles v. Department of Professional Regulation, the First and Fifth District Courts of Appeal held that, under chapter 489, a qualifying agent

5. FLA. STAT. § 489.107 (1991). The CILB, created within the Department of Professional Regulation ("DPR"), enforces the provisions of chapter 489. Id.; see infra note 84.


7. See id.

8. See id.


10. See Murthy, 618 So. 2d at 309.

11. 578 So. 2d at 397-98.

12. See Murthy, 618 So. 2d at 309.

13. 475 So. 2d at 723.

14. See Murthy, 618 So. 2d at 309.


16. 423 So. 2d 624 (Fla. 5th Dist. Ct. App. 1982).
Ferguson has a statutorily-imposed duty to supervise any construction project for which the qualifying agent is the licensee of record. 17

Gatwood, Hunt, and Alles served to establish the decisional law construing the statute’s legislative intent to impose a supervisory duty upon qualifying agents. 18 By 1988, however, before Finkle and Murthy were decided, the Legislature codified the duty to supervise in section 489.1195 of the Florida Statutes, setting standards and procedures for qualifying agents. 19 In other words, the statutory duty exists; the question becomes whether the qualifying agent’s breach of the duty creates a private cause of action. Both Hunt and Alles involved contractors who appealed disciplinary actions taken by the Department of Professional Regulation 20 and thus, did not reach the issue of creating a private cause of action against the qualifying agents. 21 While both Finkle and Murthy held the statute creates no private cause of action against qualifying agents individually, 22 the Finkle court cites Gatwood, contradicting itself, to support a cause of action in common-law negligence against an individual qualifying agent. 23 Moreover, the Murthy court cites Finkle with no additional explanation, so too implying the Gatwood court’s reasoning. 24

Both cases misapply Gatwood, Finkle directly and Murthy indirectly, because Gatwood implies a cause of action in negligence, under chapter 489, against individual qualifying agents. 25 The action lies for damages resulting from a breach of their nondelegable, statutorily-imposed supervisory duty. 26

It is likely that the Third District Court construed chapter 489 to mean it does not create a negligence per se action when a qualifying agent breaches the supervisory duty in violation of the statute. 27 In fact, by allowing a cause of action in common-law negligence the court begs the certified question. The more appropriate question may be whether chapter

17. 444 So. 2d at 999; 423 So. 2d at 626.
20. See supra note 5.
21. See Hunt, 444 So. 2d at 997; Alles, 423 So. 2d at 625.
22. See Finkle, 578 So. 2d at 397; Murthy, 618 So. 2d at 309.
23. See Finkle, 578 So. 2d at 398.
24. See Murthy, 618 So. 2d at 308.
25. See Gatwood, 475 So. 2d at 723.
26. Id.
27. See Williams v. Youngblood, 152 So. 2d 530, 532 (Fla. 1st Dist. Ct. App. 1963) (stating in dictum that an unexcused violation of a statutory standard is negligence per se, that is, negligence as a matter of law to be ruled by the court).
489 creates a private right of action in negligence per se, or whether its violation is merely prima facie evidence of negligence.\textsuperscript{28}

Although the \textit{Finkle} court refers to the plaintiffs' negligence per se claim,\textsuperscript{29} the court does not apply the negligence per se line of cases in its reasoning.\textsuperscript{30} In \textit{deJesus v. Seaboard Coast Line Railroad}, the Florida Supreme Court set forth rules applying the negligence per se doctrine, creating binding case law statewide.\textsuperscript{31} However, the \textit{Finkle} court uses the judicial implication doctrine from \textit{Fischer v. Metcalf}\textsuperscript{32} that is binding only in the Third District.\textsuperscript{33} In order to analyze and evaluate \textit{Murthy} and the certified question, one must understand both the \textit{Gatwood} and \textit{Finkle} decisions.

Part two explains the facts and disparate decisions of \textit{Gatwood}, \textit{Finkle}, and \textit{Murthy}. Part three analyzes chapter 489 and applies the Third District Court of Appeal's rationale for declining a private right of action under the statute. The threshold analysis focuses on the judicial implication doctrine adopted by the Third District and applies the doctrine to \textit{Murthy} using intrinsic and extrinsic aids to statutory construction to ascertain legislative intent.

Thereafter, part three suggests and applies an alternative judicial implication doctrine, negligence per se, not considered by either the First or Third Districts. Part three also considers extra-jurisdictional approaches

\textsuperscript{28} See \textit{deJesus v. Seaboard Coast Line R.R.}, 281 So. 2d 198, 201 (Fla. 1973) (holding that violations of statutes, other than those imposing a form of strict liability, may be either negligence per se or evidence of negligence).

\textsuperscript{29} See \textit{Finkle}, 578 So. 2d at 397.

\textsuperscript{30} See \textit{id.} at 397-98.

\textsuperscript{31} See \textit{deJesus}, 281 So. 2d at 201.

\textsuperscript{32} See \textit{Fischer}, 543 So. 2d 785, 788 (Fla. 3d Dist. Ct. App. 1989) (en banc). The court held that chapter 827, Florida Statutes (1979) does not provide a private right of action for violation of a statutory duty to report an alleged abuse. \textit{id.} at 787.

The court adopted the more restrictive United States Supreme Court doctrine, not binding on Florida district courts of appeal, \textit{id.}, instead of controlling doctrine from \textit{de Jesus}. See \textit{deJesus}, 281 So. 2d at 201; see also \textit{Smith v. Piezo Tech. & Prof. Adm'r's}, 427 So. 2d 182, 184 (Fla. 1983) (holding that an injured party should have an action where a statute gives a right, even though it has not expressly given a remedy).

The \textit{Fischer} case involves minor children who brought an action against their father's psychiatrist, alleging the psychiatrist failed to report that he knew or suspected the father was physically and emotionally abusing the children, causing their injuries. 543 So. 2d at 786.

\textsuperscript{33} See \textit{Finkle}, 578 So. 2d at 397-98. Although \textit{Fischer} is controlling authority in the Third District, and therefore binding on the \textit{Finkle} court, both courts ignored the Florida Supreme Court cases on judicial implication doctrine and negligence per se. See \textit{deJesus}, 281 So. 2d at 201; \textit{Smith}, 427 So. 2d at 184; see supra notes 28, 32.
which, when applied to Murthy, support a private remedy under chapter 489. Finally, part four discusses the likely ramifications of a private right of action against qualifying agents, then part five concludes that chapter 489 implicitly supports a private remedy.

II. SPLIT AMONG FLORIDA'S DISTRICT COURTS OF APPEAL

A. Gatwood v. McGee

Prior to 1979, Gatwood Enterprises, a home construction business, entered into an agreement with Glynquest, a third party builder, whereby Glynquest was employed to manage and supervise Gatwood Enterprises' home building operation.\(^34\) Gatwood, a building contractor, was Gatwood Enterprises' president, sole stockholder and qualifying agent.\(^35\) Gatwood, although involved in various aspects of Gatwood Enterprises' operations, had nothing to do with the actual construction of the homes.\(^36\) He did, however, obtain the building permit for the home sold to the McGees in October 1979.\(^37\) Within two months after the McGees bought and occupied the new home, they discovered that it had been constructed on a bed of muck, ten to twelve feet deep, which had been covered with a layer of fill sand.\(^38\) The unstable ground caused substantial structural problems to the home.\(^39\)

The McGees filed suit in August 1980 against Gatwood individually, and Gatwood Enterprises, Inc., a dissolved corporation since June 1980.\(^40\) The trial court entered judgment for damages against the corporation and Gatwood individually.\(^41\) Only Gatwood, individually, appealed the judgment.\(^42\)

The First District Court of Appeal held that Gatwood had a statutorily-imposed duty, as qualifying agent, to supervise construction pursuant to chapter 489, Florida Statutes (1979).\(^43\) The court further held that breach-
ing the duty provides a basis for personal liability in a negligence action. Specifically, the court stated that the "negligent performance of the qualifying agent’s statutorily imposed duty of supervision may support a cause of action for damages . . . " The court added that the qualifying agent’s duty of supervision is nondelegable; the qualifier may not evade responsibility for negligent supervision by relying upon one who, even though a competent builder, is not the qualifying agent of record for the company pursuant to chapter 489. The court emphasized that the cause of action was based upon negligence. The court further stated that to recover, the plaintiffs must prove more than Gatwood improperly delegated his supervisory responsibility. The McGees must prove that the construction defects could reasonably have been avoided if the qualifying agent executed his statutorily-imposed duty with due care.

B. Finkle v. Mayerchak

In early 1984, the Finkles met with Firestone, the owner of a construction company, MPF Enterprises, to negotiate a contract for the design and construction of their home. Firestone represented to the Finkles that he personally held a Florida general contractor’s license. Firestone did not inform the Finkles that Mayerchak was, in fact, the qualifying agent for MPF.

In 1987, the Finkles sued Mayerchak individually, as MPF’s qualifying agent, alleging that the house was not completed timely, economically, or free from defects. The Finkles filed both common law negligence and negligence per se actions. They claimed that Mayerchak was responsible for their damages pursuant to chapter 489, because the building permit was issued to him and because he allowed an unlicensed person to use his

44. Gatwood, 475 So. 2d at 723.
45. Id.
46. Id.
47. Id.
48. Id.
49. Gatwood, 475 So. 2d at 723.
50. Id.
52. Id.
53. Id.
54. Id.
55. Id.
license.\textsuperscript{56} The trial court entered summary judgment in favor of Mayerchak on both the negligence and negligence per se claims.\textsuperscript{57}

On appeal, the Third District Court of Appeal affirmed the trial court's decision on the negligence per se claim and held that neither section 489.119 nor 489.129 of the Florida Statutes, regulatory and penal statutes, creates a private cause of action against Mayerchak as the individual qualifier for a corporation acting as a general contractor.\textsuperscript{58} However, the district court reversed the trial court's ruling on the negligence claim.\textsuperscript{59} Citing \textit{Gatwood}, the court held that the Finkles' claim did state a cause of action against Mayerchak for common-law negligence.\textsuperscript{60}

C. \textit{Murthy v. N. Sinha Corp.}

Prior to 1991, the Murthys entered into a contract with N. Sinha Corporation, a home construction business, for improvements to their home.\textsuperscript{61} Sinha was the president, sole stockholder, and qualifying agent for the corporation.\textsuperscript{62} According to the terms of the contract, the corporation could not require payment before the completion of a pre-defined phase, unless it was mutually agreed by both parties.\textsuperscript{63} When the corporation requested payment before completing work on Phase III, the Murthys refused to pay until the corporation completed the Phase III work and satisfied the county building code requirements.\textsuperscript{64} The corporation refused to correct the defects and abandoned the project.\textsuperscript{65} The Dade County Building and Zoning Department later cited and red-tagged the Murthys' home for building code violations.\textsuperscript{66} Further, N. Sinha Corporation's builders prematurely cut the overhang around the house and left it uncovered for weeks knowing that the Murthys were living there.\textsuperscript{67}

\begin{itemize}
\item \textsuperscript{56} \textit{Finkle}, 578 So. 2d at 397.
\item \textsuperscript{57} Id.
\item \textsuperscript{58} Id.
\item \textsuperscript{59} Id. at 398.
\item \textsuperscript{60} Id.
\item \textsuperscript{61} \textit{Murthy v. N. Sinha Corp.}, 618 So. 2d 307, 308 (Fla. 3d Dist. Ct. App. 1993).
\item \textsuperscript{62} Id.
\item \textsuperscript{63} Initial Brief of Appellants at 2, \textit{Murthy v. N. Sinha Corp.}, 618 So. 2d 307 (Fla. 3d Dist. Ct. App. 1993) (No. 92-01237).
\item \textsuperscript{64} Id.
\item \textsuperscript{65} Id.
\item \textsuperscript{66} Id.
\item \textsuperscript{67} \textit{Murthy}, 618 So. 2d at 308.
\end{itemize}
house flooded repeatedly and the ceiling collapsed causing property damage and personal injuries. 68

In May 1991, the corporation filed a claim of lien against the Murthys' home. 69 When the Murthys contested the lien, the corporation filed an action for breach of contract and to foreclose on the mechanic's lien. 70 Thereafter, the Murthys filed an amended third party complaint against Sinha, individually. 71 The trial court granted the corporation's motion to dismiss the third party complaint, and the Murthys appealed. 72

Citing Finkle, the court held that neither section 489.119 nor 489.129, the regulatory and penal statutes, respectively, of chapter 489 creates a private cause of action against qualifying agents individually. 73 Again citing Finkle, and reversing the trial court, the district court held that the Murthys did state a cause of action against the qualifying agent, individually, for common-law negligence. 74 The court added that Sinha could not be held personally liable under the construction contract because he was not a party to the contract; the contract was between the Murthys and N. Sinha Corporation. 75

III. INTERPRETING FLORIDA STATUTES CHAPTER 489

A. Implying a Private Cause of Action

Chapter 489 makes no express provision for a qualifying agent's civil liability. 76 The threshold inquiry, therefore, concerns whether a cause of action should be judicially implied. Whether to imply a private cause of action from a statute is determined by legislative intent. 77 Legislative intent controls construction of statutes in Florida and that intent is determined primarily from the language of the statute. 78 The plain meaning of

68. Id.
69. Id.
70. Id.
71. Id.
72. Murthy, 618 So. 2d at 308.
73. Id. at 309.
74. Id. at 308.
75. Id. at 309.
78. St. Petersburg Bank & Trust Co. v. Hamm, 414 So. 2d 1071, 1073 (Fla. 1982).
the statutory language is the first consideration. This principle, known as the "plain meaning rule," requires judicial determination of statutory ambiguity as a prerequisite for judicial interpretation.

Conflicting interpretations of chapter 489 among the First and Third District Courts of Appeal evidence the statute's ambiguity. In its inconsistent and unclear interpretation of chapter 489, the Third District Court of Appeal has placed itself in direct conflict with the First District Court of Appeal. Resolution of the controversy depends upon an analysis of the rationales applied in the Third and First Districts, respectively, together with the relevant sections of chapter 489, and an alternative

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79. Id.
81. See supra text accompanying notes 11-24.
82. See Murthy, 618 So. 2d at 309; Finkle, 578 So. 2d at 397.
84. Florida Statutes, section 489.101 provides:

The Legislature recognizes that the construction and home improvement industries may pose a danger of significant harm to the public when incompetent or dishonest contractors provide unsafe, unstable, or short-lived products or services. Therefore, it is necessary in the interest of the public health, safety, and welfare to regulate the construction industry.

FLA. STAT. § 489.101 (1991). Florida Statutes, section 489.105(3) defines "contractor" as follows:

"Contractor" means the person who is qualified for and responsible for the entire project contracted for and means . . . the person who, for compensation, undertakes to, submits a bid to, or does himself or by others construct, repair, alter, remodel, add to, subtract from, or improve any building or structure, including related improvements to real estate, for others or for resale to others . . .

FLA. STAT. § 489.105(3) (1991). Florida Statutes, section 489.105(4) defines a "qualifying agent" as follows:

"Primary qualifying agent" means a person who possesses the requisite skill, knowledge, and experience, and has the responsibility, to supervise, direct, manage, and control . . . construction activities on a job for which he has obtained the building permit; and whose technical and personal qualifications have been determined by investigation and examination as provided in this part, as attested by the department.

FLA. STAT. § 489.105(4) (1991). Florida Statutes, section 489.107(1) provides in relevant part:
Construction Industry Licensing Board.

"To carry out the provisions of this part, there is created within the Department of Professional Regulation the Construction Industry Licensing Board . . . ."

FLA. STAT. § 489.107(1) (1991). Florida Statutes, section § 489.119(2)(a) provides in relevant part:

Business organizations; qualifying agents.

[A]pplicant[s] propos[ing] to engage in contracting as a . . . corporation . . . or other legal entity . . . must apply through a qualifying agent . . . . Such application must also show that the qualifying agent is legally qualified to act for the business organization in all matters connected with its contracting business and that he has authority to supervise construction undertaken by such business organization . . . . The registration or certification, when issued upon application of a business organization, must be in the name of the qualifying agent, and the name of the business organization must be noted thereon . . . .

FLA. STAT. § 489.119(2)(a) (1991). Florida Statutes, section 489.1195(1) provides in relevant part:

Responsibilities.

"A qualifying agent is . . . responsible for supervision of all operations of the business organization; for all field work at all sites; and for financial matters, both for the organization in general and for each specific job."

FLA. STAT. § 489.1195(1) (1991). Florida Statutes, section 489.129(1), (2) provides in relevant part:

Disciplinary proceedings.

(1) The board may revoke, suspend, or deny the issuance or renewal of the certificate or registration of a contractor, require financial restitution to a consumer, impose an administrative fine not to exceed $5,000, place a contractor on probation, require continuing education, asses costs associated with investigation and prosecution, or reprimand or censure a contractor if the contractor, or if the business organization for which the contractor is a primary qualifying agent . . . responsible under s. 489.1195, is found guilty of any of the following acts:

(d) Willfully or deliberately disregarding and violating the applicable building codes or laws of the state or of any municipalities or counties thereof.

(f) . . . . When a certificateholder or registrant allows his certificate or registration to be used by one or more business organizations without having any active participation in the operations, such act constitutes prima facie evidence of an intent to evade the provisions of this part.

(h) Committing mismanagement or misconduct in the practice of contracting that causes financial harm to a customer . . . .

