## THE 1990 SURVEY OF FLORIDA LAW

*Florida's New Business Corporation Act*

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Florida's New Business Corporation Act


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I. INTRODUCTION

Since the enactment of the Florida Arbitration Code ("FAC")\(^1\) in 1957, the use of arbitration to resolve disputes has grown at a steady, if not breathtaking, pace in Florida.\(^2\) As may be expected, many of the more perplexing issues concerning arbitration in the state have been long since resolved by the courts. Nevertheless, case law continues to develop as both the state and federal courts address new issues and reanalyze old problems. This survey discusses such developments during the period from October 1, 1989 to September 30, 1990.

For the most part, the opinions generated during the year under review were a predictable reprise of previous decisions. Thus, while the courts once again made it clear that they favor arbitration as a method of resolving disputes,\(^3\) they were not adverse to adopting positions that

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1. **Fla. Stat.** §§ 682.01-.22 (1989).
3. See, e.g., Gibson v. The Florida Bar, 906 F.2d 624, reh'g denied, 917 F.2d 570 (11th Cir. 1990) (bar association's decision to refer to arbitration all disputes involving the use of compulsory membership dues held proper); United Paperworkers Int'l, Local #395 v. ITT Rayonier, Inc., 740 F. Supp. 833 (M.D. Fla. 1990) (although federal law contained six month statute of limitation, Florida's one year statute of limitation was held applicable where it would serve important policy of promoting arbitration to resolve labor disputes); Feather Sound Country Club v. Barber, 567 So. 2d 10 (Fla. 2d Dist. Ct. App. 1990) (courts must yield their jurisdiction when confronted with a valid arbitration agreement); Mitchell v. School Bd. of Dade County, 566 So. 2d 2 (Fla. 3d Dist. Ct.'App. 1990) (plaintiffs' tort claims were cognizable, if at all, only in arbitration); Thomson, Bohrer, Werth & Razook v. Multi Restaurant Concepts, 561 So. 2d 1192 (Fla. 3d Dist. Ct. App. 1990) (pleading mistake by counsel did not affect party's right to immediate review of trial court's decision denying motion to compel arbitration); Air Conditioning Equip. v. Rogers, 551 So. 2d 554 (Fla. 4th Dist. Ct. App. 1989) (trial court had no authority to remove dispute from arbitration and submit it to
weakened arbitration when they felt that larger principles were at stake. They insisted that valid arbitration agreements be enforced fully, yet were adamant that parties not be referred to arbitration unless solid evidence existed that they had signed an arbitration agreement. They demanded that the agreement clearly cover the specific controversy, and refused to order arbitration when they considered the mediation).

4. See, e.g., Harbuck v. Marsh Block & Co., 896 F.2d 1327 (11th Cir. 1990) (state court's decision as to appropriate forum for arbitration was not reviewable in federal court); JDC (America) Corp. v. Amerifirst Florida Trust Co., 736 F. Supp. 1121 (S.D. Fla. 1990) (Federal Arbitration Act does not in itself confer subject matter jurisdiction on the federal courts); Robert M. Swedroe, P.A. v. First Am. Inv. Corp., 565 So. 2d 349 (Fla. 1st Dist. Ct. App. 1990) (expert who testified at arbitration hearing was not entitled to a mechanic's lien for his services); Allen v. Interstate Sec., 554 So. 2d 23 (Fla. 2d Dist. Ct. App. 1989) (once a party elects a forum for arbitration it may not switch to a different forum without the consent of the opposing party); Anstis Ornstein Assocs. v. Palm Beach County, 554 So. 2d 18 (Fla. 4th Dist Ct. App. 1989) (although party had waited for months to raise statute of limitations defense, once the defense was made arbitration had to be stayed until court could rule on the issue).

5. See, e.g., Prudential-Bache Sec. v. Goldin, Fed. Sec. L. Rep. (CCH) ¶ 95,397 (S.D. Fla. June 22, 1990) (arbitration clause in securities contract that used the term "transactions" was meant to cover investors' total relationship with brokerage house and would not be read to cover only matters affecting trading in investors' account); Fernandez v. Smith Commercial Group, 560 So. 2d 1389 (Fla. 3d Dist. Ct. App. 1990) (justice required president of company to be permitted to invoke arbitration agreement even though agreement was actually between his company and another company); deWindt v. Shearson Lehman Hutton, Inc., 40 Fla. Supp. 2d 125 (Fla. 19th Cir. Ct. 1990) (fact that arbitration agreement was entered into by predecessor company did not bar successor company from asserting its right to arbitrate dispute with employee).

6. See, e.g., Birchtree Fin. Servs. v. Lance, 561 So. 2d 8 (Fla. 2d Dist. Ct. App. 1990) (question of whether parties had entered into a valid arbitration agreement could only be decided by trial court after full evidentiary hearing); Prudential-Bache Sec. v. Greenspoon & Marder, P.A., 551 So. 2d 584 (Fla. 4th Dist. Ct. App. 1989) (trial court may enjoin arbitration proceeding if it finds that the parties did not agree to arbitrate); Spitz v. Prudential-Bache Sec., 549 So. 2d 777 (Fla. 4th Dist. Ct. App. 1989) (investors who claimed that they had been fraudulently induced to sign an arbitration agreement were entitled to a new trial when jury's verdict on the question was inconsistent and, as a result, incomprehensible).

7. See, e.g., Kincaid Constr. Co. v. Worsham Underground Util. Constr., 566 So. 2d 600 (Fla. 5th Dist. Ct. App. 1990) (arbitration agreement in construction contract covered only disputes over price and did not include disputes arising from who was to furnish equipment); Allstate Ins. Co. v. Banaszak, 561 So. 2d 463 (Fla. 4th Dist. Ct. App. 1990) (arbitration agreement in insurance policy did not extend to question of whether tortfeasor, who was not a party to the policy, had been negligent); McClure v. Painewebber, Inc., 549 So. 2d 1157 (Fla. 3d Dist. Ct. App. 1989) (arbitration agree-
dispute premature. Although the courts continued to insist on a high level of proof before finding that a party had waived its right to arbitration, they again made it clear that a bankruptcy filing trumps an arbitration agreement. And while they continued to defer to arbitrators on matters involving hearing procedure, they refused to expand the types of relief arbitrators may afford disputants. Finally, even as the courts again showed great willingness to confirm arbitration awards, they continued to be extremely cautious in enforcing the re-

8. See Graham v. Friendly Ford, Inc., 552 So. 2d 1165 (Fla. 3d Dist. Ct. App. 1989) (indemnity claim involving landlord and tenant could not be sent to arbitration until after court had determined whether underlying lease was valid).

9. See, e.g., Stone v. E.F. Hutton & Co., 898 F.2d 1542 (11th Cir. 1990) (party that engaged in discovery for almost two years before seeking arbitration waived its right to arbitration); Hardy Contractors v. Homeland Property Owners Ass'n, 558 So. 2d 543 (Fla. 4th Dist. Ct. App. 1990) (party's decision to seek discovery after expressly requesting that dispute be referred to arbitration warranted trial court's conclusion that party had waived its right to arbitration).

10. See, e.g., In re Murray Indus., 114 Bankr. 749 (Bankr. M.D. Fla. 1990) (automatic bankruptcy stay would not be lifted to permit arbitration to go forward where claimant failed to demonstrate that exceptional circumstance justified such action); In re Bicoastal Corp., 111 Bankr. 999 (Bankr. M.D. Fla. 1990) (automatic bankruptcy stay would be lifted so that contract price adjustment dispute could be submitted to arbitration because matter required special expertise possessed by the arbitrator and would not unduly interfere with the handling of the estate).

11. See Boudreau v. L.F. Rothschild & Co., No. 89-250-CIV-ORL-18 (M.D. Fla. Feb. 23, 1990) (WESTLAW, 1990 WL 81861) (whether arbitration was to be held in New York City or Orlando was question for the arbitrator). But see Latin Am. Property & Casualty Ins. Co. v. Pastor, 561 So. 2d 1302 (Fla. 3d Dist. Ct. App. 1990) (trial court was justified in instructing arbitrators to specify nature of insured's damages because of insurer's previous actions).

12. See Complete Interiors, Inc. v. Behan, 558 So. 2d 48 (Fla. 5th Dist. Ct. App.), rev. denied, 570 So. 2d 1303 (Fla. 1990) (arbitrator exceeded his power by awarding punitive damages where arbitration agreement did not expressly provide for such damages).

13. See Carpet Concepts v. Architectural Concepts, 559 So. 2d 303 (Fla. 2d Dist. Ct. App. 1990) (arbitration award must be confirmed except where statutory grounds for vacating or modifying the award are shown to exist). But see Ainsworth v. Skurnick, 909 F.2d 456 (11th Cir. 1990) (trial court may award damages denied by arbitrator where party is entitled to such damages as a matter of law); Cone Corp. v. State, 556 So. 2d 530 (Fla. 2d Dist. Ct. App. 1990) (decision by State Arbitration Board in dispute arising from the building of a state road was not consistent with the plain meaning of the relevant regulation).
The year, however, did not represent merely a retread of previously travelled terrain. Rather, at least one case, Fewox v. McMerit Construction Co., involving the often visited issue of attorneys’ fees, proved that sometimes the trip is more interesting than the destination. To fully appreciate the decision, a brief review of the landscape is in order.

II. BACKGROUND

Although arbitrators in Florida enjoy substantial discretion when it comes to making awards, they are prohibited from granting attorneys’ fees. Instead, the prevailing party in an arbitration may recover its attorneys’ fees only by making a post-award motion in circuit court. This state of affairs is the result of section 682.11 of the FAC, which reads as follows: “Unless otherwise provided in the agreement or provision for arbitration, the arbitrators’ and umpire’s expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award.”

Over the years, the bifurcation mandated by the FAC, while unwieldy, provoked little comment — that is, until 1988, when the Second District Court of Appeal dropped an unexpected bombshell in Glen Johnson, Inc. v. L.M. Howdeshell, Inc.

The facts of the case were simple. Glen Johnson, Inc. (“Johnson”), a contractor on a construction project, had entered into a subcontract with L.M. Howdeshell, Inc. (“Howdeshell”). When a dispute arose between the parties, Howdeshell filed a complaint against Johnson and The American Insurance Company (“American”), the surety on Johnson’s contractor’s bond. The complaint sought damages as well as attorneys’ fees, as provided in the surety agreement. Upon being served with the complaint, Johnson and American moved to have the dispute

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14. See, e.g., Ocala Breeders’ Sales Co. v. Brunetti, 567 So. 2d 490 (Fla. 3d Dist. Ct. App. 1990) (arbitration award would not be deemed res judicata where party seeking to invoke the award was dropped “from the style of the case”); Perez v. Great Republic Ins. Co., 559 So. 2d 1266 (Fla. 3d Dist. Ct. App. 1990) (insured who received arbitration award against its insurer would not be permitted to collect on the award until after suit against the third party tortfeasor was concluded).
15. 556 So. 2d 419 (Fla. 2d Dist. Ct. App. 1989).
17. 520 So. 2d 297 (Fla. 2d Dist. Ct. App. 1988).
submitted to arbitration.

The arbitrator to whom the case was referred dismissed Howdeshell's claim without prejudice on the ground that it could not be decided until after Johnson was paid by the construction project's owner. In response, Howdeshell filed a motion with the circuit court in which it asked the court to either modify or vacate the award.

The motion was heard by Judge Crockett Farnell, who agreed with Howdeshell. Finding that all of the conditions precedent to payment had been satisfied, he entered a final judgment for Howdeshell in the amount of $20,762.60. Of this sum, $9,717.50 represented attorneys' fees incurred by Howdeshell in conducting its case before the arbitrator.

Johnson and American appealed Judge Farnell's decision to the Second District Court of Appeal. There, in a terse opinion authored by Judge Edward F. Threadgill, Jr., with whom joined Chief Judge Paul W. Danahy, Jr., and Judge Jack R. Schoonover, Sr., the court agreed with Judge Farnell that Howdeshell was entitled to damages, but ruled that it could not recover its attorneys' fees. The panel explained its decision by saying: "Attorney's fees for arbitration proceedings are expressly excluded by section 682.11, Florida Statutes (1985)." Despite the remarkable nature of its conclusion, no authority was offered to support this view, nor was any explanation provided as to why the court was reversing summarily thirty years of precedent.

Ten months later, another panel of the Second District Court of Appeal was faced with the same issue in *St. Paul Fire & Marine Insurance Co. v. Sample*.

Judith and Robert H. Sample had taken out an automobile insurance policy with the St. Paul Fire and Marine Insurance Company ("St. Paul"). Subsequently, Mrs. Sample was involved in a car accident with an uninsured motorist and filed a claim with St. Paul. When St. Paul informed the Samples that their policy did not include uninsured motorist coverage, the Samples sought and received an order directing St. Paul to submit the issue of coverage to arbitration.

The arbitrators agreed with the Samples and awarded them $19,230.77. The Samples then proceeded to court to recover their attorneys' fees and were awarded an additional $30,000 by Judge Wil-

18. *Id.* at 298.
19. *Id.*
20. *Id.*

On appeal, the Second District Court of Appeal, in an opinion authored by Judge Vincent T. Hall and joined in by Acting Chief Judge James E. Lehan and Judge Jerry R. Parker, reversed Judge Walker. Citing *Glen Johnson*, the panel issued an opinion as cryptic as its predecessor’s:

St. Paul’s first contention in this appeal is that the trial judge erred in including the hours the Samples’ attorney spent on the arbitration proceeding in calculating the attorney’s fee award because attorney’s fees are not normally awarded for time spent in connection with arbitration proceedings. This contention is correct. 22

III. *Fewox v. McMerit Construction Co.*

Although the Second District took it as self-evident in both *Glen Johnson* and *Sample* that section 682.11 prohibited the recovery of attorneys’ fees, in the months that followed no other appellate court in Florida adopted *Glen Johnson*. 23 Thus, parties in the First, Third, Fourth, and Fifth Districts continued to be able to recover their attorneys’ fees, while parties in the Second District found themselves left out in the cold. And so matters stood in December 1989 when the Second District decided *Fewox*.

Robert D. Fewox and the Adalia Condominium Partnership of Florida ("Adalia") were the owners of a condominium built by the McMerit Construction Company ("McMerit"), the predecessor of the McCarthy Construction Company ("McCarthy"). After a controversy

22. *Id.* at 1197.

23. Indeed, in *Zac Smith & Co. v. Moonspinner Condominium Ass'n*, 534 So. 2d 739 (Fla. 1st Dist. Ct. App. 1988), the First District Court of Appeal explicitly rejected *Glen Johnson* by writing:

> Appellants interpret this provision [FLA. STAT. § 682.11] to exclude the award of attorneys fees in arbitration proceedings, relying on . . . *Glen Johnson, Inc. v. L.M. Howdeshell, Inc.*, 520 So. 2d 297 (Fla. 2d DCA 1988).

. . . .

> We accept appellee's interpretation of section 682.11 as the more logical [position]. The statute does not proscribe attorney fees in arbitration proceedings, but merely states that the arbitration panel is authorized to award all fees and costs except attorney fees.

*Id.* at 742 (footnote omitted) (emphasis in original).
arose between the parties, Fewox and Adalia sued McMerit, McCarthy, and the Federal Insurance Company ("FIC"), which had issued a performance bond. The defendants successfully moved for an order referring the case to arbitration.

The dispute was heard by the American Arbitration Association and an award ultimately was issued against McCarthy for $185,888.35. Upon receiving the award, the claimants filed a confirmation motion and moved for attorneys' fees from FIC as provided in the performance bond.

While the motions were pending, McCarthy voluntarily satisfied the award. Judge Morton J. Hanlon subsequently denied the motion for attorneys' fees on the basis of Glen Johnson. Fewox and Adalia appealed to the Second District Court of Appeal.

In a lengthy *en banc* opinion, the Second District, speaking through Judge Herboth S. Ryder, reversed the trial court and admitted the obvious: *Glen Johnson* and *Sample* had gotten the law wrong. Judge Ryder began the court's *mea culpa* by writing:

> Upon a close examination of section 682.11 and the relevant case law, we conclude that *Glen Johnson* and *Sample* were wrongly decided insofar as they hold that the statute prohibits an award of attorney's fees for services rendered by the attorney during arbitration proceedings. The "not including counsel fees" clause in section 682.11 merely indicates that an arbitrator may not include attorney's fees in his award of expenses and fees incurred during arbitration proceedings. . . . The legislature apparently eliminated attorney's fees from the subject matter jurisdiction of arbitration because arbitrators are generally businessmen chosen for their expertise in the particular subject matter of the suit and have no expertise in determining what is a reasonable attorney's fee. . . . Thus, the intent of the statute is merely to prohibit arbitrators

24. Although McCarthy issued a check for the full amount of the arbitrator's award, Fewox and Adalia did not receive the money:

> McCarthy['s] . . . check . . . [was made] payable to both appellants and the Federal Savings & Loan Insurance Corporation (FSLIC), which had claimed an interest in the proceeds of the award. McCarthy and FIC then filed a motion to interplead the funds into the registry of the court. The trial court, pursuant to a written stipulation between appellants and FSLIC, ordered that the funds be deposited into an interest-bearing account pending a determination of the claims of appellants and FSLIC thereto.

*Fewox*, 556 So. 2d at 420.
from awarding attorney's fees. 25

Judge Ryder sought to put the best face possible on Glen Johnson and Sample:

Upon examining Glen Johnson and Sample, we are of the opinion that our erroneous conclusion in those cases regarding the effect of section 682.11 may very well have stemmed from our misinterpretation of our previous decision in Beach Resorts International [v. Clarmac Marine Construction, 339 So. 2d 689 (Fla. 2d Dist. Ct. App. 1976)], although Glen Johnson did not cite Beach Resorts International. Other courts have also misconstrued Beach Resorts International to hold that section 682.11 prohibits an award of attorney's fees for services rendered during arbitration . . . . Beach Resorts International, however, merely holds that section 682.11 prohibits an arbitrator from awarding attorney's fees associated with arbitration and that such fees are awardable by the trial court if there is statutory authorization or contractual agreement between the parties therefor. In Beach Resorts International, there was neither a contractual agreement nor an applicable statute authorizing an award of attorney's fees. 26

Seemingly aware that even with the discussion of Beach Resorts International the mistake made in Glen Johnson and Sample was inexplicable, Judge Ryder made one final attempt to exonerate himself and his colleagues. Claiming that a conflict existed among the circuits as to the holding in Beach Resorts International, he certified the following question to the Florida Supreme Court as one involving inter-district conflict and being of great public importance: “Does section 682.11, Florida Statutes (1987), prohibit an award of attorney's fees incurred during arbitration proceedings, or does it merely prohibit the arbitrator from making such an award?” 27

IV. POST MORTEM

In January 1990, Judge John M. Scheb, another member of the Second District Court of Appeal, certified the same question in Park Shore Development Co. v. Higley South, Inc. 28 One month later, how-

25. Id. at 421-22.
26. Id. at 422.
27. Id. at 423.
ever, Judge Ryder threw in the towel.

In *Raymond James & Assocs., Inc. v. Wieneke*, Judge Ryder, now elevated to Acting Chief Judge, admitted that there was no inter-district conflict, the certified question was not of great public importance, and no guidance was required from the Supreme Court. As his final word on the subject, he wrote: "The Florida Arbitration Code specifically takes attorney's fees out of the broad grant of authority it gives to arbitrators . . . . Consequently, arbitrators cannot award attorney fees. When the case is taken to the trial judge for confirmation, however, the judge may then assess fees. *Fewox.*"

V. CONCLUSION

Although *Fewox* is likely to be remembered chiefly as a study in judicial embarrassment, it contains an important message that should not be lost: the Florida Legislature's decision to bar arbitrators from including attorneys' fees in their awards is fundamentally unsound. Not only does it undermine confidence in the arbitral process by suggesting that arbitrators cannot be trusted to know the difference between what is reasonable and what is unreasonable, it creates needless work for the courts. Moreover, it prohibits parties from receiving the full benefit of their decision to arbitrate because they still must go to court to recover their attorneys' fees.

Perhaps the best reason to scrap the ban, however, is the need for intellectual honesty. In 1986, the Legislature enacted the Florida International Arbitration Act ("FIAA") to govern international, as opposed to domestic, arbitrations. Unlike the FAC, the FIAA specifically authorizes arbitrators to decide whether any party is entitled to attorneys' fees. Obviously, there is no basis for distinguishing between those who arbitrate domestic disputes from those who arbitrate dis-

29. 556 So. 2d 800 (Fla. 2d Dist. Ct. App. 1990).
30. *Id.* at 801.
32. For a detailed examination of the FIAA, see Jarvis, *International Arbitration, Alternate Dispute Resolution in Fla.* §§ 7.1-.57, at 7-1 to 7-26 (1989).
33. The FIAA states: "The arbitral tribunal may award reasonable fees and expenses actually incurred, including, without limitation, fees and expenses of legal counsel, to any party to the arbitration and shall allocate the costs of the arbitration among the parties as it determines appropriate." *FLA. STAT.* § 684.19(4) (emphasis added).
putes of an international character; if international arbitrators can be trusted to determine what is a reasonable fee, so can domestic arbitrators.
Bankruptcy: Eleventh Circuit Review

Lawrence Kalevitch*

I. SECURED CLAIMS IN CONSUMER BANKRUPTCY

In the last two years, the Eleventh Circuit decided several cases which have raised controversial questions about the treatment of liens or secured claims in consumer bankruptcy. In *In re Folendore*, the court accepted an interpretation of the Bankruptcy Code unsupported in either pre-Code or legislative history: that a debtor in chapter 7 may avoid wholly undersecured claims under section 506(d). Secured claims have received a chilly reception in bankruptcy throughout the years, and *Folendore* is frostier than most.

Related to *Folendore* is the development of home mortgage lien-stripping in chapter 13: that a chapter 13 debtor may limit the mortgage lien during and after the chapter 13 case to the value of the home. Although the Eleventh Circuit has yet to rule on the controver-

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2. The Code defines a secured claim broadly in section 506(a): "An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor’s interest in the estate's interest in such property . . . ." 11 U.S.C. § 506(a) (1988).

3. *In re Folendore*, 862 F.2d 1537 (11th Cir. 1989).

4. Chapter 7 of the Code provides for the liquidation of the debtor's nonexempt assets from which creditors will receive payment. The remaining chapters of the Code deal with reorganization of debtors.


6. Lien-stripping is the invalidation of a lien on property to the extent that the property has a value less than the debt secured by the lien.

7. Chapter 13 of the Code is a reorganization chapter. Debtor commits to a three (sometimes five) year payment plan. When, or if, the plan is completed, the debtor is discharged from any remaining debt other than domestic obligations and long-term debt. 11 U.S.C. § 1328 (1988).

8. Although this issue has not appeared in a reported Eleventh Circuit opinion, a discussion of the Third Circuit opinion in *Wilson v. Commonwealth Mortg. Co.*, 895 F.2d 123 (3rd Cir. 1990), is included because *Folendore* may foreordain that result.
sial question of home mortgage lien-stripping in chapter 13, the Folendore decision and the recent validation of serial bankruptcy filings in Saylors suggest that a “chapter 20” may permit a debtor to lien-strip a home mortgage. In general under chapter 7, lien-stripping is controversial as is lien-stripping a home mortgage under chapter 13.

Bankruptcy is complex because the interpretation of the 1978 Code breeds three recurrent controversies. First, the functions of the several different chapters of the Code, as well as the different avenues of relief, are both alike, yet different. Second, a large number of key provisions of the Code, especially Chapter 5, apply to all chapters under which a debtor, and sometimes a creditor, may file for relief. Unless the Code drafters strove for controversy, it is a grave error to assume the usefulness, or appropriateness, of such a significant number of provisions for different forms of debtor relief. Surely, the drafters’ expectation of how all the provisions would fit together exceeded their draftsmanship. Core conceptions in bankruptcy often fit a paradigm of liquidation and discharge; others fit a paradigm of reorganization. Rarely do the core conceptions fill the same function in both liquidation and reorganization. Because a number of core matters receive prescription in Chapter 5, the courts have had some difficulty finding how these fit both liquidation cases under Chapter 7 and reorganization cases under Chapters 11 and 13. The third essential creating more than technical controversy under the Code is public policy. Lien-stripping in bankruptcy generates controversy not only for its novelty, but because it significantly differs from lien avoidance under the classical, strong-arm, preference and fraudulent transfer ideas. The classical theories of lien avoidance rest on a perceived inter-creditor unfairness. The strong-arm power invalidates pre-bankruptcy liens because failure to

See infra note 54 and accompanying text.
10. See infra note 92. 
11. The use of a chapter 20 to lien-strip a home mortgage should be impermissible, and Folendore itself does not permit such a strategy. See infra notes 75-99.
12. The classical lien avoidance provisions of bankruptcy law antedate the Bankruptcy Code of 1978 and were firm fixtures of bankruptcy jurisprudence at that time. See Bankruptcy Act of 1898, as amended by the Chandler Act of June 22, 1938, ch. 575, 52 Stat. 840 (repealed 1979). These classical lien avoidance provisions continue in present law. See infra notes 13-15 and accompanying text.
notice the lien presumably misleads other creditors. Preferences upset traditional bankruptcy norms concerning what creditors should receive. Similarly, fraudulent transfers to creditors and donees, prior to bankruptcy, affect bankruptcy's distributional norms. For the most part, creditors and other third parties can engage in transactions with proper planning and immunize their interests from classical lien avoidance. That is, what one might regard as legitimate secured transactions entered into with a debtor prior to bankruptcy, properly executed and perfected, rarely result in avoidable liens under the classical lien avoidance powers.

However, the new phenomena of lien-stripping arises from either market value fluctuation or mistaken collateral valuation. Planning can generally control only the latter. Even if planning could control market value fluctuation, lien-stripping under the Code would remain controversial to the extent it exceeds the proper balance of debtor and creditor benefits. The ideal balance, if any, is controversial. Thus, lien-stripping as a debtor's tool will remain controversial.

A. In re Folendore

In Folendore, the Eleventh Circuit permitted the use of a controversial lien-stripping power by a chapter 7 debtor. Prior to Folendore, courts outside of this circuit disagreed about whether section 506(d) not only determines valid secured claims against the bankruptcy estate, but also invalidates liens outside of the bankruptcy case.\(^{17}\) The question...
of extra-bankruptcy lien enforcement would not generally arise, but for a longstanding principle in bankruptcy: that discharge of debt does not per se invalidate a lien securing debt after bankruptcy.\textsuperscript{18} Congress undoubtedly reaffirmed the latter principle,\textsuperscript{19} and further provided debtors express provisions for avoiding certain liens in bankruptcy, so that after bankruptcy, debtors' fresh starts are unimpaired by lien survival.\textsuperscript{20}

Lien-stripping was part of the package of new rights individual debtors received under the 1978 Code. In chapter 7, individual\textsuperscript{21} debtors may strip particular liens which impair their enjoyment of exempt property.\textsuperscript{22} In chapter 13, individuals\textsuperscript{23} may confirm a plan which limits payments on the secured claim to the value of the collateral.\textsuperscript{24} Yet, the use of section 506(d) to strip-down a lien received no mention in the legislative history.\textsuperscript{25} Other sections provide classical avoidance of what


A decision in \textit{Dewsnup}, now before the Supreme Court, should resolve this conflict.


19. Section 524 (a)(2) as originally enacted included the phrase, "or property of the debtor," which some courts understandably assumed overruled \textit{Long}, 117 U.S. at 617; e.g., \textit{In re Willie Williams}, 9 Bankr. 228 (Bankr. D. Kan. 1981). Congress subsequently deleted the phrase.


25. The House concluded that:

Subsection [506](d) permits liens to pass through the bankruptcy case unaffected. However, if a party in interest requests the court to determine and allow or disallow the claim secured by the lien under section 502 and the claim is not allowed, then the lien is void to the extent that the claim is not allowed.

section 506(d) recognizes as secured claims in appropriate cases. 26

What is striking about the balance Congress apparently made in the Code for chapter 7 cases is the specific limitation of the debtor's lien-stripping power to certain kinds of liens 27 on certain exempt or exemptible property under section 522. 28 In contrast, section 506 applies to all claims of liens, whether they are statutory, consensual, judicial or common law liens. Additionally, section 506 speaks about secured claims on any kind of property, real or personal, exempt, exemptible or non-exempt. In Folendore, a chapter 7 debtor sought to avoid a third mortgage 29 held by the Small Business Administration (SBA) on real

ADMIN. NEWS 5963, 6313.

It also noted that:

Subsection [506](d) provides that to the extent a secured claim is not allowed, its lien is void unless the holder had neither actual notice nor knowledge of the case, the lien was not listed by the debtor in a chapter 9 or 11 case or such claim was disallowed only under section 502(e).


Each of these reports on the Bankruptcy Code limits the voidability of a secured claim under section 506(d) to claims which are not allowable claims in bankruptcy. These reports show that section 506(a) determines whether an allowed claim is a secured claim. Further, they show that section 506(d) defines what is an allowed claim for purposes of section 506(a). With exceptions stated in section 506(d), claims which are not allowed under section 502(b), the general allowance of claims provision of the Code, cannot become secured claims in a bankruptcy proceeding. Liens secure claims; if a claim is invalid, the lien is also invalid in a bankruptcy proceeding. The legislative history thus shows that section 506(d) deals with the problem of liens securing claims which are not allowable in the bankruptcy. However, the recent cases such as Folendore have construed the function of section 506(d) as also regarding the problem of the undersecured lien.

26. See supra notes 13-15 and accompanying text. These other sections operate when section 506 recognizes a secured claim. For example, one, who prior to bankruptcy, had obtained a first mortgage on land owned by the debtor will have a secured claim in the debtor's bankruptcy. If the creditor obtained that mortgage as a gift from the debtor, the mortgage will first be identified by section 506 as a secured claim and in all likelihood, the secured claim will be avoided as a fraudulent transfer under section 548.

27. Debtor's lien-stripping power is limited to judicial liens on exempt property and nonpossessory, nonpurchase money security interests in particular personal property subject to exemption. 11 U.S.C. § 522 (f)(1)(2).


29. The opinions in the case do not mention whether the realty in issue was exempt property. Even if it were, the lien-stripping rules for exempt property were inapplicable since only judicial liens may be stripped from exempt realty. § 522(f)(1). That the realty was not exemptible is implicit in the trustee's decision to abandon the prop-
property abandoned by the trustee. The combined liens of these first two mortgages exceeded the value of the collateral. Section 506(d) provides: "(d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void . . . ." The issue in Folendore is whether a lien securing an allowable claim is voidable under section 506(d) in a chapter 7 case. The court stated the issue as the following: "[W]hether an unsecured lien supported by an allowable claim is voidable under 11 U.S.C.A. § 506(d)." The court held that such a lien was voidable and reversed.

However, it should be noted that the district court clearly stated that it did not consider the lack of a request for disallowance to have been a formal or procedural defect. The district court ruled on the basis of "cases holding that a debtor in a chapter 7 case may not use § 506(d) to void the consensual lien of a creditor because the lien is undersecured." Id. at 182.

Thus, one may well find unpersuasive the Eleventh Circuit's conclusion that the avoidance rule does not presume a disallowed claim. See Folendore, 862 F.2d at 1539. If the exceptions contemplate particularly grounded disallowances, the rule must contemplate disallowable claims. Otherwise, the rule would not need the exceptions originally or presently stated. The Folendore court describes the now repealed request exception, the 1979 version of section 506(d)(1), as serving a vital function. 862 F.2d at 1539 n.3.

33. 11 U.S.C. § 506(d). The exceptions which followed the quoted body of section 506(d) when the case arose stated: "(1) a party in interest has not requested that the court determine and allow or disallow such claim under section 502 of this title; or (2) such claim was disallowed only under section 502(e) of this title." 11 U.S.C. § 506(d) (1978)(amended 1984).

34. 862 F.2d at 1538.
"The plain language of the statute, supported by a majority of the bankruptcy courts, inferences drawn from the 1984 amendments, and common sense, [sic] requires the SBA's lien be voidable whether or not its claim has been disallowed under section 502."\(^{35}\)

Is the statute plain? The statute states that a lien is void to the extent it secures a claim against the debtor that is "not an allowed secured claim."\(^{36}\) In *Folendore* the parties agreed that the SBA did not have an "allowed secured claim."\(^{37}\) The SBA unsuccessfully pointed out that it held an allowed claim. Its position was that section 506(d) only voids liens securing disallowed claims. Since its claim was allowable, the lower courts properly rejected the debtors' attempted avoidance.

Undoubtedly, the expression "not an allowed secured claim" is ambiguous. There are two reasons why a claim may not be allowed and secured. First, the claim may be wholly invalid and thus not allowed in bankruptcy. Second, though a claim may be valid and allowed, it may have nothing securing it, and thus not be a secured claim under section 506(a). The issue is whether the expression "not an allowed secured claim" in section 506(d) refers only to situations in which a secured claim (determined by section 506(a)) is not allowed under section 502. The legislative history speaks only to this function of section 506(d).\(^{38}\) Or does the expression also embrace allowable claims which are not secured claims under section 506(a)? The language is not plain.

The exceptions presume the text speaks to claims that are not allowable under other sections of the Code.\(^{39}\) The inferences the court drew from the 1984 amendments may be countered by equally plausible inferences.\(^{40}\)

The court erred in relying on common sense in justification of its conclusion.

35. *Id.* at 1539.
37. What is an "allowed secured claim" is nowhere defined in the code. The court and the parties appear to have presumed that section 506(a) defines what is an allowed secured claim. But, section 506(a) only says that an allowed claim, in reference to section 502, secured by a lien on property is a "secured claim." 11 U.S.C. § 506(a). The phrase "allowed secured claim" does not appear in section 506(a) at all but appears in sections 506(b)-(d).
38. *See supra* notes 25 & 32.
39. *See supra* note 32.
40. *See supra* note 32.
The whole point of bankruptcy is to provide a debtor with a fresh start. Section 506 allows the debtor the option to begin anew on its former property, Section 506 does not give a debtor its property back as some sort of windfall. It simply permits a debtor to eventually repurchase an equity interest in it, something the SBA admits it [the debtor] has the right to do on any other piece of land.41

Bankruptcy is intended to provide relief to both debtors and creditors. The court’s function is to determine the meaning of an often difficult bankruptcy text. Reliance on plain meaning characterizations of undefined, ambiguous statutory language is unfair to both debtors and creditors.42

The potential impact of Folendore may be addressed by considering why a debtor like Folendore would want to avoid a lien when property is worth no more than the debts secured by senior liens. Valuation of estate property is speculative. A debtor may think the collateral is worth more than the amount determined by the bankruptcy court. As well, property values may be temporarily distressed. At some future time, a debtor might be able to make a deal with senior lienors or borrow the money to buy them out. However, a trustee in a chapter 7 case is unlikely to await for these developments. Once the property is aban-

41. Folendore, 862 F.2d at 1540.
42. A further point against Folendore is that pre-Code law stated none of this. The Supreme Court has found pre-Code treatment of liens in bankruptcy critical when the Code is unclear. See United Savings Assoc. v. Timbers of Inwood Forest Assocs. Ltd., 484 U.S. 365 (1989). Pre- and post-Code case law clearly state that such a lien, along with the senior liens, survive bankruptcy whether or not the debtor gets a discharge of the underlying debt. See supra note 18 and accompanying text.

Perhaps the majority of courts have confused the invalidation of a secured claim, per section 506(d) as a claim against property of the estate, with invalidity in general. The function of section 506 is merely administrative: to define what and who has a secured claim in bankruptcy for a bankruptcy case administration. One who has a fully secured claim could not participate, for example, in distribution from the unencumbered assets’ liquidation. Nevertheless, one can appreciate the ease with which invalidity of a secured claim in a bankruptcy proceeding may be broadened to invalidity for all purposes — when a junior lien is not a secured claim in bankruptcy because the senior liens secure debt greater than the value of collateral. The Code seems to say this since by the term “void,” one might understand the paramount federal law of the Code as superseding contrary state law. Unless one understands the characterization of an invalid secured claim under section 506(d) as implicitly limited to questions arising in the bankruptcy case, one may read the subsection universally.
doned by the trustee,\textsuperscript{43} the debtor’s relatively inexpensive request\textsuperscript{44} for avoidance under section 506(d) might encourage optimism on the debtor’s part of eventually finding equity in the property.

In substance, lien cramdown\textsuperscript{45} in reorganization cases proceeds under section 506 in the same initial manner as \textit{Folendore}. The amount of a secured claim is obtained by determining the value of the collateral. When the collateral is worth less than the debt it secures, the amount of the secured claim is the value of the collateral. A debtor in reorganization must pay a secured claim at least the value of collateral under the plan, unless the claimant agrees to a lesser payment. This general structure of lien cramdown permeates the Code. Chapter 13 clearly limits all secured claims except for home mortgages to the value of the collateral.\textsuperscript{46} Likewise, Chapter 12 states the same secured claim cramdown rule,\textsuperscript{47} and chapter 11 differs only in the right of an under-secured creditor’s opportunity to elect treatment of the claim as fully secured.\textsuperscript{48} So, under the Code, the effect of lien-stripping as per section 506 will occur routinely in rehabilitation cases under the Code. Lien-stripping is a reorganization concept because it has traditionally been provided as a reorganization cramdown device.

What is strange about \textit{Folendore} is not the substance but the locus of the lien-stripping in a chapter 7 liquidation case. An argument for lien-stripping under section 506(d) may point to other Code sections providing for lien-stripping within Chapter 7, such as sections 722\textsuperscript{49} and 522(f).\textsuperscript{50} However, the redemption opportunity of section 722 is narrow. This right of redemption applies only to exempt personal property intended for personal, family or household use, and only if such property secures a dischargeable consumer debt.\textsuperscript{51} Likewise, lien-stripping under section 522 extends only to exempt property.

\textsuperscript{43} The trustee may abandon property of the estate when the property has “inconsequential value or benefit to the estate.” 11 U.S.C. § 554(a) (1988).

\textsuperscript{44} Or, is the request seemingly inexpensive? Potential appeals to the district or circuit courts of appeal surely bear on the utility of requesting and opposing avoidance under section 506(d).

\textsuperscript{45} The term cramdown describes the process in which a secured claim is reduced to the value of the collateral.


\textsuperscript{49} 11 U.S.C. § 722.

\textsuperscript{50} 11 U.S.C. § 522(f).

The implications of the Folendore treatment of section 506(d) in a distressed market are serious. Whether Folendore will lead to the results suggested in the following hypotheticals is speculative, since the courts may confine their analyses to only the most junior liens. For example, suppose I borrow money to add a pool or some other improvement to my house. Subsequently, I incur financial difficulty and file chapter 7 or 13. The current market value of my house is 50% below $200,000, the amount I paid. I financed at 90% on my first mortgage and another 10% on a second mortgage for the pool. The house today at filing is worth $100,000.

Having filed chapter 7, I use section 506(d) to avoid the junior lien per Folendore, because the junior lien is worthless: the senior mortgage exceeds the value of the collateral. Next, I also avoid so much of the first lien that exceeds $100,000, the present value of the collateral, and I discharge both debts. Because I have kept the first mortgage debt current and continue to keep it current through bankruptcy, the first mortgagee cannot get relief from stay during the bankruptcy nor may it foreclose thereafter. Sometime after bankruptcy when the market rises, I refinance or sell the property. The payoff to the first mortgagee is $100,000, the amount of its lien, less any principal paydowns made since its lien was reduced to that amount pursuant to the section 506(d) determination. Any contractual attempt to stop me from doing falls under the supremacy clause. Any attempt to collect the debt on that mortgage is stayed.

52. Section 1111(b) of chapter 11 inhibits this form of lien-stripping. Under section 1111(b), an undersecured creditor may elect to have its secured claim allowed in the amount of the debt secured. That is, section 506 is displaced by section 1111(b). As a result of the election, a secured creditor must receive payments under the plan amounting to the debt. However, the secured claim may be paid over time and the time value of the payments must amount to no less than the value of the collateral. In terms of the present value of future payments, even an electing undersecured creditor receives in a chapter 11 plan only the value of its collateral. However, an electing undersecured creditor retains its lien on its collateral during the performance of a plan in the full amount of the debt. As a result, such a creditor may enforce that lien post-confirmation should the debtor default under the plan. The post-bankruptcy effectiveness of its lien differentiates chapter 11 lien-stripping from the chapter 7 lien-stripping accepted by Folendore. Should the collateral later appreciate in value due only to market forces, the electing undersecured creditor, who elected to have the entire claim treated as secured, may reap the appreciation if the debtor defaults. Under Folendore, the lien-stripped creditor in chapter 7 presumably cannot reinvigorate its lien after bankruptcy.

B. Chapter 13 Home Mortgage Strip-down

In the same scenario, I may file chapter 13 rather than chapter 7, so long as I meet the jurisdictional limitations of chapter 13. Whether I may use the section 506(d) strip-down in my scenario depends not only on the controversy about section 506(d), but also on a controversial passage which appears only in chapter 13. Under section 1322(b)(2), a chapter 13 plan may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence . . . ." Recently, the third and the ninth circuits have created a controversy by broadly interpreting a chapter 13 debtor's right to modify a secured claim against the debtor's principal residence. These cases depend on section 506 and especially the Folendore interpretation. Cramdown in chapter 13 is precisely what section 506(d) accomplished in my previous example: all a chapter 13 debtor need pay a secured claim is the value of the collateral (any deficiency participates as an unsecured claim). Chapter 13 debtors have been cramming down secured claims on cars and nonresidential property for 12 years. But, such debtors were thought unable to affect their home mortgage because of section 1322(b), which states a chapter 13 plan "may modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence . . . ."

54. Code section 109(e) permits only individuals to use chapter 13. Individuals may have aggregate secured debts no greater than $350,000 and aggregate unsecured debts no greater than $100,000. Additionally, to file under chapter 13 one must have a regular source of income. 11 U.S.C. § 109(e).
57. In re Hougland, 886 F.2d 1182 (9th Cir. 1989).
59. Indeed, the courts have also permitted cramdown on the principal residence of a debtor when the debt is secured by more than only the principal residence of the debtor. This occurs because section 1322(b)(2) limits the chapter 13 debtor's general right to modify secured claims to claims secured "only by a security interest in real property that is the debtor's principal residence." § 1322(b)(2); see Wilson v. Commonwealth Mortg. Corp., 895 F.2d 123, 128 (3d Cir. 1990) (alternate holding); In re Selman, 120 Bankr. 576 (Bankr. D. N.M. (1990); In re Stiles, 74 Bankr. 708 (Bankr. N.D. Ala. 1987); In re Lapp, 66 Bankr. 67 (Bankr. D. Colo. 1986); In re Ramirez, 62 Bankr. 668 (Bankr. S.D. Cal. 1986); In re Baksa, 5 Bankr. 184 (Bankr. N.D. Ohio 1980).
60. 11 U.S.C. § 1322(b).
The third and ninth circuits held that the "rights of holders of secured claims" means only their rights as a secured claimant determined by section 506(a). Because section 506(a) includes as a secured claim only that portion of a claim for which the value of the collateral provides security, an undersecured claim gives rise to a secured claim only in the amount of the value of the security or collateral. As to the excess of the debt above the value of the collateral, an unsecured claim is created. Wilson and Hougland interpret the non-modification rule of section 1322(b)(2) for principal residence mortgages to refer only to the secured claim as determined by section 506(a). However, the unsecured claim is modifiable. In effect, this appears to mean that the amount of the promised monthly mortgage installment cannot be modified, but the amount of the outstanding mortgage balance can be modified and stripped-down to the value of the collateral as determined under section 506(a). Thus, a debtor's monthly payment on the home mortgage, cannot be reduced, but a debtor may have the court adjudicate the outstanding balance of the mortgage lien as invalid to the extent the debt exceeds the property value.

Under this approach, the same result may be reached in my hypothetical through a chapter 13 case as well as in a chapter 7. As noted earlier, the ordinary cramdown of secured claims to the value of the collateral holds in chapter 13, but the specific limitation of section 1322(b)(2) bars home mortgage strip-down. Whether the decisions in Wilson and Hougland will prevail in the Eleventh Circuit remains to be seen. Much may be said against the cited rulings, however, I shall discuss only two points.

A secured claim in a chapter 13 bankruptcy proceeding cannot have a value larger than that of the collateral. Section 1322(b)(2) per-

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61. Wilson, 895 F.2d at 128; Hougland, 886 F.2d at 1183.
mits modification of the rights of any claimant, secured or unsecured. Section 1325(a)(5)(B)(ii) entitles any secured claimant to payments under the plan amounting to no less than its “allowed secured claim.” That amount is the value of the collateral determined by either section 506 or by stipulation. When section 1322(b)(2) permits modification of secured claims, it cannot be addressing the issue of what the secured claimant’s entitlement under the plan is, since section 1325(a)(5) directly provides for entitlement once the section 506 determination of the amount of the secured claim is made. Thus, the function of section 1322(b)(2) regarding strip-down is mere reiteration of the lien strip-down that the other cited sections accomplish.

The exception of the home mortgage from this strip-down reiteration can have only one meaning: that a chapter 13 debtor has all the modification rights, including strip-down per section 506, that debtors in other chapters have, except when the home mortgage is used as the sole security for a debt. There are no other substantial modification rights which would not otherwise be available to the chapter 13 debtor. However, Hougland and Wilson suggest that substantial meaning remains in section 1322(b)(2) because these decisions bar the debtor from payment under the plan of less than the contractually agreed-upon monthly installment.

Thus, under this view the non-modifiability of the monthly payment is what section 1322(b)(2) accomplishes. The courts could have understood section 1322(b)(5) to provide as much. However, the

66. For example, there is the right of cure of default which presumably includes the right to decelerate, reverse a mortgagee’s acceleration of the debt. 11 U.S.C. § 1322(b)(5).
67. Section 1322(b)(5) requires the “maintenance of payments while the case is pending on any . . . secured claim on which the last payment is due after the date on which the final payment under the plan is due.” 11 U.S.C. § 1322(b)(5). The “payments” to which this subsection refers must be the amounts promised prior to the bankruptcy because the sentence begins with the idea of curing default, which is connected to the quoted text with “and.” Id. It is unimaginable that a debtor would have been thought by Congress to have either desire or need to cure a pre-bankruptcy default and then maintain any payments other than those which would not create another default. As well, this subsection applies while a case is pending, which typically refers to both pre- and post-confirmation periods. Presumably, no modifications could precede confirmation of the chapter 13 plan. So, what payment the debtor would maintain
grammatical argument within section 1322(b)(2) accepted by the Hougland and Wilson courts, is far less convincing once one recognizes maintenance of monthly payments to fall under section 1322(b)(5).

Secondly, these recent cases overlook the confirmation rule for an "allowed secured claim" applicable when the secured claimant has neither accepted the plan, nor has the debtor surrendered the collateral to the creditor. The confirmation rule provides that the secured creditor retain its lien and mandates that "the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim." Modification of the home mortgage, through strip-down to current value of the lien and payment merely of the monthly installment, cannot satisfy this controlling confirmation rule, unless payments under the plan will fully pay-off the newly determined mortgage balance. Section 1325(a)(5)(B)(ii) requires payments not less than the allowed amount of the secured claim. Few debtors in chapter 13 will be able to satisfy the rule since even a bankruptcy-reduced outstanding balance of the mortgage will far exceed the sum of 3 or 5 years of regular payments. Also, refinancing is not easily available to such

would have to be the contractual amount. Finally, this subsection applies "notwithstanding [1322(b)(2)]." Id.

68. 11 U.S.C. § 1325(a)(5)(A). "Acceptance" of a chapter 13 plan is not defined in chapter 13. Traditionally, plan acceptance in reorganization means voting favorably on the plan. See e.g., 11 U.S.C. § 1126 (1988). As well under chapter 11, an unimpaired class as defined in section 1124(1) is deemed to have accepted a plan. See § 1126(f). A class of claims is unimpaired when the plan does not alter its pre-bankruptcy rights. § 1124(1). The pro-modification cases seem to assume that a home mortgagee which will receive its regular installment payments under a plan has not been impaired and is thus deemed to have accepted the plan. Not only has chapter 13 no such impairment/non-impairment provision, it also lacks any rule presuming an unimpaired creditor to have accepted a plan.

74. A debtor may not confirm a chapter 13 plan which exceeds 3 years unless the court, for cause, approves a longer period, not to exceed 5 years. 11 U.S.C. §§ 1322(c), 1329(c) (1988). Chapter 13 may not require that a debtor include a home mortgage debt in the plan. Chapter 13 only governs the plan and the debt provided for in the plan. However, in order to modify or cure a claim, under section 1322(b), the debtor must do so in the plan. The right to cure arrearages on a mortgage, for example, under section 1322(b)(5) is a right exercisable "under the plan." To cure arrearages, the
debtors on normal credit considerations or on a refinancing agency's discovery of the debtor's proposal.

C. Serial Bankruptcy Filings: Saylors

If Folendore may truly be used in a chapter 7 to accomplish strip-down of the home mortgage, debtors should continue to favor chapter 7 for the traditional reasons. Debtors for whom chapter 13 relief is important and who also desire home mortgage strip-down, may be able to pursue a serial bankruptcy strategy. Under this strategy, debtors first file chapter 7 to obtain lien strip-down and later file, or convert, to chapter 13. Although no less controversial than the other recent developments discussed in this article, serial bankruptcy filings were approved by the Eleventh Circuit recently in Saylors.

Quite apart from lien-stripping, a debtor in a chapter 7 may incur difficulty with the home mortgage or other property on which a creditor holds a lien. Although a chapter 7 debtor has some protections against an aggressive secured creditor in a chapter 7, including the automatic stay of creditor action and personal property redemption under section 722, the former may be lifted on behalf of a creditor who has "cause for relief from stay."

In Saylors, the mortgagee on the debtor's home obtained relief from stay, in order to foreclose, shortly before the debtor's chapter 7 case was closed. The debtor filed chapter 13 the next day, even while debtor must include payments on the arrearages during the 3-5 years of the plan. § 1322(b)(5).

75. In re Saylors, 869 F.2d 1434 (11th Cir. 1989).
76. Chapter 7 does not require post-petition payment from post-petition income, nor does it subject a debtor to continuing supervision for up to five years.
77. These debtors would generally include those who need to cure or modify claims including secured claims. See § 1322(b)(2)(5). It also includes those who are without an opportunity for discharge of debt. See 11 U.S.C. § 727(a) (1988). Also included are debtors who have nondischargeable chapter 7 debt dischargeable under the broader chapter 13 discharge. See 11 U.S.C. §§ 523(a), 1328(a) (1988). And, debtors with substantial properties not exempt in a chapter 7.
78. 869 F.2d at 1437.
82. Presumably, the debtor was in default on the debt which justified the relief from stay. See 11 U.S.C. § 362(d).
the chapter 7 case remained open. The debtor filed chapter 13 for two related reasons: first, to obtain another automatic stay to preclude the mortgagee from foreclosing, and secondly, to obtain confirmation of a chapter 13 plan which would permit cure of mortgage arrearages and retention by debtor of his home.

Saylors' chapter 7 discharge eliminated his personal liability on the note secured by his home mortgage. Nevertheless, the mortgage lien remained on his home, and the mortgagee retained his rights against the home without personal recourse against debtor, Saylors. Nonrecourse claims do not expressly fall under the definition of "claim" in section 101(4). Nor does chapter 13 further elaborate the meaning of claim. But, the court ruled that Saylors could cure this nonrecourse claim because of the rule of construction provided by section 102(2): "'[C]laim against the debtor' includes claim against the property of the debtor." So long as a mortgagor, like Saylors, retains a property interest in the land, such as provided by local law in this case, the court ruled that even a nonrecourse claim may be treated in

83. The court ruled that the previous filing under chapter 7 did not preclude a second filing under chapter 13 during the period after the chapter 7 discharge and before the chapter 7 case was closed. Saylors, 869 F.2d at 1437.

84. The debtor chose to file under chapter 13, rather than convert the case from chapter 7 to chapter 13, because the debtor sought to stay the foreclosure. Conversion may have produced merely the same stay of creditor action which the debtor had in his chapter 7. If so, the relief from that stay which the creditor had obtained may have been unaffected by the conversion. See In re States Airlines, Inc., 873 F.2d 264 (11th Cir. 1989) (holding conversion from chapter 11 to chapter 7 does not re impose stay against parties previously granted relief from stay). "The filing of a petition under section 301, 302, or 303 operates as a stay under section 362. A conversion under section 348 does not." Id. at 268.

If a conversion by Saylors would not have affected the automatic stay, then his creditor who had previously received relief from stay, would not have its rights affected by conversion. Thus, the need to file a new case under chapter 13 arose and carried the cost of a new filing fee.

85. Whether a debtor with an open bankruptcy case can obtain another stay by filing under another chapter, or by filing a new petition under the same chapter, is unclear under the Code. Saylors rules on the former.

86. A nonrecourse claim in this context means a claim against particular property of the debtor but without recourse against the debtor personally or his other assets for any deficiency.

87. 11 U.S.C. § 1322(b)(5).

88. Saylors, 869 F.2d at 1436.

89. Saylors had an equitable right of redemption under Alabama law.
a chapter 13 plan. Further, Saylors' continuing property interest in
the home gave the chapter 13 bankruptcy court jurisdiction over this
property.

Had Saylors simply filed chapter 13 to deal with a nonrecourse
claim against his home, the foregoing would hold some technical signif-
cance. The greater interest in Saylors is the serial bankruptcy or the
"chapter 20" that the court approved. The court held the fact that
the chapter 13 was filed while the chapter 7 was still pending, did not
betray the debtor's necessary good faith. "A per se rule . . . [would]
conflict with the purpose of Congress in adopting and designing chapter
13 plans." More broadly, the court held: "A bankruptcy court's de-

90. Id.
91. Id.
92. "Chapter 20" does not exist in the Code. But, a debtor who files chapter 7
and takes what relief that offers, and then files chapter 13, and takes the relief there
offered, has perhaps created a new Code chapter. Other numerical combinations have
appeared, such as a "chapter 26". E.g., In re Jones, 105 Bankr. 1007, 1011 (N.D. Ala.
W.D. 1989) (2 chapter 13 filings). The Code does not specifically impose any limita-
tions on the use of chapter 13 when a debtor has had previous bankruptcy relief. Under
chapter 7, however, the Code limits the availability of discharge where a debtor has
had previous bankruptcy relief. See 11 U.S.C. §§ 727(a)(7)-(9). Courts have disagreed
about "chapter 20" and other serial filings. Compare In re Fulks, 93 Bankr. 274
1989) (Judge Baynes soundly concludes that a chapter 13 plan should not be confirmed
if the previous chapter 7 case should have been dismissed as a "substantial abuse"
under section 707(b)).

Prior to the Code, the Supreme Court in Perry v. Commerce Loan Co., 383 U.S.
392 (1966), permitted a debtor to file a chapter XIII extension plan, although within
the prior six years he had received a discharge in the predecessor to chapter 7. Saylors
relied on Perry. But, the latter uttered a clear dictum that the decision would not apply
to a chapter XIII composition (debt-reduction) plan. Perry, 383 U.S. at 397-98. As
chapter 13 does not permit composition of a secured claim such as Saylors' mortga-
gee's, unless the secured claimant assents, the Eleventh Circuit was perhaps correct in
Saylors in relying on the Perry precedent. However, where the creditor holds an under-
secured claim, the unsecured portion is subject to composition in chapter 13. 11 U.S.C.
§§ 1325(a)(4), 1325(b). To that extent Perry would disapprove a chapter 20. As well,
a serial chapter 13 may not be effective under Perry in another foreseeable context:
where a debtor does not discharge an unsecured debt in chapter 7 because the debt is
nondischargeable under section 523(a), the debtor may wish to file chapter 13 and pay
the appropriate percentage of the debt under the plan. Perry would find this composi-
tion impermissible.

93. 869 F.2d at 1437. A chapter 13 plan must be "proposed in good faith." 11
94. Saylors, 869 F.2d at 1437.
termination whether a chapter 13 plan has been proposed in good faith is a finding of fact reviewable under the clearly erroneous standard."\(^9\)\(^6\) Since the bankruptcy court was in the best position to judge the credibility of the debtor, and it found one of the factors suggesting good faith under controlling case law,\(^9\)\(^6\) the finding of good faith was not clearly erroneous. Clearly then, chapter 13 filings following chapter 7 cases will receive serious scrutiny in the bankruptcy court. That determination will almost certainly stand on appeal, given the high standard of clearly erroneous. As a device to accomplish lien-stripping of a home mortgage,\(^9\)\(^7\) a "chapter 20" will have formidable hurdles. First, a court may as a matter of law deny the combined effect of the two chapters as doing indirectly what cannot be done directly under chapter 13 because of section 1322(b)(2). Second, a court should factually find that a chapter 13 plan has not been proposed in good faith if the prior or pending chapter 7 case might have been dismissed as a substantial abuse under section 707(b).\(^9\)\(^8\) Third, debtors will usually pay more under the chapter 13 plan on the stripped-down mortgage than their regular monthly payments to meet the secured claim cramdown standard.\(^9\)\(^9\)

II. CONCLUSION

All the implications of Folendore and the other recent cases need not come to pass. The courts can, and should, limit Folendore and the others so far as possible. Congress did not intend to imperil undersecured claims for the benefit of an individual chapter 7 debtor. Nor did Congress intend to jeopardize the home mortgage as have Wilson

95. Id. at 1438.
96. See In re Kitchens, 702 F.2d 885, 888-89 (11th Cir. 1983). The bankruptcy court had found good faith in that Saylors income had increased by $283 between the time of his two filings. Saylors, 869 F.2d at 1438.
97. This assumes the local courts will not follow Wilson and Hougland. See supra notes 54-74 and accompanying text.
98. See Samarripas, 107 Bankr. at 366. A substantial abuse under section 707(b) consists of a debtor's filing chapter 7 when the debtor has the ability to pay creditors. See, e.g., In re Rushing, 93 Bankr. 750 (Bankr. N.D. Fla. 1988) (chapter 7 dismissed where debtors could have paid all unsecured claims within three years but debtors sought to retain ski boat by reaffirmation).
99. 11 U.S.C. § 1325(a)(5)(B)(ii); see supra note 68 and accompanying text.
and *Hougland*. Finally, the courts should follow *Saylors* and permit serial bankruptcy filings, but only upon a careful scrutiny of a debtor's good faith.
Securities, Supremacy and Supposition: 1990’s Legislative and Judicial Changes to Florida’s Blue Sky Law

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I. INTRODUCTION

On July 7, 1990, the Florida Securities and Investor Protection Act, chapter 517 of the Florida Statutes,¹ was revised and re-enacted,²

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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

2. The Act was scheduled for repeal on October 1, 1990 by 1981 Fla. Laws 318 and was scheduled for review prior to repeal pursuant to the Florida Regulatory Sunset Act, Fla. Stat. § 11.61 (1989).

3. The term “Blue Sky Law” refers to state laws that regulate, inter alia, the sale and registration of securities. The term originated in 1911 in connection with the enactment by the State of Kansas of the first law governing the sale of securities. Kansas had been a stronghold of the Populist philosophy in an era when an ‘Agrarian West’ was bled by a ‘Moneyed East.’ Indeed, it was in Kansas, apparently, that the term ‘blue sky law’ first came into general use to describe legislation aimed at promoters who ‘would sell building lots in the blue sky in fee simple’.


6. Id. at §§ 2-4.

7. Id. at §§ 6, 7.

8. Id. at §§ 5, 12.

9. Id. at § 8.

10. The full text of section 517.122 of the Act prior to its amendment by 1990 Fla. Laws 362 read:

Arbitration. Any agreement to provide services that are covered by this chapter, entered into after January 1, 1987, by a person required to register under this chapter, for arbitration of disputes arising under the agreement may provide to an aggrieved party the option of having arbitration before and pursuant to the rules of the American Arbitration Association.
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 . . . ."\textsuperscript{11}

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 \textit{Securities Industry Association v. Lewis},\textsuperscript{12} 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]."\textsuperscript{13}

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 \textit{Lewis} decision. It will conclude that although the \textit{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

\textsuperscript{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.

\textsuperscript{12} 751 F. Supp. 205 (S.D. Fla. 1990).
\textsuperscript{13} \textit{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 Commission19 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.\textsuperscript{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."\textsuperscript{21}

Partially in response to the stock market crash of 1929, the Florida legislature enacted the Florida Sale of Securities Act in 1931.\textsuperscript{22} Modeled on the Uniform Sale of Securities Act\textsuperscript{23} 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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-

\textsuperscript{20} In re Universal Camera Corp., 19 S.E.C. 648, 656 (1945) (citations omitted).

\textsuperscript{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.

\textit{Id.} (citations omitted.)

\textsuperscript{22} 1931 Fla. Laws 261.

\textsuperscript{23} Uniform Sale of Securities Act (1929).

\textsuperscript{24} Final Staff Analysis, supra note 14, at 2.

\textsuperscript{25} Id.

\textsuperscript{26} Id.
ment.” 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.

In 1984, the legislature revisited the Blue Sky Law, enacting the Investor Protection Act of 1984. This Act expanded the Department of Banking and Finance’s anti-fraud enforcement authority to offers and sales of investments as well as securities. 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.”

One year later, the Florida legislature attempted once again to fine tune its Blue Sky Law by promulgating the Securities and Investor Protection Act, the grandfather of Chapter 517. Having determined that it had lacked necessary prescience in 1978 when it exempted from registration all securities registered under the United States Securities Act of 1933, 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. 36

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. 37 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." 38 The primary objective of that legislation was to enhance anti-fraud enforcement of securities and investment transactions. 39

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. 40

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. 41 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} The

\textsuperscript{47} Id.

\textsuperscript{48} 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.” Id.

\textsuperscript{49} Id. at 4.

\textsuperscript{50} The Senate passed the Bill by a vote of 38 to 0; the House passed it by a vote of 110-3. 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, changes in the registration requirements and exemptions from registration for securities industry personnel and definitional and clarification changes.

B. 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
information available on which to base an informed investment decision. One such provision exempts from securities registration secondary market transactions in a security by a registered dealer.

The Bill prohibits the use of this exemption for securities of an issuer that previously have been denied registration by the Department for cause. This change puts the secondary market on par with the primary market 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, 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. Teweles & 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:

Transactions 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 regis-
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-

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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 concern 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.\textsuperscript{71} 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."\textsuperscript{72}

But the Task Force was hesitant in re-imposing\textsuperscript{73} 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 \ldots 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."\textsuperscript{74} 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.\textsuperscript{75}

A unit of limited partnership interest, in its attributes as a security\textsuperscript{76} and in the way it is regulated as a security,\textsuperscript{77} is different from the

\begin{footnotesize}
\begin{enumerate}
\item See supra note 15.
\item 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. \textit{See, e.g.,} NASAA Statement of Policy on Cheap Stock, 1 Blue Sky L. Rep. (CCH) \textsuperscript{5311} - \textsuperscript{5314} (1984); \textit{Ad Hoc Subcommittee on Merit Regulation of the State Regulation of Securities Committee, Report on State Merit Regulation}, 10 J. CORP. L. \textsuperscript{553} (1985).
\item TASK FORCE REPORT, supra note 15, at 56.
\item See supra notes 15 and 16, and accompanying text.
\item Testimony of Royce Griffin before the Task Force in Miami, Florida (January 13-14, 1986).
\item H.B. 3429, supra note 5, \S 4.
\item A limited partnership interest is an "investment contract." An investment contract involves an investment of money in a common enterprise with an expectation of profit coming from the managerial efforts of others. S.E.C. v. Howey, 328 U.S. 293 (1946); S.E.C. v. Glen W. Turner Enter., 474 F.2d 476 (9th Cir. 1973), \textit{cert. denied}, 414 U.S. 821 (1973).
\end{enumerate}
\end{footnotesize}

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.

common stock issued by a corporation. The primary distinction (for the purposes of this discussion) is the illiquidity of the partnership interest. Units of limited partnership interest are purchased as long-term investments because usually no active secondary market for them exists.

The issuing entity also is significantly different. 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.


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.


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.

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.

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81. 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.

82. The offering price of a new issue is determined after negotiations occur between the issuer and the underwriter. The factors generally considered in those negotiations in determining the offering price at which to market a new issue are: prices of similar companies; price/earnings ratio; capitalization; projected growth; acceptability of certain maximum prices by customers; acceptability of certain minimum prices by the proposed syndicate; book value; percentage of the shares to be publicly offered in relation to the shares that will be outstanding after the offering; type of security being offered; type of company; and public confidence in the market. Kowaloff & Flood, Pricing, Effectiveness, and Closing, in SECURITIES UNDERWRITING, A PRACTITIONER'S GUIDE 325 (1985).

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:
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.

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. 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 as-
sets and liabilities of any such issuer or his income statement, or
both, to be certified to by a public accountant \ldots 89

This addition allows the Department to retain jurisdiction over is-
suers or registrants that it believes have committed a fraudulent act,
with the power to require production of documents and sworn testi-
mony. 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 invest-
ment adviser or any person occupying a similar status or performing simi-
lar 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 au-
thorized 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 re-
quest to terminate or withdraw any application or registration if the department be-
lieves that an act which would be a ground for denial, suspension, restriction, or revoca-
tion under this chapter has been committed." FLA. STAT. § 517.161(5) (1990).
It also contains the application procedure and requirements for registration.\footnote{91} The Bill adds to subsection (1) of section 517.12\footnote{92} 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.\footnote{94} This provision ensures that an individual will not be registered as an associated person of an unlicensed securities firm.\footnote{95}

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.\footnote{96} 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.\footnote{97}

\footnote{91}{FLA. STAT. § 517.12 (1990).} \footnote{92}{Id.} \footnote{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. FLA. STAT. § 517.12 (1987)(amended 1990).} \footnote{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.} \footnote{95}{FINAL STAFF ANALYSIS, supra note 14, at 6.} \footnote{96}{Id.} \footnote{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.\textsuperscript{98} 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).\textsuperscript{99} Section 517.12(3) lists the instances in which an entity or individual may sell securities in an "exempt transaction"\textsuperscript{100} in Florida without registering as a securities professional.\textsuperscript{101} The most well recognized "exempt transaction" is the private offering.
exemption in which an issuer sells his own securities to no more than 35 non-accredited purchasers during a 12 month period.\footnote{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.\footnote{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.\footnote{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.\footnote{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.\footnote{106} Prior to amendment, subsection (4) stated, \textit{inter alia}:

\begin{quote}
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.\footnote{107}
\end{quote}

\footnote{102. Section 517.061(11) contains Florida's version of the "private placement" exemption.}
\footnote{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." \textsc{Fla. Stat.} \textsection{}517.121(1) (1987)(amended 1990).}
\footnote{104. \textit{Final Staff Analysis}, \textit{supra} note 14, at 7.}
\footnote{105. \textit{Id.}}
\footnote{106. \textsc{Fla. Stat.} \textsection{}517.161 (1990).}
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.\textsuperscript{108} This modification places the standard in agreement with the other subsections of section 517.161.\textsuperscript{109}

C: Definitional Changes and Clarifications

House Bill 3429 made a number of minor definitional changes and

\begin{itemize}
\item \textsuperscript{108} As amended, section 517.161(4) reads, in part:
\begin{quote}
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.
\end{quote}
\textit{FLA. STAT. § 517.161(4) (1990)}.

The Bill also added a definition of "ultimate equitable owner" to section 517.161(4):
\begin{quote}
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.
\end{quote}
\textit{FLA. STAT. § 517.161(4) (1990)}.

\item \textsuperscript{109} Section 517.161 provides, in part:
\begin{itemize}
\item \textsuperscript{10} 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:
\item 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;
\end{itemize}
\textit{FLA. STAT. § 517.161(1) (1990)}.
\end{itemize}
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.\(^\text{115}\)

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.\(^\text{116}\) 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.\(^\text{117}\) 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.\(^\text{118}\)

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."\(^\text{119}\) 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.\(^\text{120}\)

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\(^{115}\) 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."

\(^{116}\) See, e.g., FLA. STAT. § 517.021(6) (1990) (definition of "dealer"); § 517.021(8) (definition of "guarantor"); § 517.021(10) (definition of "investment advisor"); § 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).

