Securities, Supremacy and Supposition: 1990’s Legislative and Judicial Changes to Florida’s BlueSky Law

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Abstract

On July 7, 1990, the Florida Securities and Investor Protection Act, chapter 517 of the Florida Statutes, was revised and re-enacted effective October 1, 1990, to include developments in securities regulation that have occurred since the last major revision of the Florida Blue Sky Law in 1986.

KEYWORDS: judicial, law, blue
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I. INTRODUCTION

On July 7, 1990, the Florida Securities and Investor Protection Act, chapter 517 of the Florida Statutes, was revised and re-enacted,

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effective October 1, 1990, to include developments in securities regulation that have occurred since the last major revision of the Florida Blue Sky Law in 1986. The broadly based revisions include: definitional changes; limitations on and expansions of the registration requirements and exemptions therefrom for certain securities and individuals selling securities; supplementary requirements for the registration of securities industry professionals (broker-dealers and investment advisors); and additional grounds for the revocation, denial or suspension of the registration of securities and of securities industry professionals.

The most controversial alteration to the Act was the conversion of a simple three-letter word “may,” to a not-so-simple five letter word “shall.” Section 517.122, the Act’s provision regarding the arbitration of disputes between securities professionals and their customers, originally provided that Florida registered broker-dealers “may provide to an aggrieved party the option of having arbitration before . . . the American Arbitration Association.” The 1990 amendments changed
the permissive to the mandatory: Florida registered broker-dealers "shall provide . . . the option of having arbitration before . . . the American Arbitration Association or other independent nonindustry arbitration forum . . . . "

On October 3, 1990, three days after the amended Act became effective, the United States District Court for the Southern District of Florida ruled that section 517.122 was unconstitutional. In Securities Industry Association v. Lewis, the Southern District found that the Florida legislature's imposition of a required term in arbitration agreements between broker-dealers and their customers "violates the protections embodied in [the Federal Arbitration Act], and therefore [was preempted, pursuant to] the Supremacy Clause [of the United States Constitution]."

This article will provide a brief historical analysis of the evolution of the Florida Blue Sky Law and discuss the 1990 legislative changes to that law. The article will then focus on the development of the jurisprudence governing the arbitration of securities disputes; the issue of state laws controlling arbitration agreements under the potential hegemony of the Federal Arbitration Act; the Supremacy Clause and the preemption doctrine; and the Lewis decision. It will conclude that although the Lewis court's decision was not capricious, it was not compelled.

II. THE HISTORICAL DEVELOPMENT OF FLORIDA'S BLUE SKY LAW

"In Florida, securities regulation has developed dramatically over the years with the philosophy of regulation shifting from registration of

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11. The full text of section 517.122 of the Act after its amendment by 1990 Fla. Laws 362 read:
Arbitration. Any agreement to provide services that are covered by this chapter, entered into after October 1, 1990, by a person required to register under this chapter, for arbitration of disputes arising under the agreement shall provide to an aggrieved party the option of having arbitration before and pursuant to the rules of the American Arbitration Association or other independent nonindustry arbitration forum as well as any industry forum.

13. Id. at 208.
the securities to protecting investors from fraudulent practices." 14 In 1913, Florida passed its first Blue Sky Law and embarked upon regulating the "merit" of an offering of securities. 15 Merit regulation requires that the state make a substantive review of an offering and independently determine its fairness. In order to obtain registration of its offering, the issuer must show that the issue is "fair, just and equitable" to potential investors. 16

This form of regulation contrasts with the "full and fair disclosure" philosophy on which the federal securities laws are premised. 17 Under the Securities Act of 1933 ("Securities Act"), 18 issues of financial soundness, insufficient earnings, offering price, inequitable voting rights and excessive commissions or underwriting and selling expenses will not prevent an offering from going forward, so long as the issuer makes full disclosure of any such condition. The Securities and Exchange Commission 19 has stated:

In contrast to some of the State officials and commissions, operating under state "Blue-Sky" laws that authorize them to pass upon the merits of securities registered with them, it is not this Commission's function under the Securities Act to approve or disapprove securities and the statute specifically makes it unlawful to represent that the Commission has passed upon the merits of any security, or

14. House Committee on Commerce, Final Staff Analysis, H.B. 3429, 11th Leg. § 1 (1990) (Final Staff Analysis).
17. L. Loss, supra note 3, at 36.
given approval to it.20

One authority on the regulation of securities has noted colorfully: "Congress did not take away from the citizen 'his inalienable right to make a fool of himself.' It simply attempted to prevent others from making a fool of him."21

Partially in response to the stock market crash of 1929, the Florida legislature enacted the Florida Sale of Securities Act in 1931.22 Modeled on the Uniform Sale of Securities Act23 adopted by the National Conference of Commissioners on Uniform State Laws and the American Bar Association, this Act created the Florida Securities Commission consisting of the Comptroller, the Treasurer and the Attorney General.24 The state's regulatory scheme was broadened with the requirement of registration of secondary sales of securities and the expansion of requirements for registering primary offerings.25

The next major revision of Florida's Blue Sky Law took place forty-seven years later with the adoption of the Florida Sale of Securities Act in 1978.26 "The Act was characterized by a retreat from the merit review philosophy and an increased emphasis on anti-fraud enforcement. The most significant change in the law was the exemption from merit review of any security registered with the federal govern-

21. L. Loss, supra note 3, at 36. The "Dean of American securities law" continues:
   As the Supreme Court has . . . put it, the SEC statutes embrace a "fundamental purpose . . . to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry . . . ." It must not be thought, however, that Disclosure and Merit are two gods that sit on separate but equal thrones. On the one hand [a state blue sky law, in particular, the Uniform Securities Act] has a disclosure component, and most states today require the delivery of a prospectus. On the other hand, the indirect regulatory effect of a policed system of full and fair disclosure should not be underestimated: people who are forced to undress in public will presumably pay attention to their figures.
   Id. (citations omitted.)
22. 1931 Fla. Laws 261.
24. Final Staff Analysis, supra note 14, at 2.
25. Id.
26. Id.
This change in philosophy apparently resulted from the Florida Law Revision Council's 1975 finding that merit review had "arbitrarily inhibited growth of new enterprise and created undesirable competitive advantages for large corporations at the cost of small firms" and could not, therefore, survive a cost-benefit analysis.28

In 1984, the legislature revisited the Blue Sky Law, enacting the Investor Protection Act of 1984.29 This Act expanded the Department of Banking and Finance's30 anti-fraud enforcement authority to offers and sales of investments as well as securities.31 The addition of this unique remedial provision was a response to the increasing practice of unscrupulous promoters situating their fraudulent investment schemes in Florida, where they could claim that their promotions did not involve the offering or sale of "securities."32

One year later, the Florida legislature attempted once again to fine-tune its Blue Sky Law by promulgating the Securities and Investor Protection Act,33 the grandfather of Chapter 517. Having determined that it had lacked necessary prescience in 197834 when it exempted from registration all securities registered under the United States Securities Act of 1933,35 the legislature substituted the requirement of

27. TASK FORCE REPORT, supra note 15, at 69.
28. Id.
30. The Division of Securities of the Department of Banking and Finance (the Department) was created in 1969 to succeed the Securities Commission and was placed under the administration of the Comptroller. FINAL STAFF ANALYSIS, supra note 14, at 2.
31. Id.
32. TASK FORCE REPORT, supra note 15, at 70. An example of the expansion of the Department's enforcement authority by the Investor Protection Act of 1984 is the addition of a definition of "boiler rooms" and the concurrent prohibition of their operation for the commission of investment fraud. FLA. STAT. §§ 517.021 and 517.312 (1987). Prior to the 1984 Act, the term "security" in the Florida Blue Sky Law was often accorded a restrictive interpretation by the Florida courts. In Yeomans v. State, 452 So. 2d 1011, 1012 (Fla. 3d Dist. Ct. App. 1984), the court reversed the Comptroller's orders, closing thirty-two "boiler room" operations selling "filing service" contracts in connection with the United States Department of Interior's oil and gas lease lottery. The Third District held that the contracts were not securities (specifically, not "investment contracts") as defined by the Florida Blue Sky Law.
34. 1978 Fla. Laws 435.
"registration by notification" for that exemption.  

Continuing its annual foray into revising its laws governing the offering and sale of securities and the people and practices associated therewith, the legislature, in 1986, amended Florida’s Blue Sky Law again with the adoption of the Securities Industry Standards Act. The new law was premised on recommendations of the Comptroller’s Task Force on Securities Regulation, established in 1985 to “conduct a comprehensive review of Florida’s regulation of securities and other investment transactions.” The primary objective of that legislation was to enhance anti-fraud enforcement of securities and investment transactions.  

This Act sought to accomplish its purpose through, inter alia, increasing the number of types of securities offerings that can be registered in Florida only through merit registration (as opposed to notification registration), clarifying by redefinition the term “investment,” imposing stricter requirements on individuals registering in the state as broker-dealers, and strengthening the Department’s enforcement powers.