(m) Committing fraud or deceit or gross negligence, incompetency, or misconduct in the practice of contracting.
rationale not applied by any of the district courts in the context of the certified question.85

The Third District Court of Appeal, in *Finkle v. Mayerchak*, was the first to hold that neither section 489.119 nor 489.129 of the Florida Statutes, the regulatory and penal statutes governing construction contracting, creates a private cause of action against the individual qualifier for a corporation acting as a general contractor.86 The *Finkle* court relied on *Fischer v. Metcalf*, looking to legislative intent rather than what it termed the "class benefitted" factor to determine whether the statute creates a private right of action.87 The *Finkle* court found no evidence of legislative intent to create a private remedy on behalf of individuals.88 The *Murthy* court cited *Finkle* without explanation to deny the plaintiffs a statutory cause of action against the qualifying agent,89 and to permit a common-law negligence action against the qualifier.90 Neither court revealed its analyses of the statute, legislative intent, or cases upon which its conclusions were based.

However, the *Finkle* and *Murthy* courts' reasoning can be reconstructed by applying the *Fischer* court's rationale to *Murthy*. Prior to *Fischer*,91 the Third District Court of Appeal applied the common-law tradition from *Rosenberg v. Ryder Leasing, Inc.*,92 which set forth a relatively simple test. The test provides that, where a penal statute imposes a duty to benefit a class of individuals, a right of action accrues to a class member injured through breach of the duty.93 The cause of action arises by virtue of the duty created by the statute.94

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85. See supra notes 31-33 and accompanying text.
86. See *Finkle*, 578 So. 2d 396, 397 (Fla. 3d Dist. Ct. App. 1991); see also FLA. STAT. §§ 489.119, 489.129 (1989).
87. *Finkle*, 578 So. 2d at 397.
88. *Id.* at 398.
89. *Murthy*, 618 So. 2d 309.
90. *Id.* at 308.
91. 543 So. 2d 785, 788 (Fla. 3d Dist. Ct. App. 1989) (en banc).
93. *Id.*; *Fischer*, 543 So. 2d at 788.
94. *Fischer*, 543 So. 2d at 788.
The Fischer court found the United States Supreme Court's rationale in *Cori v. Ash* 95 compelling and adopted the *Cori* test while receding from the common law tradition in *Rosenberg*. 96 The Fischer court stated that, in the Third District, "the ‘class benefitted’ factor would no longer be the sole determinative” in implying a private right of action for violation of a penal statute. 97 The court set forth the United States Supreme Court doctrine using its test to determine whether a private remedy should be implied in a statute not expressly providing one. 98 The Fischer court's criteria focused on discerning the legislative intent behind enacting the statute under review. 99

First, the plaintiff must be one of the class for whose “especial” benefit the statute was enacted. 100 Second, a court must consider any explicit or implicit intent to create or deny a private remedy. 101 Third, judicial implication must be consistent with the underlying purposes of the legislative scheme. 102

The first step in applying the Fischer test to Murthy is to decide if the plaintiff is one of the class for whose "especial" benefit the statute was enacted. 103 In other words, a statute that merely makes a provision to secure the safety or welfare of the public as an entity should not be construed as establishing civil liability. 104 However, whether the liability is

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95. 422 U.S. 66, 78 (1975). The Supreme Court’s reluctance to imply civil liability from federal statutes is partly because damage actions are normally a question of state law. Bob Godfrey Pontiac, Inc. v. Roloff, 630 P.2d 840, 853 (Or. 1981) (Linde, J., concurring). Unlike Congress, however, state legislators know that judicial recognition of implicit tort liability does not involve such jurisdictional questions. *Id.*

96. *Fischer*, 543 So. 2d at 789.

97. *Id.*

98. *Id.* at 788.

99. *Id.*

100. *Id.*

101. *Fischer*, 543 So. 2d at 788.

102. *Id.*

103. *See id.*

104. Grand Union Co. v. Rocker, 454 So. 2d 14, 16 (Fla. 3d Dist. Ct. App. 1984) (violating minimum building code is not negligence per se because purpose of statute is to protect general public). The Rocker court ignored section 553.84 of the building construction standards statute which states: “any person . . . damaged as a result of a violation of . . . the State Minimum Building Codes, has a cause of action in any court . . . against the person or party who committed the violation.” Fla. STAT. § 553.84 (1979); *see also* Byron G. Petersen & Steven S. Goodman, *Section 553.84: Remedy Without a Cause?*, 17 Nova L. Rev. 1111, 1121 n.48 (1993) (noting that a violation of the building code translates into failure to meet the minimum standards of proper construction, which is more like a formulation of negligence per se than mere evidence of negligence).
exclusively of a public character depends on the nature of the duty imposed and the benefits to be derived from its performance.\textsuperscript{105}

The Legislature enacted chapter 489 to regulate the construction industry "in the interest of the public health, safety and welfare."\textsuperscript{106} The Legislature "recogniz[ed] that the construction and home improvement industries may pose a danger of significant harm to the public when incompetent or dishonest contractors provide unsafe, unstable, or short-lived products or services."\textsuperscript{107} Although the stated purpose of chapter 489 uses the broad term "public," the statute functions to protect consumers of contractors' services: a specific class of persons.

Furthermore, the nature of the qualifying agent's duty is absolute responsibility for the project.\textsuperscript{108} The qualifying agent must supervise all operations of the business organization, the field work at all sites, and financial matters of the corporation and each specific job.\textsuperscript{109} The character of the qualifying agent's duty is private not public because a specific consumer derives the primary benefits from its performance.

The statute defines a contractor as one who "undertakes to . . . construct, repair, alter, remodel . . . or improve any building or structure for others or for resale to others . . . ."\textsuperscript{110} The "others" for whom contractors provide services are a distinct, specific group of consumers. Thus, the statute was enacted for the "especial" benefit of the consumers of contractors' services. It follows that Murthy, a consumer who contracted for services from a business organization acting as a contractor, N. Sinha Corporation, is a member of the class for whom the statute was enacted.\textsuperscript{111}

\textsuperscript{105} Frontier Steam Laundry Co. v. Connolly, 101 N.W. 995, 996 (Neb. 1904). If the duty imposed is clearly intended for the benefit of individuals or their property, the plaintiff may recover; but where the duty imposed is plainly for the public at large, then an individual acquires no new rights by virtue of the statute. \textit{Id.} See generally \textit{49 FLA. JUR. 2D Statutes} § 223 (1984) (discussing rights of action predicated on violation of statutory duty); \textit{cf.} Lake v. Ramsay, 566 So. 2d 845, 847 (Fla. 4th Dist. Ct. App. 1990) (stating that qualifying agents have a duty to their employers and a further duty of competence and professional responsibility to the public).

\textsuperscript{106} FLA. STAT. § 489.101 (1991); \textit{see supra} note 84.

\textsuperscript{107} \textit{Id.}

\textsuperscript{108} FLA. STAT. §§ 489.105(4), 489.1195 (1991); \textit{see supra} note 84.


\textsuperscript{110} FLA. STAT. § 489.105(3) (1991); \textit{see supra} note 84.

\textsuperscript{111} \textit{See Mallock v. Southern Memorial Park, Inc.}, 561 So. 2d 330, 333 (Fla. 3d Dist. Ct. App. 1990) (implying right of action from statute based on \textit{Fischer} test).
Moreover, the *Finkle* court based its holding on "no evidence of . . . legislative intent . . ." rather than the "class benefitted factor." The court's statement invites the reasonable inference that the plaintiff satisfied the class benefitted factor. Notwithstanding the court's omission, the facts of *Murthy* satisfy the first requirement of the *Fischer* test.

The second prong of the *Fischer* test requires discerning any explicit or implicit legislative intent to create or deny a private remedy. While the statute does not expressly create a private remedy on behalf of individuals, and the courts are under no compulsion to apply the statute, the absence of an express provision for civil liability does not negate a legislative intent that the statute will affect private rights.

The *Finkle* and *Murthy* courts held that there was no evidence of a legislative intent to create a private remedy on behalf of individuals. The courts did not discuss their reasoning or whether the referenced lack of intent was explicit or implicit. Nor did they address legislative intent to deny a private remedy on behalf of individuals. The ensuing analysis applies rules of statutory construction to determine a legislative intent to either create or deny a private remedy against individual qualifiers.

First, penal statutes and highly regulatory laws are usually subject to strict construction in favor of the violator, and should not be extended by

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113. See Fischer, 543 So. 2d at 788. The court did not specify whether the statute must meet all three criteria to justify judicially implying a private right of action. The inference assumes the *Finkle* court applied the criteria conjunctively. *Id.* at 792 (Baskin, J., dissenting) (explaining that *Cort* directs the court to consider all relevant factors).
114. But see *id.* at 790 (legislating a private right of action to include so many, by implication only, strained the court's credulity).
115. *Id.* at 788.
117. Smith v. Piezo Tech. & Prof. Adm'rs, 427 So. 2d 182, 184 (Fla. 1983) (holding that an injured party should have an action where a statute gives a right, even though it has not expressly given a remedy); *see supra* note 32; Girard Trust Co. v. Tampashores Dev. Co., 117 So. 786, 787 (Fla. 1928); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395, 401-06 (1950) (effecting purpose of statute justifies implementing it beyond its text).
119. Fleischman v. Department of Prof. Reg., 441 So. 2d 1121, 1123 (Fla. 3d Dist. Ct. App. 1983) (instructing that "[e]very statute must be read as a whole with meaning ascribed to every portion and due regard given to the semantic and contextual interrelationship between its parts.").
interpretation. A penal statute commands or prohibits acts imposing penalties for their violations in order to enforce obedience to the law and punish its violation. However, the penal character of a statute will not prevent imposition of civil liability. Moreover, the rule of strict construction does not apply to those portions of a statute that are not penal.

Chapter 489 is penal in nature because it imposes penalties such as fines and license revocation for most violations. Section 489.127 classifies a violation of subsection (1) a misdemeanor punishable according to a cross-referenced criminal statute.

However, the sections of chapter 489 within the scope of the certified question involve the qualifying agent's positive duty to competently supervise construction projects. Moreover, section 489.129 subsection (1) authorizes the licensing board to require the qualifying agent to pay financial restitution to a consumer for violations under that subsection. The remedial nature of this part of the statute disciplining the qualifying agent removes it from a strictly penal category. Thus, courts may liberally interpret the statute because the rule of strict construction does not apply here.

120. Fedego Discount Ctr. v. Department of Prof. Reg., 452 So. 2d 1063, 1066 (Fla. 3d Dist. Ct. App. 1984); Fischer, 543 So. 2d at 788; Dotty v. State, 197 So. 2d 315, 318 (Fla. 4th Dist. Ct. App. 1967).

121. Dotty, 197 So. 2d at 318.


124. See FLA. STAT. §§ 489.127, 489.129, 489.132 (1991) (enumerating prohibitions, penalties, and disciplinary proceedings of licensed and unlicensed principals); see also supra note 84.


126. Id. §§ 489.1195, 489.129; accord Viking Pools, Inc. v. Maloney, 770 P.2d 732, 735 n.4 (Cal. 1989) (en banc) (explaining that Contractors' State Licensing Law is nonpenal in nature because its purpose is to protect consumers not punish individuals). The court added that the statute's nonpenal nature allows a broader interpretation. Id.

127. FLA. STAT. § 489.129(1) (1991); Boneski v. Department of Prof. Reg., 562 So. 2d 441, 443 (Fla. 4th Dist. Ct. App. 1990) (stating the 1988 amendment authorizing DPR to order financial restitution to a consumer may not be applied retroactively).

128. Collins v. Kidd, 38 F. Supp. 634, 637 (E.D. Tex. 1941) (holding that a statute containing both penal and remedial parts should be considered penal when it is sought to enforce the penalty, and remedial when it is sought to enforce the remedy).

129. Maloney, 770 P.2d at 735 n.4; see supra note 126.
Second, the courts may not supply an omission that to all appearances
was not in the minds of the legislators when the law was enacted. 130 To
imply a private remedy here, the court may supply the omission because the
express statutory language reveals the legislators contemplated a civil action
and inserted a provision that justifies implication. 131 Specifically, section
489.129(1)(m) provides a penalty for "[c]ommitting fraud . . . deceit . . .
gross negligence, incompetency, or misconduct in the practice of contract-
ing." 132 Notwithstanding the language in section 489.129 subsection (1),
authorizing financial restitution to a consumer, chapter 489 contains no
language explicitly creating or denying a private remedy. 133 While the
restitution clause may provide a remedy to a consumer, it does not qualify
as a private right of action because it is available only upon the DPR's
prosecution of the contractor or qualifying agent. 134

While the Legislature intended to protect the class of persons of which
the plaintiff is a member, it has not manifested an intention to achieve this
protection by imposing a private right of action against qualifying agents.

130. Special Disability Trust Fund v. Motor & Compressor Co., 446 So. 2d 224, 226
131. Telephone interview with Wellington H. Meffert, Chief Construction Attorney,
Department of Professional Regulation, (Aug. 24, 1993) [hereinafter Meffert Interview]. Mr.
Meffert, a former contractor, and prosecutor for the DPR, was the primary drafter of the 1993
amendments to chapter 489. He contributed to the 1991 and 1992 revisions as well. Mr.
Meffert said the drafters contemplated a civil suit against qualifying agents and they
envisioned that section 489.129(1)(m) would support judicial implication; however, he will
"wait and see what the Florida Supreme Court decides, to find out [what they really
intended]." Id. See generally Robert M. Rhodes & Susan Seereiter, The Search for Intent:
Aids to Statutory Construction in Florida—An Update, 13 FLA. ST. U. L. REV. 485, 508-09
(1985) (noting that postenactment statements are disfavored as indicia of legislative intent).
But see Osterdorf v. Turner, 426 So. 2d 539, 545 (Fla. 1982) (admitting a legislator's
affidavit as an expression of legislative intent).
132. FLA. STAT. § 489.129(1)(m) (1991); see supra note 84. In 1992, the Legislature
subdivided the provision into three parts:

(m) Committing fraud or deceit in the practice of contracting.
(n) Being found guilty of incompetency or misconduct in the practice of
contracting.
(o) Being found guilty of gross negligence, repeated negligence, or negligence
resulting in a significant danger to life or property.
FLA. STAT. § 489.129(1) (Supp. 1992). In 1993, the Legislature changed the wording in
subsections (n) and (o) from "[b]eing found guilty of" to "[c]ommitting." Ch. 93-166, § 18,
1993 Fla. Laws 1015, 1043 (amending FLA. STAT. § 489.129(1) (Supp. 1992)).
133. See FLA. STAT. §§ 489.101-489.132 (1991); see supra note 84.
134. See FLA. STAT. § 489.129(1) (1991). The "board may . . . require financial
restitution to a consumer . . . ." Id. (emphasis added).
The only remedies involving qualifying agents that the statute provides are
disciplinary or penal proceedings. 135

Admittedly, the Legislature could have conferred a private right of
action against qualifying agents who breach their statutorily-imposed duties
in the same manner as it has done in other statutes. 136 In 1988, section
768.0425, formerly numbered 489.5331, was transferred from chapter 489
to chapter 768 entitled "Negligence." 137 Section 768.0425 expressly
provides civil treble damages in actions against unlicensed contractors for
injuries sustained from negligence, malfeasance, or misfeasance. 138
Subsequent versions of chapter 489 of the Florida Statutes, including the
1993 revisions, do not include a cross reference to the renumbered
statute. 139

Even though the statute was originally enacted as part of chapter 489,
the same legislative act, tending to support the conclusion that it is part of
a single statutory scheme, the lack of a continuing relationship indicates
otherwise. The legislators probably transferred the provision from the
contracting chapter to the negligence chapter because they intended no
private remedy against contractors within chapter 489. Because contractors

135. Id. § 489.129; see supra note 84. The qualifying agent who breaches the duty to
supervise is not subject to criminal penalty, only discipline by the CILB. FLA. STAT. §
489.129 (1991); see supra note 84. The legislators identified one remedy to benefit the
consumer directly, and according to the general statutory construction principle, expressio
unius est exclusio alterius, the mention of one thing implies the exclusion of another. Thayer
v. State, 335 So. 2d 815, 817 (Fla. 1976). However, it is more likely the Legislature avoided
the question because it is controversial. See Fischer, 543 So. 2d at 789. Nevertheless, the
Restatement of Torts states:

The fact that a statute . . . provides for . . . the payment of a sum of money to
the injured person as a penalty [for its violation], does not in itself prevent the
imposition of tort liability through the adoption by the court of the standard of
conduct required by the legislation or regulation.

RESTATEMENT (SECOND) OF TORTS § 287(a) (1964).

136. See FLA. STAT. § 553.84 (1991) (providing private cause of action against anyone
violating minimum building codes); see also supra note 104; FLA. STAT. § 772.11 (1991)
(providing civil remedy for theft); id. § 681.11 (providing consumer remedies for violation
of motor vehicle sales warranty statutes). The preceding statutes exemplify a few, but not
all of those expressly providing private rights of action.

137. H.R. COMM. ON CONSTRUCTION CONTRACTING REGULATORY REFORM, STAFF
ANALYSIS AND ECONOMIC IMPACT STATEMENT OF 1988, Section 23 at 4 (April 18, 1988)
(transferring language on damage actions by consumers against contractors to chapter 768,
Florida Statutes).


139. See FLA. STAT. §§ 489.101-489.131 (Supp. 1992); ch. 93-166, §§ 1-23, 1993 Fla.
Laws 1015, 1055 (amending FLA. STAT. §§ 489.101-489.131 (Supp. 1992)).
must be privy to a contract with a consumer under section 768.0425,\(^\text{140}\)
and qualifying agents are not usually parties to the construction contract, the
transfer indicates no deliberate legislative intent to preclude a remedy
against qualifying agents.