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

\(^{118}\) FINAL STAFF ANALYSIS, supra note 14, at 5.


\(^{120}\) 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.

Section 29(a) of the Securities Exchange Act of 1934 states: “Any condition, stipulation, or provision binding any person to waive compliance with any provision of this title or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.” 15 U.S.C. § 78cc (1990).
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.' 134 The Court did not, however, overrule Wilko v. Swan. Although the 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 McMahon that federal securities claims are arbitrable. 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. 136

In 1989, the dissenting Justices in McMahon were presented with another occasion to dissent on the issue of arbitrating federal securities law claims when the Supreme Court decided Rodriguez de Quijas v. Shearson/American Express, Inc. 137 In Rodriguez de Quijas, the Court, through Justice Kennedy, expressly overruled Wilko v. Swan and held that predispute arbitration agreements for claims arising under the Securities Act are enforceable. 138

Justice Kennedy observed that the “Court’s characterization of the arbitration process in Wilko is pervaded by . . . ‘the old judicial hostility to arbitration,’ ” 139 and recognized the growing judicial deterioration of that view, culminating in the Court’s decision in McMahon. 140

134. Id. at 233.
135. Id. at 242.
136. Id. at 233, 260.
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 Rodriguez de Quijas. Id. at 486.
138. Id.
139. Id. at 480 (citation omitted); see supra notes 124-129 and accompanying text.
140. 490 U.S. at 480-81; 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.141

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

The Court's decision in 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.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.145

B. Section 8 of House Bill 3429

Section 8 of House Bill 3429146 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, inter alia, replacing the word "may" with the word "shall."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

141. 490 U.S. at 481.
142. See supra note 123.
143. 490 U.S. at 484.
144. 490 U.S. at 477; see supra notes 133 and 134 and accompanying text.
145. The dissent in Rodriguez de Quijas did not raise the same concerns prof- fered by the dissent in McMahon. The dissent in Rodriguez de Quijas argued that stare decisis prohibited the Court from overruling Wilko. 490 U.S. at 487.
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.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{150} These were the same concerns voiced in the dissent in \textit{McMahon}.\textsuperscript{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 arbitration thereunder had not been given fair hearings before the industry panels.\textsuperscript{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 arbitration panels to groups that are associated with the securities industry. Although there was no evidence presented that would justify concern with the impartiality of these mediators, it was the Task Force's determination that an expanded selection of arbitration groups would strengthen the arbitration process through diversification. 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].\textsuperscript{153}

In 1990, the Florida Legislature amended section 517.122 of the Act and sounded a death knell to those concerns. The legislature, however, 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 October 3, 1990, the United States District Court for the Southern District of Florida summarily quieted that nascent arbitration provision, hold-

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

C. \textit{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{itemize}
  \item 156. Id.
  \item 159. Id.; 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).
  \item 162. Byrd, 470 U.S. at 220.
\end{itemize}
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.'° 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.°

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.® 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.®

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.184 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,185 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.186

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.187 The amending language of

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.\footnote{See supra note 11 and accompanying text.}

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.\footnote{Lewis, 751 F. Supp. at 206.} Plaintiffs challenged the constitutionality of section 517.122 of Chapter 517 alleging that it conflicted with the FAA and, therefore, violated the Supremacy Clause.\footnote{Id.}

Citing \textit{Perry v. Thomas},\footnote{482 U.S. 483.} 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."\footnote{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, FLA. STAT. § 517.241 (3), precluding enforcement of predispute arbitration agreements concerning securities transactions, preempted by the Act).} In addition, the plaintiffs relied substantially on \textit{Connolly}\footnote{883 F.2d 1114.} for the same assertion.

The North American Securities Administrators Association, Inc. filed an amicus curiae brief in \textit{Lewis}.\footnote{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.} NASAA argued that \textit{Connolly} was contrary to binding precedent from the United States Court of Appeals for the Eleventh Circuit.\footnote{Brief for North American Securities Administrators Association, Inc., \textit{amicus curiae} at 6-8, Securities Indus. Ass'n v. Lewis, 751 F. Supp 205 (S.D. Fla. 1990)(No. 90 Civ. 1934) [hereinafter NASAA Brief].}

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state rule of formation singled out arbitration clauses for somewhat less favorable treatment." 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.

The Lewis court dismissed NASSA's contention that Eassa Properties was controlling 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."

The plaintiffs in Lewis also contested section 517.122 on the ground that it was preempted by section 5 of the FAA. 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."
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 \textit{McMahon v. Shearson/American Express, Inc.},\(^{203}\) it opined that the Supreme Court's mandate to rigorously enforce arbitration agreements:

\begin{quote}
... 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.\(^{204}\)
\end{quote}

The plaintiffs in \textit{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 \textit{McMahon II} obviously was speaking of judicial modification of existing arbitration agreements, \textit{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 \textit{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 \textit{Lewis} court agreed with the plaintiffs' argument and held that section 517.122 was unconstitutional, pre-

\begin{footnotes}
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 \textit{McMahon II}]. In \textit{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. \textit{See supra}, note 132 and accompanying text.
204. \textit{McMahon II}, 709 F. Supp. at 373.
206. \textit{See supra} note 196 and accompanying text.
\end{footnotes}
empted 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 McMahon 208 are valid and whether they ever can and ever will be resolved remain unanswered questions. 209

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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:

[In 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.  

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.  

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 Cl, col. 3 and C21, col. 3.

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

211. See supra note 209.
I. INTRODUCTION

During the survey period there were some significant developments in the area of Florida Civil Procedure. The first development occurred in the area of subject matter jurisdiction. As of October 1, 1990, the subject matter jurisdiction of the county court was increased, both as to the jurisdictional amount in controversy and as to the county court's power to hear "matters in equity." Although the overall scope of the changes to the subject matter jurisdiction of the county courts is not totally clear, the changes do warrant discussion.

The Florida Supreme Court also decided a significant case concerning jurisdiction over the person. In *Venetian Salami Co. v. Parethenais*, the court clarified the procedure to be followed when resolving disputed factual issues relating to jurisdiction over the person. The court approved the use of brief evidentiary trial court hearings to resolve disputed issues of fact concerning in personam jurisdiction.

Florida's highest court also addressed the continuing problems of general and specific jurisdiction over the person: specifically, whether the Florida long-arm statutes require a relationship between a cause of action and the activities of a defendant corporation in the state (connexity) when the corporation has designated a residential agent for service of process in conjunction with its license to do business within the state. In *White v. Pepsico*, the court held that the Florida statutes did not require "connexity" between the cause of action and activities of the defendant corporation.

Developments in other areas of Florida Civil Practice were not as
conspicuous as those in the jurisdictional area. However, a survey of recent appellate decisions in the areas of venue,\(^6\) disqualification of judges,\(^7\) pleadings,\(^8\) discovery,\(^9\) default,\(^10\) dismissal,\(^11\) offer of judgment,\(^12\) summary judgment,\(^13\) directed verdict,\(^14\) prejudgment interest,\(^15\) costs and interest,\(^16\) attorney's fees,\(^17\) and res judicata and collateral estoppel\(^18\) have been included for a review of the trends developing in those areas. Among these topics, the Florida Supreme Court's decision in \textit{Aspen v. Bayless}\(^19\) (concerning the recovery of costs paid by a third party) and the court's discussion of attorney's fees in \textit{Standard Guarantee Insurance Co. v. Quanstrom}\(^20\) are well worth considering.

II. JURISDICTION OVER THE SUBJECT MATTER: CHANGES IN COUNTY COURT JURISDICTION

Effective October 1, 1990,\(^21\) the county court's jurisdictional amount in controversy was increased from $5,000 to $10,000, exclusive of interest, costs and attorney's fees.\(^22\) The amended statute also in-

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6. See infra notes 88-111 and accompanying text.
7. See infra notes 112-130 and accompanying text.
8. See infra notes 131-57 and accompanying text.
9. See infra notes 158-205 and accompanying text.
10. See infra notes 206-25 and accompanying text.
11. See infra notes 226-55 and accompanying text.
12. See infra notes 265-76 and accompanying text.
13. See infra notes 277-85 and accompanying text.
14. See infra notes 286-95 and accompanying text.
15. See infra notes 296-301 and accompanying text.
16. See infra notes 302-15 and accompanying text.
17. See infra notes 316-25 and accompanying text.
18. See infra notes 326-39 and accompanying text.
19. 564 So. 2d 1081 (Fla. 1990).
20. 555 So. 2d 828 (Fla. 1990).
21. There was a textual ambiguity on the face of the new law. The new law purported to take effect on both July 1, 1990 and October 1, 1990. The Florida Supreme Court, by administrative order, resolved this conflict in favor of the later date. Administrative Order, \textit{In Re County Court Jurisdiction} (Fla. July 3, 1990) (unpublished).
22. 1990 Fla. Laws 269, codified at \textsc{Fla. Stat.} § 34.01(1)(c)(3) (Supp. 1990). Section 34.01 now reads:
   Jurisdiction of county court
   (1) County courts shall have original jurisdiction:
   (a) In all misdemeanor cases not cognizable by the circuit courts;
   (b) Of all violations of municipal and county ordinances; and
   (c) As to causes of action accruing:

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creases the amount in controversy to $15,000 for causes of action accu-
ning on or after July 1, 1992.23
The amendments to Florida Statute section 34.01 also expand the
county court's jurisdiction in equitable matters. The revised statute
states that "[j]udges of county courts may hear all matters in equity
involved in any case within the jurisdictional amount of the county
court, except as otherwise restricted by the State Constitution or Laws

1. Before July 1, 1980, of all actions at law in which the matter in con-
troversy does not exceed the sum of $2,500, exclusive of interest, costs, and
attorney's fees, except those within the exclusive jurisdiction of the circuit
courts.
2. On or after July 1, 1980, of all actions at law in which the matter in con-
troversy does not exceed the sum of $5,000, exclusive of interest, costs,
and attorney's fees, except those within the exclusive jurisdiction of the
 circuit courts.
3. On or after July 1, 1990, of actions at law in which the matter in con-
troversy does not exceed the sum of $10,000, exclusive of interest, costs,
and attorney's fees, except those within the exclusive jurisdiction of the
 circuit courts.
4. On or after July 1, 1992, of actions at law in which the matter in con-
troversy does not exceed the sum of $15,000, exclusive of interest, costs,
and attorney's fees, except those within the exclusive jurisdiction of the
 circuit courts.

The party instituting any civil action, suit, or proceeding pursuant to this
schedule where the amount in controversy is in excess of $5,000 shall pay
to the clerk of the county court the filing fees and service charges in the
same amounts and in the same manner as provided in § 28.241
(2) The county court shall have jurisdiction previously exercised by county
judges' courts other than that vested in the circuit court by § 26.012, ex-
cept that county court judges may hear matters involving dissolution of
marriage under the simplified dissolution procedure pursuant to Rule
1.611(c), Florida Rules of Civil Procedure or may issue a final order for
dissolution in cases where the matter is uncontested, and the jurisdiction
previously exercised by county courts, the claims court, small claims
courts, small claims magistrates courts, pal courts, and courts of chartered
counties, including but not limited to the counties referred to in §§ 9, 10,
11, and 24 of Art. VIII of the State Constitution, 1885.
(3) Judges of county court shall be committing magistrates. Judges of
county courts shall be coroners unless otherwise provided by law or by rule
of the Supreme Court.
(4) Judges of county courts may hear all matters in equity involved in any
case within the jurisdictional amount of the county court, except as other-
wise restricted by the State Constitution or the laws of Florida.

Fla. Stat. § 34.01 (Supp. 1990).
23. Id. at § 34.01(1)(c)(4).
These recent amendments have created some ambiguity concerning the application of the revised statute. While the former statute allowed the assertion of "equitable defenses," and the amendment's language would allow counterclaims, it is unclear whether a permissive equitable counterclaim is within the purview of the 1990 amendments to the statute. Although the statutory language has been broadened by the amendments, there is not an expressed indication that an equitable permissive counterclaim could now be considered by the county court. Also, the revised statute does not make it clear whether the transfer of an action to the circuit court is now precluded when an equitable counterclaim is asserted.

Other questions flowing from the 1990 amendments include: first, whether or not the county court may now hear a compulsory equitable counterclaim that exceeds $10,000; and, second, what procedure does the county court use to determine whether or not a permissive equitable counterclaim is greater, or less, than $10,000. The answer to the first question appears to be "no" in light of the fact that the statute restricts the county court to equitable matters "within the jurisdictional amount" of the court. However, the statute does not expressly address compulsory counterclaims, and a different construction of the statute may later emerge. As to the second question, under the prior statute, Florida courts did not have to value equitable permissive counterclaims because the circuit court had exclusive jurisdiction over such claims. Assuming the amended statute is construed to require such valuation, the discussion of the United States Court of Appeals for the Seventh Circuit — determining the federal jurisdictional amount in an injunction case — in McCarty v. Amoco Pipeline Co, 25 provides an example of the proper method for determining the value of an equitable counterclaim. However, evaluating the monetary value of equitable claims is often fraught with difficulties as it involves the complicated process of evaluating intangible equitable rights.

Until there is a judicial construction of the new statute, it is this author's opinion that the better course is to err on the side of caution and construe the statute narrowly. Such a construction, in essence, would view the amendments as a supplementary grant of jurisdiction to

24. *Id.* at § 34.01(4). Compare this new language with former section 34.01(1)(c)(2) which simply stated that "[a]ll equitable defenses in a case properly before a county court may be tried in the same proceeding." *FLA. STAT.* § 34.01(1)(c)(2)(1989) (amended 1990).

25. 595 F.2d 389 (7th Cir. 1979).
the county court to hear only limited equitable matters. This approach would allow the county court to hear equitable claims arising out of the same transaction of the case, but would not vest the county court with exclusive jurisdiction over all equitable claims properly joined as additional counts to the plaintiff's claim or that could be asserted by way of permissive counterclaims. Also, this construction would permit the transfer of the action to the circuit court.

The recent amendments also addressed some other issues. County courts are now empowered to hear, or decide, certain dissolution of marriage proceedings. Further, Florida Statute section 86.011 was amended to comply with the county court's increased equitable jurisdiction. The county court is now expressly granted "jurisdiction within [its] respective jurisdictional amount[s] to declare rights, status, and other equitable or legal relations whether or not further relief is or could be claimed." 28

III. JURISDICTION OVER THE PERSON

A. Procedures for Determination of Jurisdiction

In Venetian Salami Co. v. Parthenais, the Florida Supreme Court clarified the procedure to be followed in resolving disputed fact issues governing jurisdiction over the person. Florida requires the plaintiff to plead facts upholding jurisdiction over a non-resident served outside the state. The pleading requirement, and the confusion as to whether ultimate or evidentiary facts must be pled, was greatly sim-

27. 1990 Fla. Laws 269.
29. 554 So. 2d 499 (Fla. 1989).
30. The commentary to the 1980 Amendment to Rule 1.070 addresses this confusion:

1980 Amendment. Subdivision (i) is added in 1980 to eliminate pleading evidentiary facts for "long-arm" service of process. It is based on the long standing principle in service by publication that pleading the basis for service is sufficient if it is done in the language of the statute. See McDaniel v. McElvy, 91 Fla. 770, 108 So. 820 (1926). Confusion has been generated in the decisions under the "long-arm" statute. See Wm. E. Strasser Construction Corp. v. Linn 97 So. 2d 458 (Fla. 1957); Hartman Agency, Inc. v. Indiana Farmers Mutual Insurance Co., 353 So. 2d 665 (Fla. 2d Dist. Ct. App. 1978), and Drake v. Scharlau, 353 So. 2d 961 (Fla. 2d Dist. Ct. App. 1978). The amendment is not intended to change the distinction be-
plified by the 1980 amendments adding Rule 1.070(i), allowing the pleading to track the language of the long-arm statute.\textsuperscript{31} When the plaintiff has pled the statutory language under which jurisdiction is claimed, the defendant who desires to oppose jurisdiction must file evidentiary affidavits contesting the factual basis for jurisdiction. Once the plaintiff's pleadings are challenged by the defendant's affidavit, the burden of proof to establish, by evidentiary facts, the existence of jurisdiction is upon the plaintiff. Traditionally this has been done in several ways: attaching supporting affidavits to the complaint; filing separate affidavits; and using discovery materials. This paper has often produced conflicting affidavits concerning an identical evidentiary fact. In \textit{Venetian Salami}, the court required the trial court to conduct a live evidentiary hearing to resolve disputes.\textsuperscript{32} This hearing enables the trial court to judge credibility, weight of the evidence, and resolve the conflict.

Discovery, including interrogatories and requests for admissions, as well as depositions, can be an important tool for the plaintiff in gathering information to satisfy the burden of proof at the jurisdictional hearing. Indeed, the United States Supreme Court upheld, as a sanction for the defendant's failure to respond to interrogatories, the striking of the defense of lack of jurisdiction.\textsuperscript{33} In view of the \textit{Venetian Salami} decision, the use of discovery and brief but evidentiary trial court hearings to determine jurisdiction over the person will be the rule rather than the exception. Appellate courts should give deference to the trial court's resolution of fact issues, although the question of law that

\begin{itemize}
\item \textbf{between pleading and proof as enunciated in \textit{Elmex Corp. v. Atlantic Federal Savings & Loan Association of Fort Lauderdale}}, 325 So. 2d 58 (Fla. 4th Dist. Ct. App. 1976). It is intended to eliminate the necessity of pleading evidentiary facts as well as those of pecuniary benefit that were used in the \textit{Elmex} case. The amendment is limited to pleading. If the statutory allegations are attacked by motion, the pleader must then prove the evidentiary facts to support the statutory requirements. If denied in a pleading, the allegations must be proved at trial. Otherwise, the allegations will be admitted under Rule 1.110(e).

\item \textbf{Rule 1.070(i) states:} "\textit{W}hen service of process is to be made under statutes authorizing service on non-residents of Florida, it is sufficient to plead the basis for service in the language of the statute without pleading the facts supporting service." FLA. R. Crv. P. 1070(i).

\item \textbf{\textit{Venetian}}, 554 So. 2d 499 (Fla. 1989).

\item \textbf{\textit{Insurance Corp. of Ireland Ltd. v. Compagnie Des Bauxites de Guinee}}, 456 U.S. 694, 707 (1982).
\end{itemize}
may be involved would be reviewed de novo. 34

In Devaney v. Solitron Devices, Inc., 35 the court reversed on due process grounds, the trial court's determination of jurisdiction at a hearing noticed for other purposes. The jurisdictional hearing in Devaney had been scheduled for a later date and the court held that it was error to determine the jurisdictional question at a hearing noticed only for motions to compel discovery. 36

B. Connexity: The Problems of General and Specific Jurisdiction

In White v. Pepsico Inc., 37 the Florida Supreme Court answered a jurisdictional question certified by the Eleventh Circuit 38 as to whether Florida long-arm statutes required a relationship between the cause of action and the defendant corporation's activities in Florida ("connexity") where the corporation had designated a residential agent for service of process in Florida in conjunction with its license to do business in the state. 39 The supreme court ruled that the Florida statute did not require connexity. 40 The Eleventh Circuit only certified the question as to the construction and meaning of the Florida statute, not to question whether federal due process would require connexity. In this respect, it has long been held that a state, if it so chooses, could subject a foreign corporation that has appointed a resident agent for service of process to general in personam jurisdiction over causes of action that have no re-

35. 564 So. 2d 1229 (Fla. 4th Dist. Ct. App. 1990).
36. Id. at 1229-30.
37. 568 So. 2d 886 (Fla. 1990).
38. The Eleventh Circuit certified the following question:
   WHETHER, IN ACTIONS THAT ACCRUED BEFORE 1984, SERVICE ON A REGISTERED AGENT PURSUANT TO FLA. STAT. ANN. §§ 48.081(3) and 48.091(1) [1983] CONFERRED UPON A COURT PERSONAL JURISDICTION OVER A FOREIGN CORPORATION WITHOUT A SHOWING THAT A CONNECTION EXISTED BETWEEN THE CAUSE OF ACTION AND THE CORPORATION'S ACTIVITIES IN FLORIDA.
   White v. Pepsico, Inc., 866 F.2d 1325, 1326 (11th Cir. 1989).
39. White, 568 So. 2d 886.
40. Id.
relationship to the forum. 41

Service upon a foreign corporation's resident agent in the state is analogous, if not tantamount, to jurisdiction over a foreign citizen who is personally served with process in the state. The United States Supreme Court in Burnham v. Superior Court of California, 42 reaffirmed a state's power over a transient non-resident, personally served within the state, notwithstanding that the transient actions of the defendant within the state were not the basis of the cause of action asserted. 43

General versus specific concepts of jurisdiction have been the source of confusion and debate. The Florida Supreme Court in White quoted the definition offered by the United States Supreme Court in Helicopteros Nacionales de Colombia, S.A. v. Hall: 44

When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State has been said to be exercising 'general jurisdiction' over the defendant.' General jurisdiction is to be distinguished from 'specific jurisdiction,' which occurs 'when a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum. 45

In view of the Florida Supreme Court's citation to both Helicopteros 46 and Perkins v. Benguet Consolidated Mining Co., 47 some additional comments are necessary. Unlike White v. Pepsico Inc., the corporations in Perkins and Helicopteros had not obtained a license to do business in the forum state and consequently had not appointed a resident agent for service of process. Thus, neither Perkins nor Helicopteros is apropos concerning the issue decided in White.

In Perkins, the foreign corporation was generally carrying on all of its business activities in Ohio, and had, as a practical, matter ceased all business operations in the Philippines. The United States Supreme Court held that federal due process would not bar Ohio courts from

42. 110 S. Ct. 2105 (1990).
43. Id. at 2111.
44. 466 U.S. 408 (1984).
45. 568 So. 2d at 888 n.3 (citations omitted).
46. 568 So. 2d at 888 n.3 (citing Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984)).
47. 568 So. 2d at 888 (citing Perkins v. Benquet Consolidated Mining Co., 342 U.S. 487 (1951)).
exercising jurisdiction over the foreign corporation that was generally and systematically carrying on business activities in Ohio, even though the cause of action was in relation to matters which had occurred in the Philippines.\(^{48}\)

In *Helicopteros*, the United States Supreme Court held that more than a million dollars worth of business activities by the foreign entities in Texas were not the equivalent of the general and systematic activities of Benguet Mining in Ohio, and refused to extend the *Perkins* doctrine of general jurisdiction.\(^{49}\) The plaintiffs in *Helicopteros* (wrongful death actions for a helicopter crash in Peru) did not argue "specific" jurisdiction (*i.e.* the purchase of the helicopter, obtaining parts, and training of pilots, all in Texas, was related to the cause of action), and instead relied upon the concept of general jurisdiction.

*Helicopteros*, by limiting the theory of general jurisdiction over a foreign corporation (that does not have a resident agent) to the *Perkins* quality and quantum of facts, has eliminated practical utilization of the concept. Perhaps the problem is that the dichotomy of general and specific jurisdictional theories is so deceptively simple. Indeed, the United States Supreme Court in wrestling with substantiality of minimum contacts for specific jurisdiction has found two separate aspects: first, the question of what constitutes power; and second, the question of what is reasonable if such power exists.

The question of whether the activities of the foreign corporation that took place in the forum state were the basis for the cause of action, was clear in *International Shoe Co. v. Washington*.\(^{50}\) That case spawned the recognition of the "traditional notions of fair play and substantial justice" test, a wonderfully warm usage of constitutional prose that promotes flexibility rather than certainty.\(^{51}\) In *Hanson v. Denckla*,\(^{52}\) the question of the relationship between the trustees' conduct in Florida and the cause of action was more ambivalent with the Court, more by judicial fiat than analysis. The Court determined that there were no contacts in Florida because the claim concerned the validity of the power of appointment of a trust that had been created in Delaware.\(^{53}\) That the power of appointment had been executed in Flor- 

\(^{48}\) *Id.*

\(^{49}\) 466 U.S. at 416.

\(^{50}\) 326 U.S. 310 (1945).

\(^{51}\) 326 U.S. at 316 (citations omitted).

\(^{52}\) 357 U.S. 235 (1958).

\(^{53}\) *Id.* at 251.
ida, and the will probated in Florida, were not consensual minimum contacts because the legal question was whether the appointment clause of the Delaware trust authorized it to be exercised by a will.\textsuperscript{54}

Although \textit{Hanson} took a narrow view of what activities may be deemed related to the claim for relief, this question of the relationship is not easily resolved. A case of substantial interest to Florida's cruise line business is now pending before the United States Supreme Court.\textsuperscript{55} The Court is reviewing a Ninth Circuit decision upholding jurisdiction over a passenger's \textit{Washington} action for a slip and fall aboard ship in international waters off the coast of Mexico.\textsuperscript{56} Unlike \textit{Helicopteros}, special jurisdiction is claimed upon the relationship of the business activities (\textit{i.e.} soliciting Washington residents for international cruises by Florida agents) to the cause of action.\textsuperscript{57} This author believes jurisdiction should be upheld. But whatever the ruling, the case will be of significance.

\textit{Conley v. Boyle Drug Co.},\textsuperscript{58} decided shortly after \textit{White}, also involved construction and application of the Florida long-arm statutes. The Florida Supreme Court ruled that cross-petition motions to dismiss for lack of personal jurisdiction should have been granted because the plaintiff failed to offer any counter-affidavits or other evidentiary proof of their allegations in response to the defendants' affidavits opposing jurisdiction.\textsuperscript{59} The court also held against retroactive use of amendments to the long-arm statutes: "The prohibition against retroactive application applies in connection with both aspects of the long-arm statute at issue."\textsuperscript{60}

A correct and clear illustration of the principle that obligations for payment pursuant to a contract made outside the State of Florida, for services to be performed outside the state, do not vest jurisdiction in Florida simply because the payee subsequently moved to Florida, is found in \textit{Cookbook Publishers Inc. v. American Dental Program}.\textsuperscript{61} \textit{Cookbook Publishers} recognized that jurisdiction over the payer of an obligation is not carried on the back of the payer and simply does not

\textsuperscript{54} \textit{Id.} at 253.
\textsuperscript{57} \textit{Id.}
\textsuperscript{58} 570 So. 2d 275 (Fla. 1990).
\textsuperscript{59} \textit{Id.} at 288-89.
\textsuperscript{60} \textit{Id.} at 288.
\textsuperscript{61} 559 So. 2d 1301 (Fla. 4th Dist. Ct. App. 1990).
exist in any new forum in which the payee chooses to relocate. However, a different situation arises when the parties have contracted for payment within Florida. Such a situation would involve consideration of the totality of the transaction with a due process analysis of reasonableness.

C. *Waiver by Appearance of Plaintiff or Defendant / Collateral Attack / Child Support and Custody*

Ever since the decision by the United States Supreme Court in *Baldwin v. Iowa State Traveling Men's Ass'n*, it has been established that a party who has appeared is bound by that court's jurisdictional ruling and may not collaterally attack the decree for lack of jurisdiction. Moreover, if a party appears and does not raise the defense of lack of jurisdiction over the person, it has been deemed to be waived. Indeed, the United States Supreme Court in *York v. Texas* upheld a state's right to make every appearance a general appearance and thus bar the use of a special appearance to challenge jurisdiction. But where a party has not appeared and final judgment based upon default is obtained, it has been established since the days of *Pennoyer v. Neff* that a collateral attack may be made. These principles were recognized in *Riskin v. Miklos*, which held a "defensive jurisdictional motion filed by an attorney who was not admitted to the Ohio bar and which, for that reason, was - quite correctly - stricken by the Ohio court" did not constitute an appearance. Subsequently, the court ordered the trial court on remand to hear the jurisdictional attack.

In *Edwards v. Johnson*, the question was whether an out-of-state plaintiff, by voluntarily appearing and invoking the jurisdiction of a Florida court, is submitted to the jurisdiction of such court over permissive counter-claims authorized by Rule 1.170. The court opined:

62. *Id.*
63. *See id.* at 1303.
64. 283 U.S. 522 (1931).
65. FLA. R. CIV. P. 1.140.
66. 137 U.S. 15 (1890).
67. 95 U.S. 714 (1877).
68. 569 So. 2d 940 (Fla. 3d Dist. Ct. App. 1990).
69. *Id.* at 941.
70. *Id.*
The general rule with regard to personal jurisdiction is that a plaintiff who initiates an action in Florida court subjects himself to the jurisdiction of that court, and to such lawful orders which are thereafter entered, only with respect to the subject matter of the action. 72

The Third District Court of Appeal opinion in Burden v. Dickman, although cited by the First District as authority, does not support the Edwards opinion. In Burden, jurisdiction was upheld over the plaintiff because “[b]y petitioning the probate court to be appointed joint guardians of the property, the Burdens submitted themselves to the court’s jurisdiction. They cannot now be heard to allege lack of personal jurisdiction.”73

None of the cases cited held that a permissive counterclaim creates an exception to the general rule. In Frazier v. Frazier,’ which was also cited in Edwards, Florida was simply not the proper forum to modify the parties’ foreign dissolution decree.

With due deference, this rule that a foreign plaintiff is not subject to a permissive counterclaim appears, at first glance, to have little merit and substance. Upon further analysis, the rule makes even less sense. If a Florida plaintiff files suit in Florida, that Florida plaintiff is certainly subject to jurisdiction of any and all counterclaims, permissive or compulsory. The Rules do not require, or even provide, for the issuance of a summons for service of an answer (a counterclaim is not a separate pleading, it is to be included in the answer)75 upon the plaintiff. It is to be served (without a summons) on the plaintiff’s attorney (or plaintiff if pro se) as provided in Rule 1.080.76

Contrary to the First District’s reasoning, there is no statutory provision in Chapter 48 of the Florida Statutes, or elsewhere, that requires the defendant to obtain service by summons over the plaintiff. What possible rationale could exist for judicially creating an immunity in favor of a foreign plaintiff who chooses to voluntarily invoke the Florida’s judicial system to assert a claim against a Florida citizen? Is the quality of Florida justice so low and inferior that in good conscience we should protect foreign plaintiffs from the evils of the Florida

72. Id. at 474 (citing Burden v. Dickman, 547 So. 2d 170, 172 (Fla. 3d Dist. Ct. App. 1989)).
73. Burden, 547 So. 2d at 172.
74. 442 So. 2d 1116 (Fla. 4th Dist. Ct. App. 1983).
75. FLA. R. CIV. P. 1.170.
76. See generally FLA. R. CIV. P. 1.080.
judicial system? Surely Florida’s jurisprudence recognizes that the achievements of its legal system are at least as good as, if not better than, those of its sister states. Perhaps the reason for the Rule is that, if the foreign plaintiff had not filed suit in Florida, the Florida defendant would have had to invoke the aid of a foreign forum to obtain relief. With deference, the refusal to exercise jurisdiction should not be predicated on what the foreign party plaintiff did not do, but on what the party did do—which was to file suit in Florida and invoke the operation of the Florida judicial system. There is neither a constitutional prohibition—state or federal—or any Florida Supreme Court case, that would mandate that jurisdiction over a plaintiff be limited to the claim contained in the complaint.\(^7\)

Florida specifically has provided for jurisdiction over a spouse residing in Florida pursuing an action for alimony or child support.\(^8\) This provision does, however, continue to raise questions as to its proper meaning.

In *Durand v. Durand*, the husband contended that the provisions of the statute did not apply because he did not reside in Florida “immediately” prior to filing of the action. The court recognized that the residency should “proximately proceed the commencement of the action” but upheld jurisdiction notwithstanding the passage of several years, upon the “totality of the circumstances.”\(^8\) In *Dunlop v. Dunlop*,\(^8\) the parties had been married in New York and divorced in London some 14 years later. After the divorce, the wife moved to Florida and the husband made support payments. The court held jurisdiction did not exist in reference to her suit to domesticate a foreign judgment and to increase child support.\(^8\)

In *Alvarez v. Alvarez*,\(^8\) following a Florida divorce and the granting of custody to the mother, the father kidnapped the child from Florida and concealed the child in New York for six years.\(^8\) After the mother regained custody in Florida, the father, nevertheless, was allowed limited visitation.\(^8\) After the mother, now remarried, had moved

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77. *See generally White*, 568 So. 2d 886.
80. *Id.* at 839 (citations omitted).
81. 564 So. 2d 618 (Fla. 4th Dist. Ct. App. 1990).
82. *Id.* at 619.
83. 566 So. 2d 516 (Fla. 3d Dist. Ct. App. 1990).
84. *Id.* at 516.
85. *Id.*
to New Jersey with her child, the husband brought the child to Florida and, believe it or not, obtained an emergency change of custody at a 7:15 a.m. hearing based upon a telephonic notice to the mother in New Jersey. The Florida District Court of Appeal reversed on the basis that Florida should decline to exercise jurisdiction in favor of New Jersey pursuant to section 61.1316(3) of Florida's Statutes.

IV. VENUE

Unlike the significant statutory changes in the subject matter jurisdiction of the Florida circuit and county courts, and a number of significant cases concerning jurisdiction over the person, the venue cases were mainly representative of typical problems. Nevertheless, there are several matters worth noting.

Among the recurring issues is the standard of review. In Hickman v. Sacino, the court stated that the standard for review for granting or refusing a change of venue under forum nonconveniens is "'palpable' abuse or a grossly 'improvident' exercise of discretion." In Carter v. Fleming, the complaint alleged that a promissory note was due and payable (to the holder after default) in Escambia County. The appellate court found an abuse of discretion:

Because the promissory note designated Duval County as the place of payment and the complaint contains no allegation of fact that

86. Id.
87. The statute provides in pertinent part:
   (3) In determining if it is an inconvenient forum, the court shall consider if it is in the interest of the child that another state assume jurisdiction. For this purpose if may take into account the following factors, among others:
   (a) If another state is or recently was the child's home state;
   (b) If another state has a closer connection with the child and his family or with the child and one or more of the contestants;
   (c) If substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state;
   (d) If the parties have agreed on another forum which is no less appropriate; and
   (e) If the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in s. 61.1304.

88. 566 So. 2d 903 (Fla. 4th Dist. Ct. App. 1990)(per curiam).
89. Id. at 903 (citation omitted).
90. 567 So. 2d 535 (Fla. 1st Dist. Ct. App. 1990)
prior to Carter's breach for nonpayment a holder in due course of the note designated another place of payment, the cause of action alleged in count two could only have accrued in Duval County. Thus, the trial court abused its discretion in ruling that proper venue for count two lies in Escambia County.91

Several appeals involved related lawsuits pending in different counties. In *Independent Fire Insurance Co. v. Arvidson*,92 an insurer had previously filed a suit for a declaratory judgment against the insured to void a policy allegedly procured by misrepresentation. The present suit was brought by the insured against the tortfeasor and the insurance company for PIP and uninsured/underinsured benefits. No abuse of discretion was found in the trial court's refusal to transfer the personal injury action; however, the district court ordered the trial action stayed pending the declaratory judgment suit.93

Several cases accomplished a consolidation by transferring. In *Towers Construction Co. v. Key West Polo Club Apartments, Ltd.*,94 while a contractor's suit to foreclose on a mechanic's lien was pending in Monroe County, a subsequent suit alleging fraud and other matters was filed in Bay County and transferred by stipulation to Monroe County. The defendant in those proceedings then filed an unjust enrichment action in Orange County based upon a mistake in making payments. The court ordered the Orange County suit transferred:

[W]here there are two actions between the same parties pending in different circuits, jurisdiction is in the circuit where service of process was first perfected. Where the suits revolve around the same set of facts, the claims are interrelated and one lawsuit can resolve the issues, it is judicially prudent to permit both suits to be resolved in the same forum.95

Similarly, in *Edward J. Gerritts Inc. v. Chambers Truss Inc.*,96 the court stated: "In the interest of justice, venue should be transferred where it will avoid piecemeal litigation and the possibility of inconsistent results. In addition, a change of venue is intended to prevent a

91. *Id.* at 536-37.
92. 564 So. 2d 1254 (Fla. 4th Dist. Ct. App. 1990).
93. *Id.* at 1255.
94. 569 So. 2d 830 (Fla. 5th Dist. Ct. App. 1990).
95. *Id.* at 831 (citations omitted).
96. 564 So. 2d 625 (Fla. 4th Dist. Ct. App. 1990).
miscarriage of justice in the correct venue or to afford a more convenient venue." 97

The interpretation of "or other representative" contained in the venue statute section 47.051 was at issue in Piper Aircraft Corp. v. Schwendemann. 98 The statute, which is of substantial importance because it governs venue over foreign corporations, states in full:

Actions against corporations. -Actions against domestic corporations shall be brought only in the county or district where such corporation has, or usually keeps an office for transaction of its customary business, where the cause of action accrued, or where the property in litigation is located. Actions against foreign corporations doing business in this state shall be brought in a county where such corporation has an agent or other representative, where the cause of action accrued, or where the property in litigation is located. 99

The Third District Court of Appeal held that Piper Aircraft had representatives in Dade County on the basis of having two independent and separate entities there that were "contractually authorized by Piper to perform repair, warranty, and maintenance work." 100

The rule that a specific venue statute governs an action when a general venue provision is also available was cited in Bryant v. Bryant. 101 The court held, in a suit to enforce alimony and child support resulting from a Dade County judgment, that venue properly lay in Orange County, the location where the mother and child were now residing. 102

Spector v. Old Town Key West Development Ltd., 103 recognized the general rule that a "local action" construction requires transfer of an action to the county where the land at issue is located. The court held, however, that a claim for the appointment of a liquidating trustee for the assets of a limited partnership — assets which included real property — was a transitory rather than a local action. 104

97. Id. at 625.
98. 564 So. 2d 546 (Fla. 3d Dist. Ct. App. 1990).
100. 564 So. 2d at 547.
101. 566 So. 2d 65 (Fla. 5th Dist. Ct. App. 1990).
102. Id. at 68.
103. 567 So. 2d 1017 (Fla. 3d Dist. Ct. App. 1990).
104. Id. at 1018.
Posey v. Sheldon\textsuperscript{105} involved the question of which party should pay fees upon the transfer of an action. The Orange County Circuit Court ordered plaintiff's suit on a note executed in Okaloosa County transferred for improper venue, but nonetheless directed the defendant to pay the transfer fees. The district court reversed the ruling on fees under section 47.091 of the Florida Statutes which requires the party initially filing the action to pay the fees where the action was filed initially in the improper forum. Apparently, the trial court had confused a transfer under Rule 1.170(j), where a defendant's counterclaim or cross-claim exceeds the jurisdiction of county court and where the defendant pays the fees, with a transfer under Rule 1.060, which provides for transfer when the court in which the plaintiff filed suit lacks subject matter jurisdiction or venue. The Fifth District was clearly correct in holding that the plaintiff who has filed in the wrong venue must pay the transfer costs, not only because of section 47.091\textsuperscript{106} of the Florida Statutes, but also because of Rule 1.060(c) which states:

Method. The service charge of the clerk of the court to which an action is transferred under this rule shall be paid by the party who commenced the action within 30 days from the date the order of transfer is entered, subject to taxation as provided by law when the action is determined. If the service charge is not paid within the 30 days, the action shall be dismissed without prejudice by the court that entered the order of transfer.\textsuperscript{107}

What is strange, is why would the defendant want the suit transferred instead of dismissed for improper venue? Ordinarily the defendant moves to dismiss for lack of venue, and the plaintiff will request transfer rather than refiling a new action in the proper county (which should be done, of course, before the statute of limitations runs).

One final note concerning transfers under Rule 1.060 and 1.170(j) is that although Rule 1.060(a) and (b) specify that the transfer is to be "by the same method as provided in Rule 1.170(j),"\textsuperscript{108} section (c) of Rule 1.060 mandates a different method. Not only must the defendant tender the transfer fee under Rule 1.170(j), the defendant must do so at the time the counterclaim is filed (unless the court in its discretion

\begin{itemize}
  \item \textsuperscript{105} 560 So. 2d 357 (Fla. 5th Dist. Ct. App. 1990).
  \item \textsuperscript{106} FLA. STAT. § 47.091 (1989).
  \item \textsuperscript{107} FLA. R. CIV. P. 1.060(c).
  \item \textsuperscript{108} See FLA. R. CIV. P. 1.060(a) and (b).
\end{itemize}
extends the time).\textsuperscript{109} Under Rule 1.170(j), if the fee is paid, "the action shall be transferred forthwith."\textsuperscript{110} In contrast, under Rule 1.060(c) the plaintiff is to pay the fee within 30 days after the case is ordered transferred, which transfer the court "may" order instead of "shall" order.\textsuperscript{111}

V. DISQUALIFICATION OF JUDGES

Concepts of equity and justice are predicated on the policy of unbiased judges making impartial judicial decisions. In the common mind, judges are expected to be above reproach, totally objective, and Solomon-like as they distribute justice to the masses.

Unfortunately, most judges are merely human, notwithstanding our desires that they be otherwise. When the question of a "fair trial" or "conflict of interest" arises, two mechanisms come into play: Article V of the Florida Constitution, through the Judicial Qualifications Commission, regulating the grounds for admonishment or continuance in office; and recusal, either initiated by the judge himself, by suggestion, or by motion by one of the parties involved who might be threatened by the judge's potential for bias. Disqualification is a sensitive area for judges regardless of what mechanism is utilized.

While the Judicial Administration Rule 2.060 requires a lawyer to disregard the unfounded request of a client for disqualification of a judge, a more difficult decision must be made when the client's fears appear to be valid. Unfortunately, parties are able to abuse the system and eliminate, under the guise of bias, a competent, intelligent, and unbiased judge in the hope and expectation of obtaining a successor judge who would be friendly to the movant. Undoubtedly, this has happened and will continue to happen, but there is no effective way of precluding this possible evil because it appears essential that a challenged judge not conduct a hearing to refute ill-founded allegations. The lawyer must weigh his professional and ethical responsibilities to represent his client's best interests against personal concerns about offending the judge and living with the possible ramifications in future cases. Following an unsuccessful motion, a lawyer may find there is some truth in the old adage that if one is going to shoot at the king, it is better not to merely wound him. Additionally, the replacement may

\textsuperscript{109} FLA. R. CIV. P. 1.060(c).
\textsuperscript{110} FLA. R. CIV. P. 1.170(j).
\textsuperscript{111} FLA. R. CIV. P. 1.060(c).
cause the original judge to look more attractive in retrospect.

Proper procedures for disqualification of judges are discussed in the Florida Code of Judicial Conduct, Canon 3-C, and are based on Rule 1.432 and chapter 38 of the Florida Statutes. If a legally sufficient motion is filed, the judge must proceed to enter an order of disqualification and may take no further actions on the case. "Legal sufficiency" is met by technical compliance with the statutory and Rule requirements as well as a determination of whether the allegations would cause "a reasonably prudent person" to fear an unfair or biased hearing before the judge in question. While technical noncompliance has not barred valid claims in the past, not all courts are tolerant of motions which do not meet section 38.10 guidelines requiring the inclusion of an affidavit of prejudice.

Motions must be made within a "reasonable time" following the discovery of valid grounds for disqualification. Timely filing alleviates unnecessary costs, delay, and adverse effects on the other parties. "An allegation in a motion that a litigant or counsel for a litigant has made a legal campaign contribution to the political campaign of the trial judge, or the trial judge's spouse, without more, is not a legally sufficient ground [for disqualification]." In MacKenzie v. Super Kids Bargain Store, two suits were consolidated around a

114. Thunderbird, 566 So. 2d. at 1304 (citation omitted).
115. Caleffe v. Vitale, 488 So. 2d 627 (Fla. 4th Dist. Ct. App. 1986) (failure to comply with statutory requirements by attaching a certificate of good faith to the motion to disqualify, did not require that movant's motion to disqualify be denied).
117. Fla. R. Civ. P. 1.432(c).
118. Fischer v. Knuck, 497 So. 2d. 240 (Fla. 1986).
119. MacKenzie, 565 So. 2d at 1335 (footnote omitted).
120. 565 So. 2d 1333 (Fla. 1990).
121. Breakstone v. MacKenzie, 561 So. 2d 1164 (Fla. 3d Dist. Ct. App. 1990), was consolidated with Super Kids Bargain Store, Inc. v. MacKenzie for the purpose of en banc consideration at the appellate level. In Breakstone, at the trial court level, the defendant's motion was denied by MacKenzie. A renewed motion was also denied. In Super Kids, after the defendant moved for disqualification on the basis of the same $500 campaign contribution, plaintiff's counsel's ore tenus motion for substitution of counsel was granted, but the motion for disqualification was denied.
common allegation of bias due to a $500 campaign contribution given by the plaintiff's counsel to the trial judge's husband. The Florida Supreme Court determined that, although there are valid concerns with campaign contributions under the judicial election system, such contributions are an unavoidable part of the election process. The court then found "that Florida's Code of Judicial Conduct together with . . . statutory limitations[s] upon campaign contributions and the requisite public disclosure of such contributions, provided adequate safeguards" and a per se rule of disqualification because of campaign contributions was not necessary. The court then held that when a campaign contribution is the sole grounds for a judge's suggested recusal, it will be considered legally insufficient for disqualification purposes. Additionally, the court confirmed that judges are not to go "beyond a mere determination of the legal sufficiency of the motion" and should not attempt to defend or refute the allegations of impartiality.

When more than one disqualification is requested by any party to a suit, "a subsequent disqualification under section 38.02 shall be treated in the same manner as an initial disqualification under that statute." An important distinction exists between a disqualification under section 38.02 and a disqualification under section 38.10. While subsequent disqualifications by the same party under section 38.02 are treated "in the same manner," a party, under section 38.10, has only "one unfettered right" for a judge's disqualification so that the same party's subsequent motion for a disqualification under section 38.10 is governed by the stricter standard stated in the second portion of that statute.

122. MacKenzie, 565 So. 2d at 1335, 1340. Justice Kogan notes how easily the Rules could be abused if the district court of appeal ruling had been affirmed, allowing a $500 contribution to be legally sufficient for disqualification. "Attorney's who wished to steer their cases away from a particular judge need do not more than contribute a large sum to that judge's campaign . . . [T]hese attorneys in actuality would be buying insurance that the judge could never hear their cases." Id. at 1340 (Kogan J., concurring specially).

123. Id. at 1336.

124. Id. at 1339 (quoting Bundy v. Rudd, 366 So. 2d 440, 442 (Fla. 1978)("[W]hen a judge has looked beyond the mere legal sufficiency of a suggestion of prejudice and attempted to refute the charges of partiality, he has then exceeded the proper scope of his inquiry and on that basis alone established grounds for his disqualification." (emphasis omitted))).


126. Id. at 256.
In *Brown v. St. George Island, Ltd.*,\(^{127}\) the original trial judge was recused under section 38.02 and the succeeding judge had been disqualified under section 38.10. The Florida Supreme Court agreed that a negative statement by a trial judge causes a party to feel that the judge is biased against him, and it is reasonable for such a litigant to fear they would not receive a fair trial under that judge.\(^{128}\) One month later, the supreme court revisited *Brown* and held that when an opposing party to a suit moves under section 38.10 to disqualify a judge, the motion is regarded as an initial motion for that party even if it is a second or third disqualification within the same suit.\(^{129}\) The court noted that a second request by a party who had previously sought a disqualification is subjected to a stricter standard under section 38.10, but when a second disqualification is sought by a party who has not previously filed such a motion, then “each side has the right to seek the disqualification of one judge under the standard enumerated in the first portion of section 38.10.”\(^{130}\)

VI. Pleadings

Florida has adopted liberal rules on pleading, and forms of action and technical forms for pleas have been abolished.\(^{131}\) In *Mayedo v. Oolite Industries, Inc.*,\(^{132}\) the court reversed the trial court’s ruling because the “judgment represents an aggravated and obviously unacceptable case of . . . reliance upon a meaningless technicality.” Leave of the court to amend pleadings “shall be given freely when justice so requires.”\(^{133}\) However, despite liberal rules for pleadings, problems have arisen on appeal. Generally, recent cases reflect a trend to allow amendment as required. In *Salamon v. Munuswamy, M.D., P.A.*,\(^{134}\) the court ruled that although an amended complaint had been filed exclusively for declaratory relief, the court would allow supplementary

\(^{127}\) *Id.* at 254.

\(^{128}\) *Id.* at 257.


\(^{130}\) *Id.* at 685. The court stated that “[i]t would be illogical to assume that the legislature intended for the party that first disqualifies a judge under section 38.10 to have that motion measured by a less stringent standard than a later motion filed by an opposing party seeking to remove a successor judge.” *Id.*

\(^{131}\) Fla. R. Civ. P. 1.110.

\(^{132}\) 566 So. 2d 879 (Fla. 3d Dist. Ct. App. 1990).

\(^{133}\) Fla. R. Civ. P. 1.190 (a).

\(^{134}\) 566 So. 2d 899 (Fla. 4th Dist. Ct. App. 1990).
relief and an amendment that included injunctive relief as well. 135 In Johnson Engineering, Inc. v. Pate, 136 the appellate court allowed amendment after the trial court had denied a demand for jury trial as untimely. 137 The appellate court ruled that although the case had already been noticed for a nonjury trial, raising of new issues which are triable by a jury, embodied by an amended answer, warrant granting of such a jury trial. 138 In Estate of Bobinger v. Deltona Corp., 139 the court overturned a trial court's dismissal with prejudice of a class action suit, stating that the appellants should have been allowed an opportunity to amend their complaint. 140 In this particular case, the trial court had dismissed for failure to state a cause of action. 141 The appellate court upheld the dismissal, and only took issue with the lower court's disallowance of leave to amend the complaint. 142

However, blanket leave to amend is not guaranteed. At a minimum, "[f]undamental concepts of due process require a party seeking modification of a prior court order to file a written pleading and provide appropriate notice to all parties concerned." 143 Furthermore, appellate courts appear disinclined to review cases where the appellant has not sought leave of the trial court to amend before pressing an appeal. In Perruzzi v. Ferretti, 144 the court held that an appellant who did not seek leave of the trial court to amend his complaint cannot complain that he should have been granted leave to amend. 145 The appellate court dismissed the appeal because "[t]o bring this claimed right to amend to the appellate court before giving the trial court the opportunity to consider such [an] assertion is untimely." 146 Clearly, there are some limits regarding the court's patience when it comes to allowing amendments to complaints. In Feigin v. Hospital Staffing Ser-

135. Id. at 900.
137. Id. at 1123.
138. Id.
139. 563 So. 2d 739 (Fla. 2d Dist. Ct. App. 1990).
140. Id. at 740.
141. Id.
142. Id.
144. 564 So. 2d 621, 622 (Fla. 4th Dist. Ct. App. 1990).
145. Id. at 622.
146. Id.
the appellate court supported the trial court’s refusal to grant leave to amend, saying that “[r]efusal to grant leave to amend was not an abuse of discretion since this was the seventh complaint filed over a four-year period and the record clearly reflects the court’s warning that this was the plaintiff’s ‘last bite at the apple.’”

Courts have also focused on whether leave to amend, particularly at the trial stage, would unfairly prejudice other parties. For example, in *Saunders v. Goulard*, the court noted that the appellants were:

[D]eprived of any and all discovery as to the ‘other extras’ discovered at the eleventh hour by the plaintiff, and, additionally, the absence of information in regard to this additional claim prior to trial impacted upon the formulation of the defendants’ offer of judgement and the subsequent post-trial determination by the trial court as to the ‘prevailing party’ for the purposes of assessment of costs and fees.

The appellate court then reversed and remanded for entry of judgment exclusive of the additional items allowed by the trial court.

Similarly, within limits, courts have been liberal in determining that improper pleadings should be recast properly without penalty. For example, in *In re Forfeiture*, the court stated that “[w]e believe that respondents’ Motion to Determine Damages should be treated as a counterclaim by supplemental pleading under Florida Rule of Civil Procedure 1.170(e).* Likewise, in *Yost v. American Nat’l Bank*, the court determined that the trial court’s severance of a counterclaim was improper, since it should have been treated as a compulsory counterclaim, even if it was not cast in that mold originally. However, the court in *Turkey Creek, Inc. v. Londono*, noted that when there are substantial differences in issues between the claim and counterclaim, the fact that there is a logical relationship is not enough to allow re-

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147. 569 So. 2d 941, 942 (Fla. 4th Dist. Ct. App. 1990) (citations omitted).
148. *Id.* at 942.
149. 569 So. 2d 1305, 1307 (Fla. 5th Dist. Ct. App. 1990).
150. *Id.* at 1306.
151. *Id.*
152. 569 So. 2d 1274, 1277 (Fla. 1990) (footnote omitted).
153. *Id.* at 1277.
155. *Id.* at 352.
156. 567 So. 2d 943, 946 (Fla. 1st Dist. Ct. App. 1990).
casting as a compulsory counterclaim. Thus, as in amending pleadings, the record is mixed, but the trend appears to be in favor of liberal application of the Rules.

VII. DISCOVERY

A. In General

Liberal “notice pleading” in Florida requires that some form of discovery be used in almost every case. Florida’s broad discovery provisions reflect a policy of trial on the merits instead of trial by ambush. Florida Rule of Civil Procedure 1.280 provides the general framework for discovery in Florida. Rule 1.280(b)(1) allows discovery of “any matter, not privileged, that is relevant to the subject matter of the pending action . . . .” Rule 1.280 also provides the various methods for complying with discovery under the general rule. These methods of discovery include: oral or written depositions (Rules 1.310, 1.320); interrogatories (Rule 1.340); production of documents and things and entry upon land for inspection and other purposes (Rules 1.350, 1.351); physical and mental examinations (Rule 1.370); and requests for admissions (Rule 1.370).

Information is discoverable if it is “reasonably calculated to lead to the discovery” of evidence admissible at trial. The courts have supported the broad use of discovery, even at the pre-suit stage. For example, in Adventist Health System v. Hegwood, an en banc panel of the Fifth District Court of Appeal affirmed the trial court’s grant of an equitable “pure bill of discovery” — allowing depositions of witnesses — even though the applicable medical malpractice statute granted only limited and informal presuit discovery and would have prevented the depositions.

There are, however, some limits on the use of discovery. While the Rule provides broad authority to delve into “relevant” matters, discovery may not be used for harassment purposes. Thus, in FDIC v. Balkany, the appellate court invalidated an expansive discovery order

157. Id. at 945.
160. 569 So. 2d 1295, 1297 (Fla. 5th Dist. Ct. App. 1990)(en banc).
161. Id. at 1296.
that allowed a party access to transactions contained in bank records not even remotely related to the requestor's business. The court held that the defendant's hope of finding some reference to misplaced documents did not justify an order that amounted to a "fishing expedition." The principal discovery tool is the deposition. The discovery rules have kept pace with technology concerning the manner in which this discovery tool may be used so that oral depositions may now be conducted via telephone or videotape, provided that the proper procedures, outlined in the Rule, are followed.

In an oral deposition under Rule 1.310, section (d) provides the proper manner for suspending or terminating the deposition and failure to comply with the Rule may result in a waiver of any objections to questions asked at the deposition. This point was illustrated in DeGennaro v. Janie Dean Chevrolet, Inc., where the appellate court held that, although counsel objected to a limited waiver of his client's attorney-client privilege, proceeding with the deposition waived the privilege and the court could not "unring the bell." When an objection has been raised to a question asked during a deposition, the proper procedure under Rule 1.310(d) is to suspend the deposition pending a ruling on the objectionable question. It is improper for a lawyer to instruct a witness not to answer a question and then continue with the deposition. In Smith v. Grady, the court stated that such an improper procedure, through "selective adherence to the rules of civil procedure," amounts to "arrogance of the defense attorney" and "is without legal justification." Similarly, where a request for a continuation is not made at a summary judgment hearing, a party cannot later claim that they did not have enough time to complete discovery.

The 1988 Amendments to Florida's discovery rules clarified the scope of discovery. The existence and content of insurance and indemnity agreements are now discoverable. Additionally, expert witnesses

164. Id.
169. Id. at 1009.
171. Id. at 507.
173. Fla. R. Civ. P. 1.280(b)(2) (indemnity agreements are discoverable but not
"expected to be called" at trial may now be deposed without leave of the court. However, in Edwards v. Humana, Inc., the court recognized that "it is clear that the intent of rule 1.280 (b)(4)(B) is to afford protection from the discovery of a consulting expert." The court's holding in Edwards is consistent with the language of the Rule that protects a consulting expert except under "exceptional circumstances."

Interrogatories were also addressed under the 1988 Amendments to the Rule. A party may now serve up to 30 interrogatories on another party without leave of the court. Further, if the Florida Supreme Court has approved a standard form for initial interrogatories, then that form must be used. Examination of persons was also broadened under the 1988 amendments to the Rules. An examination of a person, as to matters in controversy, may now be performed by experts other than physicians.

B. Work Product/Attorney—Client Privilege

The work product privilege protects materials "prepared in anticipation of litigation" by allowing discovery of materials only upon a requestor's showing of "need" and inability, "without undue hardship to obtain the substantial equivalent of the materials by other means." The courts have limited the reach of this "privilege" through the construction of the term "substantial equivalent." Illustrative of this concept is Florida Mining and Materials Corp. v. Continental Casualty Co., where the court protected a party's internal memoranda by finding that "admissions provide[d] the 'substantial

admissible at trial).
equivalent’ of the internal memoranda.”\textsuperscript{184} While materials, or fact work product, are discoverable upon a showing of need and the lack of a substantial equivalent, opinion work product is “absolutely, or nearly absolutely, privileged.”\textsuperscript{185} In appropriate cases, the work product protection may apply to the investigative materials prepared on behalf of a nonparty. For example, in \textit{Zaban v. McCombs},\textsuperscript{186} corporate officers and directors were named as defendants in a work-related wrongful death action, but the corporation was not named as a party. The corporation had, however, hired an investigator and had prepared investigative materials concerning the accident and the plaintiff, claiming that the materials were not protected because of the corporation’s nonparty status, requested discovery of the materials. The appellate court held that the plaintiff, in such a situation, could not circumvent the work product protection of Rule 1.280 (b)(3) merely because the producer of the work product was not named as a party.\textsuperscript{187}

Under the attorney-client privilege, a recognized evidentiary privilege, undisclosed communications between an attorney and a client are protected from involuntary disclosure even when the communications “arise in the course of a transaction which itself later becomes the subject of litigation.”\textsuperscript{188} An in-camera examination of requested material is proper in order to determine if privileged information is protected by the attorney-client privilege.\textsuperscript{189} Waiver of the attorney-client privilege may result from disclosure of the information.\textsuperscript{190}

The courts have not been receptive towards attempts at circumventing an evidentiary privilege. In \textit{Paper Corp. v. Schneider},\textsuperscript{191} the defendant, in a post-judgment execution proceeding, tried to shield financial records from disclosure by turning them over to his accountant and then seeking protection under the accountant-client privilege.\textsuperscript{192}

\begin{thebibliography}{99}
\bibitem{184} \textit{Id.} at 519.
\bibitem{185} State v. Rabin, 495 So. 2d 257, 262 (Fla. 3d Dist. Ct. App. 1986); \textit{see also} FLA. R. CIV. P. 1.280(b)(3) (“The court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.”).
\bibitem{186} 568 So. 2d 87, 89 (Fla. 1st Dist. Ct. App. 1990).
\bibitem{187} \textit{Id.} at 89.
\bibitem{188} \textit{Florida Mining and Materials Corp.}, 556 So. 2d at 519.
\bibitem{189} Blank v. Mukamal, 566 So. 2d 54 (Fla. 4th Dist. Ct. App. 1990) (certiorari granted and trial court’s order demanding production of counsel’s entire files quashed).
\bibitem{190} \textit{Id.} at 55.
\bibitem{191} 563 So. 2d 1134, 1135 (Fla. 3d Dist. Ct. App. 1990).
\bibitem{192} FLA. STAT. §§ 90.5055, 473.316 (1989).
\end{thebibliography}
However, the court refused to accept the defendant's claim of evidentiary privilege and held that the defendant could not shield otherwise discoverable material by shifting that material into the possession of a person granted a statutory privilege.193

C. Sanctions

Rule 1.380 provides sanctions for a party's failure to comply with a discovery order. A trial court has the discretion to order dismissal194 or default195 for failure to comply with discovery requirements and a dismissal or default entered by the trial court will be reviewed under an "abuse of discretion" standard.196 The Florida Supreme Court recently addressed what factual findings are necessary before the trial court may enter a default or dismissal under Rule 1.380. In Commonwealth Federal Savings and Loan v. Tubero,197 the Florida Supreme Court considered the following certified question:

IS AN EXPRESS WRITTEN FINDING OF WILLFUL OR DELIBERATE REFUSAL TO OBEY A COURT ORDER TO COMPLY WITH DISCOVERY UNDER FLORIDA RULE OF CIVIL PROCEDURE 1.380 NECESSARY TO SUSTAIN THE SEVERE SANCTIONS OF DISMISSAL OR DEFAULT AGAINST A NONCOMPLYING PLAINTIFF OR DEFENDANT.198

The court answered the question in the affirmative, and, though reaffirming the trial judge's discretionary power to enter a default or dismissal for noncompliance with discovery requirements, required that an order of dismissal or default "contain an explicit finding of willful noncompliance."199

An order of dismissal or default is the exception rather than the general rule and thus, as the court noted in Yanks v. Amerifirst

193. Schneider, 563 So. 2d at 1135.
196. Id. at 1273.
197. Id. at 1271.
199. Tubero, 569 So. 2d at 1273.
"the severity of the sanction [for noncompliance with a discovery order] must be commensurate with the violation." The range of appropriate sanctions include: prohibiting the introduction of evidence; refusing to allow a party to present a claim or defense; or the awarding of fees and costs. The court's contempt power may also be used to remedy an individual's noncompliance with discovery requirements. In *Anderson Inv. Co. v. Lynch*, the court noted that a defendant may be found in contempt of court if he fails to be sworn or to answer questions after being directed to do so by the court.

**VIII. Default**

The terms "default" and "judgment" are *not* synonyms. "Default," as used in the Rules, refers to an entry or order of default by the clerk or judge. "Judgment," as used in the Rules, refers to the final disposition of the proceeding, rendered by the judge, following the entry of a default. The term "default judgment," when it is used in court opinions or legal literature, usually refers to a final judgment that was rendered as a result of default. Occasionally the term "default judgment" is used to incorrectly denote an entry of default, requiring that the context in which the term is used be examined in order to ascertain what the writer intended through the use of the term.

Rule 1.500 addresses the entry of default, the entry of judgments upon the default, and the setting aside of defaults. Rule 1.500 is distinct from Rule 1.380(b); the later provision allows a judgment by default for a party's failure to comply with discovery while Rule 1.500 addresses a party's failure to plead. In addition to a default for failure to plead, a default may also be entered for: filing a sham pleading, failure to comply with a discovery order; failure of a party to appear for his deposition or to answer properly propounded interrogato-

201. Id.
203. Id.
205. 540 So. 2d 832 (Fla. 4th Dist. Ct. App. 1988).
206. FLA. R. CIV. P. 1.500.
207. FLA. R. CIV. P. 1.380(b); FLA. R. CIV. P. 1.500.
208. FLA. R. CIV. P. 1.150(a).
ries;\textsuperscript{210} or, failure to attend a pretrial conference.\textsuperscript{211}

The courts have liberally construed Rule 1.500, and are hesitant to uphold an entry of default that could deny a party the opportunity of a decision on the merits of the case.\textsuperscript{212} In \textit{Apolaro v. Falcon},\textsuperscript{213} the court held that a delay of 30-40 days in seeking relief from a default did not justify denying the relief.\textsuperscript{214} The court stated that "[w]here there exists any reasonable doubt in the matter, and where there has been no trial on the merits, the trial court is to exercise its discretion in the direction of vacating the default."\textsuperscript{215}

In \textit{Rapid Credit Corp. v. Sunset Park Centre},\textsuperscript{216} "Rapid" had erroneously filed a motion to transfer and consolidate in the wrong case. Despite knowledge of these motions, opposing counsel sought, and was granted, a clerk-entered default in the other case pending between the parties. The appellate court remanded for vacation of the default and held that opposing counsel, in this situation, was "on notice" that Rapid intended to contest the action\textsuperscript{217} and thus had an affirmative duty to provide the court, and Rapid's counsel, with information regarding the procedural status of a case prior to default being entered.\textsuperscript{218}

Entry of an order of default can be avoided by filing a responsive pleading prior to a motion for default. In \textit{Houswerth v. Sheriffs Dep't}, the court allowed dismissal for failure to prosecute, but held that a default could not be entered in the action when a responsive pleading was filed before the motion for default.\textsuperscript{219}

If the trial court enters a default, until the entry has formed the basis for a final judgment, the defaulted party can move to vacate or set the order aside. A defendant is permitted, upon motion for relief from a default judgment, to attack the "sufficiency of the complaint

\textsuperscript{210} FLA. R. CIV. P. 1.380(d).
\textsuperscript{211} FLA. R. CIV. P. 1.200 (b).
\textsuperscript{212} \textit{Ole, Inc. v. Yariv}, 566 So. 2d 812 (Fla. 3d Dist. Ct. App. 1990) (default judgment vacated and default set aside when defendant was unaware he was no longer represented by counsel and plaintiff applied for ex parte default and obtained a default judgment).
\textsuperscript{213} 566 So. 2d 815, 816 (Fla. 3d Dist. Ct. App. 1990).
\textsuperscript{214} \textit{Id.} at 816.
\textsuperscript{215} \textit{Id.} at 816.
\textsuperscript{216} 566 So. 2d 810, 811 (Fla. 3d Dist. Ct. App. 1990).
\textsuperscript{217} \textit{Id.} at 811.
\textsuperscript{218} \textit{Id.}
\textsuperscript{219} 567 So. 2d 476 (Fla 5th Dist. Ct. App. 1990).
and its allegations to support the judgment. A default may also be set aside when, on the face of the pleadings, there is confusion over the amount of time allowed for a response.

Under Rule 1.500, only the court may enter an order of default when "any paper" has been filed by the opposing party. The term "any paper" has been construed liberally to allow a default entered without notice to be vacated when a motion to consolidate and transfer was erroneously filed in the wrong lawsuit or when a motion to quash service of process was filed. After entry of a default, a party in default may only file a pleading requesting relief from the default.

IX. DISMISSAL

Rule 1.420 provides for both voluntary and involuntary dismissals. A party's failure to attend a pretrial conference may also result in a dismissal of the action but Rule 1.200(c) governs the court's action in that situation. Rule 1.420 allows for dismissal of claims with or without prejudice.

Because dismissal is such a drastic remedy, the courts have required evidence of "wilful or flagrant or persistent disobedience" of a court order prior to allowing dismissal of an action. As noted by the court in Epps v. Hartley, dismissal of a plaintiff's complaint suspends the plaintiff's right to proceed but does not serve as an adjudication on the merits. However, an order granting a motion to dismiss should plainly indicate that the action has in fact been dismissed, and should

220. Cabral v. Diversified Serv., Inc., 560 So. 2d 246 (Fla. 3d Dist. Ct. App. 1990) (citations omitted) (abuse of discretion to enter default when failure to respond was due to confusion resulting from the pendency of a case with a related subject matter).

221. Hader v. American Builders and Contractors Co., 564 So. 2d 271 (Fla. 4th Dist. Ct. App. 1990) (pleading that read "[t]he Defendants have _____ number of days" to respond was sufficient to demonstrate excusable neglect that justified setting aside the default).