The Florida legislature in 1986 also opted to add the simple three-letter word “may,” rather than the not-so-simple five-letter word “shall” to the Act’s provision regarding the arbitration of disputes between a broker-dealer and its customer and the option of using the American Arbitration Association. Thus, the controversy between the State and the securities industry would be avoided for four years, during which time the industry would be allowed to bolster its arsenal of federal court jurisprudence and dicta with which to challenge such a

36. See Task Force Report, supra note 15, at 70. The proliferation of offerings of federally registered penny stocks “had not been envisioned seven years earlier when the Florida Securities Act was passed”. Id. The 1985 legislation also enhanced the investigative authority of the Department “by providing confidentiality for examination of books and records and strict penalties for non-compliance with investigative subpoenas.” Id. at 71.


mandate.

III. HOUSE BILL 3429: THE 1990 LEGISLATIVE CHANGES TO FLORIDA'S BLUE SKY LAW

A. Purpose and Scope

In addition to inspiring litigation over one of its more palpable sections, the Bill reenacted the Florida Blue Sky Law, Chapter 517 of the Florida Statutes. In arguing the necessity of the Act's reinstatement, the House Commerce Committee (the Committee) recognized that "Florida residents are frequently the target of investment scams due to the large pool of retirement money and the population growth rate" of the state. The Committee asserted:

Without the Florida Securities and Investor Protection Act, and the rules promulgated thereunder, citizens of the State of Florida would be vulnerable to a vast array of fraudulent schemes and the State would be a haven for unscrupulous conduct within the securities and investment advisory industry. The Act protects the economic health, safety, and welfare of the investing public by establishing a method of regulating the sale of securities and investments.

Chapter 517 attempts to achieve its goals in three ways. First, it requires the registration of securities, the purpose of which is to prevent the offer or sale of issues that could result in fraud upon the purchaser, unreasonable underwriting or selling expenses, or windfall profits to the promoter or issuer at the expense of the public. Second, it requires registration of persons engaged in the offer or sale of securities, thereby attempting to assure the public that such people have at least a minimal knowledge and ability to act in a fiduciary capacity, that they have met minimal standards of financial responsibility and that unqualified or unscrupulous persons are excluded from the business. Third, it provides penalties for persons engaging in fraudulent activity in connection with the sale or purchase of securities or investments and gives the De-

42. See supra note 2.
43. Final Staff Analysis, supra note 14, at 3.
44. Id. at 2-3.
45. Id. at 3.
46. Id.
partment the necessary authority to enforce those punitive provisions.\textsuperscript{47}

Additionally, the Committee recognized that in the absence of a Florida law regulating securities, only the federal securities laws would apply, if at all, to transactions in the State. The Committee posited that:

[F]ederal protection would be limited in both scope and availability [to Florida residents] for three reasons: (1) federal law would only apply to interstate commerce and not to those transactions occurring strictly within Florida; (2) federal law would not be as comprehensive as the Florida Securities and Investor Protection Act; and (3) the resources to pursue individual investment schemes would not be available . . . [A]ny degree of deregulation could result in a lessening of protection and remedies available to the public as well as to the industry.\textsuperscript{48}

Finally, the Committee argued that Chapter 517 protects persons engaged in the securities and investment advisory business as well as the investing public.

[Chapter 517] protect[s] the business climate in which legitimate dealers operate by ensuring that they are all held to the following: the same minimum level of competence; the same books and records, and net capital requirements; and the same standards in the way they conduct business and deal with the investing public. These standards serve to ensure fairness in competition among persons in the industry, and further protect the industry from arbitrary or capricious conduct by the Department.\textsuperscript{49}

The Florida Legislature agreed with the Committee's assessment of the need for reinstating the State's Blue Sky Law, as amended by House Bill 3249, and voted, almost unanimously, for its passage.\textsuperscript{50}

\begin{flushright}
\textsuperscript{47} \textit{Id.}
\end{flushright}\begin{flushright}
\textsuperscript{48} \textsc{Final Staff Analysis, supra} note 14, at 3-4. The Committee continued: “Failure to re-enact the Act would most certainly adversely affect the public [by leading] to more improper or fraudulent securities transactions. In the absence of regulatory authority, the Department [of Banking and Finance] would be powerless to sanction such conduct.” \textit{Id.}
\end{flushright}\begin{flushright}
\textsuperscript{49} \textit{Id.} at 4.
\end{flushright}\begin{flushright}
\textsuperscript{50} The Senate passed the Bill by a vote of 38 to 0; the House passed it by a vote of 110-3. \textit{Id.} at 10. The legislative history of the Bill was curious: On 4/04/90 House Bill 3429 was filed by the Commerce Committee and Representative Ron Johnson. The bill was referred to the Appropriations
amendments to the Act that the legislature so overwhelmingly endorsed include changes affecting the registration of securities and exemptions from securities registration,\textsuperscript{61} changes in the registration requirements and exemptions from registration for securities industry personnel\textsuperscript{62} and definitional and clarification changes.\textsuperscript{63}

B. \textit{Changes in the Registration and Exemption Therefrom of Securities and Securities Professionals}

1. Securities: Registration and Exemption

The Bill contains four significant changes regarding the registration and exemption from registration of securities offerings under the Florida Blue Sky Law.

First, the Act enumerates certain transactions that are exempt from registration because of the nature of the issuer and the investors involved in the issuer’s offering. These exemptions are available in situations in which the potential for fraud and deceit are minimal, usually because the purchaser is experienced in the investment field and has

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Committee on 4/09/90 (HJ 00164), withdrawn from the Appropriations Committee on 4/17/90 (HJ 00207) and placed on the Calendar. On 5/02/90, the bill was placed on the Special Order Calendar and passed as amended on 5/03/90 by a vote of 114-2 (HJ 00437). On 5/10/90 the Senate received the bill in Messages and referred it to the Commerce Committee (SJ 00319). On 5/23/90 the bill was withdrawn from the Commerce Committee, substituted for CS/SB 1442 (SJ 00427) and was passed as amended by a vote of 38-0 (SJ 00429). On 5/31/90 the House refused to concur and requested the Senate to recede (HJ 1519). On 6/01/90 the Senate refused to recede and requested the House to concur (SJ 01247). On 6/02/90 the House concurred and passed the bill as amended by a vote of 110-3 (HJ 01901), and the bill was ordered enrolled.

\textit{Id.} It is interesting to note that the Bill presented to Governor Martinez on June 6, 1990, became law on July 7, 1990 without his signature. \textit{Id.}

51. \textit{See infra} notes 54-90 and accompanying text. The \textbf{FINAL STAFF ANALYSIS} advanced a different scheme organizing the Bill’s changes to the Act. The Bill contains: changes that codify the Department of Banking and Finances historical interpretations of certain provisions of the Act, changes that update various provisions of the law to reflect changes in corresponding federal law and technical changes that clarify the requirements for compliance with the Act and the meaning of certain terms.

\textbf{FINAL STAFF ANALYSIS}, \textit{supra} note 14, at 2.

52. \textit{See infra} notes 91-109 and accompanying text.

53. \textit{See infra} notes 110-20 and accompanying text.
information available on which to base an informed investment decision.54 One such provision exempts from securities registration secondary market transactions in a security by a registered dealer.55

The Bill prohibits the use of this exemption for securities of an issuer that previously have been denied registration by the Department for cause.56 This change puts the secondary market57 on par with the primary market58 in Florida, and precludes an offering that would have been denied registration from infiltrating the State's borders in a secondary market transaction through a Florida registered dealer.

Second, the Bill grants the Department the rulemaking authority to exclude persons who sell securities in one type of exempt transaction, the non-public ("private placement") or limited offering that the Department has made exempt by rule,59 from the registration require-

54. **Final Staff Analysis**, *supra* note 14, at 5.
56. **H.B. 3429**, *supra* note 5, § 3. "Cause" exists when:
   (a) The issuer is insolvent;
   (b) The issuer or any controlling person has violated any provision of [Chapter 517] or any rule made hereunder or any order of the Department of which such issuer has notice;
   (c) The issuer or any controlling person has been or is engaged or is about to engage in fraudulent transactions;
   (d) The issuer or any controlling person is in any other way dishonest or has made any fraudulent representations or failed to disclose any material information in any prospectus or in any circular or other literature that has been distributed concerning the issuer or its securities; or
   (e) The terms of the offer or sale of such securities under [the merit registration provision] would not be fair, just, or equitable.
57. The sale of a security by the buyer from the issuer in the primary market (in the primary distribution of that security) to another purchaser at a mutually agreed upon price is a sale in the secondary market (a secondary market transaction). The proceeds of this transaction accrue to the first buyer, not to the issuer. This sale may take place privately, through a broker-dealer or over a national securities exchange. R. Tewes & E. Bradley, *The Stock Market* 3 (5th ed. 1987).
58. The initial sale of securities is from the issuing entity to the investor in a primary transaction in the "primary market," with the sale proceeds flowing to the issuer. *Id.*
59. **Fla. Stat.** § 517.061(18)(c) gives the Department the authority to exempt, by rule, transactions from the Act's registration requirements. In relevant part, that section states:
   
   [T]ransactions defined by rules as transactions exempted from the registration provisions of [the Act], which rules the department may . . . adopt . . . after a finding . . . that the application of the [Act's registra-
ments for "dealers." Regulation D, the federal regulation containing the rules under which such offerings are exempt from federal securities registration, allows the issuer (and its representatives) to offer and sell its securities (in a regulated manner) without registering as a dealer. The adoption of such a rule by the Department would coordinate further the Florida exemption with the federal exemption, thereby simplifying the process and decreasing the expense to an issuer desiring to make a private placement or limited offering in Florida.