Third, when scrutinizing the history of legislation to determine
legislative intent, it is appropriate to consider acts passed at subsequent
sessions.\(^\text{141}\) In addition, the courts may consider extrinsic aids to statutory
construction.\(^\text{142}\) Florida courts frequently cite committee reports to assess
legislative intent, especially staff analyses.\(^\text{143}\)

Review of the statute’s history indicates the Legislature has repeatedly
amended chapter 489 since its enactment in 1979. In the most recent
revision, during the aftermath of Hurricane Andrew, the Legislature
substantially amended chapter 489, effective July 1993.\(^\text{144}\) While the
drafters did not add a private right of action against qualifying agents, they
reaffirmed prior legislative intent by maintaining the qualifying agent’s
absolute duty to supervise each project.\(^\text{145}\) The Legislature recognized that
consumers needed more protection from incompetent and unscrupulous
contractors.\(^\text{146}\) Legislative intent derived from committee reports, staff
analyses, staff materials and the revised text of the 1993 amended provisions
focused on more consumer protection.\(^\text{147}\)

In the 1993 amendments to chapter 489, the Legislature reformed
various elements of existing provisions and added several elements designed

\(^{140}\) FLA. STAT. § 768.0425 (1991). The statute states: "[f]or purposes of this section
only, the term ‘contractor’ means any person who contracts [with a consumer] to perform
any construction . . . ." (emphasis added).

\(^{141}\) Watson v. Holland, 20 So. 2d 388, 393 (Fla. 1944), cert. denied, 325 U.S. 839
(1945).

\(^{142}\) Rhodes & Seereiter, supra note 131, at 488.

\(^{143}\) Id. at 495.

\(^{144}\) Ch. 93-166, §§ 1-23, 1993 Fla. Laws 1015, 1055 (amending FLA. STAT. §§
489.101-489.131 (Supp. 1992)).

\(^{145}\) Id. § 14 (amending FLA. STAT. § 489.1195(1)(a) (Supp. 1992)).

\(^{146}\) See H.R. COMM. ON BUSINESS AND PROFESSIONAL REGULATION, FINAL BILL
ANALYSIS AND ECONOMIC IMPACT STATEMENT, STAFF DATA AND MATERIALS ON
CONSTRUCTION AND ELECTRICAL CONTRACTING OF 1993, at 3, Summary (Apr. 8, 1993)
[hereinafter H.R. COMM. ON CONSTR. REFORM].

\(^{147}\) H.R. COMM. ON CONSTR. REFORM, supra note 146, at 2-12; WELLINGTON H.
MEFFERT, DEP’T OF PROF. REG., SYNOPSIS OF CONSTRUCTION REFORM BILL CH. 93-166 AND
93-154, LAWS OF FLA. (1993); ch. 93-166, §§ 1-23, 1993 Fla. Laws 1015, 1055 (amending
to protect the consumer. The revised statute establishes a recovery fund for homeowners to recover monies lost in dealing with a licensed contractor. Although the 1993 amendments do not apply to Murthy, the Legislature acknowledges the hardships consumers such as Murthy faced under the 1991 and 1992 versions of the statute. Prior to the 1993 revisions, there was no recourse for consumers who suffered financial damage from dealing with licensed contractors if those contractors were insolvent, "judgment proof," or had simply disappeared. If the contractors were available, the consumer could have initiated a disciplinary process which may have penalized the consumer. Alternatively, the consumer could have filed a civil suit against the contractor. However, in many cases, neither the disciplinary action nor the civil suit resulted in reimbursement for the consumer's losses.

Concededly, the Legislature has had ample opportunity to broaden the penalty for a qualifying agent's breach of a statutory duty by adding a companion civil remedy. However, the unchanged nature of the penalties

148. H.R. COMM. ON CONSTR. REFORM, supra note 146, at 3. Major consumer-oriented changes included requiring state certification for all municipal or county building personnel, revising and enhancing disciplinary measures, requiring all contractors to maintain a $10,000 surety bond, and establishing a Construction Industries Recovery Fund. In addition, local jurisdictions that do not provide discipline must cease to issue local construction contractor licenses. Id.

149. Ch. 93-166, § 21, 1993 Fla. Laws 1015, 1050 (to be codified at FLA. STAT. § 489.140); H.R. COMM. ON CONSTR. REFORM, supra note 146, § 22, at 7.

150. See H.R. COMM. ON CONSTR. REFORM, supra note 146, at 3.

151. Id.

152. If a consumer allowed the statute of limitations to run on a civil suit while waiting for the DPR to complete its investigation, and the DPR decided not to prosecute [the contractor], the consumer loses. Meffert Interview, supra note 131. Consumers encounter other disadvantages if they file a complaint with the DPR in lieu of a civil suit. First, the DPR must meet a higher standard of proof (clear and convincing), than the plaintiff in a civil action. Hence, the consumer is more likely to prevail in a civil action. Second, the consumer is not a party to any action the DPR takes; thus, consumers relinquish decision-making control that they would maintain in a civil action with their own attorneys. Id.


154. H.R. COMM. ON CONSTR. REFORM, supra note 146, at 3.
in the face of repeated revisions may imply that, rather than a deliberate omission, the legislators avoided the question because it was controversial or they simply did not have a civil suit in mind.\textsuperscript{155}

In summary, chapter 489 reveals no explicit legislative intent, using intrinsic or extrinsic aids to statutory construction, to create or deny a private right of action against qualifying agents.\textsuperscript{156} However, the statute's expressed purposes and penalties supply an implicit intent to support a private remedy which overrides any implicit intent to deny one.\textsuperscript{157} Without question, the Legislature recognizes the need for and intends to provide consumer protection against the risk of harm from incompetent and unscrupulous contractors, including qualifying agents.\textsuperscript{158} While the Legislature's expressed intent is to provide that protection through regulation, the court would further the general purpose of the statute by implying a private right of action.

Finally, the third prong of the \textit{Fischer} test requires that judicial implication must be consistent with the underlying purposes of the legislative scheme.\textsuperscript{159} An implied civil remedy is consistent with the underlying purposes of the legislative scheme. The thrust of the legislation indicates intent to protect consumers of contractors' services, of which qualifying agents are a subset, and to discourage dishonest and incompetent contractors from harming those who employ their services, whether by criminal prosecution, CILB discipline or by civil lawsuit.

Chapter 489 satisfies each prong of the \textit{Fischer} test. Therefore, its application should not operate to "close the courthouse doors to litigants seeking private redress" for violations of the qualifying agent's statutory duty.\textsuperscript{160} While the legislators may not have forecasted a situation in which a contractual remedy would not apply,\textsuperscript{161} they have supplied sufficient

\textsuperscript{155} See Meffert Interview, \textit{supra} note 131; see also \textit{supra} note 117.
\textsuperscript{157} See \textit{id.; see supra} note 84.
\textsuperscript{158} \textsc{Fla. Stat.} § 489.101 (1991).
\textsuperscript{159} \textit{Fischer} v. Metcalf, 543 So. 2d 785, 788 (\textsc{Fla. 3d Dist. Ct. App. 1989}) (en banc).
\textsuperscript{160} \textit{id. at} 789.
\textsuperscript{161} When a qualifying agent controls the project that results in the plaintiffs' injuries, a contractual remedy does not apply. \textit{See} A.R. Moyer, Inc., v. Graham, 285 So. 2d 397, 399 (\textsc{Fla. 1973}). Currently, the qualifying agent is accountable to the contractor, who is bound by the contract, and to the DPR which can discipline and penalize the qualifying agent. \textsc{Fla. Stat.} §§ 489.127, 489.129 (1991). However, without judicial implication, the plaintiff is without a private remedy against the responsible party, the qualifying agent. \textit{See id. But cf.} Montgomery v. Chamberlain, 543 So. 2d 234, 235 (\textsc{Fla. 2d Dist. Ct. App. 1989}) (holding licensed contractor of record liable for implied warranty claims based on principles of agency
specifications to provide a discernible frame of reference within which to imply a private right of action against qualifying agents. Without ignoring the plain purpose and language of the statute, the court should not be reluctant to provide civil liability for an unlawful breach of a statutory duty that the Legislature envisioned as necessary to protect unwary homeowners and deter unscrupulous and incompetent contractors.

B. What Type of Action to Imply

In Florida, violation of a statute is either evidence of negligence or negligence per se. In a negligence per se action, the measure of the legal duty is fixed by statute, so that the violation becomes conclusive evidence of negligence, or negligence per se. In a common-law negligence action, the duty is determined by common-law principles. In either case, failure to perform the duty, whether imposed by common law or by statute, constitutes negligence.

The issues of common-law negligence parallel the issues in the negligence per se claim. Pleading a negligence per se claim differs from a common-law negligence claim only in that the plaintiff must allege a statutory violation. More important, the primary difference between them is how they are proved. Negligence per se results from the violation of a statute; thus, the jury must determine only whether the actor

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162. Simmons v. Owens, 363 So. 2d 142, 143 (Fla. 1st Dist. Ct. App. 1978). The court stated:

The ordinary purchaser of a home is not qualified to determine when or where a defect exists. Yet purchaser[s] make[ ] the biggest . . . investment [of their] li[ves] . . . on a limited budget . . . . The careless work of contractors, [formerly] insulated from liability, must cease or they must accept financial responsibility for their negligence.

Id.

163. See Fischer, 543 So. 2d at 793 (Baskin, J., dissenting).


165. Id.; RESTATEMENT (SECOND) OF TORTS § 286(d) (1964).

166. RESTATEMENT (SECOND) OF TORTS § 282 (1964). “[T]he care which the actor is required to exercise to avoid being negligent . . . is that which a reasonable man in his position, with his information and competence, would recognize as necessary to prevent the act from creating an unreasonable risk of harm to another.” Id. § 298.

167. deJesus, 281 So. 2d at 201; RESTATEMENT (SECOND) OF TORTS § 285 (1964).


169. Tamiami Gun Shop v. Klein, 116 So. 2d 421, 423 (Fla. 1959) (stating the court rules negligence per se, as a matter of law); Williams v. Youngblood, 152 So. 2d 530, 532 (Fla. 1st Dist. Ct. App. 1963).
committed or omitted the specific act prohibited or required. The jury must find common-law negligence from the evidence.

The Florida Supreme Court, in *deJesus*, stated that not all violations of statutes are negligence per se; for some, a violation may be only evidence of negligence. Violations of statutes, other than those imposing a form of strict liability, may be either negligence per se or evidence of negligence. The court divided statutory violations into three categories: (1) violation of a strict liability statute designed to protect a particular class of persons who are unable to protect themselves, constituting negligence per se; (2) violation of a statute establishing a duty to take precautions to protect a particular class of persons from a particular injury or type of injury, also constituting negligence per se; and, (3) violation of any other kind of statute, constituting mere prima facie evidence of negligence.

For actionable negligence per se, based on a statute other than the strict liability type, plaintiffs must first meet the statutory purpose test on the issue of negligence. Plaintiffs must prove that they are of the class the statute was intended to protect, that they suffered injury of the type the statute was designed to prevent, and that the Legislature intended to create a private liability as distinguished from one of a public character. Plaintiffs also must prove a causal connection between the statutory violation and the injury. They must establish that the conduct constituting the violation was the cause in fact and the legal or proximate cause of the injury. Plaintiffs must satisfy these tests for the defendant’s statutory violation to

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170. *Klein*, 116 So. 2d at 423. If the court deems a statutory violation negligence per se, the plaintiff will have established a conclusive presumption of duty and breach, two of the four elements necessary for actionable negligence. *Id.*

171. *Id.* (stating that the jury weighs all four elements of negligence when a statutory violation is held to be merely evidence of negligence). Here, the plaintiff must prove all four elements of actionable negligence: (1) duty, (2) breach, (3) proximate cause, and (4) damage.

172. See *deJesus*, 281 So. 2d at 200-01.

173. *Id.* at 201.

174. *Id.*

175. *Id.*

176. *Id.*; RESTATEMENT (SECOND) OF TORTS § 288(b) (1964); see *supra* note 105 and accompanying text.

177. *deJesus*, 281 So. 2d at 201 (holding that in a negligence per se action, plaintiff must still prove proximate cause).

178. *Id.*
amount to negligence per se or even to be considered as evidence of negligence in a common-law action.\textsuperscript{179}

While a qualifying agent’s violation of a statutory duty falls outside the parameters of the strict liability category, violations are within the second type of negligence per se category\textsuperscript{180} because, as has been demonstrated,\textsuperscript{181} the statute establishes the qualifying agent’s duty to take precautions to protect a particular class of persons (consumers of the contractor’s and qualifying agent’s services) from a particular type of harm (bodily harm, financial harm, or property damage).\textsuperscript{182} Alternatively, violations are at least prima facie evidence of negligence.\textsuperscript{183} Nevertheless, the plaintiff still must prove proximate cause and the other elements of actionable negligence.\textsuperscript{184}

The \textit{Finkle} and \textit{Murthy} courts ignored the line of cases implying a private cause of action in negligence per se.\textsuperscript{185} The \textit{Finkle} court referred to the claims as negligence per se or common-law negligence theories.\textsuperscript{186} However, the court did not cite to any binding case law on negligence per se.\textsuperscript{187} Instead, the court relied on \textit{Fischer} for judicial implication doctrine and \textit{Gatwood} for common-law negligence theory.\textsuperscript{188} While \textit{Finkle} asserts that the statute creates no private cause of action against the qualifying agent, the court relied on \textit{Gatwood}, the only case holding otherwise.\textsuperscript{189} The \textit{Finkle} court cites \textit{Gatwood} to support an action in common-law negli-

\textsuperscript{179.} \textsuperscript{179}Id. (holding that contributory negligence is a defense to negligence per se if violation is not of strict liability statute); Alford v. Meyer, 201 So. 2d 489, 491 (Fla. 1st Dist. App. 1967), cert. denied, 209 So. 2d 671, 671 (Fla. 1968) (stating that negligence or negligence per se rules apply to statutes, ordinances, and administrative rules or regulations); see generally RESTATEMENT (SECOND) OF TORTS § 288A (1964) (listing situations in which a statutory violation may be excused).

\textsuperscript{180.} \textsuperscript{180}See supra notes 169-70 and text accompanying note 174.

\textsuperscript{181.} \textsuperscript{181}See supra text accompanying notes 103-11.

\textsuperscript{182.} \textsuperscript{182}FLA. STAT. §§ 489.101, 489.129(1)(d), (h), (m) (1991); see supra note 84. The statute’s stated purpose to protect the “public” from “incompetent or dishonest contractors [who] provide unsafe, unstable, or short-lived products or services,” functions effectively to protect those who employ the contractor’s services from personal injury, property damage, and financial harm. See supra text accompanying notes 103-11.

\textsuperscript{183.} \textsuperscript{183}deJesus, 281 So. 2d at 201.

\textsuperscript{184.} \textsuperscript{184}Id.

\textsuperscript{185.} \textsuperscript{185}See Finkle v. Mayerchak, 578 So. 2d 396, 397-98 (Fla. 3d Dist. Ct. App. 1991); Murthy v. N. Sinha Corp., 618 So. 2d 307, 308-09 (Fla. 3d Dist. Ct. App. 1993).

\textsuperscript{186.} \textsuperscript{186}Finkle, 578 So. 2d at 397.

\textsuperscript{187.} \textsuperscript{187}See id. at 397-98.

\textsuperscript{188.} \textsuperscript{188}Id.

\textsuperscript{189.} \textsuperscript{189}Id.
gence.190 However, *Gatwood* stands for the propositions that the statute creates a private right of action against qualifying agents, and that the cause of action for breach of the qualifying agent’s statutory duty is negligence.191 According to *Gatwood*, the plaintiff must prove the construction defects could reasonably have been avoided if the qualifying agent performed his statutorily-imposed supervisory duty with “due care.”192 Even though *Gatwood* does not mention negligence per se or the Florida Supreme Court’s test set forth in *deJesus*, the facts of the case fit into the second category of negligence per se.193 Applied to *Murthy*, the plaintiffs are members of the class the statute is intended to protect (consumers of contractors’ and qualifying agents’ services) and they suffered the particular type of harm the statute was designed to prevent (bodily harm, financial harm and property damage).194 Additionally, in order to prevail, the Murthys must establish that the qualifying agent’s violation of the statute proximately caused their injuries.195

C. Guidance from Other Jurisdictions

Authority from other jurisdictions supports extending chapter 489 to allow a private right of action against qualifying agents. For example, in *Brown v. Transcon Lines*,196 the Supreme Court of Oregon recognized a public policy that supported a civil action for damages for wrongful discharge by a worker discharged for applying for such benefits.197 The court explained that it was not “creating” a new cause of action based upon a statutory violation, but was holding only that the employee had an existing common-law cause of action for wrongful discharge.198 The court characterized *Brown* as an extension of an existing common-law cause of action, rather than a creation of a new cause of action.199

190. *Id.* at 398.
192. *Id.*
193. See *id.* at 721-22; see also *supra* notes 169-70 and text accompanying note 174.
194. See *supra* text accompanying notes 65-68.
195. See *deJesus*, 281 So. 2d 198, 201 (Fla. 1973).
196. 588 P.2d 1087 (Or. 1978) (en banc).
197. *Id.* at 1094.
198. *Id.* at 1092-95.
199. *Id.* The court also used a violation of a statutory duty as the basis for finding liability under an existing common-law cause of action for negligence per se. *Id.* See *Davis v. Billy’s Con-Teena, Inc.*, 587 P.2d 75, 78 (Or. 1978) (en banc) (holding that violation of statute prohibiting sale of liquor to minors is negligence per se).
Conversely, in *Bob Godfrey Pontiac, Inc. v. Roloff*, the Supreme Court of Oregon analyzed violations of statutory duties and when such violations give rise to a private right of action. The *Roloff* court declined to create a private cause of action for conduct by attorneys who violate duties imposed by the Code of Professional Responsibility. The court denied recovery for damage to the attorneys’ reputations or for attorney’s fees incurred in the defense of a civil action. However, the court’s rationale turned on the fact that there was no underlying common-law cause of action.