222. FLA. R. CIV. P. 1.500(b).
223. Rapid Credit Corp., 566 So. 2d 810.
226. FLA. R. CIV. P. 1.420.
227. FLA. R. CIV. P. 1.200(c).
228. FLA. R. CIV. P. 2.420.
contain the "requisite words of finality" in order to vest an appellate court with jurisdiction to review the order.\textsuperscript{231}

Much litigation arises regarding just what is meant by dismissal of an action for "failure to prosecute." If "no record activity in furtherance of the suit"\textsuperscript{232} has occurred for a period of one year, then dismissal of the suit for failure to prosecute\textsuperscript{233} may be proper. In \textit{Anthony v. Schmitt}, the Second District Court of Appeal provided an in-depth analysis of Rule 1.420(e).\textsuperscript{234} The court noted the conflict between the First District\textsuperscript{235} and the Fourth District\textsuperscript{236} and opted for an interpretation of Rule 1.420(e) that would allow the trial court more discretion than the rule of the Fourth District, but less than that of the First District.\textsuperscript{237} The court stated that:

\begin{quote}
[A] trial court may dismiss an action if the only activity within the relevant year is discovery activity by the plaintiff taken in bad faith merely as a means to avoid the application of Rule 1.420(e) and without any design "to move the case forward toward a conclusion on the merits or to hasten the suit to judgment."\textsuperscript{238}
\end{quote}

The appellate court noted that its "bad faith activity" test was similar to striking discovery that amounted to "sham or pretextual record activity" when used by a plaintiff to circumvent Rule 1.420(e).\textsuperscript{239}

A motion to dismiss for failure to prosecute need not be filed by a party to the action since the Rule itself grants standing to file the motion to "any interested person."\textsuperscript{240} Under the Rule, the one-year period without record activity accrues from the date of filing the action, not the date of service of notice in the proceeding.\textsuperscript{241} Rule 1.420(e) is not

\begin{itemize}
\item \textsuperscript{231} Henrion v. New Era Realty IV, Inc. 567 So. 2d 562, 563 (Fla. 4th Dist. Ct. App. 1990).
\item \textsuperscript{232} Rosa v. Hodges, 559 So. 2d 1289, 1290 (Fla. 2d Dist. Ct. App. 1990).
\item \textsuperscript{233} FLA. R. CIV. P. 1.420(e).
\item \textsuperscript{234} 557 So. 2d 656.
\item \textsuperscript{235} Karcher v. F.W. Schinz & Assoc., 487 So. 2d 389 (Fla. 1st Dist. Ct. App. 1986) (trial court may determine whether discovery was "genuine" when deciding whether such discovery constituted record activity under Rule 1.420(e)).
\item \textsuperscript{236} Philips v. Marshall Berwick Chevrolet, Inc. 467 So. 2d 1068 (Fla. 4th Dist. Ct. App. 1985) (dismissal is proper only when discovery is "repetitious").
\item \textsuperscript{237} \textit{Anthony}, 557 So. 2d at 662.
\item \textsuperscript{238} \textit{Id.} (quoting Barnett Bank v. Fleming, 508 So. 2d 718, 720 (Fla. 1987)).
\item \textsuperscript{239} \textit{Id.}
\item \textsuperscript{240} FLA. R. CIV. P. 1.420(e); Rosa, 559 So. 2d at 1290.
\item \textsuperscript{241} Scharlin v. Broward County Property Appraisal Bd., 500 So. 2d 345 (Fla.
self-executing, record activity prior to a party, or the court on its own motion, moving for a dismissal for failure to prosecute will preclude dismissal. 442

No consensus exists among the appellate courts regarding what particular actions by the parties constitute record activity that is sufficient to survive a motion to dismiss for failure to prosecute: each case turns on the specific facts before the court. Litigation concerning costs and fees as to one defendant has been held to constitute record activity precluding dismissal against co-defendants. 443 A notice of trial, 444 a filing of summons, 445 service of process, 446 and paying a new filing fee in order to transfer the case 447 have all been viewed as acts intended to hasten a suit toward judgment and thus sufficient record activity to preclude dismissal. Non-frivolous discovery activity may also constitute record activity within the meaning of Rule 1.420(e). 448

On the other hand, the following actions have been viewed as non-record activity, thus permitting dismissal for failure to prosecute: the taking of depositions; 449 notices of withdrawal and substitution of counsel; 450 and responses to interrogatories filed after a motion to dismiss. 451 In Caldwell v. Mantei, 452 the court held that status requests and reports, even though technically record activity, did not further the case toward disposition and were held insufficient to shield against a motion to dismiss for failure to prosecute.

Upon a showing of "good cause," the court has the discretion to allow an action to continue despite a party's failure to prosecute the


244. Mitchell v. Coker Fuel Inc., 511 So. 2d 344 (Fla. 2d Dist. Ct. App. 1987)(notice for trial controlled the action even though filed simultaneously with motion to dismiss for failure to prosecute).

245. Garland v. Southeastern Palm Beach County Hospital Taxing Dist., 526 So. 2d 725 (Fla. 4th Dist. Ct. App. 1988).

246. Glassalum Eng'g Corp. v. 392208 Ontario Ltd., 487 So. 2d 87 (Fla. 3d Dist. Ct. App. 1986).


252. Id. at 254.
claim within one year.253 In A & W Electric, Inc. v. Abraira, the court held that the plaintiff’s heart surgery and subsequent rehabilitation period were sufficient reasons to preclude dismissal, even though the plaintiff did not seek a continuance prior to a one-year period of record inactivity.254 However, in Denson v. Meyer,255 the court refused to view settlement negotiations between the parties as “good cause” for not dismissing an action that was without record activity for over one year.

X. OFFER OF JUDGMENT

Florida Rule of Civil Procedure 1.442 seeks to encourage parties to settle claims without litigation.256 At any time, not later than 60 days before trial or less than 15 days after service of a counteroffer, either party in an action may make an offer to settle “all pending claims.”257

The Florida Supreme Court’s amended version of Rule 1.442 (Offer of Judgment) took effect as of January 1, 1990.258 When considering the amendment of the Rule, the court rejected the argument that the court should declare sections 768.79 and 45.061, Florida Statutes, unconstitutional based on possible conflicts between the statutes and Rule 1.442, saying “[w]e agree with the Committee that sections 768.79 and 45.061 impinge upon this Court’s duties in their procedural details . . . [t]o the extent the procedural aspects of new rule 1.442 are inconsistent . . . the rule shall supersede the statutes.”259

Applying only to money damages,260 offers of judgment must be accepted within 30 days after service of the offer or the offer will be deemed rejected.261 A rejection of an offer terminates the offer.262 A counteroffer is also considered a rejection.263 The court may impose “sanctions equal to reasonable attorneys fees and all reasonable costs of

254. Id.
255. 565 So. 2d 758 (Fla. 3d Dist. Ct. App. 1990).
256. FLA. R. CIV. P. 1.441; Aspen v. Bayless, 564 So. 2d 1081 (Fla. 1990).
257. FLA. R. CIV. P. 1.442.
258. 550 So. 2d 442 (Fla. 1989).
259. Id. at 443.
260. FLA. R. CIV. P. 1.441(a).
261. FLA. R. CIV. P. 1.441(f)(1).
262. FLA. R. CIV. P. 1.441(f)(3).
263. FLA. R. CIV. P. 1.441(f)(2).
the litigation accruing from the date the relevant offer of judgment was made"\(^{264}\) when the rejection of the offer was unreasonable, resulting in further litigation costs,\(^{265}\) and when, either the damages awarded to the offeree "are less than 75 percent of the offer" or, "more than 125 percent of the offer."\(^{266}\)

Offers of judgment may not contain extraneous conditions which must be met in order to accept the monetary settlement offer.\(^{267}\) In *Martin v. Brousseau*,\(^{268}\) the appellate court ruled that a conditional offer of judgment made by the appellee was invalid because of the conditions attached to the offer. The court then reversed the trial court's decision imposing costs and attorney's fees upon the prevailing litigant who had been awarded damages of twenty-five percent less than the conditional offer of judgment.\(^{269}\) The conditions attached to the offer of judgment were "to execute a full and complete release and satisfaction, a hold harmless affidavit, and a stipulation for dismissal with prejudice."\(^{270}\)

In *Aspen v. Bayless*,\(^{271}\) a landmark case, the Florida Supreme Court held that "a party is not precluded from recovering costs under Florida Rule of Civil Procedure 1.442, or after judgment in its favor, when someone other than the named party pays or advances those costs."\(^{272}\) The court reasoned that a nonprevailing plaintiff should not reap windfall benefits simply because litigation costs were borne by an insurance carrier.\(^{273}\) In keeping with the goal of settling disputes without going to trial, the court further reasoned that "[i]f a named insured is unable to obtain costs under rule 1.442, there would be less incentive to accept an offer to settle and no penalty for failing to do so."\(^{274}\) Additionally, the insurer who expends funds to pay for litigation has a right of subrogation against the named party who was awarded costs by the court and thus the awarding of such costs is appropriate.\(^{275}\) The ruling

\(^{264}\) FLA. R. CIV. P. 1.441(h)(1) (footnote omitted).
\(^{265}\) FLA. R. CIV. P. 1.441(h)(1)(A).
\(^{266}\) FLA. R. CIV. P. 1.441(h)(1)(B)(i)(ii).
\(^{268}\) Id.
\(^{269}\) Id. at 241.
\(^{270}\) Id. (footnote omitted).
\(^{271}\) 564 So. 2d 1081 (Fla. 1990).
\(^{272}\) Id. at 1082.
\(^{273}\) Id. at 1083.
\(^{274}\) Id. at 1083.
\(^{275}\) Id. at 1082.
in *Aspen* should provide guidance in the cases involving a conflict between Rule 1.442 (offers of judgment) and section 768.79, Florida Statutes, regarding the amount of entitlement which may be taxed following the rejection of an offer of settlement. 276

**XI. SUMMARY JUDGMENT**

In contrast with the trend toward the increased use of summary judgment in federal courts in recent years, 277 the Florida courts have maintained a more conservative approach by demanding more of the moving party. For example, in *Freeman v. Fleet Supply, Inc.*, 278 the court reviewed a summary judgment entered in favor of defendant in a faulty brake case. The trial court had found that the plaintiff’s allegations failed to establish that the defective brakes proximately caused his injury, based on his testimony in deposition that he had performed a routine brake inspection before the accident, but that his knowledge of braking systems was limited. In reversing the lower tribunal, the appellate court outlined its restrictive view that:

> [T]he movant carries the considerable burden of showing conclusively that there is no genuine issue of material fact. Until it is determined that the movant has successfully met this burden, the opposing party is under no obligation to show that there are no issues remaining to be tried. 279

Freeman’s failure, in his deposition, to establish the exact cause of the brake failure “did not mean that Fleet Supply had conclusively demonstrated the absence of a genuine issue of material fact.” 280 Similarly, in *Mason v. McCrory Corp.*, the court found that evidence of

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276. Kanaar v. Goodwin, 567 So. 2d 1006 (Fla. 3d Dist. Ct. App. 1990). In *Royster v. Van Der Meulen*, 564 So. 2d 1204 (Fla. 1st Dist. Ct. App. 1990), the trial judge denied appellant’s motion to tax costs and attorney’s fees because his insurance company had paid the costs of the litigation. The first district reversed, and certified a conflict with the 1989 second district ruling in *Aspen*. Oddly enough, this case was decided on July 25, 1990 - just one day before the Florida Supreme Court ruling in *Aspen*.


279. Id. at 871 (citations omitted).

280. Id.
faulty shampoo packaging, "susceptible to different reasonable inferences," was more than adequate to establish a jury question and defeat a motion for summary judgment advanced by the defendant.\textsuperscript{281}

The appellate court also found an abuse of discretion in denials of requests for relief and rehearing in \textit{Jeff-Ray Corp. v. Jacobson},\textsuperscript{282} where the trial court had granted summary judgment against a party which "made an unrebuted showing that it did not receive notice of the summary judgment motion or hearing until receipt of the judgment itself."\textsuperscript{283} In \textit{Hialeah, Inc. v. Adams}, the appellate court found a similar abuse of discretion where the lower court had "denied the motion to vacate solely on the basis that the registered agent's affidavit failed to establish excusable neglect" in the mishandling of a complaint and summons.\textsuperscript{284} On the other hand, in \textit{Slachter v. Ahundio Inv., Co.}, a case where a moving party did properly meet his burden, the simple allegation that the non-moving party had "'meritorious defenses'" was held to be insufficient to preclude summary judgment.\textsuperscript{285}

\section*{XII. Directed Verdict}

Motions for a directed verdict are governed by Rule 1.480.\textsuperscript{286} A directed verdict is improper unless the evidence, viewed in a light most favorable to the non-moving party, shows that the jury "could not reasonably differ as to the existence of any material fact" and that the moving party is "entitled to judgment as a matter of law."\textsuperscript{287} In \textit{Jones v. Heil Co.}, the court overturned a directed verdict for the defendant and held that a directed verdict will not be upheld on appeal unless no evidence, or reasonable inferences from evidence presented, would support a jury's verdict for the non-moving party.\textsuperscript{288} While a directed verdict should not be granted without serious consideration, a failure to present competent evidence to support a claim will support the trial court's setting aside the jury's verdict.\textsuperscript{289} However, as the court noted

\begin{itemize}
\item \textsuperscript{281} 567 So. 2d 1011, 1012 (Fla. 3d Dist. Ct. App. 1990).
\item \textsuperscript{282} 566 So. 2d 885 (Fla. 4th Dist. Ct. App. 1990).
\item \textsuperscript{283} \textit{Id}.
\item \textsuperscript{284} 566 So. 2d 350 (Fla. 3d Dist. Ct. App. 1990).
\item \textsuperscript{285} 566 So. 2d 348, 349 (Fla. 3d Dist. Ct. App. 1990).
\item \textsuperscript{286} FLA. R. CIV. P. 1.480.
\item \textsuperscript{287} Garrahan v. Sea Ray Boats, Inc., 569 So. 2d 518 (Fla. 4th Dist. Ct. App. 1990).
\item \textsuperscript{288} 566 So. 2d 565 (Fla. 1st Dist. Ct. App. 1990).
\item \textsuperscript{289} Yanks v. Barnett, 563 So. 2d 776 (Fla. 3d Dist. Ct. App. 1990) (directed
\end{itemize}
in *Reaves v. Armstrong World Industries Inc.*, if there is no evidence in the record to support the jury verdict, then a directed verdict is appropriate.\(^{290}\) A directed verdict is also appropriate if a claim is barred by an affirmative defense such as the statute of frauds.\(^{291}\) As the appellate court recognized in *Cho v. Mackey*, certain issues, such as the question of foreseeability prior to imposing tort liability, are questions for the jury and a directed verdict is improper in such cases.\(^{292}\)

Rule 1.480 requires that a motion for a directed verdict be made at the close of all the evidence.\(^{293}\) A judgment notwithstanding the verdict and a directed verdict are interrelated. Judgment notwithstanding the verdict will not be entered unless a party earlier moved for a directed verdict.\(^{294}\) Additionally, judgment notwithstanding the verdict is determined under the same test as a directed verdict: "[I]t will be granted only if there is no evidence or reasonable inference therefrom supporting a verdict for the other party."\(^{295}\)

### XIII. Prejudgment Interest/Costs and Interest/Attorneys' Fees

#### A. Prejudgment Interest

Prejudgment interest compensates the aggrieved party for the time and use of his money beginning on the date, as determined by the verdict, when the claim began to accrue. For example, in a construction contract, the date of accrual could be the date the claim became liquidated by agreement of the parties.\(^{296}\) When there is no liquidation agreement fixing the rate of interest in the event of a breach, a court should impose the current statutory interest rate\(^{297}\) of 12 percent per

verdict upheld because of plaintiffs failure to present competent evidence in fraudulent misrepresentation claim).


292. *567 So. 2d 1064 (Fla. 2d Dist. Ct. App. 1990).*

293. *FLA. R. CIV. P. 1.480(b).*


295. *Id.* at 638.


297. *Id.* at 1010.
annum simple interest.\textsuperscript{298}

When the statutory interest rate changes between the date of the original judgment and a later judgment, the court will apply the rate imposed on the date of each rendering of judgment.\textsuperscript{299} In \textit{Herskowitz v. Herskowitz},\textsuperscript{300} the appellate court reversed the trial court's modification of interest on an action to enforce a judgment. The court imposed six percent "from the entry of judgment" in June of 1972 to October 1985, "the date the judgment disposing of all pending matters was entered," with twelve percent interest thereafter.\textsuperscript{301} Finally, it should be noted that while prejudgment interest is available in contract-based causes of action — if previously pled by the prevailing party — it is not recoverable in tort actions or usurious transactions.

B. Costs and Interest

Under section 57.041 of the Florida Statutes,\textsuperscript{302} certain legal costs and charges may be awarded to the prevailing party in a civil action.\textsuperscript{303} The court may award costs and attorney's fees to the prevailing plaintiff of the original action even if the defendant prevailed on a counterclaim, causing both to be "prevailing parties."\textsuperscript{304} If the significant relief awarded to the prevailing plaintiff is "limited in comparison to the scope of the litigation," a reduced fee may be awarded at the court's discretion.\textsuperscript{305} As noted by the court in \textit{Oriental Imports Inc., v. Alilin}, a trial court no longer has the discretion to deny costs to the party prevailing in the judgment,\textsuperscript{306} especially when taxed for refusal of a pre-trial offer of judgment.\textsuperscript{307} The "prevailing party" rule applies even when the counter claimant recovers an award of damages in excess of
those awarded to the prevailing plaintiff. Additionally, any sales tax incurred due to the Florida service tax on attorney's fees will be added onto the sum total of any cost awards.

The prevailing party may recover costs under Rule 1.442, even when someone other than the named party, such as an insurer, has paid the costs. In a case where a party is awarded costs but the actual costs were paid by another party, no real windfall occurs because the party who actually paid the costs of the litigation has subrogation rights against the named party for reimbursement of those costs.

Taxation of costs for discovery purposes, depositions, and requests for production, are allowed or disallowed depending on whether they serve a useful purpose in determining issues before the trial court. However, reliance upon the information gleaned through discovery depositions is not enough to invoke taxation of those costs. Attorneys who are found guilty of charges brought by the Florida Bar during disciplinary proceedings will be taxed any costs incurred by the Bar, including witness fees.

While the court has great discretion in taxation of costs, the cost of depositions should not be disallowed merely as a result of voluntary dismissal. Finally, as to the appropriate amount of costs surrounding a party's use of expert witnesses, all that is required of the court in calculating taxation of fees for expert witnesses - who actually attend court to testify - is consideration of a listing of itemized costs per expert witness used and a determination as to whether the cost listed was reasonable.


310. Aspen, 564 So. 2d 1081.


312. See generally Balseca, 566 So. 2d at 328 (taxation of costs rests largely within the discretion of the trial court).


315. Balseca, 566 So. 2d at 324; Allstate, 549 So. 2d 816.
C. **Attorneys' Fees**

Except where awarded by statute, the taxing of attorneys' fees is a product of the common law. Section 57.105 of the Florida Statutes provides "for the award of attorney's fees to a prevailing party where the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party." Fees are similarly awarded to the prevailing parties of post-divorce harassment cases through the continuous filing of motions and frivolous action cases that are so devoid of merit, both on the facts and the law, as to be completely untenable.

If properly pled, a motion for attorneys fees may be made after final judgment and accompanied by proof of fees, personal testimony of the attorney who performed the services, and sufficient proof of reasonable time spent in arriving at the total amount of fees requested. The Florida Supreme Court has recognized that there are different categories of attorneys fees. In *Standard Guaranty Insurance Co. v. Quanstrom*, the court stated that “different types of cases require different criteria to achieve the legislative or court objective in authorizing the setting of a reasonable attorney’s fee.” Because of prevailing confusion among lawyers as to when the application of a multiplier is appropriate, the Florida Supreme Court discussed the logistics of proper multiplier usage in *Quanstrom*. According to the court, the multiplier is not ordinarily used in estate and trust, eminent domain, or domestic relations cases. In contractual disputes, the trial court should consider: (1) the market availability of competent counsel, (2) attorney mitigation of expenses/fees, and (3) the relevance of the *Rowe* factors.

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320. 555 So. 2d 828, 833 (Fla. 1990).
321. *Id.*
322. *Id.* Attorney’s fees are usually guaranteed in the first two, while ethically inappropriate in the later cases.
323. See Florida Patient’s Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985). Fee computation should be based on: 1) number of hours reasonably spent in litigation; 2) the reasonable hourly rate applicable to the specific type of litigation involved; 3) multiply (1) and (2), and when necessary; 4) allow adjustment of the fee to compensate for failure to prevail on the claims or based on the nature of the litigation.
tors, especially the total amount, post litigation results, and attorney/client fee agreements. As the First District Court of Appeal noted in Jones v. Associates Fin. Inc., the Rowe factors must be applied by the trial court when determining attorney's fees in order to avoid reversible error.

XIV. RES JUDICATA/COLLATERAL ESTOPPEL

A final judgment will bar further litigation under principles of res judicata (claim preclusion) when the judgment includes the identity of the cause of action, the identity of the thing sued for, the identity of the persons and parties to the action, and the identity of quality for or against whom the claim is made. Res judicata must be pled as an affirmative defense and is generally utilized in conjunction with a motion for summary judgment. Once a judgment has been entered, a second suit, filed by the same parties or parties who could have been in privity in the first suit, is barred by res judicata in order to inhibit the splitting of causes of action into multiple suits. Exceptions to the principle of res judicata may be raised in connection with recurring claims; however, without proof compelling modification of a previous final order, non-recurring issues which were clearly litigated in the first suit are barred by res judicata in all subsequent suits for recurring damages.

Under res judicata or claim preclusion (also sometimes referred to as estoppel by judgment), all matters that were part of the initial cause of action are said to be merged into the final judgment and a party is said to be barred from relitigating any matters that were, or could have been, included as a part of that cause of action. The principle problem

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324. Quanstrom, 555 So. 2d at 834; see also Sun Bank v. Ford, 564 So. 2d 1078, 1080 (Fla. 1990) (trial judge appropriately set the attorney's fees by the terms of the promissory note, $150/hr for the time reasonably spent).
327. Id. at 1218.
of the application of claim preclusion generally concerns whether a matter which was not litigated could have been litigated as part of the cause of action. Issue preclusion or collateral estoppel (also sometimes called estoppel by verdict) precludes relitigation of an issue that was actually litigated and necessary to the holding. Three typical problems emerge in reference to collateral estoppel: (1) is it the same identical issue (i.e. same burden of proof); (2) was the litigated issue necessary to the court's judgment; and (3) whether the requirement of mutuality should be relaxed so that issue preclusion can be used as a shield or a sword.

When the first and second suits involve different causes of action between the same parties or parties who were in privity in the first suit, the doctrine of collateral estoppel is invoked; thus, the parties are estopped from litigating any common issues that were actually adjudicated in prior litigation. One example of collateral estoppel is seen in section 775.089(8) of Florida Statutes, which dictates that, in civil suits for restitution arising from criminal convictions, collateral estoppel prevents the denial of any essential allegations which led to the criminal conviction in the previous proceeding.

"Collateral Estoppel" (issue preclusion) and its synonymous term "estoppel by verdict" should not be confused with "estoppel by judgment" which refers to a res judicata bar (claim preclusion). Because of the confusion that could result, even synonymous terms should not be redundantly used together. Some Florida courts have used these terms interchangeably, much to the befuddlement of the reader. It would be helpful if Florida courts would adopt the definitions used by the Restatement of Judgments (Second) in order to provide greater uniformity.

The modern view, allowing the use of collateral estoppel as a "sword" or a "shield," has been accepted by the United States Supreme Court in the landmark cases of Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation and Parklane Hosiery Co.
Res judicata and collateral estoppel are dependant upon the entry of a final judgment or order.\textsuperscript{336} When the order is not final — such as when an evidentiary hearing is required or when a petition for a writ of certiorari is denied without an opinion, or when the first case is dismissed for lack of prosecution or as a sanction without adjudication on the merits — the doctrines of res judicata or collateral estoppel may not be invoked in the case.\textsuperscript{338} In the absence of a reversal, an order or judgment that is voidable bars later adjudication for res judicata purposes.\textsuperscript{339}

\textsuperscript{336} 439 U.S. 322 (1979) (offensive "sword" usage - plaintiff was able to prevail in second suit by using a prior determination in an action by the United States against the same defendant).

\textsuperscript{337} \textit{DeCarlo}, 566 So. 2d 318.
\textsuperscript{338} See, e.g., Accent Realty, Inc. v. Crudele, 496 So. 2d 158 (Fla. 3d Dist. Ct. App. 1986).
This article is a brief survey of substantive criminal law cases decided by the Florida Supreme Court between December 1, 1989, and December 1, 1990.

I. CRIMINAL OFFENSES: CONSTITUTIONALITY OF STATUTES

In *Stall v. State*, the Florida Supreme Court addressed the issue of whether prosecution under Florida’s Racketeer Influenced and Corrupt Organization (RICO) Act, predicated upon violations of Florida’s obscenity statute, violates the Florida constitutional right to privacy. The court recognized that the right to privacy protects one’s right to possess obscene materials in the privacy of one’s home. However, the court found that the right to privacy does not extend to vendors of obscene materials and held the obscenity and RICO statutes constitutional.

The court also reviewed the constitutionality of Florida Statute section 893.12(1)(e), which prohibits selling, purchasing, delivering, etc., a controlled substance within 1,000 feet of a school. The statute was attacked as being violative of the single-subject provision of the Florida Constitution. The court held that the statute did not violate

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1. 570 So. 2d 257 (Fla. 1990).
2. FLA. STAT. § 895.01-.06 (1985).
3. FLA. STAT. § 847.011 (1985). This statute is violated through the showing, sale, distribution, and rental of obscene writings, tapes, and objects intended for obscene purposes. Id.
4. *See* FLA. CONST. art. 1, § 23.
5. *Stall*, 570 So. 2d at 262; *see also* Stanley v. Georgia, 394 U.S. 557 (1969).
6. *Stall*, 570 So. 2d at 258.
7. Burch v. State, 558 So. 2d 1 (Fla. 1990); *see also* Leonardi v. State, 567 So. 2d 408 (Fla. 1990); Bennett v. State, 559 So. 2d 1136 (Fla. 1990); Morrow v. State, 557 So. 2d 865 (Fla. 1990); Lewis v. State, 556 So. 2d 1103 (Fla. 1990); Blankenship v. State, 556 So. 2d 1108 (Fla. 1990); Dame v. State, 556 So. 2d 1109 (Fla. 1990).
II. SENTENCING

A. Length of Sentence

Florida Statute section 948.01(5) limits the duration of a sentence of community control to two years. However, where a defendant has been convicted of separate crimes, the sentencing court may impose consecutive terms of community control even if the sentences are imposed at the same sentencing hearing.

Additionally, community control and probation may be stacked, provided the total term does not exceed the recommended guidelines range. Minimum mandatory sentences in capital felony cases may also be stacked. Such consecutive sentences are permitted in homicide cases as well as in other capital felony cases and even if the crimes arise out of the same criminal episode.

The supreme court also addressed the issue of whether or not imprisonment in the county jail may exceed one year if successive sentences for various offenses are pending. The court held that if the sentences are imposed at the same time, the total time in the county jail may not exceed one year. However, if the defendant has previously been sentenced to imprisonment in the county jail, a subsequent sentence may be imposed for additional county jail time up to one year, even if the cumulative effect is that the defendant will be in the county jail for over one year.

B. Resentencing Upon Violation of Probation or Community Control

When a defendant's probation is violated, upon resentencing, the

10.  FLA. STAT. § 948.01(5) (Supp. 1988).
12.  State v. Reed, 557 So. 2d 33 (Fla. 1990); Skeens v. State, 556 So. 2d 1113 (Fla. 1990).
14.  Boatwright, 559 So. 2d at 211.
16.  Id. at 1163.
17.  Id.
defendant is entitled to gain time earned during his prior imprisonment on the charge for which probation was revoked.\textsuperscript{18} Accrued gain time equals time spent in prison.\textsuperscript{19} A defendant sentenced as a youthful offender whose probation is revoked is still entitled to the benefit of Florida Statute 958.14, which limits imprisonment to a maximum of six years.\textsuperscript{20}

III. SENTENCING GUIDELINES

A. \textit{In General}

Since the adoption of the sentencing guidelines, sentencing courts have been required to sentence all defendants convicted of a felony committed after the effective date of July 1, 1985, within the recommended guidelines range. Even where the statutory minimum or maximum sentences preclude sentencing within the guidelines, the court must impose either concurrent or consecutive sentences if there are multiple convictions in order to come as close as possible to the guidelines recommendation.\textsuperscript{21} The court must provide written reasons for departure at the time the sentence is imposed or the sentence will be invalidated.\textsuperscript{22} If the court does not provide written reasons, the reviewing court must remand for resentencing within the guidelines with no possibility of departure.\textsuperscript{23}

In determining the recommended range, prior convictions include all convictions for crimes obtained prior to sentencing.\textsuperscript{24} The trial court

\begin{itemize}
\item \textsuperscript{18} State v. Carter, 553 So. 2d 169 (Fla. 1989).
\item \textsuperscript{19} Heuring v. State, 559 So. 2d 207 (Fla. 1990) (imposition of a sentence of imprisonment for a specific term may not include probation for the time remaining when the defendant is released early due to gain time or otherwise).
\item \textsuperscript{20} State v. Watts, 558 So. 2d 994 (Fla. 1990). The court in \textit{Watts} discussed the 1985 amendment to section 958.14, which limits the sentences of youthful offenders to six years, and held that the amendment was applicable to all violations of probation and community control occurring after the effective date of the amendment, even if the original offense occurred prior to the amendment. \textit{See also} State v. Kerklin, 566 So. 2d 513 (Fla. 1990); Cole v. State, 565 So. 2d 1353 (Fla. 1990); State v. Warren, 559 So. 2d 1139 (Fla. 1990); State v. Johnson, 559 So. 2d 1136 (Fla. 1990); State v. Dixon, 558 So. 2d 1001 (Fla. 1990); State v. Miles, 558 So. 2d 1001 (Fla. 1990); James v. State, 558 So. 2d 1000 (Fla. 1990).
\item \textsuperscript{21} Branam v. State, 554 So. 2d 512 (Fla. 1990).
\item \textsuperscript{22} Ree v. State, 565 So. 2d 1329 (Fla. 1990).
\item \textsuperscript{23} Robinson v. State, 571 So. 2d 429 (Fla. 1990); Ferguson v. State, 566 So. 2d 255 (Fla. 1990); Pope v. State, 561 So. 2d 554 (Fla. 1990).
\item \textsuperscript{24} Thorp v. State, 555 So. 2d 362 (Fla. 1990).
\end{itemize}
should also score juvenile furlough, attendance in juvenile programs, and conditions of bail as legal constraint. 25

B. Departure Sentences

During the survey period, the Florida Supreme Court reviewed various departure sentences. In *State v. Vanhorn*, 26 an escalating pattern of criminal conduct was sufficient to justify a upward departure, even where the remaining reasons were invalid. However, in *Herrin v. State*, 27 the court found that substance abuse, coupled with reasonable possibility of successful treatment, was a valid reason for a downward departure.

In *State v. Simpson*, 28 the court held that although defendant’s crimes were committed two days apart, it did not sustain a finding of an escalating criminal pattern and sentence departure. The mere fact the defendant committed a second offense while on probation, but was not convicted therefor, was not sufficient for the court in *Wesson v. State* to depart on the sentencing on the first offense. 29 The court in *Brown v. State* 30 held a violation of a condition of bail an invalid reason for departure. Additionally, in *Wilson v. State* 31 the court held that an abuse of a position of familial authority over the victim was not reason to justify the imposition of departure sentence on convictions of lewd and lascivious assault of child under sixteen years of age, even when the child is mildly retarded.

IV. Death Penalty

The Florida Supreme Court reviewed numerous death penalty cases during the survey period. The court was again called upon to weigh the aggravating and mitigating factors present in each case to determine if the trial court properly imposed the most severe punishment our law allows.

25. Brown v. State, 569 So. 2d 1223 (Fla. 1990); State v. Young, 561 So. 2d 583 (Fla. 1990); State v. Ellison, 561 So. 2d 576 (Fla. 1990).
26. 561 So. 2d 584 (Fla. 1990).
27. 568 So. 2d 920 (Fla. 1990).
28. 554 So. 2d 506 (Fla. 1989).
29. 559 So. 2d 1100 (Fla. 1990).
30. 569 So. 2d 1223 (Fla. 1990).
31. 567 So. 2d 425 (Fla. 1990).
A. Constitutionality of Death Imposed in Florida's Electric Chair

During the survey period, the supreme court reviewed the novel issue of whether the death penalty was violative of the United States and Florida Constitutions' prohibition against cruel and unusual punishment because of a malfunction in the electric chair. The issue arose after the execution of Jesse Tafero on May 4, 1990. Flames and smoke spurted from Tafero's head and emanated from the area of the metallic skull cap. The state concluded, after an investigation, that the use of a synthetic sponge in the skull cap caused the problem. The court found that one malfunction is insufficient to justify additional inquiry and held the death penalty not to be cruel and unusual punishment under these circumstances.

B. Written Findings

To impose a sentence of death, the sentencing court must issue written findings regarding aggravating and mitigating factors. Merely stating that "[t]he court has considered the aggravating and mitigating circumstances in evidence . . . and determines that sufficient aggravating circumstances exist, and there are insufficient mitigating circumstances to outweigh the aggravating circumstances" does not comport with the statute and is insufficient to justify a death sentence. The trial court does not have to expressly address each nonstatutory mitigating factor to sufficiently reject them. However, the written findings must be sufficient so as to allow an opportunity for meaningful review by the supreme court. If the written findings are insufficient, the death penalty will be vacated and a life sentence imposed.

32. Bertolotti v. State, 565 So. 2d 1343 (Fla. 1990); White v. State, 565 So. 2d 322 (Fla. 1990); Hamblen v. State, 565 So. 2d 320 (Fla. 1990); Squires v. State, 565 So. 2d 318 (Fla. 1990); Buenoano v. State, 565 So. 2d 309 (Fla. 1990).
33. Buenoano, 565 So. 2d at 310.
34. Id. at 311.
35. Id.; see also Bertolotti, 565 So. 2d at 1343; White, 565 So. 2d at 323; Hamblen, 565 So. 2d at 321; Squires, 565 So. 2d at 319.
39. Id.
40. Id.; see also Bouie, 559 So. 2d at 1115-16; Fla. Stat. § 921.141(3) (1989).
C. Jury Recommendation of Life

During the survey period, the supreme court reviewed five cases wherein the trial court overrode the jury's recommendation of life imprisonment. In all five cases, the supreme court vacated the death sentence. In four of the cases, the supreme court remanded for imposition of a life sentence. In one case, the court remanded for an evidentiary hearing on the issue of ineffective assistance of counsel during the sentencing hearing.

D. Mitigating Factors

1. Statutory

Section 921.141(6) of the Florida Statutes sets out the statutory mitigating factors to be considered in determining whether or not to impose the death penalty. The defendant is entitled to an instruction

41. Cheshire v. State, 568 So. 2d 908 (Fla. 1990) (trial court failed to consider emotional disturbance as mitigating factor and erred in finding aggravating factor of heinous, atrocious or cruel where defendant shot his estranged wife); Carter v. State, 560 So. 2d 1166 (Fla. 1990) (statutory and nonstatutory mitigating factors outweigh evidence of five aggravating factors found by the trial court); Hallman v. State, 560 So. 2d 223 (Fla. 1990) (four of six aggravating factors found to be valid but insufficient to outweigh the nonstatutory mitigating factors present); Heiney v. Dugger, 558 So. 2d 398 (Fla. 1990) (Hitchcock error found to be harmless beyond a reasonable doubt, case remanded for an evidentiary hearing on defendant's claim of ineffective assistance of counsel at sentencing); Morris v. State, 557 So. 2d 27 (Fla. 1990) (override of jury recommendation of death penalty based on finding of single aggravating factor of heinous, atrocious, or cruel, insufficient to overcome the great weight given jury's recommendation).

42. See Cheshire, 568 So. 2d at 913; Carter, 560 So. 2d at 1169; Hallman, 560 So. 2d at 228; Morris, 557 So. 2d at 30.

43. Heiney, 558 So. 2d at 400.

44. The mitigating factors include:
(a) The defendant has no significant history of prior criminal activity.
(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
(c) The victim was a participant in the defendant's conduct or consented to the act.
(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor,
(e) the defendant acted under extreme duress or under the substantial domination of another person.
(f) The capacity of the defendant to appreciate the criminality of his con-
regarding each factor for which evidence was adduced, unless the defendant specifically waives such an instruction. If the trial court fails to appropriately instruct the jury, the reviewing court must determine whether the failure to so instruct the jury affected the jury's recommendation. If the court cannot say beyond a reasonable doubt that the failure had no effect on the jury's recommendation, a new sentencing proceeding must be held.

2. Nonstatutory

The supreme court again reviewed Hitchcock violations. Once the court determines that there is a Hitchcock violation, it must apply the harmless error doctrine to determine if reversible error occurred. Where the jury recommends life, there is no doubt that the error is harmless. Where the jury recommends death, the error could be prejudicial or harmless depending on the evidence of mitigating factors presented during the penalty phase.

E. Aggravating Factors

Aggravating factors to be considered by the court are dictated by

- conduct or to conform his conduct to the requirements of law was substantially impaired.
- The age of the defendant at the time of the crime.


47. Id. at 421.
48. See Hitchcock v. Dugger, 481 U.S. 393 (1987) (death sentence held invalid where trial court failed to instruct jury that it may consider all mitigating circumstances in determining whether to recommend death). The trial court must allow the consideration of nonstatutory as well as statutory mitigating circumstances to avoid a Hitchcock violation.
49. See Copeland v. Dugger, 565 So. 2d 1348 (Fla. 1990) (state conceded error and record contained many items of potentially mitigating evidence and also was unclear as to whether trial court was aware that it could consider nonstatutory mitigating factors); Smith v. State, 556 So. 2d 1096 (Fla. 1990) (state conceded error but met burden of proving harmless error where overwhelming body of aggravating factors exist).
50. Heiney, 558 So. 2d 398.
51. Way v. Dugger, 568 So. 2d 1263 (Fla. 1990) (not harmless error where evidence of numerous mitigating factors presented during penalty phase which the jury should have considered); see also Copeland, 565 So. 2d 1348; Smith, 556 So. 2d 1096.
section 921.141(5) of the Florida Statutes. Once the jury makes its recommendation, the trial court must weigh the aggravating factors present before imposing sentence.

In the cases surveyed in this subsection, the jury recommended death. The supreme court upheld the death sentence in fourteen cases. The cases reviewed contained the following aggravating factors: prior conviction of a felony involving the use or threat of violence; felony committed for pecuniary gain; felony committed in a cold, calculated, and premeditated manner; felony committed while engaged in an enumerated felony; felony particularly heinous, atrocious, or cruel; felony committed to avoid lawful arrest; felony committed under sen-

52. Aggravating factors include:
(a) The capital felony was committed by a person under sentence of imprisonment.
(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
(c) The defendant knowingly created a great risk of death to many persons.
(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.
(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
(f) The capital felony was committed for pecuniary gain.
(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
(h) The capital felony was especially heinous, atrocious, or cruel.
(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.
(j) The victim of the capital felony was a law enforcement officer engaged in the performance of his official duties.
(k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.

53. § 921.141(5)(b).
54. § 921.141(5)(f).
55. § 921.141(5)(i).
56. § 921.141(5)(d).
57. § 921.141(5)(h).
58. § 921.141(5)(e).
tence of imprisonment; defendant created a great risk of death to many persons; and felony committed to disrupt a governmental function.

59. § 921.141(5)(a).
60. § 921.141(5)(c).
61. § 921.141(5)(g); see Holton v. State, 573 So. 2d 284 (Fla. 1990) (prior conviction of violent felony for a contemporaneous sexual battery and arson not upheld but proper as to prior attempted robbery conviction; committed during commission of sexual battery; heinous, atrocious, and cruel; cold, calculated, and premeditated not upheld — two mitigating factors insufficient to outweigh the valid aggravating factors); Downs v. State, 572 So. 2d 895 (Fla. 1990) (prior conviction of violent felony; committed for pecuniary gain; and cold, calculated, and premeditated not overcome by evidence of nonstatutory mitigating circumstances); Sanchez-Velasco v. State, 570 So. 2d 908 (Fla. 1990) (heinous, atrocious, and cruel; committed during commission of sexual battery — no mitigating factors found); Occhicone v. State, 570 So. 2d 902 (Fla. 1990) (prior conviction of violent felony; committed during a burglary; and cold, calculated, and premeditated supported by the record and death not disproportionate); Floyd v. State, 569 So. 2d 1225 (Fla. 1990) (committed for pecuniary gain and heinous, atrocious, and cruel sufficient to justify death penalty); Brown v. State, 565 So. 2d 304 (Fla. 1990) (committed during commission of a felony; previous conviction of a violent felony; and committed in a cold, calculated, and premeditated manner not outweighed by mitigating circumstances presented); Van Poyck v. State, 564 So. 2d 1066 (Fla. 1990) (committed while under sentence of imprisonment, committed to escape from custody, created great risk of death to many persons and prior conviction of violent felony sufficiently outweighed mitigating evidence to sustain sentence of death); Porter v. State, 564 So. 2d 1060 (Fla. 1990) (prior conviction of violent felony; committed during commission of burglary; cold, calculated, and premeditated; heinous, atrocious, or cruel not upheld but the three valid aggravating factors sufficient to justify death penalty); Pardo v. State, 563 So. 2d 77 (Fla. 1990) (multiple murders — cold, calculated, and premeditated apply to all and committed to disrupt governmental function and committed for pecuniary gain applied to individual murders; additional aggravating factor present but not found by court is prior conviction of violent felony even though the conviction contemporaneous with other convictions where multiple victims or separate episodes involved); Freeman v. State, 563 So. 2d 73 (Fla. 1990) (prior conviction of violent felony and committed for pecuniary gain outweighed nonstatutory mitigating factors); Randolph v. State, 562 So. 2d 331 (Fla. 1990) (committed during commission of sexual battery; committed to avoid lawful arrest; committed for pecuniary gain; and heinous, atrocious, or cruel sufficient where no statutory mitigating factors found and only two nonstatutory mitigating factors present); Rivera v. State, 561 So. 2d 536 (Fla. 1990) (prior conviction of violent felony; committed during commission of enumerated felony; heinous, atrocious, or cruel; cold, calculated, and premeditated not upheld — three remaining factors sufficient where only one statutory mitigating circumstance present and no nonstatutory mitigating circumstances); Haliburton v. State, 561 So. 2d 248 (Fla. 1990) (under sentence of imprisonment; prior conviction of violent felony; committed during commission of a burglary; and cold, calculated, and premeditated sufficient to impose death where nonstatutory mitigating factors did not
The supreme court found the death penalty inappropriate in eight of the cases included under this subsection. In doing so, the court found in some of these cases that certain aggravating factors had not been established by the evidence. Consistent with prior decisions, the court also found that introduction of evidence of the defendant’s lack of remorse is improper and requires resentencing. In other cases, the court found the death penalty disproportionate under the particular circumstances of the case.

Once the supreme court vacates the death penalty, it may remand for a new sentencing hearing or for imposition of a life sentence. The supreme court remanded four of the above cases for a new sentencing hearing and four for imposition of a life sentence.

outweigh these aggravating factors); Reed v. State, 560 So. 2d 203 (Fla. 1990) (committed while engaged in commission of sexual battery; committed to avoid lawful arrest; committed for pecuniary gain; and heinous, atrocious, or cruel sufficient even where aggravating factors of prior conviction of felony of violence and cold, calculated, and premeditated held invalid—total absence of mitigating circumstances).

62. Campbell v. State, 571 So. 2d 415 (Fla. 1990) (cold, calculated, and premeditated improperly found); Jones v. State, 569 So. 2d 1234 (Fla. 1990) (trial court found aggravating factors of committed for pecuniary gain and cold, calculated, and premeditated; error to instruct jury as to heinous, atrocious, or cruel); Farinas v. State, 569 So. 2d 425 (Fla. 1990) (cold, calculated, and premeditated not present); Thompson v. State, 565 So. 2d 1311 (Fla. 1990) (single aggravating circumstance of cold, calculated, and premeditated inapplicable where the heightened premeditation required to support this finding not present); Preston v. State, 564 So. 2d 120 (Fla. 1990) (prior conviction of violent felony inapplicable where conviction vacated; cold, calculated, and premeditated previously eliminated).

63. Colina v. State, 570 So. 2d 929 (Fla. 1990).

64. Nibert v. State, 59 U.S.L.W. 3 (Fla. July 26, 1990) (one aggravating factor and trial court failed to find mitigating circumstances where such evidence presented and unrefuted); Farinas, 569 So. 2d 425; Blakely v. State, 561 So. 2d 560 (Fla. 1990) (disproportionate in light of penalty imposed in factually similar cases — killing resulting from ongoing domestic problems).

65. Nibert, 59 U.S.L.W. 3; Campbell, 571 So. 2d 415 (remanded for new sentencing hearing); Colina, 570 So. 2d 929; Farinas, 569 So. 2d 425; Jones v. State, 569 So. 2d 1234 (Fla. 1990), Thompson, 565 So. 2d 1311 (remanded for imposition of life sentence); Preston, 564 So. 2d 120; Blakely, 561 So. 2d 425.
Lastly, the supreme court approved an addition to the standard jury instruction on the aggravating factor of heinous, atrocious, or cruel. The addition defines the terms heinous, atrocious, and cruel.


67. Id.

('Heinous' means extremely wicked or shockingly evil. 'Atrocious' means outrageously wicked and vile. 'Cruel' means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.)
Florida Constitutional Law: 1990 Survey of the State Bill of Rights*

David C. Hawkins**

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ment and insight contributed much to the value of this project.
This is a comprehensive survey of the decisions of the Supreme Court of Florida that construed the bill of rights contained in article I of the state constitution during 1990. It supplements this Review's 1989 Survey of Florida Law, which examined the article I cases released by the court during the decade past. Continuing the same format and case selection criteria, the following

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1. See Hawkins, Florida Constitutional Law: A Ten-year Retrospective on the State Bill of Rights, 14 NOVA L. REV. 693 (1990). That project provides clear indications that the court is engaged in producing an active body of state constitutional jurisprudence. To briefly abstract its principal findings, the project concluded that: The court's decisions create a hierarchical order of rights in article I, with the order dependent solely upon the particular standard chosen by the court to measure the justification for the state's encroachment; article I rights are not absolute, despite rhetoric to the contrary; those rights eclipsed the protection against government interference afforded by their federal analogues on five occasions during the decade; litigants should exploit the textual differences between state and federal provisions, thereby promoting constitutional imperatives that are unique to Florida; and the court has promoted the independence of the state constitution on several occasions when it eschewed relevant federal precedent.

2. What follows is a section-by-section summary of the cases that addressed article I during 1990. This survey accepts the premise that each opinion citing to the state bill of rights, whether by principled analysis or passing reference, uniquely contributes to the development of the Florida Constitution. In profile, the opinion must confirm that the state constitution was relied upon by the court, addressed by a lower court, or advanced by a litigant in support of a claim. Conversely, an opinion that generically refers to equal protection, double jeopardy, and the like, cannot be said to directly add to the body of state constitutional law. Several recent cases support this position. In them, the court specifically declined to distinguish the nature of the state and federal protections, very likely because the claimants sought no particular relief under the
work marks, for the moment, the contours of Florida’s evolving constitutional landscape.

A. INTRODUCTION

The bill of rights is the constitutional pedigree of personal freedoms. The integrity of the pedigree is only as sound as the barriers it establishes as protection from governmental excess. Conflict between the state sovereign and its constituents occurs inevitably when the state seeks to limit the exercise of personal freedom in the name of the common good, or wields its power in disregard of constitutional safeguards.

A challenging array of personal rights issues tested the limits of the state constitution this year. Among them are those that asked whether the state can:

• authorize a disinherited daughter to avoid her deceased mother’s devise to charity;
• prohibit candidates for statewide offices from accepting campaign contributions during legislative sessions;
• tax the retail sales of magazines while exempting newspapers;
• enter judgment against a delinquent obligor of child support payments without allowing the obligor an opportunity to be heard in court;
• refuse with impunity for two years to comply with an order directing the state to restore wrongfully confiscated and withheld property to the owner;
• search the carry-on luggage of boarded bus passengers without a


There is one exception to these case selection criteria. Occasionally, the court cites to a prior constitutional decision as precedent, without mentioning that the holding has constitutional significance. The line of cases beginning with State v. Neil, 457 So. 2d 481 (Fla. 1984), offers several illustrations. Cases of that ilk are included to the extent research successfully identified them.

The five district courts of appeal also contribute to the shaping of constitutional parameters, and their decisions oftentimes have statewide import. See Stanfill v. State, 384 So. 2d 141, 143 (Fla. 1980) (state constitutional decisions of the district courts “represent the law of Florida unless and until overruled by the supreme court”); Weiman v. McHaffie, 470 So. 2d 682, 684 (Fla. 1985) (absent conflicting precedent of its district court or the supreme court, a trial court is obliged to follow state constitutional decisions of other district courts). Time limits alone prevented review of district court cases in this survey.
whisper of suspicion of wrongdoing;
• execute roadside stops of law-abiding motorists merely because they satisfied an officer's self-styled drug courier profile;
• provide constitutionally effective legal representation when the defendant's state-paid assistant public defender is also a special deputy sheriff;
• relegate citrus growers, whose crops the state destroyed in a citrus canker eradication program, to an administrative rather than a judicial determination of damages;
• sanction the seller of allegedly obscene material that the buyer has a constitutionally protected right to possess; and
• deny a person the right to refuse unwanted medical intervention, without which death would certainly follow.

Article I cases occasionally spring from emotionally-charged societal disputes, which are fired by the cultural passions of a diverse citizenry. Once reduced to legal claims, those cases often produce fractured opinions that express doctrinal positions no less impassioned. The opinions in 1990 crystallized numerous driving principles at work behind the positions advocated by the court's membership. For instance, the justices on occasion displayed an ambitious aspiration to expand the scope of protection afforded by the constitutional imperatives of article I. Other times, a majority returned to the safe harbor of precedent and narrow construction to deny protection. Some opinions clearly attempted to reach a proper accommodation between the competing interests of the governed and those who govern. Others sought to achieve a just result, without regard to accommodation. Some turned deferentially upon the court's perception of its own role as a coordinate branch of government. Others cast the judiciary into the role of guardian of human dignity when another branch defaulted by failing to provide adequate protection. And there were cases that made apparent the ongoing tension between law, as a dynamic, evolutionary process, and law, as an interdiction comprised of prohibitory rules. To be sure, the holdings of the court's 1990 cases are of no greater interest and importance than the collegial and doctrinal forces that produced them.

B. DECLARATION OF RIGHTS

1. Political Power

All political power is inherent in the people. The enunciation herein of certain rights shall not be construed to deny or impair
others retained by the people. FLA. CONST. art. I, § 1.

No decisions construed this section during the survey period.

2. Basic Rights

Article I, section 2 makes three separate declarations. The first expresses the central constitutional concept that the state must deal with similar persons in a similar manner. The second declares that persons have inalienable rights, and specifically enumerates many of those rights. The third protects all basic rights of natural persons from deprivation, especially on account of race, religion, or physical handicap.

a. Equal Protection Clause

"All natural persons are equal before the law . . . .” FLA. CONST. art. I, § 2.

In Shriners Hospitals for Crippled Children v. Zrillic, the court considered a will executed by Lorraine Romans that intentionally limited the inheritance of her daughter, Lorraine Zrillic, to several boxes of antique dishes and figurines, and left the remainder of the estate to Shriners Hospitals for Crippled Children. Romans died approximately two-and-one-half months after executing her will. Zrillic sought to avoid the devise to Shriners Hospitals in circuit court, relying upon Florida’s version of a “mortmain” statute, a statute that essentially enabled a lineal descendent to avoid a charitable devise made within six months of the testator's death. The circuit court declared the statute unconstitutional, and the district court reversed that decision.

On review, the Supreme Court of Florida first decided that Zrillic had standing under the mortmain statute to avoid her mother’s devise to Shriners Hospitals, and then measured the statute against two separate clauses within article I, section 2--the equal protection clause, and the inalienable rights clause. Regarding the first clause, five justices agreed that Florida Statutes section 732.803(1) violated state and fed-

eral equal protection guarantees. To survive equal protection analysis, the scheme "must appear to be based at a minimum on a rational distinction having a just and reasonable relation to a legitimate state objective." The statutory scheme here created a class of testators who die within six months of executing a charitable devise. The court said that there exists no rational basis for considering differently devises executed six months or more before death, from those executed less than six months before death. Moreover, the class cannot be said to advance the statutory aim, for it may operate to uphold charitable devises made hastily, without adequate deliberation, albeit outside the six month limit, and may void those devises made without undue influence.

Three other cases touched upon Florida's equal protection guarantee. The petitioners in the first case, Amendments to Rules Regulating The Florida Bar—1-3.1(a) and Rules of Judicial Administration—2.065 (Legal Aid), were fifty-eight members of The Florida Bar who requested the court to exercise its rule-making power to create a mandatory pro bono program for the state's practicing lawyers. The justices declined for the moment to take action on the rules proposed by the petitioners, pending receipt of a special committee's report on the subject, but did reach agreement on an interim statement of principle. Unanimously, the court held: 

"[E]very . . . member of The Florida Bar has an obligation to represent the poor when called upon by the courts . . . . Pro bono is a part of a lawyer's public responsibility as an officer of the court."

Petitioners asserted that mandatory pro bono legal services were compelled by the state equal protection clause, as well as other article I sections. The justices never reached the constitutional claims. Instead, the decision is clearly pegged upon the professional obligation undertaken in the lawyer's oath, and imposed by common law anteced-

7. Id. at 69 (citations omitted).
8. Id. at 70-71.
10. Id. at 806.
11. They also contended that mandatory pro bono legal services were required by article I, sections 9 (due process clause) and 21 (access to courts). Id.
12. The oath states, in part, that "'I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed . . . .'" Id. at 803 (quoting Rules Relating to Ethics Governing Bench and Bar, 145 Fla. 763, 797 (1941) (em-
ents. Thus, a lawyer's duty to provide pro bono legal services does not rest upon any express constitutional entitlement of the poor. The court's avoidance of the constitutional claims may be explained by the strong likelihood that it chose the more prudential course of resolving the cause on non-constitutional grounds.

*White v. Dugger* dealt with a habeas petitioner's equal protection claim that the state obtained the indictment against him in a fundamentally flawed manner. The stated basis for his argument was that the indictment against him was returned by a grand jury comprised of twenty-three jurors, and that the presence of persons during grand jury deliberations that exceeded the statutory limit of eighteen raised a constitutional violation. The court rejected the claim as meritless.

Finally, *Department of Revenue v. Magazine Publishers of America, Inc.* considered a statute that taxed the retail sales of magazines, while exempting from taxation the retail sales of newspapers. Various magazine publishers charged that the statute violated the Speech and Press Clauses of the first amendment, the Equal Protection Clause of the fourteenth amendment, and the state constitutional counterparts. The court never reached the equal protection claim, but instead resolved the case in favor of the publishers on first amendment grounds, very likely because there existed clear first amendment precedent. *Magazine Publishers* is more fully discussed below, under article I, section 4.

b. *Inalienable Rights and Deprivation Clauses*

*All natural persons . . . have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness,*
to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion or physical handicap. FLA. CONST. art. I, § 2.

Shriners Hospitals, introduced in the preceding section, made two significant contributions to the state's constitutional jurisprudence. First, it elevated the right of persons to dispose of property by will from legislative creation to constitutional dimension. At issue was the scope of protection afforded by the inalienable rights clause, in light of the mortmain statute's restriction of certain devises to charity. The clause expressly protects the right of natural persons "to acquire, possess and protect property." To ascertain the meaning of that right, the majority of four justices turned to a principle of constitutional construction that requires a "common sense reading of the plain and ordinary meaning of the language."19 Resorting to dictionary definitions, the justices interpreted the right to "possess" property as meaning "to have, hold, own, or control 'anything which may be the subject of property, for one's own use and enjoyment, either as owner or as the proprietor of a qualified right in it.' "20 They determined that the right to "acquire, possess and protect property" necessarily includes the incidents of property ownership,21 which, in turn, includes the "'right to transmit' " property to others.22 The mortmain statute directly restrained that right.

A second contribution is apparent from the court's reliance upon a principle of constitutional construction that permits it "to carry out the

19. Id. at 67 (citation omitted). Shriners Hospitals is consistent with Florida's legal tradition of ascertaining intent of the legislature and constitutional adopters by resort to a plain meaning of the text. For other recent illustrations, see In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender, 561 So. 2d 1130, 1137 (Fla. 1990); State v. Dodd, 556 So. 2d 1104, 1106 (Fla. 1990).

20. Shriners Hospitals, 563 So. 2d at 67 (quoting BLACK'S LAW DICTIONARY 1046-47 (5th ed. 1979)).

21. Id.

22. Id. (quoting BLACK'S LAW DICTIONARY 997 (5th ed. 1979) (emphasis omitted)). Article I, section 2 permits the legislature to regulate or prohibit property inheritance and possession by a narrowly limited class—aliens ineligible for citizenship. The court also reasoned that the framers must have intended that persons outside that class, including testators, ought to "be free from unreasonable legislative restraint." Id.
intent of the framers as applied to the context of our times."\textsuperscript{23} Historically, courts have distinguished property rights from testamentary rights. The former were grounded in natural law, and incorporated into the common law of England. The latter were foreign to the common law, and were creatures of statute, originally intended to retain for the monarchs the power of testamentary disposition in their struggle for power with the organized church.\textsuperscript{24} The failure of modern-day courts to question the basis for the distinction only served to blindly perpetuate it. Finding that those "long-abandoned feudal notions of property" were now "inapplicable" in Florida, the majority reasoned that the adopters necessarily had rejected blind adherence to the old English distinction, and in its place elevated testamentary disposition to constitutional stature as an article I, section 2 property right.\textsuperscript{25}

However, property rights are not absolute, and may yield to valid exercises of the state's police power. But here, the statutory limit on charitable devises was not "reasonably necessary" to accomplish the state's aim of protecting a decedent's spouse or lineal descendants from disinherition. That protection formerly was said to avert undue influence by charitable organizations, or the peculiar susceptibility to influence by testators facing impending death.\textsuperscript{26} Fatally, the mortmain statute enabled a lineal descendent having no contact with a testator to realize a windfall if a charitable devise were avoided, and enabled artful will drafters to deprive a spouse or lineal descendent of standing to contest the devise altogether.\textsuperscript{27}

Three justices would have upheld the mortmain statute because its

\textsuperscript{23} Id. (emphasis added). More recent case law indicates that a majority of the court is committed to viewing article I, section 2 property protections in light of prevailing social and economic conditions. See Harris v. Martin Regency, Ltd., 16 Fla. L. Weekly s98 (Fla. Jan. 17, 1991) (Barkett, J., author. McDonald, and Kogan, JJ., and Ehrlich, Senior Justice, concurred. Shaw, C.J., Overton, and Grimes, JJ., dissented.).

\textsuperscript{24} Id. at 67-68 (citations omitted).

\textsuperscript{25} Id. at 68. For another recent instance of the court's rejecting outmoded usage, see Warren v. State, 572 So. 2d 1376 (1991). Warren struck down on grounds of vagueness an anti-prostitution law that proscribed the keeping of a house of 'ill fame.' The court effectively receded from prior case law upholding the law, writing: "While the general population might have understood the meaning of 'ill fame' a century ago, the lack of definition in the statutes, jury instructions, and cases is fatal to its continued validity. Since the legislature first adopted the "ill-fame" statute, both our society and our language have changed." Id. at 1377.

\textsuperscript{26} Shriners Hospitals, 563 So. 2d at 69.

\textsuperscript{27} Id.
earlier version survived constitutional scrutiny.\textsuperscript{28} Previously, the court rejected claims that the predecessor statute denied the testator and legatees the right to receive, enjoy, and dispose of property without due process, and denied them equal protection by unfairly limiting their right to acquire and dispose of property.\textsuperscript{29} \textit{Shriners Hospitals} illustrates the majority's willingness to favor article I rights over unjustified state regulation, even though it requires the court to expressly overturn a line of opposing case law.

One other case, \textit{In re Forfeiture of 1976 Kenworth Tractor Trailer Truck, Altered VIN 243340M},\textsuperscript{30} has importance for personal property rights protected under article I, section 2. The justices held that the owners of a truck were entitled to seek damages for loss of use under the implied constitutional remedy of inverse condemnation. The owner’s right arose when the state wrongfully seized the truck, and wrongfully detained it for a period of two years after the trial court ordered the state to restore the truck to the owner. This case is more fully discussed below, under article I, section 9.

### 3. Religious Freedom

\textit{There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution. FLA. CONST. art. I, \S 3.}

\textsuperscript{28} \textit{Id.} at 71 (Grimes, J., concurring in result); \textit{id.} (McDonald, J., concurring in result, dissenting in part. Overton, J., concurring). Justice McDonald added that the legislature was well within its prerogatives when it sought to protect “the widow and children from improvident gifts made to their neglect by the testator.” \textit{Id.} at 72 (citation omitted). “Surely one would have to say that, had the testator, in her last few days, succumbed to a television evangelist's call to be with the Lord by delivering her property to his church and thus leave unprotected a physically handicapped child, a rational basis for the statute would exist.” \textit{Id.}

\textsuperscript{29} Taylor v. Payne, 154 Fla. 359, 17 So. 2d 615, \textit{appeal dismissed}, 323 U.S. 666 (1944).

\textsuperscript{30} 569 So. 2d 1274 (Fla. 1990) (per curiam) (the mandate did not issue until March 13, 1991, therefore this opinion was prematurely published. Check subsequent case history for the citation of the official opinion).
No decisions construed this section during the survey period.

4. Freedom of Speech and Press

Every person may speak, write and publish his sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions and civil actions for defamation the truth may be given in evidence. If the matter charged as defamatory is true and was published with good motives, the party shall be acquitted or exonerated. FLA. CONST. art. I, § 4.

In State v. Dodd, the court considered whether Florida's Campaign Financing Act may constitutionally prohibit a candidate for the 1990 Republican nomination for state agriculture commissioner from accepting or soliciting campaign contributions during a regular or special legislative session. Candidate Dodd argued that the act violated his free speech and associational rights, and a clear majority of the court agreed.

The plurality wrote that independent campaign expenditures in support of a political candidate are said to lie "at the core of our electoral process and the First Amendment freedoms," in particular, those relating to speech and association. Governmental restrictions of those freedoms are "particularly grave" when they prevent political candidates "from amassing the resources for effective advocacy." Here, the act effectively cut off all campaign financing during any meeting of the legislature. That burden is particularly onerous because Florida law imposes no limit on the number of legislative sessions that might be convened.

32. FLA. STAT. § 106.08(8) (1989).
33. Adding to the three justices who signed onto the lead opinion, Justice Overton wrote separately that he "fully agree[d] with the majority . . . ." Dodd, 561 So. 2d at 267 (Overton, J., concurring).
34. Id. at 264 (quoting Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391, 1396 (1990)).
35. Id. at 264.
36. Id. (quoting Buckley v. Valeo, 424 U.S. 1, 21 (1976)).
Because the act implicated "weighty" free speech and associational rights protected under the state and federal constitutions, with an intrusion said to be "particularly grave," the act's restrictions must meet the compelling state interest test. The plurality said there is no doubt that the act promotes a compelling state interest, however, the act failed to advance its goals through the least intrusive means. Indeed, the act was a "drastic, overbroad curtailment" of speech and associational rights. For instance, the act applied without exception to all office-seekers, yet, an incumbent cabinet officer, a position sought by Dodd, only marginally affects the legislative process; and others, such as judges, have absolutely no role in that process. Moreover, corrupt campaign practices may occur as easily during the legislative session as during any other time. The legislature's effort to remove the appearance of corruption from the campaign podium, though laudably motivated, simply went too far.

In separate opinions, two justices wrote that the statute suffered from unconstitutional overbreadth, and another would hold the statute facially unconstitutional because its sweeping application to all candidates was not the least restrictive means of achieving the state's interest.

37. In addition to the speech protections assured under article I, section 4, the court relied upon the equally availing associational rights protection under article I, section 5.
38. Dodd, 561 So. 2d at 264.
39. Id. at 265 (citing Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480, 496-97 (1985)) (acknowledging that the "only legitimate and compelling governmental interests" are the prevention of corruption and the appearance of corruption) (emphasis omitted). The state argued that Florida politicians suffered a "crisis of confidence" with the voters, which the act was specifically targeted to improve. Id. at 266.
40. Id. at 267.
41. Id. at 265-66.
42. Id. at 267. The plurality elaborated:
[F]ew rights are more basic to the American tradition than the ability of people to work for political reform through grassroots or personal campaigning. The raising of money from private sources is a crucial component of this right. In its commendable effort to stop the appearance of corruption caused by well-heeled special interests, the Campaign Financing Act imposes too heavy a hand on the innocent.

Id.
43. Dodd, 561 So. 2d at 268 (Overton, J., concurring); id. (McDonald, J., concurring in result).
44. Id. (Ehrlich, C.J., concurring in result only. McDonald, J., concurring).
Two other cases were decided on federal first amendment grounds, with passing reference to article I, section 4. In one, *Miami Herald Publishing Co. v. Morejon*, the court determined that a news journalist enjoyed no qualified privilege under the federal first amendment to refuse to disclose information learned on a newsgathering mission as an eyewitness to a police arrest. The defendant issued a subpoena *duces tecum* to the reporter to appear for a discovery deposition. Asserting a reporter's qualified privilege against disclosing information or documents obtained in connection with newsgathering activities, the reporter moved the trial court to quash the subpoena. The trial court denied the motion and ordered the reporter to appear. That decision was affirmed by the district court and approved by the Supreme Court of Florida.

Noting that the Florida Legislature had not enacted a "shield" law or statutory reporter's privilege, the court explained that any reporter's privilege must be based upon the first amendment and article I, section 4. Turning to the leading first amendment decision in this area, *Branzburg v. Hayes*, the court ruled that in Florida "there is no privilege, qualified, limited, or otherwise, which protects journalists from testifying as to their eyewitness observations of a relevant event in

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46. The rationale for the qualified journalist privilege under the first amendment has been broadly expressed as follows: "The concept of freedom of the press as guaranteed by the First Amendment is the keystone of our constitutional democracy and is broad enough to include virtually all activities for the press to fulfill its First Amendment functions." DiResta & Fee, *Unanswered Questions Regarding the Journalist's Privilege in Florida*, 64 FLA. BAR J. 26 (1990) (quoting Loadholtz v. Fields, 389 F. Supp. 1299, 1300 (M.D. Fla. 1975)). The district court explained that the underlying rationale for protecting confidential news sources does not apply to most non-confidential sources of information. "Unlike confidential news sources which are likely to dry up if disclosed, non-confidential news sources and like evidence seem, for the most part, unlikely to disappear if journalists are required to testify concerning the same in a subsequent court proceeding . . . ." *Id.* at 1208.

47. *Morejon*, 561 So. 2d at 579 n.1.

48. 408 U.S. 665 (1972) (plurality) (acknowledging that the states were free to construe their own laws to recognize a reporters' privilege, whether qualified or absolute, the plurality decided that reporters have no qualified privilege under the first amendment to refuse to respond to subpoenas issued by grand juries, acting in good faith, in criminal investigations).
a subsequent court proceeding."49 Because the journalist could point to no privilege, the court found it "unnecessary" to apply a balancing test.50 Moreover, the court rejected the newspaper’s claim that the first amendment privilege should apply unqualifiedly, and that compelling testimony might chill the newsgathering process.61 Morejon treats the eyewitness news journalist like all other citizen eyewitnesses, although it left unanswered whether the journalist could successfully assert a privilege against disclosure of eyewitness information if the source of his or her eyewitness information is confidential.52

In another case, various magazine publishers challenged the constitutionality of a state statute that imposed a sales tax on the retail sale of magazines, while exempting the retail sale of newspapers.53 Some publishers in Department of Revenue v. Magazine Publishers of America, Inc.54 argued that the statute violated the Speech and Press Clauses of the first amendment, the Equal Protection Clause of the fourteenth amendment, and the state counterparts.

The court did not address the state constitutional claims, and decided the issue entirely on first amendment grounds. The first amendment poses no absolute bar against state regulation of the press. For instance, the state can legitimately subject the press to “generally applicable economic regulation[".55 However, a scheme like Florida’s sales tax on magazines singles out an individual press entity, which poses a danger of abuse by the state, thereby implicating first amendment protections.56

49. Morejon, 561 So. 2d at 580 (emphasis added). Earlier decisions had upheld the right of a journalist to protect his or her confidential sources of information. Tribune Co. v. Huffstetler, 489 So. 2d 722 (Fla. 1986); Morgan v. State, 337 So. 2d 951 (Fla. 1976).