Third, the Department also was provided authority to exempt from the Act's "laborious merit review process" securities that, although marketed at five dollars or less per share, are nevertheless of high investment quality. Section 517.082 of the Act exempts from merit re-


60. "Dealer" includes any of the following:

1. Any person, other than an associated person registered under this chapter, who engages, either for all or part of his time, directly or indirectly, as broker or principal in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person.

2. Any issuer who through persons directly compensated or controlled by the issuer engages, either for all or part of his time, directly or indirectly, in the business of offering or selling securities which are issued or are proposed to be issued by the issuer.


Adopting such a rule would also bring the Department's small-offering exemption into parallel with the statutory limited offering exemption. Persons associated with an issuer that makes an offering pursuant to section 517.061(11) (the statutory "private placement") are excluded from the statutory definition of "dealer." See FLA. STAT. § 517.021(6)(b)(6) (1990).

It must be noted that the Department has not acted under its grant of authority to adopt rules creating transaction exemptions for small or limited offerings in addition to those provided in Chapter 517.


60. "Dealer" includes any of the following:

1. Any person, other than an associated person registered under this chapter, who engages, either for all or part of his time, directly or indirectly, as broker or principal in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person.

2. Any issuer who through persons directly compensated or controlled by the issuer engages, either for all or part of his time, directly or indirectly, in the business of offering or selling securities which are issued or are proposed to be issued by the issuer.


Adopting such a rule would also bring the Department's small-offering exemption into parallel with the statutory limited offering exemption. Persons associated with an issuer that makes an offering pursuant to section 517.061(11) (the statutory "private placement") are excluded from the statutory definition of "dealer." See FLA. STAT. § 517.021(6)(b)(6) (1990).

It must be noted that the Department has not acted under its grant of authority to adopt rules creating transaction exemptions for small or limited offerings in addition to those provided in Chapter 517.

63. See Final Staff Analysis, supra note 14, at 5.

64. H.B. 3429, supra note 5, § 4. The legislature did not impose any standard with which the Department must abide in promulgating such a rule. The Final Staff Analysis explains that because this is an area where there is a potential for fraud, such as with stock priced at less than $5 (or 'penny stock'), no substantive statutory standard
registration all securities “offered and sold pursuant to a registration statement filed under the Securities Act of 1933,” but requires the issuers of those offerings to register them for sale in the State of Florida pursuant to “notification.” Notification registration, “a cursory process,” requires the issuer to notify the Department of its intention to make the offering, of its name and address of the title of the securities that will be offered and sold, and to file with the Department a consent to service and copies of documents filed with the Securities and Exchange Commission.

The 1986 amendments to the Act limited the use of notification registration to issuers whose securities at the time of effectiveness with the Securities and Exchange Commission are offered at a price of more than five dollars per share or unit, unless the securities have been listed or approved for listing on a national securities exchange or NASDAQ. This limitation was added because of the Task Force’s comparison set for the Department to issue such rules as a standard may only encourage fraudulent obtainment of any exemption which may be set by rule.

**Final Staff Analysis, supra note 14, at 5-6.**

65. See supra note 1.

66. Final Staff Analysis, supra note 14, at 5.

67. Section 517.082 also requires the payment of a $1,000 nonrefundable fee. A registration by notification becomes effective upon effectiveness of the registration statement under the Securities Act of 1933. See supra note 1.

68. See supra note 4; see also Cane, supra note 40, for a detailed analysis and explanation of this “limited return to merit regulation.”

69. Fla. Stat. § 517.082(3) (1987). The full text of the then-new subsection 3 provided:

 Except for securities offered or sold pursuant to a registration statement filed under the Investment Company Act of 1940, the provisions of this section may not be used to register securities if the offering price at the time of effectiveness with the Securities and Exchange Commission is $5 or less per share or per unit, unless such securities are listed or designated, or approved for listing or designation upon notice of issuance, on a stock exchange registered pursuant to the Securities Exchange Act of 1934 or on the National Association of Securities Dealers’ Automated Quotation (NASDAQ) System, or unless such securities are of the same issuer and of senior or substantially equal rank to securities so listed or designated.

*Id.* The stock exchanges referred to include the New York Stock Exchange, the American Stock Exchange and the regional exchanges, such as the Philadelphia and Pacific Stock Exchanges.

NASDAQ is the computerized price quotation system established by the National Association of Securities Dealers (NASD) in 1971.

The system displays price quotations that are continuously updated on a
cern over the proliferation of offerings of "penny stocks," shares of stock that are sold for nominal amounts. The Task Force Report stated: "These are often highly speculative, undercapitalized offerings and usually sold in states where the registration standards provide for no merit review. Florida has a significant number of these questionable investment opportunities due to the current absence of review for all federally-registered offerings."

But the Task Force was hesitant in re-imposing a merit review provision for securities registration. As former Florida Governor Rubin Askew, the Chairman of the Task Force, stated: "[W]e are looking for a balance . . . something that is workable and something that will allow the market to operate fairly and at the same time reduce the incidence of people being taken on outright fraudulent schemes." The balance that was struck in 1986 was tilted in 1990. In addition to authorizing the Department to exempt from merit review securities of high investment quality, the Bill added to the Act's listing of exclusions from the required merit review of securities marketed at five dollars or less units of limited partnership interest.

A unit of limited partnership interest, in its attributes as a security and in the way it is regulated as a security, is different from the

real-time basis on computer terminals located in a subscriber's office. The minimum qualification standards for initial inclusion of an issuer's securities in the NASDAQ system include (i) total assets of $2 million; (ii) capital and surplus of $1 million; (iii) 100,000 publicly held shares; (iv) 300 shareholders of record; and (v) two NASDAQ market makers.

70. See supra note 15.
71. See Task Force Report, supra note 15, at 56. Penny stock, also known as "cheap stock," has been the subject of heated debate between state regulators and practitioners. See, e.g., NASAA Statement of Policy on Cheap Stock, 1 Blue Sky L. Rep. (CCH) ¶ 5311 - 5314 (1984); Ad Hoc Subcommittee on Merit Regulation of the State Regulation of Securities Committee, Report on State Merit Regulation, 10 J. CORP. L. 553 (1985).
73. See supra notes 15 and 16, and accompanying text.
74. Testimony of Royce Griffin before the Task Force in Miami, Florida (January 13-14, 1986).
75. H.B. 3429, supra note 5, § 4.
common stock issued by a corporation. The primary distinction (for the purposes of this discussion) is the illiquidity of the partnership interest.\textsuperscript{78} Units of limited partnership interest are purchased as long-term investments because usually no active secondary market for them exists.\textsuperscript{79}

The issuing entity also is significantly different.\textsuperscript{80} The limited part-

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Investment contracts are included in the definitions of a security in both Florida law (see FLA. STAT. § 517.021 (1990)) and the federal Securities Act of 1933 (see 15 U.S.C. § 77b (1990)).

Note that, as a security, a unit of limited partnership interest shares a number of similarities with a share of stock: they are both investment vehicles; unless an exemption exists they must be registered before being offered and sold, and the anti-fraud rules apply to transactions in both.


77. Numerous states require that partnership offerings satisfy specific standards, including standards of investor suitability. See, e.g., NASAA Statement of Policy, 1 Blue Sky L.Rep. (CCH) Real Estate Programs, ¶ 5363, pt. III (1984). The NASD also requires that limited partnerships satisfy certain criteria not applicable to corporate offerings. See art. III, § 34, NASD Rules of Fair Practice, NASD Manual (CCH) ¶ 2191.


79. Id. Note that this is not true of "publicly traded limited partnerships" (sometimes referred to as master limited partnerships) that are exchange or NASDAQ listed. Id.

The lack of an active secondary market is the result of restrictions imposed by partnerships on free transferability of partnership units in order to protect the status of the partnership as a non-taxable entity. The partnership agreement usually will prohibit assignment or transfer of a unit without consent of the general partner to avoid automatic termination of the partnership status under the Internal Revenue Code. Section 708(b)(1) of the Code provides for automatic termination if fifty percent or more of the capital and profit interests in a partnership are sold within a twelve-month period. Id.

80. The traditional attributes of the partnership and corporate forms of business organization differ in the formalities of organization, capital and credit requirements, management and control, profits and losses, extent of liability, transferability of inter-
nership is usually formed with a single, temporary business objective. Unlike the corporation, it does not have perpetual life and its focus is peculiarly specific.

These differences between the partnership and the corporation and their respective securities typically result in a lower price to the public of partnership units than of new issues of corporate stock. In removing partnership interests from the category of securities that must undergo a merit review for registration in Florida, the legislature recognized that those interests frequently are marketed at or below five dollars without necessarily being of poor investment quality. In this important area, the regulatory balance has shifted in favor of "[s]omething that is workable."

Fourth, the Bill expands the grounds for denial, suspension or revocation of securities to include instances in which the issuer or any controlling person of the issuer has failed to disclose any material information in any prospectus, any offering circular or any other literature concerning the issuer or its securities. Section 517.111 of the Act sets forth the grounds for which the Department may revoke or suspend the registration of any security registered with it, or deny any application to register securities with it.