Applied to *Murthy*, the *Roloff* and *Brown* analyses support a private action arising from chapter 489 because an underlying action exists at common law. Neither *Murthy*, *Finkle* nor *Gatwood* conflict as to whether a common-law cause of action against qualifying agents exists under chapter 489. Each case so holds. Additionally, the circumstances surrounding *Murthy* are similar to those in *Brown*. In both cases three other conditions are satisfied. A civil action is: 1) consistent with the legislative provision; 2) appropriate for promoting the statute’s policy; and 3) needed to assure its effectiveness.

Applying the Supreme Court of Oregon’s analysis to *Murthy*, the Florida Supreme Court would have to recognize a private right of action under chapter 489. A civil remedy would promote the statute’s policy and it would be consistent with legislative intent to protect consumers from exploitation by incompetent and unscrupulous contractors. Moreover, in the wake of Hurricane Andrew, a civil remedy is needed to assure the statute’s effectiveness.

In *Colberg v. Rellinger*, a case factually similar to *Murthy*, the Supreme Court of Arizona rejected the plaintiffs’ claim against the qualifying agent for failing to supervise the construction work on their residence. The court rejected the claim on the basis that the statute

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201. *Id.* at 842-51.
202. *Id.*
203. *Id.* at 851.
204. *Id.*
207. See *Roloff*, 630 P.2d at 847.
209. *Id.* at 352.
pertaining to the qualifier’s obligations contained no language contemplating a private cause of action for an injured party against a qualifying agent. 210 Thus, the court concluded that the Legislature intended no private right of action against qualifying agents. 211 However, the court noted that the Arizona contracting statute “may contemplate a private claim against contractors” because the statute permits consumers to recover from the contractors’ recovery fund when they obtain a judgment against a contractor who violates the statute. 212

The Colberg analysis applied to Murthy supports the notion that a private right of action against qualifying agents logically flows from chapter 489. The Colberg court rejects the action against qualifiers because it assumes that statutory silence means it excludes civil recovery. 213 This view assumes the Legislature fosters a hostile policy toward making whole the intended beneficiaries of a statutory duty imposed for their protection. 214 Colberg is distinguishable from Murthy because chapter 489 does contain language that indicates the Legislature contemplated such a private claim. 215 Further, the Colberg court weighs consumers’ ability to recover from the contractors’ recovery fund in favor of judicially creating a private remedy. 216 Section 489.129 of the 1991 Florida Statutes provides a restitutional remedy to consumers, which comports with the Colberg analysis that the Legislature contemplated a private right of action; therefore, it should be allowed. 217 Moreover, Florida Statutes section 489.140 creates a Construction Industries Recovery Fund analogous to that referenced by the Colberg court. 218 Although section 489.140 was added to chapter 489 in 1993, it provides evidence that the legislators again contemplated a private remedy. 219 Accordingly, applying the Colberg analysis, the Florida Supreme Court would necessarily recognize a private right of action against qualifying agents under chapter 489 because the statute contains both language and remedial provisions indicating the legislators contemplated a private action.

210. Id.
211. Id.
212. Id.
213. Colberg, 770 P.2d at 351.
214. See Roloff, 630 P.2d at 854 (Linde, J., concurring).
216. Colberg, 770 P.2d at 352.
217. See Fla. Stat. § 489.129 (1991); see also supra notes 84, 127.
219. See id.
In Donnelly Construction Co. v. Oberg/Hunt/Gilleland, the Supreme Court of Arizona provided an instructive analysis supporting a negligence action against a design professional, individually, for purely economic loss. The Donnelly court held that a negligence action may be maintained if the plaintiffs prove that the design professional owed them a duty, that the duty was breached, and that the breach proximately caused an injury that resulted in damages. The Donnelly court stated that design professionals have a duty to use ordinary skill, care, and diligence in rendering their professional services. The court further concluded that the duty extends to those with whom the design professional is in privity as well as to those with whom he is not.

The Donnelly analysis applies to qualifying agents such as Sinha, Mayerchak, and Gatwood who, like design professionals, had a duty to use ordinary skill, care, and diligence in rendering service to the Murthys, Finkles, and McGees, respectively. Therefore, the Donnelly decision supports two propositions applicable to Murthy. First, a negligence action against individual qualifying agents under chapter 489 is appropriate and second, the action against those not in privity precludes application of the economic loss rule.

IV. PRACTICAL EFFECTS OF THE MURTHY DECISION

If the Florida Supreme Court reverses Murthy, thus agreeing that chapter 489 supports a private right of action against qualifying agents, Florida residents will reap five significant benefits: (1) qualifying agents will be more likely to comply with the statute, affording consumers more protection; (2) consumers will have a private right of action against the culpable party; (3) consumers will be required to meet less of a burden to establish negligence if the court rules the statutory violation is negligence per se; (4) consumers probably would not be limited to claims of property damage and personal injury because the economic loss rule should not

221. See id. at 1294; accord A.R. Moyer, Inc. v. Graham, 285 So. 2d 397, 402 (Fla. 1973); see generally RESTATEMENT (SECOND) OF TORTS § 906(b) (1979) (stating that compensatory damages may include compensation for harm to property which also includes physical impairment of anything that is the subject of ownership).
222. Donnelly, 667 P.2d at 1295.
223. Id.
224. Id.; accord Graham, 285 So. 2d at 402.
225. See infra text accompanying notes 232-38.
apply; and finally, (5) consumers may be allowed to claim exemplary damages.

First, if qualifying agents are subject to personal liability for violating chapter 489, they are more likely to comply with their statutorily-imposed duties. Qualifying agents will receive a clear signal that they will be held accountable for their negligence. Second, consumers will have a right of action against the culpable party. A right of action against qualifying agents comports with the basic function of tort law; that is, to "shift the burden of loss from the injured plaintiff to one who is at fault . . . or to one who is better able to . . . prevent its occurrence." Where the qualifying agent is also a corporate officer and stockholder of the corporate entity with whom the consumer contracts, a Murthy reversal would reduce contractors' ability to evade liability for their negligence. The statute may effectively pierce the corporate veil that heretofore has insulated them.

Commonly, in such cases, consumers are without a remedy even when they prevail in a civil action on the contract. The corporation may be dissolved or bankrupt. Consequently, the corporation fails to satisfy the judgment, and the consumer loses. Hence, a statutory action against the qualifying agent, the individual responsible under chapter 489, will avail consumers of a remedy against the culpable party.

Third, if the court rules that the statutory violation is negligence per se, consumers will have an added advantage because they will be required to


228. A statutory remedy would function effectively to pierce the corporate veil when the qualifying agent is also an officer of the corporation with whom the consumer contracts. E.g., Mitchell v. Edge, 598 So. 2d 125, 129 (Fla. 2d Dist. Ct. App. 1992) (Hall, J., concurring) (stating that the statute has the effect of lifting the protection of the corporate veil, rendering the qualifying agent personally liable). But cf. Roberts' Fish Farm v. Spencer, 153 So. 2d 718, 721 (Fla. 1963) (holding that the corporate entity's purpose is to limit liability and serve a business convenience). The Spencer court further stated that those who do business in the corporate form have every right to rely on the rules of law that protect them against personal liability. Id.

229. Mitchell, 598 So. 2d at 127 (holding action against qualifying agent not barred because prior judgment against contracting corporation not satisfied).

230. See id.; see also supra notes 148-54 and accompanying text.
prove only two instead of the four elements of actionable negligence.  

Fourth, if the court implies a private right of action under the statute, the economic loss rule should not apply.  

A consumer's action on the contract, against the corporation, may prove fruitless if the consumer's damage is purely economic loss without an accompanying physical injury or property damage.  

For example, if the Finkles were not afforded a cause of action under the statute against the qualifying agent, Mayer-chak, they would have been remediless because the Third District Court of Appeal affirmed the trial court's judgment for MPF Enterprises, on their contract claim.  

The court reasoned that without property damage or personal injury, the economic loss rule precluded their remedy.  

The rationale of the economic loss rule is that parties who have bargained for the distribution of risk should not be permitted to circumvent their bargain after loss occurs to property that was the subject of the

231. See Tamiami Gun Shop v. Klein, 116 So. 2d 421, 423 (Fla. 1959); see also supra note 169 and accompanying text.  

232. Gatwood v. McGee, 475 So. 2d 720, 722 (Fla. 1st Dist. Ct. App. 1985) (affirming a statutory action for damages against a qualifying agent where builders constructed the home on a bed of muck, and "unstable ground . . . caus[ed] substantial problems to [part of] . . . the home."); see also Mitchell, 598 So. 2d at 126, 127 (holding that action against qualifying agent was not barred where homeowners claimed that the builders' workmanship was inferior, improper, unsound, and untimely completed). Contra Finkle v. MPF Enters., Inc., 618 So. 2d 307, 307 (Fla. 3d Dist. Ct. App. 1993) (affirming judgment for builders based on economic loss rule where homeowners claimed their house was not completed timely, economically, or free from defects).  

233. Finkle, 618 So. 2d at 307; see also Casa Clara Condominium Ass'n, 620 So. 2d at 1248 (holding that economic loss rule applies to home purchasing); AFM Corp. v. Southern Bell Tel. & Tel. Co., 515 So. 2d 180, 181 (Fla. 1987) (holding that for services, there can be no independent tort flowing from a contractual breach without personal injury or property damage). But see Barnes v. Mac Brown & Co., 342 N.E.2d 619, 621 (Ind. 1976) (rejecting the argument that injury in addition to the defective product is necessary). In Barnes, the court reasoned that when consumers are personally injured from a defect, they recover mainly for their economic loss. Id. The court further stated:  

If there is a defect in a stairway and the purchaser repairs the defect and suffers an economic loss, should he fail to recover because he did not wait until he or some member of his family fell down the stairs and broke his neck? Does the law penalize those who are alert and prevent injury? Should it not put those who prevent personal injury on the same level as those who fail to anticipate it?  

Id.  

234. Finkle v. Mayerchak, 578 So. 2d 396, 398 (Fla. 3d Dist. Ct. App. 1991) (holding no statutory action allowed, but then allowed one); see supra text accompanying notes 22-23.  

235. Finkle, 618 So. 2d at 307.  

236. Id. (citing AFM Corp., 515 So. 2d at 181); see supra note 232-33 and accompanying text.
bargain.\textsuperscript{237} Here, the privity requirement triggering the economic loss rule would not be satisfied,\textsuperscript{238} because no contract exists between the individual qualifying agent and the consumer. In fact, the tort action would not flow from a contractual breach.\textsuperscript{239} Rather, the plaintiffs would raise a fresh question when a qualifying agent violates the statute. The economic loss rule would "work a mischief" here, where the culpable party is not privy to the contract but injury to third parties is reasonably foreseeable.\textsuperscript{240} Indeed, qualifying agents are at fault for negligence because they are responsible for the construction work.\textsuperscript{241} Therefore, when consumers sustain foreseeable injuries as a result of qualifying agents' statutory violations,\textsuperscript{242} a negligence action under the statute would preclude application of the economic loss rule without contravening it.

Finally, because a statutory action against the qualifying agent would not flow from a contractual breach, exemplary damages may be allowed over and above actual or compensatory damages.\textsuperscript{243} The Florida Supreme Court noted in \textit{Casa Clara Condominium Ass'n}, that plaintiffs prefer tort remedies because they often permit recovery of greater damages.\textsuperscript{244} However, the court will allow exemplary damages only as a deterrent to others if the plaintiff proves malice, moral turpitude, wantonness, or outrageousness of the tort.\textsuperscript{245}

Alternatively, two deleterious effects may result if the court recognizes a private right of action against qualifying agents under chapter 489. First,

\textsuperscript{237} \textit{Casa Clara Condominium Ass'n}, 620 So. 2d at 1248 (Shaw, J., concurring in part and dissenting in part).

\textsuperscript{238} See \textit{AFM Corp.}, 515 So. 2d at 181; A.R. Moyer, Inc. v. Graham, 285 So. 2d 397, 399 (Fla. 1973) (approving recovery for economic losses without personal injury or property damage because plaintiff was not beneficiary of underlying contract). The Graham court explained that "[p]rivity is a theoretical device . . . that recognizes limitation of liability commensurate with compensation for contractual acceptance of risk." \textit{Id.} Moreover, "[s]uch liability cannot be reasonably anticipated . . . when there is no privity between the parties . . ." \textit{Id.} at 403 (Dekle, J., concurring in part, dissenting in part).

\textsuperscript{239} See \textit{AFM Corp.}, 515 So. 2d at 181.

\textsuperscript{240} See \textit{id.}; FOWLER V. HARPER ET AL., THE LAW OF TORTS § 7.6, at 404 n.3 (2d ed. 1986) (explaining that the economic harm likely to result from negligence is finite and easily predictable in some cases).


\textsuperscript{242} See Murthy, 618 So. 2d at 308; Mitchell, 598 So. 2d at 127; Finkle, 578 So. 2d at 397; Gatwood, 475 So. 2d at 722.


\textsuperscript{244} 620 So. 2d at 1245.

\textsuperscript{245} Rosenberg, 168 So. 2d at 680.
the cost of litigation may propel consumer prices upward. Qualifiers may be unwilling to risk incurring personal liability and may become scarce. In turn, corporate contractors who remain in the market may have to purchase additional insurance coverage to indemnify their qualifying agents, or the qualifiers themselves may necessarily incur the expense. Consequently, the pace of development would probably decelerate because construction costs would accelerate; thus, consumers may bear the cost of higher priced homes.

Second, an implied private remedy under the statute would add to the Florida courts' "ever-greater burden" of litigation. Notably, the Fischer court adopted the more restrictive federal implication doctrine from Cort v. Ash, rather than that which was controlling in Florida under deJesus or Smith, when it confronted the issue of creating a private right of action under a statute. The court adopted the more restrictive doctrine to manage the burden of discerning legislative intent from increasingly complex legislation and to contain the growing volume of litigation.

In striking a balance between the positive and potentially negative effects of creating a private remedy, the scales tip to ensure the intended beneficiaries of the legislation, the consumers, the full measure of protection their needs may warrant.

V. CONCLUSION

We live in a society which values every person's right to pursue a grievance in court. Our jurisprudence rests on the principle that absent compelling, countervailing public policies, a remedy exists for every wrong. Chapter 489 clearly imposes a duty upon qualifying agents to perform their statutory obligations with due care. Therefore, the statute confers by implication every particular power necessary to insure the performance of that duty; viz. the power to pursue a private right of

247. Id. at 789 (adopting doctrine from Cort v. Ash, 422 U.S. 66 (1975)).
248. See id. at 788-89.
249. See id. at 789.
251. FLA. CONST. art. I, § 21; Holland ex. rel. Williams v. Mayes, 19 So. 2d 709, 710 (Fla. 1944); Casa Clara Condominium, 620 So. 2d at 1248 (Barkett, J., concurring in part, dissenting in part).
252. See FLA. STAT. § 489.1195 (1991); see also supra note 84.
action in a court of competent jurisdiction.\textsuperscript{254} Although the Legislature
did not explicitly provide for a civil action, that is not determinative.\textsuperscript{255}
Moreover, the Legislature has explicitly recognized consumer hardship at the
hands of incompetent and dishonest contractors.\textsuperscript{256} In fact, the Florida
lawmakers have systematically manifested their intent to provide more
consumer protection each time they revised the statute, most notably with
the victims of Hurricane Andrew in mind, in the 1993 amendments.\textsuperscript{257} In
the face of legislative faltering or uncertainty, the court should not relinquish
its task of judicial implication.\textsuperscript{258} To do so the court would sacrifice a
balance.

Mindful of the pitfalls of loose legislative drafting, Justice Frankfurter
once told a story in which one legislator said to his colleagues, "I admit this
new bill is too complicated to understand. We'll just have to pass it to find
out what it means."\textsuperscript{259} Similarly, when the Florida Supreme Court decides
Murthy and answers the certified question, so too will the Florida legislators
know what chapter 489 means.\textsuperscript{260}

\textit{Gail E. Ferguson}

\textsuperscript{254} \textit{See id.} at 184 n.1. \textit{Contra} Wilson C. Barnes \& Larry R. Leiby, The Role of the
Qualifying Agent in a Corporate Structure, 45 (1993) (available at Florida International
University, Dep't of Constr. Mgmt.) (recommending that Legislature add language stating no
private right of action is created by failure to perform statutory duties under chapter 489).

\textsuperscript{255} \textit{Smith}, 427 So. 2d at 184; \textit{accord} Mascareñas v. Jaramillo, 806 P.2d 59, 62 (N.M.
1991) (determining legislative intent requires looking not only to the language of the statute,
but also to the object sought to be accomplished and the wrong to be remedied).

\textsuperscript{256} \textit{See supra} text and accompanying notes 147-54.

\textsuperscript{257} \textit{See Meffert Interview, supra} note 131. George Stuart assumed responsibility for
the Department of Business and Professional Regulation, formerly called the Department of
Professional Regulation, in January 1991. According to Mr. Meffert, Secretary Stuart
undertook a mission to reorient the Department from a "peer group regulatory agency" to a
"consumer regulatory agency." The consumer-focused changes to chapter 489 reflect the new
mission. In fact, Hurricane Andrew was a "catalyst" for those changes. \textit{Id.}

\textsuperscript{258} \textit{See Fischer}, 543 So. 2d at 789.