50. On that point, there is dispute among the justices. See Morejon, 561 So. 2d at 582 (Barkett, J., concurring specially) (arguing that decisions of the United States Supreme Court and Supreme Court of Florida consistently apply a balancing test when, as here, first amendment interests are implicated).

51. Id. at 580. The justices aligned Florida with other state courts that declined to adopt an absolute journalist privilege. Id. at 581 (citations omitted).

52. See DiResta & Fee, supra note 46, at 32.


56. Magazine Publishers, 565 So. 2d at 1305-06 (citing Arkansas Writers’ Pro-
To justify a differential tax that implicates the first amendment, the state must satisfy the strict scrutiny standard. Here, the tax assertedly advanced the public interest of promoting those publishers engaged in the dissemination of news while it was still new. Concluding that the state's interest clearly was not compelling (and likely not even rational), the court determined that the state failed to meet its burden, and consequently the statutory scheme could not stand. Having so concluded, the court struck the exemption granted to newspapers and allowed the statute to otherwise survive.

Typical of the court's speech and press decisions *Dodd*, *Morejon*, and *Magazine Publishers* are firmly rooted in federal first amendment precedent. The occasional, if only passing, references to article I, section 4 suggest that the court is disinclined to craft a decision independent of federal case law based on the facts at issue in those cases or the arguments of counsel. Even passing references to the state constitution indicate, however, that litigants and jurists view the cases as representing equally important, but not necessarily identical, state constitutional markers.

5. Right to Assemble

*The people shall have the right peaceably to assemble, to instruct their representatives, and to petition for redress of grievances.* FLA. CONST. art. I, § 5.

*State v. Dodd* was the only case to cite article I, section 5. *Dodd* was presented in the preceding section, and demonstrates a factual context where the freedom of speech and the freedom to associate are coextensive protections.

6. Right to Work

*The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or*
labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike. FLA. CONST. art. I, § 6.

No decisions construed this section during the survey period.

7. Military Power

The military power shall be subordinate to the civil. FLA. CONST. art. I, § 7.

No decisions construed this section during the survey period.

8. Right to Bear Arms

The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law. FLA. CONST. art. I, § 8.

No decisions construed this section during the survey period. Of note, the legislature proposed an amendment to article I, section 8, that imposed a three-day waiting period between the purchase and delivery of any handgun.61 The voters adopted the legislative proposal during the general election of November, 1990.

61. The amendment added three subsections to the existing section:
(b) There shall be a mandatory period of three days, excluding weekends and legal holidays, between the purchase and delivery at retail of any handgun. For the purposes of this section, “purchase” means the transfer of money or other valuable consideration to the retailer, and “handgun” means a firearm capable of being carried and used by one hand, such as a pistol or revolver. Holders of a concealed weapon permit as prescribed in Florida law shall not be subject to the provisions of this paragraph.
(c) The legislature shall enact legislation implementing subsection (b) of this section, effective no later than December 31, 1991, which shall provide that anyone violating the provisions of subsection (b) shall be guilty of a felony.
(d) This restriction shall not apply to a trade-in of another handgun.

9. Due Process

Florida's due process section combines three discrete categories of rights. The first category creates interests commonly understood to enjoy due process protections—the guarantees of life, liberty, and property. The due process section also lumps together two other categories that generally are regarded as protections independent of due process—the protection against double jeopardy, and the protection against self-incrimination.

a. Life, Liberty, or Property

No person shall be deprived of life, liberty or property without due process of law . . . . FlA. Const. art. I, § 9.

The article I, section 9 cases decided in 1990 addressed the safeguards afforded to persons whose liberty or property rights the state impinged, either by legislation or by action of its agents. Typically, challenges to state action arise in a variety of contexts, and the year's cases proved to be no exception. The court reviewed, on state due process grounds, state procedures that involved enforcement of child support judgments, administrative permitting procedures, use of evidentiary devices to facilitate the trial of defendants in criminal cases, and procedures of particular importance in the prosecution of and sentencing for capital crimes. Finally, the court considered a constitutional claim for damages by owners whose property the state wrongfully seized and confiscated. Those cases are treated in turn.

To sharpen the teeth of the state's child support enforcement laws, the Florida legislature declared in section 61.14(5)(a) and (b) that an unpaid support payment that became final after July 1, 1987, automatically became a final judgment by operation of law once the clerk of the circuit court notified the obligor.62 Two district court panels interpreted the statute as directing the clerk to enter judgment without hearing, without an opportunity for the obligor to present defenses, and without opportunity for the trial court to alter unpaid installments when warranted. Each panel struck the statute as a violation of various provisions of the state constitution.63 Those decisions were consolidated

63. State ex rel. Pittman v. Stanjeski, 541 So. 2d 1214 (Fla. 2d Dist. Ct. App. 1989); and Attorney General v. D'Agosto, 541 So. 2d 167 (Fla. 4th Dist. Ct. App.)
for review, and quashed in *State ex rel. Pittman v. Stanjeski*.

The court couched the "critical question" as whether the law requires the clerk of court to enter judgment without opportunity for the obligor to present a defense before a judge. To answer that question, the court relied upon guiding principles of statutory construction that required it "if reasonably possible . . . to adopt a reasonable interpretation . . . " and to "avoid declaring a statute unconstitutional if such statute can be fairly construed in a constitutional manner."

The court avoided declaring section 61.14(5)(a) and (b) unconstitutional by reading into it a requirement that the obligor was entitled to an opportunity to be heard. State and federal due process required that the section "should be interpreted" to allow a hearing before entry of a final judgment, provided the obligor timely responds to the clerk's notice. That notice should advise the obligor to respond by a date certain, failing which a default judgment will be entered. The hearing should be held by a judicial officer, before whom the obligor may present equitable defenses. Several reasons support the judicial gloss: Child support enforcement is a major governmental concern which the statute advances; all branches of government have a shared interest in the maintenance and support of children; federal legislation requires states to follow certain procedures toward this end; and Florida has long supported effective child support collection procedures.

In another setting, a unanimous court in *Ridgewood Properties, Inc. v. Department of Community Affairs* held that the Secretary of the Department of Community Affairs may not testify at an administrative hearing as the sole witness to establish a material fact, and then pass upon his own evidence by reviewing the hearing officer's proposed findings and legal conclusions. Here, the Department notified Ridge-

1989. In particular, the district courts determined that section 61.14(5) violated article I, sections 9 (due process) and 21 (access to courts), and article II, section 3 (separation of powers) of the state constitution.

64. 562 So. 2d 673 (Fla. 1990) (Overton, J., author. Ehrlich, C.J., McDonald, Shaw, Barkett, and Grimes, JJ., concurring. Kogan, J., concurred in result only.).

65. *Id.* at 674.

66. *Id.* at 677 (quoting *Sandlin v. Criminal Justice Standards and Training Comm'n*, 531 So. 2d 1344, 1346 (Fla. 1988)).

67. *Id.* (citation omitted).

68. *Id.* at 678-79.

69. *Stanjeski*, 562 So. 2d at 677-78.

70. 562 So. 2d 322 (Fla. 1990) (Grimes, J., author. Ehrlich, C.J., Overton, McDonald, Shaw, Barkett, and Kogan, JJ., concurring.).
wood that it was required to obtain approval for its office park development as a development of regional impact. Ridgewood contested that decision in an administrative hearing, at which the secretary testified as an expert that Ridgewood held no vested development rights under the Department's policy that would exempt it from compliance. The hearing officer so found, and the Department, over the secretary's signature, issued a final order against Ridgewood. The justices held, however, that the secretary violated Ridgewood's state and federal due process rights by acting as prosecutor at an administrative hearing, testifying as the Department's sole witness, and "[m]ost significantly" by passing on his own evidence. The opinion does not distinguish the state and federal rights.

In criminal prosecutions, due process requires the state to prove every element of the offense beyond a reasonable doubt. It is axiomatic that this burden remains with the state, and may not be shifted onto the defendant. State v. Cohen considered the limits of burden shifting in the context of a purported affirmative defense created in the witness tampering statute. The statute included a subsection that provided: "[I]t is an affirmative defense . . . that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully." The justices saw through the transparency of the statutory language. An affirmative defense "is any defense that assumes the complaint or charges to be correct but raises other facts that, if true, would establish a valid excuse or justification or a right to engage in the conduct in question." In effect, an affirmative defense concedes the offense. This section, though labeled an affirmative defense, actually required the defendant to negate an element of the offense with proof that his or her conduct was lawful. Relying exclusively on article I, section 9, the court held that the legislature improperly shifted the burden of proving an element of the crime from the state to the defendant.

71. Id. at 323-24.
72. 568 So. 2d 49 (Fla. 1990) (Kogan, J., author; Shaw, C.J., Ehrlich, Barkett, and Grimes, JJ., concurring; Overton, J., dissented in an opinion joined by McDonald, J., who also dissented with an opinion).
74. Cohen, 568 So. 2d at 51.
75. Id. at 52. The court also concluded that section 914.22(3) was illusory because it shifted to the defendant a burden of proof that is impossible to meet. Fla. Stat. § 914.22(3) (1985). That section requires the defendant to prove that "the con-
On vagueness grounds, *Cohen* struck down another subsection of the witness tampering statute, which proscribed conduct intended to "influence" a person's testimony in an official proceeding. Because it was unclear whether the legislature intended to proscribe conduct designed to induce either false testimony, truthful testimony, or both, the section suffered from vagueness, and facially violated article I, section 9.77

*Cohen* departed from federal precedent by construing the state due process clause to provide a degree of protection greater than that afforded under the federal Due Process Clause. One federal district court upheld the federal analogue against constitutional attack, reasoning that the elements of the affirmative defense allow a defendant to avoid criminal liability upon proof by a preponderance of the evidence, and do not relieve the government of its burden of proving the elements of the crime beyond a reasonable doubt.78

Due process protections are also at work in criminal prosecutions when the state relies at trial upon evidentiary devices, such as presumptions and inferences. Construing the federal Due Process Clause, *State v. Rolle*79 upheld Florida's drunk driving law,80 which permitted the state to proceed upon the alternative theories of impairment, or unlawful blood alcohol level. The court said that the law did not impermissibly relieve the state of proving every element of the crime. The court also sustained the use of the related jury instruction which provided that evidence of unlawful blood alcohol level "'would be sufficient by
itself” to establish impairment.\(^{81}\)

The statute underlying the jury instruction provides that proof of unlawful blood alcohol “shall be prima facie evidence” of impairment.\(^{82}\) The court let the statute stand because the phrase was commonly understood to create an inference that the jury was free to accept or reject, and thus, the jury was not bound constitutionally to find impairment from evidence of unlawful blood alcohol. Moreover, the court said, the legislature would have used the term “presumption,” had it intended to create a presumption.\(^{83}\) Justice Barkett’s special concurrence made an important clarification of \textit{Rolle} by noting that the effect of an evidentiary device, not its label, determines its validity under state and federal due process standards.\(^{84}\)

Death-sentenced prisoners frequently assert due process protections on appeal. The court reached the merits in four such cases, and unanimously resolved the due process issues. In the first, \textit{Randolph v. State},\(^{85}\) the trial court excused for cause a prospective juror who “guessed” that she could vote to impose the death penalty in an appropriate case. Randolph argued that the state and federal due process clauses prohibited the court from excusing a juror “simply because [she] voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.”\(^{86}\) After evaluating the voir dire colloquy, the court was unable to hold that the trial

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\(^{81}\) \textit{Rolle}, 560 So. 2d 1155 (emphasis in original) (quoting the jury instruction).

\(^{82}\) FLA. STAT. § 316.1934(2)(c) (1985).

\(^{83}\) \textit{Rolle}, 560 So. 2d at 1157; \textit{see also} \textit{Frazier v. State}, 559 So. 2d 1121 (Fla. 1990) (applying \textit{Rolle}).

\(^{84}\) \textit{Id.} at 1161. (Barkett, J., specially concurring, Kogan, J., concurring). The special concurrence suggests that several of the court’s previous decisions improperly concluded that the phrase “prima facie evidence” meant inference, rather than presumption. The opinion is significant for its principled analysis of the operation of inferences and presumptions, and pointedly demonstrates that the profusion of terms led to a confusing body of law.

Six months later, the court revisited section 316.1934(2)(c) in \textit{Wilhelm v. State}, 568 So. 2d 1 (Fla. 1990), and held that a jury instruction virtually identical to that section violated federal due process by relieving the state of its burden of proof. Five of the seven justices agreed that “‘[p]rima facie’ is a technical term without common meaning for the lay person. Confronted with such a term in the jury instructions, and provided with no definition, a reasonable juror would be forced to guess at its meaning . . . .” \textit{Id.} at 3. \textit{Rolle} and \textit{Wilhelm} are easily reconciled by noting that the instruction in \textit{Rolle} contained no undefined terms, and avoided using “prima facie evidence.” Consequently, \textit{Rolle} never measured the term against due process standards.

\(^{85}\) 562 So. 2d 331 (Fla. 1990) (unanimous) (Barkett, J., author).

\(^{86}\) \textit{Id.} at 334 (quoting \textit{Lockhart v. McCree}, 476 U.S. 162, 176 (1986)).
court abused its discretion. Citing federal precedent to resolve the claim, the justices explained: "The trial court had the opportunity to evaluate the demeanor of the prospective juror, and given [the juror's] equivocal answers, we cannot say that the record evinces [her] clear ability to set aside her own beliefs 'in deference to the rule of law.'" 87

In the second case, Scull v. State, 88 the trial court held a resentencing hearing on December 28, 1988, only three weeks after the state supreme court denied rehearing, but before the trial court received the mandate. Defense counsel returned from Christmas vacation on December 27, learned of the impending hearing, and asked the prosecutor to explain the sudden and hurried case activity. He responded that the trial judge was expected to soon leave his position and did not want to "dump" the case on his successor. 89 Realizing that he had no authority to conduct that hearing before receipt of the mandate, the trial judge held a second resentencing hearing on December 30, after receiving the mandate. On appeal of the judgment reimposing the death sentence, Scull claimed that the trial court's haste to resentence him violated his due process rights. 90 The justices unanimously agreed.

Article I, section 9, the court wrote, requires that "all proceedings affecting life, liberty, or property must be conducted according to due process." 91 In one sense, the term is incapable of precise definition, and "embodies a fundamental conception of fairness that derives ultimately from the natural rights of all individuals." 92 In another sense, the term subsumes certain well-defined rights, among which are fair notice and reasonable opportunity to be heard. 93 The trial court's haste to conduct Scull's resentencing proceeding violated those basic rights, in part, because "[h]aste has no place in a proceeding in which a person may be sentenced to death." 94 Perhaps equally important to the decision, the justices agreed that the "appearance of irregularity so permeates these

87. Id. at 337 (quoting Buchanan v. Kentucky, 483 U.S. 402, 416 (1987)).
88. 569 So. 2d 1251 (Fla. 1990) (unanimous) (Kogan, J., author).
89. Id. at 1252.
90. Id.
91. Id.
92. Id. (citation omitted); compare Huff v. State, 569 So. 2d 1247, 1250 (Fla. 1990) (citing principle, and holding that trial court abused its discretion by striking motion for post-conviction relief filed by death-sentenced defendant, without first ruling on contemporaneously-filed motion to admit foreign attorney pro hac vice).
93. Scull, 569 So. 2d at 1252.
94. Id.
proceedings as to justify suspicion of unfairness."\textsuperscript{95} The court vacated the sentence of death, and remanded for another sentencing hearing.

In the third capital appeal, \textit{Nowitzke v. State},\textsuperscript{96} the court agreed with the defendant who charged that the trial court erred in refusing to order a competency hearing immediately before trial. On the Friday before the scheduled trial date, the prosecution offered a plea that included concurrent life sentences on two murder counts. Defense counsel conveyed the offer to Nowitzke, who rejected it, stating that he could not be executed. He explained that he would be "spiritually released on July 4, 1989 . . . because it was Independence Day and because of the number of letters in his three names."\textsuperscript{97}

Defense counsel moved for a competency hearing. The trial court summarily denied counsel's request because Nowitzke had been pronounced competent to stand trial on his return from a state mental health facility three months earlier. A unanimous court reversed the convictions and remanded for another trial. Due process prohibits the prosecution of a person while he or she is incompetent.\textsuperscript{98} Even though competency has once been established, the trial court has a continuing obligation to order a competency examination, and conduct a hearing when it "has reasonable ground to believe that the defendant is not mentally competent to proceed."\textsuperscript{99} Here, the importance of a second competency hearing was indicated by Nowitzke's irrational reasons for rejecting the state's plea offer, which in turn cast doubt upon his ability to assist in his defense or understand the proceedings against him.\textsuperscript{100}

\textit{White v. Dugger},\textsuperscript{101} the fourth capital appeal, rejected as meritless the defendant's claim that a grand jury allegedly consisting of more than the statutory limit of eighteen violated state and federal due process.

In the remaining due process case, the owners of a truck that the state wrongfully confiscated sued to recover damages. \textit{In re Forfeiture of 1976 Kenworth Tractor Trailer Truck, Altered VIN 243340M}\textsuperscript{102} posed the following certified question: "Does a trial court have jurisdiction to order a payment of damages based on the failure of the state

\textsuperscript{95} Id.
\textsuperscript{96} 572 So. 2d 1346 (1990) (per curiam) (unanimous).
\textsuperscript{97} Id.
\textsuperscript{98} Id.
\textsuperscript{99} Id. (quoting FLA. R. CRIM. P. 3.210).
\textsuperscript{100} Id. at 646. \textit{Nowitzke} also appears below, in article I, section 16.
\textsuperscript{101} 565 So. 2d 700 (Fla. 1990) (per curiam) (unanimous on this issue).
\textsuperscript{102} 569 So. 2d 1274 (Fla. 1990) (per curiam).
over a two-year period to honor that court’s order returning confiscated property to its owner[?]” Unanimous on the point, the justices answered the question affirmatively. The facts showed that the Florida Highway Patrol (FHP) seized a truck in 1983, and prevailed in a later forfeiture proceeding. The owners appealed that decision. During the pendency of the appeal, the FHP transferred the truck and title to the state Department of Transportation, which incurred costs for storage and improvements.

The owners succeeded in overturning the forfeiture, after which the trial court entered an order on July 22, 1986, directing the state to return the truck to them. One year later, the trial court entered an amended order, granting the FHP’s motion to add the Department as a necessary party. Thereafter, the owners filed a motion to determine damages, in which they sought to recover the value of the truck at the time of seizure, depreciation, loss of use during the period of confiscation, prejudgment interest, and attorney’s fees. On April 11, 1988, the trial court ordered the Department to return the truck within ten days. It entered a final order on May 12, 1988, which denied the damages claim, and again directed the Department to return the truck, although that was not accomplished until July, 1988, two years after the court entered its initial order.

The trial court denied the owners’ claim for damages, apparently concluding that their recourse was through an action separate from the claim to recover possession of the truck. The district court reversed that decision, stating that the owners were entitled to include a damages claim in the supplemental proceedings incident to their claim for return of property. “It defies common sense,” the panel explained, “to require [the owner] to initiate independent legal proceedings involving the same identical parties in order to secure relief that is predicated upon the failure to comply with the trial court’s order directing return of the property.”

103. Id. at 1275.
105. Motion To Determine Damages at 2, In re Forfeiture, 569 So. 2d at 1274.
106. In re Forfeiture, 569 So. 2d at 1275-76.
107. That course would have been fatal to the owners’ cause because the second suit extended beyond the time permitted by the applicable statute of limitations. Answer Brief of Respondents at 3, In re Forfeiture, 569 So. 2d at 1274.
The justices declined to affirm the opinion of the district court, but approved the result. Turning to the jurisdictional issue, they creatively interpreted the rules governing civil pleading practice, so that the owners' motion to determine damages could be treated as a counterclaim by supplemental pleading. In that way, the trial court was empowered to exercise its jurisdiction to entertain the claim for damages in the original suit, although it arose after service of pleadings.\footnote{In re Forfeiture, 569 So. 2d at 1277 (citing Fla. R. Civ. P. 1.170(e)).}

Next, the justices rejected the state's argument that damages claim sounded exclusively in tort, which would have required dismissal because the doctrine of sovereign immunity shielded the state from tort liability. Instead, they characterized the suit as "nothing less than a [constitutional] claim of inverse condemnation,"\footnote{Id. (citation omitted).} against which the statutory doctrine of sovereign immunity posed no bar.\footnote{See, e.g., State Road Dep't v. Tharp, 1 So. 2d 868, 869 (Fla. 1941) ("neither will it be permitted as a plea to defeat the recovery of land or other property wrongfully taken by the State through its officers and held in the name of the State"); Schick v. Florida Dep't of Agriculture, 504 So. 2d 1318, 1322 (Fla. 1st Dist. Ct. App. 1987).} Expressing uncustomary conviction, the justices wrote that "the Florida Constitution \textit{dictates} that a remedy of this type must exist under the facts of the present case."\footnote{In re Forfeiture, 569 So. 2d at 1277 (emphasis added). Why the constitution "dictates" such a remedy is not explained in the court's opinion. Probably, the answer lies in the notion that the constitutional remedy of inverse condemnation is self-executing in character, see Department of Agriculture & Consumer Servs. v. Mid-Florida Growers, Inc., 521 So. 2d 101, 103 n.2 (Fla. 1988); United States v. Clarke, 445 U.S. 253, 257 (1980) (citation omitted) (construing fifth amendment counterpart), and that an owner of private property appropriated for public use may compel compensation via that remedy. Village of Tequesta v. Jupiter Inlet Corp., 371 So. 2d 663, 669 (Fla.), \textit{cert. denied}, 444 U.S. 965 (1979).} Those circumstances showed unmistakably that the state deprived the owners of the use of their truck for two years, in "outright refusal" to return it after the trial court ordered the state to do so.\footnote{In re Forfeiture, 569 So. 2d at 1276. The tone of the majority opinion suggests that a court might wield the constitutional remedy of inverse condemnation as if it were a sanction against a contemnor. With great charity to the state, however, Justice McDonald explained that the delay in restoring the truck to the owners was the result of the Department's efforts to protect its expenditures repairing and improving the vehicle. \textit{Id.} at 1277 (McDonald, J., \textit{concurring}. Overton, J., \textit{concurring}).}

On remand, the truck owners were entitled to seek damages for inverse condemnation under article X, section 6(a) of the Florida Con-
stition ("takings" clause). Those damages include loss of use between the date of the initial order directing the return of the truck, and the date when the Department returned the truck. Also, they were entitled to prejudgment interest on that amount, and attorney's fees.

In re Forfeiture effectively illustrates the interrelationship of several state constitutional sections that bond together to protect personal property rights—article I, section 2 (inalienable rights clause), article I, section 9 (due process clause), and article X, section 6(a). However, several aspects of the opinion counsel that its holding will be limited to the facts. First, the court on its own resorted to inverse condemnation as a means for affording the owners relief. Indeed, the two district court opinions that decided this case, and the record itself, are void of discussion about or pleading asserting a constitutional remedy. The sole record reference that would give rise even to the barest allegation of constitutional infringement cannot be said to contemplate an action in inverse condemnation. The decision is explained by the court's search for a fair result, no doubt at least partially motivated by its disdain for the state's contemptuous disregard of the trial court's order directing the state to restore the forfeited truck to the owners. For that reason alone, the circumstances should be viewed as "unique," and unlikely to recur.

Second, the majority attempted to distinguish Wheeler v. Corbin, a case where the state deprived Gailyn Wheeler of the use of her car for 524 days after a wrongful forfeiture. The majority reasoned that the police had probable cause, and thus lawfully seized Wheeler's

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114. The section provides: "No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner." Fla. Const. art. X, § 6(a).

115. Id. at 1277 (McDonald, J., concurring).

116. The theory advanced by the owner was premised on inherent power, and not on inverse condemnation: "[A] court has the power to enforce its orders and judgments, including ordering the payment of incidental damages for the violation and long delay in complying with an order to return confiscated property." Answer Brief of Respondents at 4, In re Forfeiture, 569 So. 2d at 1274.

117. The owners charged that the Florida Highway Patrol violated a valid court order without lawful cause, and that its actions offended "'due process' and the orderly process of the court." Answer Brief of Respondents at 6, In re Forfeiture, 569 So. 2d at 1274.

118. In re Forfeiture, 569 So. 2d at 1277 (McDonald, J., concurring).

119. 546 So. 2d 723 (Fla. 1989).
car, whereas the seizure of the truck here was unlawful.\footnote{120}

\textit{In re Forfeiture} offers precedential value for private property rights that extends beyond the four corners of the majority opinion. The opinion plainly holds that the owner of private property may look to the remedy of inverse condemnation to vindicate temporary, rather than permanent, interferences by the state with the use of his or her property. Another of the court's recent opinions impliedly reached that result,\footnote{121} and the two decisions effectively overturned Florida's historical position that denied damage claims for mere temporary "takings."\footnote{122} The decisions have the salutary effect of firmly aligning Flor-
ida with federal precedent.123

In conclusion, the court contributed significantly in 1990 to the development of a body of state constitutional law independent of federal standards. Cohen124 struck down the witness tampering law because it impermissibly shifted the burden of proving the elements of the crime from the state to the defendant in violation of state due process, although a federal court had previously upheld the federal analogue. Two other cases relied exclusively on article I, section 9. Scull125 vacated a death sentence and remanded for another sentencing hearing because the trial court’s hastily conducted sentencing hearing created an impermissible appearance of irregularity and suspicion of unfairness. In re Forfeiture126 held that state due process dictated that property owners were entitled to damages for inverse condemnation after the state wrongfully confiscated and withheld their property. The remaining cases resolved claims on both state and federal due process grounds, but drew no distinction between the nature of those independent sources.

b. Double Jeopardy

No person shall . . . be twice put in jeopardy for the same offense

FLA. CONST. art. I, § 9.

Most successive prosecution or punishment claims are waged generically as double jeopardy claims, and do not expressly rely on article I, section 9. Of the numerous double jeopardy claims raised in 1990, only two expressly addressed the state constitution. In one, Fridovich v.
State, the state prosecuted Fridovich for first-degree murder and sought to retry him after the district court overturned the conviction for manslaughter. In a second trial, the state proceeded upon a "Refile Information for Manslaughter," and obtained a conviction for manslaughter.128

There was no doubt that state and federal double jeopardy clauses limit the state on retrial to prosecuting Fridovich for the lesser included offense of manslaughter. Fridovich argued, however, that the state had abandoned its prosecution because the refiled information bore a different case number than the one appearing on the original indictment. The court rejected his claim, noting that the new case number was the product of a clerical error, and that Fridovich was not prejudiced by a reprosecution of the identical offense for which he was convicted in the first trial.129

In the other case, State v. Glenn, the defendant sought post-conviction relief following multiple convictions and sentences for trafficking in, and delivery of cocaine and heroin, all arising out of a single episode. He charged that Carawan v. State prohibited the state from obtaining convictions on each offense under the state and federal double jeopardy clauses. That claim required the court to revisit Carawan to determine whether Glenn, who was convicted and sentenced at the time when Carawan became final, but who had not then challenged his conviction and sentence collaterally, could rely upon the decision as precedent.

Applying the rule of lenity in section 775.021(1), Carawan determined that the state could not sentence a defendant for both manslaughter and aggravated battery when it failed to adequately prove that those crimes arose from more than a single shotgun blast. The

127. 562 So. 2d 328 (Fla. 1990) (unanimous) (Overton, J., author).
128. Id. at 329.
129. Id. at 330.
131. 515 So. 2d 161 (Fla. 1987).
132. Carawan was actually a statutory construction case, and never reached the constitutional concerns of the state double jeopardy clause. However, because the rule of lenity incorporated into that statute lies at the very heart of double jeopardy guarantees, Carawan and those cases adhering to it are reported here. See State v. Smith, 547 So. 2d 613, 621 (Fla. 1989) (Barkett, J., concurring in part, dissenting in part. Kogan, J., concurring).
legislature subsequently amended that statute effective July 1, 1988,\(^{133}\) providing, in part, that offenses were to be viewed as separate if each required proof of an element not required by the other. In so doing, the legislature overruled the court's decision prospectively.\(^{134}\) Carawan, however, has precedential value for pipeline cases, that is, cases with direct appeals pending at the time the decision became final.\(^{135}\) Glenn asked whether Carawan was similarly available to persons whose direct appeals were final, but who had not yet resolved their collateral appeals.

The court held that Glenn was not entitled to rely upon Carawan.\(^{136}\) It reasoned that Carawan was no revolutionary change in the law, but an evolutionary refinement that merely clarified past decisions.\(^{137}\) The policy interest of decisional finality, coupled with the absence of any manifest injustice brought about by the court's refusal to revisit his case (post-Carawan laws would permit the state to convict Glenn separately for his crimes), argued against applying Carawan retroactively to collateral appeals.\(^{138}\)

134. State v. Smith, 547 So. 2d 613, 617 (Fla. 1989) (acknowledging that the legislative amendment effectively overruled Carawan).
135. Rehearing was denied in Carawan on December 10, 1987. Carawan's pipeline cases decided this year include: State v. Reddick, 568 So. 2d 902 (Fla. 1990) (separate convictions for homicide and shooting into an occupied dwelling have no common elements, address separate evils, and therefore may properly be imposed); Porterfield v. State, 567 So. 2d 429 (Fla. 1990) (remanding for resentencing where defendants were convicted and sentenced for sale or delivery of controlled substance and for possession of that substance); State v. McCray, 561 So. 2d 257 (Fla. 1990) (sale and delivery of a drug in a container are two crimes that address the same evil where the drug paraphernalia is used to facilitate the sale or delivery, and may not give rise to separate convictions or sentences); Skeens v. State, 556 So. 2d 1113 (Fla. 1990) (unanimous) (carrying a concealed firearm and possession of a firearm by a convicted felon are separate offenses and may arise out of a single act); Jones v. State, 569 So. 2d 1234 (Fla. 1990) (finding that Carawan imposed no impediment to sentencing defendant for two murders and for shooting into a vehicle occupied by the victims, when evidence showed that defendant fired three shots).
136. 558 So. 2d at 8.
137. Id.
138. Id. at 7-8. Numerous cases followed Glenn this year. See Love v. State, 559 So. 2d 198 (Fla. 1990); State v. Finney, 558 So. 2d 409 (Fla. 1990); State v. Jensen, 557 So. 2d 23 (Fla. 1990); State v. Spadaro, 556 So. 2d 1119 (Fla. 1990); State v. Etlinger, 556 So. 2d 1118 (Fla. 1990); State v. Pastor, 556 So. 2d 1112 (Fla. 1990); State v. Merckle, 556 So. 2d 1103 (Fla. 1990).
c. Self-Incrimination

No person shall . . . be compelled to be a witness against himself.
FLA. CONST. art. I, § 9.

Only Holton v. State\textsuperscript{139} addressed this section during the survey period. Holton appealed a sentence of death imposed after his conviction of first-degree murder. He argued that the trial court failed to consider the statutory mitigating circumstance of impaired capacity, which assertedly applied due to his longstanding drug addiction. The court disagreed and ruled that the trial court considered the matter, as evidenced in part by the sentencing order: "The defendant testified that he was addicted to drugs but still maintained his innocence of these offenses. This [circumstance] would not apply in view of that sworn testimony."\textsuperscript{140}

The importance of the opinion for article I, section 9 lies with the court’s recognition that a protestation of innocence, which due process generally prohibits the trial court from using against a defendant in either guilt phase or penalty phase of a capital trial, may be considered by the sentencer if it is relevant to mitigation.\textsuperscript{141}

10. Prohibited Laws

No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed. FLA. CONST. art. I, § 10.

The court struck down two legislative enactments as violations of article I, section 10. One prohibited awarding attorney’s fees under certain circumstances, and the other prohibited escalation clauses in recreational leases. The first, Florida Patient’s Compensation Fund v. Scherer,\textsuperscript{142} involved a medical malpractice action brought by Clara Scherer for injuries that occurred in June, 1979. She filed her claim on

\textsuperscript{139} 573 So. 2d 284 (Fla. 1990) (per curiam) (unanimous). Holton is also discussed under article I, section 16, below.

\textsuperscript{140} Id. at 292.

\textsuperscript{141} Id.

\textsuperscript{142} 558 So. 2d 411 (Fla. 1990) (Kogan, J., author. Ehrlich, C.J., Overton, Shaw, and Grimes, JJ., concurring. McDonald, J., dissented in part, but concurred on the constitutional issue discussed here. Justice Barkett did not participate in the decision.).
September 20, 1982. Following the jury verdict awarding her damages, the trial court awarded her an attorney's fee under a law that entitled the prevailing party to an attorney's fee in medical malpractice actions. That same law prohibited an attorney's fee for any action filed before July 1, 1980. The district court affirmed the fee award, finding that Scherer's cause of action accrued when she discovered or should have discovered the existence of malpractice.

The Supreme Court of Florida vacated the attorney's fee award and quashed the district court's opinion. It found that the cause of action under the attorney's fee statute accrued in June, 1979, when the negligent act itself occurred, and not when the negligence was discovered. "[D]amages and penalties, including an award of attorney's fees, for which a physician may be held liable cannot be constitutionally enlarged after the date of the alleged malpractice . . . [without violating] state and federal prohibitions against ex post facto laws." The prohibition against retrospective application of laws was also tested when the court allowed enforcement of a rent escalation clause in condominium recreational leases despite a later-enacted statute that voided such clauses. The dispute in *Association of Golden Glades Condominium Club, Inc. v. Security Management Corp.* centered on two documents, a lease and a declaration of condominium. On March 14, 1970, the recreation corporation, as lessor, entered into a long term lease with the Association, as lessee, which included an escalation clause allowing for rental adjustments based upon the cost of living index. On the same date, the developer entered into a declaration of condominium with the Association, which bound the parties to the state's condominium act "as the same may be amended from time to

143. *Id.* at 413.

144. Fla. Stat. § 768.56 (1981). This section was repealed effective October 1, 1985, Ch. 85-175, § 43, 1985 Fla. Laws 1180, 1225, but continues in force for causes then pending.

145. *Morales v. Scherer*, 528 So. 2d 1, 2 (Fla. 4th Dist. Ct. App. 1988) (reasoning that the award of attorney's fees was controlled by the statute of limitation, rather than section 766.56, and concluding that the jury's determination that the cause of action accrued after September 20, 1980 should control).

146. *Scherer*, 558 So. 2d at 414 (agreeing with *Morales*, 528 So. 2d at 3 (Anstead, J., dissenting, in part)).

147. 557 So. 2d 1350 (Fla. 1990) (Overton, J., author. Ehrlich, C.J., Grimes, and Kogan, JJ., concurring. McDonald, J., concurred with a separate opinion. Barkett and Shaw, JJ., concurred in result only.).
time.'  

The recreation corporation was not a party on that document. On November 30, 1981, by way of merger, Security Management Corporation became the successor in interest to the corporation on the lease, and to the developer on the declaration of condominium. This litigation involved Security's suit for rent from the Association between July, 1980 and January, 1987.

Between 1975 and 1989, the legislature enacted various laws that declared void all escalation clauses in residential condominium recreational leases. Section 718.4015(2), Florida Statutes, in particular, provided that this policy did not apply "to contracts entered into prior to June 4, 1975, may not divest the parties of any benefits or obligations arising from the escalation of fees prior to October 1, 1988, but only prohibits further escalation of fees pursuant to the escalation clauses, on or after October 1, 1988." The court decided that under the circumstances, Security Management Corporation was entitled to enforce a rent escalation clause in its lease with the Association.

Several reasons appear to support the court's decision. First, by its own terms, section 718.4015(2) had no effect on the enforceability of the contested rent escalation clause because the lease was entered into before June 4, 1975. Moreover, that section could not be applied retroactively, even if the legislature so intended, because to do so would violate article I, section 10, and the corresponding federal protection against ex post facto laws. Second, the decision was controlled by precedent. In summary, a subsequent merger binds the lessor to the

148. Id. at 1352 (citations omitted).
149. Id. at 1351-52.
150. Id. at 1352-53 (recounting the history of this legislation).
152. Id. at 1354 (citing Fleeman v. Case, 342 So. 2d 815 (Fla. 1976) (dictum)). Emphasizing the point, Justice McDonald wrote that "[n]o matter how hard the legislature may try, it cannot affect the terms of a contract" in existence before the enactment. Id. at 1355 (McDonald, J., concurring). But see Pomponio v. Claridge of Pompano Condominium, Inc., 378 So. 2d 774 (Fla. 1979) (reh'tg denied) (looking to the "actual effect" of a statute on the contractual right, and applying balancing test to weigh the competing interests); United States Fidelity & Guarantee Co. v. Department of Insurance, 453 So. 2d 1355 (Fla. 1984) ("minimal" impairment outweighed by reasonable state action); Hawkins, supra note 1, at 767-71 (demonstrating that the protections of article I, section 10 are not absolute, and have yielded to acts of the legislature under certain circumstances).
153. Association of Golden Glades, 557 So. 2d at 1355 (citing Cove Club Investors, Ltd. v. Sandalfoot S. One, Inc., 438 So. 2d 354 (Fla. 1983)) (successor lessor under a recreational lease with an escalation clause, not a party on the declaration of

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declaration of condominium only when the lessor expressly agrees to be bound prospectively by amendments to the condominium act, or the lessor and developer are a single entity.

11. Imprisonment for Debt

No person shall be imprisoned for debt, except in cases of fraud.
FLA. CONST. art. I, § 11.

In this survey period, the court considered whether article I, section 11 protects from imprisonment a parent found delinquent in child support payments. In Gibson v. Bennett, an ex-wife sought to enforce a final judgment from a Virginia court, which awarded child support arrearages, in a Florida court by invoking its equitable powers, including contempt. The justices noted that Florida has long recognized the use of equitable remedies to enforce foreign support decrees. Moreover, the legislature has authorized the use of contempt proceedings to enforce judgments for arrearage as a means of enhancing enforcement of family support obligations.

Gibson argued, however, that enforcement of a “judgment for support” by contempt violates article I, section 11. The court rejected condominium, held not bound by the declaration).

154. Association of Golden Glades, 557 So. 2d at 1354-55 (citing Cove Club Investors, Inc., 438 So. 2d at 355); see also Condominium Ass’n of Plaza Towers N., Inc. v. Plaza Recreation Development Corp., 557 So. 2d 1356 (Fla 1990) (holding enforceable, escalation clause in recreation lease entered into before 1975 statute prohibiting such clauses).


156. Id. at 1355 n.2.

157. 561 So. 2d 565 (Fla. 1990) (Kogan, J., author. Ehrlich, C.J., Shaw, Barkett, and Grimes, JJ. Overton and McDonald, JJ., each concurred specially with separate opinions.).

158. See, e.g., Haas v. Haas, 59 So. 2d 640 (Fla. 1952); McDuffie v. McDuffie, 155 Fla. 63, 19 So. 2d 511 (1944).

159. FLA. STAT. § 61.17(3) (1989) (“The entry of a judgment for arrearage for child support, alimony, or attorney’s fees and costs does not preclude a subsequent contempt proceeding . . . for failure of the obligor to pay . . .”).

160. Gibson, 561 So. 2d at 570. More precisely stated, Gibson challenges his ex-wife’s attempt to enforce a judgment of arrearage of child support, as distinct from a judgment or decree awarding support in the first instance.
Gibson's claim. The obligation to pay alimony or child support is not a debt, but rather a personal duty to the ex-spouse or child, as the case may be, and society.\(^\text{161}\) Reducing a support decree to a money judgment does not destroy the decree as an obligation to pay support.\(^\text{162}\) Nor is the character of the award altered when the obligor relocates to another state. The purpose remains the same—fulfillment of a continuing moral and legal obligation to support the former spouse or children.\(^\text{163}\) So important are these obligations, that a judgment for support arrearage may be enforced by contempt even after a child reaches majority.\(^\text{164}\)

Justices Overton and McDonald wrote separately\(^\text{165}\) to argue that the decision required the court to recede from \textit{Lamm v. Chapman},\(^\text{166}\) which held that "the acceptance of public assistance for the support of a dependent child vests in the [Florida Department of Health and Rehabilitative Services] the authority to proceed with \textit{all} remedies available to the child's custodian."\(^\text{167}\) In so holding, the court approved the use of contempt, as well as other remedies, to enforce judgments for support, and thereby rejected the claim that the obligation to pay child support or alimony is a debt for which a delinquent obligor cannot be imprisoned under article I, section 11. The two justices asserted that \textit{Lamm} was premised upon the election of remedies doctrine, which obligates a party to adhere to a remedy, once chosen. In particular, \textit{Lamm} stated that contempt would not be available to enforce a decree that awarded child support once arrearages were reduced to judgment.\(^\text{168}\) That is, the aggrieved spouse may seek to secure a money judgment for the delinquent alimony in a court of law, or alternatively seek enforcement of the original decree in a court of equity,\(^\text{169}\) but contempt is unavailable to enforce the latter. Although the distinction between a judgment of arrearage and a decree awarding child support is "technical," and "important in deciding whether contempt lies" under

\begin{itemize}
  \item \textit{Id.}.
  \item \textit{Id.} at 572.
  \item \textit{Id.} at 569 (citations omitted).
  \item \textit{Id.} at 572.
  \item \textit{Gibson}, 561 So. 2d at 572 (Overton, J., concurring specially); \textit{id.} at 573 (McDonald, J., concurring specially).
  \item 413 So. 2d 749 (Fla. 1982).
  \item \textit{Id.} at 753 (emphasis in original).
  \item \textit{Id.}.
  \item \textit{Gibson}, 561 So. 2d at 574 (McDonald, J., specially concurring) (citing Haas v. Haas, 59 So. 2d 640 (Fla. 1952)).
\end{itemize}
the election of remedies doctrine, Justice McDonald wrote that the doctrine has no further utility and should not impede enforcement in the child support and alimony context.¹⁷⁰

12. Searches and Seizures

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of the evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution. FLA. CONST. art. I, § 12.

Frequently referred to as the “conformity amendment,” the current version of article I, section 12 took effect on January 1, 1983. Its principal aim is to assure that Florida courts construe that section identical to decisions of the United States Supreme Court that interpreted its fourth amendment counterpart.¹⁷¹ The section makes two principle textual contributions beyond the protections secured by the federal version. It incorporates an exclusionary rule as a part of Florida’s organic law, whereas the federal exclusionary rule is a product of judicial construction, and merely procedural in nature.¹⁷² In addition to a great

¹⁷⁰ Id. at 573.
¹⁷¹ This was not always the case, for the court construed the pre-1983 article I, section 12 version independent of the fourth amendment. The body of decisional law developed under that version has continuing currency in many instances. See Hawkins, supra note 1, at 773-75 (identifying cases decided during the three-year period 1980-82, before the conformity amendment took effect).
¹⁷² The conformity requirement had two effects upon the exclusionary rule of article I, section 12: First, it stripped the rule of its constitutional stature, by relegating it to a judicial construct of the United States Supreme Court; and second, it laid vulnerable an entire body of state law interpreting that rule.
deal more descriptive language, the section also expressly affords protection "against the unreasonable interception of private communications," whereas the fourth amendment contains no such expression.

Twice in 1990, the court considered whether the conformity amendment protected persons who became the object of the state's war on drugs in two very commonplace settings—as passengers on commercial carriers, and as motorists on the open road. In each instance, the court determined that the state enterprise reached too far into the envelope of personal freedom, and held the line on unwarranted police practices.

In *Bostick v. State*, a four-member majority struck down a Broward County Sheriff Department's drug interdiction practice, which consisted of plain-clothed narcotics officers, without a whisper of suspicion of wrongdoing, boarding busses and confronting passengers, requesting consent to search their carry-on luggage for contraband. The "crucial question" was whether "a reasonable person would have believed he was not free to leave," such that voluntary consent could be given under the circumstances. In light of facts that the trial judge characterized as "very intimidating," the majority determined that Bostick was not free to leave, or "to disregard the [officers'] questions and walk away." With the protections of article I, section 12 implicated, the state was required to justify its detention of Bostick. It could not do so. The majority wrote that "[t]here were no articulable facts and no rational inferences to support the police activity involved here." Moreover, the state could not justify the ensuing luggage

173. 554 So. 2d 1153 (Fla. 1989) (Barkett, J., author, Ehrlich, C.J., Shaw, and Kogan, JJ., concurring. Justices McDonald and Grimes each filed dissenting opinions in which the other, and Justice Overton concurred.), cert. granted, No. 89-1717 (U.S. Oct. 9, 1990). The court released *Bostick* on November 30, 1989, and the decision was addressed in Hawkins, *supra* note 1, at 781-83. Because the decision became final during the survey period, brief mention is made here. A series of bus cases that relied upon *Bostick* also became final this year. See *McPherson v. State*, 566 So. 2d 255 (Fla. 1990); Jones v. State, 559 So. 2d 1096 (Fla. 1990); Nazario v. State, 554 So. 2d 515 (Fla. 1990); McBride v. State, 554 So. 2d 1160 (Fla. 1989); Mendez v. State, 554 So. 2d 1161 (Fla. 1989); Shaw v. State, 555 So. 2d 351 (Fla. 1989); Avery v. State, 555 So. 2d 351 (Fla. 1989).

174. *Id.* at 1157 (citing United States v. Mendenhall, 446 U.S. 544, 554 (1980)).

175. *Id.*

176. *Id.* (quoting *Mendenhall*, 446 U.S. at 554).

177. *Id.* at 1158 (relying upon United States v. Sokolow, 490 U.S. 1 (1989); United States v. Cortez, 449 U.S. 411 (1981); United States v. Brignoni-Ponce, 442
search, for it failed to demonstrate by clear and convincing evidence that Bostick freely and voluntarily consented to that search. 178

Then in State v. Johnson, 179 five justices concluded that a drug courier profile developed by Florida Highway Patrol Trooper Vogel to stop and detain passing motorists violated article I, section 12. Trooper Vogel stopped Paul Clive Johnson because he matched the self-styled profile:

(1) the car was driving at 4:15 a.m.; (2) the driver was alone; (3) the driver was about thirty years of age; (4) the car had out-of-state tags; (5) the car was of a large model type; (6) the driver was male; (7) the driver was wearing casual clothes; (8) the driver was being "overly cautious" by driving at precisely the speed limit; and (9) the car was driving on a known drug corridor, Interstate 95.180

At roadside, Trooper Vogel searched the trunk of Johnson's car and discovered marijuana inside. The trooper arrested Johnson and seized the marijuana, which the trial court later suppressed. The district court affirmed the trial court's decision to suppress the evidence.181

On review by the Supreme Court of Florida, a five-member majority acknowledged that police officers may exercise discretion to stop an individual under circumstances indicating a likelihood of wrongdoing.182 It said that a "profile" is permissible "precisely to the degree that it reasonably describes behavior likely to indicate a crime."183 The fourth amendment, in an analogous context, requires a roving border patrol officer in search of illegal aliens to point to "specific articulable facts, together with rational inferences from those facts" that warrant suspicion of criminal wrongdoing before the officer is justified in mak-

U.S. 873 (1975)).

178. Id. at 1158-59.


180. Id. at 1140. Trooper Vogel testified that he developed the profile based upon elements common to thirty arrests he made during a thirteen month period before Johnson's arrest. That profile differed from the Patrol's own profile, which included the presence of air shocks on the car, window opaquing, and evidence that the car was loaded heavily. Id. at 1140-41.


182. Johnson, 561 So. 2d at 1142.

183. Id.
ing a stop. 184 "At the very least," the justices reasoned, the same standard applies to "roving stops of state citizens by state police." 185

Two justices disputed the majority's conclusion that Trooper Vogel lacked sufficient justification to conduct a stop. Chief Justice Ehrlich conceded that several factors relied upon by the trooper were inappropriate, but argued that other factors were sufficient to support reasonable suspicion. He viewed reasonable suspicion as "'seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.'" 186 Justice McDonald argued that the trooper's accumulation of factors was "reasonable," and "reasonable profile stops of an automobile on a state highway should be contemplated by users of the highway," whose expectation of privacy is necessarily diminished due to the fight against Florida's "huge drug problem." 187

The majority responded that an individual's "unusual" conduct, conduct that sets him or her apart from others, may justify a stop, 188 as illustrated by the United States Supreme Court's decision in United States v. Sokolow. 189 There, agents of the Drug Enforcement Administration became suspicious that Sokolow was engaged in drug trafficking, and stopped him at the Honolulu International Airport, where he had two day's earlier purchased two round-trip airplane tickets from Honolulu to Miami. In what it described as "a typical attempt to smuggle drugs" through an airport, 190 a seven-justice majority determined that the agents demonstrated sufficient justification to stop Sokolow. Important to that opinion, Sokolow's arrest was supported by several factors of probative significance such as: the agents' "reasonable ground to believe" that Sokolow used an alias when he purchased the tickets; and their knowledge that he paid $2,100 in cash for them. 191 That latter factor was "out of the ordinary," especially because Sokolow made payment from a roll of $20 bills containing nearly twice that amount of cash. 192 When taken together with other factors known to

184. Id. (quoting United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975)).
185. Id. (emphasis in original).
186. Id. at 1145 (Ehrlich, C.J., dissenting) (citation omitted).
187. Id. at 1146 (McDonald, J., dissenting. Ehrlich, C.J., concurring).
188. Id. at 1142 (emphasis in original).
190. Id. at 4.
191. Id. at 8-9.
192. Id. at 8.

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agents, the government had a reasonable basis under the fourth amendment to suspect that Sokolow was transporting illegal drugs.

To satisfy an article I, section 12 infringement, the state must demonstrate that there exists "a strong and articulable link—a 'rational inference'—between the sequence of acts observed by the police and the concealed criminal conduct believed to exist, whether or not this sequence is described as a 'profile.'” Johnson, unlike Sokolow, contained no record evidence that the defendant behaved unusually. Indeed, Johnson matched a profile that included an enormous class of law-abiding travelers. The court noted that the "sole basis" for Trooper Vogel's decision to stop Johnson was the coincidence of similarities between Johnson and the trooper's personal profile. Thus, his detention and arrest upon that basis alone were unjustified.

In an opinion released the same day as Johnson, Creswell v. State, a realigned majority reached an opposite result. The majority of four justices held that factors in a drug courier profile, when viewed in light of the officer's experience, may provide an articulable or founded suspicion that will justify under fourth amendment standards a brief investigatory detention of a motorist after a lawful traffic stop. It distinguished the two cases by noting that Johnson considered whether a profile could justify a brief investigatory stop, whereas Creswell concerned a brief investigatory detention following a lawful traffic stop.

193. Sokolow's original destination was Miami, "a source city for illicit drugs; he stayed in Miami for only 48 hours, even though a round-trip flight from Honolulu to Miami takes 20 hours; he appeared nervous during his trip; and he checked none of his luggage." Id. at 3.
194. Johnson, 561 So. 2d at 1143 (quoting Brignoni-Ponce, 422 U.S. at 884).
196. Trooper Vogel stopped Cresswell for "following too closely." and justified the roadside detention in the following manner:

Cresswell was very nervous, was driving along a known drug route in a vehicle with a large trunk, had a Massachusetts driver's license but was driving a car registered to someone else with Maine license plates and New York state insurance and inspection stickers, there was a CB radio in the car, the ignition key was separate from the other keys, and the back seat contained items normally found in the trunk.

Id. at 483. Trooper Vogel then detained Cresswell to await the arrival of a narcotics canine unit. The court wrote: "when viewed together by a trained law enforcement officer such facts . . . "can be combined with permissible deductions . . . to form a legitimate basis for suspicion of a particular person and for action on that suspicion." Id. (quoting United States v. Cortez, 449 U.S. 411, 419 (1981)).
traffic stop.\textsuperscript{197} Moreover, it regarded the factors in \textit{Cresswell} "at least as strong as those approved in \textit{Sokolow}."\textsuperscript{198}

Looking beyond the record facts, Justice Kogan argued in dissent that the experience of precedent disproved the constitutional validity of Trooper Vogel's profile. The earlier cases that had considered the trooper's profile showed that he had applied it "with such extreme inconsistency as to make it extremely unreliable."\textsuperscript{199}

13. Habeas Corpus

\textit{The writ of habeas corpus shall be grantable of right, freely and without cost. It shall be returnable without delay, and shall never be suspended unless, in case of rebellion or invasion, suspension is essential to the public safety. FLA. CONST. art. I, § 13.}

No decisions construed this section during the survey period.

14. Pretrial Release and Detention

\textit{Unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great, every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release on reasonable conditions. If no conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process, the accused may be detained. FLA. CONST. art. I, § 14.}

No decisions construed this section during the survey period.

15. Prosecution for Crime; Offenses Committed by Children

\textit{(a) No person shall be tried for capital crime without presentment}

\textsuperscript{197} \textit{Id.} at 482 n.2.  
\textsuperscript{198} \textit{Id.} at 483. Justice Shaw viewed the facts relied upon by the majority as vastly different from those in \textit{Sokolow}; and concluded that the trooper lacked the justification for detaining Cresswell. \textit{Id.} (Shaw, J., dissenting, Barkett, J., concurring).  
\textsuperscript{199} \textit{Id.} (Kogan, J., dissenting, Barkett, J., concurring) (citations omitted).
or indictment by a grand jury, or for other felony without such presentment or indictment or an information under oath filed by the prosecuting officer of the court, except persons on active duty in the militia when tried by courts martial.

(b) When authorized by law, a child as therein defined may be charged with a violation of law as an act of delinquency instead of crime and tried without a jury or other requirements applicable to criminal cases. Any child so charged shall, upon demand made as provided by law before a trial in a juvenile proceeding, be tried in an appropriate court as a adult. A child found delinquent shall be disciplined as provided by law. FLA. CONST. art. I, § 15.

A lone dissenting justice in State v. Smith argued that article I, section 15 should be construed to permit prior inconsistent statements made by a declarant during a prosecutorial investigation to be introduced at trial. The court relied upon the controlling statute without reaching the constitutional position advanced by the dissent.

Evidence of an out-of-court prior inconsistent statement is generally regarded as unreliable, and inadmissible under the hearsay statutes. Florida Statutes section 90.801(2)(a) creates a narrow exception when the declarant testifies at trial, and has made the prior inconsistent statement at some “other proceeding.” The exception admits the statements as substantive evidence to prove the truth of the matter asserted. In Smith, the prosecutor interrogated a witness, in the presence of a deputy sheriff and court reporter, about her involvement in a homicide. The court was asked to decide whether a prosecutor’s investigation qualified as an “other proceeding” under section 90.801(2)(a).

The court in an earlier case said that the statute required formality, no less than a deposition, but no more than a hearing, and that a police investigative interrogation, even though under oath, does not qualify as an “other proceeding.” In Smith, the court held that the section applied equally to a prosecutor’s investigation, and ruled the witness’s prior statements inadmissible because the investigation lacked the requisite “degree of formality, convention, structure, regularity

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202. Smith, 573 So. 2d at 313-14.
204. State v. Delgado-Santos, 497 So. 2d 1199 (Fla. 1986).
and replicability of the process in question."  

Relying in part on article I, section 15 to dispute the majority's decision, Justice Overton argued in dissent that the state constitution gives to an assistant state attorney virtually the same power to charge that it gives to the grand jury. Because grand jury proceedings have been held to satisfy the requirements of the statute, Justice Overton argued that the prosecutor should be no less entitled to rely upon its provisions.

16. Rights of Accused and Victims

(a) In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation against him, and shall be furnished a copy of the charges, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to have a speedy and public trial by impartial jury in the county where the crime was committed. If the county is not known, the indictment or information may charge venue in two or more counties conjunctively and proof that the crime was committed in that area shall be sufficient; but before pleading the accused may elect in which of those counties he will be tried. Venue for prosecution of crimes committed beyond the boundaries of the state shall be fixed by law.

(b) Victims of crimes or their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused. FLA. CONST. art. I, § 16.

Article I, section 16(a) creates a cluster of rights designed to protect persons subject to criminal prosecution. Among those rights considered this year were the right to confront adverse witnesses, the right of representation, and the right to trial by an impartial jury.

a. Confrontation

The right "to confront at trial adverse witnesses" was one of sev-

205. Smith, 573 So. 2d at 314 (citation omitted).
206. Id. at 320.
eral constitutional rights abused by prosecutorial misconduct that resulted in the court's reversal of two murder convictions in *Nowitzke v. State*.

Through a psychiatrist, the defense established that Nowitzke was insane at the time of the offenses. On cross-examination, the prosecutor asked the psychiatrist whether he had been accused of being a "hired gun" by another psychiatrist, who was unconnected with the case. The prosecutor asked the question several more times and buttressed the accusation by emphasizing it during closing argument. The court wrote that the prosecutor's introduction of the opinion was irrelevant and misleading on the issue of the psychiatrist's credibility, was improper impeachment of an expert, and violated the defendant's right to confront the declarant under the state and federal constitutions.

b. Representation

Indigent persons may qualify for the assistance of court-appointed counsel in both felony trial proceedings and any ensuing appeal. The appointment of counsel advances the right of the accused "to be heard . . . by counsel," assured under article I, section 16. *In re Order of the First District Court of Appeal Regarding Brief Filed in Forrester v. State* addressed the nature and extent of appellate counsel's role in prosecuting the initial appeal on behalf of an indigent defendant. *Forrester* is best understood against the backdrop of the sixth amendment's requirement that "the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense," and *Anders v. California*, where the United States Supreme Court stated that counsel's "bare conclusion" that there was no merit to an appeal "[could not] be an adequate substitute for the right to full appellate review available to all defendants' who may not be able to afford such an expense." The Court in *Anders* continued:

The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an advo-

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207. 15 Fla. L. Weekly 645 (Fla. 1990) (per curiam) (unanimous). *Nowitzke* is also addressed above, in article I, section 9.
208. *Id.* at 647.
209. 556 So. 2d 1114 (Fla. 1990) (unanimous) (McDonald, J., author.).
210. Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (deciding that the sixth amendment was obligatory on the states through the fourteenth amendment).
211. 386 U.S. 738 (1967).
212. *Id.* at 742-43 (citation omitted).
cate in behalf of his client, as opposed to that of amicus curiae . . . . Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however be accompanied by a brief referring to anything in the record that might arguably support the appeal. 213

Forrester pled nolo contendere to possession of cocaine and marijuana that were seized from his automobile without a warrant, and reserved the right to appeal the trial court’s denial of his motion to suppress that evidence. 214 Forrester’s appellate counsel filed an Anders brief, in which he concluded that an appeal would be frivolous and totally without merit. 215 Counsel stated that no good faith argument could be made in support of the suppression claim. 216

The district court ordered counsel to file a supplemental brief on the suppression issue, and to advocate “‘whether, in the context of a non-consensual, warrantless search, a canine alert, without more, constitutes probable cause.’” 217 Counsel appealed that order to the Supreme Court of Florida, arguing that it violated article I, section 16 and its federal counterparts by shifting counsel’s role from advocate for the client to amicus curiae for the court, which would infringe upon a defendant’s right to effective assistance of counsel.

The court unanimously rejected that constitutional argument. Exercising its inherent power, “an appellate court can order supplemental briefs in any case before it, regardless of the type of brief originally filed.” 218 Anders requires a “complete and careful review of the record” to support counsel’s claim that an appeal would be wholly frivolous. In so doing, counsel serves the dual aims of effective client representation and assisting the court in its independent evaluation of the record. 219

Harich v. State 220 also addressed the right to effective legal representation assured by article I, section 16. Harich argued in a collateral appeal of his conviction that his assistant public defender’s appointment as a special deputy sheriff created a conflict of interest that vio-

213. Id. at 744.
214. Forrester, 556 So. 2d at 1115.
215. Id.
216. Id. at 1115 n.2.
217. Id. at 1116 (citation omitted).
218. Id. at 1117.
219. Id.
220. 573 So. 2d 303 (Fla. 1990) (per curiam) (unanimous).
lated that section. At an evidentiary hearing on the claim, the trial court found that the sheriffs of three Florida counties issued "special" or "honorary" deputy sheriff cards to Harich’s trial counsel, but that counsel neither acted nor held himself out as a regular deputy. Not only did Harich fail to produce any evidence in support of his claim, but the evidence disproved it. The justices unanimously approved the findings of the trial court that counsel’s status as a special deputy was widely known to members of the legal community, and easily discoverable through due diligence. They also rejected Harich’s arguments that counsel’s appointment as a deputy sheriff amounted to an actual conflict, that prejudice must be presumed from that appointment, and that the allegation of these facts creates a per se constitutional violation.

**c. Impartiality**

The right to "trial by impartial jury" is the most frequently litigated of the cluster of rights created under article I, section 16. Trial impartiality includes the assurance that a party will not exclude prospective jurors solely because of their membership in a discrete racial group. In 1984, *State v. Neil* established the standard for determining whether a party’s peremptory challenges were racially motivated, and thus violated article I, section 16. Briefly stated, the challenging party must make a timely objection, and demonstrate on the record, first, that the challenged prospective juror belongs to a distinct racial group, and second, that there exists a strong likelihood that the other party exercised a peremptory challenge to remove that juror solely on account of race. If the trial court agrees with the movant, the burden shifts to the other party to show the existence of valid non-racial reasons for striking the juror. *State v. Slappy* later confirmed the court’s commitment to “a vigorously impartial system of selecting

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221. Those counties were Volusia County, located in the Seventh Judicial Circuit, the venue of the trial, and Marion and Lake Counties, located in the adjoining Fifth Judicial Circuit.
222. *Id.* at 305.
223. *Id.*
224. 457 So. 2d 481 (Fla. 1984).
225. *Id.* at 484.
226. *Id.* at 486-87.
After Neil, the court declared that a defendant has standing to raise an article I, section 16 violation, even though he or she is not of the same race as the juror peremptorily challenged by the state. However, it acknowledged that such a defendant may have more difficulty in making a prima facie showing of racial bias than a defendant who is of a race different from the challenged juror. Reed v. State is the most recent illustration of the point. Reed, a white man charged with murdering a white victim, moved for mistrial following the prosecutor's use of eight of ten peremptory challenges to excuse blacks from the jury. The trial court found, virtually without any explanation by the state, that the challenges were not based purely on race. With due regard for the "inherent fairness and color blindness" of trial judges, the Supreme Court of Florida agreed:

Given the circumstances that both the defendant and the victim were white and that two black jurors were already seated, we cannot say that the trial judge abused his discretion in concluding that the defense had failed to make a prima facie showing that there was a strong likelihood that the jurors were challenged because of their race.

Although Reed illustrates the court's deference to the role of the trial court in assuring trial impartiality under article I, section 16, the court is unlikely to address the merits of a Neil claim in the absence of record support. Only by adequately developing the record can trial attorneys protect a valid Neil claim, or defend against it, as the case may be. For example, in Bryant v. State, the state proffered no reasons to justify its excusing five blacks during the course of its first seven peremptory challenges, yet the trial court summarily denied defense counsel's request for a Neil inquiry. Ultimately, six white and six black jurors were impanelled, but not until the state exercised seven of its

228. Id. at 21. A four-justice majority in Slappy agreed that any doubt about whether the complaining party met the initial burden under Neil would be resolved in favor of that party. Id. at 22.
230. 560 So. 2d 203 (Fla.) (per curiam), cert. denied, 111 S. Ct. 230 (1990).
231. Id. at 206.
232. Id.
233. 565 So. 2d 1298 (Fla. 1990) (per curiam).
sixteen peremptories to strike blacks. The state argued that the reasons for the peremptories were race-neutral and not pretextual. The majority acknowledged that some of the excused jurors' responses indicated valid basis for challenge, but found the responses of others impossible to evaluate. Without benefit of an independent evaluation of the state's reasons by the trial court, the supreme court declined to review the bare record.

The absence of record clarity was also central to Floyd v. State. Defense counsel timely objected to the prosecutor's attempt to peremptorily excuse the last of two black prospective jurors remaining on the panel. The prosecutor offered a factually erroneous, but race-neutral, explanation for the peremptory. He said that during voir dire, the juror had expressed the view that twenty-five years' imprisonment was enough for Floyd's crime, which suggested a predisposition against imposing the death penalty. The trial court denied defense counsel's objection, conceding that it did not recall the juror's response, but noting that it was "'on the record.'" In fact, however, the record confirmed that the excused juror never made such a response.

A five-justice majority rejected Floyd's claim of error because defense counsel did not object to the prosecutor's erroneous explanation, and thereby failed to preserve the claim for appellate review.

There is no question that the state's explanation was race-neutral, and if true, would have satisfied the test established in [Neil and Slappy]. It is uncontroverted, however, that the explanation was not true. . . . Thus, we must determine the parameters of the trial court's responsibility to ascertain if the state has satisfied its burden of producing a race-neutral reason for the challenge.

234. Id. at 1300.
235. Id. at 1301.
236. Id. Justice McDonald dissented on the Neil issue, declaring that it was "manifest from the record" the state's exercise of peremptory challenges was not racially motivated. He believed that record proof of the state's race-neutrality was demonstrated by the ultimate composition of the jury, which included six black and six white jurors. Id. at 1303 (McDonald, J., concurring in part, and dissenting in part).
237. 569 So. 2d 1225 (Fla. 1990) (per curiam) (Shaw, C.J., Overton, Ehrlich, Grimes, and Kogan, JJ., concurred; McDonald, J., dissented with an opinion in which Barkett, J., concurred).
238. Id. at 1229 (footnote omitted).
239. Id.
240. Id.
The duty of the trial court is to establish record support for the state's reason, and it may assume the verity of any race-neutral reason if unchallenged by defense counsel. Had defense counsel disputed the prosecutor's reason, the trial court could have easily reviewed the record, discovered, and then corrected the error.241

_Floyd_ accomplishes two ends. First, it reiterates the court's commitment to the _Neil-Slappy_ formulation—defense counsel can preserve a claim for appellate review only by timely objecting when the state strikes a prospective juror who is a member of a distinct racial group, and by showing that there exists a strong likelihood of a racially improper motive. The court could have rejected Floyd's _Neil_ claim because defense counsel failed to clearly satisfy the latter component of this standard.242 By assuming that counsel satisfied the threshold, however, the court was able to address the more vexing problem posed by an unresolved record conflict. Second, _Floyd_ imposes upon defense counsel the requirement to object when the state's explanation for its peremptory challenge lacks record support.

In stark contrast to the record uncertainty in _Bryant_ and _Floyd_, the record "clearly support[ed]" the trial court's ruling to summarily deny defense counsel's _Neil_ objection in _Holton v. State_.243 The record showed that one prospective juror peremptorily excused by the prosecutor harbored reservations about capital punishment, and another was ambivalent toward recommending the death penalty. For those reasons, defense counsel was unable to demonstrate a "strong likelihood" that the state excused the two prospective jurors solely because they were black.244

When asked to explain his excuse of a third prospective black juror, the prosecutor stated his belief that the juror might be unsympathetic toward the murder victim, who was a female prostitute. The justices agreed that "one could reasonably conclude that the prospective juror could not be sympathetic toward a prostitute."245 _Holton_ is a straightforward application of _Slappy_,246 and reconfirms that the state's peremptory challenge will be sustained on appeal if the record

241. _Id._ at 1229. Two justices took no issue with the majority's resolution of the _Neil_ claim, but dissented, arguing that the facts of the murder made the death penalty inappropriate. _Id._ at 1233 (McDonald, J., dissenting; Barkett, J., concurring).
242. _Id._ at 1229 n.4.
243. 573 So. 2d 284 (per curiam) (unanimous).
244. _Id._ at 287.
245. _Id._ (emphasis added).
246. 522 So. 2d at 22.
demonstrates that its proffer is both race-neutral and reasonable.

Collateral claimants only unsuccessfully raised Neil issues this year. Roberts v. State\textsuperscript{247} rejected an argument on collateral appeal that the trial court employed an improper Neil standard. The claim was procedurally barred because appellate counsel failed to raise it on direct appeal.\textsuperscript{248} However, the court reached the merits of Roberts' claim for habeas relief, which charged that appellate counsel was ineffective for failing to challenge the trial court's reliance upon Neil, rather than the prevailing federal standard. The court held that counsel's failure to challenge the jury selection was not ineffective assistance because it amounted to neither defective performance, nor prejudiced the appeal.\textsuperscript{249}

Lastly, State v. Griffith\textsuperscript{250} may be fairly viewed as recognizing that the right of an accused to a trial by an impartial jury is a coordinate protection with article I, section 22, which provides that the qualifications and the number of jurors, no fewer than six, shall be fixed by law.