82. A limited partnership is a contractual arrangement among one or more general partners and limited partners who aggregate their financial resources and business expertise to accomplish a business objective. Hensley & Rothwell, supra note 78, at 557.

83. See supra note 74 and accompanying text.

84. H.B. 3429, supra note 5, § 5.

85. Section 517.111, of the Florida Statutes read, prior to amendment, inter alia: Revocation or denial of registration of securities. (1) The department may revoke or suspend the registration of any security, or may deny any application to register securities, if upon examination into the affairs of the issuer of such security it shall appear that:

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https://nsuworks.nova.edu/nlr/vol15/iss3/3
Prior to the Bill’s amendment to this section, an issuer’s registration of its securities could be denied or revoked pursuant to sub-section (d) of section 517.111, if the issuer (or any controlling person of the issuer) had made any fraudulent representation; no provision existed for patent non-disclosure. While arguably an issuer’s non-disclosure could have given rise to revocation or denial under another sub-section of section 517.111, the amendment explicitly creates a separate ground for material non-disclosure.87

Furthermore, the Bill amends section 517.111 to authorize the Department to deny any request to terminate any securities registration or withdraw any application for securities registration if the issuer has committed any act that would be the ground for denial, suspension or revocation of securities registration.88 The significance of this addition lies in the extent of the examination the Department may make into the affairs of an issuer that it believes has committed any such act. Section 517.111(1) states, in part, that:

In making such examination, the department shall have access to

(a) The issuer is insolvent;
(b) The issuer or any controlling person has violated any provision of this chapter or any rule made hereunder or any order of the department of which such issuer has notice;
(c) The issuer or any controlling person has been or is engaged or is about to engage in fraudulent transactions;
(d) The issuer or any controlling person is in any other way dishonest or has made any fraudulent representations in any prospectus or in any circular or other literature that has been distributed concerning the issuer or its securities; or . . . .


The Bill inserted “or failed to disclose any material information” in sub-section (d) after the word representations. H.B. 3429, supra note 5, § 5.

86. Id.
87. See supra note 85. Arguably, sub-section (c) of Section 517.111 could provide the grounds for denial or revocation of securities registration because failing to disclose material information has been held to be engaging in a fraudulent transaction. See, e.g., S.E.C. v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1978), cert. denied, 394 U.S. 976 (1969) (ruling that the failure to disclose material information in the sale of securities is actionable under the antifraud provisions of section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5, thereunder).
88. The Bill added sub-section 5 to section 517.111: “(5) The department may deny any request to terminate any registration or to withdraw any application for registration if the department believes that an act which would be grounds for denial, suspension, or revocation under this chapter has been committed.” H.B. 3429, supra note 5, § 5.
and may compel the production of all the books and papers of such issuer and may administer oaths to and examine the officers of such issuer or any other person connected therewith as to its business and affairs and may also require a balance sheet exhibiting the assets and liabilities of any such issuer or his income statement, or both, to be certified to by a public accountant . . . . 89

This addition allows the Department to retain jurisdiction over issuers or registrants that it believes have committed a fraudulent act, with the power to require production of documents and sworn testimony. It also conforms the standard for denial or requests to terminate or withdraw registration of securities to the standard that exists for associated persons. 90

2. Securities Professionals: Registration and Exemption

The Bill contains six significant changes regarding the registration and exemption of securities professionals under the Florida Blue Sky Law.

First, section 517.12 of the Act requires that all persons, dealers, investment advisers and others that transact a securities or investment advisory business to or from the state be registered with the Depart-

90. FINAL STAFF ANALYSIS, supra note 14, at 6. “Associated person” means any of the following:
   (a) Any partner, officer, director, or branch manager of a dealer or investment adviser or any person occupying a similar status or performing similar functions;
   (b) Any natural person directly or indirectly controlling or controlled by such dealer or investment adviser, other than an employee whose function is only clerical or ministerial; or
   (c) Any natural person, other than a dealer, employed, appointed, or authorized by a dealer, or issuer to sell securities in any manner or act as an investment adviser as defined in this section.
The partners of a partnership and the executive officers of a corporation or other association registered as a dealer are not “associated persons” within the meaning of this definition.
Section 517.161(5) contains the following with respect to the revocation, denial or suspension of registration of an associated person: “The department may deny any request to terminate or withdraw any application or registration if the department believes that an act which would be a ground for denial, suspension, restriction, or revocation under this chapter has been committed.” FLA. STAT. § 517.161(5) (1990).
mendment unless otherwise exempt. It also contains the application procedure and requirements for registration.

The Bill adds to subsection (1) of section 517.12 the requirement that the securities firm, for which any applicant for registration as an associated person seeks to register, be a Florida registered dealer or investment advisor. This provision ensures that an individual will not be registered as an associated person of an unlicensed securities firm.

Second, the Bill clarifies that associated persons must successfully pass oral or written examinations to register under the Act, and codifies the Department’s “long held position” that principals, managers, supervisors or persons exercising similar functions may be held to higher examination standards because of their responsibilities over the acts of their associated persons. The Bill also clarifies that if the applicant has passed certain tests prescribed by the Securities Exchange Act, the Department shall waive its own requirements only if the federal examination is for a position that relates to the position to be filled by the applicant.

92. Id.
93. Subsection (1) of section 517.12 requires that persons selling securities in Florida register under the Act. Prior to amendment by the Bill, it read:

(1) No dealer, associated person, or issuer of securities shall sell or offer for sale any securities in or from offices in this state, or sell securities to persons in this state from offices outside this state, by mail or otherwise, unless the person has been registered with the department pursuant to the provisions of this section.

94. The text of the language added to section 517.12(1) states: “The department shall not register any person as an associated person of a dealer or investment adviser unless the dealer or investment adviser with which the applicant seeks registration is lawfully registered with the department pursuant to this chapter.”

H.B. 3429, supra note 5, § 6.

It is interesting to note that although in common parlance an investor’s representative at the investor’s brokerage firm is referred to as a “broker-dealer,” actually (more often than not) it is the corporate or partnership entity that employs those representatives that is registered under the federal and state securities laws as a broker-dealer. The human, individual representative employed by the broker-dealer firm is registered under the securities laws as an “associated person” of that registered broker-dealer firm.

95. FINAL STAFF ANALYSIS, supra note 14, at 6.
96. Id.
97. Id. As amended, section 517.12(8) states (with the Bill’s amending language in italics):
Third, the Bill requires that every entity registered as a securities dealer in the State of Florida also be registered as a broker or dealer with the United States Securities and Exchange Commission and be insured by the Securities Investor Protection Corporation. As written prior to amendment, section 517.12(16) allowed a Florida registered broker-dealer’s federal registration to lapse for a period of time prior to the time at which the broker-dealer was required to renew its license in Florida.

Fourth, to clarify its position that even though a broker-dealer may effect transactions in securities that are exempt from registration under the Act that broker-dealer is not always exempt from registration with the state. The legislature revised appropriate statutory cross references in section 517.12(3). Section 517.12(3) lists the instances in which an entity or individual may sell securities in an “exempt transaction” in Florida without registering as a securities professional. The most well recognized “exempt transaction” is the private offering

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The department may require the applicant of one or more principals or general partners, or natural persons exercising similar functions, or any associated person applicant to successfully pass oral or written examination. Because any principal, manager, supervisor, or person exercising similar functions shall be responsible for the acts of the associated persons affiliated with a dealer or investment adviser, the examination standards may be higher for a dealer, office manager, principal, or person exercising similar functions than for a nonsupervisory associated person. The department may waive the examination process when it determines that such examinations are not in the public interest. The department shall waive the examination requirements for any person who has passed any tests as prescribed in s. 15(b)(7) of the Securities Exchange Act of 1934 that relates to the position to be filled by the applicant.


98. House Bill 3429 added the italicized language to section 517.12(16) of the Act:

Except for securities dealers who are designated by the Federal Reserve Bank of New York as primary government securities dealers or securities dealers registered as issuers of securities, every applicant for initial or renewal registration as a securities dealer and every person registered as a securities dealer shall be registered as a broker or dealer with the Securities and Exchange Commission and shall be subject to insurance coverage by the Securities Investor Protection Corporation.

H.B. 3429, supra note 5, § 6.

99. Final Staff Analysis, supra note 14, at 6.

100. Section 517.061 of the Act provides that the securities registration provisions of the Act do not apply to sales or purchases of certain securities.

exemption in which an issuer sells his own securities to no more than 35 non-accredited purchasers during a 12 month period. 102

Fifth, the Bill amends section 517.121 of the Act. Prior to the amendment, subsection (1) of that section required any dealer, investment adviser, branch office or associated person registered with the Department to maintain such books and records as required by rule. This section further requires the Department to periodically examine these books and records to determine if there is compliance. 103

The Bill deleted the requirement that the dealer, investment adviser, branch office or associated person be registered with the Department. Thus, after amendment, a branch office that is not lawfully registered will not escape culpability for failure to maintain the required books and records. 104

The House of Representatives Committee on Commerce indicated that this amendment served two purposes. First, it protects the public by ensuring that securities professionals will keep proper records of their transactions. And second, regulators will have additional evidence of the transactions at unregistered branch offices to determine whether violations have occurred at any such office. 105

Finally, section 517.161 of the Act was amended by the Bill. Section 517.161 sets forth the grounds and procedures for revocation, denial or suspension of registration of a dealer, investment advisor, associated person or branch office. 106 Prior to amendment, subsection (4) stated, inter alia:

It shall be sufficient cause for denial of an application or revocation of registration in the case of a partnership, corporation, or unincorporated association, if any member of the partnership or any officer, director, or ultimate equitable owner . . . of the corporation or association has been guilty of an act or omission which would be cause for denying or revoking the registration of an individual dealer, investment adviser, or associated person. 107

102. Section 517.061(11) contains Florida's version of the "private placement" exemption.

103. Prior to amendment, section 517.121(1) read: "A dealer, investment adviser, branch office, or associated person registered under s. 517.12 shall maintain such books and records as the department may prescribe by rule." FLA. STAT. § 517.121(1) (1987) (amended 1990).