\textsuperscript{259} Rhodes \& Seereiter, \textit{supra} note 131, at 514 (citing Felix Frankfurter, \textit{Some
Reflections on the Reading of Statutes}, 47 COLUM. L. REV. 527, 545 (1947)).

\textsuperscript{260} \textit{See Meffert Interview, supra} note 131.
Grant v. State Farm Fire & Casualty Company—Finding Coverage for Motorcycles Under Florida Insurance Law: Has the “Good Neighbor” Moved?

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I. INTRODUCTION

In 1991, there were 5906 accidents involving motorcycles in Florida, ninety percent of which involved bodily injury.1 During 1992, in Broward County alone, there were 538 motorcycle accidents, eleven resulting in fatalities and 485 resulting in injury.2 Comparatively, there was a sixty-five percent injury rate for private passenger automobile accidents over the same period in Broward County.3 Moreover, injuries in motorcycle accidents are

2. Id.
3. Id.; see infra Appendix A.
more severe than those sustained in private passenger automobiles. A motorcyclist is not surrounded by the protective structure of an automobile when a collision occurs. The motorcycle's first impact with the other vehicle will send the rider hurling through the air to make a second and devastating impact with the ground or surrounding structure. Therefore, motorcyclists not only die more often, but are also injured more often and more severely than motorists in automobiles. This combination has prompted much litigation to define these vehicles and the insurance coverage available to their victims.

The Florida District Courts of Appeal, once again, disagree on such a coverage question. There is now a conflict between the Third and Fourth District Courts of Appeal regarding whether or not a motorcycle is a motor vehicle under the owned-uninsured vehicle exclusion in uninsured motorist coverage ("UM"). This conflict, which has emerged with the recent decisions of Petersen v. State Farm Fire & Casualty Co. and Grant v. State Farm Fire & Casualty Co., will soon force the Florida Supreme Court to re-examine its "polestar" opinion regarding uninsured motorist coverage, and change the way Florida courts define an insured.

The purpose of this comment is to provide a guide for the attorney faced with the confusing task of defining a motor vehicle under Florida law.
insurance law. The comment will discuss UM and the history of the owned-uninsured vehicle exclusion in Florida. The comment will then review the key cases defining motorcycles and "motor vehicles" in other areas of insurance and will demonstrate that under Florida's insurance law, "motor vehicle" has no plain meaning. The comment will conclude with an analysis of the courts' reasoning in Grant and Petersen and will propose a direction for the courts and the Florida Legislature.

II. THE COVERAGE CONFLICT

A. Petersen v. State Farm

On February 22, 1991, Robert Petersen was severely injured when his uninsured 1986 Yamaha motorcycle collided with an uninsured motorist. When the accident occurred, Petersen also owned a 1988 Ford truck which was insured by State Farm Fire & Casualty Company ("State Farm"). The policy provided coverage for "damages for bodily injury an insured is legally entitled to collect from the owner or driver of an uninsured motor vehicle." It also contained the following exclusion:

THERE IS NO COVERAGE:
FOR BODILY INJURY TO AN INSURED WHILE OCCUPYING A MOTOR VEHICLE OWNED BY YOU, YOUR SPOUSE OR ANY RELATIVE IF IT IS NOT INSURED FOR THIS COVERAGE UNDER THIS POLICY.

The only definition for the term "motor vehicle" was provided in the No-Fault section of the policy, which, in accordance with Florida's No-Fault Law, defined a "motor vehicle" as:

[A] vehicle with four or more wheels that:

16. The survey includes mopeds, minibikes, three-wheeled vehicles, golf carts, and lawn mowers.
18. Id.
19. Id.
20. Id. at 3. This is commonly called the "owned-uninsured motor vehicle exclusion."
See IRVIN E. SCHERMER, AUTOMOBILE LIABILITY INSURANCE § 32.02 (revised ed. 1993).
1. is self propelled and is of a type;
   a. designed for, and
   b. required to be licensed for use on Florida highways; or
2. is a trailer or semitrailer designed for use with a vehicle described in 1 above.\(^{22}\)

Petersen asserted that because the State Farm policy defined a motor vehicle as one with four or more wheels, his motorcycle was not a motor vehicle under the terms of the policy.\(^{23}\) The motorcycle, therefore, could not be excluded from coverage under the owned-uninsured vehicle exclusion and the uninsured motorist coverage provided by the policy covered him for his injuries.\(^{24}\) In the alternative, Petersen argued that the term "motor vehicle" was ambiguous,\(^{25}\) and the ambiguity must be construed in favor of the insured.\(^{26}\)

Conversely, State Farm asserted that the definition of the term "motor vehicle" under the No-Fault provision was not applicable to the uninsured motorist provision.\(^{27}\) Absent any applicable definition for UM, the term "motor vehicle" must be given its plain meaning which, State Farm asserted, includes motorcycles.\(^{28}\)

On March 2, 1993, the Third District Court of Appeal reversed the summary judgment which had been rendered in favor of State Farm.\(^{29}\) The court held that the term "motor vehicle," as used in the policy, was ambiguous and the policy was, therefore, construed against the insurer.\(^{30}\)

\(^{22}\) Appellant’s Initial Brief at 4, Petersen (No. 92-01828).
\(^{23}\) Id.
\(^{24}\) Id. at 5.
\(^{25}\) Id. at 6. In demonstrating the ambiguity, appellant cited to several Florida Statutes sections which define “motor vehicle.” See FLA. STAT. § 627.041(8) (1991) (insurance rates and rating); FLA. STAT. § 316.209(1) (1991) (traffic control); FLA. STAT. § 627.732(1) (1991) (No-Fault law).
\(^{26}\) Appellant’s Initial Brief at 6, Petersen (No. 92-01828) (citing State Farm Mut. Auto. Ins. Co. v. Pridgen, 498 So. 2d 1245 (Fla. 1986)).
\(^{28}\) Id.
\(^{29}\) Petersen, 615 So. 2d at 182.
\(^{30}\) Id. (citing National Auto. Ass’n v. Brumit, 98 So. 2d 330 (Fla. 1957); Ceron v. Paxton Nat’l Ins. Co., 537 So. 2d 1090 (Fla. 3d Dist. Ct. App.), review denied, 545 So. 2d 1368 (Fla. 1989)).
B. Grant v. State Farm

On April 7, 1993, the Fourth District Court of Appeal decided a case that was factually identical to Petersen, but reached the opposite result. In Grant v. State Farm Fire & Casualty Co., the Fourth District held that a motorcycle was a motor vehicle “based upon statutory definition, public policy, and precedent (by analogy)” and affirmed the summary judgment rendered in favor of State Farm.

For statutory definition, the Grant court looked to the Financial Responsibility Law, which specifies the minimum amount of insurance required by Florida drivers. By defining a motor vehicle as “[e]very self propelled vehicle which is designed and required to be licensed for use upon a highway . . . ,” the Financial Responsibility Law’s general definition includes motorcycles. For public policy, the Grant court cited Standard Marine Insurance Co. v. Allyn, which held that the Financial Responsibility Law’s definition of motor vehicle was more appropriate for defining an uninsured motor vehicle, as using the No-Fault definition would impermissibly limit coverage where an insured was struck by an uninsured motorcycle. Such limitation on coverage was considered against the public policy of the UM statute.

Finally, the precedent cited by the court consists of cases that were decided when Florida’s antistacking statute included UM coverage.

33. Id. at 780.
34. Id. at 779 (citing FLA. STAT. § 324.021(1) (1991)).
35. Id. (quoting FLA. STAT. § 324.021(1) (1991)).
36. See Appellee’s Answer Brief at 8-9, Grant v. State Farm Fire & Casualty Co., 620 So. 2d 778 (Fla. 4th Dist. Ct. App. 1993) (No. 91-03303).
38. Allyn, 333 So. 2d at 499.
39. Id.
40. “Stacking” is the concept of adding or multiplying uninsured or underinsured motorist coverage available to an injured accident victim from multiple sources. John G. Douglass & Francis E. Telegadas, Stacking of Uninsured and Underinsured Motor Vehicle Coverages, 24 U. RICH. L. REV. 87 (1989). For example, if an insured owns three automobiles, each with UM limits of $10,000 per accident, he could add all three together and recover $30,000, provided his injuries exceeded that amount and he was injured by an
Uninsured motorist coverage was eliminated from the antistacking statute in 1980. With the 1987 amendments to the UM statute allowing selective destacking, the Grant court implied that this precedent may again be applicable "by analogy".

Although the Petersen and Grant courts effectively reach opposite results, with Petersen finding coverage for the insured and Grant finding no coverage under identical language of the same policy, the rationale applied by these courts are different. Petersen relies on rules of policy construction, while Grant relies on the supposed public policy of the UM statute. As Petersen deals with a narrow issue of policy construction, this article will, instead, focus on Grant and demonstrate that the public policy considered by the court is either no longer valid, or is inapplicable to these cases. To fully understand the reasoning of the court, one must review the history of the owned-uninsured vehicle exclusion and the different ways in which it has been handled in Florida courts.

III. UNINSURED MOTORIST COVERAGE

World War II and the proliferation of the mass produced automobile on America's highways prompted a need to provide compensation when this dangerous instrumentality was used negligently. Although some motorists transferred the economic risk of their negligence through the purchase of liability insurance, many drivers neither purchased insurance nor

uninsured motorist. Florida's antistacking statute was enacted in 1976 to prohibit this practice with UM and other insurance coverages. See Fla. Stat. § 627.4132 (1977).


42. Ch. 80-364, § 1, 1980 Fla. Laws 1495 (amending Fla. Stat. § 627.4132 (1979)).

43. Ch. 87-213, § 1, 1987 Fla. Laws 1341, 1343 (amending Fla. Stat. § 627.727 (1986)).


45. Grant, 620 So. 2d at 780.

46. Petersen, 615 So. 2d at 182.

47. Grant, 620 So. 2d at 779-80.

48. A dangerous instrumentality is "[a]nything which has the inherent capacity to place people in peril, either in itself . . . or by a careless use of it . . . ." Black's Law Dictionary 394 (6th ed. 1990).

49. See generally Alan I. Widiss, Uninsured and Underinsured Motorist Insurance § 1.1, at 3-4 (2d ed. 1985) (historical development of UM coverage).
had the financial resources to compensate the victims of their carelessness.\textsuperscript{50} Because a significant number of injured motorists were left uncompensated for injuries by financially irresponsible drivers, pressure upon legislatures to require liability insurance for all drivers increased.\textsuperscript{51} This pressure led to two significant developments in motor vehicle tort law: financial responsibility statutes and UM coverage.\textsuperscript{52}

Uninsured motorist coverage is now required in forty-nine states,\textsuperscript{53} and was first required in Florida in 1961.\textsuperscript{54} Since its enactment, the UM statute has been the subject of much litigation, interpretation, and amendment.\textsuperscript{55} The landmark case interpreting UM coverage in Florida is \textit{Mullis v. State Farm Mutual Automobile Insurance Co.},\textsuperscript{56} and no discussion of UM may begin without a review of this Florida Supreme Court opinion.

\textbf{A. Mullis v. State Farm}

Interestingly, the facts of \textit{Mullis} are similar to those of \textit{Grant} and \textit{Petersen}. On May 25, 1967, Richard Lamar Mullis was severely injured when he was struck by an uninsured automobile while riding his mother’s uninsured Honda motorcycle.\textsuperscript{57} His parents owned two other vehicles which were insured by State Farm.\textsuperscript{58} The policies defined an insured as including “the first person named in the declarations and while residents of his household, his spouse and the relatives of either . . . .”\textsuperscript{59} The UM sections included “owned-uninsured” exclusions similar to those in \textit{Grant} and \textit{Petersen}.\textsuperscript{60} State Farm refused to arbitrate the claim, asserting that although Richard Mullis was an insured, the motorcycle was excluded.\textsuperscript{61}

\begin{footnotesize}
\textsuperscript{50} \textit{Id.} Widiss refers to these drivers as the “financially irresponsible”. \textit{Id.}
\textsuperscript{51} \textit{Id.}
\textsuperscript{52} \textit{Id.}
\textsuperscript{53} \textsc{Widiss}, supra note 49, § 1.12, at 14. Only Michigan does not require insurers to offer UM. \textit{Id.} at 4.
\textsuperscript{54} Ch. 61-175, § 1, 1961 Fla. Laws 291, 292 (codified at \textsc{Fla. Stat.} § 627.0851 (1961)) (renumbered as \textsc{Fla. Stat.} § 627.727 in 1970).
\textsuperscript{55} The statute has been amended so many times that one judge equated the relationship between the Florida Legislature and the UM statute to that between a fragile beach and a hurricane, “except the annual storm season in the legislature arrives a few months earlier.” \textsc{Quirk v. Anthony}, 563 So. 2d 710, 713 (Fla. 2d Dist. Ct. App. 1990).
\textsuperscript{56} 252 So. 2d 229 (Fla. 1971).
\textsuperscript{57} \textit{Id.} at 231.
\textsuperscript{58} \textit{Id.}
\textsuperscript{59} \textit{Id.}
\textsuperscript{60} \textit{Id.}
\textsuperscript{61} \textit{Mullis}, 252 So. 2d at 231.
\end{footnotesize}
The trial court granted summary judgment for State Farm, which was affirmed by the district court of appeal.\textsuperscript{62} The Florida Supreme Court reversed\textsuperscript{63} and set up the foundation for analyzing UM coverage that is still followed.\textsuperscript{64}

In labeling UM the counterpart of the Financial Responsibility Law,\textsuperscript{65} the court stated that UM coverage "provides bodily injury family protection as if, and to the extent, the uninsured motorist had been covered by a standard automobile liability insurance policy under the Financial Responsibility Law."\textsuperscript{66} Because the Financial Responsibility Law is mandated by statute, it cannot be narrowed by exclusions contrary to the law.\textsuperscript{67} Similarly, a carrier could not narrow UM coverage in a manner contrary to the purpose of the UM statute which, as the court stated, was to "provide uniform and specific insurance benefits to members of the public to cover damages for bodily injury caused by the negligence of insolvent or uninsured motorists and such \textit{statutorily fixed} and prescribed protection is not reducible by insurers' policy exclusions and exceptions . . . ."\textsuperscript{68}

The court then classified insureds into two groups: Class I insureds, which included the named insured, the named insured's spouse, and relatives residing in the same household;\textsuperscript{69} and, Class II insureds, permissive users or passengers of the insured vehicle.\textsuperscript{70} Coverage for Class II insureds was linked to the vehicle they occupied when injured. Therefore, Class II insureds were only covered for injury that occurred in or by the insured vehicle.\textsuperscript{71} Class I insureds, however, were covered

\begin{quote}
[\textit{w}henever bodily injury is inflicted upon [them] \ldots \textit{by the negligence of an uninsured motorist, under whatever conditions, locations, or circumstances, any of such insureds happen to be in at the time . . . . They may be pedestrians at the time of such injury, they may be riding}
\end{quote}

\begin{enumerate}
\item \textit{Id.} at 232.
\item \textit{Id.}
\item See, e.g., Florida Farm Bureau v. Hurtado, 587 So. 2d 1314 (Fla. 1991); see also Coleman v. Florida Ins. Guar. Ass'n, 517 So. 2d 686 (Fla. 1988) (applying the \textit{Mullis} doctrine).
\item \textit{Mullis}, 252 So. 2d at 233.
\item \textit{Id.} at 236.
\item \textit{Id.}
\item \textit{Id.} at 233-34.
\item Both Peterson and Grant were named insureds on their respective policies and were, therefore, Class I insureds. See \textit{Grant}, 620 So. 2d at 778; \textit{Petersen}, 615 So. 2d at 181.
\item \textit{Mullis}, 252 So. 2d at 233.
\item \textit{Id.}
\end{enumerate}
in motor vehicles of others or in public conveyances and they may occupy motor vehicles (including Honda motorcycles) owned by but which are not "insured automobiles" of named insured. 72

Thus, the Mullis court invalidated the owned-uninsured vehicle exclusion, and any other exclusion that attempted to "whittle away"73 at the coverage mandated by the UM statute. 74 Accordingly, defining the vehicle which a Class I insured occupied when injured was unnecessary under the Mullis doctrine. Although similar fact patterns have arisen in the courts since Mullis was decided, defining a motorcycle was unnecessary as long as the exclusion was invalid, and the type of vehicle occupied by a Class I insured did not affect coverage. The antistacking nature of this exclusion, 75 however, has left it alternatively, valid and invalid, depending on the status of stacking in Florida.