17. Excessive Punishments

*Excessive fines, cruel or unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden.* FLA. CONST. art. I, § 17.

Claims of excessive or disproportionate punishment are litigated

\textsuperscript{247} 568 So. 2d 1255 (Fla. 1990) (per curiam).

\textsuperscript{248} Id. at 1258; see also Hill v. Dugger, 556 So. 2d 1385, 1387-88 (Fla. 1990) (per curiam) (without approving or disapproving the claim that the state violated Hill's rights by peremptorily excusing black prospective jurors on account of race, the court simply noted that the trial court denied the latter as procedurally barred because appellate counsel failed to raise it on direct appeal).

\textsuperscript{249} Roberts, 568 So. 2d at 1262-68; see also Hill, 556 So. 2d 1385. Hill provides no glimpse into the allegedly offending colloquy, and it sheds little light onto the ineffective assistance claim:

Given the state of the law on the Neil issue at the time of this appeal, as well as the record in this case on the inquiry and reasons given by the prosecution for the excusal of the prospective jurors, we find that appellate counsel was not ineffective under the Strickland v. Washington, 466 U.S. 668 (1984) test.

Hill, 556 So. 2d at 1389.

\textsuperscript{250} 561 So. 2d 528, 530 n.3 (Fla. 1990). Griffith is discussed more fully under article I, section 22.
virtually entirely on federal eighth amendment grounds. It is indeed unusual to find mention of article I, section 17. For that reason, Judy Buenoano’s last-minute collateral appeal to stay her impending electrocution, and in particular Justice Kogan’s dissenting opinion, warrant special mention. In Buenoano v. State, the court considered Buenoano’s request for an evidentiary hearing on her claim that her execution would be “cruel and unusual” because, she asserted, the electric chair used by the state prison system would malfunction. Her legal theory seized upon the macabre, grizzly circumstances of Jesse Tafero’s electrocution, which occurred only weeks earlier. The evidence showed that smoke and twelve-inch flames spurted from Tafero’s head immediately after he received the first jolt of electricity. Tafero was pronounced dead approximately seven minutes later and only after a third jolt of electricity was administered. Relying upon the strength of an affidavit from her own expert, Buenoano argued on appeal that a “‘homemade’” electrode caused the chair to malfunction, a condition which she claimed the Florida Department of Corrections had failed to remedy.

A four-justice majority reached the merits of Buenoano’s constitutional claim, and found that the record as proffered failed to justify judicial interference with the Department’s function. The majority deferred to the Department as the agency charged with executing condemned prisoners, and presumed that the Department properly performed that function. It noted that the Department’s own investigation showed that the “irregularities in Tafero’s execution” were the result of using a synthetic, rather than a natural sponge, which apparently did not affect the functioning of the electrode. “Death by electrocution,” the majority concluded, “is not cruel and unusual punishment, and one malfunction is not sufficient to justify a judicial inquiry into the Department of Corrections’ competence.”

251. 565 So. 2d 309 (Fla. 1990) (per curiam) (Ehrlich, C.J., Overton, McDonald, and Grimes, JJ., concurring; Shaw, J., dissented with an opinion in which Barkett and Kogan, JJ., concurred; Barkett, J., dissented with an opinion in which Kogan, J., concurred; Kogan, J., dissented with an opinion).
252. Id. at 311.
253. Id. at 310-11.
254. Id. at 311. One expert attributed the malfunctioning to the Department’s use of “only a single ‘homemade’ leg electrode[,] . . . haphazardly constructed from an old Army boot and other spare parts.” Id. at 315 (Kogan, J., dissenting).
255. Id. at 311 (citing Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463 (1947)). This conclusion was hotly disputed. Justice Barkett charged that the majority,
Buenoano decided a federal question, as is evident by the majority's use of eighth amendment phraseology, "cruel and unusual," and by its reliance upon federal precedent. In marked contrast, article I, section 17 uses the disjunctive form, "cruel or unusual." Arguably, the adopters of article I, section 17 intended to create a protection against barbaric, arbitrary, non-individualized, and disproportionate punishment that is qualitatively different from the eighth amendment protection. Otherwise, the adopters would have replicated federal phraseology in this section, as they had in many other article I sections. However, Buenoano took no occasion to consider the distinction.

Buenoano's importance for state constitutional law is not lost, for Justice Kogan's dissenting opinion provides a glimpse of the contours of this right from the viewpoint of one justice. Believing that article I, section 17 requires "swift and sure punishment," he argued the court should remand for an evidentiary hearing to establish whether "any reasonable possibility" existed that the flames observed during Tafero's execution were the result of faulty electrodes. If so, the trial court should stay future executions until the state overhauls the electric chair, for "any electrical malfunction that results in needless charring of human flesh or an unnecessarily slow death" violates state and federal protections.
On another subject, there is minority support for the view that conviction under Florida's RICO statutes,\textsuperscript{259} and the predicate obscenity laws,\textsuperscript{260} produces the potential of "draconian," unconstitutionally excessive penalties. That argument appeared in a dissent to \textit{Stall v. State},\textsuperscript{261} and expresses the concern that the state could impose upon a defendant convicted of showing, selling, distributing, or renting obscene materials, the same severe maximum penalties intended for organized criminals, drug smugglers, and contract murders (life imprisonment, heavy fines, and likely forfeiture of assets).\textsuperscript{262}

18. Administrative Penalties

\textit{No administrative agency shall impose a sentence of imprisonment, nor shall it impose any other penalty except as provided by law. Fla. Const. art. I, § 18.}

No decisions construed this section during the survey period.

19. Costs

\textit{No person charged with crime shall be compelled to pay costs before a judgment of conviction has become final. Fla. Const. art. I, § 19.}

No decisions construed this section during the survey period.

\textsuperscript{259} Florida RICO (Racketeer Influenced and Corrupt Organization) Act, codified at Fla. Stat. §§ 895.01-.06 (1985).
\textsuperscript{261} 570 So. 2d 257, 274 (Fla. 1990) (Kogan, J., dissenting; Barkett, J., concurring).
\textsuperscript{262} Id. at 527-28; see also Comment, \textit{RICO's Forfeiture Provision: A First Amendment Restraint on Adult Bookstores}, 43 U. Miami L. Rev. 419, 446-47 (1988) (concluding that RICO's forfeiture provision amounts to a prior restraint on the distribution of non-obscene materials, which are entitled to first amendment protection, and suggesting that the government's goal of eradicating organized crime is not sufficiently compelling to justify total forfeiture of all assets of an adult bookstore).
20. Treason

*Treason against the state shall consist only in levying war against it, adhering to its enemies, or giving them aid and comfort, and no person shall be convicted of treason except on the testimony of two witnesses to the same overt act or on confession in open court.*

FLA. CONST. art. I, § 20.

No decisions construed this section during the survey period.

21. Access to Courts

*The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.*


Many litigants during the 1980s challenged statutes that sought to limit product liability claims by imposing time bars on recovery. One type of statute, a statute of repose, cuts off a right of action after a specified time, such as the completion of work or delivery of goods. It not only bars an accrued action, but also prevents accrual where the final element essential to the accrual occurs beyond the period established by the statute.\(^{263}\) In 1980, *Battilla v. Allis Chalmers Manufacturing Co.*\(^{264}\) held that the twelve-year statute of repose, which required that product liability actions must be commenced “within twelve (12) years after the date of delivery of the completed product to its original purchaser,”\(^{265}\) violated article I, section 21 as applied. The court receded from *Battilla* in *Pullum v. Cincinnati, Inc.*,\(^{266}\) and held that the statute of repose did not violate article I, section 21. The court reasoned that manufacturers should not be held perpetually accountable.

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263. See University of Miami v. Bogorff, No. 74,797 slip op. at 3-4 (Fla. Jan. 18, 1991); Bauld v. J.A. Jones Constr. Co., 357 So. 2d 401, 402 (Fla. 1978); Carr v. Broward County, 505 So. 2d 568, 570 (Fla. 4th Dist. Ct. App. 1987), aff'd, 541 So. 2d 92 (Fla. 1989). Those cases also explain that the statute of repose operates differently from another time bar to recovery, the statute of limitation. The latter establishes a time limit within which an action must be commenced, bars enforcement of an accrued cause of action, and runs from the date the cause of action accrues.

264. 392 So. 2d 874 (Fla. 1980).

265. FLA. STAT. § 95.11(3) (1975).

266. 476 So. 2d 657 (Fla. 1985), appeal dismissed, 475 U.S. 1114 (1986).
for injuries caused by their products, and that the legislature could reasonably decide that the risk of liability should not extend beyond a twelve-year period beginning with the date of a product's sale.\textsuperscript{267}

In 1990, \textit{Frazier v. Baker Material Handling Corp.}\textsuperscript{268} decided the fate of product liability claims that accrued in the window between \textit{Battilla} and \textit{Pullum}. Frazier was injured by a product delivered before the court issued \textit{Battilla}. His injury occurred after \textit{Battilla}, yet within the twelve-year statute of repose declared unconstitutional by that decision. Only the four-year statute of limitation posed a time bar to his claim, and Frazier filed suit within that period. Nonetheless, the trial court entered summary judgment against him, reasoning that \textit{Pullum} reinstated the twelve-year statute of repose, which operated to cut off his claim. The district court affirmed the trial court.\textsuperscript{269}

The Supreme Court of Florida expressed the general rule: "'[A] decision of a court of last resort which overrules a prior decision is retrospective as well as prospective in its application unless declared by the opinion to have prospective effect only.'"\textsuperscript{270} Because \textit{Pullum} was silent on the issue of retroactivity, the rule applied to reinstate the statute of repose, making it binding on Frazier. However, Frazier convinced four justices that his case fell within a well-established exception to the general rule, which provides that "[a] claimant with a viable cause of action is entitled to rely on the existing law which provides that claimant access to the court."\textsuperscript{271} Thus, a claimant who relies upon a then-prevailing judicial interpretation of the controlling statute cannot be penalized by a later decision that leaves the claimant without relief.\textsuperscript{272}

\textsuperscript{267.} Id. at 659 (adopting Battilla v. Allis Chalmers Mfg Co., 392 So. 2d 874, 874-75 (Fla. 1980) (McDonald, J., dissenting)).
\textsuperscript{268.} 559 So. 2d 1091 (Fla. 1990) (Barkett, J., author; Shaw, Grimes, and Kogan, JJ., concurring; McDonald, J., dissented in an opinion concurred in by Ehrlich, C.J., and Overton, J.).
\textsuperscript{270.} Frazier, 559 So. 2d at 1092 (quoting Melendez v. Dreis and Krump Mfg. Co., 515 So. 2d 735, 736 (Fla. 1987)).
\textsuperscript{271.} Id. at 1093 (citing FLA. CONST. art. I, § 21).
\textsuperscript{272.} Id. at 1092 (citations omitted). In dissent, Justice McDonald argued that the exception relied upon by the majority did not apply. He wrote that Frazier had no reason to rely on \textit{Battilla} at the time he filed his claim, because that decision had no bearing on his case. \textit{Battilla} simply held the statute of repose unconstitutional as applied, that is, as applied to suits initiated against a manufacturer more than twelve years after the date of sale. Id. at 1093 n.1 (McDonald, J., dissenting; Ehrlich, C.J.,
Turning to the subject of child support enforcement, the justices in *State ex rel. Pittman v. Stanjeski*\(^{273}\) rejected the finding of two lower courts that section 61.14(5), Florida Statutes (1987), denied delinquent obligors access to courts. The statute provided that unpaid support payments became a final judgment by operation of law after notice by the clerk of court to the obligor. However, it omitted from its text any provision that would allow the obligor to challenge the facts upon which the judgment was based. The court salvaged the statute by "reasonably constru[ing]" it to require a hearing *before* any such judgment became final, provided that the obligor timely responded to the clerk's notice of arrearage.\(^{274}\)

Another topic of constitutional significance emerged from the state's exercise of its police power in 1984, when it eradicated a blight on Florida's valuable citrus industry known as citrus canker. The eradication program spawned a series of cases by citrus growers who sued in inverse condemnation to recover damages for property destroyed by the state. In the first of those cases to reach the court, a five-member majority held in 1988 that the eradication program was a valid exercise of the state's police power, and that owners were entitled to full and just compensation for destroyed "healthy, but suspect" citrus plants.\(^{275}\)

Among the cases that followed were three suits consolidated for relief in *Department of Agriculture & Consumer Services v. Bonanno*.\(^{276}\) In circuit court, the Department moved to dismiss the suits, arguing that the act,\(^{277}\) which established procedures for citrus canker claims, deprived the court of jurisdiction. The act created an administrative hearing process as the "'sole and exclusive remedy'"

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273. 562 So. 2d 673 (Fla. 1990). This case is discussed more fully under article I, section 9.
274. *Id.* at 678-79.
276. 568 So. 2d 24 (Fla. 1990) (per curiam). The court released two other decisions that emerged from challenges to the state's eradication program. Both involved liability and damages issues. Department of Agriculture & Consumer Servs. v. Polk, 568 So. 2d 35 (Fla. 1990), and *Department of Agriculture & Consumer Servs. v. Mid-Florida Growers, Inc.,* 570 So. 2d 892 (Fla. 1990).
277. Ch. 89-91, 1989 Fla. Laws 143.
for owners who opted to accept a schedule of compensation. That schedule prescribed presumptive values for categories of destroyed citrus plants, and presumed that those values represented full and fair compensation. The circuit court declared the act unconstitutional, and denied the Department’s motion. The Department then petitioned the supreme court for a writ of prohibition to restrain the circuit court from exercising jurisdiction.

The owners responded by arguing, in part, that the act unconstitutionally deprived them of their right of access to courts under article I, section 21. A four-justice majority disagreed, and prohibited the circuit court from proceeding further with the suits.

To the extent that the statute could be said to place a limitation upon access, there is no violation of article I, section 21. In Kluger v. White, 281 So. 2d 1 (Fla. 1973), this Court held that the legislature may abolish a common law right of access to the courts if it provides a reasonable alternative to protect the rights of the people to redress for injuries.

Clearly, the legislature abolished a right of access enjoyed at common law. By itself that action would have been fatal to the act. However, the majority concluded that the act survived constitutional scrutiny because the legislature put in its place a “reasonable alternative” remedy, by assuring the owners the opportunity for review of the administrative decision by the First District Court of Appeal.

Three justices dissented on this point, arguing that the legislature impermissibly interfered with the exercise of constitutionally conferred judicial power. In particular, the Administrative Procedures Act

278. Bonanno, 568 So. 2d at 27.

279. That theory is grounded in the notion that the trial judge, not an administrative agency, is the trier of all legal and factual issues in an inverse condemnation suit, except those relating to damages. See Mid-Florida Growers, Inc., 521 So. 2d at 104.

280. Bonanno, 568 So. 2d at 30.

281. Id. (Shaw, C.J., Overton, McDonald, and Grimes, JJ., concurring). The majority added that the act also provided salutary advantages to affected owners. It conferred some benefits not available in circuit court, permitted the payment of claims barred by the statute of limitations, and eliminated the obligation that claimants invalidate releases they signed to obtain partial compensation under the act. Id.

282. Id. at 35 (Ehrlich, J., concurring in part and dissenting in part; Barkett and Kogan, JJ., concurring).

insulates the agency from effective judicial review. A court reviewing an agency's decision under the canker eradication program may not reweigh the evidence, but may only decide whether there exists on the record sufficient evidentiary support for the final decision.

Another of Bonanno's constitutional contributions is addressed in the following section.

22. Trial by Jury

The right of trial by jury shall be secure to all and remain inviolate. The qualifications and the number of jurors, not fewer than six, shall be fixed by law. Fla. Const. art. I, § 22.

The first of two cases to consider this section focused upon the meaning of the guarantee that the right to a jury trial shall be secure and inviolate. Department of Agriculture & Consumer Services v. Bonanno,284 introduced in the preceding section, considered a claim by nursery and grove owners that the canker eradication program deprived them of their right to litigate their inverse condemnation suits before a court and jury, and impermissibly relegated them to the administrative process. The majority rejected their claim.

Relying upon principles familiar to this section, the court determined that the right to jury trial is assured in those cases where the right was recognized "at the time Florida's first constitution became effective in 1845."285 Because there then existed no right to jury trial in condemnation proceedings,286 and the right to have a jury determine damages is a creature of modern statute, the legislature is free to change or take away that right. Thus, the citrus owners have no constitutionally protected right to prosecute inverse condemnation suits before a jury.

The second of the two cases focused upon this section's numeric requirement for jury size. By law, twelve persons are required to try capital cases, and six persons are required to try all other criminal

284. 568 So. 2d 24 (Fla. 1990) (per curiam).
286. Bonanno, 568 So. 2d at 28 (citing Carter v. State Rd. Dep't, 189 So. 2d 793, 799 (Fla. 1966)).
cases. In State v. Griffith, the state waived the death penalty before jury selection in exchange for an agreement with Griffith's counsel to accept a six-person rather than a twelve-person jury. Describing the right to a jury trial as “indisputably one of the most basic rights guaranteed by our constitution,” the court determined that the state’s waiver of the death penalty in a capital case does not automatically entitle a defendant to trial by a six-person jury. However, where the record indicates that defense counsel discussed the waiver of the twelve-person jury with the prosecutor and trial court, counsel’s choice to proceed with a six-person jury will be viewed as tactical. Under those circumstances, there is no need that the record contain the defendant’s personal waiver for the waiver to be effective.

23. Right of Privacy

Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public’s right of access to public records and meetings as provided by law. FLA. CONST. art. I, § 23.

The right of privacy, or as it is more precisely phrased in the state constitutional context, “the right to be let alone,” expresses the power of natural persons to define for themselves the boundary of their per-
sonal lives, and imposes a correlative limit upon the state that prevents its encroachment into that boundary.\textsuperscript{292} To assure that this "independent, freestanding, [and] fundamental" right\textsuperscript{293} will remain "as strong as possible,"\textsuperscript{294} the court measures state intrusions under the most exacting standard of review, the compelling state interest test.\textsuperscript{295} Once the protections of the privacy amendment are implicated, the state may justify its interference with that right only by showing that interference was necessary to advance a compelling state interest, and that it accomplished the interference by the least intrusive means.

The "right to be let alone" is inherently subjective, and, in its absolute sense, respects a universe of personal choices. That partially accounts for the diversity of definitions found in much of the commentary on the subject. Grouping the court's privacy decisions into broad categories representing spheres of personal interest promotes our understanding of the concept, and suggests how an asserted interest will fare under article I, section 23 analysis by facilitating comparison with factually similar cases.

To accomplish those aims, the decade survey organized the court's article I, section 23 cases into three general categories of privacy interests:

- disclosural or informational privacy (how, when, and to what extent a person allows private information to be communicated to others);
- traditional search and seizure contexts (the privacy protected by article I, section 23 that is similarly protected by the

\textsuperscript{292} The distinction between "right of privacy" and "right to be let alone" has significance beyond the obvious turn of the phrase. Stall v. State, 570 So. 2d 257, 264 (Fla. 1990) (Kogan, J., dissenting). For one, it respects the framers' intent to set apart Florida's express constitutional guarantee from the right to privacy implied in the federal constitution. See Dore, Of Rights Lost and Gained, 6 FLA. ST. U.L REv. 609, 652-53 n.268 (1978). Moreover, the "right to be let alone" borrows from an historical concept that reveres privacy as the most valued fundamental right. See Hawkins, supra note 1, at 827 n.674. Finally, it bears note that the text of a constitutional section, and not its title, determines its construction. FLA. CONST. art. X, § 12(h). For that reason, courts must look to the text itself, not the caption, to ascertain its meaning.

\textsuperscript{293} Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d 544, 548 (Fla. 1985).

\textsuperscript{294} Id. at 544.

\textsuperscript{295} The court has uniformly applied this standard in civil cases See, e.g., In re T.W., 551 So. 2d 1186 (Fla. 1989); Florida Bd. of Bar Examiners Re: Applicant, 443 So. 2d 71 (Fla. 1983); administrative cases, see, e.g., Winfield, 477 So. 2d at 548; and criminal contexts, see, e.g., State v. Wells, 539 So. 2d 464 (Fla.), aff'd, 110 S. Ct. 1632 (1989).
warrant and reasonableness requirements of article I, section 12 and the fourth amendment); and decisional autonomy or self-determination (control over one's character, identity, and associations).

This survey adheres to that model. Twice in 1990 the court construed article I, section 23. The two decisions, *In re Guardianship of Estelle M. Browning* and *Stall v. State*, addressed claims that the state unjustifiably interfered with the freedom of personal choice assured under that section.

Personal dignity, individual autonomy, and the right to make for oneself decisions affecting matters of purely personal destiny lie at the heart of the right to be let alone, or as it is also described in this context, the right of self-determination. Persons make decisions of this sort daily, seldom with interference. Yet, some decisions, such as the difficult choice made by persons to refuse or discontinue life-sustaining medical intervention, often run head-on into a "regulatory purgatory" that effectively circumscribes personal choice. *Browning* poignantly illustrates the unfortunate consequences of misguided

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296. Hawkins, *supra* note 1, at 831. Functionally, these categories aid the definitional understanding of privacy by focusing on the varied qualities of individual life that persons seek to reserve for themselves, apart from outside scrutiny. *See* Stall v. State, 570 So. 2d 257, 264 (Fla. 1990) (Kogan, J., dissenting). Privacy interests derive from constitutional sources other than article I, section 23, including the search and seizure, substantive due process, and liberty clauses. *See, e.g.*, State v. Johnson, 561 So. 2d 1139, 1143 (Fla. 1990) (unjustified stops of motorists with similarity to drug courier profile intrude upon privacy rights protected under article I, section 12 of the Florida Constitution); Rasmussen v. South Fla. Blood Serv., 500 So. 2d 533, 536 (Fla. 1987) (privacy interests are inherent in the concept of ordered liberty). *Compare* Roe v. Wade, 410 U.S. 113, 153 (1973) (the right to privacy is founded in the concept of personal liberty of the fourteenth amendment).

297. 568 So. 2d 4 (Fla. 1990) (Barkett, J., author; Shaw, C.J., Ehrlich, Grimes, and Kogan, JJ., concurring; McDonald, J., concurred with an opinion; Overton, J., concurred in part and dissented in part with an opinion).

298. 570 So. 2d 257 (Fla. 1990) (McDonald, J., author; Shaw, C.J., Overton, Ehrlich, and Grimes, JJ., concurring; Barkett, J. and Kogan, J., each dissented with an opinion in which the other concurred).

299. Often referred to as "death with dignity" or the "right to die," the term right of choice more precisely describes the particular decisions made under the rubric self-determination, whether the decision is either to choose or to refuse a particular course.

regulation.\textsuperscript{301}

Like many others, Mrs. Browning took care to execute a living will, an instrument that is essentially a directive to physicians and family expressing preferences about the medical course to be followed in the event she were to face incapacity. Her declaration provided:

If at any time I should have a terminal condition and my attending physician has determined that there can be no recovery from such condition and my death is imminent, where the application of life-sustaining procedures would serve only to artificially prolong the dying process, I direct that such procedures be withheld or withdrawn, and that I be permitted to die naturally with only the administration of medication or the performance of any medical procedure deemed necessary to provide me with comfort care or to alleviate pain.\textsuperscript{302}

Mrs. Browning expressly added that she did not desire to be fed nutrition or hydration, either by gastric tube or intravenously.\textsuperscript{303}

The year following her declaration, Mrs. Browning suffered a massive stroke that caused major, permanent, and irreversible damage to her brain, and left her totally unresponsive and unable to communicate. On the day of her accident, Mrs. Browning was hospitalized, and a gastrostomy tube was inserted into her stomach. Through it, she received food and liquid. The same month, she was transferred to a nursing home, where a nasogastric tube was inserted after her gastrostomy tube became dislodged and she encountered numerous unpleasant,

\textsuperscript{301} Many reported decisions, \textit{Browning} among them, confirm that patients often predecease the resolution of legal proceedings initiated on their behalf. \textit{See Browning}, 568 So. 2d at 16 n.17.

\textsuperscript{302} \textit{In re Guardianship of Browning}, 543 So. 2d 258, 275 (Fla. 2d Dist. Ct. App. 1989). That provision substantially comports with Florida's Life-Prolonging Procedure Act, Ch. 84-58, 1984 Fla. Laws 136 (codified at FLA. STAT. § 765.01.15 (Supp. 1984)).

\textsuperscript{303} The removal of nutrition or hydration was foreign to the Life-Prolonging Procedure Act. Although any competent adult could declare a written intent to withhold or withdraw "life-prolonging procedures" under specified circumstances, the act excluded the "provision of sustenance" (food and water) from its definition. FLA. STAT. § 765.03(3) (Supp. 1984). For that reason, the issue before the court did not involve the import of remedial protections afforded under the act, but Mrs. Browning's right of privacy under the state constitution. Meanwhile, the legislature amended the act to eliminate the exclusion, now including sustenance within the scope of "life-prolonging procedures." Ch. 90-223, § 1, 1990 Fla. Laws 1644.
Several months after Mrs. Browning’s relocation to the nursing home, the circuit court appointed a guardian. Some two years after the debilitating stroke, the guardian petitioned the circuit court to order that artificial feeding be discontinued. At a hearing on the guardian’s petition, medical evidence showed that Mrs. Browning was non-comatose, and lived in a persistent vegetative state. The circuit court found that Mrs. Browning’s death was not imminent, a prerequisite to the withdrawal of medical support under Florida’s Life-Prolonging Procedure Act, and denied the petition.

The district court affirmed the circuit court, finding, however, that even though Mrs. Browning had no remedy under the act, she did have a remedy under article I, section 23. It declared that “a remedy must exist to fulfill Mrs. Browning’s constitutional right of privacy,” and in particular, her right to refuse medical treatment. The district court panel took the initiative, and proposed a thoughtfully crafted procedural scheme to give effect to that right. It then certified the fol-

304. *Browning*, 568 So. 2d at 8 n.3; *Browning*, 543 So. 2d at 261-62.
305. *Browning*, 568 So. 2d at 9; *Browning*, 543 So. 2d at 261.
306. That finding was premised upon medical opinion testimony that Mrs. Browning could continue to live for an “indeterminate” time with the feeding tube left in place. *Browning*, 568 So. 2d at 9. To the mind of the district court panel, and at least one commentator, this distinction, like others in the act, warrants rethinking. See *Browning*, 543 So. 2d at 265 (defining imminent death under conditions where medical treatment is continued, effectively renders the statute “useless”); Morgan, *Florida Law and Feeding Tubes—The Right of Removal*, 17 STETSON L. REV. 109 (1987) (such a construction effectively disenfranchises persons whose condition, though not terminal, is irreversible). As will be seen, the state supreme court rejected the trial court’s method of determining “imminence” for constitutional purposes. See infra at note 338.
308. *Browning*, 543 So. 2d at 261. The district court observed that the case was presented to the trial court almost exclusively under the Florida Statutes, and that both the guardian’s attorney and the trial court were understandably confused about the distinction between the procedural requirements for a statutory, versus a constitutional claim. Id. at 262.
309. Id. at 266.
310. The district court outlined procedures that took into account the selection of the surrogate (either a guardian or the circuit court in exceptional cases), id. at 270; the need for an informal forum, preferably without judicial review, id. at 270-71; evidence essential to the decision to forego treatment, including physicians’ certificates to establish the patient’s current medical condition, evidence that the patient will not regain competency, evidence that the patient, if competent, would have selected the course chosen by the surrogate, and proof that the state’s interests are not paramount,
lowing question to the state supreme court as having great public importance:

Whether the guardian of a patient who is incompetent but not in a permanent vegetative state and who suffers from an incurable, but not terminal condition, may exercise the patient's right of self-determination to forego sustenance provided artificially by a nasogastric tube? 311

The court answered affirmatively with qualification. In this, only the second self-determination case to expressly construe article I, section 23,12 the justices began with a broadly-stated premise—"everyone has a fundamental right to the sole control of his or her person." 3312 An "integral component" of self-determination is the inherent right to make personal medical treatment decisions, which necessarily encompasses "all medical choices." 313 Competent persons have the right to refuse medical intervention, 314 regardless of the denomination of the procedure at issue, 315 and regardless of the subjectivity of the choice.

Indeed, mainstream judicial thought has often honored the subjective medical decisions of patients. For instance, courts have enforced the wishes of competent adults to forego medical intervention when

\[\text{id. at 271-73; the requirement that the surrogate support a decision to forego treatment by clear and convincing evidence, id. at 273; and the scope of judicial review, when required, id. at 273-74.}\]

311. \text{id. at 274.}\n
312. Only \text{In re T.W.}, 551 So. 2d 1186 (Fla. 1989), clearly decided a self-determination claim under article I, section 23. That decision struck down Florida's parental consent law because it impermissibly interfered with the right of an unmarried, fifteen-year-old pregnant female to decide for herself whether to terminate her pregnancy during the first trimester. It bears repeating, however, that the court's privacy cases that construed common law and the federal constitution may strongly suggest principles incorporated into article I, section 23.

313. \text{Browning}, 568 So. 2d at 10.

314. \text{id. (emphasis added).}\n
315. \text{id. (citing Public Health Trust v. Wons, 541 So. 2d 96 (Fla. 1989); Cruzan ex rel. Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841, 2852 (1990)). Cf. id. at 2851-52 (regarding the right of a competent person to refuse unwanted medical treatment, including lifesaving hydration and nutrition, as a liberty interest that derives from the fourteenth amendment).}\n
316. \text{Browning}, 568 So. 2d at 11 n.6 (regarding as legally indistinguishable, medical procedure denominated as "major or minor, ordinary or extraordinary, life-prolonging, life-maintaining, life-sustaining, or otherwise").}
premised on tenets of religious faith, on the desire to avoid a diminished quality of life, and on the refusal to endure prolonged and insufferable pain. Notably, the court has yet to insist that a claimant first demonstrate an objective manifestation of reasonableness as a precondition to the threshold finding that personal medical choice deserves protection.

The inviolability of the personal right to decide a medical course does not turn on whether the person is competent or incompetent. The

317. See, e.g., Public Health Trust v. Wons, 541 So. 2d 96 (Fla. 1989) (competent adult, who is also a practicing Jehovah’s Witness, has a lawful right to refuse a blood transfusion, without which she may well die).

318. See, e.g., Bouvia v. Superior Court, 179 Cal. App. 3d 1127, 1142, 225 Cal. Rptr. 297, 304 (Ct. App. 1986) (patient in a public hospital, whose life has been diminished to the point of “hopelessness, uselessness, unenjoyability and frustration,” has the right to forego life-support); Drabick v. Drabick, 200 Cal. App 3d 185, 196, 245 Cal. Rptr. 840, 846 (Ct. App. 1988) (“Whether the benefits of treatment outweigh its detriments is a decision that engages on personal and medical values, including ideas about the quality of life. It is not a decision that courts are constituted or especially well-qualified to make.”); Brophy v. New England Sinai Hosp., Inc., 398 Mass. 417, 434, 497 N.E.2d 840, 846 (Ct. App. 1986) (recognizing a right “to avoid circumstances in which the individual himself would feel that efforts to sustain life demean or degrade his humanity”) (citation omitted); In re Gardner, 534 A.2d 947, 955 (Me. 1987) (“Gardner has himself done the balancing of his own values and their bearing on the question of whether to be kept alive in a persistent vegetative state by artificial means. That personal weighing of values is the essence of self-determination. . . . [W]e judges do not ourselves engage in an independent assessment of the value of his life.”); In re Torres, 357 N.W.2d 332, 340 (Minn. 1984) (a terminally ill patient might choose to avoid “[t]he ultimate horror . . . of being maintained in limbo, in a sterile room, by machines controlled by strangers”’) (citation omitted); In re Quinlan, 70 N.J. 10, 26, 355 A.2d 647, 663 (“We have no hesitancy in deciding . . . that no external compelling interest of the State could compel Karen to endure the unendurable, only to vegetate a few measurable months with no realistic possibility of returning to any semblance of cognitive or sapient life”), cert. denied, 429 U.S. 922 (1976). Cf. Cruzan, 110 S. Ct. at 2853 (states may decline to make judgments about a particular person’s “quality” of life, and simply assert “an unqualified interest in the preservation of human life”).

319. See, e.g., Satz v. Perlmutter, 362 So. 2d 160, 161 (Fla. 4th Dist. Ct. App. 1978) (terminally ill adult, who testified at bedside hearing to being “miserable” with use of a respirator, has a right to remove it, even though death would follow within one hour), approved, 379 So. 2d 359 (Fla. 1980); In re Guardianship of Grant, 109 Wash. 2d 545, 555, 747 P.2d 445, 450-51 (1987) (en banc) (the amount of pain endured by a terminally ill, noncomatose person is a significant factor, although not the only factor, to be considered in deciding whether to withhold life sustaining treatment).

320. In contrast, the court has imposed an objectivity requirement in disclosural privacy cases, and cases decided in traditional search and seizure contexts.
justices agreed that there was no constitutional basis for distinguishing the protections inuring to competent persons, and those whose non-cognitive condition prevented the personal exercise of their choice. 321

Having decided that competent and incompetent persons alike enjoy a constitutional right to make decisions involving their personal medical care, the justices addressed three remaining questions—who may exercise the right for an incompetent person, under what circumstances may the state regulate this area, and what procedures give force to the right. Concerning the first question, precedent established that a close family member, or a court-appointed guardian, may exercise the right for an irreversibly comatose patient, whose essentially vegetative existence was sustained by a mechanical respirator. 322 Browning extended the class of persons capable of exercising the patient’s right to include proxies, 323 and surrogates, such as close family members and friends. 324 The role of those decision makers is a narrow one:

We emphasize and caution that when the patient has left instructions regarding life-sustaining treatment, the surrogate must make the medical choice that the patient, if competent, would have made, and not one that the surrogate might make for himself or

321. Browning, 568 So. 2d at 12 (citing John F. Kennedy Memorial Hosp., Inc. v. Bludworth, 452 So. 2d 921, 924 (Fla. 1984)).
322. Id. at 13 (citing Bludworth, 452 So. 2d at 926).
323. Persons to whom the patient delegated full responsibility for future medical decision making. Id. at 15.
324. Id. (footnote omitted). Browning is a logical and warranted extension of Bludworth. It makes little sense to limit the class of surrogate decision makers in this context to court-appointed guardians and “close” family members. Friends, for instance, may be well-suited to exercise the patient’s charted medical course. Moreover, the patient may prefer to designate a friend, rather than a family member, or there may be no family that could be said to be “close,” whether by consanguinity or familiarity. Indeed, delegations of friends by patients are commonplace. Cruzan, 110 S. Ct. at 2857 (O’Connor, J., concurring).

The durable family power of attorney is another device used in this setting. The legislature authorizes a principle to create a durable family power of attorney by designating his or her “spouse, brother, sister, niece, nephew, or a person related to the principal by lineal consanguinity” FLA. STAT. § 709.08(1) (Supp. 1990). But see Waters, Florida Durable Power of Attorney Law: The Need For Reform, 17 FLA. ST. U.L. REV. 519 (1990). Mr. Waters argues that the durable power as presently enacted “affords only a limited and frequently unhelpful alternative to guardianship,” id at 521, by illogically restricting the class of attorneys-in-fact to a narrow group of relatives, and failing to provide procedural safeguards for exercise of the power. Id. at 546.
herself, or that the surrogate might think is in the patient's best interests.\(^{325}\)

Regarding the second question, the state must first show a compelling state interest before it regulates the exercise of personal medical care choices protected under article I, section 23. Often repeated as the state's interests in cases involving a person's refusal of unwanted medical treatment are a non-exclusive list of factors that include preserving life, protecting innocent third parties, preventing suicide, and helping to maintain the ethical integrity of the medical profession.\(^{326}\)

Browning makes a significant contribution to state constitutional doctrine by recognizing that among the state's interests is its overarching responsibility to safeguard the inalienable rights of its citizens. The court wrote with great clarity that "[t]he state has a duty to assure that a person's wishes regarding medical treatment are respected."\(^{327}\) Continuing, it said that: "obligation serves to protect the rights of the individual from intrusion by the state unless the state has a compelling interest great enough to override this constitutional right."\(^{328}\) On balance, the state's interests failed to outweigh Mrs. Browning's right to self-determine her medical course.\(^{329}\) Moreover, there is no state inter-

\(^{325}\). Browning, 568 So. 2d at 13. The opinion does not suggest the parameters of the constitutional right of privacy when the patient left no instructions regarding future medical care.

\(^{326}\). Courts have recognized other state interests in this context. See Browning, 568 So. 2d at 14 n.13 (protecting incompetents from erroneous decisions, avoiding unwanted medical care, and assuring that the person's wishes are faithfully executed); Public Health Trust v. Wons, 541 So. 2d 96, 98 (Fla. 1989) (holding that the state's interest in maintaining a home with two parents for two minor children is insufficient to override one parent's choice to forego lifesaving blood transfusion on religious and privacy grounds); Cruzan, 110 S. Ct. at 2853 (states are entitled to guard against potential abuse, and to establish procedures that guarantee accurate fact-finding).

\(^{327}\). Browning, 568 So. 2d at 13 (emphasis added). The notion that the state has a duty to secure the inalienable rights of all persons was a truth self-evident to the signers on the nation's Declaration of Independence. The court noted Justice Stevens's recent observation of the principle in the context of the federal constitution: "'Our Constitution is born of the proposition that all legitimate governments must secure the equal right of every person to 'Life, Liberty, and the pursuit of Happiness.'" Id. at 13 n.12 (quoting Cruzan, 110 S. Ct. at 2878-79 (Stevens, J., dissenting) (footnote omitted) (quoting Declaration of Independence). Browning makes a novel addition to the court's constitutional jurisprudence by declaring that the Florida Constitution embraces those same ideals.

\(^{328}\). Browning, 568 So. 2d at 13-14.

\(^{329}\). Id. at 14. Because the state failed to demonstrate a compelling state interest
est that overrides the interest of the state in protecting its people.

Finally, the court addressed the procedures designed to protect the patient's chosen medical course. The court declared that the decision maker need not obtain prior judicial approval to carry out the wishes of the patient, provided the patient specifically expressed those wishes orally or in writing in the event of later incapacity. 330 If a patient delegates decision making power to a proxy, the designation must be in writing. Because the proxy by nature has full decision making responsibility, the patient need not express any instructions. However, when a patient provides instructions, the patient need not designate a decision maker. In that event, a close family member or friend may carry out the patient's wishes, and a designation, if made, may be oral or written. 331

Browning charges the decision maker with two responsibilities. First, the decision maker must take "great care" in exercising a patient's medical choice. 332 Second, the decision maker must support a decision with clear and convincing evidence. 333 If the particular decision is to forego medical treatment of an incompetent patient, the decision maker must satisfy three conditions by clear and convincing evidence:

1. . . . that the patient executed any document knowingly, willingly, and without undue influence, and that the evidence of the patient's oral declarations is reliable;
2. . . . that the patient does not have a reasonable probability of recovering competency so that the right could be exercised directly by the patient; and

that would justify its regulation of a person's decision to forego life-sustaining medical intervention, there was no need to consider whether the means to carry out the state's interest was "narrowly tailored in the least intrusive manner possible." Id.

330. Id. at 15. This was not the first time the court opted for a nonjudicial procedure that facilitated an individual's choice. See John F. Kennedy Hosp., Inc. v. Bludworth, 452 So. 2d 921, 925 (Fla. 1984) (rejecting the need to obtain prior court approval as "too burdensome" under the circumstances).

331. Browning, 568 So. 2d at 15.

332. Id. The requirement of "great care" does not insist upon bright lines. The case sheds no light on what facts might satisfy the requirement, and its true meaning remains to be charted by future cases. Its usage, however, suggests that it is a standard entirely independent of the second requirement imposed upon the decision maker.

333. Id. Accord Cruzan, 110 S. Ct. at 2852 (holding that the United States Constitution does not forbid a state from requiring clear and convincing evidence of an incompetent's wishes to withdraw treatment).
3. . . . that any limitations or conditions expressed either orally or in the written declaration have been carefully considered and satisfied.\textsuperscript{334}

The third condition does not apply to proxies, nor does the provision for oral declarations contained in the first condition.\textsuperscript{335}

Trial courts are available to proxies or surrogates who seek a declaration of their powers, and to interested parties who challenge the decision of a proxy or surrogate. If questioned or challenged in court, a written declaration or designation of proxy, in the absence of contrary evidence of intent, establishes a rebuttable presumption that constitutes clear and convincing evidence of the patient’s wishes. The decision maker may rely upon physicians’ certificates to establish a rebuttable presumption that the medical condition described in the declaration has been satisfied.\textsuperscript{336} Oral statements by the patient to forego treatment, if made while competent, are admissible on the issue of intent, but standing alone, are not presumptively clear and convincing.\textsuperscript{337}

Turning to the record facts, the court found that the conditions Mrs. Browning established in her declaration were satisfied. There was no question concerning the validity of the declaration, or that she suffered from a terminal condition. Only the question of imminence remained to be decided. Medical evidence established that death would occur within four-to-nine days were the nasogastric tube removed. Thus, there was clear and convincing evidence on the record that satisfied the condition of imminence, and the surrogate could confidently instruct Mrs. Browning’s health care providers to discontinue

\begin{itemize}
\item \textsuperscript{334} \textit{Browning}, 568 So. 2d at 15.
\item \textsuperscript{335} \textit{Id.} at 15-16.
\item \textsuperscript{336} The decision maker “must obtain, and may rely upon” certificates (affidavits, sworn statements, or depositions) from at least three physicians, including the primary treating physician and two others who are specialists. \textit{Id.} at 16 (adhering to \textit{Bludworth}, 452 So. 2d at 926).
\item \textsuperscript{337} \textit{Browning}, 568 So. 2d at 16. Justice Overton’s objection to the majority opinion was limited to its authorization of oral statements as proof of the patient’s intent. He argued that judicial involvement was “appropriate” to assure the validity of the statements, and to avoid conflicts of interest between patient and surrogate, for instance, when the surrogate stands to financially benefit from the premature termination of the patient’s life support. \textit{Id.} at 18 (Overton, J., concurring in part, and dissenting in part.). The majority addressed these concerns by stating: “We cannot ignore the possibility that a surrogate might act contrary to the wishes of the patient. Yet, we are loath to impose a cumbersome legal proceeding at such a delicate time in those many cases where the patient neither needs nor desires additional protection.” \textit{Id.} at 15.
\end{itemize}
feeding.\textsuperscript{338}

With unmistakable clarity, \textit{Browning} advances the core concept that article I, section 23 makes inviolable certain personal freedoms. The case holds that persons have a constitutionally protected right to make all personal medical decisions, without prior judicial approval, and that they may freely delegate to others the power to make those decisions on their behalf in the event of incapacity.\textsuperscript{339} If a person loses competence after making a declaration that charts a future medical course, the decision maker may exercise the medical choice that the patient would have wanted, provided that the patient's intent is supported by clear and convincing evidence. Several features in the opinion underscore the significance of that holding including: the unanimity of the justices on the turning principles of the opinion; the repeated rejection of factors traditionally thought to justify state intervention into this area; the recognition of a constitutional right not asserted by a claimant, and previously undefined by the court's case law; and the seldom-seen crafting of rules to safeguard the exercise of the constitutional right.

\textit{Browning}'s importance extends beyond the four corners of the opinion, for it signals that the Florida Constitution's right of privacy may eclipse the privacy protections of the United States Constitution in the area of self-determination. Only months before \textit{Browning}, the United States Supreme Court decided \textit{Cruzan ex rel. Cruzan v. Director, Missouri Department of Health},\textsuperscript{340} and acknowledged for the first time that a person's choice to discontinue life-sustaining medical treatment is a liberty interest protected by the fourteenth amendment. The justices stood noticeably silent on the question logically presented by the case, whether the choice deserved protection under the implied federal right to privacy. To some, it matters not whether the right of self-determination derives from liberty, privacy, or some other fundamental guarantee.\textsuperscript{341} Prudence cautions, however, that the textual basis of an

\begin{itemize}
  \item \textsuperscript{338} \textit{Id.} at 17. A declaration that instructs the decision maker to remove life-support in the event of "imminent" death, will be satisfied constitutionally by looking to the length of time a patient will survive after removal of life-support, not to the length of time the patient will survive if life-support measures are introduced, or maintained.
  \item \textsuperscript{339} \textit{Browning}, 568 So. 2d at 17.
  \item \textsuperscript{340} \textit{Id.}
  \item \textsuperscript{341} Indeed, \textit{Browning} acknowledges that "privacy" encompasses a concept of freedom that has been interchangeably used with the commonly understood notion of "liberty," both of which imply a fundamental right of self-determination. \textit{Browning},
\end{itemize}
asserted right cannot be lightly considered.\textsuperscript{342} Cruzan's silence about whether federal privacy protects the right to make personal medical decisions leaves federal constitutional privacy law unsettled, and raises the possibility that the Court no longer views privacy as a fundamental right.\textsuperscript{343} Alternatively, the decision may signal that the Court has no desire to nationalize privacy law in this context, and for the moment leaves the states free to fashion federal privacy protections.

When read together, \textit{In re T.W.}\textsuperscript{344} and \textit{Browning} in one year's time seemingly demonstrate a commitment of the court to hold that the exercise of personal choice within the realm of self-determination ought to remain largely unimpeded by state regulation. The release of \textit{Stall} one month after \textit{Browning}, however, cast into doubt the court's true resolve to vigorously defend expressions of personal freedom classified under that rubric. Review of \textit{Stall} follows.

The state charged Stall and others with violating Florida's RICO act,\textsuperscript{345} and the predicate offenses under the obscenity statute,\textsuperscript{346} for allegedly showing, selling, distributing, or renting obscene material. The trial court dismissed the information, finding in part that the obscenity statute violated article I, section 23. On appeal to the district court, Stall maintained that he had standing to vicariously assert the privacy rights of his customers. Relying upon \textit{Stanley v. Georgia},\textsuperscript{347} which declared that the first and fourteenth amendments prohibited states from

\begin{quote}
568 So. 2d at 9-10; see also \textit{Cruzan}, 110 S. Ct. at 2856 (O'Connor, J., concurring) (the notion of liberty is "inextricably entwined with our idea of physical freedom and self-determination").
\end{quote}
proscribing the mere possession of obscene material,\textsuperscript{348} Stall argued that the right to possess would be meaningless unless sellers and distributors of obscene material were similarly able to seek protection from governmental intrusion.

Citing two federal decisions, \textit{Griswold v. Connecticut}\textsuperscript{349} and \textit{Eisenstadt v. Baird},\textsuperscript{350} the district court panel expressly found that Stall was entitled to assert the privacy right of his customers to possess obscene material.\textsuperscript{351} It reasoned that Stall’s customers had no effective means of protecting their right of possession in a prosecution for distribution, unless Stall had standing to raise the claim on their behalf.

On review, a majority of five justices found the two federal cases easily distinguishable. \textit{Griswold} rested on different facts. The State of Connecticut prosecuted as accessories the executive director of the state planned parenthood league, and a licensed physician because they prescribed contraceptives to married persons in violation of a statute that forbade the use of contraceptives. Ultimately, the \textit{Griswold} defendants were allowed to champion the fundamental right of marital privacy held by the patients with whom they had a professional relationship. Otherwise, their patients’ right would have had no voice against the infringement occasioned by Connecticut’s contraceptive ban. The majority in \textit{Stall} relied upon \textit{Paris Adult Theater I v. Slaton},\textsuperscript{352} where the United States Supreme Court had disapproved the

\textsuperscript{348.} In \textit{Stanley}, state and federal officers gained entry into Stanley’s home upon the strength of a search warrant, which entitled them to seize illegal bookmaking equipment, records, and materials. While looking through a desk drawer in an upstairs bedroom, they discovered three eight-millimeter reels of film. After viewing the films on a projector, the officers determined that the films were obscene and seized them. The state prosecuted Stanley under a Georgia obscenity law, which among other things, proscribed the “possession . . . of obscene matter,” \textit{id.} at 558 n., and obtained a conviction. The Court overturned that conviction with its familiar holding:

\begin{quote}
[T]he First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime . . . . [T]he States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home.
\end{quote}

\textit{Id.} at 568 (footnote omitted).

\textsuperscript{349.} 381 U.S. 479 (1965).

\textsuperscript{350.} 405 U.S. 438 (1972).

\textsuperscript{351.} State v. Long, 544 So. 2d 219, 221-22 (Fla. 2d Dist. Ct. App. 1989), \textit{approved sub nom.} Stall v. State, 570 So. 2d 257 (Fla. 1990). Ultimately, the district court held that article I, section 23 did not shield Stall from criminal prosecution under the obscenity statute, \textit{id.} at 222, and that the statute did not impermissibly interfere with the constitutional right of privacy. \textit{Id.} at 223.

\textsuperscript{352.} 413 U.S. 49 (1973).
analogy by saying that "'it is unavailing to compare a theater, open to the public for a fee, with the private home of Stanley v. Georgia, and the marital bedroom of Griswold v. Connecticut.'"\textsuperscript{353}

\textit{Eisenstadt} was also unavailing. There, the defendant who distributed vaginal foam to an unmarried adult woman in violation of Massachusetts law was entitled to assert the rights of unmarried persons who were denied access to contraceptives under that law. The majority distinguished \textit{Eisenstadt} upon the stated basis that it clearly was premised on the statute's unequal treatment of married and unmarried persons in violation of the fourteenth amendment's Equal Protection Clause. The two cases were easily contrasted:

There is no such distinction between adults who may have access to obscene materials. Moreover, private users and commercial sellers are separate and distinct classes and may be treated differently. \textit{Eisenstadt} provides a vehicle, as do other cases, to raise the constitutionality of a statute by holding that persons or entities in different positions have the same rights and must be treated the same. It certainly does not sustain the rationale that, because one has a right to view obscene material in one's home, statutes forbidding the sale and commercial distribution of such material are invalid.\textsuperscript{354}

Stall's \textit{Stanley} argument was equally unpersuasive to the majority because the United States Supreme Court has consistently limited \textit{Stanley} to its facts. In particular, \textit{United States v. 12 200-Foot Reels of Super 8mm. Film}\textsuperscript{355} directly stated: "'[T]he protected right to possess obscene material in the privacy of one's home does not give rise to a correlative right to have someone sell or give it to others.'"\textsuperscript{356}

Having distinguished \textit{Griswold} and \textit{Eisenstadt}, and limited \textit{Stanley} to its facts, the majority implicitly rejected the district court's find-
ing that Stall had standing to assert the constitutionally protected right of privacy enjoyed by his customers.\textsuperscript{357} Gratuitously, the majority added that the privacy amendment does not apply to vendors of obscenity either.\textsuperscript{358} Normally, a claimant’s failure to assert successfully a protected interest disposes the issue. Once Stall failed to meet that threshold, he could advance no constitutional privacy claim, and the inquiry into the merits was unnecessary. Perhaps it was to more fully establish its position on obscenity regulation that the majority continued.

The five-member majority reached the merits of Stall’s privacy claim by engaging in the following hypothetical: “Assuming that [those who show, sell, distribute, or rent allegedly obscene material] have vicarious standing to raise their customers’ privacy interest, we agree with the district court that their customers’ right of privacy does not extend to [them].”\textsuperscript{359}

As a threshold matter, the right of privacy in the context of obscenity regulations attaches only when a claimant demonstrates a “reasonable” expectation of privacy.\textsuperscript{360} Borrowing from \textit{Paris Adult Theater I},\textsuperscript{361} the majority wrote: “The idea of a ‘privacy’ right and a place

\textsuperscript{357}. The majority’s disagreement with the district court on the standing issue may explain why the majority approved the \textit{decision} of the district court, \textit{see Stall}, 570 So. 2d at 258, 262, and did not approve the \textit{opinion}.

\textsuperscript{358}. \textit{Id.} (relying upon \textit{12 200-Foot Reels}, 413 U.S. at 128). The only question posed by \textit{Stall} asks whether the right of the vendor’s \textit{customers} to privately possess obscene material extends to the point of sale, and if so, whether the vendor can take advantage of that protection in a criminal prosecution for unlawful distribution. Whether Stall himself, as a \textit{distributor}, has a personal privacy interest is a concern not directly presented by the case as framed by the four corners of the opinion.

\textsuperscript{359}. \textit{Stall}, 570 So. 2d at 258 (citation omitted).

\textsuperscript{360}. The reasonableness of one’s expectation of privacy takes into account all the circumstances, and in particular, the objective manifestations of that expectation. \textit{Id.} at 260 (citations omitted). Requiring a claimant to show objective reasonableness is a standard that is characteristic of disclosural privacy, and search and seizure cases. Before \textit{Stall}, the court had not yet imposed that requirement on matters of personal choice grouped under the rubric of self-determination.

\textsuperscript{361}. \textit{Paris Adult Theater I}, 413 U.S. at 49. That opinion involved the civil prosecution of two Atlanta movie theaters, together with their owners and managers, under the Georgia Code, for the exhibition of allegedly obscene films to the public for paid admission. The Court reaffirmed the principle that obscene material enjoys no first amendment protection, and held: “[T]he States have a legitimate interest in regulating commerce in obscene material and in regulating exhibition of obscene material in places of public accommodation, including so-called ‘adult’ theaters from which minors are excluded.” \textit{Id.} at 69.
of public accommodation are, in this context, mutually exclusive.’” 362 The justices summarily declared that a customer has no “legitimate reasonable” expectation of privacy to patronize a retail establishment in order to purchase obscene material. 363 Stall is the first instance where the court declined to find even the bare existence of an asserted privacy interest under article I, section 23. 364

The majority declared that the state has a “legitimate interest ‘in stemming the tide of commercialized obscenity.’” 365 To accomplish that aim, the state is empowered to make “‘morally neutral’” judgments that commercialized obscenity injures the community as a whole. 366 Unless those choices “‘clearly transgress private rights,’” 367

362. Stall, 570 So. 2d at 261 (quoting Paris Adult Theater I, 413 U.S. at 66-67).

363. Stall, 570 So. 2d at 257. The majority implied in dicta that Stall could not succeed on his claim because he failed to present persons whose constitutionally protected right to possess obscene material was affected by the state action. Id. However, the court had already concluded that there exists no constitutionally protected right to purchase such material. Thus, it would be futile for Stall to produce persons who were entitled to privately possess that material. That dicta raises speculation whether the court would have been less reticent to seriously explore the limits of article I, section 23, were the right asserted by such individuals personally. Stall’s close link to the commercial enterprise, which was the focus of the legislative policy, made him an unlikely candidate to champion the right vicariously in a case of first impression.

364. In a few pre-article I, section 23 cases, the court was unwilling to find an implied right of privacy in the Florida Constitution. See, e.g., Shevin v. Byron, Harless, Schaffer, Reid & Assocs., Inc., 379 So. 2d 633, 639 (Fla. 1980); In re Post-Newsweek Stations, Fla., Inc., 370 So. 2d 764, 779 (Fla. 1979); Laird v. State, 342 So. 2d 962, 965 (Fla. 1977).

365. Stall, 570 So. 2d at 260 (quoting Paris Adult Theater I, 413 U.S. at 57) (emphasis added). Federal constitutional analysis accepts as the state’s interests in this context, “the interest of the public in the quality of life and the total community development, the tone of commerce in the great city centers, and, possibly, the public safety itself.” Paris Adult Theater I, 413 U.S. at 58.

366. Stall, 570 So. 2d at 261 (quoting Paris Adult Theater I, 413 U.S. at 69). Unwilling to accept the notion that obscene materials are inherently harmful, the dissent looked to the record for evidence that would show actual injury to one or more persons. Having found “no shred of evidence” to support the state’s regulation, Justice Kogan wrote, “I do not believe that abstract, unproven harm is a sufficient reason to invade the right to be let alone.” Id. at 270. He would hold that the article I, section 2 prohibits governmental intrusion into the noninjurious aspects of one’s personal life, including the acquisition of “noninjurious reading materials and entertainment for discrete personal use.” Id. at 269. Accord Bostick v. State, 554 So. 2d 1153, 1155 (Fla. 1989) (construing privacy in the context of article I, section 12, the court’s majority wrote that the “right of personal autonomy or privacy . . . is forfeited when an individual acts to harm another”).
it is the role of the judicial branch to defer to a coordinate branch. There is no breach of private rights when the state regulates obscene works that "‘depict or describe sexual conduct.’” 368

The anti-obscenity statute at issue proscribes the distribution and exhibition of "‘obscene’” material, as well as "‘lewd, lascivious, filthy, indecent, sadistic, or masochistic’ material.” 369 The majority reasoned that those statutes are "sufficiently limited, both by their terms and by common sense” 370 to pass constitutional scrutiny. Conceding that the terms have different shades of meaning, the majority accepted that the federal analogue to Florida’s obscenity statute, which uses the identical terms, "‘has always been taken as aimed at obnoxiously debasing portrayals of sex.’” 371

That analysis provoked Justice Kogan and Justice Barkett to charge that the majority’s mode of statutory interpretation was "legally indefensible.” The fundamental legal obstacle posed by the anti-obscenity law, they argued, is that the term “obscenity” itself defies a legally comprehensible definition. Consequently, a handful of people “define” the crime after-the-fact, and thereby impose their personal views of morality on others. 372 Such unbridled censorship impermissibly restricts individual autonomy, and offends the very spirit of the privacy amendment. 373

The majority also reasoned that the weight of state court prece-

367. Stall, 570 So. 2d at 261 (quoting In re T.W., 551 So. 2d at 1204 (Grimes, J., concurring in part, dissenting in part)).

368. Stall, 570 So. 2d at 259 (quoting Miller v. California, 413 U.S. 15, 24 (1973)). Miller set standards for state regulation of obscenity, which were incorporated in Florida law. See FLA. STAT. § 847.001(7), (11) (Supp. 1986).

369. Stall, 570 So. 2d at 259 (citations omitted).

370. Id.

371. Id. (quoting Manual Enters., Inc. v. Day, 370 U.S. 478, 482-83 (1962) (footnotes omitted)). But cf. Warren v. State, 572 So. 2d 1376 (Fla. 1991) (striking on vagueness grounds a statute that proscribes the keeping of house of “ill fame”; even though “the general population might have understood the meaning of ‘ill fame’ a century ago, the lack of definition in the statutes, jury instruction, and cases is fatal to its continued validity”) (unanimous on point); Hicks v. State, 572 So. 2d 1378 (Fla. 1991) (following Warren) (unanimous); Palmieri v. State, 572 So. 2d 1378 (Fla. 1991) (following Warren) (unanimous).

372. Stall, 570 So. 2d at 263 (Barkett, J., dissenting; Kogan, J., concurring.); id. at 263 (Kogan, J., dissenting; Barkett, J., concurring). History records with irony the numerous, short-lived attempts by the censorship police to suppress literary works, now regarded as masterpieces. Don Juan, An American Tragedy, Lady Chatterly’s Lover, God’s Little Acre, and Ulysses are among them. Id. (citations omitted).

373. Id.
Hawkins

dent opposes Stall. It claimed that the court had several years ago "addressed" Stall's Stanley claim in State v. Kraham, which specifically rejected the argument that it was illogical and arbitrary to sanction one person for providing material to another who was entitled to possess that material.

To say that the court had before "addressed" the issue now raised by Stall is imprecise. Kraham considered whether the 1975 version of the obscenity statute, which proscribed the sale of obscene material, was unconstitutional in light of one's right to possess such material under Stanley. However, the voters approved article I, section 23 in November 1980, over two years after Kraham. Thus, the court never even considered whether a person could vicariously assert the protections of the state privacy amendment. This criticism of the majority's opinion is all the more valid in light of its repeated reliance in earlier privacy cases upon the teachings of Winfield v. Division of Pari-Mutuel Wagering, which firmly established Florida's general privacy right as affording greater protections than those implied in the federal Bill of Rights.

Finally, Stall makes an intriguing contribution to the principles of constitutional construction. Said the majority:

There is no indication that the drafters of article I, section 23 meant to broaden the right of privacy [beyond then-existing state or federal protections] as it relates to obscene materials or that the validity of [the anti-obscenity statute] is affected by the privacy provision. Indeed, had the public been aware of such an application, we seriously doubt that the amendment would have been adopted.

But this is not a case where the court must divine the adopters' intent. Unlike many personal rights with ancient origins and no recorded historical materials to aid constitutional interpretation, Florida's right of privacy is a recent addition to the organic law, with much available material to its credit. The majority's use of unwarranted, unsupported

375. Stall, 570 So. 2d at 258.
376. 477 So. 2d 544 (Fla. 1985); see also In re T.W., 551 So. 2d at 1191; Public Health Trust v. Wons, 541 So. 2d 96, 102 (Fla. 1989) (Ehrlich, C.J., concurring specially); Cope, To Be Let Alone: Florida's Proposed Right of Privacy, 6 FLA. ST. U.L. REV. 671, 740 (1978).
377. Stall, 570 So. 2d at 262 (footnote omitted).
speculation implicitly discredits precedent. First, past privacy cases were guided by the knowledge that the adopters intended to assure a level of protection beyond the level afforded by federal law. Second, there can be no doubt that Florida’s privacy amendment imported state and federal cases in existence at the time of its adoption. Among them are several cases that recognized the right of persons to possess obscene materials in their homes. These cases are necessarily woven into the state constitutional fabric.

Third, Stall is out of sync with the court's two most recent article I, section 23 cases, Browning and In re T.W. Unlike Stall, both cases addressed the constitutional claims head-on, and broke new ground by extending constitutional horizons beyond the perimeter of precedent. And unlike Stall, neither case speculated about the adopters' intent. No doubt the court could have avoided reaching the heart of those claims by engaging in the selfsame speculation: “had the public been aware” that the amendment would one day be interpreted to protect the decision of a person to terminate his or her life by refusing medical intervention, or to protect the decision of a minor female to terminate her pregnancy without her parents' consent, “we seriously doubt that the amendment would have been adopted.”

But it did not. Instead, Browning began boldly with the premise that “everyone has a fundamental right to the sole control of his or her person.” And In re T.W. observed initially that “‘[t]he citizens of Florida opted for more protection from governmental intrusion when they approved article I, section 23’” than that required by federal law. Only one year before the court released Stall, Chief Justice Ehrlich acknowledged the central importance of precedent in constru-

378. Id. at 264 (citing Jenkins v. State, 385 So. 2d 1356, 1357 (Fla. 1980); see also Lieberman v. Marshall, 236 So. 2d 120, 127 (Fla. 1970) (adopting cases that construed predecessor version of article I, section 4)).

379. Id. (citing Stanley, 394 U.S. at 557; State v. Keaton, 371 So. 2d 86 (Fla. 1979)).

380. Browning, 568 So. 2d at 4.

381. In re T.W., 551 So. 2d at 1186.

382. Indeed, the court could have avoided a substantial portion of the political controversy spurred by In re T.W. had it declined to face the issue head-on. See Anderson, Judicial Politics, 77 A.B.A. J. 34 (Jan. 1991) (reporting that this case threatened the very composition of the court by “caus[ing] such a ruckus among abortion-rights opponents” as to cast into doubt the outcome of the retention campaign of the opinion’s author).

383. Browning, 568 So. 2d at 10.

384. In re T.W., 551 So. 2d at 1191-92 (quoting Winfield, 477 So. 2d at 548).
ing article I, section 23—the certain knowledge that Floridians chose a greater degree of privacy than provided under federal law "alone could justify broadening the scope of [precedent]." Rather than engage in unsupported speculation about what the adopters might have intended, the majority should have ascertained the adopters' intent in light of historically known fact and relevant precedent.

*Stall* is a decisional oddity that leaves much to ponder. One might argue that the majority actually decided *Stall* by applying the doctrine of standing. Clearly, the court concluded that Stall could not vicariously assert the privacy rights of his customers. Under that interpretation, the majority had no need to reach the merits of the underlying privacy claim. However, much of the majority opinion addresses the very nature of the substantive right of privacy, and indeed declares that Stall failed to satisfy the threshold for asserting a privacy right. Consequently, one might alternatively argue that the majority effectively mooted the standing issue, rendering its discussion of the standing doctrine mere dicta, and reached the merits. In the final analysis, the standing theory advances the narrower of the two alternative holdings and therefore presents the stronger argument.

Several factors argue that *Stall* is an aberrational distortion on the landscape of article I, section 23. Among them are its lack of analytical clarity, disregard of constitutionally relevant precedent, and casting upon the claimant a requirement of objectivity when the court in numerous other instances has honored purely subjective wishes of persons to self-determine matters of personal choice. These factors caution that the decision lacks precedential importance outside the circumstances presented.

385. *Wons*, 541 So. 2d at 102 (Ehrlich, C.J., concurring specially) (emphasis added).

386. *Compare* Shriners Hosps. for Crippled Children *v.* Zrillic, 563 So. 2d 64 (Fla. 1990). In *Shriners Hospitals*, released only four months before *Stall*, a four-member majority struck down the centuries-old mortmain statute as the result of a "common sense reading of the plain and ordinary meaning" of the text of article I, section 2. *Id.* at 67. It is beyond dispute that a like reading of the personal "right to be let alone," especially when taken together with extant privacy case law, would have amply supported the conclusion that, as a threshold matter, article I, section 23 embraced a person's right to procure or view obscene material, free from state interference. Whether that right could survive state regulation, however, is altogether another matter.
C. Conclusion

The single most noteworthy conclusion to be drawn from the court's state constitutional jurisprudence of 1990 is that the court has accepted major responsibility for protecting personal rights from governmental excess. The court convincingly asserted its role as guardian of article I rights when it twice reached outside the record pleadings, and imposed a constitutional remedy to achieve a just result.\(^{387}\) In matters of personal medical health care choices, a decisive majority of the membership showed its commitment to reshaping the constitutional landscape by pushing the frontiers of protection beyond the perimeter of precedent. Moreover, the majority added a component to compelling state interest analysis by declaring that the state has an overarching responsibility to safeguard the inalienable rights of its citizens.\(^{388}\)

On three occasions, the court also assumed a role for the judiciary that deferred to the policy choices and functions of coordinate branches of government. A majority declined to interfere with the legislature's efforts to regulate commercialized obscenity without any record evidence that justified the state's action;\(^{389}\) accepted the legislature's exclusive procedures to compensate owners whose property the state destroyed in a citrus canker eradication program, as a "reasonable alternative" to the time-honored common law remedy of inverse condemnation;\(^{390}\) and presumed that the Department of Corrections properly performed its function of executing condemned prisoners in the face of macabre evidence of a malfunctioning electric chair.\(^{391}\)

The opinions teach that the selection of a particular principle of constitutional interpretation greatly influences the court's constitutional logic. Although it is impossible to predict with precision which principle the justices will rely upon in any given case, two cases this year deserve particular attention, because they illustrate the importance of principle selection on the outcome.\(^{392}\)

\(^{387}\) See supra notes 116 and 308 and accompanying text.
\(^{388}\) See supra notes 327-28 and accompanying text.
\(^{389}\) See supra note 366 and accompanying text.
\(^{390}\) See supra note 280 and accompanying text.
\(^{391}\) See supra notes 253-55 and accompanying text.
\(^{392}\) In any analytical scheme, the point of departure is of vital importance. As Justice Frankfurter noted years ago: in law, as in history, "the place you reach depends upon the direction you are taking[, and] where one comes out on a case depends on where one goes in." United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).
Courts often glean the meaning of constitutional text from the original intent of the adopters, and there are a variety of theories used to ascertain that intent. One theory proved to be critical to the analysis of *Shriners Hospitals*, where a clear majority of four justices made a "common sense reading of the plain and ordinary meaning" of the text of article I, section 2. It decided that the adopters must have intended that the ability to transmit property to others is included within the grasp of that section's right "to acquire, possess and protect property," and then tossed out Florida's mortmain statute because it allowed certain persons to avoid charitable devises.