104. Final Staff Analysis, supra note 14, at 7.

105. Id.


The Bill provides that a securities firm's equitable owner's mere commission of, as opposed to a judgement or plea of guilty for, any act or omission that would be cause for denying or revoking an individual's registration is cause for the Department to deny or revoke the registration of the firm. This modification places the standard in agreement with the other subsections of section 517.161.

C: Definitional Changes and Clarifications

House Bill 3429 made a number of minor definitional changes and

108. As amended, section 517.161(4) reads, in part:
   It shall be sufficient cause for denial of an application or revocation of registration, in the case of a partnership, corporation, or unincorporated association, if any member of the partnership or any officer, director, or ultimate equitable owner of the corporation or association has committed any act or omission which would be cause for denying, revoking, restricting, or suspending the registration of an individual dealer, investment adviser, or associated person.


The Bill also added a definition of "ultimate equitable owner" to section 517.161(4):
   As used in this subsection, 'ultimate equitable owner' means a natural person who directly or indirectly owns or controls an ownership interest in the corporation, partnership, association, or other legal entity however organized, regardless of whether such natural person owns or controls such ownership interest through one or more proxies, powers of attorney, nominees, corporations, associations, partnerships, trusts, joint stock companies, or other entities or devices, or any combination thereof.


109. Section 517.161 provides, in part:
   (1) Registration [of any dealer, investment adviser, associated person or branch office] may be revoked, restricted, or suspended by the department if the department determines that such applicant or registrant:
   (a) Has violated any provision of this chapter or any rule or order made under this chapter; (b) Has made a material false statement in the application for registration; (c) Has been guilty of a fraudulent act in connection with any sale of securities, has been or is engaged or is about to engage in making fictitious or pretended sales or purchases of any such securities, or has been or is engaged or is about to engage in any practice or sale of securities which is fraudulent or in violation of the law; (d) Has made a misrepresentation or false statement to, or concealed any essential or material fact from, any person in the sale of a security to such person;

modifications to clarify portions of the Act.110

Section one of the Bill amends the definition section of the Act, section 517.021, by deleting the definition of “accredited investor.”111 Section three of the Bill provides that “accredited investor” will be defined by the Department in a rule that is in accordance with the corresponding federal definition of that term.112 The Department has proposed an amendment to the Florida Blue Sky Regulations to include a definition of accredited investor that tracks the federal definition under the Securities Act of 1933.113

The Bill also deletes the terms “broker,” “agent” and “person” and their accompanying definitions from section 517.021 of the Act.114 The House Committee on Commerce offers no explanation for this change. However, because prior to being deleted the definition of “bro-

110. The other changes made to the Act by House Bill 3429 are:
a. Section 3 of the Bill amended section 517.061 of the Act to include a reference to “share exchanges” to reflect a recent amendment to the Florida General Corporation Act;
b. Section 9 of the Bill deleted an obsolete date in section 517.131;
c. Section 10 of the Bill provided a necessary cross reference to the Open Government Sunset Review Act in section 517.201(6) of the Act;
d. Section 11 of the Bill amended section 517.211(1) of the Act to provide a cross reference to the Florida Statute section providing the legal rate of interest;
e. Section 12 of the Bill deleted an obsolete date in section 517.302 of the Act;
f. Section 14 of the Bill re-enacted Chapter 517 of the Florida Statutes as of October 1, 1990; and
g. Section 15 of the Bill provides that Chapter 517 of the Florida Statutes will be repealed on October 1, 2000, and shall be reviewed by the legislature pursuant to Section 11.61 of the Florida Statutes.

111. H.B. 3429, supra note 5, § 1.

112. Id.

113. The “Florida Blue Sky Regulations” are the Rules of the Department, Division of Securities. The Department’s proposed amendment is to Rule 3E-200.001, the definition section of the Regulations. The language of the proposed amendment is that found in the definition of “accredited investor” in Rule 501 of the Rules and Regulations of the Securities and Exchange Commission under the Securities Act of 1933 (found at 17 C.F.R. § 230.501(a) (1990)).

The scant legislative history of the Bill provides no indication of why the legislature chose to delete the statutory definition and substitute a regulatory definition. However, if the legislature’s intention was to place and keep the state’s definition in step with the federal definition, it is logically more appropriate for the term to be defined in the Regulations than in the Statute. If the federal definition is amended in the future, it will be less costly and time consuming for the Department to issue a new Rule than for the legislature to amend the Chapter 517.

114. H.B. 3429, supra note 5, § 1.
"Dealer" referred to the definition of "dealer" and the definition of "agent" referred to the definition of "associated person" in the Act, the legislature may have determined that these terms were superfluous.\textsuperscript{115}

It is more curious that the legislative history of the Bill provides no rationale for the legislature's decision to delete the term "person" and its corresponding definition from the Act. The Florida Blue Sky Regulations do not contain a definition of that term and the Department was not directed to propose one. The term "person" is used numerous times within other definitions in the Act and throughout the Act's substantive provisions.\textsuperscript{116} Determining the effect, if any, this deletion will have in the future, is left to the future.

Section 517.051 of the Act enumerates the securities not subject to the Act's registration requirements.\textsuperscript{117} These securities are exempted from registration because they ordinarily are not susceptible to fraudulent practices because the nature and character of the issuer, governmental regulation on the issuer and the concomitant disclosure of financial information regarding the issuer, or because information about the issuer is readily available in the marketplace.\textsuperscript{118}

Prior to the Bill's amendment, section 517.051 included as "exempt securities," securities "issued by a corporation organized exclusively for religious, educational, benevolent, fraternal, charitable, or reformatory purposes and not for pecuniary profit."\textsuperscript{119} The Bill amended this language to provide that a corporation organized exclusively for one of those enumerated purposes must also be operated for those purposes in order for its issues to qualify for the exemption.\textsuperscript{120}

\textsuperscript{115} Furthermore, the Florida Blue Sky Regulations contain a number of situation-specific definitions of those terms. For example, Rule 3E-200.001(3) defines "Agent of Issuer" and Rule 3E-200.001(10) defines "Broker/Dealer."

\textsuperscript{116} See, e.g., FLA. STAT. § 517.021(6) (1990) (definition of "dealer"); § 517.021(8) (definition of "guarantor"); § 517.021(10) (definition of "investor"); § 517.021(19) (definition of "promotor"). See also FLA. STAT. § 517.12 (1990) (requiring "persons" to register as dealers, associated persons, investment advisors or branch offices); FLA. STAT. § 517.211 (1990) (holding every "person" who violates certain provisions of the Act liable for damages).

\textsuperscript{117} FLA. STAT. § 517.051 (1990). Securities exempted by this section include federal bonds, state bonds, insurance policies and annuity contracts. \textit{Id.}

\textsuperscript{118} FINAL STAFF ANALYSIS, \textit{supra} note 14, at 5.


\textsuperscript{120} The amended text reads "securities issued by a corporation organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, or reformatory purposes and not for pecuniary profit . . . ." FLA. STAT. § 517.051(9) (1990).
IV. Securities Industry Association v. Lewis: The 1990 Judicial Changes to Florida's Blue Sky Law

A. Arbitration of Securities Law Disputes

The jurisprudence of arbitrating securities law disputes under federal law, prior to 1989, focused on the “anti-waiver” provisions of the Securities Act of 1933 and Securities Exchange Act of 1934 ("Exchange Act"). These provisions nullify any condition or stipulation in a securities transaction that binds any person to waive compliance with any provision of the securities laws. In 1953, in Wilko v. Swan, the United States Supreme Court considered the language, purposes and legislative history of the Securities Act of 1933 and concluded that a pre-dispute agreement to arbitrate a claim under that act was void pursuant to section 14 of the Securities Act.