B. The Owned-Uninsured Vehicle Exclusion and Stacking
Statutory Schizophrenia

Stacking permits an automobile owner to provide UM coverage for himself and members of his family while operating or occupying any owned vehicle, even if only one of them has UM coverage. 76 The owned-uninsured exclusion was developed to circumvent the effects of stacking by precluding coverage if the insured is injured in or by a vehicle which he owned, but was not insured under the particular policy. 77 Because of its antistacking effect, the owned-uninsured vehicle exclusion has been considered valid or invalid by Florida’s courts depending on whether or not stacking was prohibited by statute. 78

72. Id.
73. Id. (citing First Nat'l Ins. Co. of Am. v. Devine, 211 So. 2d 587, 589 (Fla. 2d Dist. Ct. App. 1968) (invalidating endorsement which precluded coverage for drivers under twenty-five years of age)).
74. The only exception recognized by the Mullis court was that under the statute, an insured could elect to reject the coverage altogether. Id. at 238; see also FLA. STAT. § 627.727(1) (1991).
75. See SCHERMER, supra note 20, § 31.02.
76. Id. § 32.02; see also supra note 40.
77. SCHERMER, supra note 20, § 32.02.
78. See, e.g., Firemen's Fund Ins. Co. v. Pohlman, 485 So. 2d 418 (Fla. 1986). The supreme court’s opinion in Pohlman clarified the relationship between the owned-uninsured vehicle exclusion and the antistacking statute. In Pohlman, the insured purchased a policy covering two vehicles on March 1, 1979, when the antistacking statute was in effect. Id. at 419. On February 27, 1981, after UM was removed from the antistacking statute, the insured
Stacking of UM coverage was permitted in Florida until 1976, when Florida’s Legislature enacted the antistacking statute. Because the Legislature targeted UM in response to case law which allowed stacking, it effectively repealed the statute in 1980 when it removed UM from the antistacking statute. In 1987, the Legislature compromised by giving insureds the opportunity to select non-stacked policies if they so chose. Under the 1987 amendment, insurers may now offer policies with exclusions preventing stacking of coverage, including the owned-uninsured vehicle exclusion.

added an additional vehicle. After the insured was injured while riding a motorcycle which he owned but did not insure with Firemen’s Fund, the court held that the insured could recover under the coverage added in 1981, despite an owned-uninsured vehicle exclusion. The insured could not, however, stack the coverage for the two vehicles insured in 1979. See also Hausler v. State Farm Mut. Auto. Ins. Co., 374 So. 2d 1037 (Fla. 2d Dist. Ct. App. 1979) (where policy was purchased one month before the antistacking statute was signed into law, insured was entitled to coverage under prior case law despite owned-uninsured vehicle exclusion).

79. Florida Statutes section 627.4132 in its entirety provided:
If an insured or named insured is protected by any type of motor vehicle insurance policy for liability, uninsured motorist, personal injury protection, or any other coverage, the policy shall provide that the insured or named insured is protected only to the extent of the coverage he has on the vehicle involved in the accident. However, if none of the insured’s or named insured’s vehicles is involved in the accident, coverage is available only to the extent of coverage on any one of the vehicles with applicable coverage. Coverage on any other vehicles shall not be added to or stacked upon that coverage. This section shall not apply to reduce the coverage available by reason of insurance policies insuring different named insureds.

FLA. STAT. § 627.4132 (1977) (emphasis added); see also supra note 40 and accompanying text.


81. Id. The statute, in pertinent part, currently reads:
This section does not apply:
1. To uninsured motorist coverage which is separately governed by § 627.727.
2. To reduce the coverage available by reasons of insurance policies insuring different named insureds.


82. See FLA. STAT. § 627.727(9) (1991). In exchange for the lower exposure, insurers must roll back premiums to the insured by 20% on all destacked policies. Id.

83. Id. Florida Statutes section 627.727(9) states:
Insurers may offer policies of uninsured motorist coverage containing policy provisions, in language approved by the department, establishing that if the insured accepts this offer: . . . .
The case law relating to the owned-uninsured vehicle exclusion likewise alternates between finding the exclusion valid or invalid depending upon the version of the statute applicable when the case accrued.\textsuperscript{84} Accordingly, the case law relating to this exclusion and stacking can be categorized chronologically: cases accruing before 1976, which find the exclusion invalid and hold that the Class I insured can recover;\textsuperscript{85} cases accruing between 1976 and 1980, which find the exclusion valid under the antistacking statute and hold that the Class I insured cannot recover;\textsuperscript{86} cases accruing between 1980 and 1987, which reinstate Mullis as precedent and, again, find the exclusion invalid;\textsuperscript{87} and cases accruing after 1987, whose findings and holdings have mixed results.\textsuperscript{88}

The reason for mixed results in cases under the current statute is that there are now two types of policies in the insurance market, stacked and nonstacked.\textsuperscript{89} The Grant court asserted that prior case law from the

\textit{id.}

\begin{itemize}
  \item \textsuperscript{85} See, e.g., Mullis, 252 So. 2d at 238; Hauser, 374 So. 2d at 1038; McDonald, 373 So. 2d at 95; Auto-Owners Ins. Co., 289 So. 2d at 750.
  \item \textsuperscript{86} See Harbach, 439 So. 2d at 1386; Reynolds, 437 So. 2d at 196 (case accruing in 1979); Indomenico, 388 So. 2d at 30-31; Wimpee, 376 So. 2d at 21; Kuhn, 374 So. 2d at 1081.
  \item \textsuperscript{87} See Beem, 469 So. 2d at 140; accord Glenn, 428 So. 2d at 368.
  \item \textsuperscript{88} Compare Phillips, 609 So. 2d at 1390-91 with Peterson, 615 So. 2d at 182.
  \item \textsuperscript{89} A Florida practitioner must therefore be careful in determining which type of policy his client carries. For example, State Farm currently offers stacked UM coverage called "U"
\end{itemize}
antistacking era is now applicable to nonstacked policies “by analogy,” in the same way the Florida Supreme Court reinstated prior case law in Florida Farm Bureau Casualty Co. v. Hurtado. In Hurtado, the court held that the amendment eliminating UM from the antistacking statute operated to revive prior case law that permitted stacking for Class I insureds. Hurtado is distinguishable, however, in that the court cited legislative history which indicated the Legislature’s intent to “revive prior case law which permitted and determined the extent of the stacking of uninsured motorist insurance policies.” There is no similar language in the legislative history of the 1987 amendment. It is unclear, therefore, if the Legislature intended precedent from the antistacking era to again control determination of UM coverage. If the supreme court adopts the Grant court’s analogy, there will be two separate bodies of case law that are mutually exclusive but equally applicable. Stacked policies, following Mullis, will provide UM benefits wherever the injury occurred and, because the exclusion is invalid, defining the occupied vehicle remains irrelevant. Nonstacked policies, however, containing a valid exclusion in compliance with Florida’s UM statute will be construed under Harbach, and the nonstacked definition of the occupied vehicle becomes an issue.

IV. MOTOR VEHICLES DEFINED

Because of these changes in the UM statute, the definition of a motor vehicle has only recently become important again in determining UM coverage. Although the term “uninsured motor vehicle” is defined in the UM statute, this definition explains when a vehicle is uninsured and does

in addition to the nonstacked “U3” in dispute in Grant and Peterson.

90. Grant, 620 So. 2d at 780; see also CONTINUING LEGAL EDUCATION COMM., FLORIDA BAR, FLORIDA AUTOMOBILE INSURANCE LAW § 4.38 (2d ed. 1991) [hereinafter FLORIDA LAW].
91. 587 So. 2d 1314 (Fla. 1991).
92. Id. at 1318.
93. Id. (citing Staff of Fla. H.R. Comm. on Ins., HB 1315 (1980) Staff Analysis (June 16, 1980)).
95. See Phillips, 609 So. 2d at 1388-89.
97. See supra note 86 and accompanying text.
not define the vehicle itself. Any definition of a "motor vehicle" must, therefore, be gleaned from cases and other statutes. The two major statutory sources for defining a motor vehicle have been the Financial Responsibility Law, and Florida's No-Fault Law. Because application of either statutory definition will yield opposite results, they will be discussed separately.

A. No-Fault Insurance

The term "motor vehicle" is defined in several places in Florida's statutes. Because Florida's No-Fault law also deals with automobile insurance, its definition has often been asserted as the controlling definition of a motor vehicle. The No-Fault statute is also the source from which State Farm derived its definition of "motor vehicle" for the No-Fault provisions of its automobile policy.

Creating Personal Injury Protection Benefits ("PIP"), Florida's No-Fault statute was enacted to provide baseline coverage for an injured person's medical expenses, lost income, death benefits, and funeral expenses without regard to fault. Much like workers' compensation, in exchange for recovery of basic expenses without the burden of proving fault, the injured

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100. See Allyn, 333 So. 2d at 499.
101. See supra notes 25, 98, 99.
103. See, e.g., Allyn, 333 So. 2d at 498 (carrier asserted that the No-Fault definition contained in the PIP provision of an automobile policy applied to defining the uninsured motor vehicle, which was a motorcycle).
104. See supra notes 21-22 and accompanying text.
105. The purpose of the statute is to:
provide for medical, surgical, funeral, and disability insurance benefits without regard to fault, and to require motor vehicle insurance securing such benefits, for motor vehicles required to be registered in this state and, with respect to motor vehicle accidents, a limitation on the right to claim damages for pain, suffering, mental anguish, and inconvenience. Fla. Stat. § 627.731 (1991).
loses his right to pursue a bodily injury claim in tort unless his injuries meet a minimum threshold of severity. 106

The statute defines a “motor vehicle” as “any self-propelled vehicle with four or more wheels which is of a type both designed and required to be licensed for use on the highways of this state and any trailer or semitrailer designed for use with such vehicle . . . .” 107 By definition, the phrase “four or more wheels” under no-fault clearly excludes any two wheeled vehicles, including motorcycles. The Legislature deliberately excluded coverage to motorcycles because of the higher risk of severe injuries faced by the driver or passenger of a motorcycle. 108 There is an underlying belief that anyone who rides a motorcycle has assumed this higher risk of injury. 109 Although insurance for medical expenses resulting from injury are available to motorcyclists, such coverage is expensive and not mandated by statute. 110

There are two ways in which a vehicle must be defined under PIP. The vehicle that struck the claimant must be a motor vehicle, and the vehicle that the claimant occupied when struck must be either a motor vehicle or not a self propelled vehicle. 111 If the claimant is occupying a motor vehicle, he need not be struck by anything at all as the claimant’s

106. Id.; see also FLA. STAT. § 627.737(2) (1991).
107. FLA. STAT. § 627.732(1) (1991) (emphasis added); see also supra note 22.
108. See Miller v. Allstate Ins. Co., 560 So. 2d 393, 394 (Fla. 4th Dist. Ct. App. 1990) (“[I]ntent seems to focus on the equipment’s propensity for accidental injury during operation, excluding those types of vehicles with the highest propensity for injury from coverage such as motorcycles . . . .”); cf. State Farm Mut. Auto. Ins. Co. v. Nicholson, 337 So. 2d 860, 862 (Fla. 2d Dist. Ct. App. 1976) (finding three-wheeled police vehicle is a motor vehicle because its physical characteristics, including safety equipment, were more determinative than the number of wheels); see also supra text accompanying notes 4-6.
109. Unfortunately, this assumption is often shared by juries, making it more difficult to prove fault in motorcycle accident cases. See Kelner & Kelner, supra note 4, at 3.
110. Accordingly, a motorcyclist does not have to meet the statutory injury threshold requirement in order to pursue a claim for non-economic damages against the tortfeasor. See Scherzer v. Beron, 455 So. 2d 441 (Fla. 5th Dist. Ct. App.) (holding that a motorcyclist is not required to meet the statutory injury threshold to maintain tort action), cause dismissed, 459 So. 2d 1039 (Fla. 1984); cf. Santiagoherrera v. Stout, 470 So. 2d 718 (Fla. 5th Dist. Ct. App. 1985) (because a bus was not a motor vehicle under the No-Fault statute, woman injured while driving the bus did not have to meet the threshold).
111. In describing the coverage required, section 627.736(1) of the Florida Statutes states that every insurance policy complying with the statute must provide PIP to “the named insured, relatives residing in the same household, persons operating the insured motor vehicle, passengers in such motor vehicle, and other persons struck by such motor vehicle and suffering bodily injury while not an occupant of a self-propelled vehicle . . . .” FLA. STAT. § 627.736(1) (1991) (emphasis added).
injury need only alight from operation, maintenance, or use of the vehicle. At the other extreme, however, if the claimant is a pedestrian or bicyclist, then he must be injured by a collision with a motor vehicle which, by definition, precludes motorcycles, mopeds, minibikes and any other two wheeled vehicle. Most of the litigation comes from the gray area between the automobile and the pedestrian, and classifying the modes of transportation that fall in between as either motor vehicles or self propelled vehicles.

In defining the vehicle occupied by the claimant, the importance of the "self propelled vehicle" distinction becomes apparent. A motorcycle, with its high rate of speed and propensity for injury, is excluded because it is a self propelled vehicle. Conversely, mini-bikes and mopeds, with a much lower brake horsepower, are viewed as less dangerous by Florida courts, and are, therefore, considered bicycles and not self propelled vehicles. Accordingly, under PIP, an automobile, a three wheeled police vehicle, and a golf cart are motor vehicles, but a motorcycle is not. A motorcycle and lawn mower are self propelled vehicles,

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112. Fla. Stat. § 627.736(1) (1991); see also Hernandez v. Protective Casualty Ins. Co., 473 So. 2d 1241 (Fla. 1985) (holding PIP was recoverable for claimant who was injured when pulled out of his car by police during an arrest for a traffic violation); Government Employees Ins. Co. v. Novak, 453 So. 2d 1116 (Fla. 1984) (holding PIP was recoverable by plaintiff's estate where plaintiff was shot in her vehicle after refusing to give the assailant a ride).

113. See Prinzo, 465 So. 2d at 1365 (pedestrian struck by a moped could not recover PIP or UM).

114. Cf. Meister v. Fisher, 462 So. 2d 1071 (Fla. 1984) (finding a golf cart is a motor vehicle and a dangerous instrumentality).

115. See State Farm Mut. Auto. Ins. Co. v. Link, 416 So. 2d 875 (Fla. 5th Dist. Ct. App. 1982); State Farm Mut. Auto. Ins. Co. v. O'Kelly, 349 So. 2d 717 (Fla. 1st Dist. Ct. App. 1977), cert. denied, 357 So. 2d 188 (Fla. 1978); see also Nicholson, 337 So. 2d at 860 (three wheeled police vehicle which had enclosed cabin, was steered with wheel, and could stand upright when not ridden, was more like a motor vehicle than a self propelled vehicle despite the "four or more" wheels requirement of the statute).

116. See Velez v. Criterion Ins. Co., 461 So. 2d 1348 (Fla. 1984); Prinzo, 465 So. 2d at 1365; Link, 416 So. 2d at 876.

117. Nicholson, 337 So. 2d at 862; see supra note 115.

118. Meister, 462 So. 2d at 1072.


120. See Miller, 560 So. 2d at 393 (insured who was struck by a motor vehicle while riding a lawn mower could not recover PIP benefits). In a dissenting opinion, Justice Stone asserts that a lawn mower is no more a self propelled vehicle than is an electric wheelchair.
but a moped is not. Finally, a moped is a bicycle and not a motorcycle or “self propelled vehicle.”

To illustrate, when a car hits a pedestrian, both the pedestrian and driver recover. Likewise when a car strikes a moped. If, however, a motorcycle or moped strikes a pedestrian, neither the pedestrian nor rider can recover. Finally, when a car strikes a motorcycle, the car driver can recover, but the motorcyclist cannot. As these examples show, determining coverage under PIP involves a simultaneous evaluation of both the vehicle occupied by the claimant and the vehicle that struck the claimant. If a motorcycle was involved in the accident on either side, the claimant will not recover unless the claimant was in a car.

Cases defining motorcycles in other areas of insurance further illustrate the bias against motorcycles in Florida. Cases defining the unowned vehicles under liability coverage, for example, have produced some results similar to the PIP cases. Although defining the insured vehicle is easily accomplished by looking at the declarations page of the policy, this will not define unowned vehicles driven by the named insured.

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Id. at 395 (Stone, J., dissenting). His dissent demonstrates how far the courts may go to preclude recovery.

121. Velez, 461 So. 2d at 1349; Prinzo, 465 So. 2d at 1365; Link, 416 So. 2d at 878.
122. See, e.g., Velez, 461 So. 2d at 1349; see also FLA. STAT. § 316.003(2) (1991).
123. The pedestrian recovers because he is not on a “self propelled vehicle” when struck by a “motor vehicle”; the driver recovers because his injury alights from the “operation, maintenance and use” of the motor vehicle.
124. The pedestrian can not recover because, although he is not the occupant of a self propelled vehicle, he was not struck by a motor vehicle. The moped rider cannot recover, because, as with the pedestrian, although he was not the occupant of a self propelled vehicle, he was not struck by a motor vehicle. The motorcyclist cannot recover both because he was not the occupant of a motor vehicle, and because he was the occupant of a self propelled vehicle.
125. The car driver recovers because his injuries alighted from operation, maintenance and use of a motor vehicle. Although the motorcyclist was struck by a motor vehicle, the motorcyclist cannot recover because he or she was not the driver of a motor vehicle and was the occupant of a self propelled vehicle.
126. Automobile liability insurance, usually “provides that the insurer will pay damages that the insured becomes legally obligated to pay because of personal injury or property damage to others caused by an accident resulting from the ownership, maintenance, or use of the . . . insured motor vehicle.” FLORIDA LAW, supra note 90, § 5.2. Automobile liability insurance will also typically protect the insured as well as family residents of the insured’s household, when he or she is driving unowned vehicles. Id. § 5.8.
127. See Florida Farm Bureau Mut. Ins. Co. v. Pitzer, 330 So. 2d 499 (Fla. 4th Dist. Ct. App.) (where policy defined “motor vehicle” as the motor vehicle, semitrailer, or trailer described in the policy, court held that this definition does not define automobile not
courts have held that, absent a definition of the term "automobile" in the policy, a motorcycle is not an automobile, and coverage for injuries caused to others while driving an uninsured motorcycle is precluded. 128

Homeowner's insurance also contains liability coverage that indemnifies the insured for injury caused to others on the premises, as well as medical payments coverage which provides reimbursement of medical expenses for injuries caused by the insured when off the insured premises. 129 To prevent duplication of automobile insurance, homeowner's policies typically exclude coverage for property damage and bodily injury arising from the use of any "land motor vehicle." 130 In Allstate Insurance Co. v. Caronia, 131 the insured's minor son injured the plaintiff while driving someone else's motorcycle. The court held that a motorcycle was a "land vehicle" under the policy exclusion and, as a result, the injured plaintiff could not recover. 132 Likewise, a three-wheeled power driven cycle, called a "Tri-sport," was considered a land motor vehicle under the same exclusionary language. 133 As under No-Fault, however, a moped was considered a bicycle and not a "land motor vehicle." 134

In Loftus v. Pennsylvania Life Insurance Co., 135 the insured was killed while riding a motorcycle. In construing a policy providing coverage for accidental injury sustained while driving or riding within an automobile, the Fourth District Court of Appeal held that the insured's motorcycle was not an automobile and, thus, his spouse could not recover for his death. 136

described in the policy), cert. dismissed, 336 So. 2d 603 (Fla. 1976).