Another theory of construction emerged in *Stall*, where a five-member majority relied upon an intriguing, common sense-like interpretation of article I, section 23 to reject a claim that argued essentially, because the section entitles persons to possess obscene materials privately, free from state regulation, then it must necessarily entitle persons to acquire such materials. Said the court: "[H]ad the public been aware of such an application, we seriously doubt that the amendment would have been adopted." *Stall*, unlike *Shriners Hospitals*, never considered the black letter text of article I, section 23. It never asked whether the express textual protection afforded to the "right to be let alone" entitled persons to acquire such materials for private use. Had the majority applied *Shriners Hospitals*, it very likely would have begun with the analytical premise that the text raises the potential of such an entitlement, rather than reject the claim at the outset by the unwarranted use of unsupported speculation.

*Shriners Hospitals* is instructive for its use of another approach to constitutional interpretation, one unconcerned with original intent of the adopters. The majority struck down the centuries-old mortmain statute because its feudal rationale had no constitutional relevance in "the context of our times." *Shriners Hospitals* aptly supports the principles that the constitution must be viewed as a dynamic, "living" document, and that courts must interpret the state's organic law free of anachronistic strain upon its order.

The court's state constitutional labors concentrate on the personal rights created in article I. In all, the court framed 102 state constitutional issues in 80 cases. Of those, 73 issues and 62 cases directly pertained to article I. The decade survey of the 1980s identified five instances where a state constitutional right eclipsed the corresponding

393. See supra notes 19-22 and accompanying text.
394. See supra note 377 and accompanying text.
federal right.\textsuperscript{395} Already this decade, two cases, \textit{Browning}\textsuperscript{396} and \textit{Cohen},\textsuperscript{397} clearly illustrate circumstances where the state constitution provides a degree of protection of personal rights greater than the federal constitutional minimum.

\begin{itemize}
\item \textsuperscript{395} Hawkins, \textit{supra} note 1, at 857-58.
\item \textsuperscript{396} \textit{See supra} notes 297-344 and accompanying text.
\item \textsuperscript{397} \textit{See supra} notes 72-78 and accompanying text.
\end{itemize}
Evidence

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I. INTRODUCTION

Florida evidence has continued to develop in the same predictable patterns as seen in previous survey years. The areas of relevance and hearsay generated the most case law during the survey period, and criminal decisions again outnumbered civil cases in generating evidentiary case law.

Changes made during the 1990 legislative session should have a distinct impact on Florida evidence. These changes will have the biggest affect in the areas of relevance, impeachment, exclusion of witnesses and hearsay. The change that will probably generate the most

1. This is the fifth annual survey of Florida evidence that the Nova Law Review has published. The annual survey generally runs from December of one calendar year through November of the following year. A break in the annual survey of evidence occurred last year. Therefore, to bring the evidence survey up to date, this issue will consider Florida evidence decisions from October 1988 through October 1990.

2. 1990 Fla. Sess. Law Serv. 40 (West) amended section 794.022 of the Florida Statutes which affects the rules of evidence concerning relevancy. This change directly affects section 90.404(1)(b)1 (Supp. 1990) regarding the character of the victim by "excluding evidence presented for the purpose of showing that manner of dress of the victim at the time of the offense incited the sexual battery." 1990 Fla. Sess. Law Serv. 90-40 (West).


4. 1990 Fla. Sess. Law Serv. 174 (West) created section 90.616 of the Florida Statutes, which is a codification of the term "invoking the rule," or more commonly stated as sequestration of witnesses. The section reads as follows:

   (1) At the request of a party the court shall order, or upon its own motion the court may order, witnesses excluded from a proceeding so that they cannot hear the testimony of other witnesses except as provided in subsection (2).

   (2) A witness may not be excluded if he is:

      (a) A party who is a natural person.

      (b) In a civil case, an officer or employee of a party that is not a natural person. The party’s attorney shall designate the officer or employee who shall be the party’s representative.

      (c) A person whose presence is shown by the party’s attorney to be essential to the presentation of the party’s cause.

FLA. STAT. § 90.616 (Supp. 1990).
problems, and the most case law, will be the change in impeachment. The impact of this change will be distinctly felt in the criminal area.  

This article will discuss the major cases affecting Florida evidence law. As with prior surveys, the focus will be on Florida Supreme Court cases. District and circuit court cases will be discussed if the impact on Florida evidence is significant, or an important conflict between Florida jurisdictions is present.

II. CONTEMPORANEOUS OBJECTION RULE AND OFFERS OF PROOF

Though a varying amount of case law was generated in this evidentiary area during the survey period, the importance of making contemporaneous objections and offers of proof at trial cannot be understated. Although no significant changes occurred in this evidentiary


6. Though there will be an impact on civil cases as well as criminal, the criminal cases will probably generate more law since prosecutors will be able to call hostile or adverse witnesses and impeach them without the necessity of using section 90.801(2)(a) or declaring the witness adverse under section 90.608(2). Subsection (2) was eliminated after the 1990 amendment to section 90.608.

Some attorneys, on a literal reading of section 90.801(2)(a), believe that this section merely makes inconsistent statements nonhearsay because they are not used to prove the truth of the matter asserted but are simply used to demonstrate that an in court statement differs from an out of court statement. This is a misreading of section 90.801(2)(a) because it allows the prior inconsistent statement to be offered to prove the truth of the matter asserted. Professor Ehrhardt stated it best in his treatise on evidence:

Although normally a witness may not be impeached by the party who calls him, that restriction is not applicable to a statement offered under [section 90.801(2)(a)] because the purpose for offering the evidence is to prove the truth of the contents of the prior statement rather than to attack the credibility of the witness.

C. EHRHARDT, FLORIDA EVIDENCE 449 (2d ed. 1984). This is important in criminal cases because it allows the prosecutor to argue the truth of the inconsistent statements in closing. This area has caused a lot of reversals, if the appellate court finds that impeachment under section 90.801(2)(a) does not meet all the prerequisites of that section.

7. See Fla. Stat. § 90.104 (1989), providing in part that:

(1) A court may predicate error . . . on the basis of admitted . . . evidence when a substantial right of the party is adversely affected and: (a) When the ruling is one admitting evidence, a timely objection or motion to strike appears on the record, stating the specific ground of objection . . .
area, Florida courts examined various cases during the survey period of which the following are worth noting.

In *Glendening v. State*, the Florida Supreme Court affirmed the defendant's conviction because defense counsel failed to object when the State's expert witness testified that the father of the sexual abuse victim was the person who actually committed the sexual offense. The court ruled that the testimony was more prejudicial than probative, but declined to reverse the conviction finding that "[d]efense counsel neither objected to the answer nor moved to strike it and the error was not of a fundamental nature . . . [Therefore], the issue was not properly preserved for appeal . . . ." Additionally, the court stated that although the State's expert witness was "improperly allowed to vouch for the credibility of a witness," the issue was not cognizable on appeal because defense counsel objected on the grounds of relevance, and not because "the question called for improper vouching for the credibility of the hearsay declarant." 10

(b) When the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer of proof or was apparent from the context within which the questions were asked. A proper contemporaneous objection has two primary ingredients, both of which are needed to preserve objections for appellate review. First, the objection must be timely. If counsel does not promptly object, the problem is waived. Second, the objection must be specific. Failure to state the correct grounds for objection will waive it. The appellate courts have strictly monitored this rule.

A proper offer of proof merely requires that when evidence is excluded, the substance of the evidence must be made known to the court. If the substance of the proof is not apparent from the record, the appellate court will be unable to render a decision on the excluded evidence and will thus dismiss the argument for failure to properly have substance of the excluded evidence before it.

8. 536 So. 2d 212 (Fla. 1988).
9. Id. at 221.
10. Id. The court seems to be splitting hairs regarding the specificity needed to preserve an issue for appeal. Though the court did not elaborate on the relevance objection by defense counsel, it would seem that counsel may have made the correct objection. Vouching for the credibility of a witness brings into play a witness's character under section 90.404, which states that "evidence of a person's character or a trait of his character is inadmissible to prove that he acted in conformity with it on a particular occasion . . . ." FLA. STAT. § 90.404 (Supp. 1989). Additionally, vouching for an individual's credibility can, in fact, be more prejudicial than probative since the jury may give that individual's testimony more weight than it normally would have. See FLA. STAT. § 90.403 (1989). This is alleviated when the individual's credibility has already been attacked.

Some trial judges may not allow objections such as "improper vouching for the credibility of the hearsay declarant" but may instead ask for the "legal objection."
In *Assiag v. State*, the Fifth District Court of Appeal also affirmed a defendant’s conviction, even though two expert witnesses improperly vouched for the credibility of the sex crime victim. The court stated that, by itself, the error was not fundamental and therefore, failed to justify reversal in the absence of a timely objection. The district court went on to compare other cases where similar errors occurred and no objection was made, but the court, nevertheless, found those errors fundamental. The Fifth District stated that those cases involved cumulative errors which combined to deny the defendant a fair trial and rose to the level of fundamental error.

Making an objection, based on relevance under section 90.404 because the question calls for improper character evidence, should be specific enough. However, a proper, and perhaps more specific objection, could be made under section 90.609, which provides that evidence of the truthful character of a witness is only admissible "after the character of the witness for truthfulness has been attacked by reputation evidence." FLA. STAT. § 90.609 (1989).

Another specific “legal objection” could be made under section 90.806 regarding attacking and supporting the credibility of a hearsay declarant. FLA. STAT. § 90.806 (1989). It is improper to vouch for the credibility of a hearsay declarant whose credibility has not been attacked. However, both section 90.609 and section 90.806 are grounded in the rule of relevance, which states that the jury will attach more weight to a witness whose credibility is bolstered by others. Since the court did not elaborate on the specifics of the relevance objection in the *Glendening* case, the reader is left to speculate regarding the proper specificity of these other objections. See *Glendening*, 536 So. 2d at 212.

This case, once again, illustrates the importance of making specific objections at trial. It also demonstrates that all possible objections should be raised if there is a reasonable basis for the objection.

12. *Id.* at 388.
13. *Id.* Cumulative error cases generally point out that counsel was ineffective during trial. In criminal cases, this type of error may be more appropriate under the collateral attack provisions of Florida Rule of Criminal Procedure 3.850 for ineffective assistance of counsel. Although an allegation of ineffective assistance of counsel is rarely allowed on direct appeal, it may be brought before the court when the errors are apparent on the record. Stewart v. State, 420 So. 2d 862 (Fla. 1982), *cert. denied*, 110 S. Ct 2575 (1991); Foster v. State, 387 So. 2d 344 (Fla. 1980), *cert. denied*, 464 U.S. 1052 (1984). However, since ineffective assistance of counsel claims are rarely apparent from the record, this would preclude direct review and would confine this claim to collateral attack. This would, in essence, deter the appellate court from examining the case in light of cumulative error on direct appeal and move the court to examine the case from a more advantageous perspective under the standard set out in *Strickland v. Washington*, 466 U.S. 668 (1984), for ineffective assistance of counsel, after a collateral attack has been made. In this way the court can examine the case from the perspective of whether counsel’s lack of objection was a strategic decision designed to al-
In *Fernandez v. State*, the trial court excluded two statements directly affecting the defendant's alibi defense. The district court affirmed the conviction because there was no proffer of the statements, nor were the statements apparent from the record.

Finally, the district court, in *G.A. v. State*, reversed the trial court when the trial court refused to allow the defense attorney to proffer excluded testimony. The district court concluded that defense counsel's failure to state the relevancy and materiality did not preclude review of the issue, because the trial court cut off defense counsel's proffer. The proffer was necessary for the appellate court to determine whether the testimony was relevant, and material, and the trial court erred by refusing to allow the proffer.

### III. Relevancy

Relevance forms the basic foundation for every evidentiary principle and should be closely examined whenever evidence is being entered pursuant to any rule in the evidence code. Relevance is best understood by remembering two basic fundamentals. First, is the evi-
dence logically relevant? That is, will the evidence prove or disprove a material fact in issue?\textsuperscript{20} Second, is the evidence legally relevant? In other words, will the evidence be prohibited by specific statutory law\textsuperscript{21} or will its probative value be "outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or needless pres-

\ \textsuperscript{20} \textbf{FLA. STAT.} § 90.401 (1989).

\textsuperscript{21} \textbf{FLA. STAT.} § 90.402 (1989). The author's position is that once it has been demonstrated that an item of evidence will make a material fact in issue more or less probative, then the only basis for excluding the item from evidence is a legal rule of law. Therefore, the author finds that section 90.402 and section 90.403 should be lumped together under the term of legal relevance. Professor Ehrhardt has recognized the broad concept of legal relevance and stated that "[t]hese exclusionary policy rules, often referred to under the concept of legal relevancy, are included in sections 90.403-404 and 90-407-410 of the Code." C. EHRHARDT, FLORIDA EVIDENCE § 90.402.1 (2d ed. 1984).

Section 90.402 states that "[a]ll relevant evidence is admissible, except as provided by law." \textbf{FLA. STAT.} § 90.402 (1989). This section would exclude logically relevant evidence when a statute specifically prohibits it. Two examples excluding relevant evidence are section 934.06, which excludes logically relevant evidence obtained by a wire-tap in violation of the Florida Statutes, and section 794.022, which excludes specific instances of sexual activity between the victim and any person other than the offender. \textit{See} \textbf{FLA. STAT.} §§ 794.022, 934.06 (1989).

Section 90.403 is also a rule of law that excludes logically relevant evidence when its probative value is outweighed by "unfair prejudice, confusion of issues, misleading the jury or needless presentation of cumulative evidence." \textbf{FLA. STAT.} § 90.403 (1989). Therefore, both sections are categorized under the term of legal relevance.
entation of cumulative evidence?" By examining all evidence for logical and legal relevance, the trial attorney can minimize the use of harmful evidence and safeguard against error and possible reversal.

The following flow chart demonstrates the relationship between logical and legal relevance:

Is the evidence LOGICALLY RELEVANT? 90.401

- NO evidence excluded

- YES

Is the evidence LEGALLY RELEVANT? 90.402 & 90.403

- NO evidence excluded

- YES evidence excluded

Is the evidence excluded by statutory law such as 934.06 or 794.033 etc.?

- NO

- YES evidence excluded

Is the evidence excluded by another evidentiary rule such as 90.403?

- NO

- YES evidence excluded

The evidence is ADMISSIBLE

22. FLA. STAT. § 90.403 (1989).

23. Logical and legal relevance are the watchdogs of evidence. For example, an improper evidentiary foundation can be excluded from evidence based on relevance grounds.

A typical scenario has opposing counsel attempting to enter a hearsay statement in evidence as an excited utterance. The foundation for an excited utterance is:
A. Logical Relevance

Logical relevance is defined in section 90.401 of the Florida Statutes and determines whether the relevant evidence is evidence “tending to prove or disprove a material fact.” Although many cases discuss logical relevance, they are dependent on the logical connection between the evidence and the matter it is being offered to prove or disprove in that particular factual setting. Therefore, a slight change in the fact pattern can produce a substantially different result. This does not lead to sound precedential value and, generally, offers little guidance, other than the court’s analysis during that particular factual setting. However, a few cases are worth discussing.

In *Martinez v. State*, the issue of DNA fingerprinting in Florida was once again the center of attention. The issue was whether the overwhelming statistical probabilities of DNA fingerprint evidence invades the province of the jury by suggesting proof beyond a reasonable doubt. The court held that it did not. The court stated that rigorous

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1. A statement or utterance,  
2. relating to a startling event or condition,  
3. while the declarant,  
4. was under the stress of excitement,  
5. caused by the event or condition.  

FLA. STAT. § 90.803 (Supp. 1990).

Opposing counsel does not elicit testimony that the statement was made under the stress of excitement. The statement must be examined under the auspices of logical and legal relevance. First, does the statement make some fact in issue more or less probative? If the statement does not make a fact in issue more or less probative, then the statement is not relevant and does not go into evidence. There is no need to examine the statement for legal relevance. If the statement does make a fact in issue more or less probative, then it is logically relevant and to this point, admissible.

Second, is the statement outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless cumulative evidence? If the statement was not made under the stress of excitement, then it is more prejudicial than probative and not legally relevant, and should be inadmissible as evidence. The reasoning is simple. A person who is excited as a result of a startling event does not have the reflective capacity which is essential for conscious misrepresentation. If the foundational element of excitement is left out, then the individual making the statement could easily fabricate it. The reliability of the hearsay statement is, therefore, in question. The statement’s probative value may be substantially outweighed by the danger of unfair prejudice it could cause the opposing party, and it could also mislead the jury. The jury could reach an incorrect verdict based on an unreliable statement fabricated out of court.

25. 549 So. 2d 694 (Fla. 5th Dist. Ct. App. 1989).  
26. DNA material recovered from the victim’s clothing matched the defendant’s
cross-examination of expert witnesses, or an attack upon the scientific bases upon which the statistical proofs are based, will guard against such errors. 28 The Martinez court agreed with the large majority of out of state courts in reaching its conclusion that overwhelming statistical probability is both relevant and probative in assisting the jury in making its final decision, when the statistical probability testimony is scientifically and reliably grounded. 29

In Odice v. Pearson, 30 plaintiff was stabbed in a restaurant parking lot. The plaintiff brought suit against the restaurant owners for negligent lighting and security. At trial, plaintiff attempted to enter police reports concerning prior crimes committed near the restaurant owners' property in order to establish the owners' failure to foresee criminal activity and take reasonable precautions to guard against crime on the restaurant premises. The trial court excluded the police reports regarding the prior crimes. 31 The appellate court reversed, finding the police reports of prior crimes relevant and probative of a material fact in issue, foreseeability. 32 The appellate court stated that "[e]vidence as to the nature and likelihood of any crime occurring has a direct bearing on whether the preventive measures taken by the property owner were reasonable in light of all the other relevant facts and circumstances in the case." 33

DNA. The State's expert testified that only one individual in 243 billion would have the same DNA pattern. Id. at 695. Since the present population of the world is only five billion, it makes the argument of identity rather overwhelming, as well as compelling.

27. Id. at 694.
28. Id. at 697.
29. The State had little evidence to prove the identity of the victim's attacker. The victim suffered from a form of night blindness and the attack took place at night with the electrical current severed from outside the house. The victim's description of her attacker was less than accurate and the best piece of evidence the State had to prove the defendant's identity was a fingerprint from the victim's electrical box. Therefore, the DNA fingerprint material was highly probative of a material fact in issue, the defendant's identity. Because there was little other identity evidence, its probative value simply outweighed the prejudicial effect of the overwhelming statistics. Id.

31. Id. at 706.
32. Id.
33. Id.
B. Exclusion on the Grounds of Unfair Prejudice or Confusion—Legal Relevance

One form of legal relevance is defined in Florida Statutes section 90.403. Once the prerequisites of logical relevance have been satisfied, it must be determined if the evidence is legally relevant. Is there a statutory law which excludes the evidence or is the evidence more prejudicial than probative? Numerous cases decided during the survey period relied upon section 90.403. However, few cases demonstrated any remarkable significance. For example, appellate courts have continued to examine gruesome photographs, which are entered into evidence at the trial level, to determine if they are unduly prejudicial. However, no cases demonstrate a break or change in the courts' analysis of such evidence. Additionally, no courts have changed the standard usage or analysis of section 90.403 regarding other relevant evidence.

In one application of section 90.403, the Second District Court of Appeal, in *State v. Sawyer*, held that the admission of a single hair found in the murder victim's apartment, alleged to be that of the defendant, had the danger of unfairly prejudicing the defendant. During a pre-trial hearing on a motion in limine, an FBI hair and fiber expert testified that the hair in question matched the defendant's.

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34. FLA. STAT. § 90.403 (1989).

35. Cases excluding evidence based on statutory law under section 90.402 are discussed under the specific evidentiary sections they affect.

36. See Thompson v. State, 565 So. 2d 1311 (Fla. 1990). In Thompson, the Florida Supreme Court held that the trial court has discretion to admit photographic evidence as long as that evidence is relevant. Photographs of the murder victim were relevant to establish the victim's identity and to demonstrate that the defendant's out-of-court confessions were consistent with the physical evidence found at the scene, so that the gruesome nature of the photographs did not render the decision to admit them an abuse of discretion. *Id.* at 1315; see also Gomaco Corp. v. Faith, 550 So. 2d 482 (Fla. 2d Dist. Ct. App. 1989). In Gomaco, the court held that photographs of the accident victim's nearly severed foot may have been tangentially relevant to the victim's action against the manufacturer of the curbing machine the victim was operating when he suffered the injury. However, relevance was overwhelmingly outweighed by the photographs' gruesome and inflammatory nature, which was prejudicial to the manufacturer. *Id.* at 483. The photographs did not in themselves independently establish any material part of the victim's case, nor were they necessary to corroborate some disputed factual issue. *Id. But see* Tompkins v. Dugger, 549 So. 2d 1370 (Fla. 1989), *cert. denied*, 110 S. Ct. 1170 (1990) (decision of the trial judge to admit inflammatory photographs of murder victim's skeletal remains was within his discretion).

observable characteristics. However, this only meant that the hair came from a class of individuals having the same hair characteristics. The expert also testified with regard to how hair is transferred from place to place. Although the defendant had stated he was never in the victim’s apartment, he lived next door and the victim had visited his apartment a few days before the murder. The trial court ruled that the hair had no probative value regarding the defendant’s presence in the victim’s apartment at the time of the murder. The appellate court affirmed and indicated that admission of the hair would seriously prejudice the defendant before the jury. The court explained:

[T]he probative value of the single hair cannot be positively identified as being from [the defendant]. Even if it is his hair, it is simply not probative of proving that [the defendant] was even in [the victim’s] apartment much less that he was there at the time of the murder in light of the extensive contamination of the crime scene. However, [the defendant] could have been seriously prejudiced before the jury if this hair evidence were presented to them.

In West v. State, the appellate court reversed the defendant’s conviction for DUI manslaughter, stating that the trial court committed reversible error in admitting evidence that the defendant had a trace of valium in his blood. Expert testimony in the case indicated that the valium had no measurable effect on the defendant’s driving. Therefore, the evidence concerning the valium had no probative value, or relevance, to the charge of driving under the influence of alcohol and was unfairly prejudicial.

The West court cited to State v. McClain in finding error in admitting this evidence. McClain was a case similar to West, where the court found testimony regarding drugs found in the defendant’s system more prejudicial than probative since the State already had a high blood alcohol reading on which to prove impairment. There is still

38. Id. at 283.
39. Id. at 284.
40. Id.
41. Id.
42. 553 So. 2d 254 (Fla. 4th Dist. Ct. App. 1989).
43. Id. at 255.
44. 508 So. 2d 1259 (Fla. 4th Dist. Ct. App. 1987), aff’d, 525 So. 2d 420 (Fla. 1988).
45. Id. at 1260.
some confusion caused by State v. Weitz, even after the Florida Supreme Court's decision in McClain resolved the apparent conflict between the cases. Weitz involved the introduction of evidence regarding drugs in the defendant's system after the State had already taken a breath reading. However, the breath reading in the case was only 0.017%, and the drugs offered the only reasonable explanation for the defendant's acute intoxication, even though the drugs in the defendant's system could not be quantified. It can only be assumed that in West, the State had the necessary blood alcohol level needed to prove impairment, since this information was not included in the case facts.

C. Character Evidence in General

Character evidence inevitably causes judges and attorneys innumerable headaches and numerous reversals. General character evidence is codified in section 90.404(1) of the Florida Statutes, and is a general prohibition against using a person's character, or a trait of the person's character, to prove that the person acted in conformity with that character trait on a particular occasion. This general prohibition has a few enumerated exceptions, generally limited to criminal cases.

46. 500 So. 2d 657 (Fla. 1st Dist. Ct. App. 1986), overruled, 525 So. 2d 420 (Fla. 1988).
47. The Florida Supreme Court addressed Weitz in McClain and stated: In both cases, it could be said that the prejudicial impact of permitting the jury to hear that the defendant had taken illegal drugs was equal but that it was the difference in probative value which tipped the scales. In Weitz, the defendant's low blood alcohol test belied the other evidence of his intoxication. Thus, the presence of even a small amount of drugs in the defendant's urine was significant because it provided an explanation for his impaired conduct. In the instant case, McClain's blood alcohol level substantially exceeded the figure necessary to raise a presumption of impairment. Therefore, evidence of a trace amount of cocaine in McClain's blood added little to the state's proof of intoxication.

McClain, 525 So. 2d at 423.
50. The particular character of the accused, of the victim, or of a witness all have special exemptions. Fla. Stat. § 90.401(1)(a)-(c) (Supp. 1990). Similar fact evidence is basically character evidence which is admissible under specific circumstances. Similar fact evidence, otherwise known as the "Williams Rule," from the case of Williams v. State, 110 So. 2d 654 (Fla. 1959), cert. denied, 361 U.S. 847 (1959), will be discussed infra note 65 and accompanying text.
51. Section 90.404(1) provides that character evidence is inadmissible to prove
In *Erickson v. State*, the defendant objected to expert psychiatric testimony presented by the State in an indecent assault case on a child under sixteen. The State's expert witness testified that the defendant's condition was diagnosed as pedophilia and antisocial behavior. The expert also testified that the defendant had not been truthful during the psychiatric interview. The State claimed that this testimony was needed to rebut the defendant's defense, regarding lack of intent, and to establish the defendant's capacity to understand and waive his rights. The Fourth District Court of Appeal disagreed with the State's position and found that the testimony was inadmissible character evidence. The court determined that: (1) the testimony was used to demonstrate the defendant's bad character and propensity to the commit the crime charged; and (2) expert testimony is not allowed to attack the credibility of the defendant when the defendant has not become a witness in the case.

A type of character evidence which causes innumerable problems is "high crime area" testimony. A number of cases have been devoted to this scenario. The problem arises when a state witness describes the area where the defendant was apprehended, or lived, as a high crime area. The argument takes the following form: since the defendant was located in a high crime area, he must be associated with the criminal activity occurring there. In other words, if the area is one where criminal activity takes place, the defendant must be a criminal. This association could prejudice the defendant in the eyes of a jury, especially when the defendant comes from an impoverished neighborhood. A jury with a different cultural background than the defendant

that a person acted in conformity with that character, unless one of three exceptions appear. The first two exceptions specifically refer to the "prosecution" and the "accused" and are only applicable in criminal cases. The third exception concerns attacking the credibility of a witness, which is permitted in both civil and criminal cases under sections 90.608-90.610. See C. EHRLANDT, supra note 21, at § 404.

52. 565 So. 2d 328 (Fla. 4th Dist. Ct. App. 1990).
53. Id. at 330.
54. Id. at 331.
55. Id.
56. Id. The court ultimately affirmed the defendant's conviction, finding the error to be harmless in light of the overwhelming evidence of guilt.
may simply be unable to accept the fact that an individual who lives in a “designated high crime area” may not be a criminal.

The Florida courts have tried to address the issue to prevent the needless reversal of convictions. The key issue is one of prejudice. Did the evidence presented in court have the effect of demonstrating the defendant’s bad character, or was the use of this evidence admissible for some other purpose which simply outweighs any prejudice it may have had on the defendant? The courts have pointed to two factors which prevent this evidence from reversing a defendant's convictions. First, the identification of a neighborhood as a “high crime area” may be considered *de minimus* if its use was merely descriptive.58 Second, the evidence must be used for some purpose other than to demonstrate the defendant’s bad character.58 Typically the evidence is used to demonstrate why a witness was in the neighborhood or why a witness was more observant or alert than normal.

The “high crime area” evidence is fact specific. Therefore, what is reversible in one case may not be in the next case. In *Black v. State*,60 the Fourth District Court of Appeal reversed a drug conviction when an objection was made to the testimony given by one of the police officers in the case. The officer stated that he had been watching several areas of drug activity called “crack houses” and in particular the “crack house” where the defendant was arrested. The officer also testified that numerous arrests were made here and that no “normal people” live there.61

In *Gillion v. State*,62 the Fourth District Court of Appeal affirmed a drug conviction even though “high crime area” testimony was admitted into evidence. The police officer in the case testified that the area

58. *See, e.g.*, Jefferson v. State, 560 So. 2d 1374 (Fla. 5th Dist. Ct. App. 1990); Gillion v. State, 547 So. 2d 719 (Fla. 4th Dist. Ct. App. 1989). The description was considered *de minimus* since it was used for “mere identification.” No mention was made that the prosecutor in either case used the “high crime area” testimony in argument to the jury or that the prosecution tried to deliberately elicit the “high crime area” testimony from the witness to demonstrate propensity. In *Gillion*, the fact that the neighborhood was described as a high crime area was completely irrelevant and could not have prejudiced the defendant, since the defendant was claiming mistaken identity. *Gillian*, 547 So. 2d 719.

59. In Jefferson, the evidence was used to explain why the witness was sent to this particular location and why the witness was monitored. Jefferson, 560 So. 2d at 1374.

60. 545 So. 2d 498 (Fla. 4th Dist. Ct. App. 1989).

61. *Id.* at 499.

was a "high crime area," and that several narcotics transactions were taking place there. Additionally, he testified that there were many individuals known to him as narcotics dealers in the area, and that the defendant was arrested in this area. The Fourth District Court of Appeal stated that the "mere identification of a neighborhood as a high-crime area [should not] constitute [sic] reversible error in and of itself, especially . . . where the defense is claiming mistaken identity."64

D. Other Crimes, Wrongs or Acts

Section 90.404(2) of the Florida Statutes, otherwise known as "Williams Rule," or similar fact evidence, is one of the single biggest causes for reversal in criminal cases. It prohibits the introduction of other crimes, wrongs or acts to prove the defendant's propensity to commit crime. However, evidence of other crimes, wrongs or acts is admissible when relevant to prove a material fact in issue.

In order to utilize section 90.404(2), the State must notify the defense in writing at least ten days prior to trial. The State must furnish a written statement of the acts or offenses it intends to offer as similar fact evidence. If the evidence is used for impeachment or on rebuttal, no notice is required. Additionally, if the evidence presented at trial is "inextricably interwoven" or "inseparable" from the crime being charged, there is no notice requirement.

The State in a criminal prosecution should never rely solely on the evidence being "inseparable" and thus being outside of the ten day provision. If the court disagrees with the State's interpretation of the evidence, the State will be precluded from using the similar fact evidence as Williams rule material because it did not comply with the ten day provision. The State should always file its ten day notice when possible and cover itself should the court disagree with the argument that the evidence is inseparable. However, whenever the State would have to tell the story of the crime in a vacuum, or would have to leave out parts of

63. Id. at 720.
64. Id.
67. Id.
68. FLA. STAT. § 90.404(2)(b)1 (1989).
69. Id.
70. Id.
the story that would disrupt the logical sequence of events, the court has ruled that the evidence is admissible because it is "inextricably interwoven" with the main crime. In other words, it would be impossible to illustrate the events surrounding the main crime, and give a uniform picture of the event, without evidence of both crimes being given.71

In *Erikson v. State*,72 the Fourth District Court of Appeal allowed the admission of collateral crimes evidence even though the State did not comply with the ten day notice provision. In this case, both the victim and another little girl were assaulted in the course of the day's activities at a Parents Without Partners beach picnic. The touching of the one young girl lead to the defendant's apprehension after a witness observed the incident. The court held that this testimony, regarding this uncharged crime, was relevant because it was so "inextricably intertwined" in the scenario of the crime charged.73 The events leading to the apprehension and detention of the defendant could not be given without reference to the other crime, and therefore, it was admissible.74

A recent trend in the last few years has been the use of "reverse" *Williams* rule, which develops when the defendant wants to use evidence of crimes, wrongs, or acts of another to prove his innocence. Section 90.404(2)(a) does not specifically preclude this use. Invariably, the problem with this type of usage is defining its application. When section 90.404(2)(a) is used within the criminal context, the evidence is limited to evidence proving a material fact in issue, such as motive, opportunity, intent, or identity.75 However, when applied as reverse *Williams* rule, it is more difficult to demonstrate that evidence of the crimes, wrongs or acts of a third person will prove a material fact in issue. The only legitimate claim may be when identity is in issue and the similar fact evidence, which the defense wishes to use, demonstrates that an individual other than the defendant committed the crime. Other applications take on a strained relationship with the rule.

Reverse *Williams* rule has been addressed sparingly by our district courts.76 However, during the survey period, the Florida Supreme

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73. Id. at 333.
74. Id.
75. FLA. STAT. § 90.404(2)(a) (1989).
Court faced this issue for the first time in *Rivera v. State.*77 In *Rivera,* the defendant assaulted and killed a little girl and left her body in an open field. The defendant attempted to establish that a crime of similar nature had been committed by another person. The court stated that "reverse" *Williams* rule is permissible and set out the standards on which to base its admission.78 The court held that evidence which tends, in any way, to establish a reasonable doubt should be admissible.79 However, "the admissibility of this evidence must be gauged by the same principle of relevancy as any other evidence offered by the defendant."80 The court then examined the two crimes and found them dissimilar.81 The Florida Supreme Court stated that since the two crimes were dissimilar, the trial court did not abuse its discretion in excluding the evidence.82

The Florida Supreme Court again addressed the issue of reverse *Williams* rule in *State v. Savino.*83 In *Savino,* the defendant was charged with the murder of his stepson. The stepson died of injuries inflicted by blunt trauma to the stomach. The defendant advanced the theory that his wife killed the boy. The defendant sought to introduce evidence of the death of his wife's daughter seven years before, caused by blunt trauma. However, the court found that the wife's alleged abuse of a one month old child, in a different state, in a different marriage, was not sufficiently similar to be admissible in the defendant's trial for the death of the six year old child.84 The court stated, once again, that the admissibility of reverse *Williams* rule evidence is the same as for any other evidence under section 90.404(b)(2).85 First, the relevancy must be established, then the issue of prejudice must be weighed.86 In *Savino* the court found that the defendant did not meet the relevancy test.87 In other words, the defendant did not demonstrate the required close similarity of facts needed for the evidence to be relevant.

77. 561 So. 2d 536 (Fla. 1990).
78. *Id.* at 539.
79. *Id.*
80. *Id.*
81. *Id.* at 540.
82. *Id.*
83. 567 So. 2d 892 (Fla. 1990).
84. *Id.* at 894.
85. *Id.*
86. *Id.*
87. *Id.*
E. Rape Shield Law

Section 90.404(b) permits a criminal defendant to introduce pertinent character traits of a victim. However, this section of the evidence code is specifically limited in rape cases by section 794.022, otherwise known as the Florida Rape Shield Statute. This statute sets up a procedure to determine the admissibility of a victim's previous sexual conduct. Previous sexual conduct is ordinarily deemed inadmissible under this statutory section, unless an in camera hearing is held prior to trial to determine the relevance of the evidence.

During the survey period, a significant amendment took place in the Florida Rape Shield Statute. The amendment was fueled by a highly publicized Broward County rape case. In that case, the defense claimed that the victim's provocative clothing was one of the catalysts for the rape. The underlying defense theory was that it was a "drugs for sex" scenario, which was set up by the victim's enticing clothing. The verdict in the case came back not guilty, and the jury later stated that the victim was "asking for it." The case caused a public furor spurred on by newspaper and television coverage.

Fueled by public outrage, the legislature hastily amended section 794.022 to exclude evidence of the victim's manner of dress at the time of the sexual assault. However, what the legislature failed to discover was that the victim in the Broward rape case was later charged by the State Attorney's Office for Trafficking and Conspiracy to Traffick in

91. 1990 Fla. Sess. Law Serv. 40 (West) amending Fla. Stat. § 794.022 (1989). The amendment affects the rules of evidence concerning relevancy. This change also directly affects Florida Statutes section 90.404(1)(b)1, regarding the character of the victim, by "excluding evidence presented for the purpose of showing that manner of dress of the victim at the time of the offense incited the sexual battery." 1990 Fla. Sess. Law Serv. 40 (West).
92. State v. Lord, No. 88-024726CF10A (Broward County Fla. 1988). The case was prosecuted by James DeHart of the State Attorney's Office Sexual Battery Unit and the case was defended by Timothy Day of the Public Defender's Office. Both attorneys had extensive experience in trying sexual battery cases.
93. Id.
94. Id.
95. Id.
Cocaine of over 400 grams. She was found guilty in a jury trial of Conspiracy to Traffick in Cocaine and was sentenced to the minimum fifteen year mandatory drug trafficking sentence.

It appears, based on the whole story, that the defense in the rape case was, in fact, much more than mere puffery. The victim's drug trafficking charges supported the defense theory that the rape was a "drugs for sex" set-up that went bad. Provocative dress was needed in the set-up to attract the next target.

Though the intention of the new legislation was to protect the victim, and discourage the jury from deciding the case based merely on the manner of dress, the same protection could have been afforded by relying on logical relevancy and the trial judge's common sense. Though rapes are insidious crimes, the legislature's attempt to protect the victim, at any cost, could backfire on the wrongly accused defendant by unfairly preventing him from presenting favorable evidence on his behalf.

IV. PRIVILEGES

A significant case in the area of attorney-client privilege did not come from the Florida Courts but instead emanated from the United States Supreme Court. In United States v. Zolin, the Supreme

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97. State v. Chiapponi, No. 89-26532CF10B (Broward County Fla. 1989).
98. Id.
99. The author does not wish to leave the impression that the defendant was not a culpable party in this case. However, had all the facts been known to the prosecuting attorney from the beginning, he may have attempted to try the case in a different manner to alleviate any damaging testimony, thus, enhancing his chances for a favorable outcome. The prosecuting attorney may also have changed his posture on plea negotiations.

In trial, the jury was confronted with a very plausible defense, bolstered by the victim's lack of emotion upon her narration of the rape. In contrast, another rape victim that testified at the trial was extremely emotional upon recounting the events surrounding her rape by the same defendant. Additionally, the defense managed to hurt the credibility of the victim by pointing out inconsistencies in her testimony and demonstrating her unwillingness to cooperate with the State's prosecution of the case. The victim's unwillingness to cooperate was all the more revealing when it was later learned that she was involved in drug trafficking. Id.

100. Please see the case file and accompanying reports in State v. Chiapponi, No. 89-26532CF10B (Broward County Fla. 1989), located in the Broward County Clerk's Office.

Court discussed the attorney-client privilege in relation to the "crime-fraud" exception.103 The Court set up a procedure to determine how the "crime-fraud" exception should be applied in privilege cases. Since Florida has implicitly recognized the "crime-fraud" exception, the opinion should offer guidance in privileged matters.104 | In Zolin, the IRS, as part of its investigation of the tax returns of L. Ron Hubbard, the founder of the Church of Scientology, attempted to enforce a summons on the Clerk of the Los Angeles County Court

103. The "crime-fraud" exception to the attorney-client privilege simply stands for the proposition that confidential communications between an attorney and his client do not extend to communications made for the purpose of getting advice for the commission of a fraud or crime. Though the phrase "crime-fraud exception" is not generally used in Florida courts, the exception has been recognized in Florida cases. See Florida Mining & Materials v. Continental Casualty, 556 So. 2d 518 (Fla. 2d Dist. Ct. App. 1990); Eastern Air Lines, Inc. v. Gellert, 431 So. 2d 329 (Fla. 3d Dist. Ct. App. 1983); Leithauser v. Harrison, 168 So. 2d 95 (Fla. 2d Dist. Ct. App. 1964); see also FLA. STAT. § 90.502(4)(a) (1989). The "crime-fraud" exception applies to both the attorney-client privilege and the work-product doctrine. See In re Doe, 662 F.2d 1073 (4th Cir. 1981); In re Special September 1978 Grand Jury, 640 F.2d 49 (7th Cir. 1980); In re Grand Jury Proceedings (FMC), 604 F.2d 798 (3d Cir. 1979). The Third Circuit Court of Appeal stated:

The two privileges [attorney-client and work-product] are separate and distinct, but there is an overlap. Information furnished by the client to the lawyer may merge into his work-product; moreover, the overriding purpose of the two privileges is the same—to encourage proper functioning of the adversary system. From this viewpoint, there is no actual inconsistency in applying the crime-fraud exception to the work-product as well as to the attorney-client privilege. The rationale supporting the exception in both areas is virtually identical. The work-product privilege is perverted if it is used to further illegal activities as is the attorney-client privilege, and there are no overpowering considerations in either situation that would justify the shielding of evidence that aids continuing or future criminal activity. In re Grand Jury Proceedings, 604 F.2d at 802.

The crime-fraud exception to attorney-client communications is becoming a popular tool to combat criminal activity of attorneys and their clients. As prosecutors aggressively pursue their cases, the Florida courts will find more and more cases involving confidential materials at their doorstep. See Glanzer & Taskier, Attorneys Before the Grand Jury: Assertion of the Attorney-Client Privilege to Protect a Client's Identity, 75 J. CRIM. L. & CRIMINOLOGY 1070 (1984); Silbert, The Crime-Fraud Exception to the Attorney-Client Privilege and Work-Product Doctrine, The Lawyer's Obligations of Disclosure, and the Lawyer's Response to Accusation of Wrongful Conduct, 23 AMER. CRIM. L. REV. 351 (1986).

for documents and two tapes in his possession concerning a pending suit. The Church of Scientology opposed the production of these materials by claiming they were privileged. The IRS claimed the materials fell within the "crime-fraud" exception because the material was in furtherance of future illegal conduct. The IRS urged the federal district court to listen to the tapes in making its privilege determination. The district court ruled that the tapes need not be produced, since they contained privileged attorney-client communications to which the crime-fraud exception did not apply. The district court refused to listen to the tapes in an in camera review to determine if the privilege existed. The court of appeal stated that the district court was powerless to grant the IRS demand for in camera review of the tapes because the Government's evidence of crime or fraud must come from sources independent of the attorney-client communications on the tape.

The United States Supreme Court, however, held that in camera review may be used to determine whether allegedly privileged attorney-client communications fall within the crime-fraud exception. Therefore, when determining whether material is privileged or not, the lower court may examine the material in camera before it makes its determination. The Supreme Court reasoned that in camera review was a lesser intrusion upon the confidentiality of the attorney-client relationship than public disclosure.

The Court also held that before the lower court could engage in an in camera review at the request of the party opposing the privilege, "that party must present evidence sufficient to support a reasonable belief that in camera review may yield evidence that establishes the exception's applicability." The Court believed that this would eliminate "fishing expeditions" and the enormous burden on the court system in examining voluminous records generated by parties opposing the privilege. The evidence does not have to be independent of the privileged materials and, in fact, may be used not only for the in camera review but can also be used for the ultimate showing that the

106. Id. at 2622.
107. Id.
108. Id. at 2632.
109. Id. at 2630.
110. 109 S. Ct. at 2630. This rule only applies to a party who opposes the privilege. The party that holds the privilege does not need to meet this criteria and may ask for in camera review of the privileged material at anytime. Id.
111. Id.
crime-fraud exception applies.

Finally, the Court stated that “the threshold showing to obtain in camera review may be met by using any relevant evidence, lawfully obtained, that has not been adjudicated to be privileged.”112 In order for evidence to be adjudicated privileged, the lower court must make specific factual findings as to the privileged nature of the materials. Therefore, simply because one of the parties claims that the material is privileged does not prevent a court from considering the material. The court must make a specific factual finding regarding the privileged nature of the information to prevent its consideration.

Florida practitioners who have cases concerning privileged material should examine the procedures promulgated by Zolin when there is an attempt to abrogate the privilege using the “crime-fraud” exception. A “Zolin Inquiry” should be used to determine the privileged nature of the communications and the applicability of the “crime-fraud” exception.

V. WITNESSES

A. Impeaching One's Own Witness

Perhaps the biggest change in the Florida Evidence Code deals with impeachment. The legislature amended section 90.608 to allow impeachment of one's own witness.113 This brings Florida in line with the Federal Rules of Evidence which also allow impeachment of one's own witness.114 The change will probably cause some initial problems

112. Id. at 2632 (emphasis added).
113. 1990 Fla. Sess. Law Serv. 174 (West), amending Fla. Stat. § 90.608 (1989). Section 90.608 now reads as follows:
   Any party, including the party calling the witness, may attack the credibility of a witness by:
   (1) Introducing statements of the witness which are inconsistent with his present testimony.
   (2) Showing that the witness is biased.
   (3) Attacking the character of the witness in accordance with the provisions of s. 90.609 or s. 90.610.
   (4) Showing a defect of capacity, ability, or opportunity in the witness to observe, remember, or recount the matters about which he testified.
   (5) Proof by other witnesses that material facts are not as testified to by the witness being impeached.

114. See Fed. R. Evid. 607 (“The credibility of a witness may be attacked by
in criminal cases, since the prosecution may be inclined to call “adverse” witnesses and then impeach the witness in an attempt to use the impeaching evidence to bolster its case. Since prior inconsistent statements used for impeachment purposes cannot be used as substantive evidence, the State must be cautious, and the defense must be on guard to avoid having the impeaching statements argued to the jury as substantive evidence. After a witness is impeached, opposing counsel should ask the court for a limiting instruction to inform the jury that the impeaching statement cannot be used as substantive evidence.

B. Impeachment by Other Witnesses with Inconsistent Material Facts

Section 90.608(1)(e) allows proof, by other witnesses, that the material facts testified to are not the same as testified to by the witness being impeached. One case worth noting was heard during the survey period. In Garcia v. State, the defendant was charged with the first degree murder of two elderly women. There was little evidence in the case linking the defendant to the crime scene. However, the defendant was a farm field laborer at the same time and place as one of the State’s witnesses. This witness overheard the defendant talk about the murder and testified about this conversation at trial. The defense attempted to impeach the witness by demonstrating that at the time of the alleged conversation, the defendant was no longer working at the farm. The defense attempted to enter the payroll records to cast doubt on the credibility of the State’s witness. The trial court disallowed this and the jury found the defendant guilty.

The Florida Supreme Court reversed the defendant’s conviction any party, including the party calling the witness.

115. See supra note 6 and accompanying text. The State cannot use the impeaching statements as substantive evidence unless the statement is brought in under section 90.801(2)(a).
116. See supra note 6 and accompanying text (discussing the limitations).
117. See Everett v. State, 530 So. 2d 413 (Fla. 4th Dist. Ct. App. 1988) (where the defendant’s conviction was reversed because the State attempted to use the impeaching statements as substantive evidence during closing argument, despite the court’s earlier warning that the statements were not to be considered as substantive evidence).
119. 564 So. 2d 124 (Fla. 1990).
120. Id. at 125.
121. Id. at 126.
and sentence of death in the case. The court found that the failure of the defense to impeach with the payroll records, plus the State's argument that the records were unavailable, lead the court to conclude that the error could not be harmless. The court reasoned that the payroll records could have impeached "a crucial link in the chain of circumstantial evidence." Without this link, there was little other evidence to tie the defendant to the crime. Therefore, the credibility of the witness was central to the State's case and failure to allow the jury to weigh this impeaching evidence against this witness justified the court's reversal of the conviction.

C. Bias

Demonstrating a witness's bias or motivation to testify falsely is one of the strongest arguments for the admissibility of what otherwise would be considered highly prejudicial evidence. Counsel should always examine a witness's testimony for any possible motivation or bias that would allow the admissibility of such evidence.

In McCrae v. State, the Third District Court of Appeal reversed the defendant's conviction of attempted murder when the trial court refused to allow defense counsel to demonstrate a witness's bias. In McCrae, the defendant attempted to elicit testimony that the State's sole witness, and the victim of the crime, was in fact a drug dealer who may have been shot by a third party during a drug deal. The defense argued that the trial testimony was an attempt to conceal that fact by blaming the shooting on the defendant. The district court dismissed the State's argument that this was merely a facade to demonstrate the witness's bad character, and stated that evidence which is inadmissible for one purpose can be admissible for another purpose under the rule of "limited admissibility." Since the State's case rested solely on the testimony of one witness, it was reversible error to exclude relevant evidence demonstrating the possible bias or motivation of the witness to testify falsely.

In Hernandez v. Ptomey, the Third District Court of Appeal

122. Id. at 129.
123. Id.
124. Id.
125. 549 So. 2d 1122 (Fla. 3d Dist. Ct. App. 1989).
126. Id. at 1123.
again discussed bias and motivation of a witness. In *Hernandez*, defense counsel attempted to elicit that the State's witness was under internal review investigation for actions in other cases.\textsuperscript{129} The court recognized that the defense has an absolute right to examine any possible motivation of a State witness when that motivation may skew the witness' testimony in favor of the State. However, the district court went on and discussed that "charges of unrelated offenses against a defense witness are not proper grounds for impeachment."\textsuperscript{130} The court concluded that if the State can demonstrate, based on the pending charges, that the defense witness would color his testimony, then the bias testimony should be admissible.\textsuperscript{131} Note that the State should be cautious and avoid attempting to demonstrate a "general bias" by the witness against the State.\textsuperscript{132} Though most witnesses being charged by the State will probably have a general bias against the State, the testimony regarding a pending charge (such as murder) would probably be more prejudicial than the general bias evidence would be probative.

D. Negative Impeachment

Florida case law has stated that mere negative use of a police report for impeachment should not be allowed.\textsuperscript{133} However, this blanket restriction is often interpreted too broadly. In *State v. Johnson*, the preeminent case on negative impeachment, the Florida Supreme Court set forth a four-part test to determine if negative impeachment should be allowed. The court stated that "[i]t depends, as we have said, upon 1) being critical 2) upon a material and vital point 3) reasonably exculpatory of defendant, within sound judicial discretion, and 4) after 'in camera' review and deletion of any improper matter."\textsuperscript{134} The "critical" issue in *Johnson* was the fact that the officer testified at trial that the defendant had white powder on his jacket but left this information out of his police report.\textsuperscript{135} The *Johnson* court found that failure to allow

\textsuperscript{129} Id. at 758.

\textsuperscript{130} Id. (emphasis in original)

\textsuperscript{131} Id.

\textsuperscript{132} See Fulton v. State, 335 So. 2d 280 (Fla. 1976) (discussing that a general bias is not a proper subject for impeachment).

\textsuperscript{133} State v. Johnson, 284 So. 2d 198 (Fla. 1973).

\textsuperscript{134} Id. at 201.

\textsuperscript{135} Id. at 199. The white powder was considered important because the entry point of the burglary in the *Johnson* case was a two by three foot hole surrounded by a white powdery substance.
the use of negative impeachment in that case caused reversible error.\textsuperscript{136}

Today, Florida courts use the \textit{Johnson} case as a blanket restriction on the use of negative impeachment for police reports and rarely consider the four-part test promulgated by the Florida Supreme Court. A prime illustration of this is the case of \textit{Jimenez v. State}.\textsuperscript{137} In \textit{Jimenez}, the defendant appealed his conviction for possession and sale of cocaine on the grounds the trial court precluded him from impeaching the officer's testimony regarding an incriminating fact which the officer left off his police reports.\textsuperscript{138} At trial, the officer testified that he "observed the defendant arrive at the scene of the transaction carrying a silver box and exit shortly thereafter with a bag which officers had earlier filled with cash."\textsuperscript{139} The officer did not note this in his police reports.\textsuperscript{140} The appellate court affirmed the conviction concluding that no error had occurred concerning the precluded use of negative impeachment on this issue.\textsuperscript{141} However, the appellate court failed to even acknowledge that this evidence may have fit within the four-part test enunciated in \textit{Johnson}.\textsuperscript{142} Since the charge was for sale and possession of cocaine, it would seem that the methodology of the transaction could be critical on the material issue of possession and, therefore, could have exculpated the defendant if the jury did not believe the officer.\textsuperscript{143} It is hard to discern how the failure to report the methodology of a drug transaction in \textit{Jimenez} is any less critical than the failure to report a white powdery substance on a jacket in \textit{Johnson}. However, this will be left for another day and another court.\textsuperscript{144}

\textsuperscript{136} Id. at 200.
\textsuperscript{137} 554 So. 2d 15 ( Fla. 3d Dist. Ct. App. 1989).
\textsuperscript{138} Id. at 16.
\textsuperscript{139} Id. at 16.
\textsuperscript{140} It seems somewhat odd that an officer doing a drug bust would fail to mention in any of his reports the method by which the contraband was transported.
\textsuperscript{141} \textit{Jimenez}, 554 So. 2d at 16.
\textsuperscript{142} See supra note 134 and accompanying text.
\textsuperscript{143} The author believes the current viability of negative impeachment may be in doubt.
\textsuperscript{144} The continued vitality of \textit{Johnson} should also be questioned in light of the changes in the rules of criminal discovery. Florida Rule of Criminal Procedure 3.220 now restricts the use of depositions in cases where the officer's "knowledge of the case is fully set out in a police report or other statement furnished to the defense." FLA. R. CRIM. P. 3.220(b)(1)(i)(b) (emphasis added). Since the incident must be "fully set out," this implies that material left out of the report should in all fairness be explored by defense counsel by the use of negative impeachment.

Additionally, depositions in criminal misdemeanor cases no longer exist, unless
E. *Impeachment by Lack of Mental Capacity or Defect*

The Florida Supreme Court, in *Edwards v. State*,\(^{145}\) settled a conflict between the district courts of appeal regarding the prejudicial use of a witness’ drug addiction during trial. In *Edwards*, the evidence at trial established that the defendant stabbed the victim with a knife. During the trial, the defense proffered the cross-examination testimony of the victim concerning her prior drug use. The proffered testimony demonstrated that the victim had been using drugs for twenty years but had been clean for the past several years. The victim’s proffer also included the fact that she was not using drugs at the time of the incident and that during her testimony she was not using drugs.\(^{146}\) Defense counsel argued for the admittance of the victim’s prior drug use to demonstrate that the victim was not a credible witness and that her prior drug use would impair her ability to perceive and remember. The trial court rejected this argument and excluded the proffered testimony but allowed the defense to question the victim about drug use on the days preceding the incident and on the night of the incident.\(^{147}\)

The Fourth District Court of Appeal upheld the defendant’s conviction and the Florida Supreme Court affirmed.\(^{148}\) The Florida Supreme Court noted that authoritative commentators have taken adverse views regarding the relevance of prior drug usage.\(^{149}\) The court cited Professor Ehrhardt and Professor McCormick’s views that evidence of prior drug usage, other than during the incident or at trial, is admissible only if it can be demonstrated to be “relevant to the witness’s ability to observe, remember and recount.”\(^{150}\) However, the court noted that Professor Graham took a contrary view indicating that drug addiction possesses at least the minimum probative value necessary to establish relevancy, and the evidence could be excluded if it leads to unfair prejudice or could possibly mislead the jury.\(^{151}\) The Supreme Court

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good cause is demonstrated. FLA. R. CRIM. P. 3.220(h)(iii). Therefore, failure to allow the defense to fully utilize negative impeachment may cut off the defendant’s only method of defense.

145. 548 So. 2d 656 (Fla. 1989).
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.* at 657.
150. *Id.* (quoting C. EHRHARDT, FLORIDA EVIDENCE § 608.6 (2d ed. 1984)); see also E. CLEARY, MCCORMICK ON EVIDENCE § 45 (3d ed. 1984).
151. *Edwards*, 548 So. 2d at 657-58 (citing M. GRAHAM, HANDBOOK OF FLOR-
Bruschi held that the introduction of evidence of drug use for the purpose of impeachment would be excluded unless:

(a) it can be shown that the witness had been using drugs at or about the time of the incident which is the subject of the witness's testimony;
(b) it can be shown that the witness is using drugs at or about the time of the testimony itself; or
(c) it is expressly shown by other relevant evidence that the prior drug use affects the witness's ability to observe, remember and recount. ¹⁵²

This three-part test should aid the trial courts in discerning when impeachment by drug use is admissible at trial. Through Professor Graham's view that drug addiction possesses at least minimum probative value, it would seem that if the drug addiction did not fall within the three-part test, it would probably be more prejudicial than probative and should be excluded.

F. Mode and Order of Interrogation and Presentation

Two cases during the survey period established the importance of understanding the bounds of cross-examination. In *Eberhardt v. State*,¹⁵³ the appellate court reversed the defendant's conviction and sentence for burglary when the trial court failed to allow the defense to question and explore all the facts relevant to the defendant's intoxicated state or condition. The State, on direct examination, elicited testimony that two witnesses found the defendant asleep in a desk chair inside the burglarized structure. On cross-examination, defense counsel was prohibited from asking the witnesses whether the defendant appeared to be under the influence of drugs or alcohol. The appellate court found this to be error, since the State opened the door by asking about the defendant's condition and appearance.¹⁵⁴

The State also elicited testimony from a police witness regarding statements made by the defendant. When defense counsel attempted to elicit the whole conversation from the witness, the State objected on

¹⁵² Id. at 658.
¹⁵⁴ Id. at 105.
hearsay grounds, and the trial court sustained the objection. The appellate court once again found error and stated that the "rule of completeness" allowed admission of the "balance of the conversation as well as other related conversations that in fairness are necessary for the jury to accurately perceive the whole context of what has transpired between the two." Trial counsel should be aware that once a statement is elicited, opposing counsel has the right to explore other parts of the conversation free from any hearsay objections.

In Ellis v. State, the defendant was convicted of trafficking in cocaine and conspiracy to traffic in cocaine. After the State rested its case, the defendant took the stand and denied both of the charges. The defense counsel argued that these denials did not open the door for further questioning by the State. The trial court disagreed and instructed the jury to disregard the defendant's testimony after he refused to answer the State's cross-examination questions. The appellate court affirmed the convictions and noted that once the defendant takes the stand he does so as any other witness and, therefore, may be cross-examined as any other witness. Before committing a client to the stand, defense counsel should always inform his client that he will be treated, for cross-examination purposes, as any other witness and will be unable to reclaim the safeguards against self-incrimination whenever cross-examination becomes inconvenient.

VI. EXPERTS

One of the most interesting subjects to come along in recent years, in the area of expert testimony, is the psychological autopsy. The admissibility of such evidence was first discussed in this state in Jackson v. State. In Jackson, Judge Glickstein concurred specially and framed the issue as follows:

[Whether a psychological autopsy performed on a suicide victim is

155. Id.
156. FLA. STAT. § 90.108 (1989).
157. Eberhardt, 550 So. 2d at 105.
158. 550 So. 2d 110 (Fla. 2d Dist. Ct. App. 1989).
159. Id.
160. Id.
161. A psychological autopsy is a retrospective look at an individual's suicide to try to determine what lead the person to choose death over life.
162. 553 So. 2d 719 (Fla. 4th Dist. Ct. App. 1989).
proper evidence in a criminal case charging the defendant with child abuse in the form of the defendant causing her seventeen-year-old daughter mental injury by requiring her to work as a strip dancer to earn money and that the defendant's demands on the child caused her such stress that she took her own life to escape the situation.  

The State charged the defendant with child abuse, pursuant to section 827.04(1) of the Florida Statutes. In order to help establish the child abuse, the State used a psychological autopsy to demonstrate that the nature of the relationship between the defendant and her daughter was a substantial contributing factor in the daughter's decision to commit suicide. The underlying facts gleaned from Judge Glickstein's concurring opinion demonstrate that the victim was forced, by her mother, the defendant, to work as a strip dancer at a nightclub to earn money.  

Doctor Jacob, the State's expert witness, established the foundation for his expert opinion by testifying to his previous work as a pioneering psychologist at UCLA, interviewing people who attempted suicide and the surrounding basis of his findings during that study. He also testified that psychological autopsies are required by many hospitals when there is a suicide. The doctor then examined the life of Tina Mancini, the teenage victim. At trial, the doctor brought out a previous suicide attempt of the victim, her dysfunctional family atmosphere, her attempts to get away from her mother, her calls for help, and the method of her death.

The appellate court found that the expert witness' review of the victim's school records, police reports, medical records, testimony from various witnesses at the trial, and an incident report from an earlier suicide attempt established the foundation for his expert opinion that the relationship between the defendant and her daughter contributed to the daughter's decision to commit suicide. Additionally, the court found that the State presented sufficient evidence to establish that the "psychological autopsy is accepted in the field of psychiatry as a method of evaluation for use in cases involving suicide and the trial judge acted within his discretion in admitting this evidence at trial."  

163. Id. at 720 (Glickstein, J., concurring).
164. Id. at 719.
165. Id. at 721.
166. Id. at 720.
167. Id.
Hearsay case law once again tops the list for the total number of evidentiary cases contributed to this area. However, few cases made any noticeable changes in the evidentiary law, though a few are worth discussing.

A. Inconsistent Statements as Substantive Evidence

Florida Statutes section 90.801(2)(a) allows a prior inconsistent statement to be used as substantive evidence when certain prerequisites are met. In Dudley v. State, these prerequisites were not met. The facts in Dudley surround a plan to kill an elderly woman who had fired the defendant's mother from her job as the woman's companion. The defendant, along with her boyfriend, went to the woman's house and cut her throat. During the trial, the State attempted to have the defendant's former boyfriend called as a witness to elicit statement's made by the defendant regarding the murder. The statements were made to a detective and an assistant state attorney during the police investigation. The trial court granted the State's request, and the State impeached the witness with the prior inconsistent statements. The trial court initially instructed the jury that the testimony could not be considered as substantive evidence. However, the State, in its final argument to the jury, and its argument before the judge, argued the prior inconsistent statement as substantive evidence.

On appeal, the State relied on section 90.801(2)(a) for the proposition that the statements could be argued as substantive evidence, reasoning that they fell within the "other proceeding" section of the rule. The Florida Supreme Court disagreed and held "that this type of law enforcement investigation and inquiry was not an 'other proceed-

168. Fla. Stat. § 90.801(2) (1989). This section provides in part:
   (2) A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is:
   (a) Inconsistent with his testimony and was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding or in a deposition

169. 545 So. 2d 857 (Fla. 1989).
170. Id. at 858.
171. Id. at 859.
172. Id.
ing' under the code and, consequently, section 90.801(2)(a) did not apply.\footnote{178}

B. Prior Consistent Statements

A typical problem associated with the use of prior consistent statements is the failure of counsel attempting to admit this evidence to properly have a time line of events squarely in place.\footnote{174} Basically, what this amounts to is knowing whether the consistent statement was made before or after the charge of improper influence, motive, or recent fabrication. \textit{State v. Lazarowicz}\footnote{175} illustrates this problem. In \textit{Lazarowicz}, the State charged the defendant with sexual battery of a child by a person in position of familial authority, pursuant to section 794.011 and 794.041 of the Florida Statutes. The defendant's seventeen-year old daughter testified that when she asked her father's permission to attend a school function with her boyfriend, her father denied the request and forced her to engage in sexual intercourse. He then rescinded the refusal. The trial court admitted the statements made by the daughter prior to trial, which were consistent with her in court testimony.\footnote{176}

The appellate court found that the prior consistent statements were in fact made after an improper motive arose.\footnote{177} The defense claimed that the daughter had fabricated the charges of sexual battery to prevent her father from being in a position to prevent her from maintaining an active sexual relationship with her boyfriend.\footnote{178} The daughter's motive was indicated by her failure to report her father to the authorities until one week after she first engaged in sexual intercourse with her boyfriend.\footnote{179} Statements made after this improper motive would not be admissible under section 90.801(2)(b). At trial, various witnesses testified regarding the prior consistent statements. However, all these statements occurred after the improper motive arose, not before, and therefore, all the statements were inadmissible under section 90.801(2)(b).

\begin{footnotes}
\item[173] \textit{Id.}
\item[174] See \textsc{Fla. Stat.} § 90.801(2)(b) (1989).
\item[175] 561 So. 2d 392 (Fla. 3d Dist. Ct. App. 1990).
\item[176] \textit{Id.} at 393.
\item[177] \textit{Id.} at 394.
\item[178] \textit{Id.} at 393.
\item[179] \textit{Id.}
\end{footnotes}
In *Stewart v. State*, a prior consistent statement was allowed because the charge of recent fabrication occurred after the statement. In *Stewart*, the defendant was charged with first degree murder. During trial, the state elicited testimony from a witness that the defendant had related details of the crime to him. The defense claimed that the witness fabricated his testimony to obtain favorable treatment from the State in his sentencing on other charges. However, the prior consistent statement, regarding the details of the crime, was made before the convictions had been obtained and the sentencing pending. Therefore, the statements were not hearsay under section 90.801(2)(b).

C. Spontaneous Statement and Excited Utterance

An interesting case analyzing both the spontaneous statement and excited utterance exceptions to the hearsay rule arose in the case of *Sunn v. Colonial Penn Insurance Co.* In that case, after the plaintiff purchased a boat, he then purchased insurance coverage for it from Colonial Penn Insurance Company. The plaintiff conspired with another individual, Joseph Keeton, to burn the boat and collect the insurance proceeds. The plan backfired when the boat exploded. Joseph Keeton was badly burned and returned home. After approximately 20 hours, Mr. Keeton told his son how he got the burns and informed him about the conspiracy. The insurance company denied the plaintiff’s claim for reimbursement for the loss of the boat because the coverage excluded intentional acts done by the policy holder. On a motion for summary judgment, the parties stipulated that judgement could be entered for the insurance company if the statements constituted competent evidence. The trial court held that the statements were admissible and granted summary judgment in favor of the insurers. The plaintiffs appealed.

On appeal, the insurance company argued that the statements were properly admitted as spontaneous statements or excited utter-

180. 558 So. 2d 416 (Fla. 1990).
181. *Id.* at 419.
182. *Id.*
185. 556 So. 2d 1156 (Fla. 3d Dist. Ct. App. 1990).
186. *Id.* at 1157.
187. *Id.*
188. *Id.*
ances. The appellate court listed the factors to be analyzed in determining whether a statement qualifies under the exceptions, stating that these were "(a) the time gap between the incident and the statement, (b) the voluntariness of the statement, (c) whether the statement is self-serving, and (d) the declarant's mental and physical state at the time the statement was made."\(^{189}\)

The appellate court found that the most important of these factors is the duration of time between the incident and the statement.\(^{190}\) The longer the time, the more chance of reflective thought in which to fabricate a statement. The appellate court held that the case did not provide a sufficient basis to conclude that the declarant made the statements without reflective thought and, thus, the standards for spontaneity as to the hearsay statements had not been proven by the insurers.\(^{191}\) Therefore, it was error to grant the summary judgement in favor of the defendant.\(^{192}\)

D. Statements for Purposes of Medical Diagnosis

In *Bradley v. State*,\(^{193}\) the appellate court reversed a rape conviction when the trial court erroneously admitted a hearsay statement that the victim was raped. The victim was raped by the defendant on July 4, 1987. The victim testified that a month later she told her mother about the incident. A few days later, the victim went to a family planning clinic for a pregnancy test and physical exam. While she was there she told a staff member that she had been raped on July 4, 1987 and the staff member wrote down "raped 7-4-87" on the victim's health history form.\(^{194}\)

At trial, the State entered this form as a statement for medical diagnosis under section 90.803(4).\(^{195}\) The defense objected to the part of the form where it mentioned the victim had been raped. The trial

\(^{189}\) Id. at 1157-58.
\(^{190}\) 556 So. 2d at 1158.
\(^{191}\) Id.
\(^{192}\) Compare Edmond v. State, 559 So. 2d 85 (Fla. 3d Dist. Ct. App. 1990) (where the court held that an 11 year old witness' emotional description of an assailant to the police approximately two to three hours after the incident was admissible as an excited utterance, because the child was still excited and hysterical at the time the statement was made).
\(^{193}\) 546 So. 2d 445 (Fla. 1st Dist. Ct. App. 1989).
\(^{194}\) Id. at 446.
\(^{195}\) See FLA. STAT. § 90.803(4) (1989).
court overruled the objection and the jury found the defendant guilty.\textsuperscript{196} The appellate court reversed and reasoned that it was improper to allow the statement into evidence.\textsuperscript{197} The court found that only "statements which describe the inception or cause of the injury if they are reasonably pertinent to the treatment are . . . within the exception."\textsuperscript{198} The purpose of the victim's visit was not to receive treatment for injuries due to the rape but to substantiate her suspicion that she was pregnant. Therefore, the statement the victim gave to the clinical staff member was not reasonably pertinent to the diagnosis of whether the victim was pregnant, and it was error to allow the statement into evidence as a hearsay exception under 90.803(4).

In \textit{Danzy v. State},\textsuperscript{199} the same district court of appeal came to an entirely different conclusion than the \textit{Bradley} case. In this case, the victim was staying with her girlfriend and the defendant while recovering from a car accident. On the morning of the crime, the victim went to wake the defendant for work. The defendant then picked the victim up and carried her into the living room where the sexual assault occurred. The victim attempted to leave the apartment and fell down the stairs while exiting.