The Wilko court understood its decision was a difficult one in view of the competing legislative policies embodied in the Securities Act and the United States Arbitration Act of 1925. The Court described the Arbitration Act's policy, one that strongly favors the enforcement of agreements to arbitrate as a means of effecting a “prompt, economical and adequate solution of controversies,” as “not easily reconcilable” with section 14 of the Securities Act. But the Wilko court reached its holding based on its conviction that section 14 of the Securities Act does not permit waiver of the right to select the judicial forum in favor of arbitration because “arbitration lacks the certainty of a suit at law under the [Securities] Act to enforce [the buyer's] rights.” The Court also was convinced that the Securities Act was intended to pro-

121. See supra note 18.
125. Id. at 438.
126. See infra notes 158-184 and accompanying text.
127. 346 U.S. at 438.
128. Id. at 432.
tect buyers of securities, who often do not deal at arm's length with sellers, by offering them "a wider choice of courts and venue" than is enjoyed by participants in other business transactions, making the "right to select the judicial forum" a particularly valuable feature of the Securities Act. 129

In 1985, the Supreme Court again wrestled with the competing policies of the federal securities laws and the federal Arbitration Act. In Dean Witter Reynolds, Inc. v. Byrd, a unanimous Court held that the Arbitration Act requires federal courts, when faced with claims that involve questions of federal securities law, state securities law or common law, to sever or bifurcate the federal claims and compel arbitration of all pendent state arbitrable issues when the parties had agreed to arbitrate their dispute. 130

Byrd inspired a profusion of comment and considerable litigation in the lower federal courts. 131 The Byrd decision indicated the Court's maturing receptiveness to effectuate the policies underlying the Arbitration Act, but it did not overrule Wilko. And, the question of whether Wilko should be extended to predispute agreements to arbitrate claims under the Exchange Act remained.

Two years later, the Supreme Court accepted the opportunity to answer that question. In Shearson/American Express Inc. v. McMahon, the Court held that anti-fraud claims arising under the Exchange Act are arbitrable pursuant to a pre-dispute arbitration agreement between a broker and a customer. 132 The McMahon court recognized that the Arbitration Act establishes a "federal policy favoring arbitration, and stressed the statute's strong language, which declares, as a matter of federal law, that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 133 The Court concluded: "Thus, the mistrust of arbitration that formed the basis for the Wilko opinion in 1953 is difficult to square with the assessment of arbitration that has

129. Id. at 435.
131. See, e.g., Comment, Arbitrating Civil RICO and Implied Causes of Action Arising Under Section 10(b) of the Securities Exchange Act of 1934, 36 Cath. U.L. Rev. 455 (1987); see also Cane, supra note 40; notes 125-148 and accompanying text.
132. 482 U.S. 220 (1987). The Court also held that federal civil RICO claims are arbitrable pursuant to pre-dispute arbitration agreements between brokers and their customers. Id.
133. Id. at 226-27 (citations omitted).
prevailed since that time."\textsuperscript{134} The Court did not, however, overrule \textit{Wilko v. Swan}. Although the \textit{McMahon} decision established the validity of arbitrating claims arising under the Exchange Act, claims arising under the Securities Act remained non-arbitrable.

Three Justices dissented from the Court's holding in \textit{McMahon} that federal securities claims are arbitrable.\textsuperscript{135} Justices Blackmun, Brennan and Marshall did not deny the federal policy favoring arbitration, but were concerned about protecting the investing public from arbitrable forums controlled by the securities industry. Justice Blackmun wrote:

Both the Securities Act of 1933 and the Securities Exchange Act of 1934 were enacted to protect investors from predatory behavior of securities industry personnel. [T]he arbitral process at best places the investor on an equal footing with the securities industry personnel against whom the claims are brought. Compelling an investor to arbitrate securities claims puts him in a forum controlled by the securities industry. This result directly contradicts the goal of both securities Acts to free the investor from the control of the market professional.\textsuperscript{136}

In 1989, the dissenting Justices in \textit{McMahon} were presented with another occasion to dissent on the issue of arbitrating federal securities law claims when the Supreme Court decided \textit{Rodriguez de Quijas v. Shearson/American Express, Inc.}\textsuperscript{137} In \textit{Rodriguez de Quijas}, the Court, through Justice Kennedy, expressly overruled \textit{Wilko v. Swan} and held that predispute arbitration agreements for claims arising under the Securities Act are enforceable.\textsuperscript{138} Justice Kennedy observed that the "Court's characterization of the arbitration process in \textit{Wilko} is pervaded by ... the old judicial hostility to arbitration,"\textsuperscript{139} and recognized the growing judicial deterioration of that view, culminating in the Court's decision in \textit{McMahon}.\textsuperscript{140}

\textsuperscript{134} \textit{Id.} at 233.
\textsuperscript{135} \textit{Id.} at 242.
\textsuperscript{136} \textit{Id.} at 233, 260.
\textsuperscript{137} 490 U.S. 477 (1989). Justices Blackmun, Brennan and Marshall, joined this time by Justice Stevens (the author of the dissenting opinion) dissented from the Court's holding in \textit{Rodriguez de Quijas}. \textit{Id.} at 486.
\textsuperscript{138} \textit{Id.}
\textsuperscript{139} \textit{Id.} at 480 (citation omitted); \textit{see supra} notes 124-129 and accompanying text.
\textsuperscript{140} 490 U.S. at 480-81; \textit{see supra} notes 122-126 and accompanying text.
He asserted:

Once the outmoded presumption of disfavoring arbitration proceedings is set to one side, it becomes clear that the right to select the judicial forum and the wider choice of courts are not such essential features of the Securities Act that § 14 is properly construed to bar any waiver of these provisions.\textsuperscript{141}

The Court posited that there is no distinction between the "anti-waiver" provisions of the Securities Act and the Exchange Act,\textsuperscript{142} and concluded that it "would be undesirable for the decisions in Wilko and McMahon to continue to exist side by side."\textsuperscript{143}

The Court's decision in \textit{Rodriguez de Quijas} was a logical extension of a previous disposition. In reversing Wilko, the Court again emphasized the compelling language of the Arbitration Act that declares, as a matter of federal law, a policy favoring arbitration of disputes.\textsuperscript{144} The majority did not address, however, the concerns raised by the dissent in McMahon, and the question of what arbitration forum (as opposed to any arbitration forum) was not before the Court.\textsuperscript{145}

\textbf{B. Section 8 of House Bill 3429}

Section 8 of House Bill 3429\textsuperscript{146} modified the text of Florida Statutes section 517.122, the Act's provision regarding the arbitration of disputes between securities professionals and their customers, by, \textit{inter alia}, replacing the word "may" with the word "shall."\textsuperscript{147} As amended by the Bill, section 517.122 stated:

Arbitration. Any agreement to provide services that are covered by this chapter, entered into after October 1, 1990, by a person required to register under this chapter, for arbitration of disputes arising under the agreement shall provide to an aggrieved party the

\begin{itemize}
\item \textsuperscript{141} 490 U.S. at 481.
\item \textsuperscript{142} See supra note 123.
\item \textsuperscript{143} 490 U.S. at 484.
\item \textsuperscript{144} 490 U.S. at 477; see supra notes 133 and 134 and accompanying text.
\item \textsuperscript{145} The dissent in \textit{Rodriguez de Quijas} did not raise the same concerns profheated by the dissent in McMahon. The dissent in \textit{Rodriguez de Quijas} argued that \textit{stare decisis} prohibited the Court from overruling Wilko. 490 U.S. at 487.
\item \textsuperscript{146} H.B. 3429, 11th Leg. (1990).
\item \textsuperscript{147} H.B. 3429, supra note 146, § 8. For the text of section 517.122 before and after amendment by the Bill, see supra notes 10 and 11, respectively.
\end{itemize}
option of having arbitration before and pursuant to the rules of the
American Arbitration Association or other independent nonindus-
try arbitration forum as well as any industry forum. 148

The House Commerce Committee's Final Staff Analysis is silent
on why the legislature chose to change the permissive to the
mandatory. However, the Task Force Report had proposed making this
change when the Act was last amended in 1986. 149 The Task Force
Report originally proposed the change to ameliorate the perception
among investors that their only redress through arbitration was in a
forum sponsored and controlled by the securities industry. 150 These
were the same concerns voiced in the dissent in McMahon. 151

The Task Force Report indicated an apprehension on the part of
the investing public that customers who had entered into predispute
arbitration agreements with their brokers and who submitted to arbi-
tration thereunder had not been given fair hearings before the industry
panels. 152 The Task Force Report continues:

It was the finding of this Task Force that the current provisions
contained in brokerage agreements often limit the choice of arbi-
tration panels to groups that are associated with the securities indus-
try. Although there was no evidence presented that would jus-
tify concern with the impartiality of these mediators, it was the
Task Force's determination that an expanded selection of arbitra-
tion groups would strengthen the arbitration process through diver-
sification. There is a need for at least one additional arbitration
source in brokerage contracts that is sponsored by other than an
industry self-regulatory organization [such as the NASD]. 153

In 1990, the Florida Legislature amended section 517.122 of the
Act and sounded a death knell to those concerns. The legislature, how-
ever, should have sent to know for whom the bell tolls. Two days after
the October 1, 1990 effective date of Chapter 517, the death knell
sounded again. This time the bell tolled for section 517.122. On Octo-
ber 3, 1990, the United States District Court for the Southern District
of Florida summarily quieted that nascent arbitration provision, hold-

148. FLA. STAT. § 517.122 (1990); see also supra notes 10 and 11.
149. TASK FORCE REPORT, supra note 15, at 55.
150. Id. at 54.
151. See supra note 136 and accompanying text.
152. Id.
153. Id.
ing it unconstitutional under the Supremacy Clause of the United States Constitution, preempted by the United States Arbitration Act.\textsuperscript{154}