129. 3 WARREN FREEDMAN, FREEDMAN'S RICHARDS ON THE LAW OF INSURANCE, Appendix K at 442 (6th ed. 1990); see also TORT AND INSURANCE SECTION, PROPERTY INSURANCE LAW COMM., AMERICAN BAR ASSOCIATION, ANNOTATIONS TO THE HOMEOWNERS POLICY 18 (2d ed. 1990) (reproduction of Insurance Services Office (ISO) and State Farm Homeowner's policies with annotations).

130. FREEDMAN, supra note 129, at Appendix K.


132. Id. at 1223.


135. 314 So. 2d 159 (Fla. 4th Dist. Ct. App. 1975), cert. denied, 327 So. 2d 33 (Fla. 1976).

Generalizations emerge when viewing these cases together. First, if a motorcycle has anything to do with causing the injury, the claimant will usually not recover. Second, courts define vehicles based upon their propensity to cause injury, rather than strictly by statutory or policy construction. Finally, the vehicle the claimant was occupying when injured is critical in determining coverage.

The exception, however, has been the UM statute, under which, as a matter of public policy, the insured could purchase coverage for himself and his family regardless of the type of vehicle driven, or its propensity for injury. Because the occupied vehicle distinction typical of No-Fault was contrary to this public policy, the PIP definition was not applied to UM coverage.

Although the public policy in determining UM has historically been to provide coverage for the insured wherever or whenever an accident occurs, the 1987 statutory amendment allowing nonstacked policies has changed this principle. In nonstacked policies provided by the amendment, the vehicle occupied by the insured becomes the critical determinant of coverage much as it does under the No-Fault law. The No-Fault definition of a motor vehicle may, therefore, be more applicable to UM, at least to nonstacked policies, than it has in the past. Thus, while the Grant court asserts that the policy definition, which is patterned after the No-Fault statute, is inapposite, the underlying rationale for the inapplicability may not be valid in construing nonstacked policies.

137. See, e.g., Dunlap, 470 So. 2d at 99-100 (precluding recovery for plaintiff because he was originally riding a motorcycle, even though he was thrown off and into the roadway by a truck collision and was later injured when run over by a taxi).

138. See Nicholson, 337 So. 2d at 862; Miller, 560 So. 2d at 393; see also supra note 108.

139. See supra notes 123-25 and accompanying text.

140. See supra text accompanying notes 66, 72.

141. See, e.g., Allyn, 333 So. 2d at 499.

142. E.g., Mullis, 252 So. 2d at 233; Allyn, 333 So. 2d at 499.

143. See supra note 82 and accompanying text.

144. See supra text accompanying notes 96-97.

145. Section 627.727(9)(b) of the Florida Statutes states, “[i]f at the time of the accident the injured person is occupying a motor vehicle, the uninsured motorist coverage available to him is the coverage available as to that motor vehicle.” FLA. STAT. § 627.727(9)(b) (1991) (emphasis added).

146. Both Petersen and Grant had purchased nonstacked policies.
B. Grant and the Financial Responsibility Equation

The Grant court held that public policy requires application of the Financial Responsibility Law definition of motor vehicle. 147 This public policy is rooted in the reciprocal relationship between the Financial Responsibility Law and the UM statute, and their intertwined histories. 148

Financial responsibility laws attempt to induce drivers to procure liability insurance to cover injury their negligence causes to others. 149 Florida’s Financial Responsibility Law 150 was enacted in 1955 to promote “safety, and provide financial security by such owners and operators whose responsibility it is to recompense others for injury to person or property caused by the operation of a motor vehicle . . . .” 151 Both UM insurance and the Financial Responsibility Law, therefore, were created as solutions to the same problem: The financially irresponsible driver, with Financial Responsibility Laws inducing third party coverage, and UM insurance offering first party coverage for the same risk. 152 This relationship was recognized by the Florida Supreme Court in Mullis, when the court called UM the “reciprocal or mutual equivalent of automobile liability coverage prescribed by the Financial Responsibility Law.” 153

147. Grant, 620 So. 2d at 779.
148. See supra text accompanying notes 49-52.
149. WIDISS, supra note 49, § 1.1, at 2-7. Unfortunately, most such statutes do not require proof of financial responsibility until the driver has had one accident. Id.
151. Ch. 29963, § 1, Laws of Fla. (1955) (codified at FLA. STAT. § 324.011 (1956)).

Although Personal Injury Protection coverage has been required throughout the registration period since the No-Fault statute was enacted in 1971, property damage liability was added to the required coverage in the motor vehicle insurance reform act of 1988. Robert Henderson & Patrick F. Maroney, Motor Vehicle Insurance Reform: Revisiting the Uninsured Driver, 16 FLA. ST. U. L. REV. 789, 790 (1988). Bodily injury liability coverage, however, is still only required under the Financial Responsibility Law, and only after the first accident as Florida Statutes section 324.011 states:

[T]he operator of a motor vehicle involved in an accident or convicted of certain traffic offenses meeting the operative provisions of s. 324.051(2) shall respond for such damages and show proof of financial ability to respond for damages in future accidents as a requisite to his future exercise of such privileges.

FLA. STAT. § 324.011 (1991) (emphasis added). Thus, in Florida, only the vehicles are protected for liability from the time of registration. Injured persons are still only guaranteed the minimum coverage afforded under PIP.

For an overview of the history and development of Florida’s Financial Responsibility Law see, FLORIDA LAW, supra note 90, §§ 1.5-1.8.

152. WIDNESS, supra note 49, § 1.1, at 4.
153. Mullis, 252 So. 2d at 237-38; see supra text accompanying notes 65-67.
Florida’s Financial Responsibility Law defines a motor vehicle as

*every self-propelled vehicle* which is designed and required to be licensed for use upon a highway, including trailers and semitrailers designed for use with such vehicles, except traction engines, road rollers, farm tractors, power shovels, and well drillers, and every vehicle which is propelled by electric power obtained from overhead wires but not operated upon rails, but not including any bicycle or moped. ¹⁵⁴

The distinction between the PIP statute and Financial Responsibility statute is readily apparent; PIP treats self-propelled vehicles separately, whereas the Financial Responsibility Law incorporates self-propelled vehicles into the definition of a motor vehicle. Thus, absent the four or more wheels requirement of PIP, the two statutes are mutually exclusive in their handling of motorcycles. If the PIP definition is used, motorcycles are excluded. Conversely, when the Financial Responsibility statute is used, motor vehicles include motorcycles. ¹⁵⁵

The courts have shown a preference for using the broader Financial Responsibility Law definition to include motorcycles under UM coverage. ¹⁵⁶ Relying on *Standard Marine Insurance Co. v. Allyn*, the *Grant* court, likewise, applied the Financial Responsibility Law’s definition. ¹⁵⁷ In *Allyn*, the insured was a pedestrian who was severely injured when struck by an uninsured motorcycle. ¹⁵⁸ He filed a claim under his automobile policy, which provided that the carrier would “pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile . . . ” ¹⁵⁹ In defining an *uninsured* motor vehicle, the court stated:

We do not perceive that the legislature, by enacting the Florida Automobile Reparations Reform Act, intended to exclude those motor

¹⁵⁵. The inverse relationship between a policy provision and exclusion should be noted. When the definition is applied to a coverage provision, the broader the definition, the more coverage available. Conversely, as in *Grant* and *Petersen*, applying the definition to an exclusion, the broader the definition the less coverage available.
¹⁵⁷. *Grant*, 620 So. 2d at 779.
¹⁵⁸. *Allyn*, 333 So. 2d at 497.
¹⁵⁹. *Id.* at 498. The term “uninsured automobile” was later changed to “uninsured motor vehicle” by amendment. *Id.*
Tamir

vehicles enumerated above from the umbrella of uninsured motorists. The statutory definition of a "motor vehicle" found in the Financial Responsibility Act is far more consonant with the public policy of this state as to uninsured motorist...  

The public policy described by the court was to provide the insured recovery under his own policy for the same damages he would have been entitled to recover had the tortfeasor maintained liability insurance. The court, therefore, held that the tortfeasor's uninsured motorcycle, which struck the insured pedestrian, was an uninsured motor vehicle and the insured could recover under his own UM coverage. This logic was clarified further by the supreme court in Carguillo v. State Farm Mutual Automobile Insurance Co.

As in Allyn, the Carguillo court was defining the tortfeasor's uninsured vehicle. The insured was injured when struck by a motorcycle designed mainly for off road use. The court reasoned that because the definition of motor vehicle in the Financial Responsibility Law excluded vehicles designed mainly for off road use, the tortfeasor would not have been required to maintain liability coverage for his vehicle. Because the exclusion in the policy did not reduce the insured's coverage to a level below that which was required by the Financial Responsibility Law, the court upheld the exclusion and denied recovery to the insured.

160. Id. at 499 (emphasis added).
161. Id. (citing Davis v. United Fidelity & Guar. of Baltimore, Md., 172 So. 2d 485 (Fla. 1st Dist. Ct. App. 1965); Standard Accident Ins. Co. v. Gavin, 184 So. 2d 229 (Fla. 1st Dist. Ct. App. 1966)).
162. Allyn, 333 So. 2d at 498.
163. 529 So. 2d 276 (Fla. 1988).
164. Id. at 277.
165. Id. at 278 (citing Becraft, 501 So. 2d at 1316).
166. Id. Another doctrine for determining UM coverage bears discussion at this point. Florida courts have interpreted this portion of the Mullis case to mean that UM coverage for the injured party is based on whether or not the liability coverage of that particular policy would cover him if he were the tortfeasor. See, e.g., Valiant Ins. Co. v. Webster, 567 So. 2d 408, 410 (Fla. 1990) (holding that the insured could not recover for the wrongful death of his son, who was no longer a member of father's household, because son was not an insured contemplated by Financial Responsibility Law, and because father sustained no bodily injury as specified under the Financial Responsibility Law's minimum coverage requirement); Auto-Owners Ins. Co. v. Queen, 468 So. 2d 498 (Fla. 5th Dist. Ct. App. 1985) (where liability portion of the policy provided coverage for the daughter, who was a resident relative of the insured, the UM section containing an owned-uninsured vehicle exclusion could not preclude her recovery); Auto-Owners Ins. Co. v. Bennet, 466 So. 2d 242 (Fla. 2d Dist. Ct. App. 1984); France v. Liberty Mut. Ins. Co., 380 So. 2d 1155 (Fla. 3d Dist. Ct. App. 1980).
(where definition of relative under liability portion of the policy excluded relatives who owned their own automobile, daughter, who was injured while driving her own uninsured auto, was not an insured under the liability provision and could not recover UM).

This “liability analysis” took on an additional wrinkle, however, when the supreme court restated the Mullis doctrine:

[S]ince our decision in Mullis, the courts have consistently followed the principle that if the liability portions of an insurance policy would be applicable to a particular accident, the uninsured motorist provisions would likewise be applicable; whereas, if the liability provisions did not apply to a given accident, the uninsured motorist provisions of that policy would also not apply (except with respect to occupants of the insured automobile).

Webster, 567 So. 2d at 410 (emphasis added).

In his dissenting opinion, Chief Justice Shaw clarified the problem.

[A]ll of these cases apply an analysis that focuses exclusively on the injured individual rather than the accident; they rule simply and clearly that UM coverage is unavailable if liability coverage is inapplicable to a particular individual. The majority, unsupported by case law, broadens the exclusion from the ‘individual’ to the ‘accident’ . . . .

Id. at 412 (Shaw, J., dissenting opinion).

The distinction between “individual” and “accident” has served to broaden the exclusion, and thus narrow coverage. See Nationwide Mut. Fire Ins. Co. v. Phillips, 609 So. 2d 1385 (Fla. 5th Dist. Ct. App. 1992). In Phillips, the insured’s husband was injured while riding his owned, uninsured motorcycle. Id. at 1386. Nationwide asserted that the supreme court overruled Mullis, sub silentio, by shifting the focus of the analysis from the individual to the accident. Id. at 1387. The Nationwide policy provided liability coverage for “your [the insured’s] auto.” “[Y]our auto” was defined as “the vehicle or vehicles described in the . . . . declarations.” Id. at 1386. Thus, Nationwide asserted that because the motorcycle was not listed in the declarations page, the accident would not have been covered under liability if the insured’s spouse had been the tortfeasor. Id. Although the husband was the spouse of the named insured, and was covered under the liability section as an individual, Nationwide asserted that the accident was not covered, and he was therefore precluded from recovery under UM. Phillips, 609 So. 2d at 1388.

The Phillips court held that the restatement of the Mullis doctrine in Webster was confusing and contradicted the repeated holding by Florida courts that UM applied to a Class I insured “under whatever conditions, locations, or circumstances any of such insureds happen to be in at the time . . . .” Id. at 1388-89 (quoting Coleman v. Florida Ins. Guar. Ass’n Inc., 517 So. 2d 686, 689 (Fla. 1988)). Moreover, the statement is contradicted by a later reference in Webster to the Mullis opinion: “Mullis specifically holds that the statute requires only that uninsured motorist coverage must be provided to those covered for liability.” Id. at 1389 (quoting Webster, 567 So. 2d at 411). The Phillips court therefore held that the language in Webster, which defined UM coverage by the availability of liability coverage for the accident, was non-binding dicta, and that the husband could recover under UM. Id.

Allyn and Carguillo are distinguishable from Grant and Petersen, however, in that Allyn and Carguillo define the tortfeasor's vehicle. It is logical to apply the Financial Responsibility Law when defining the "offending motorist," whose fictitious insurance under that law UM coverage is intended to parallel. The Grant and Petersen courts, however, are not defining the tortfeasor's vehicle. Rather, they define the vehicle occupied by the insured. Because there is no fictitious liability coverage pertinent to the analysis in Grant and Petersen, the rationale for preferring the Financial Responsibility Law definition over the No-Fault definition, the public policy outlined in Allyn and Carguillo, is not applicable to Grant or Petersen.

V. PETERSEN, GRANT AND POLICY CONSTRUCTION

In "My Fair Lady", Professor Higgins lamented, "Why Can't the English Learn How to Speak?" On behalf of the insureds and their attorneys, this plea may well be paraphrased to "Why Can't the Companies Learn How to Write?" Why is it that so many of them insist upon cluttering up their policies with braintesting definitions, exclusions and conditions? . . . For years they have insisted upon inserting ambiguity and repugnancy in their policies, to the consternation of laymen and attorneys alike, all in face of the fact that when they indulge in such practice, the courts invariably construe the policies liberally in favor of the insured and against the insurer.169

Although Grant and Petersen effectively reach opposite results, the reasoning of the courts are different. While the Grant court focused on the public policy of UM and the Financial Responsibility Law outlined above,170 the Petersen court based its ruling on policy construction.

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Farm Fire & Casualty Co. v. Petersen, 615 So. 2d 181 (Fla. 3d Dist. Ct. App. 1993) (No. 81,740). The court's opinion was not available as of this publication. This issue is raised now to demonstrate the degree to which carriers have attempted to narrow the broad coverage afforded under Mullis since it was decided.

167. Allyn, 333 So. 2d at 499.

168. Salas v. Liberty Mut. Fire Ins. Co., 272 So. 2d 1 (Fla. 1972) (Dekle, J., dissenting) (in applying the reasoning that recovery should be as if the uninsured motorist had carried an automobile liability policy, the court "fictitiously" "issues" a liability policy to the tortfeasor).

169. Fontainbleau Hotel Corp. v. United Filigree Corp., 298 So. 2d 455, 458 (Fla. 3d Dist. Ct. App.), cert. denied, 303 So. 2d 334 (Fla. 1974).