Upon returning to the medical center for treatment of her injuries, the doctor noticed that the victim was obviously upset and felt it was necessary to learn why the victim was so upset and why she had fallen. Upon learning of the incident the doctor instructed the victim to go to the hospital to obtain a rape examination.\textsuperscript{200}

At trial, the defendant objected to the testimony of the doctor and his nurse regarding the rape, arguing that it was hearsay. The appellate court found that the statement fell within the hearsay exception for purposes of medical diagnosis\textsuperscript{201} and distinguished the \textit{Bradley} case.\textsuperscript{202} The court stated that in \textit{Bradley} the only purpose was to determine whether the victim was pregnant.\textsuperscript{203} In contrast, in \textit{Danzy} the statement made to the doctor was made only hours after the incident had occurred and was made after repeated requests by the doctor who believed his patient's emotional condition was a consideration in his ex-

\begin{enumerate}[\textsuperscript{196}]  \item \textit{Bradley}, 546 So. 2d at 446.  
\item \textit{Id.} at 447.  
\item \textit{Id.} (quoting C. \textsc{Ehrhardt}, \textsc{Florida Evidence} § 803.4 (2d ed. 1984)).  
\item 553 So. 2d 380 (Fla. 1st Dist. Ct. App. 1989).  
\item \textit{Id.}  
\item \textit{See} \textsc{Fla. Stat.} § 90.803(4) (1989).  
\item \textit{Danzy}, 553 So. 2d at 381.  
\item \textit{Id.}  
\end{enumerate}
amination. Therefore, the court found that the "circumstances under which the statement was made and the purpose for which the same was elicited thus insure its trustworthiness and admissibility under the evidence code." 

VIII. CONCLUSION

The vast number of evidentiary cases will continue to fill the case books on a daily basis. Attorneys should be aware of the new changes that have been made by our legislature and listed herein. Every attorney should strive to understand how the changes can be applied in a courtroom setting. Some of these changes will go by unnoticed, others are sure to generate even more case law. Though not every evidentiary case will cause earth-shaking changes, the methodology and analysis supplied by the appellate courts will aid the trial attorney in the application of these rules during trial.

With the volume of new evidentiary and substantive case law being produced every day, the trial attorney should strive to cull through the cases to develop a notebook of helpful cases. In this manner the attorney will have the cases he needs at his fingertips. With the advent of computer technology, the trial attorney can keep a simple notebook system of case law updated on a regular basis with a minimum of work.

204. Id.
205. Id. The court focused on the rationale behind the admissibility of the statements by focusing in on the patient's motive to be truthful, because the diagnosis or treatment will depend on what the patient will say. Id. An additional degree of trustworthiness is displayed when the information will be relied upon by the physician in making his diagnosis or determining treatment.
Juvenile Law: 1990 Survey of Florida Law

Michael J. Dale*

I. INTRODUCTION

During the past presidential campaign, President George Bush asked the American people to "read my lips" in an effort to convince the electorate of his position on a tax increase. In 1989 the Florida appellate courts employed the same strategy to convince the legislature and the lower courts of their apparent failure to cause Florida's juvenile justice and child welfare system to deal effectively with the state's delinquent and dependent children.

During the 1990 session, the legislature responded at least in part, making substantial changes in the juvenile delinquency provisions of Florida's children's code when it passed the Juvenile Justice Reform Act of 1990. On the other hand, a review of the appellate opinions decided through September 30, 1990, suggests that the trial courts were not reading the lips of the appellate judges. For example, in the twelve month period between October 1, 1988 and September 30, 1989, the intermediate appellate courts wrote seventeen separate opinions reversing the lower courts for failure to comply with statutory provisions requiring consideration of six criteria when determining if a child is suitable for sentencing and sanctioning as an adult, as opposed to disposition in the juvenile justice system after waiver or certification of the child to adult court and subsequent conviction there. This past year there were eleven additional reported opinions dealing with the same

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1. Speech by George Bush, then Presidential Candidate, at the Republican Nat'l Convention (Aug. 18, 1988).


3. This survey will cover the time period from October 1, 1989, to September 30, 1990. Appellate cases involving generic criminal and evidentiary issues are beyond the scope of this article unless the issue is unique to juvenile law. A detailed analysis of new legislation is also outside the purview of this article.

4. See infra notes 146-154 and accompanying text.
technical issue.

The legislature's response to the perceived problems in the juvenile justice field did not carry over substantially to child welfare. And even in the juvenile justice arena, recent events suggest that resolution of the problems under the new delinquency statute may be difficult to achieve. A central component of the new statute is the appropriation of substantial state funds which, at the time of this writing, are in jeopardy because of the state's projected revenue shortfall.

This article will survey the case law in both the juvenile justice and child welfare areas of juvenile law since September, 1989. The survey is divided into two sections: Juvenile Delinquency and Dependency. The survey will not include a discussion of status offender proceedings because, for the second year in succession, there have been no reported opinions interpreting the now two year-old Part IV of the Act which governs families in need of services and children in need of services.

5. The Legislature did pass the "William and Budd Bell Prevention and Protection Act," which made a number of specific changes in the dependency and termination of parental rights parts of Chapter 39 of the Florida Statutes. See Fla Stat. § 39.002 (1990).


7. Appellate opinions which raise no significant issues of general significance will not be discussed.

8. The Florida Juvenile Justice Act, located at Chapter 39 of the Florida Statutes, is divided into six sections. Relevant here are Part II governing delinquency matters, Part III governing dependency matters and Part VI governing termination of parental rights.

II. JUVENILE DELINQUENCY

A. Detention

When a child is taken into custody—the equivalent of an adult arrest—and charged with an act of delinquency, Florida's statute, like those in most states, allows the child to go home, be placed in non-secure detention or be held in secure detention. Florida's approach to detention has changed dramatically on several occasions over the past decade. For example, prior to 1981 Florida had relatively narrow detention criteria. The law was rewritten in 1981 to substantially expand the grounds upon which a child could be held in secure detention. The new law narrows the grounds again.

Under current and prior law, when placed in detention "[n]o child shall be held in non-secure or secure detention care or a crisis home under a special detention order for more than 21 days unless an adjudicatory hearing for the case has been commenced by the court." The appellate courts have issued a substantial number of opinions over the past two years reversing trial court orders that violate the 21 day rule. Indeed, the courts became so concerned that in J.F. v. Johnson the Fourth District admonished a particular trial court that, given its repeated failure to comply with orders to comply with the 21 day rule, the trial court might find itself outside the limits of judicial immunity. Over the past year, the failure to comply with the rule continued. In R.C. v. Fryer, the Fourth District Court of Appeal reported that the trial court had even suggested the possibility that the appeals court itself would invite the child to bring suit against the trial judge for refusing to release the child. Referring to its earlier decision in J.F. v.

15. 543 So. 2d 471 (Fla. 4th Dist. Ct. App. 1989).
Johnson, in which it admonished the same trial court judge, the appellate court concluded, "continued and intentional disregard of the governing statutes by this trial judge will certainly invite harm to the trial judge, as well as to the reputation of our courts and judicial system."\(^\text{17}\)

On the same day, the Fourth District ruled in *L.J. v. Fryer*\(^\text{18}\) that the trial court could not retroactively and sua sponte continue detention which had gone beyond the 21 day period on the ground that the child's parents had failed to provide an attorney to represent the boy. The court ruled that this did not constitute good cause to extend the 21 day limit.\(^\text{19}\) The court held further that the trial court's belief that the child was represented by the public defender's office did not change the result.\(^\text{20}\) Represented or not, the child was entitled to be released from detention. When the detention period under the statute runs out, the trial court lacks jurisdiction to extend the original detention.\(^\text{21}\)

Finally, in *D.M. v. Korda*,\(^\text{22}\) the court granted another writ of habeas corpus relating to continued detention ordered by the same trial judge. The appellate court stated: "Unfortunately, for reasons beyond our comprehension, and despite this court's opinions in *J.F.* and in *P.R. v. Johnson*, this pattern continues. Even with the purest intentions and sentiments, no judge may put himself above the law."\(^\text{23}\)

It then explained that while judicial immunity may exist for money damages, it is not a bar to claims for injunctive relief against the judge or to an award of attorney's fees under 42 U.S.C. § 1988, the Civil Rights Attorneys' Fees Award Act.\(^\text{24}\) The court concluded, "[w]e will leave such considerations to the discretion of those parties who may consider such claims in the future, should the particular division continue to refuse to confine its rulings to the governing laws."\(^\text{25}\)

\(^{17}\) *Id.*

\(^{18}\) 565 So. 2d 713 (Fla. 4th Dist. Ct. App. 1990).

\(^{19}\) *Id.* at 713 (citing *FLA. STAT.* § 39.032(6)(d) (1990)).

\(^{20}\) *Id.* at 714.

\(^{21}\) *Id.*

\(^{22}\) 562 So. 2d 407 (Fla. 4th Dist. Ct. App. 1990). In prior reported opinions on this issue, the appellate court removed the name of the judge *sua sponte* and substituted the name of the superintendent of the detention center. This time it did not. *See* *L.J. v. Fryer*, 565 So. 2d 713 (Fla. 4th Dist. Ct. App. 1990); *R.C. v. Fryer*, 561 So.2d 31 (Fla. 4th Dist. Ct. App. 1990).

\(^{23}\) 562 So. 2d at 408 (citation omitted).

\(^{24}\) *Id.*

\(^{25}\) *Id.; see also* Dale, 1989 *Survey*, supra note 12, at 868 (discussing the limits of judicial immunity).
In *E.W. v. Brown*, the First District Court of Appeal was faced with a question of interpretation of the good cause exception to the 21-day detention rule. The state's attorney argued that good cause to extend detention is met when the state establishes the need for continuation of the original detention. The appellate court disagreed, holding what seems obvious - good cause relates to the reason for the delay in the commencement of the adjudicatory hearing process. Thus, if the state can show that its investigation was incomplete or that a witness could not be found, it may seek an extension of detention. However, such is not the case when the basis for extension is the original justification for detention.

In *C.S. v. Brown*, a question of first impression concerning the 21-day rule arose. The child had been detained on various charges, and on the 21st day of his detention, the state filed an information against him as an adult. The court determined that the filing of the information removed the child from the jurisdiction of the juvenile court for the purposes of pre-trial detention. Thus, the state was obligated to bring this child before a judge sitting in the criminal division for an initial appearance under the rules of criminal procedure. To do otherwise, the court reasoned, would permit the state to extend the child's period of deprivation of liberty without adequate procedural safeguards. It found that the juvenile authorities lacked the ability to continue holding the child. The court concluded that if the state did not bring the youngster before a judicial official for a first appearance within 24 hours of the time the information was filed, the child would be entitled to release by the juvenile authorities.

B. *Adjudicatory Issues*

Section 39.05(6), Florida Statutes, now renumbered as section

27. *Id.* at 713.
28. *Id.*
30. *Id.* at 319; *see* FLA. R. CRIM. P. 3.131, 3.132.
31. 553 So. 2d at 317 (citing P.R. v. Johnson, 541 So. 2d 791, 793 (Fla. 4th Dist. Ct. App. 1989)). The court also relied upon Rule 8.150 of the Florida Rules of Juvenile Procedure, which provides specific procedures in order to waive jurisdiction of the juvenile court and to certify the case for trial as if the child were an adult. FLA. R. JUV. P. 8.150.
32. 553 So. 2d at 319.
39.048(6), provides that a petition must be filed within 45 days of the
time the child is taken into custody. The courts in the past year have
been faced with several appeals relating to interpretations of the 45 day
rule. For example, in W.G.K. v. State, while the original petition was
filed within 45 days, the state named the wrong victim, and then filed
an amended petition changing the name of the victim after the 45 day
period had run. The court concluded that the situation was controlled
by J.H. v. State, and therefore, the adjudication of delinquency had
to be reversed.

The question of when the 45 day period begins to run was raised
in In Interest of S.V. The child, a suspect in a series of burglaries,
voluntarily surrendered to the police. He was then arrested for several
but not all of the burglaries. The state waited almost five months to file
a probable cause affidavit and almost six months to file a petition alleg-
ing delinquency as to the burglary which was the subject of the appeal.
The court held that while the child voluntarily surrendered himself to
the police months earlier, they did not arrest him for the specific
charge which was the subject of the appeal. Thus, 45 days had not run
from the time the youngster was taken into custody on the instant
charges to the time the delinquency petition was filed.

It is possible for a juvenile to waive the 45 day time period. In
R.F.R. v. State, the child expressly and voluntarily waived his right
to have the petition filed in 45 days in exchange for a plea agreement
in which the state would place him in a youth diversionary program.
When the child failed to comply with the diversionary program agree-
ment, the state attorney filed a delinquency petition. The child’s motion
to dismiss on the ground that the petition was filed beyond the 45 day

33. Section 39.05 of the 1989 Florida Statutes states:
   On motions by or on behalf of a child, a petition alleging delinquency shall
   be dismissed with prejudice if it was not filed within 45 days of the date
   the child was taken into custody. The court may grant an extension of
time, not to exceed an additional 15 days, upon such motion as by the state
   attorney for good cause shown.

34. 565 So. 2d 885 (Fla. 1st Dist. Ct. App. 1990).
35. 424 So. 2d 928 (Fla. 1st Dist. Ct. App. 1983) (filing of a defective original
   petition, because it named the wrong party, does not toll the running of the 45 day
   period. Thus, an amended petition not timely filed is invalid).
37. Id. at 403.
39. Id. at 1085.
limit was denied. The First District held that the child should not be allowed to agree to an alternative disposition, wait for the 45 days in which a petition could be filed to pass, and then refuse to comply with the conditions of the alternative program.\footnote{10} Such a result is neither fair nor logical. This was a reciprocal and interdependent compact.\footnote{41} On appeal the child argued that the waiver was not expressly provided for by statute.\footnote{42} Thus, he argued, waiver was foreclosed as an option. The appellate court disagreed as a matter of statutory interpretation.

In \textit{M.F. v. State},\footnote{43} the child claimed that the delinquency petition should have been dismissed because the amended petition, which was filed more than 45 days after he was taken into custody, alleged an entirely new charge. The amendment changed the type of controlled substance the child was charged with selling, delivering, or possessing with intent to sell, from cannabis to cocaine. Finding that the child was not prejudiced in the preparation of his defense, the court held that unlike a criminal case, in a juvenile delinquency proceeding, the child is not convicted of a crime.\footnote{44} Therefore, he was adequately informed of the charges against him when he was charged with the sale and delivery of a controlled substance. This information was enough to toll the statutory filing period.\footnote{46}

The Second District Court of Appeal was faced with a similar problem in \textit{State v. M.M.}\footnote{46} There, a child was charged with being a

\begin{footnotes}
\item 40. \textit{Id.}
\item 41. If this were not such a compact, the rehabilitative purpose of the Juvenile Code would be lost. \textit{Id.} at 1086 n.3 (citing \textsc{Fla. Stat.} \S 39.001(2)(a) (1989) (amended 1990)) ("substituting for retributive punishment, whenever possible, methods of offender rehabilitation"). The section was substantially rewritten in 1990 and the relevant provision, section 39.001(c), states:

\begin{quote}
(c) To assure due process for each child, balanced with the state's interest in the protection of society, by substituting methods of prevention, early intervention, diversion, offender rehabilitation, treatment, community services, and restitution in money or in kind for retributive punishment, whenever possible, and by providing intensive treatment sanctions only when most appropriate, recognizing that sanctions which are consistent with the seriousness of the act committed and focus on treatment should be applied in cases where necessary efforts have been made to divert the child from the juvenile justice system.
\end{quote}

\textsc{Fla. Stat.} \S 39.001(c) (Supp. 1990).
\item 42. \textit{R.F.R.}, 558 So. 2d at 1085.
\item 43. 563 So. 2d 171 (Fla. 3d Dist. Ct. App. 1990).
\item 44. \textit{Id.} at 172.
\item 45. \textit{Id.}
\item 46. 557 So. 2d 217 (Fla. 2d Dist. Ct. App. 1990).
\end{footnotes}
principal to sexual battery. Subsequently, and outside the 45 day period, the state filed amended petitions against the child charging him with two additional counts of kidnapping and aggravated assault.47 The appellate court concluded that the two amended petitions were a continuation of the initial petition, and therefore, the trial court's dismissal of the petitions was in error.48 The court suggested two rationales for upholding the amended petitions. First, they did not mislead the child or prejudice the preparation of the defense as would have occurred where the victim's name was misstated as in Interest of W.G.K.49 Second, where the amended charges arise from the same factual situation and where there is no showing of prejudice by the change, the amendment will be allowed.50

In late 1988 the Florida Supreme Court changed the juvenile rule of procedure concerning speedy trials to match the criminal rules.51 In State v. A.H., the Second District had an opportunity to interpret the speedy trial rule.52 In that case, the defense requested discovery of the informant and a tape recording in a case involving the sale of .1 gram of rock cocaine to a confidential informant who was wearing a body transmitter.53

When the defense demonstrated that the informant's testimony conflicted with the testimony of the police officers who monitored the drug transaction, it asked for a continuance to further depose the informant. The court reset the hearing for a day after the time for expiration under the speedy trial rules. The defense then moved for discharge under the rule. The trial court granted the motion and the Second District Court of Appeal reversed relying upon Rule 8.180(j)(3). That section provides that the state is allowed 10 days af-

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47. Id. at 218.
48. Id.
50. Id. (citing Interest of E.M., 362 So. 2d 427 (Fla. 1st Dist. Ct. App. 1978)). See generally FED. R. CIV. P. 15(e); FLA. R. CIV. P. 1.190(c) (civil practice rules known as the "relation back doctrine"). In a civil case, when the amended complaint filed outside the statute of limitations alleges a cause of action arising out of a common nucleus of operative fact with the original claim, the cause of action will relate back and not violate the statute of limitations. See also United Mine Workers v. Gibbs, 383 U.S. 715 (1966).
52. 550 So. 2d 138 (Fla. 1989).
53. Id. at 138-39.
ter a hearing on a motion for discharge to bring the defendant to trial. It was not given this opportunity and thus reversal was appropriate. In dicta, the court stated that the trial court has discretion to dismiss a case if it finds that there has been an egregious discovery violation which materially prejudices the defendant. However, the trial court did not dismiss for this reason, but rather on the basis of the expiration of the speedy trial time.

A particularly sensitive discovery issue arose in B.E. v. State. In that case a 14-year old child was charged with a lewd and lascivious act upon a 3-year old girl. When the lawyer for the respondent sought to take the three-year old’s deposition, the trial court granted a protective order which not only precluded taking the deposition, but also forbade the lawyer from communicating with the child. The bases for the denial were the unsworn representation of the prosecutor that the child could not recount the events in question and thus would not be called as a witness and the judge’s personal feeling that no 3-year old should be subjected to the legal process under any circumstance. The appellate court reversed on several grounds. First, it found that the blanket preclusion violated the sixth amendment and article VI, section 16 of the Declaration of Rights of the Florida Constitution. Second, it held that the age of the child of tender years does not itself demon-

54. Id. at 139.
55. Id.; see also State v. A.J., 558 So. 2d 197 (Fla. 2d Dist. Ct. App. 1990)(reversing a dismissal on discovery abuse grounds because there was no showing of prejudice).
56. 564 So. 2d 566 (Fla. 3d Dist. Ct. App. 1990).
57. Id.
58. Id. at 567.
59. Article VI, section 16, of the Florida Constitution provides, “the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor.” It is not altogether clear that a respondent in a juvenile delinquency proceeding has sixth amendment rights. In a series of cases, the United States Supreme Court has held that the juvenile delinquency proceeding is not a criminal prosecution so as to implicate the protections in the Constitution that apply to adults in criminal cases. On the other hand, the Court in these cases did hold that due process rights apply under the fourteenth amendment to the United States Constitution. Thus, it seems clear that the respondent would have the right to confront his accuser as a constitutional matter but under the due process clause. See McKeiver v. Pennsylvania, 403 U.S. 528 (1971); In re Winship, 397 U.S. 358 (1970); In re Gault, 387 U.S. 1 (1967); Of course, even then there are limitations. See, e.g., Maryland v. Craig, 110 S. Ct. 3157 (1990)(limiting defendants’ sixth amendment rights to personally confront child accusers in sex crime cases); B.E. v. State, 564 So. 2d 566 (Fla. 3d Dist. Ct. App. 1990)(citing Coy v. Iowa, 487 U.S. 1012 (1988)).
strate lack of competency to testify. To the contrary, the court explained a body of Florida state law which suggests just the opposite.\(^{60}\)

The two judges assigned to the Fourth Judicial Circuit juvenile court in 1990 had a general policy that all juveniles in secure detention would be shackled at all times during court appearances. The policy was challenged in *S.Y. v. McMillan*.\(^{61}\) The court denied a petition for a writ of certiorari challenging the blanket system on the grounds that, unlike adult cases involving the right to appear unshackled before a jury, the child has no equivalent right.\(^{62}\) The appellate court concluded further that the shackles were limited to juveniles being detained and took into consideration the trial court testimony of the chief bailiff in which he said that the use of shackles had a positive effect on the security and decorum of the courtroom. Additionally, he said that fights among the juveniles and escape attempts had decreased. It is not clear from the opinion whether any documentary evidence was presented.\(^{63}\) The public defender argued on appeal that appearing in shackles violates the presumption of innocence. The court ruled that the lack of a jury in a juvenile delinquency case was a significant distinguishing factor.\(^{64}\) The court, however, failed to mention decisions in other jurisdictions, including cases involving juveniles in which the courts ruled that the question of security was an individualized one.\(^{65}\)

The more appropriate question was whether the particular child was likely to create a security risk as balanced against the substantial bias which might be created by the appearance of a child in court in shackles. There is no explanation in the *S.Y.* opinion as to why only children held in detention rather than all children charged are shackled other than the assertion that detained children meet the statutory detention criteria.\(^{66}\) Nor is there any explanation as to why this procedure...

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\(^{60}\) *B.E.*, 564 So. 2d at 568 (providing relevant cases).


\(^{62}\) *Id.* at 808. Although the court cited to no case in this regard, the Supreme Court has distinguished between the constitutional rights of adults versus those of juveniles. See *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

\(^{63}\) 563 So. 2d at 808-09.

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


\(^{66}\) It is not clear what conclusion the court was drawing. Perhaps it was suggesting that detained children are more dangerous or are greater security risks. But see *Levine*, supra note 12, at 255 (suggesting that the criteria are expansive and include children charged with minor offenses). Nor did the court address whether any proce-
is not followed elsewhere in Florida. Finally, the use of shackles seems to run counter to the spirit of the Florida Juvenile Justice Act.\textsuperscript{67}

In what is hopefully a unique case, the Fifth District Court of Appeal was asked to decide the question of whether a trial court could refuse to allow the prosecution to put on evidence by dismissing a delinquency petition over the prosecution’s objection at arraignment.\textsuperscript{68} The appellate court held in \textit{State v. S.C.} that the decision to charge rests with the prosecutor, and until both sides have an opportunity to present evidence, the court cannot make a proper decision to dismiss.\textsuperscript{69}

Technical questions concerning application of protected constitutional rights have recently come up on several occasions in the appellate courts. For example, the right to counsel, set out over 20 years ago by the United States Supreme Court in \textit{In re Gault},\textsuperscript{70} has been expanded by Florida statute so that the child shall be advised of his right to counsel at a dispositional hearing.\textsuperscript{71} In \textit{Interest of J.C.S.},\textsuperscript{72} the trial court failed to advise the child of the right to counsel\textsuperscript{73} and the court of appeal reversed.

A second technical matter which has come up frequently involves a Florida Supreme Court rule requiring written consent to employment of a certified law student intern which must be filed in the case and brought to the attention of the trial judge.\textsuperscript{74} In \textit{Interest of L.S.},\textsuperscript{75} the court reversed and remanded for a new adjudicatory hearing when the
record was shown to be insufficient to establish that the child understood his legal options and that he knowingly waived the right to be represented by a lawyer when he consented to be represented by a certified legal intern. In *Interest of A.R.*, exactly the same issue came up when there was no evidence of a written consent to be represented by the legal intern in the file. Of similar constitutional significance is the requirement that the court determine that a guilty plea or a plea of *nolo contendere* shall be freely, knowingly, and voluntarily tendered. In two separate cases the trial court had failed to undertake the appropriate plea colloquy and as a result, in *C.W. v. State* and *M.C. v. State*, the appellate court reversed and remanded for appropriate proceedings.

Sixteen years ago the United States Supreme Court ruled that the double jeopardy clause of the fifth amendment, applied to the states through the fourteenth amendment, also applies to juveniles. In *D.L.V. v. Kirk*, the Fifth District Court of Appeal granted a writ of prohibition to prevent further proceedings in a delinquency case where the state filed a petition alleging unlawful sale and delivery of cocaine after a prior petition alleging the identical allegations was dismissed at the adjudicatory hearing. At the hearing, the state was not prepared to proceed and was unsuccessful in obtaining a continuance. The trial court ruled on the first petition that the child was not delinquent as charged. In a rather blunt opinion, the appeals court held that the order of dismissal was a final order in the first case since the trial court explicitly found that the child had not committed the act. The court then added that the state's refiling of the petition was "a blatant attempt to circumvent the court's final order of dismissal."

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76. *Id.* at 425.

77. 554 So. 2d 640 (Fla. 4th Dist. Ct. App. 1989).


79. 554 So. 2d 28 (Fla. 2d Dist. Ct. App. 1989).

80. 561 So. 2d 461 (Fla. 3d Dist. Ct. App. 1990).


82. 551 So. 2d 611 (Fla. 5th Dist. Ct. App. 1989).

83. *Id.*
The First District Court of Appeal in *K.Y.E. v. State*, recently decided a first amendment free speech case. A child was adjudged to have breached the peace and obstructed a police officer without violence when she continually sang an obscene epithet in the presence of the police officer, which allegedly interrupted the officer's conversation with another individual. Because the record disclosed no evidence that the singing epithet evoked a response intending to inflict injury or incite breach of the peace under Florida law, the court found no breach. Therefore, it concluded that the speech and conduct were protected by the first amendment.

A recent case, *Interest of D.D.*, involved a question of the constitutionality of the serious habitual juvenile offender dispositional placement statute. The specific issue was whether arrests are a proper criterion to determine serious offender placement. Relying upon the Florida Supreme Court opinion in *State v. Potts*, which held that the state may not penalize someone merely for the status of being under indictment or otherwise accused of a crime, the appellate court ruled that an arrest cannot be taken into account in setting sentencing guidelines for juveniles. The court concluded the arrest criteria violated substantive due process under the fourteenth amendment as well as article 1, section 9 of the Florida Constitution.

**C. Dispositional Issues**

Florida's Juvenile Justice Act provides a variety of dispositional...
alternatives including community control,\textsuperscript{92} commitment to the Department of Health and Rehabilitative Services (HRS),\textsuperscript{93} commitment to a licensed child-caring agency,\textsuperscript{94} restitution,\textsuperscript{95} and juvenile dispositional alternatives when the child has previously been transferred to the adult court for trial.\textsuperscript{96} Each of these dispositional alternatives has been the subject of regular appellate review over the past three years.\textsuperscript{97}

In addition to the 21 day detention requirement,\textsuperscript{98} Florida's law provides that the Department of Health and Rehabilitative Services must move a child from secure detention and place the youngster in a placement program within five days after the child has been committed.\textsuperscript{99} Seven different appellate court opinions over the past year have dealt with this problem. In \textit{C.M.T. v. Department of Health and Rehabilitative Services},\textsuperscript{100} the appellate court enforced the removal statute and ruled explicitly that the statute is not discretionary.\textsuperscript{101} In a series of three opinions, \textit{M.A. v. Coler},\textsuperscript{102} \textit{D.A.T. v. Coler},\textsuperscript{103} \textit{T.J.D. v. Coler},\textsuperscript{104} and \textit{A.M.R. v. Coler},\textsuperscript{105} the Second District Court of Appeal enforced the same five day rule adding that while it was not unsympathetic to the HRS's argument that it was unable to comply with the statute because of lack of resources, the court was obligated to enforce the statute. It further suggested that the agency's argument was more properly addressed to the legislature.\textsuperscript{106} In \textit{Interest of A.B.},\textsuperscript{107} the Fourth District Court of Appeal was faced with sixteen separate peti-
tions for mandamus relating to the five day rule. Again, HRS argued that there were no placement facilities available. Citing other cases, the appellate court ruled that the statute is mandatory and requires release of the juvenile held more than five days without placement into a commitment program.\textsuperscript{108} This issue appeared to be alleviated with the passage of the new Juvenile Justice Act and subsequent appropriations. As noted earlier, as of this writing, the availability of funds for the appropriation to HRS to develop placement options which would stop the backup of youngsters into detention, among other programs, remains uncertain.

A second dispositional alternative under Florida law is restitution.\textsuperscript{109} Restitution is defined as money or "in kind" payment.\textsuperscript{110} In a dozen cases this past year the appeals courts have interpreted this seemingly simple statute. In \textit{R.F. v. State},\textsuperscript{111} the Fourth District ruled that the trial court must determine that the amount of restitution it orders is an amount which the child can reasonably be expected to pay. In this particular case, the court ordered $15,000 in restitution, which the appellate court said "would inevitably be uncollectible."\textsuperscript{112} In \textit{D.M. v. State},\textsuperscript{113} the court ordered restitution of $988.00 in a matter involving the theft of an automobile. The appellate court reversed because the trial court left it to the interested parties to develop the payment schedule. In addition, although the child established that the amount was beyond his financial ability to pay, he did not establish that it was beyond the financial ability of his parents.\textsuperscript{114} Florida law states that when restitution is ordered by the court, the amount of restitution shall not be greater than the amount the child and his parents can reasonably be expected to pay or make.\textsuperscript{115} This statute does, however, place a maximum of $2,500 on parents.\textsuperscript{116} In \textit{J.O. v. State},\textsuperscript{117} a case which may have significance for restitution orders, the Third District Court of Appeals recently reduced a grand theft adjudication to petty theft be-

\begin{itemize}
\item \textsuperscript{108} \textit{Id.} at 1350.
\item \textsuperscript{109} \textsc{Fla. Stat.} \textsection 39.054 (Supp. 1990).
\item \textsuperscript{111} 549 So. 2d 1169 (Fla. 4th Dist. Ct. App. 1989).
\item \textsuperscript{112} \textit{Id.} at 1170 (the opinion is silent as to what the restitution was for).
\item \textsuperscript{113} 550 So. 2d 149 (Fla. 3d Dist. Ct. App. 1989).
\item \textsuperscript{114} \textit{Id.} at 150.
\item \textsuperscript{115} \textit{See Fla. Stat.} \textsection 39.054(1)(a)5(f) (Supp. 1990).
\item \textsuperscript{116} \textit{Id.}
\item \textsuperscript{117} 552 So. 2d 1167 (Fla. 3d Dist. Ct. App. 1989).
\end{itemize}
cause no evidence was presented as to the value of the property stolen. In *G.C. v. State*,\(^{118}\) another restitution case, the appellate court explained the obvious. A child is responsible for that portion of the damage which he caused. In other words, as the Fourth District said *In Interest of J.C.S.*,\(^{119}\) if the damage is not the result of the child's conduct, even when damage occurs, then restitution is not a proper disposition.

Two obvious opinions are *G.R. v. State*,\(^{120}\) and *L.A.R. v. State*.\(^{121}\) *G.R.* involved a theft of $70.00 in American Express Travelers Checks. The child was unable to cash the check, and the money was refunded to the customer. Neither American Express nor the customer lost any money. The court held that in order for restitution to be ordered, there must be a loss.\(^{122}\) In *L.A.R.*, the Fifth District Court of Appeals reversed because it was not shown that the losses on which the order was based were caused by the offenses to which the child plead guilty.\(^{123}\)

Florida law does provide an exception to the parents' obligation to pay restitution if it can be shown that they made "diligent good faith efforts to prevent the child from engaging in delinquent acts."\(^{124}\) In *M.D. v. State*,\(^{125}\) the court, in a case of first impression, decided what constitutes diligence. The court first ruled that the parent had the burden of establishing diligence by the greater weight of the evidence. It then defined diligence as an effort which is over and above average, an effort that is painstaking.\(^{126}\)

Community control, Florida's term for probation, is another dispositional alternative. The maximum time one may be placed on community control is set in various respects by statute. Thus, for example, the maximum period of community control which may be imposed for petty theft is 60 days.\(^{127}\) Therefore, in *A.D.A. v. State*,\(^{128}\) the appellate court ruled that the trial court could not impose community control for

\(^{118}\) 560 So. 2d 1186 (Fla. 3d Dist. Ct. App. 1990).

\(^{119}\) 560 So. 2d 426 (Fla. 4th Dist. Ct. App. 1990).

\(^{120}\) 564 So. 2d 207 (Fla. 3rd Dist. Ct. App. 1990).

\(^{121}\) 563 So. 2d 836 (Fla. 5th Dist. Ct. App. 1990).

\(^{122}\) *G.R.*, 564 So. 2d at 208.

\(^{123}\) 563 So. 2d at 837.


\(^{125}\) 561 So. 2d 1259 (Fla. 2d Dist. Ct. App. 1990).

\(^{126}\) *Id.* at 1261 (citing WEBSTER'S NEW WORLD DICTIONARY 386 (1988 ed.)).

\(^{127}\) See *FLA. STAT.* § 39.054(1)(a)(5)(f) (Supp. 1990)

\(^{128}\) 564 So. 2d 615 (Fla. 1st Dist. Ct. App. 1990).
a longer period of time than the statute allowed. In *M.G. v. State*, the Fifth District ruled that an imposition of community control may not exceed the time period to which the child could have been exposed if the court had ordered a commitment within the juvenile system. The court distinguished its holding from the adult system, where a distinction between time in prison and time on community control is allowable by statute. Finally, Florida law provides that an order of community control in a juvenile delinquency case may be revoked under certain circumstances. In *In Interest of L.S.*, the court held that evidence of arrest alone is insufficient to cause a violation of community control. The appellate courts have regularly ruled that a child may not be committed to HRS or placed on community control for a term longer than the sentence that could have been imposed if he were an adult. The Florida statute is explicit. Yet, in *J.S. v. State*, the court once again was obligated to reverse because the trial court ordered a 12-year old to be committed until his 19th birthday for the burglary of a structure where, had he been adult, he could be punished for no more than five years.

Florida law also provides that at the dispositional stage, when the court determines it will commit the child to HRS, the agency must furnish the court with a list of not less than three placement options. HRS must also rank the order of preference. The trial courts have regularly failed to employ the ranked choices and the appellate courts have reluctantly ordered them to comply. This year, in *State v. R.W.K.*, the appellate court again dealt with a frustrated trial court which had ordered HRS to place the child in a specific residential facility and fully fund the placement. The appellate court held that in the absence of commitment under the Florida statute, a residential facility

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131. 553 So. 2d 345 (Fla. 4th Dist. Ct. App. 1989).
134. 552 So. 2d 327 (Fla. 1st Dist. Ct. App. 1989).
135. *Id.* at 328.
138. 556 So. 2d 815 (Fla. 5th Dist. Ct. App. 1990).
was not a proper placement alternative and, under the Florida statute
the court did not have the statutory authority to place the child in a
specific facility.\textsuperscript{139}

Juvenile court jurisdiction exists until the child’s 19th birthday.\textsuperscript{140} Thus, a dispositional order suspending a child’s license beyond his 19th
birthday was reversed by the Second District Court of Appeal in
\textit{R.M.S. v. State}.\textsuperscript{143} In addition, in \textit{Lewis v. State}, the First District
held that community service may not be imposed in lieu of court costs
because the court lacks authority to do so.\textsuperscript{142}

Prior to 1988, juveniles could be placed in secure detention on the
basis of contempt adjudications. That year, the Florida legislature
passed section 39.0321, Florida Statutes, which prohibited the place-
ment of juveniles in secure detention for punishment.\textsuperscript{143} In \textit{T.D.L. v. Chi-
ault},\textsuperscript{144} the appellate court ruled that placement in secure deten-
tion, based upon contempt, was a clear violation of the new 1988 stat-
ute. In \textit{T.D.L.}, the contemptuous act by the juvenile consisted of wad-
ing up commitment papers and throwing them onto the public
defender’s table. The court held the child in criminal contempt and
entered a two-part disposition. It placed the child in secure detention
for 179 days and then converted that detention to a county jail sentence
when the child reached his 18th birthday some twenty days after the
contemptuous act occurred. In addition to vacating the placement of
the juvenile in the juvenile detention center, the appellate court also

\begin{enumerate}
\item\textit{Id.}\textsuperscript{139}
\item 552 So. 2d 301 (Fla. 2d Dist. Ct. App. 1989).
\item 564 So. 2d 589 (Fla. 1st Dist. Ct. App. 1990).
\item Section 39.0321, 1988 Florida Statutes, provided:

\begin{quote}
Prohibited use of secure detention. - A child alleged to have commit-
ted a delinquent act shall not be placed in secure detention for the follow-
ing reasons:
\begin{enumerate}
\item To punish, treat, or rehabilitate the child.
\item To allow a parent to avoid his or her responsibility.
\item To permit more convenient administrative access to the juvenile.
\item To facilitate further interrogation or investigation.
\item Due to a lack of more appropriate facilities.
\end{enumerate}
\end{quote}

prior to 1988 under Florida law in juvenile cases). It would appear that placement in
secure detention for contempt is once again permissible under the 1990 amendments.
\textit{See FLA. STAT. § 39.044(10) (Supp. 1990).}
\item 570 So. 2d 1335 (Fla. 2d Dist. Ct. App. 1990).
\end{enumerate}
vacated the adult jail sentence. The appellate court concluded that in order for an adult jail sentence to be properly imposed, the court had to make specific findings pursuant to section 39.111(7), Florida Statutes. 145

D. Transfer Issues

The juvenile delinquency provisions of the Florida Juvenile Justice Act provide that under certain circumstances the child may be tried in adult court. 146 When a child has been tried as an adult and convicted, the court shall determine whether the child should receive adult or juvenile sanctions. Six criteria are to be considered. 147 Application of the criteria continues to produce a significant number of appellate opinions. 148 The appellate cases have uniformly enforced what the statute plainly states:

Suitability for adult sanctions is determined by reference to the six criteria and any decision shall be in writing and in conformity with those criteria with the court making a specific finding of fact and reasons for the decision. 149

Yet, the lower courts continue to fail to make written findings as required. 150 As the Third District properly noted in Ervin v. State, 151

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145. Section 39.111(7), Florida Statutes, provides:
(7) When a child has been transferred for criminal prosecution and the child has been found to have committed a violation of Florida law, the following procedure shall govern the disposition of the case:
   (a) At the disposition hearing the court shall receive and consider a predisposition report by the department regarding the suitability of the child for disposition as a child.

not only must there be a written opinion, but that decision must include specific factual findings to support the conclusion. The failure to make such findings is reversible error. In *Henschke v. State*, the First District Court of Appeal also explained that the violation of this section requires that the case be returned to the trial court for resentencing and that the child is entitled to be present. According to the Fifth District in *Youngblood v. State*, in making the written decision, the court must consider all six factors and must not only track them using conclusory language, but must provide specific underlying findings of facts and reasons. The court commented on the many prior decisions holding it reversible error to fail to make the findings under the six criteria, but also explained that the written findings need not actually be made at the sentencing, only before reaching the decision. The record need only show that the trial court considered the factors at the time of the sentencing. It would then be required to make a written explanation.

III. DEPENDENCY PROCEEDINGS

A. The Right to Counsel

Issues concerning the role of counsel in dependency proceedings continue to appear in decisions of Florida’s appellate courts. In *Met-

recodified at Fla. Stat. § 39.059(7) (Supp. 1990), prior to accepting the child’s plea and imposing adult sanctions was reversible error).

151. 561 So. 2d 423 (Fla. 3d Dist. Ct. App. 1990).
152. 556 So. 2d 409, 410 (Fla. 1st Dist. Ct. App. 1989).
153. 560 So. 2d 409 (Fla. 5th Dist. Ct. App. 1990).
154. *Id.*; see also T.D.L. v. Chinault, 570 So. 2d 1335 (Fla. 2d Dist. Ct. App. 1990) (holding that the six criteria are applicable in the context of a contempt proceeding where the court contemplates sanctioning the child by placement in the county jail); Lang v. State, 566 So. 2d 1354 (Fla. 5th Dist. Ct. App. 1990) (holding that a check list of the six criteria which is initialed by the court does not satisfy the statutory requirement of a specific finding of fact and the reason for the decision) (citing Keith v. State, 542 So. 2d 440, 441 (Fla. 5th Dist. Ct. App. 1989)). The court in *Lang* also held that a child could waive rights under the six criteria test, but the waiver must be manifest either in the plea agreement or on the record. See also Dale, 1989 Survey, supra note 12, at 881-83 (reviewing *Keith* and other earlier cases articulating the obligations under the sanctions provision).

155. See Dale, 1988 Survey, supra note 9, at 1171-74; Dale, 1989 Survey, supra note 12, at 885 (discussing cases decided in prior years together with a basic analysis of the issue of right to counsel for parties in dependency cases).
ropolitan Dade County v. Faber, the Third District Court of Appeal certified to the Supreme Court the question of the availability of reasonable attorneys' fees for court appointed lawyers in dependency and termination proceedings. The issue involved an order by a trial court that the lawyer for the mother in a dependency and termination case be paid fees in a reasonable amount in excess of the $1000.00 maximum, which is provided for in section 39.415, Florida Statutes. The Second District Court of Appeal had ruled a year earlier in Board of County Commissioners v. Scruggs that there was a constitutional right to counsel, and that the fee limitation was an impermissible legislative encroachment on the power of the judiciary. The Scruggs court ruled that if the facts showed extraordinary circumstances, an award in excess of the statutory maximum would be allowed. The court in Faber explicitly agreed with the reasoning in Scruggs.

One possible source of representation of parents in dependency cases is the Office of the Public Defender. However, in Yacucci v. Hershey, the Fourth District Court of Appeal ruled that the public defender had no obligation to represent indigent parents in dependency cases. The case arose because there had been an unwritten policy in the Office of the Public Defender in Martin County to represent defendants in both criminal cases and dependency proceedings. When the successor public defender objected to the practice, and was still appointed, the defender filed a writ of prohibition and subsequent appeal. The court granted the petition and reversed. First, it found that section 27.51, Florida Statutes, which describes the functions of the public defender, is silent as to any authorization to represent parents in dependency proceedings. Similarly, the juvenile code does not allow for such representation.

Second, the court relied upon an earlier decision in Public Defender v. Baker which held that neither Chapter 27 nor Chapter 39 of the Florida Statutes gives the court power to appoint the public defender to represent children in dependency proceedings. The court re-

156. 564 So. 2d 185 (Fla. 3d Dist. Ct. App. 1990).
157. 545 So. 2d 910 (Fla. 2d Dist. Ct. App. 1989) (holding that a fundamental constitutional right was involved in such a case, albeit, not a sixth amendment criminal law right, but a due process right).
158. Faber, 564 So. 2d at 186; see also Dale, 1989 Survey, supra note 12, at 885-86 (providing a more detailed discussion of Scruggs and the underlying issues).
159. 549 So. 2d 782 (Fla. 4th Dist. Ct. App. 1989).
160. Id. at 783.
jected the argument that Rule 3.111 of the Rules of Criminal Procedure provides authority for the court to appoint the public defender. 162 The rule states only that lawyers may be provided to indigent individuals in all proceedings arising from the initiation of a criminal action against the defendant which may result in imprisonment. It lists certain proceedings as examples, although it does not include dependency matters. The court avoided the rule by saying that it gave no indication that counsel can be from the public defender’s office. This argument is problematic because the section of the rule refers to counsel as a general matter and could just as easily have been interpreted expansively to include the office of the public defender. The court’s third argument appears to be that counsel need not be appointed because a liberty interest is not a stake. This argument is problematic because indeed the parent does have a liberty interest in a dependency proceeding. 163 Finally, the court did not address the fact that under Florida law the parent does have an absolute right to counsel in a termination of parental rights proceeding. 164

A separate issue, the appropriateness of HRS non-lawyer staff representing the Department in uncontested dependency proceedings, has finally been resolved. The matter had been presented to the Florida Supreme Court two years ago by the Florida Bar, which sought an advisory opinion. 165 Last year the supreme court ruled that HRS must

162. FLA. RULE CRIM. P. 3.111(c) states:
   (c) Duty of Booking Officer. In addition to any other duty, the officer who commits a defendant to custody has the following duties:
   (1) He shall immediately advise the defendant:
       (i) of his right to counsel;
       (ii) that if the defendant is unable to pay a lawyer, one will be provided immediately at no charge.
   (2) If the defendant requests counsel or advises the officer he cannot afford counsel, said officer shall immediately and effectively place said defendant in communication with the (office) Public Defender of the circuit in which the arrest was made.

163. See Stanley v. Illinois, 405 U.S. 645, 651 (1972) (explicitly finding a liberty interest referring specifically to the “interest of a parent and the companionship, care, custody, and management of his or her children”); Lassiter v. Dep’t of Social Services, 452 U.S. 18 (1981) (holding that while due process applied in termination of parental rights cases, counsel as of right was not an element of the process to which the parent was entitled. This analysis differs from the statement of the court in Yacucci.).


be represented by counsel. The Florida Supreme Court has now promulgated an amendment to the Florida Rules of Juvenile Procedure, which addresses the unlicensed practice and provides that "the Department of Health and Rehabilitative Services must be represented by an attorney at every stage of these proceedings."  

B. Evidentiary Issues  

Florida Statutes, section 39.409, provides that the court must briefly state the facts upon which the finding of dependency is made. An issue about which there appears to be some confusion is whether a finding of dependency must be reversed when the court fails to recite the relevant facts supporting the adjudication of dependency pursuant to the statute, but where the record is sufficient to support the adjudication. In I.T. v. State, the parents appealed from an order adjudicating their son dependent. The Third District Court of Appeal ruled that the trial court's failure to state the facts upon which its finding of dependency was made, relying instead on the reasons set forth within the petition, was clearly reversible error. However, the appeals court also evaluated the evidence in the record and found that the state had failed to show by preponderance of the evidence that the child was dependent and for that reason reversed the order of adjudication.  

In Interest of K.S., the parents also appealed from a dependency adjudication. They argued the court's order omitted a recitation of the specific facts upon which the determination was based and the record was insufficient to support a finding of dependency. The appellate court held that when a court fails to make the appropriate recitation of facts supporting the adjudication, and a sufficient factual basis cannot be discerned, reversal may be required. However, in K.S., the First District Court of Appeals found the necessary evidence in the rec-
ord and thus affirmed.174

Similarly, in T.S. v. State,175 parents appealed an order of dependency on the grounds that the evidence was insufficient and that the court failed to state the factual basis. The Second District Court of Appeal found that an examination of the record of the proceedings disclosed sufficient evidence to support the finding of dependency.176 However, the court also held that the specific factual basis stated by the court—the children were found to be living in the conditions set forth in the dependency petition—was insufficient to support an adjudication of dependency under the mandate of section 39.409 of the Florida Statutes.177 Because, under the facts of this case, the trial court could have withheld an adjudication of dependency, the appellate court remanded and ruled that the adjudication be stricken.178 Thus, it is unclear from T.S. what the court would have done if it had been faced with a situation where the record had proven the dependency, the findings had not been made under section 39.409, and further intervention had appeared necessary.

The court's reliance in T.S. on three earlier intermediate appellate opinions in support of its conclusion that the court order failed to state the facts upon which the finding was made as required by section 39.409(3) of the Florida Statutes, does not clarify matters. The three cases are I.T.,179 Fitzpatrick v. State,180 and Interest of C.S..181 In two of the cases, I.T. and C.S., the courts ruled that failure to make the order specifying the facts upon which the dependency was based was clearly reversible error.182 In Fitzpatrick, on the other hand, the appellate court held that the trial court erred by simply resolving the petition without making the necessary factual findings, but it never concluded that this alone was reversible error.183 All three courts also evaluated the evidentiary record. In I.T. and C.S., the appellate courts determined the state had failed to prove dependency.184 In Fitzpatrick, the

174. Id. at 159.
175. 557 So. 2d 676 (Fla. 2d Dist. Ct. App. 1990).
176. Id. at 677.
177. Id.
178. Id.
179. 532 So. 2d 1085.
180. 515 So. 2d 319 (Fla. 3d Dist. Ct. App. 1987).
182. I.T., 532 So. 2d at 1088; C.S., 503 So. 2d at 418.
183. 515 So. 2d at 320-21.
184. I.T., 532 So. 2d at 1088; C.S., 503 So. 2d at 418.
court remanded with directions to make appropriate factual findings because the evidence before the appellate court was in conflict. Finally, in Fitzpatrick, the court also noted that the reason for reviewing a facially insufficient dependency order is to provide an early resolution of the child’s placement.

What these cases teach is that Florida courts will look beyond the statutory authority to determine whether, despite the failure to make factual findings, there was evidence in the record to substantiate the determination of dependency. While they may be practical resolutions, the decisions seem contrary to the clear statutory language of section 30.409, Florida Statutes. It does not seem at all difficult for the appellate courts to do with section 39.409 what they have done in the delinquency area with section 39.111, Florida Statutes. In other words, if the factual findings are not stated on the record, the court simply remands the case to the trial court for a recitation of the factual bases for the decision. Proper findings will provide the parties and the appellate court a clear record against which to argue the legal significance of the underlying facts.

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185. Fitzpatrick, 515 So. 2d at 321.
186. Id.
187. What is interesting about the development of the seeming exception to section 39.409, Florida Statutes, based upon a review of the facts, is the process of reliance on prior cases until one reaches the seminal case. See generally A.T. v. State, 409 So. 2d 155 (Fla. 1st Dist. Ct. App. 1986) (its assertion is unsupported by statute or doctrine). A.T. is a termination of parental rights case involving the failure of the trial court to comply Rule 8.810 of the Florida Rules of Juvenile Procedure which required that a final order granting a petition for permanent commitment include a statement of the facts upon which the court based its order. Despite the failure to comply with the rule, the court upheld the determination based upon “overwhelming evidence supporting the permanent commitment, as well as the need for an early resolution of this case in order to provide a stable, emotional environment for the children.” Id. at 156.

The problem with this conclusion is that there is no support for it in either the rule or the statute. One might argue that where there is a failure to comply with the factual findings, affirmance may be justified on grounds of harmless error. But none of the cases uses this argument. Even so, the problem with the harmless error argument is that significant rights are in issue. See e.g., Stanley v. Illinois, 405 U.S. 645 (1972). Furthermore, the statute is otherwise meaningless. It was clearly written for a purpose and that purpose was to obligate the court to set out the factual basis for its opinion. To do otherwise is to force the appellate court on a cold record to carry out what is in effect a de novo review of the underlying facts. The trial court is in a much better position to evaluate credibility and demeanor of witnesses. It may well be that the appellate court upholds a finding of dependency in a case based upon facts which the trial court, had it entered an order listing the factual basis for the opinion, would have
The matter of proof in dependency cases is constantly litigated on the appellate level. In *C.C. v. HRS*, the First District Court of Appeal was faced with a question of whether the facts of the underlying dependency amounted to a significant impairment of the child's physical, mental or emotional health as is required under the statutory definition of abuse. In this case, the court held that the mother's act of loudly and angrily scolding a child, shaking the youngster by the shoulders and striking the child's face and legs at the courthouse amounted to an isolated event. There simply was no further evidence to support the finding, although the court noted that uncontrolled and hysterical behavior is to be condemned. Based upon a preponderance of the evidence, the court could find no evidence of repeated activities and so reversed and remanded the finding.

The difficulty of proving child abuse is demonstrated in *In Interest of N.W.*, where, despite evidence of severe physical abuse of the child, the state could not prove who was the perpetrator. The court of appeal reversed the finding that the father was the perpetrator. There was testimony that both parents had access to the child and that the child became rigid and exhibited hysterical behavior at the appearance of the father. However, all staffing participants believed that identification of the perpetrator was impossible, and the child had been cared for by various family members at the relevant point in time. The trial court had also relied upon the father's personality type and potential for cruel behavior as well as his institution of a paternity action prior to the alleged abuse. According to the appellate court, such evidence amounted to "little more than innuendo and speculation concerning the father's surmised superior ability to abuse in the tragic manner to which he was abused."

In *Paquin v. HRS*, the court was faced with the question of whether a finding of dependency as to one child can be used as the

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191. 556 So. 2d at 417; see also Interest of T.S., 511 So. 2d 435 (Fla. 2d Dist. Ct. App. 1987); In re W.P., 434 So. 2d 905 (Fla. 2d Dist. Ct. App. 1988).
193. Id. at 258.
194. Id.
195. 561 So. 2d 1286 (Fla. 5th Dist. Ct. App. 1990).
basis for a finding as to second child. In the Paquin case, the court found three children dependent. The facts demonstrated that the father sexually abused one son and that the abuse occurred in the presence of a second son. The court ruled that there was no competent evidence that the third youngster, who did not live in the same household with the two brothers, had witnessed any abuse or might be subjected to abuse in the future. On that basis, the court ruled that there could be no transfer of dependency. Thus, as to the single child the finding of dependency was reversed. 196

C. Procedural Matters

The question of whether a child may see his file at the end of a dependency case was before the Fourth District Court of Appeal in C.E.B. v. Birken. 197 Reported in local newspapers, this case involved pro se actions by a youngster to obtain the contents of his court file. The circuit court judge had refused to unseal the social section of the youngster’s file and to turn the information over to him. 198 The district court of appeal reversed the lower court and held that under Florida law the petitioner had the right to review the official records. Originally, the court reasoned that under section 39.411(3), Florida Statutes, the child is one person who has the right to inspect and copy the official record. 199 HRS had argued that providing the material was discretionary based upon the court’s determination of the child’s best interests. The court rejected this argument on the ground that the use of

196. Id. at 1287.
198. Id. at 908.
199. FLA. STAT. § 39.411(3) (Supp. 1990) provides:

(3) The clerk shall keep all court records required by this part separate from other records of the circuit court. All court records required by this part shall not be open to inspection by the public. All records shall be inspected only upon order of the court by persons deemed by the court to have a proper interest therein, except that, subject to the provisions of ss. 63.162, a child and the parents or legal custodians of the child and their attorneys, law enforcement agencies, and the department and its designees shall always have the right to inspect and copy any official record pertaining to the child. The court may permit authorized representatives of recognized organizations compiling statistics for proper purposes to inspect and make abstracts from official records, under whatever conditions upon their use and disposition the court may deem proper, and punish by contempt proceedings any violation of those conditions.
the word “shall” made this statutory provision mandatory.\textsuperscript{200} The court then decided what constitutes the total record given that there is a “social section” of the juvenile file. It found that the official record must be turned over.\textsuperscript{201} The court found that whether HRS and other agency reports constitute part of the official record is based upon whether the court relied upon them or considered them in reaching its determination. If it did, the documents from the social file are part of the official record.\textsuperscript{202}

A difficult question of discovery was raised in \textit{In Interest of C.W.}\textsuperscript{203} In that case, the trial court granted a motion filed by the father requiring a 4-year old child, alleged to be the victim of sexual abuse, to undergo a physical and psychological examination.\textsuperscript{204} On appeal, the court quashed the trial court’s order on the basis that there was no compelling reason advanced by the father to support the intrusion. The court relied upon \textit{State v. Drab},\textsuperscript{206} which held that in the context of a criminal charge of sexual battery on a child, the defendant must show the presence of extreme and compelling circumstances such that the denial of the examination will deprive the defendant of due process.\textsuperscript{206}

Dependency proceedings continue to be entwined with custody matters.\textsuperscript{207} In \textit{Ammons v. Hathaway},\textsuperscript{208} the trial court ruled on a peti-

\textsuperscript{200} 566 So. 2d at 909. The court in dicta determined that if the child was mature enough to persuade the court on the law, he was old enough to “handle” the disclosure of his own juveniles records on remand. \textit{Id.}

\textsuperscript{201} Official records are defined at section 39.411(2), Florida Statutes:

(2) The court shall make and keep records of all cases brought before it pursuant to this chapter and shall preserve the records pertaining to a dependent child until 10 years after the last entry was made, or until the child is 18 years of age, whichever date is first reached, and may then destroy them, except that records of cases where orders were entered permanently depriving a parent of the custody of a juvenile shall be preserved permanently. This court shall make official records, consisting of all petitions and orders filed in a case arising pursuant to this part and any other pleadings, certificates, proofs of publication, summonses, warrants, and other writs which may be filed therein.


\textsuperscript{202} C.E.B., 556 So. 2d at 910.

\textsuperscript{203} 553 So. 2d 292 (Fla. 2d Dist. Ct. App. 1989).

\textsuperscript{204} \textit{Id.} at 293.

\textsuperscript{205} 546 So. 2d 54 (Fla. 4th Dist. Ct. App. 1989).

\textsuperscript{206} \textit{Id.} at 55-56. Rule 8.750 of the Florida Rules of Juvenile Procedure provides for examinations of children, guardians and other persons when custody is in issue. The discovery rule, 8.770, is silent on the issue of physical examinations.

\textsuperscript{207} \textit{See Dale, 1989 Survey, supra} note 12, at 891 (discussing \textit{In Re F.B.}, 534

https://nsuworks.nova.edu/nlr/vol15/iss3/18
tion for permanent custody filed by a mother. The children, who had previously been declared dependent, were placed in the custody of their paternal aunt and uncle where they remained after the mother filed her petition. She alleged that she was now able to provide sufficient financial and emotional support to the youngsters. After a hearing, the trial court entered an order providing that the children be permanently placed with the aunt and uncle. The order also gave the mother visitation rights based upon the best interests of the child. The appellate court ruled that the permanent status of dependency is not an option available under Chapter 39 of the Florida Statutes. The court explained that its primary obligation is to return the children to their natural parents, and only when such efforts are exhausted is permanent placement, with the aim of adoption, appropriate. The court noted that custody in the natural parents "is an important interest which should generally not be terminated absent certain circumstances constituting abandonment or an unfitness which impacts the child's welfare."

The First District seems to have understood clearly the distinction between the test for dependency and custody. The best interests of the child is not the test in a dependency case, but may be proper when the issue is one of custody. Clearly Chapter 39 of the Florida Statutes does not allow a dependency matter to be turned into a custody case. In Ammons, the court also quite properly pointed out that the court should not rely principally on material and economic benefits as opposed to personal, emotional and social welfare and stability as the basis for a custody determination.

The rather technical matter of who can commence a dependency proceeding was raised in the Fourth District Court of Appeal in In So. 2d 899 (Fla. 5th Dist. Ct. App. 1988)); Dale, 1988 Survey, supra note 9, at 1182 (discussing In re A.W., 519 So. 2d 114 (Fla. 2d Dist. Ct. App. 1988)).

209. Id. at 146.
210. Id.
211. Id. (citing Interest of K.H., 444 So. 2d 547 (Fla. 1st Dist. Ct. App. 1984)).
212. Id.
214. 550 So. 2d at 146; see also In re J.H., 535 So. 2d 669 (Fla. 2d Dist. Ct. App. 1988)(setting out the same proposition in the context of a dependency proceeding).
Interest of J.M.. 215 In this case, maternal grandparents appealed the trial court's dismissal of their petition for dependency on the motion of HRS, who desired dismissal. The court of appeals held that section 39.404(1), Florida Statutes, provides that any person with knowledge of the facts may file the petition for dependency. 216 HRS is not the only agency or party who can commence a proceeding. 217 Thus, the appellate court reversed.

A technical issue of appellate practice in dependency cases came before the Fifth District Court of Appeal this past year. In HRS v. C.G., 218 HRS sought to challenge by certiorari a court order adjudicating a child dependent and ordering the youngster to be placed in the first available opening at a particular facility. 219 The appellate court held that the appropriate remedy was not certiorari but plenary appeal. Although the Florida Supreme Court had previously held that under certain circumstances the appellate court has jurisdiction to review a case even when the form of appellate relief is misstated, the difficulty in the particular case was that the 30-day time frame within which to file a notice of appeal had expired. 220 The Fifth District Court of Appeal refused to follow the holding of the Fourth District, which declined jurisdiction over an appeal where the party incorrectly sought relief by certiorari. 221 Rather, the Fifth District agreed with the dissent, which viewed the timely filing of the application for certiorari as sufficient to invoke appellate court jurisdiction. 222

Florida, like many other states, has recently developed a statewide child abuse reporting system. It includes an abuse registry which receives reports and pursuant to which HRS conducts investigations. 223 When a report is received and HRS conducts an investigation, the in-

217. 560 So. 2d at 343 (citing Interest of J.R.T., 427 So. 2d 251 (Fla. 5th Dist. Ct. App. 1983)).
218. 556 So. 2d 1243 (Fla. 5th Dist. Ct. App. 1990).
219. The issue on the merits appears to be governed by Interest of K.A.B., 483 So. 2d 898 (Fla. 5th Dist. Ct. App. 1986) and Fla. Stat. § 39.41(5) (Supp. 1990), which conclude that HRS determines when and with whom a dependent child shall live. C.G., 556 So. 2d at 1244.
220. Id. at 1244; see Johnson v. Citizen State Bank, 537 So. 2d 96 (Fla. 1989).
222. 556 So. 2d at 1244; Skinner, 541 So. 2d at 176.
vestigator must determine whether abuse or neglect has occurred and identify the perpetrator. When the report stems from corporal punishment as occurred in *B.R. v. HRS*, the question is one of whether the punishment was "excessive." HRS had an internal policy to confirm reports of excessive corporal punishment in those cases where the bruises remained visible for least 24 hours. In *B.R.*, two school officials had paddled a student. The next day the student's mother reported the incident to HRS which confirmed abuse under the 24-hour rule. The court ruled on the definition of the term despite the fact that HRS subsequently withdrew the 24-hour rule and conceded reversible error. The court held that "whether corporal punishment is excessive must be proved in each case by competent, substantial evidence, and all relevant issues presented must be considered without resort to arbitrary presumptions fixed by the passage of time."

IV. TERMINATION OF PARENTAL RIGHTS

In 1981, the United States Supreme Court held that the due process clause of the fourteenth amendment did not give natural parents an absolute right to counsel in every termination of parental rights case, although the court did suggest that generally a lawyer ought to be provided. By statute, Florida authorizes the appointment of counsel for parents in all termination of parental rights cases and further provides that the court shall appoint counsel for insolvent persons.

225. 558 So. 2d 1027 (Fla. 2d Dist. Ct. App. 1989).
226. Id. at 1028.
227. Id.
228. Id.
Interest of M.R.,\textsuperscript{232} the court vacated an order terminating parental rights on the ground that the record failed to reveal that the insolvent parents were afforded meaningful assistance of counsel. In M.R., the trial court appointed counsel pursuant to the statute, but the appellate court found that the lawyer failed to appear at the adjudicatory hearing and acted in other ways which raised doubts about his competence. The court recognized the severity of this loss, stating that the right of impoverished parents to a lawyer is a basic right guaranteed by the due process clause of both the United States and Florida Constitutions.\textsuperscript{233} The opinion is imprecise in its interpretation of the federal constitutional guarantee in light of the holding in \textit{Lassiter v. Department of Social Services}, in which the Supreme Court said that due process does not require a court to appoint counsel for an indigent parent in all termination proceedings.\textsuperscript{234} However, while there is no constitutional right to counsel per se, the First District is correct in its ruling that once counsel is provided and in Florida by statute it must be - the parents' right to be protected is lost when there is no meaningful assistance. The court did not articulate the exact contours of the principle of meaningful assistance.\textsuperscript{235} However, the United States Supreme Court did say

\begin{itemize}
  \item \textbf{232.} 565 So. 2d 371 (Fla. 1st Dist. Ct. App. 1990).
  \item \textbf{233.} \textit{Id.} at 372.
  \item \textbf{234.} 452 U.S. at 26-27. The Court concluded that:
    \begin{quote}
      In some, the court's precedent speak with one voice about what 'fundamental fairness' has meant when the Court has considered the right to appointed counsel, and we thus draw from them the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty.
    \end{quote}
    \textit{Id.} There being no deprivation of liberty to the parent, the Court held that there was no absolute right to counsel. However, perhaps in an effort to ameliorate the impact of its decision, the Court went on to say:
    \begin{quote}
      In its Fourteenth Amendment, our Constitution imposes on the State the standards necessary to ensure the judicial proceedings are fundamentally fair. A wise public policy, however, may require that higher standards be opted than those minimally tolerable under the Constitution. Informed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel not only in parental termination proceedings, but in dependency and neglect proceedings as well ... The Court's opinion today in no way implies that the standards increasing the urge by informed public opinion and now widely followed by the states are other than enlightened and wise.
    \end{quote}
    \textit{Id.} at 34-35.
  \item \textbf{235.} 565 So. 2d at 372; see Richardson & Smith, \textit{States Differ Over Compensation for Lawyers for Indigent Parents}, Nat'l L. J., Oct. 22, 1990, at 16 (survey of the
\end{itemize}
that counsel has to be present at critical stages of the proceedings and that performance might otherwise fail to afford the most basic services to be reasonably expected by competent counsel.236

Because Florida participates in the Federal Child Abuse Prevention Act of 1974, it appoints guardians ad litem in dependency proceedings.237 In In Interest of C.B.,238 a court appointed guardian ad litem appealed from an order dismissing her petition for termination of parental rights. The trial court had ruled that the termination statute was unconstitutional because it permitted any person who had knowledge of the facts justifying the termination to file the petition.239 The section in question states that "any other person who has knowledge of the facts alleged or is informed of them and believes they are true,"240 may file a petition. The court held that neither the privacy rights of the parent nor the suggested limitation that only HRS or licensed child care agencies could initiate the proceedings, was a valid basis for finding the statute unconstitutional.241 However, the court, without citation, then defined the phrase "any other person who has knowledge" as "someone who is in peculiar position so that such knowledge can reasonably be inferred; for example, the judge familiar with the file, the guardian or attorney for the child, neighbors or friends of the parties who, because of their proximity could be expected to have knowledge, etc."242 Perhaps the concern of the appellate court was that the action might be commenced by someone with improper motives. However, this dicta does not appear to be based on authority in the appellate courts or the language of the statute. The matter should properly be handled by the legislature.

Florida, like other states, has passed legislation aimed at guaranteeing either speedy return of the child to his or her parents or termina-

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236. 452 U.S. at 372.
238. 561 So. 2d 663 (Fla. 5th Dist. Ct. App. 1990).
239. Id.
241. Id. at 666.
242. Id.
tion of parental rights. In compliance with federal legislation, after a finding of dependency, HRS will either provide the parent with a performance agreement or a permanent placement plan, dependent on whether the agency concludes that the child should go home or be placed out ultimately for adoption. However, under certain circumstances HRS may move to terminate parental rights without requiring a performance agreement or permanent placement plan.

In *In Interest of D.J.*, the mother of four minor children appealed from the final order terminating her parental rights, arguing that the circumstances did not require this extraordinary procedure. The court held that there was no requirement that HRS participate in a performance agreement or permanent placement plan if evidence is presented showing either abandonment or severe or continuous abuse. The court found that the extraordinary procedures provision applied because there was clear evidence of severe abuse of two of the mother's children. Significantly, the court terminated parental rights to each of the children, although the opinion only described physical injury to two of the youngsters. Although the court did not speak to the issue of transferred neglect, it held that two physical manifestations of abuse had the effect of threatening the life and well being of each of the children.

In *In Interest of J.A.*, the court was faced with the difficult question of whether it could terminate parental rights where the patients' inability to comply with the performance agreement was caused by chronic mental illness. The trial court had concluded that it was in the best interests of the child to terminate parental rights but ruled that

247. *Id.* at 379.
249. 553 So. 2d at 379. The childrens' injuries included a fractured skull as a result of one youngster's head being struck against a door and the other suffering vigorous shaking.
251. *D.J.*, 553 So. 2d at 379; *see infra* notes 271-274 and accompanying text (analyzing transferred neglect).
section 39.467(2)(c), Florida Statutes, prevented the termination. The facts of the case indicated that the mother suffered from chronic mental illness, and it was quite unlikely that she would ever be able to safely raise her son. The appellate court concluded that the legislature did not intend to preclude termination of parental rights when chronic mental illness of the parent prevents return of the child. The court relied upon the legislative enactment, which refers to the location of a permanent stable placement for children resulting either in the return home or adoption. The appellate court also concluded that a condition which is beyond the parent’s control cannot be used to categorically preclude the termination of parental rights and placement for adoption; to do so would be to frustrate the statute. The court explained that there might be circumstances beyond the parent’s control which are of a temporary nature. In situations unlike J.A. where prompt safe return of the child to the parent is a realistic possibility, the protection makes sense.