C. Supremacy, Preemption and the Federal Arbitration Act

The Supremacy Clause of article VI of the United States Constitution prevents the states from trespassing on federal law and policy.\textsuperscript{155} Preemption is the vehicle by which the Supremacy Clause is enforced.\textsuperscript{156} State laws are preempted by federal laws when the state law actually conflicts with a federal law and when the state law encroaches upon an area in which Congress intended its enactment to occupy the given area to the exclusion of state law.\textsuperscript{157}

The Federal Arbitration Act (FAA)\textsuperscript{158} mandates that courts enforce arbitration agreements and recognizes arbitration as a valid form of dispute resolution. It does not contain, however, an express preemptive provision.\textsuperscript{159}

The FAA was designed “to overrule the judiciary's long-standing refusal to enforce agreements to arbitrate”\textsuperscript{160} and to place such agreements “upon the same footing as other contracts.”\textsuperscript{161} The Supreme Court has postulated that although Congress undoubtedly was aware that the FAA would encourage the expeditious resolution of disputes, its passage “was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered.”\textsuperscript{162}

\begin{thebibliography}{99}
\bibitem{156} \textit{Id}.
\bibitem{159} \textit{Id.}; \textit{see also} Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956) (upholding application of state arbitration law to arbitration provision in contract not covered by the FAA).
\bibitem{162} Byrd, 470 U.S. at 220.
\end{thebibliography}
The Court has recognized that the FAA does not require parties to arbitrate when they have not agreed to do so, and it does not prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement. It merely requires courts to enforce negotiated agreements to arbitrate according to their terms.

Furthermore, the Supreme Court has held that Congress did not intend the FAA to occupy the entire field of arbitration law. The Court has held that the FAA did not preempt a California law that permits courts to stay arbitration proceedings pending resolution of related litigation involving third parties not bound by the arbitration agreement when the parties contracted to abide by the state rules of arbitration.

In striking down a section of the California Labor Code in Perry v. Thomas, the Supreme Court reasoned that in enacting the FAA, "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." It continued: "Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements . . . . We see nothing in the [FAA] indicating the broad principle of enforceability is subject to any additional limitations under state law."

Although the Supreme Court has clearly indicated that the intention of the FAA was to mandate the enforceability of contractually valid arbitration agreements, thereby proscribing a state from legislatively or judicially requiring a judicial forum after the parties to the arbitration contract have agreed otherwise, some lower federal courts have interpreted the FAA and the Supreme Court's interpretation of it to be hegemonic, prohibiting all state action with respect to arbitration contracts.

163. See id. at 219.
166. See supra note 159 and accompanying text; see also Volt Information Sciences, Inc. v. Trustees of Leland Stanford Junior Univ., 489 U.S. 468 (1989).
169. Id. at 489-90 (quoting Southland Corp., 465 U.S. at 11, 16).
170. Id.
For example, in *Securities Industry Association v. Connolly*, the United States Court of Appeals for the First Circuit held that the FAA preempts the enforceability of a Massachusetts securities regulation. The regulation at issue barred securities firms from requiring individuals to enter into predispute arbitration agreements as a nonnegotiable condition to opening a brokerage account, ordered that the prohibition be brought conspicuously to the attention of the prospective customers and required the brokerage firm to make a written disclosure of the legal effect of the agreement.

The *Connolly* court reviewed the language of the FAA and the Supreme Court's interpretation of both the language and the legislative history of the FAA. It seemingly relied heavily on dicta from *McMahon* that "courts must be on guard for artifices in which the ancient suspicion of arbitration might reappear," in holding that "no state may simply subject arbitration to individualized regulation in the same manner as it might subject some other unprotected contractual device."

The First Circuit also placed great emphasis, out of context, on a statement from *Perry v. Thomas*. The parties in *Perry* were a brokerage firm and one of its former employees who had signed an agreement to arbitrate any dispute arising out of the employment relationship. One issue in the case was whether the provision of the California Labor Code that provided wage collection actions may be maintained without regard to the existence of any private agreement to arbitrate was valid in face of the FAA.

The Supreme Court noted that section 2 of the FAA governs situations, such as this one, in which determining the enforceability of an executed arbitration agreement requires choosing between a state law and the FAA. The Court opined that an agreement to arbitrate is valid, irrevocable and enforceable, as a matter of federal law, "save upon such grounds as exist at law or in equity for the revocation of any

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172. *Id.* at 1117.
173. *Id.* at 1117-20.
174. *Id.* at 1119 (citing Shearson/American Express, Inc. v. McMahon, 482 U.S. at 226).
175. *Id.* at 1120.
176. 482 U.S. 483.
177. *Id.* at 485.
178. *Id.* at 486.
179. *Id.* at 492. The Court was not addressing the issue of contract formation.
contract.'"180 The Supreme Court continued:

Thus state law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2. A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law.181

The issue in Perry and the Supreme Court's broad statements regarding section 2 of the FAA dealt directly with the heart of the FAA and the legislative intent underlying it: States cannot, legislatively or judicially, deny persons the right to arbitrate disputes after those persons voluntarily have entered into a contract to do so.182 The court in Perry was not faced with the issue of whether, for the welfare of the investing public, a state securities regulatory body could prohibit brokerage firms from requiring individuals to enter into predispute arbitration agreements as a condition precedent to opening an account or require the firm to disclose to potential investors the legal consequences of such a clause in the brokerage agreement the prospective customer was signing.183

The Connolly court lifted, out of context, the Supreme Court's statement that a "state law principle that takes its meaning precisely

180. Id. at 492 n.9 (quoting 9 U.S.C. § 2 (1989). Section 2 of the Federal Arbitration Act states:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. 9 U.S.C. § 2 (1989).

181. Perry, 482 U.S. 492 n.9 (citation omitted).
182. See supra, notes 155-64 and accompanying text.
183. See supra, note 172 and accompanying text. Admittedly, the first proposed regulation appears inhospitable to arbitration. However, it does not affect the "validity, irrevocability, or enforceability" of an arbitration agreement. It merely prohibits a brokerage firm from requiring its potential customers from involuntarily entering into a contract. See McMahon, 482 U.S. 220.
from the fact that a contract to arbitrate is at issue does not comport with the [equality requirement] of § 2," applied it to a different issue and found the proposed regulations unconstitutional. Connolly's application of Perry to its issue and facts was unfounded and unnecessary.

D. Supposition: The Demise of Section 8

The Connolly court was not alone in making an unwarranted conclusion during its foray into Supremacy Clause jurisprudence. The United States District Court for the Southern District of Florida, in Securities Industry Association v. Lewis, following Connolly's wanton lead, made the same suppositions about the FAA and the judicial gloss painted thereon, and summarily held that section 8 of the Bill was unconstitutional under the Supremacy Clause, preempted by the FAA.

Prior to section 8's amendment to section 517.122 of the Act, an arbitration agreement between a securities brokerage firm and its customer could contain a provision allowing the parties the option of arbitrating any dispute arising thereunder before and pursuant to the rules of the American Arbitration Association. The amending language of

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184. See Connolly, 883 F.2d at 1123 (quoting Perry, 482 U.S at 493). Additionally, the appeals court in Connolly found no merit to Connolly's argument that Massachusetts treats arbitration agreements like other contracts between businesses and consumers—it regulates them as extensively as necessary for the public welfare. It stated: "In our view, that self-congratulatory casuistry will not wash. Indeed, we think that it was precisely this sort of categorization error which Congress sought to cure when it enacted the FAA." Id. at 1120.

185. 751 F. Supp. 205. Gerald Lewis was named the defendant in this action in his official capacity as the Comptroller of the State of Florida and head of the Department. Mr. Lewis is empowered to act as the senior executive in charge of the Department for the state, including the Division of Securities and Investor Protection. In that capacity, he is responsible for administering and enforcing the securities laws of Florida. FLA. STAT. § 517.03 (1990).


187. See supra note 10 and accompanying text. The American Arbitration Association is an independent, non-securities industry controlled, arbitration association.
section 8 required that such agreements contain that option.\textsuperscript{188}

The plaintiffs in \textit{Lewis} regularly transact securities brokerage businesses in the State of Florida and do not include in their arbitration agreements with their customers a provision for arbitration before the American Arbitration Association or other independent, nonindustry arbitration forum.\textsuperscript{189} Plaintiffs challenged the constitutionality of section 517.122 of Chapter 517 alleging that it conflicted with the FAA and, therefore, violated the Supremacy Clause.\textsuperscript{190}

Citing \textit{Perry v. Thomas},\textsuperscript{191} the plaintiffs argued that "[s]tate laws that stand as obstacles to the parties' freedom to privately negotiate arbitration agreements are . . . preempted by the [FAA], and invalid under the Supremacy Clause, U.S. Const. art. VI, cl. 2."\textsuperscript{192} In addition, the plaintiffs relied substantially on \textit{Connolly}\textsuperscript{193} for the same assertion.