170. See supra text accompanying notes 160-66.
As the quote above indicates, insurance contracts are the penultimate contracts of adhesion. Because they are steeped in ambiguity and confusion, Florida courts have adopted the rule of liberal construction in favor of the insured, and strict construction against the insurer.\textsuperscript{171} If a policy is ambiguous, it must be construed in favor of the insured.\textsuperscript{172} This rule is tempered, however, by requiring a “genuine inconsistency, uncertainty, or ambiguity in meaning remain[ing] after resort to the ordinary rules of construction” before the policy will be construed in favor of the insured.\textsuperscript{173} A genuine ambiguity occurs when the terms of a policy are susceptible to two reasonable constructions, and the interpretation which sustains coverage for the insured will then be adopted.\textsuperscript{174} The rationale underlying this principle is that the carrier, and not the insured, picks the language used.\textsuperscript{175}

\textsuperscript{171} Hartnett v. Southern Ins. Co., 181 So. 2d 524 (Fla. 1965); see also Nixon v. United States Fidelity & Guar. Co., 290 So. 2d 26 (Fla. 1973) (where contractor, sued for defect in wall which collapsed killing a child, could recover under policy despite exclusion precluding recovery for completed products); Kirsch v. Aetna Casualty & Sur. Co., 598 So. 2d 109 (Fla. 2d Dist. Ct. App.) (terms of an exclusion in insurance policy are to be narrowly construed and uncertainties resolved in favor of coverage), review denied, 613 So. 2d 1 (Fla. 1992); Swindal v. Prudential Property & Casualty Co., 599 So. 2d 1314 (Fla. 2d Dist. Ct. App. 1992) (exclusion of liability for intentional acts in homeowner’s policy construed narrowly allowing indemnity to insured who shot the plaintiff); Tire Kingdom Inc. v. First Southern Ins. Co., 573 So. 2d 885 (Fla. 3d Dist. Ct. App. 1990) (inconsistencies in policy required adopting construction that afforded coverage under commercial policy for claim of unfair trade practices made against insured), review denied, 589 So. 2d 290 (Fla. 1991); Tropical Park Inc. v. United States Fidelity & Guar. Co., 357 So. 2d 253 (Fla. 3d Dist. Ct. App. 1978) (terms of policy susceptible to two reasonable constructions, interpretation which sustains coverage for the insured will be adopted); Fontainbleau Hotel, 298 So. 2d at 455 (under contractor’s liability policy having two interpretations, court adopted interpretation which sustained claim for building collapse caused by contractor’s negligence).


\textsuperscript{173} State Farm Mut. Auto. Ins. Co. v. Pridgen, 498 So. 2d 1245, 1248 (Fla. 1986); see also Ostrager & Newman, supra note 172, § 1.02, at 8-10.

\textsuperscript{174} See, e.g., Tire Kingdom, 573 So. 2d at 885; accord Tropical Park, 357 So. 2d at 253; Fontainbleau Hotel, 298 So. 2d at 455; Feldman v. Central Nat'l Ins. Co. of Omaha, 279 So. 2d 897, 898 (Fla. 3d Dist. Ct. App. 1973); see also Ostrager & Newman, supra note 172, § 1.03[b], at 12-13.

\textsuperscript{175} See, e.g., Tropical Park, 357 So. 2d at 256; Nixon, 290 So. 2d at 29; Hartnett, 181 So. 2d at 525. In Hartnett, the supreme court stated:

There is no reason why such policies cannot be phrased so that the average person can clearly understand what he is buying. And so long as these contracts are drawn in such a manner that it requires the proverbial Philadelphia lawyer to comprehend the terms embodied in it, the courts should and will construe
In Petersen, State Farm asserted that because the term “motor vehicle” was not defined in the definitions section of the policy, and did not appear in “bold italics” as other defined terms did, it was an undefined term in the UM section and must be afforded its plain meaning. It proposed that the definition of the term “motor vehicle,” which appeared in the No-Fault section, did not apply to the UM section. This assertion, however, is contrary to Florida law which states that “[e]very insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy and as amplified, extended, or modified by any application therefore or any rider or endorsement thereto.” If an application must be incorporated into the terms of a policy, so must a definition that appears on the face of it. The only definition for the term “motor vehicle” appears liberally in favor of the insured and strictly against the insurer to protect the buying public who rely upon the companies and agencies in such transactions.

Hartnett, 181 So. 2d at 528; see also RESTATEMENT (SECOND) OF CONTRACTS § 206 cmt. b, (1981) (rationale for interpretation of a contract against the drafter).

It should also be noted that State Farm could have avoided this problem altogether in one of two ways: (1) it could have adopted the wording of Florida’s Statutes section 627.727(9)(d) which phrases the exclusion:

The uninsured motorist coverage provided by the policy does not apply to the named insured or family members residing within his household who are injured while occupying any vehicle owned by such insureds for which uninsured motorist coverage was not purchased.

FLA. STAT. § 627.727(9)(d) (1991) (emphasis added); or (2) it could have merely supplied another definition of “motor vehicle” in the UM section of the policy.

176. Appellee’s Brief at 19, Petersen (No. 92-01828).
177. Id.
178. FLA. STAT. § 627.419 (1991) (emphasis added); see also Associated Elec. & Gas Ins. Servs. v. Houston Oil & Gas Co., 552 So. 2d 1110 (Fla. 3d Dist. Ct. App. 1989) (allowing insured to recover under Completed Operations Hazard clause of commercial policy for damages caused by explosion occurring off the insured premises); Ellenwood v. Southern United Life Ins. Co., 373 So. 2d 392 (Fla. 1st Dist. Ct. App. 1979) (refusing to read clause in life insurance policy separately from the two sentences preceding it, when all read together provided coverage, and the sentence read separately excluded coverage); Feldman v. Central Nat’l Ins. Co. of Omaha, 279 So. 2d 897 (Fla. 3d Dist. Ct. App. 1973) (construing health insurance policy as covering hospitalization after termination of the policy, where policy language provided for all hospitalizations resulting from an accident, and hospitalization was caused by injuries sustained in accident which predated termination of the policy).
179. See Dorrel v. State Farm Fire & Casualty Co., 221 So. 2d 5, 6 (Fla. 3d Dist. Ct. App. 1969) (holding that definitions given in the policy must be followed when interpreting automobile insurance policies); accord Valdes v. Prudence Mut. Casualty Co., 207 So. 2d 312, 314 (Fla. 3d Dist. Ct. App. 1968) (In holding that a motor scooter is not an “automobile” for an owned-uninsured vehicle exclusion, the court stated “this case could and should
peared in the PIP section of the policy. Therefore, when construing the State Farm policy “according to the entirety of its terms,” the exclusion must incorporate the definition provided in the policy, which excludes motorcycles. Because Petersen was driving a motorcycle, his vehicle was not excluded, and he was, therefore, covered when the accident occurred.

Even if State Farm can persuade the court that a motorcycle is excluded by applying the Financial Responsibility Law’s definition, State Farm must still fail. By writing a definition into the policy which contrasted with the definition applied to the exclusion, State Farm created ambiguity in the policy. The policy is susceptible to two opposite interpretations; one affording coverage, and the other precluding coverage. This “genuine ambiguity” must be resolved in favor of the insured.

The Petersen court correctly applied Florida’s rules of construction in finding coverage for the insured. The Grant court reached different results, however, not by applying the plain meaning of the term as urged by State Farm; rather, by adopting the Financial Responsibility Law’s definition and relying on the precedent of Allyn and Carguillo.

Allyn dealt with a similar policy construction issue of whether the court should look to a statutory definition in favor of one provided by the policy. As in Grant and Petersen, the Allyn policy had a No-Fault section which defined a motor vehicle as one with four or more wheels. Ironically, the insurer made the same argument the plaintiffs now propose. In recalling the rule that the court must apply the policy definitions when construing its terms, Standard Marine asserted that the court should apply the policy definition under the PIP section to the motor vehicle driven by the uninsured tortfeasor. Standard Marine asserted that because the

be decided by reference to the words and definitions used by the defendant itself in the policy.” (quoting Westerhausen v. Allied Mut. Ins. Co., 140 N.W.2d 719 (1966))); see also OSTRAGER & NEWMAN, supra note 172, § 1.01, at 3.

180. Petersen, 615 So. 2d at 182.
182. Petersen, 615 So. 2d at 182.
183. See supra text accompanying note 173.
184. See supra note 174 and accompanying text.
185. See supra text accompanying notes 37-39.
186. See Allyn, 333 So. 2d at 498-99.
187. Id.
188. Id. at 499 (citing Dorrel, 221 So. 2d at 5).
189. Allyn, 333 So. 2d at 499. As in Peterson and Grant, the PIP definition in the Standard Marine policy was based upon the No-Fault law which required the vehicle to have
Tortfeasor was driving a motorcycle, his vehicle was not an uninsured motor vehicle under the policy definition, and the claimant, who was a Class I insured, was precluded from recovering UM coverage.\(^9\)

The Allyn court, however, held that the definition in a policy may be applied where the definition given is applicable to the coverage assumed, if not contrary to statutory limitations and requirements.\(^{191}\) "It is well settled in this State that where a contract of insurance is entered into on a matter surrounded by statutory limitations and requirements, the parties are presumed to have entered into such agreement with reference to the statute, and the statutory provisions become part of the contract. . . ."\(^{192}\) In recalling the public policy of the UM statute,\(^{193}\) the Allyn court reasoned that applying the policy definition in this instance would impermissibly provide the insured with less coverage than required by the statute.\(^{194}\) Thus, the policy definition was supplanted with the Financial Responsibility definition in order to afford the insured the minimum coverage required by the UM statute.\(^{195}\)

Although the public policy of the UM statute overrode the words of the policy in Allyn, no such public policy exists in Grant and Petersen. Because Grant and Petersen are not defining the tortfeasor’s motor vehicle, using the State Farm policy definition of "motor vehicle" will not provide the insured less coverage than intended by the statute. Although a carrier may not afford less coverage than outlined in the statute, it can provide more.\(^{196}\) Because the Grant court had no reason to construe the policy

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\(^{190}\) Id.

\(^{191}\) Id. (citing Standard Accident Ins. Co. v. Gavin, 184 So. 2d 229 (Fla. 1st Dist. Ct. App. 1966), cert. dismissed, 196 So. 2d 440 (Fla. 1967)).

\(^{192}\) Gavin, 184 So. 2d at 232 (citation omitted); see also Restatement (Second) of Contracts §§ 178-79 (1981).

\(^{193}\) The UM statute is intended to provide an insured with the same coverage he would have been entitled to recover had the tortfeasor carried liability insurance. Allyn, 333 So. 2d at 499; see supra text accompanying note 161.

\(^{194}\) Allyn, 333 So. 2d at 499.

\(^{195}\) Id.

\(^{196}\) This is so because the statutes outline the minimum coverage required, not the maximum. See Universal Underwriters Ins. Co. v. Morrison, 574 So. 2d 1063 (Fla. 1990) (policy language allowed recovery even though tortfeasor’s liability coverage exceeded insured’s UM limits and under Florida Statutes section 627.727, insured would not have been able to recover); see also Newton v. Auto-Owners Ins. Co., 560 So. 2d 1310 (Fla. 1st Dist. Ct. App.) (allowing insured recovery under UM policy even though insured’s injuries did not meet the statutory injury threshold required to pursue a claim for non-economic damages against the tortfeasor), review denied, 574 So. 2d 139 (Fla.), review denied sub nom.
differently from the way it was written, its holding erroneously relied on precedent and public policy that did not apply to the facts of the case. Moreover, Florida’s courts generally treat coverage clauses differently from exclusions, such that exclusionary clauses are construed more strictly than coverage clauses.197 Yet the Grant court applied the rationale from cases which construed coverage in order to broaden an exclusion. The distinction between coverage clauses and exclusions was clarified in Salas v. Liberty Mutual Fire Insurance Co.,198 when the supreme court stated “the use of the language utilized in the argument under consideration ... indicates that the phraseology was intended to create greater liability coverage, not to create exemptions.”199 The supreme court rejected the carrier’s attempt to apply case law which broadened coverage to exclusions which decreased it.200 The Grant court’s reliance on case law which broadens coverage for the insured, therefore, is misplaced when construing an exclusion.

Thus, the Grant court’s application of the Financial Responsibility Law’s definition is in error for two reasons. First, the public policy the court relied upon does not apply to the facts of the case. Second, the court applied case law that construes coverage broadly, in order to broaden an exclusion, which, according to Florida’s rules of construction, are to be narrowly construed.

VI. CONCLUSION

While the Petersen court correctly applied Florida’s rules of policy construction, the Grant court relied on public policy that does not apply, and precedent that may not be controlling, in order to construe the State Farm policy as precluding coverage to the insured. The Florida Supreme Court could resolve the conflict between Petersen and Grant on narrow grounds by ruling on the policy construction issue only. However, such a narrow

International Bankers Co. v. Newton, 574 So. 2d 141 (Fla. 1990).

197. Triano v. State Farm Mut. Auto. Ins. Co., 565 So. 2d 748 (Fla. 3d Dist. Ct. App. 1990); accord Wallach v. Rosenberg, 527 So. 2d 1386 (Fla. 3d Dist. Ct. App.), review denied, 536 So. 2d 246 (Fla. 1988); see also OSTRAGER & NEWMAN, supra note 172, § 1.03[b][1], at 12.

198. 272 So. 2d 1 (Fla. 1973).

199. Id. at 4.

200. Id. at 5 (holding that language of Mullis, which provided that the public policy of UM is to provide the minimum limits of automobile liability policy, could not be applied to household member exclusion).
ruling will not address the position of *Mullis* as precedent under the current version of the statute which allows selective nonstacking; would not resolve the effect of the 1987 amendment to the UM statute on UM's relationship to the Financial Responsibility Law and PIP Law; and would shed no further light on the position of a motorcycle under Florida insurance law.

This comment has illustrated that in most insurance cases, the motorcyclist does not recover for his injuries; either because the courts define a motorcycle as a motor vehicle when such definition precludes recovery by policy exclusion, or because the Legislature excluded motorcycles from the definition of motor vehicle under the No-Fault Law. Uninsured motorist coverage, therefore, has usually been the only recovery available to the motorcyclist in the wake of catastrophic collisions and devastating injuries. Uninsured motorist coverage, however, is rapidly disappearing as the safety net for the motorcyclist.

Although motorcyclists can purchase UM coverage for a motorcycle, most insureds do not understand the nature of this coverage or its importance.201 Moreover, many insureds are not fully informed by their carriers of the availability of UM coverage for motorcycles, or are intentionally misled.202 The *Grant* and *Petersen* cases illustrate the degree to which UM carriers have tried to narrow the coverage afforded under UM, and to "whittle away" at the broad holding of *Mullis*.

Given motorcycles' propensity for injury and damage, Florida's Legislature should consider providing more coverage for their victims rather than less. The public funds contribution to care for injured motorcyclists has been estimated at between 63.4 and 82.3 percent of total expenses.203 The Legislature must consider the public cost of treating the injured

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203. Motorcycle Trauma, *supra* note 8, at 222 (studying the costs of motorcycle trauma in Seattle, Washington); see also Timothy Bray, M.D. et al. *Cost of Orthopedic Injuries Sustained in Motorcycle Accidents*, 254 JAMA 2452 (1985) (studying the costs of motorcycle trauma at the University of California, Davis, Medical Center in Sacramento, California). The average cost per patient in the Seattle study group was estimated at $25,764.00 in 1988. Motorcycle Trauma, *supra* note 8, at 222. Factoring in the rising cost of health care, the per patient cost is much higher today.
motorcyclist, caring for his or her family during a long period of convalescence, and supporting the family of a motorcyclist permanently if he or she dies. Thus, the underlying argument for failing to require coverage for motorcyclists, that they assume the inherent risk of riding these vehicles, falls flat when Florida’s citizens assume the cost.

Although the optimum solution, both for motorcyclists and for all Florida motorists, would be mandated bodily injury liability coverage for all drivers, Florida’s Legislature has been reluctant to do this. In the alternative, the Legislature could mandate UM coverage as a prerequisite for all motorcycle registrations, and thus require drivers who wish to assume the inherent risk of driving these vehicles to also assume the insurance cost of their protection. Although this seems a paternalistic solution, it would shift the financial burden of caring for the injured motorcyclist from the taxpayer. It would also ensure recompense for motorcyclists who face a much higher risk of death and severe injury and who, in Florida, will more likely than not, be struck by an uninsured driver.

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204. See Motorcycle Trauma, supra note 8, at 222-23. A Massachusetts court summed up the problem:

We cannot agree that the consequences of such (motorcycle) injuries are limited to the individual who sustains the injury. From the moment of injury, society picks the person up off the highway; delivers him to a municipal hospital and municipal doctors; provides him with unemployment compensation, if after recovery, he cannot replace his lost job, and, if the injury causes permanent disability, may assume the responsibility for his and his family’s subsistence. Simon v. Sargent, 346 F. Supp. 277, 279 (D. Mass), affirmed, 409 U.S. 1020 (1972).

205. This would decrease the number of uninsured drivers on Florida’s roads, and accordingly, reduce the risk of non-compensable injuries.

206. Surprisingly, it is the insurance industry that has lobbied against such required coverage. See Henderson & Moroney, supra note 151, at 802.

207. See id. at 792.
Exhibit A

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<tr>
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</tr>
<tr>
<td>BROWARD COUNTY</td>
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</tr>
<tr>
<td>PASSENGER VEHICLES</td>
<td>34,933</td>
<td>195 (.56)</td>
<td>22,984 (65.79)</td>
</tr>
<tr>
<td>MOTORCYCLES</td>
<td>538</td>
<td>11 (2.04)</td>
<td>485 (90.15)</td>
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</tr>
<tr>
<td>PALM BEACH COUNTY</td>
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<td></td>
</tr>
<tr>
<td>PASSENGER VEHICLES</td>
<td>19,935</td>
<td>152 (.76)</td>
<td>13,202 (66.23)</td>
</tr>
<tr>
<td>MOTORCYCLES</td>
<td>311</td>
<td>8 (2.57)</td>
<td>269 (86.50)</td>
</tr>
</tbody>
</table>

# = The number of all crashes which resulted in a fatality or injury.
% = The percentage of all crashes which resulted in a fatality or injury.

Source: Florida Department of Highway Safety and Motor Vehicles, crash records.
Exhibit B

MOTORCYCLIST FATALITY RATE* (COMPAR ED TO ALL MOTOR VEHICLE DRIVERS)

*PER 100,000 REGISTERED VEHICLES
**Data prior to 1986 include bicycle drivers.

Source: Florida Department of Highway Safety and Motor Vehicles


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