The North American Securities Administrators Association, Inc. filed an amicus curiae brief in \textit{Lewis}.\textsuperscript{194} NASAA argued that \textit{Connolly} was contrary to binding precedent from the United States Court of Appeals for the Eleventh Circuit.\textsuperscript{195}

In \textit{Eassa Properties v. Shearson Lehman Brothers}, the Eleventh Circuit stated that "[this court] has adhered to the FAA's distinction between contract formation and contract enforcement even though the

\textsuperscript{188} See supra note 11 and accompanying text.
\textsuperscript{189} \textit{Lewis}, 751 F. Supp. at 206.
\textsuperscript{190} \textit{Id.}
\textsuperscript{191} 482 U.S. 483.
\textsuperscript{192} Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment at 8, Securities Indus. Ass'n v. Lewis, 751 F. Supp. 205 (S.D. Fla. 1990)(No. 90 Civ. 1934). The plaintiffs also cited general propositions of law on the validity of state arbitration laws from a number of equally inapposite cases to support their conclusion: Southland Corp. v. Keating, 465 U.S. 1, 16 (1984) ("The preeminent concern of Congress in passing the [FAA] was to enforce private agreements into which parties had entered . . . ."); Ruby-Collins, Inc. v. City of Huntsville, 748 F.2d 573 (11th Cir. 1984) (Alabama law that predispute arbitration agreements were void ab initio preempted by the FAA); Oppenheimer & Co. v. Young, 475 So. 2d 221 (Fla. 1985) (provision of Florida Blue Sky Law, \textit{Fla. Stat.} § 517.241 (3), precluding enforcement of predispute arbitration agreements concerning securities transactions, preempted by the Act).
\textsuperscript{193} 883 F.2d 1114.
\textsuperscript{194} The North American Securities Administrators Association, Inc. (NASAA) is an organization of securities administrators from the many states and Canadian provinces. See Loss, supra note 3, at 8.
state rule of formation singled out arbitration clauses for somewhat less favorable treatment."\(^{196}\) NASAA therefore argued that while federal law may govern the interpretation and enforcement of a valid arbitration agreement, state law governs the question of whether such an agreement exists at all.\(^{197}\)

The *Lewis* court dismissed NASSA's contention that *Eassa Properties* was controlling\(^{198}\) and adopted plaintiffs' arguments. The court held that "a state law that singles out arbitration agreements, as does the amended version of [section] 517.122, conflicts with section 2 of the FAA."\(^{199}\)

The plaintiffs in *Lewis* also contested section 517.122 on the ground that it was preempted by section 5 of the FAA.\(^{200}\) Section 5 of the FAA states in part that "[i]f in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed."\(^{201}\)

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196. 851 F.2d 1301, 1304 n.7 (11th Cir. 1988). The position of the Eleventh Circuit is consistent with language from the Supreme Court in Perry. See Perry, 482 U.S. at 491 n.8; see also Hull v. Norcom, Inc., 750 F.2d 1547 (11th Cir. 1985) (applicability of the general provisions of state contract law to the determination of the making of an arbitration agreement does not contravene the FAA or its underlying policy).

197. NASAA Brief, supra note 195, at 7.

198. The court in *Eassa Properties* upheld a provision of the Florida Uniform Partnership Act that required all partners to agree to submit a claim or liability to arbitration for the arbitration agreement to be valid. See *Eassa Properties*, 851 F.2d at 1304. The *Lewis* court maintained that *Eassa* was distinguishable because it involved an issue of state law that was applicable not only to arbitration agreements. See *Lewis*, 751 F. Supp. at 208.

199. Id.


201. 9 U.S.C. § 5 (1989). Section 5 states:

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or it for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under he said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

*Id.*
The plaintiffs contended that section 5 of the FAA "reflects a determination by Congress that contracting parties' voluntary choice of an arbitrator, or their choice of an arbitral forum, should govern and should not be displaced by state statutes or regulations." 202 The second time the trial court heard *McMahon v. Shearson/Express, Inc.*, 203 it opined that the Supreme Court's mandate to rigorously enforce arbitration agreements:

demands respect for a forum selection method voluntarily adopted by the parties, which should be given specific enforcement . . . The method agreed upon by the parties for naming an arbitrator is explicit and unambiguous and therefore must be given controlling effect. We have no power to change any of the terms of the agreement. 204

The plaintiffs in *Lewis* relied on this language and argued that securities brokers and their customers are "expressly entitled under section 5 of the [FAA] to select the . . . arbitrable forums before whom they will resolve their disputes. The compulsory forum provision [of section 517.122] seeks to interfere with these voluntary choices." 205 Although the court in *McMahon II* obviously was speaking of judicial modification of existing arbitration agreements, *Lewis* did not question or consider the potentially spurious logic of applying that holding to an issue dealing with the formation, as opposed to the enforcement, of an agreement to arbitrate disputes. Furthermore, the court failed to address the Eleventh Circuit's position, most recently expressed in *Eassa Properties*, that it adheres to the FAA's distinction between contract formation and contract enforcement even though the state rule of formation singles out arbitration clauses for somewhat less favorable treatment. 206 Again, the *Lewis* court agreed with the plaintiffs' argument and held that section 517.122 was unconstitutional, pre-

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203. *McMahon v. Shearson/American Express, Inc.*, 709 F. Supp. 369 (S.D.N.Y. 1989), rev'd in part on other grounds, 896 F.2d 17 (2d Cir. 1990) [hereinafter *McMahon II*]. In *McMahon II*, the district court was asked to compel arbitration under the rules of the New York Stock Exchange. That request was made by the broker after the case was remanded to the district court following the Supreme Court's decision upholding the enforceability of arbitration agreements under the Exchange Act. See supra, note 132 and accompanying text.
206. See supra note 196 and accompanying text.
emptied under the Supremacy Clause by the FAA.207

The United States District Court for the Southern District of Florida attributed a hegemonic deference to the Federal Arbitration Act that was unnecessary based on the FAA, the legislative intent supporting the FAA, and the United States Supreme Court’s jurisprudence of that act and its legislative history. The Department chose not to send to know for whom the bell tolls; it did not appeal the Lewis decision. Whether the concerns of the dissenting Justices in McMahon208 are valid and whether they ever can and ever will be resolved remain unanswered questions.209

207. Lewis, 751 F. Supp. at 208.
208. See supra note 136 and accompanying text.
209. The issue is not dead, however. On January 31, 1990, The Honorable John D. Dingall, Chairman of the Committee on Energy and Commerce, U.S. House of Representatives, posted a letter to The Honorable Charles A. Bowsher, Comptroller General of the United States, in which Representative Dingall asked the General Accounting Office to prepare a comprehensive study of securities industry practices with respect to predispute arbitration clauses in customer agreements and of the arbitration process as sponsored by the securities industry self-regulatory organizations.

Interestingly, on March 5, 1991, the Wall Street Journal ran an article entitled “Brokerage Firms Drop Opposition to Arbitration.” The article not only is germane to this article, it also may provide some insight into the reasons for the Securities Industry Association’s energetic attempt to gain the ruling it did in Lewis. The article reports:

[I]n a major shift, several big brokerage firms have embraced the independent American Arbitration Association as an alternative to industry-sponsored forums for settling some investor disputes. The firms . . . agreed to participate in a pilot program that would allow customers to bring disputes before the [American Arbitration Association] even when their brokerage agreements restrict them to industry-sponsored arbitration forums.

The pilot program is a response to pressure from the Securities and Exchange Commission, which a year ago strongly urged the securities industry to adopt a rule allowing investors a choice in arbitration forums. The SEC believes giving customers such flexibility would allay concerns that arbitration stacks the deck against small investors, which the securities industry has long denied.

The [American Arbitration Association] is a major independent forum that is privately funded and widely perceived to be more sympathetic to investors. Investors win about 60% of the time at the [American Arbitration Association], compared with about half of the time at industry-sponsored forums.

But brokerage firms have long had problems with the [American Arbitration Association]. For one thing, it is more expensive than industry-sponsored forums.

Dean Witter and PaineWebber will be reluctant to allow investors to
V. CONCLUSION

House Bill 3429, enacted as Chapter 517 of the Florida Statutes, made broadly based revisions to the Florida Blue Sky Law. It reinforced the goal of its predecessors by adding a number of provisions that deny issuers or securities professionals the benefits of exemption from registration, the opportunity to register when required to do so to offer or trade in securities, and the ability to withdraw from registration if those individuals have committed any fraudulent act in connection with a securities transaction. The addition of these prohibitions should increase the Department’s ability to effectuate the legislature’s enunciated purpose of protecting Florida residents from investment scams and other fraudulent activity in connection with the purchase and sale of securities.210

The Bill reduced the number of securities that will be subject to Chapter 517’s laborious merit review process and it gave the Department additional rule making authority. These modifications will promote economy in transactions involving securities in Florida and in regulating those transactions.

Finally, the Bill added the short-lived section 8 to the Act. The Lewis court had at its disposal a plethora of binding precedent and persuasive authority in deciding whether to uphold or strike down the prescription that arbitration agreements between Florida-registered broker-dealers and their customers grant the customer the option of arbitrating before a non-securities industry controlled forum. Based on the jurisprudence of the Federal Arbitration Act and its potential hegemony over state laws affecting arbitration, the court’s decision was not capricious, but it was not compelled. And the final bell has yet to toll.211

use the [American Arbitration Association] in some jurisdictions, such as Florida and California, where they perceive lessened chances of winning.

Siconolfi, Brokerage Firms Drop Opposition to Arbitration, Wall St. J., March 5, 1991, at C1, col. 3 and C21, col. 3.

210. See supra notes 43-53 and accompanying text.

211. See supra note 209.