The issue of prospective neglect continues to appear in the appellate case law, although the legislature amended Chapter 39 of the Florida Statutes in an effort to define the concept. In Caso v. HRS, the appellate court affirmed a judgment terminating parental rights of a mother with long standing and significant psychiatric problems. Relying upon earlier case law upholding termination of parental rights

253. *Id.* at 357. Fla. Stat. § 39.467(2)(c) (Supp. 1990) states:

(2) For the purpose of determining the manifest best interests of the child, the court shall consider and evaluate all relevant factors, including, but not limited to:

(c) The present mental and physical health needs of the child and the future needs of the child to the extent that such future needs can be ascertained based on the present condition of the child.

254. *J.A.*, 561 So. 2d at 357.

255. *Id.* at 359-60.

256. *Id.* (relying upon the decision in Interest of T.D., 537 So. 2d 173 (Fla. 1st Dist. Ct. App. 1989) (holding that parental rights should not ordinarily be terminated on the basis of a temporary deficiency beyond the parent’s control)); *see also* Interest of R.D.D. Jr., 518 So. 2d 412 (Fla. 2d Dist. Ct. App. 1988).


258. 569 So. 2d 466 (Fla. 3d Dist. Ct. App. 1990).

259. *Id.* at 471.
based upon the concept of prospective neglect, the court applied both past factual information and its own projection about what would occur in the future to uphold the termination. Specifically, the appellate court found that the mother had failed to get medical care for her son, failed to provide medication, failed to adequately supervise him, failed to comply with a performance agreement, and failed to complete counseling. Additionally, the court found that the mother's psychiatric history and past behavior would create a potentially significant impairment of the child's mental and physical condition. The court concluded that the mother had deprived the child of a physically and emotionally safe environment in the past and that such deprivation would appear certain to occur in the future.

Chief Judge Schwartz dissented and, while bluntly recognizing there were serious shortcomings in the mother, concluded that there was no demonstration that the mother had forfeited parental interest as defined under the Florida termination of parental rights statute. Chief Judge Schwartz applied the same standards set out in a series of dissenting opinions written over the past several years by Judge Coward of the Fifth District Court of Appeal.

In *In Interest of D.J.S.*, decided this past year in the First District, can itself serve as an outline of the many issues confronting the courts in matters of termination of parental rights. It is an en banc reversal of a decision which had reversed a trial court order terminat-

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261. Caso, 569 So. 2d at 468.

262. Id. at 471.

263. According to the Chief Judge, "the court's opinion conclusively demonstrates in agonizing detail that [the child] would have been far better off with the mother different from the early-flawed and seriously ill woman who gave him birth." Id.

264. See Letts v. HRS, 547 So. 2d 328, 330 (Fla. 5th Dist. Ct. App. 1989); Manuel v. HRS, 537 So. 2d 1022, 1024 (Fla. 5th Dist. Ct. App. 1988); Gunter v. HRS, 531 So. 2d 345 (Fla. 5th Dist. Ct. App. 1988); Fredrick v. HRS, 523 So. 2d 1164, 1167 (Fla. 5th Dist. Ct. App.), review denied, 531 So. 2d 1353 (Fla. 1988); see also Dale, 1989 Survey, supra note 12, at 895-99 (discussing the issue of prospective neglect).

ing parental rights. The major issues concern the standard of review for the termination of parental rights, the tests for child abuse and child neglect, whether abuse and neglect can be applied prospectively, when a finding of dependency may be transferred from one child to the other, and what constitutes compliance with performance agreements under Florida law. 266

Before analyzing the majority and minority views on these issues, it is necessary to discuss two procedural matters which appear in the opinion. First, the dissents argue that *en banc* rehearing was predicated in part on the ground that this was a case of exceptional importance involving the application of the United States Supreme Court holding in *Lehr v. Robinson*267 and the Florida Supreme Court opinion in *Doe v. Roe.*268 In *Lehr,* the Supreme Court held that a putative father who had not developed a substantial relationship with his child had no constitutional right to challenge his child's adoption.269 The Florida Supreme Court ruled similarly in *Doe.* Careful reading of both the majority and minority opinions in *D.J.S.* demonstrates that the issue decided in *Lehr* and *Doe* was not dealt with in the *en banc* redetermination. There is no explanation as to why this was the case.

The second procedural issue related to the content of the record on appeal. The dissent argued that a number of documents, which it viewed to be crucial, were missing from the record.270 Apparently missing were the performance agreements with which the department claimed the father failed to comply, prior proceedings, motions, orders and reports which the trial court judicially noticed, as well as the order of adjudication of dependency of July, 1986, reports from the guardian ad litem, and other reports. The majority concluded that these documents were not crucial to its determination.271

*D.J.S.* involved the termination of parental rights of two children of a man who was the putative father of one child (J.S.G.) and who, while not the natural father of the second youngster (D.J.S.), raised that child for some period of time while living with the child's mother.

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266. *Id.* at 661-69.
268. 543 So. 2d 741 (Fla. 1989).
270. *D.J.S.*, 563 So. 2d at 684.
271. *Id.* at 668 n.16.
When D.J.S. was 18 months of age, the appellant struck the child causing physical injury. He was subsequently charged with aggravated child abuse and pleaded nolo contendere.\textsuperscript{272} Approximately 16 months after the incident, D.J.S.’s mother gave birth to J.S.G. Appellant and the mother voluntarily placed the child with HRS. Thus, J.S.G. was never in appellant’s custody and D.J.S. was in his custody for a short period of time prior to the beating.\textsuperscript{273} Based upon a variety of assertions, including physical assaults, alcohol and drug abuse, incarceration, and failure to comply with performance agreements, HRS eventually sought to terminate parental rights. After a hearing with 16 witnesses over a four day period, the trial court terminated parental rights.\textsuperscript{274} On rehearing \textit{en banc}, the majority held that the standard of review of a termination proceeding, is that “a trial court’s determination that evidence is clear and convincing will not be overturned unless it may be said as a matter of law that no one would reasonably find such evidence to be clear and convincing.”\textsuperscript{275} The appellate court noted that it is not a matter of de novo review but rather, whether the decision is clearly erroneous or lacking in evidentiary support.\textsuperscript{276}

On the matter of child abuse, the issue was whether the proven criminal offense against D.J.S. could be used to support evidence of child abuse and subsequently a termination of parental rights as to J.S.G. The majority opinion, relying upon a series of majority opinions in other cases, concluded that it could.\textsuperscript{277} The court further held that the evidence of abuse as to one child could be used together with other evidence to predict abuse against the other child, in other words employing the tests of transferred intent and prospective neglect.\textsuperscript{278} The majority held that the battery of the child was not an isolated act and that the law did not require the child to continue to be at risk. As the majority rhetorically put it, “‘how much more should this child be forced to endure?’ . . . That question and response, ‘no more,’ fits here

\textsuperscript{272} Id. at 658.
\textsuperscript{273} Id. at 657-58.
\textsuperscript{274} Id. at 659.
\textsuperscript{275} D.J.S., 563 So. 2d at 661-62 (citing FLA. STAT. § 39.41(1)(f)3 (1989)).
\textsuperscript{276} Id. at 662 (citing The Florida Bar v. Hooper, 509 So. 2d 289, 290-91 (Fla. 1987)).
\textsuperscript{277} Id. at 663 (citing Interest of W.D.N., 443 So. 2d 493 (Fla. 2d Dist. Ct. App. 1984)).
\textsuperscript{278} Id. (citing the various cases discussed earlier in this survey article); see \textit{supra} note 260.
as well." On the issue of child neglect, the court held that despite the
fact that the father never had legal or actual custody of the child he
fathered, he could nonetheless be held accountable for neglect because
a duty is imposed upon him regardless of the child's circumstances.
The appellate court recognized that the appellant had made some ef-
forts on behalf of the children, but concluded that the trial court was in
the best position to determine whether the concern was genuine.

The court next ruled on the performance agreement. It held first,
as have other courts, that failure to comply with the performance
agreement cannot be the sole basis for a ruling terminating parental
rights. However, it recognized that failure to comply can be consid-
ered as one of a number of factors. Taken together with other evidence,
it found that the lack of compliance was an element to be considered in
terminating parental rights. The majority found that under Florida law
when there is no prospect that the parent can ever assume parental
responsibilities, it is appropriate to terminate parental rights.

The dissent disagreed vigorously about the facts in a detailed opin-
ion. Its stated purpose was to demonstrate that the evidence was leg-
ally insufficient. Therefore, in its view there was no question of excep-
tional importance to allow an *en banc* review. On the issue of abuse,
the dissent argued that the single episode of child abuse involving the
child D.J.S. and persistent aggressive and violent action toward the
mother, were not sufficient to prove that the father had abused J.S.G.
and that he was likely to abuse him in the future. According to the
dissent, the facts of this case did not match those of other cases where
abuse of one child could be transferred to another. On the issue of
neglect, the dissent again disagreed with the majority over the facts.
The dissent argued that the father did what he should have under the
circumstances to protect his children by contacting HRS. The dis-

279. *Id.* at 664 (citing J.M. v. HRS, 479 So. 2d 826, 828 (Fla. 2d Dist. Ct. App. 1985)).
280. *D.J.S.*, 563 So. 2d at 667.
281. *Id.* at 668 (citing Interest of P.A.D., 498 So. 2d 1342 (Fla. 1st Dist. Ct. App. 1986)).
282. *Id.* at 669-70 (citing *FLA. STAT.* § 409.168(1)(a) (Supp. 1986).
283. *Id.* at 672-81 (Zehmer, J., dissenting).
284. *Id.* at 686.
286. *Id.* at 688.
287. *Id.*
288. *Id.*
sent agreed that the father's failure to comply with the performance agreement cannot be the sole ground to terminate parental rights.\textsuperscript{289} It concluded that because the performance agreements were not before it, it was impossible to rule on this issue.\textsuperscript{289} Further, it concluded that the performance agreements were invalid because neither contemplated return of the child to the father's custody as, according to the dissent, Florida law requires.\textsuperscript{291}

At the heart of the dissent, and apparently independent of its view of the facts and impact of the decision on the individual parties, is its belief that the majority opinion sets bad legal precedent. "The extraordinary length of this dissent alone serves to convey my deep concern that the \textit{en banc} decision will be allowed to stand as bad legal precedent for seriously relaxing, if not judicially overriding, important statutory requirements governing the termination of parental rights."\textsuperscript{292}

It is not as clear that the majority misinterpreted the law as it is that it applied the law differently to the facts than did the dissent. However, it does seem odd that the case was heard \textit{en banc} in light of the fact that the issue raised in \textit{Lehr v. Robinson} was never discussed in the opinion. The last dissent, that of Judge Barfield, which expresses this view, was never rebutted by the majority.\textsuperscript{293}

\section*{V. Conclusion}

It remains to be seen what impact the new Justice Reform Act of 1990 will have on delinquency matters in Florida's courts. The state's current fiscal problems will make it more difficult to judge the impact of the law in the near term. Independent of the new statute, the appellate courts continue to chide the trial courts for failure to comply with

\begin{itemize}
\item \textsuperscript{289} \textit{Id.} at 689.
\item \textsuperscript{290} \textit{D.J.S.}, 563 So. 2d at 689.
\item \textsuperscript{291} \textit{Id.} at 690 (describing the statutory provisions in detail).
\item \textsuperscript{292} \textit{Id.} at 699.
\item \textsuperscript{293} \textit{Id.} at 700. According to Judge Barfield:
\begin{quote}
No where in the majority opinion is there a statement of the issue of exceptional importance upon which this case was considered \textit{en banc}. Reference is made to the order of supplemental briefing which suggested that the court was concerned about the application of [\textit{Lehr v. Robinson}], but no suggestion is made that this court passed upon this matter \textit{en banc}. Of course, it could not be because no issue of abandonment was ever present and none could be created.
\end{quote}
\end{itemize}

\textit{Id.}
rudimentary statutory obligations. Undoubtedly, these appellate lectures will continue under the new law.

On the dependency side, in addition to expressing similar concerns about obvious failures to comply with statutory authority, the appellate courts continue to express concern about the right to counsel provided by statute to parents in termination cases. Most of the intermediate appellate courts approve of the doctrine of prospective neglect, although the subject awaits full resolution by the Florida Supreme Court.
Mediation: Part II: Mediation in Florida

Geraldine Lee Waxman*
Sharon Press**

In Mediation: Part I: Background and Overview\(^1\) mediation as a process was discussed. This article expands both on the philosophy of mediation and on the mediation process itself, especially as it has evolved in Florida.

I. THE ESSENCE OF MEDIATION

The mediation process starts when the parties have tentatively decided to explore mediation as an option to resolve a dispute. In the first session, it is the mediator's responsibility to explore the various forms of dispute resolution with the parties. Litigation, negotiation, and arbitration are all discussed. Once mediation is agreed upon as the best alternative, the procedure begins.

A. What Mediation is Not

Mediation is neither the practice of law nor the practice of therapy. This is so regardless of the background of the mediator. Thus, although the mediator may explore the legal issues facing the parties and may provide the parties with legal information, the mediator is prohibited from imparting legal advice to the parties. An example of this would be a mediator's ability to discuss what spousal support is but not whether or not a party is entitled to spousal support in their particular circumstance. Succinctly, the mediator's job is not to interpret the law, only to provide information about the law.

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B.  Mediator Neutrality

Mediator neutrality is crucial to the effectiveness of mediation. However, arriving at a clear definition has been the topic of frequent debate. There are two basic standards defining mediator neutrality. Neutrality is defined by the ethical standards for non-attorneys; neutrality contemplates the mediator as a non-judgmental, strict facilitator. Thus, if the parties are in accord, the mediator should be satisfied with their agreement. However, ethical standards promulgated by the American Bar Association for its attorney mediators recommend mediator accordance with the agreement only insofar as that agreement is "fair." The mediator who subscribes to the ABA's interventionist method of mediator neutrality must ultimately decide whether or not the agreement is "fair." This model may well place the burden for a successful agreement on the mediator since the mediator must explore his or her own biases, life experiences and experience as a mediator in defining "fair."

C.  Necessity of Party Presence

A mainstay of mediation as an approach to dispute resolution is the physical presence of the parties. Other dispute forms may or may not require the presence of the principals. However, in mediation it is essential for the parties to be present since "all decisions are to be made voluntarily by the parties themselves." An exception to direct involvement by the principals in mediation involves mediation of non-family civil disputes where a representative of the parties may empower the principals to participate in mediation. Such representatives have the ability to agree to settlement.

5. Id. at D3. But see Fla. R. Civ. P. 1.720(b)(1), 1.750(c).
D. **Informal Yet Structured**

Compared to litigation, mediation is a relatively informal process. Generally, the parties control the speed with which they move through the system. Thus, parties may wish to take several months, several weeks or several hours to complete the mediation. As long as no outside time constraints have been placed on the parties, the parties decide on how much time they need to work out an agreement. Additionally, parties who have voluntarily entered mediation may do away with much of the legal paperwork normally generated by a dispute.

The informality of mediation should not suggest, however, that mediation is without structure. Structure lies at the core of mediation. Once issues have been defined and discussed, and after a priority rating has been given to each, the mediator focuses the parties on specific areas to be addressed. Each issue, newly defined, becomes a building block toward the final agreement. Thus, the manner in which the mediator structures the issues to be discussed becomes central to the resolution of the dispute between the parties. The resolved issues are compiled until there is complete agreement regarding all issues.

E. **Confidentiality**

Mediation is an open process between parties that encourages problem solving. In order for the parties to be comfortable in their environment, they must be assured that they may explore all factors surrounding their disagreement, without fear of this exploration becoming detrimental at some subsequent point in time. "Being able to assure confidentiality of disclosure is crucial to reaching an agreement and may determine the success of the proceeding."

F. **Trust in the Mediator**

Finally, the parties need to trust the mediator. They must be able to trust the mediator to understand the problems of the parties and to assist them toward building an agreement, one step at a time. It has

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been suggested⁹ that the parties only begin to trust the mediator when the mediator has been able to hear two opposing views, recognize that they are different, and yet work with both as if they were compatible.¹⁰

II. THE MEDIATION PROCESS

While the mediator may occasionally be called upon to set limits for the parties, the burden of reaching agreement rests with the parties themselves. The mediation process is composed of many elements. Basic areas include (A) gathering relevant and pertinent information, including when necessary, the use of experts; (B) reframing the issues and focusing on interests of the parties; (C) exploring and providing options for the parties; and (D) conducting private caucuses when necessary.

A. Gathering Information and Objective Criteria

Inherent in any binding contract is the mutual disclosure of information and open exchange of that information between the parties. The exchange and disclosure must be sufficient enough to enable the parties to the contract to make an informed choice when consenting to it. Thus, the gathering of information is a necessary prerequisite, permitting the parties to ultimately agree. Sometimes the parties are unsure of what information is necessary or disagree as to what information should be involved in assisting them to make an informed choice. Essentially, all relevant, pertinent information must be brought to the table.

Because each of the parties is frequently at odds with each other regarding the accuracy of each other's claims, the mediator may discuss the use of an expert, agreed to by the parties, to resolve the dilemma of accuracy. The use of objective criteria and the utilization of an outside and neutral expert often resolve the issue between the parties. For example, the parties' disagreement about the value of a painting may be resolved with the use of an art appraiser. Of course, the parties must be in accord with the individual expert and the method used by him or her.

10. See G. ORWELL, 1984 (1949). Orwell's famous "double think" used by the bureaucrats is noteworthy for its similarity to the mediator's role in understanding divergent viewpoints without negating either.
B. **Reframing the Issues and Focusing on Interests**

When negotiators bargain over positions, they tend to lock themselves into those positions. The more you clarify your position and defend it against attack, the more committed you become to it . . . .

As more attention is paid to positions, less attention is devoted to meeting the underlying concerns of the parties. Agreement becomes less likely. Any agreement reached may reflect a mechanical splitting of the difference between final positions rather than a solution carefully crafted to meet the legitimate interests of the parties. The result is frequently an agreement less satisfactory to each side than it could have been.¹¹

When parties move away from their position and look to what their interests are, their differences narrow. The mediator’s ability to reframe and rephrase one party’s position to the other party is essential. For instance, one party’s “I want the house,” after exploring the interest of that party may become “I need to stay in the house until I find another house” or “I am concerned that I will not have any money or a place to live.” The true interest of the party, once uncovered and discussed between the parties, may be readily resolved.

C. **Exploring and Providing Options for the Parties**

The mediator must overcome several obstacles before the parties can begin to explore and provide each other with options that may lead to agreement. First, each party initially thinks only of his or her own self-interest, a common factor at the commencement of any disagreement; second, the parties tend to think that many ideas muddy the waters and often only advance one idea; third, the parties desire to immediately judge and concomitantly dismiss any new idea; and fourth, the parties believe that the sum of the whole is greater than its parts.

(1) Self interest: When each party is interested only in their own gain, agreement is limited. The parties must be made aware that only when both or all of them have something to gain will an agreement become viable. Thus, it is imperative for the mediator to explore and assist the parties in identifying shared interests. Once shared interests

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have been identified mutual benefits may be broached. For example, a husband and wife both want custody. This may be translated into the shared interest of both wanting time with the children. Rather than focusing on a self-interest, custody, the parties have identified the shared interest, time with the children. From this shared interest the parties may explore and agree upon shared time and a specific method to accomplish this mutual interest.

(2) Issues versus options: Because parties seem to think only one idea is valid they limit themselves when making an attempt at problem solving. But no single answer is "the" answer. The more choices that are available to the parties, the more they have to review as possible solutions. Thus, the parties are more likely to come to an agreement. In short, the more there is on the menu, the less likely it is that anyone will be stuck with something they cannot digest.

(3) Judging too soon: Parties tend to look at new ideas and dismiss them immediately. One of the mediator's functions is to inform the parties that creating a new option is not necessarily agreeing to that option. The creation of options is merely an attempt at exploring "possibilities."

(4) The sum of the whole: One of the best examples of redefining the whole is exemplified in Fisher and Ury's famous story about an orange. Two parties insist on owning an orange. Eventually the orange is divided in half. Neither party has their needs met: yet, one party needed the peel for an orange cake and the other party needed the pulp for orange juice. Had they both explored their needs differently each would have received not half but one hundred percent of the pie — or orange!12

D. Caucus

Another key element to the process of mediation is the use of the caucus. At one or several points during the mediation process, it may be necessary to separate the principals and have private time with each one. The caucus allows the mediator to (1) probe the separate interests of a party; (2) permit a party to vent anger without escalating hostility; (3) reinform a party on a point without dis-empowering that party; (4) request more information from a party; or (5) discuss matters on an individual basis. When all the parties have been informed at the outset that caucusing is sometimes used and why, the caucus can become an

effective tool in the arsenal of the mediator and, when used properly, can move the parties quickly and smoothly to agreement. When used improperly or overused, it can create conflict and mistrust where there was none. Parties subjected to continual caucus often feel betrayed by the process because of their lack of control of that process. As a procedural tool, the mediator must be very cautious in using separate and private time with each party taking care not to alienate the other party.

III. HISTORY OF MEDIATION IN FLORIDA

Florida's first formal entry into the field of mediation began in May of 1975 when Dade County opened a CDS (Citizen Dispute Settlement) Center. This corresponded to a similar occurrence in several other states. The early success of this program led to expansion to other counties, many of the programs being affiliated with the State Attorney's offices. As of 1990, twelve judicial circuits established CDS programs and another two circuits are in the process of establishing these programs.

Also in 1975, the first juvenile arbitration/mediation program opened in Duval County (Jacksonville). These programs, designed to deal with children in need of supervision, have been established in different ways — some through the courts and some through HRS. Furthermore, the methods used to resolve the conflicts vary from straight mediation (where the neutral does not make any decisions for the parties) to straight arbitration (where the neutral makes of finding for the parties) to mixed mediation/arbitration process.


15. Bridenback, supra note 14, at 571.

16. J. Mason & S. Press, Florida Mediation and Arbitration Programs: A Compendium (July 1990) (available at the Florida Dispute Resolution Center) (the following circuits report the use of a CDS program: 4th, 5th, 6th, 7th, 9th, 10th, 11th, 12th, 13th, 17th, 18th and 20th; the 3rd and 19th circuits are in the development stage).

17. See generally R. St. Onge Kadlec, Florida Juvenile Arbitration/Mediation Programs (March 1, 1984); J. Kassack, Outcome Evaluation Report: A First Step Toward Accountability 155-66 (Dec. 31, 1989) (Both articles are HRS reports and are available at the Florida Dispute Resolution Center).

18. The Florida Dispute Resolution Center will be publishing an updated study of juvenile arbitration/mediation programs by 1992.
The following year, 1976, legislation was introduced for both CDS and Juvenile Mediation/Arbitration programs. Neither effort was successful during this first attempt; however, juvenile arbitration legislation was adopted effective July 1, 1977. In January 1978, Chief Justice Benjamin Overton appointed the first Supreme Court Committee on Dispute Resolution Alternatives. Justice Hatchet served as chair to this committee which met eighteen times over the next two years.

That same year, Florida's first family mediation program was established in Broward County (Fort Lauderdale). The first attempt at state-wide legislation for family mediation, in 1978, was not successful, although the 1982 legislative session saw the passage of a family mediation statute with an immediate effective date. As of 1990, nineteen counties representing twelve judicial circuits established family mediation programs. These programs continue to be a popular alternative to the traditional court system. The use of mediation in divorce settings where children are involved has been strongly encouraged by the Family Courts Commission and the recent amendments to the mediation statute which require courts to send cases to family mediation under certain circumstances.

In 1984, the Florida Legislature created a study commission on Alternative Dispute Resolution chaired by David Strawn. The follow-
ing year, the commission released its first report recommending a comprehensive mediation and arbitration program for Florida’s courts. Over the next few years, mediation began to flourish in the State. In 1986, the first circuit civil mediation program opened in Lee County and the Florida Dispute Resolution Center was created by Chief Justice Parker Lee McDonald and Florida State University College of Law Dean Talbot “Sandy” D’Alemberte.

Shortly after the Center’s creation, the legislative study commission released its final report which included proposed legislation on court-ordered mediation and arbitration. The legislation was introduced unsuccessfully in 1986, but was passed when introduced the following year. This was truly a watershed year in the development of court-annexed mediation, not only for Florida but for the nation. The statute authorized “a court, pursuant to rules adopted by the Supreme court, [to] refer to mediation all or part of a filed civil action . . . .” The supreme court adopted rules of procedure which established for the first time three different types of mediation with specific qualifications

Letts, Marshall McDonald, Alan Sundberg, and Thomas Testa.


27. B. Duane & M. Bridenback, Florida Mediation Programs: A Compendium (1988) (available at the Florida Dispute Resolution Center). The Lee County program was established through the court administrator’s office and handled cases where the amount in dispute ranged from $5000 to $25,000. The program had one paid administrator and seven volunteer mediators. A total of 15 cases were handled during the initial year. Id.; see also J. Mason & S. Press, supra note 16, at 5-3 - 5-12. The program currently has a program director, a program specialist and a secretary as paid staff who handle all the mediation services for Lee and Charlotte Counties. One hundred part-time paid mediators handled the 61 cases mediated in 1989.

28. The Center was formed as joint program of the Florida Supreme Court and the Florida State University College of Law. Professor James J. Alfini was hired by FSU to be the Director of Education and Research for the Center and Mike Bridenback took on the role of Director of the Center.


30. FLA. STAT. § 44.302 (1987), recodified at FLA. STAT. § 44.102(2)(a) (Supp. 1990).

31. FLA. R. CIV. P. 1.700-1.780. The three types of mediation are county, family (divorce) and circuit (civil, non-family). The Florida Legislature in 1990 created the following definitions for the three types of mediation:

(b) ‘Circuit court mediation’ . . . means mediation of civil cases, other than family matters, in circuit court. If a party is represented by counsel, the counsel of record must appear unless stipulated to by the parties or otherwise ordered by the court.
for each. The cornerstone of the qualifications for each was training, but threshold educational and experiential qualifications were also set for family and circuit court mediation.\textsuperscript{32}

The 1987 legislation also authorized the establishment of a demon-

\begin{itemize}
\item[(c)] 'County court mediation' . . . means mediation of civil cases within the jurisdiction of county courts, including small claims. Negotiations in county mediation are primarily conducted by the parties. Counsel for each party may participate. However, presence of counsel is not required.
\item[(d)] 'Family mediation' . . . means mediation of family matters, including married and unmarried persons, before and after judgments involving dissolution of marriage; property division; shared or sole parental responsibility; or child support, custody, and visitation involving emotional or financial considerations not usually present in other circuit civil cases. Negotiations in family mediation are primarily conducted by the parties. Counsel for each party may attend the mediation conference and privately communicate with their clients. However, presence of counsel is not required, and, in the discretion of the mediator, and with the agreement of the parties, mediation may proceed in the absence of counsel unless otherwise ordered by the court.
\end{itemize}

\textbf{FLA. STAT. § 44.1011 (Supp. 1990).}

\textbf{32. See FLA. R. CIV. P. 1.760(a)(b)(c). The following qualifications were set: 1) County Court Mediators must complete a minimum of 20 hours in a training program certified by the Supreme court. FLA. R. CIV. P. 1.760(a); 2) Family Mediators must have a masters degree in social work, mental health, behavioral or social sciences; or be a physician licensed to practice adult or child psychiatry; or be an attorney or Certified Public Accountant licensed to practice in U.S. jurisdiction; and have at least four years practical experience in one of the above mentioned fields; and have completed a minimum of 40 hours in a mediation training course certified by the supreme court; or have a Masters degree in family mediation from an accredited college or university. FLA. R. CIV. P. 1.760(b); and 3) Circuit Court Mediators must be a former judge of a trial court who was a member of the bar of the state in which the judge presided; or be a member in good standing of the Florida Bar with at least five years Florida Practice; and complete a minimum of a 40 hour mediation training program certified by the supreme court. FLA. R. CIV. P. 1.760(c).}

Individuals who were currently mediating prior to the adoption of the rule were allowed to continue to mediate under a grandfather clause. See FLA. R. CIV. P. 1.760(d). By 1990, all mediators must be of good moral character and must complete a "mentorship." A "mentorship" for county mediators consists of the observation of four county mediations conducted by a certified county mediator and the conducting of four county mediations under the observation and supervision of a certified county mediator. FLA. R. CIV. P. 1.760(a)(2). A family mediator must observe two family mediations conducted by certified family mediator and conduct two family mediations under the observation and supervision of a certified family mediator. FLA. R. CIV. P. 1.760(b)(3). And a circuit mediator must observe two circuit mediations conducted by a certified mediator and conduct two circuit mediations under the observation and supervision of a certified circuit mediator. FLA. R. CIV. P. 1.760(c)(3).
stration site for the new statute. The 13th Circuit, Hillsborough County (Tampa), received state funds to implement the statute and rules, and an evaluation was conducted. While most observers thought that this would be the sole testing ground of the legislation, they were mistaken. Due to the interest of many skilled attorneys and former judges, private mediation companies and mediators fervently promoted the use of the large case mediation (small claims and family mediation programs were already fairly well established).

IV. RULES GOVERNING MEDIATION

Court-ordered mediation is governed by Chapter 44 of the Florida Statutes, Rules 1.700 - 1.760 Florida Rules of Civil Procedure, and several Florida Supreme Court Administrative Orders. The following is a review of the law and procedures which govern court-ordered mediation.

General rules of procedure were adopted to cover all types of mediation sessions, and specific rules of procedure were adopted for family and small claims mediation to cover the differences. In addition, qual-

35. See Fla. R. Civ. P. 1.740, 1.750. The rules for family mediation include the following:

Limitation on Referral to Mediation. Unless otherwise agreed by the parties, family mediation matters and issues may be referred to a mediator or mediation program which charges a fee only after the court has determined that the parties have the financial ability to pay a fee.

Fla. R. Civ. P. 1.740(c).

Appearances. Unless otherwise stipulated by the parties, a party is deemed to appear at a family mediation convened pursuant to this rule if the named party is physically present at the mediation conference.

Fla. R. Civ. P. 1.740(d).

Completion of Mediation. Mediation shall be completed within 75 days of the first mediation conference unless extended by order of the court.

Fla. R. Civ. P. 1.740(e).

Report on Agreement. If agreement is reached as to any matter or issue . . . the agreement shall be reduced to writing, signed by the parties and their counsel, if present, and submitted to the court. If counsel for any party is not present when the agreement is reached and does not sign the agreement or object in writing to the agreement within 10 days after receipt, the agreement is presumed to be approved by counsel and shall be filed with the court by the mediator.
ifications were established for each type of mediation.\textsuperscript{36}

The presiding judge is authorized to send all or any part of a civil case, filed in circuit or county court, to mediation,\textsuperscript{37} subject to exceptions adopted by court rule.\textsuperscript{38} Cases subject to these exceptions can only be sent upon written stipulation of the parties. In addition to these exceptions, cases which have been found to have "a significant history of domestic abuse which would compromise the mediation process" can not be referred to mediation.\textsuperscript{39}

The first mediation conference must be held within sixty days of the order of referral.\textsuperscript{40} The court or its designee, who may be the medi-

\textbf{FLA. R. CIV. P. 1.740(f)(1).}

The rules for small claims mediation include the following:

- **Scheduling.** The mediator shall be appointed and the mediation conference held during or immediately after the pretrial conference unless otherwise ordered by the court. In no event shall the mediation conference be held more than 14 days after the pretrial conference.

- **FLA. R. CIV. P. 1.750(b).**
  - Settlement Authority. If a party gives counsel or another representative authority to settle the matter, the party need not appear in person.

- **FLA. R. CIV. P. 1.750(c).**
  - Agreement. Any agreements reached as a result of small claims mediation shall be written in the form of a stipulation. After court review the stipulation shall be entered as an order of the court.

- **FLA. R. CIV. P. 1.750(d).**
  - See supra note 32.

- **FLA. STAT. § 44.102(2) (Supp. 1990).**

- **FLA. R. CIV. P. 1.710(b) (listing the following exceptions: appeals from rulings of administrative agencies, bond estreatures, forfeitures of seized property, habeas corpus and extraordinary writs, bond validations, declaratory relief, any litigation expedited by statute or rule, except issues of parental responsibility, and such other matters as may be specified by order of the Chief Judge of the Circuit).**

- **FLA. STAT. § 44.102(2)(b) (Supp. 1990).** This language was amended during the 1990 legislative session. The original language adopted in 1987 did not contain any restriction on referrals of domestic violence cases to mediation. The 1989 Legislature had enacted a broader restriction, effective January 1, 1990, which contained the following language: "A court may refer all issues relating to custody, visitation, or child support with the exception of those cases where there is a history of domestic violence, to mediation, if an appropriate mediation program has been established in the circuit or county over which the court has jurisdiction." FLA. STAT. § 44.302(1)(c) (1989) (repealed 1990). The courts reported that this language was overboard based on the high percentage of petitions for divorce which contain an allegation of domestic violence. If read strictly, mediation of family disputes would have been curtailed severely and cases which could have benefitted from the use of mediation would be prohibited from being referred.

- **FLA. R. CIV. P. 1.700(a)(1); but see FLA. R. CIV. P. 1.740(e) (described
ator, must notify the parties in writing within ten days after the order of referral of the date, time and place of the mediation conference.\textsuperscript{41} Within fifteen days after the order of referral, a party may make a motion to disqualify a mediator or to forego the mediation process.\textsuperscript{42} Sanctions, including the fees and costs of the mediator, may be assessed against any party who, absent good cause, fails to appear at a court-ordered mediation conference.\textsuperscript{43}

Mediation is to be completed within forty five days of the first mediation conference, unless extended by court order or by stipulation of the parties.\textsuperscript{44} Either party may apply to the court for interim or emergency relief at any time.\textsuperscript{45} Mediation will continue while the motion is pending unless the court or the mediator determines otherwise.\textsuperscript{46} Discovery may continue throughout the mediation process or be delayed by agreement of the parties.\textsuperscript{47}

\begin{itemize}
\item \textsuperscript{41} FLA. R. Civ. P. 1.700(a)(2). \textit{But see} FLA. R. Civ. P. 1.750(b) (described \textit{supra} note 35).
\item \textsuperscript{42} FLA. R. Civ. P. 1.700(b). Acceptable reasons to forego the mediation process include: the issue has previously been mediated or arbitrated between the same parties; the issue only presents a question of law; it is exempted from mediation pursuant to FLA. R. Civ. P. 1.710(b); or if other good cause is shown.
\item \textsuperscript{43} FLA. R. Civ. P. 1.720(b). This rule was specifically drafted to refer to appearance at the court-ordered mediation conference and not "good faith" participation or negotiation in the process. Such a requirement was deemed by the supreme court and their Committee on Mediation and Arbitration Rules to be unreasonable since mediation is by definition a consensual process. Appearance was defined in the 1990 Rule revisions to require that the following persons be physically present, unless stipulated to by the parties:
\begin{itemize}
\item (1) the party or its representative having full authority to settle without further consultation; and
\item (2) the parties counsel of record, if any; and
\item (3) a representative of the insurance carrier for any insured party who is not such carrier's outside counsel and who has full authority to settle without further consultation.
\end{itemize}
\textsuperscript{supra} note 35).
\item \textsuperscript{44} FLA. R. Civ. P. 1.710(a). In the original rules adopted by the court in 1988, mediation was to be completed within 30 days to ensure that mediation would be a speedy, low cost alternative. After two years of experience, the court was persuaded that parties and their attorneys were not abusing the process and that some cases legitimately needed more time to be resolved. \textit{Cf.} FLA. R. Civ. P. 1.740(e) (described \textit{supra} note 35) (allowing 75 days for the completion of family mediation).
\item \textsuperscript{45} FLA. R. Civ. P. 1.720(a).
\item \textsuperscript{46} \textit{Id}.
\item \textsuperscript{47} FLA. R. Civ. P. 1.710(c).
\end{itemize}
The rules of civil procedure provide a great deal of discretion to the mediator. In the initial set of rules adopted by the court, effective from January 1988 to June 30, 1990, court-ordered mediation could only be handled by a certified mediator.

In 1990, the rules were amended to provide the parties ten days from the order of referral to choose their own mediator by stipulation. This mediator can be a certified mediator, but if the parties agree otherwise, it need not be.

The supreme court has two standing committees on mediation and arbitration, one on rules and the other on training. The next phase for

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48. See Fla. R. Civ. P. 1.720(c)(d)(e). The mediator is in control at all times of the mediation session and the procedures to be followed and has the liberty to reschedule or adjourn the mediation at any time it is deemed to be inappropriate to proceed. Mediation may proceed without the presence of counsel if the parties agree and the mediator determines that it is appropriate to continue. In addition, the mediator may meet and consult privately with the any party or their counsel. Id. The mediator, however, was not given the authority to provide recommendations to the court in the event no agreement was reached by the parties. Fla. R. Civ. P. 1.730(a). The mediator is to report the lack of agreement to the court without comment or recommendation. Id. The 1990 Rule revisions allow the mediator to identify pending motions or outstanding legal issues, discovery process or other action by any party which, if resolved or completed, would facilitate the possibility of a settlement. Id.

49. Fla. R. Civ. P. 1.760 (mediators were certified by the chief judge of a circuit if they were deemed to have complied with the established qualifications); see supra note 32. Chapter 44 of the Florida Statutes was amended in 1990 (effective July 1, 1990) to remove certification from the local level and place it with the supreme court. Fla. Stat. § 44.102(4) (Supp. 1990).

50. Fla. R. Civ. P. 1.720(f). The rule provides:

Within 10 days of the order of referral, the parties may agree upon a stipulation with the court designating: (a) a certified mediator; or (b) a mediator who does not meet the certification requirements of these rules but who in the opinion of the parties and upon review by the presiding judge, is otherwise qualified by training or experience to mediate all or some of the issues in the particular case.

Id.

51. See J. Mason & S. Press, supra note 16, at C-1 - C-10. The Florida Supreme Court Standing Committee on Mediation/Arbitration Training was appointed in February of 1988 by Chief Justice Parker Lee McDonald. The committee chaired by Judge Frank Orlando was charged with: 1) recommending policies and procedures concerning the certification of mediator and arbitrator training programs; and 2) reviewing applications for the certification of such training programs and making recommendations to the supreme court by making other recommendations relating to the implementation of the provisions of the new rules governing mediation and arbitration qualifications and training, as deemed necessary. Id.

The Supreme Court Standing Committee on Mediation and Arbitration Rules was created by Chief Justice Raymond Ehrlich on July 26, 1989. Chaired by Lawrence
court-ordered mediation is to establish a code of conduct for court mediators, a grievance procedure and discipline process.52

V. CONCLUSION

This is an exciting time for dispute resolution. Mediation has made tremendous strides in Florida. In fact, Florida is becoming the "national showcase for court-ordered mediation."53

Watson, Esq., this committee was charged with evaluating the rules of civil procedure and making recommendations reflecting proposed amendments, recommending a set of Standards of Conduct. See J. Mason & S. Press, supra note 16, at D-1 - D-8 (evaluating Chapter 44, advising the supreme court of the need for changes and making any other recommendations as would improve the use of mediation and arbitration). Both committees continue to meet on a regular basis to establish policies on their respective issues.

52. See generally Fla. Stat. § 44.307 (1990) (the 1989 amendments to chapter 44 provided immunity to the full extent of a judge to all mediators appointed pursuant to the chapter).

Real Property — Florida Supreme Court Survey

Ronald Benton Brown*

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This article surveys the decisions made by the Florida Supreme Court between October 1, 1989 and September 30, 1990 which deal with real property. The six decisions concern condominiums, real estate sales, recording and wills. It is interesting that there are so few supreme court decisions in this area despite the fact that real estate is such an important and large part of the practice of law in this state.

I. CONDOMINIUMS - RECREATION LEASES

Association of Golden Glades Condominium Club, Inc. v. Security Management Corp.¹

In 1970, the developer of the Golden Glades Condominium filed a

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The author would like to thank his research assistant Keith Baron, class of '92, for his assistance, and would also like to thank Professors Joseph Grohman, Michael Masinter, and Donna Seiden for reading and commenting on parts of this paper.

¹ 557 So. 2d 1350 (Fla. 1990). Justice Overton wrote the opinion in which Chief Justice Ehrlich and Justices Grimes and Kogan concurred. Justices Shaw and Barkett concurred in the result only. Justice McDonald concurred with an opinion.
declaration of condominium. The condominium association\textsuperscript{2} immediately leased recreational property from the Golden Glades Club Recreation Corporation; the lease included a rent escalation clause. Later,\textsuperscript{3} the lessor merged with the developer and with the Security Management Corporation. As a result of the merger, Security Management became the successor landlord. Security Management brought this suit to collect what it claimed was due for the period between 1980 and January 1987 under the rent escalation clause.

The question originally posed to the court was whether section 718.401(8) of the Florida Statutes prohibited rent escalation under a lease entered into before June 4, 1975, when the statute became effective.\textsuperscript{4} After the district court entered its decision in this case, the legislature amended the statute, creating section 718.4015.\textsuperscript{5} The 1989 amendment\textsuperscript{6} was intended to clarify the 1988 amendment.\textsuperscript{7} The supreme court decided it would be appropriate to decide this case under the amended statute, rephrasing the certified question as: "TO WHAT EXTENT DOES SECTION 718.4015(2), FLORIDA STATUTES, PROHIBIT ENFORCEMENT OF ESCALATION CLAUSES IN LEASES ENTERED INTO PRIOR TO JUNE 4, 1975?"\textsuperscript{8}

The supreme court expressly rejected any claim that the 1988 amendment allowed the enforcement of escalation clauses contained in leases, like the lease in this case, entered into prior to June 4, 1975.\textsuperscript{9} The statute did not change how escalation clauses entered into prior to

2. The association, the Golden Glades Condominium Club, Inc., was apparently controlled at that moment by the developer.
3. The merger occurred in 1981.
4. 557 So. 2d at 1351.
7. As amended, the statute provides:
   (2) [I]t prohibits the enforcement of escalation clauses in leases related to condominiums for which the declaration of condominium was recorded prior to June 4, 1975, but which have been refused enforcement on grounds that the parties agreed to be bound by subsequent amendments to the Florida Statutes or have been found to be void . . . or which have been refused enforcement . . . .
8. 557 So. 2d at 1351.
9. \textit{Id.}
June 4, 1975 were to be enforced, but merely intended to "recognize established case law and establish a statutory prohibition for escalated rents pursuant to those escalation clauses due after October 1, 1988. This interpretation is also consistent with the 1989 amendment . . .". 

Under the existing case law, passage of section 718.401(8) in 1975 invalidated any rent escalation clause in an existing lease if a lessor and an association had intended to be bound by subsequent amendments to the condominium act. Consequently, the question in this case was whether this lessor had agreed to be bound by subsequent amendments to the Florida Statutes, but in this case, the lessor trying to enforce the rent escalation clause was not the original lessor. Nor was the current lessor one of the parties to the condominium documents in which there was an agreement binding the parties to subsequent amendments to the Florida Statutes.

Even though Security Management had become the lessor and also the successor to the developer, they were separate entities when the declaration and the lease were entered into, and it was "never alleged at trial that the lessor and developer should be viewed as one corporation and that the corporate veil should be pierced." Consequently, the existing case law was not applicable because it applied only to parties who had agreed to be bound by subsequent statutory amendments, and these had not.

The outcome of this case might have been different if such a claim had been successfully made at trial, and that leaves the reader to speculate on the precedential value of this case. The court might have been hinting at a willingness to pierce the corporate veil under these circumstances. Unfortunately, the court did not reveal why the successor, by a series of mergers, should not be bound by the agreements and the law, which would have bound one of the merged parties. Hopefully, the court did not intend to indicate that a business entity can escape its contractual obligations by merging into another entity.

The court also concluded that there was nothing to suggest that

10. The treatment of escalation clauses remained unchanged at least for claims arising prior to October 1, 1988.
11. Id. at 1355.
13. Golden Glades, 557 So. 2d at 1355 n.2.
the merger by itself was intended to change the terms of the lease.\textsuperscript{14} Therefore, the merger did not have the effect of adding to the lease the provision that the lease would subsequently incorporate amendments to the Florida Statutes, and that the subsequent merger of these parties, by itself, could not cause that change in the lease. This author cannot imagine any logical reason why it would have.

The petitioner had also claimed that the adoption of the definitions from the condominium declaration into the lease had the effect of also adopting into the lease the part of the condominium document whereby the parties would agree to be bound by subsequent amendments of the Florida Statutes. The court apparently found this argument did not merit analysis and simply ignored it.\textsuperscript{15}

Justice McDonald concurred. He pointed out that article 1, section 10 of the Florida Constitution prohibits any law impairing the obligation of contracts. He stated: “No matter how hard the legislature may try, it cannot affect the terms of a contract unless the contracting parties indicated an intent to allow it to do so and agreed to follow future legislative enactments. This did not happen here.”\textsuperscript{16}

Consequently, if the majority had found that this statute prohibited enforcement of a rent escalation clause entered into before the statute’s enactment, Justice McDonald would have voted to hold the statute unconstitutional.

II. REAL ESTATE SALES

A. Interstate Land Sales Full Disclosure Act

\textit{Samara Development Corporation v. Marlow}\textsuperscript{17}

The Interstate Land Sales Full Disclosure Act\textsuperscript{18} is a federal stat-

\begin{itemize}
\item 14. \textit{Id.} at 1355.
\item 15. \textit{Id.}
\item 16. \textit{Id.} at 1356 (McDonald, J., concurring).
\item 17. 556 So. 2d 1097 (Fla. 1990). Chief Justice Ehrlich wrote the opinion in which Justices Shaw, Barkett and Kogan joined. Justice Overton wrote a dissenting opinion in which Justice Grimes concurred. Justice McDonald dissented without opinion.
\end{itemize}
ute which was designed to protect consumers. It prohibits developers from engaging in certain activities\textsuperscript{19} and requires that developers disclose certain information by filing registration statements\textsuperscript{20} and making property reports available to prospective buyers or lessees.\textsuperscript{21} When these requirements are violated, the act provides that "[a] purchaser or lessee may bring an action at law or in equity . . . [and] the court may order damages, specific performance, or such other relief as the court deems fair, just, and equitable."\textsuperscript{22} When the seller in this case breached the contract,\textsuperscript{23} the buyer sought damages under this statute because the contract had limited his remedies to rescission of the contract or to specific performance.

The critical question was whether the Interstate Land Sales Full Disclosure Act even applied. The act exempts from coverage any sales contract which obligated the developer to erect a building within two years.\textsuperscript{24} The contract to buy a condominium unit, which this buyer had signed, required that the unit would be completed at a date less than two years from the date of the agreement. Consequently, the seller claimed it fit within the statutory exemption, but the district court had not agreed,\textsuperscript{25} and, in this decision, the Florida Supreme Court approved

\begin{quote}
this article will be to the U.S.C. sections. See also Beyond Consumer Protection: The Application of the Interstate Land Sales Full Disclosure Act to Condominium Sales, 37 U. FLA. L. REV. 945 (1985); R. BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 2.08 (1959).

22. \textit{Id.} at § 1709(a). Furthermore, the recovery may include "interest, court costs, and reasonable amounts for attorneys' fees, independent appraisers' fees, and travel to and from the lot." \textit{Id.} at § 1709(c).

23. It is not clear how the seller defaulted from either the supreme court's decision or from the district court's decision in \textit{Marlow v. Samara Development Corp.}, 528 So. 2d 420 (Fla. 4th Dist. Ct. App. 1988).

24. Section 1702 provides:
(a) Unless the method of disposition is adopted for the purpose of evasion of this chapter, the provisions of this chapter shall not apply to-

\begin{itemize}
\item[(2)] the sale or lease of any improved land on which there is a residential, commercial, condominium, or industrial building, or the sale or lease under a contract obligating the seller or lessor to erect such a building thereon within a period of two years.
\end{itemize}


25. \textit{Marlow}, 528 So. 2d 540.
of that conclusion. The basis of the holding was that because the buyer could not recover damages if the seller defaulted, this contract essentially gave the seller the choice of returning the buyer’s money rather than completing the project. Thus, the contract did not really obligate the seller to erect a building within two years, and so it did not fall within the statutory exception.

The seller had argued that the HUD guidelines provided otherwise and that the courts should defer to the judgment of the agency empowered to interpret and enforce the act. While the district court had recognized that principle, it had simply followed its own precedent in rejecting the exemption claim, but it felt constrained to certify the question, implicitly acknowledging the conflict between its holding and the HUD guidelines.

That was the point of Justice Overton’s dissent. He stated: “If I

26. Marlow, 556 So. 2d at 1099.
27. Id. at 1098.
30. The question certified was as follows:

Marlow, 528 So. 2d at 422; Marlow, 556 So. 2d at 1098. The reference to section 1710 is rather odd. That section deals the relief available to a person aggrieved by an order or determination of the Secretary of HUD. In all probability, this is merely a typographical error in the district court’s opinion which was inadvertently repeated by the supreme court. It should have been 15 U.S.C. §§ 1701-1720 (1982).

31. After establishing the authority of HUD under 15 U.S.C. § 1715 (1982), he examined the 1979 HUD Guidelines, the 1984 HUD Guidelines, and pointed out “numerous [Office of Interstate Land Sales Registration] advisory opinions which state that exemptions will be granted to complete the building within two years and the purchaser is not restricted from seeking specific performance.” Marlow, 556 So. 2d at 1102 (Overton, J., dissenting).
were writing on a clean slate, I would have no problems reaching the conclusion of the majority." \(32\) But, he concluded, "I find that we must defer to the authorized federal agency's interpretation of the federal statute unless it is shown to be clearly erroneous." \(33\) The majority, however, found no conflict.

In examining the 1979 and 1984 HUD Guidelines, it found that the examples were to be merely illustrative, not exhaustive. The example of a non-exempt sale provided in the 1979 Guidelines was a contract which limited the buyer's right to seek specific performance. The example of a non-exempt sale provided in the 1984 Guidelines was a contract which provided that the breaching seller would be liable only for the return of the buyer's deposit. But these were not intended to establish the only types of non-exempt sales contracts. "The position indicated by these guidelines is clearly that the obligation to complete construction within two years must not be illusory." \(34\)

Furthermore, the court invoked two well established canons of statutory interpretation. First, a statute intended to protect the public should be liberally construed in favor of the public. Second, exceptions should be narrowly and strictly construed. It used these, apparently, as the basis for adopting a liberal definition of "illusory." \(35\)

Whether a contract is illusory is a matter of state contract law on which the Florida Supreme Court is the highest authority. The court concluded that under Florida law, "without the availability of at least both specific performance and damages the obligation to complete construction within two years is illusory." \(36\) Therefore, this contract did not fit within the statutory exemption, and the buyer was entitled to the statutory remedy.

The majority, however, pointed out that the dissent relied on advisory opinions issued during a six month period during 1982 and that there were earlier and later advisory opinions which were contradictory. More importantly, the advisory opinions may have been based upon counsel's representation of state law. \(Id.\) at 1100 n.2.

32. *Marlow*, 556 So. 2d at 1102.
33. \(Id.\)
34. \(Id.\) at 1099-1100.
35. \(Id.\) at 1101. The author suggests that the conclusion of the court that this obligation is illusory is only for the purposes of deciding whether this sale is exempt from the Interstate Land Sales Full Disclosure Act and is not to suggest that such a contract is illusory for any or all other purposes.
36. \(Id.\) at 1101.
B. Closing Practices

Warren Finance, Inc. v. Barnett Bank of Jacksonville\(^\text{37}\)

This case does not deal directly with real property. It deals with cashier's checks. However, it is included in this survey because it reflects upon a common practice at real estate closings.\(^\text{38}\) Real estate purchase contracts frequently provide that the buyer will pay the purchase price, above new or existing mortgages, by cashier's check. The buyer has the cashier's check made out to himself or herself, and then at the closing, endorses the cashier's check over to the seller. Buyers follow this practice so that if the closing is aborted, it will be easy for them to deposit the check into their own accounts. This practice raises several questions for the seller and his or her attorney. Does the contract require the seller to accept that endorsed cashier's check? Is the seller taking any additional risks by accepting that check?

In *Warren Finance*, the supreme court was presented with the following certified question: "MAY THE ISSUING BANK ASSERT THE DEFENSES OF A PAYEE OR ENDORSEE AGAINST THE RIGHT OF A SUBSEQUENT ENDORSEE TO RECEIVE PAYMENT ON A CASHIER'S CHECK?"\(^\text{39}\) If the issuing bank could refuse to pay the check and escape liability by asserting the defenses of the payee or endorsee,\(^\text{40}\) then the seller taking the endorsed cashier's check would have an instrument which might not be paid for a greater number of reasons than if the seller had received a cashier's check made out to him or her directly. By accepting the endorsed check, the seller might be taking additional risks thereby losing some of the protection sought by having the contract provide for payment by cashier's check. Of course, whether the seller would be required to accept that check would depend on the terms of the particular contract, so informed parties should consider this case carefully before drafting a contract and negotiating its terms.

\(^{37}\) 552 So. 2d 194 (Fla. 1990). Justice McDonald wrote the opinion in which Justices Overton, Barkett, Grimes and Kogan and Chief Justice Ehrlich joined. Justice Shaw wrote a special concurrence.

\(^{38}\) The common practice referred to is namely, the closing of the sales transaction when the buyer pays the price and the seller delivers the deed.

\(^{39}\) *Id.*

\(^{40}\) *See infra* text and accompanying notes 50-60. Defenses of the payee and endorsee include fraud in the underlying transaction between the payee or endorser and the endorsee who is presenting the cashier's check for payment.
In this case, Barnett Bank issued three cashier's checks naming Redan as payee and Blossam and Butler as purchasers. The payee endorsed the cashier's checks to Warren who deposited them in its account at another bank. Having a change of heart, the payee and one of the purchasers convinced Barnett Bank to refuse payment based upon allegations that the endorsee had committed fraud. The endorsee brought this suit against the bank for the wrongful dishonor of the checks. The district court remanded the case to determine if Warren was a holder in due course, but this court quashed that decision, ordering the reinstatement of the trial court's judgment that the bank pay damages to the endorsee.

Two theories are currently in vogue regarding cashier's checks. One is the cash equivalent theory, which analogizes the cashier's check to a certified check. Under U.C.C. section 4-303, because a certified check has already been accepted by the certifying bank, it may not be dishonored "based either on its own defenses or the defenses of another party to the check" and so neither may the cashier's check. The court rejected this analysis.

The other approach is the note theory. Characterizing a cashier's check as a draft drawn by the bank upon itself, this theory relies upon U.C.C. section 3-118, which provides that such a draft is "effective as a note." Under the U.C.C., the defenses available against one presenting a note would depend on whether the person was a holder in due course. The court rejected this analysis too.

Rather than adopt either of these theories, the court pointed out

41. The payee sought to stop payment because Warren had allegedly breached other terms of their agreement by refusing to advance funds to Redan. *Warren Finance*, 552 So. 2d at 195.
43. *Warren Finance*, 552 So. 2d at 201.
44. U.C.C. § 4-303 (1987). The court prefers to refer to the Uniform Commercial Code sections rather than to the statutory counterpart, chapters 671-680 of the Florida Statutes. See *Warren Finance*, 552 So. 2d at 196 n.2. This discussion will follow the same format.
45. *Id.* at 197.
46. *Id.* (quoting U.C.C. § 3-118 (1987)).
47. See U.C.C. § 3-305 (1987).
48. It may also be possible to analogize a cashier's check to a letter of credit, which under U.C.C. § 5-114(2), a customer may enjoin the issuing bank from honoring due to fraud in the transaction if the presenter is not a holder in due course. However, further analysis of these three theories is beyond the scope of this article, which is to
that the U.C.C. lacks any provisions which govern the problem and that: "When used in place of a personal check or other negotiable instrument, the parties' expectation is that the cashier's check will remove all doubt as to whether the instrument will be returned to the holder unpaid due to insufficient funds in the account, a stop payment order or insolvency." Therefore, the court invoked U.C.C. section 1-103 and U.C.C. section 1-102(1) as the basis for giving prime importance to the commercial use of cashier's checks and expectations of people using cashier's checks.

It concluded that the issuing bank must not be placed in the middle of disputes about underlying transactions and that payees and endorsees must be able to rely upon the cash-like quality of cashier's checks, but, "[a] rule that would absolutely forbid a bank's refusing to pay the holder of a cashier's check would be inordinate." It adopted the rule that "upon presentment for payment by a holder, a bank may only assert its real and personal defenses in order to refuse payment on a cashier's check issued by the bank," and it went on to state that:

The only inquiry a bank may make upon the presentment of a cashier's check is whether or not the payee or endorsee is in fact a legitimate holder, i.e., whether the cashier's check is being presented by a thief or one who simply found a lost check, or whether the check has been materially altered.

It seems that the court is, in this dicta, narrowing the scope of "real

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49. Of course, a contrary argument can be made. The U.C.C. clearly provides the rules which apply to checks and, by not treating a cashier's check any differently, the drafters and the adopting legislatures have indicated an intent that these rules apply the same way to cashier's checks as they do to checks drawn by others.


51. This section provides that "[u]nless displaced by the particular provisions of this Act, the principles of law and equity . . . shall supplement its provisions." U.C.C. § 1-103 (1987).

52. This section provides that "[t]his Act shall be liberally construed and applied to promote its underlying purposes and policies," noting that one of these is "to permit the continued expansion of commercial practices through custom, usage and agreement of the parties." UCC § 1-102(2)(b) (1987).

53. *Warren Finance*, 552 So. 2d at 201.

54. *Id.*

55. *Id.*

56. *Id.*
and personal defenses" available to the issuing bank and thereby eliminating some, such as the failure of consideration in the purchase of the cashier's check. Whether the court really intended to go so far and whether subsequent courts will feel bound by this language is uncertain.

The language quoted above would seem to eliminate any reason for a seller to hesitate in accepting a properly endorsed cashier's check at a real estate closing. If only the court had stopped there. Unfortunately, the court created some uncertainty when it chastised the district court for its mistaken reliance on an Ohio case. In that case, one person was both the purchaser and payee of a cashier's check. He had purchased a car, paying for it with a cashier's check that he endorsed over to the car's seller. Upon discovering the condition of the car had been misrepresented, the purchaser/payee convinced the issuing bank to refuse payment. The Ohio court had held that the issuing bank could, in its discretion, refuse payment at the request of the purchaser/payee without incurring liability.

The Florida Supreme Court emphasized that the Ohio case was distinguishable, correctly stressing that the case before the court did not deal with a purchaser/payee as did the Ohio case. What follows begins — "[m]oreover, banks cannot be permitted . . . ."60 Moreover means "in addition to what has been said."61 The problem is that the opinion did not clarify to what the addition applied. Is it in addition to what had already been said about the reasons the Ohio case should not have been followed, i.e., does it mean that, in addition to being factually distinguishable, the Ohio case is also badly reasoned and would not have been followed even if not distinguishable? Or was the court simply reiterating the reasons for its holding without considering the persuasive value of the Ohio case?

This author would suggest that the former is more likely the correct interpretation. The reasons that followed the "moreover" were that banks should not be allowed the discretion to refuse to pay cashier's

57. See U.C.C. § 3-408 (1987), entitled "Consideration." This section states that "[w]ant of failure of consideration is a defense as against any person not having the rights of a holder in due course (Section 3-305) . . . ."
59. Warren Finance, 552 So. 2d at 200.
60. Id.
61. Webster's New World Dictionary of the American Language 957 (College ed. 1964).
checks and that banks should not arbitrate disputes over the payment of cashier's checks. Both would occur if banks could refuse to pay the endorsee/holder of a cashier's check based upon another's defenses regardless of whether that third party was both the purchaser and the payee. Thus, it would seem what followed the "moreover" were additional reasons why the Ohio case should not have been followed even if it had not been factually distinguishable.

Such an interpretation would help eliminate some doubts which sellers of land may have about accepting an endorsed cashier's check as payment, and this author would certainly endorse such an interpretation. Unfortunately, it is merely dicta and unclear dicta at that. 62 While judicial conservatives will fault the court for going beyond the facts of this case, many members of the practicing bar will lament that the court did not go far enough. The rights of an endorsee/holder of a cashier's check which was purchased by the named payee/endorser have yet to be made clear and certain.

The uncertainty results, in part, from the existence of another possible interpretation of this case; the court may have been exercising judicial restraint and, therefore, the reasons after the "moreover" were simply a reiteration of the reasons, already expressed, for the holding. Why, one may ask, did the court go to the trouble of factually distinguishing that case if it intended to indicate that the reasoning of the Ohio court was erroneous? Why make a big deal out of the distinguishing facts if those facts were not significant enough to have produced a different outcome? But if the court did not disapprove of the Ohio case, it might be followed in the future in a case that is not factually distinguishable. That should concern real estate lawyers because the distinguishable facts in the Ohio case, which involved a purchaser/payee, 63 are exactly what would be encountered in a typical real estate closing.

If the supreme court did not intend to disapprove of the Ohio case, then why was it even raised? 64 The court might have simply been taking the district court to task for what it considered sloppy workmanship 65 in hopes of getting a better quality product in the future, but

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62. If only a phrase of clarification had been added. For example, "moreover, even if not distinguishable, this case is not persuasive because . . . " or "moreover, reiterating the reasons for our decision . . . ."

63. The purchaser of the cashier's check is also the purchaser of the real estate.

64. Of course, that is an excellent argument for the proponents of the first interpretation, i.e., that the court intended to express its disapproval of its reasoning.

65. The impression the court is complaining of (sloppy workmanship) may be based upon the court's language that "[t]he district court's reliance [on the Ohio case]
that hardly seems warranted by this district court decision. Rather, the court might have been leaving open the possibility that it might, at some time in the future, allow a bank to escape liability for wrongful dishonor, where a real estate buyer purchased a cashier's check, used it at closing to pay the purchase price by endorsing it over to the seller, and subsequently convinced the issuing bank not to honor it based upon a claim that the condition of the property had been misrepresented. That possibility, however remote it may seem, might encourage a disgruntled or unscrupulous buyer to try it, might encourage the bank to agree, and should concern sellers and their lawyers. Because of the language in this case, the real estate seller who accepts the endorsed cashier's check does so with the risk that the buyer might try to have the cashier's check dishonored and possibly succeed. Nor is it entirely clear, that the seller would be in any better position with a cashier's check made out directly to him or her.

This author doubts that the Florida Supreme Court, particularly in light of its recognition of the importance of facilitating commercial practices, intended to create this uncertainty or intended to discourage this use of cashier's checks. Under the current state of the law, sellers might be well advised to negotiate for a contract term which requires that the deed be held in escrow until the buyer's check has cleared. A land seller who accepts an endorsed cashier's check at closing should realize the risk, but if the contract merely provides for payment by cashier's check, he or she may have little choice but to take it and hold his or her breath until the check clears.

It may be advisable to do everything possible to minimize that time between accepting the check and its being paid by the issuing bank. The seller might bargain for a term in the contract which requires the cashier's check to be drawn on a local bank. The land seller/endorsee could immediately present the cashier's check at that bank for

is untenable." Warren Finance, 552 So. 2d at 200. Untenable seems an extreme word if the court was merely substituting its judgment for that of the lower court.

66. It is far beyond the scope of this article to suggest whether the lawyer for an issuing bank should consider dishonoring a cashier's check or whether it might incur liability by doing so. The point here is that a bank might actually do it and that could cause considerable harm to a real estate seller even if the bank is subsequently held liable or, as is more likely, the matter is subsequently settled.

67. It may certainly be argued that there is no legitimate reason to mention the Ohio case other than to leave the door open for a subsequent case to follow it without being inconsistent with this decision.
payment.\textsuperscript{68} Even if deposited at another bank, a local check would clear more quickly than an out-of-state check, and, therefore, be more likely to clear before there was time for the buyer to make a protest to the issuing bank. At the very least, the real estate seller should try to schedule the closing so as to minimize the time between the closing and the time when the check would normally be expected to clear.\textsuperscript{69}

Justice Shaw concurred specially in \textit{Warren}, noting that he would have preferred to adopt the cash equivalent theory, and he would have preferred that the court go no further than was necessary to decide this case. Since the bank in this case did not assert any real or personal defenses, it was, he stated, inappropriate to speculate upon the question of whether they could be asserted against the presentment of an endorsed cashier's check.\textsuperscript{70}

The uncertainty in the use of cashier's checks is a problem which could be quickly and easily solved by the legislature. It has not, thus far, been hesitant to modify the terms of the U.C.C., and, solving this problem would not require elaborate statutory surgery. Until that happens, or the supreme court has the opportunity to clarify this holding, the current practice of a seller accepting an endorsed cashier's check is under an unfortunate, and probably inadvertent, cloud.

\section*{III. Recording}

\subsection*{A. Title Search}

\textit{Erskine Florida Properties, Inc. v. First American Title Insurance, Inc.}\textsuperscript{71}

The court state the issue in this case as: "WHEN A PARTY CONDUCTS A TITLE SEARCH OF A PIECE OF PROPERTY AND SEARCHES ONLY THE DIRECT AND INDIRECT ALPHABETICAL INDEXES, CAN IT BE HELD LIABLE FOR FAILING TO DISCOVER AN IMPROPERLY INDEXED

\textsuperscript{68} Perhaps the land seller might present it to the issuing bank and obtain, in exchange, a cashier's check in which he is the named payee and the purchaser. Asking for cash will probably result in a ridiculous delay, possibly refusal for lack of sufficient cash, and the unpleasant attention of both the D.E.A. and the I.R.S.

\textsuperscript{69} For example, the closing should be scheduled so there is no weekend between the closing and the anticipated payment of the check by the issuing bank.

\textsuperscript{70} 552 So. 2d at 201 (Shaw, J., concurring specially).

\textsuperscript{71} 557 So. 2d 859 (Fla. 1989). Justice Shaw wrote the opinion for an unanimous court.
CLAIM?" The question could probably be better stated by asking if an abstractor could be held liable for failing to discover an outstanding interest which was not properly indexed in the official grantor-grantee indexes but was discoverable in another index. Both questions are answered by the word "yes."

Erskine contracted for First American to provide a title search. First American searched only the "alphabetical indexes maintained in the county clerk's office," but failed to discover a third party's superior interest because evidence of that had not been properly indexed. The interest could, however, have been discovered by reference to a computerized index system which identified the parcels by numbers.

The court reasoned that an abstractor has contracted to determine what is in the public record. Therefore, the abstractor may be held liable for breaching that contract if the search is not conducted "skillfully and diligently." The problem in this case is that the plaintiff had not introduced any expert evidence that the search failed to meet this standard. The evidence did show, however, that an index organized by parcel numbers existed which the abstractor admitted was relied upon "as a security check," although "her office caution[ed] abstracters not to rely solely on [it] . . . ." The supreme court found that this was sufficient evidence to support the trial court's conclusion that the abstractor had failed to perform its contractual duty.

72. Id.
73. Id.
74. A more complete explanation of the facts may be discovered in the district court's opinion, but it is not necessary for the discussion here. See First Am. Title Ins. Co. v. Erskine Florida Properties, Inc., 528 So. 2d 1229 (Fla. 4th Dist. Ct. App. 1988).
75. The abstractor testified that parcels of land are assigned an identification number and that number is used when the information is entered into the computer. Erskine, 557 So. 2d at 860.
76. Id. (quoting with approval Williams v. Polgar, 391 Mich. 6, 20, 215 N.W.2d 149, 157 (1974)).
77. See, e.g., First Am. Title Insurance Co. v. First Title Serv. Co., 457 So. 2d 467 (Fla. 1984); Stickler v. Indian River Abstract & Guar. Co., 142 Fla. 528, 195 So. 195 (1940). Note that this impliedly, though not expressly, overrules the holding in Kovaleski v. Tallahassee Title Co., 363 So. 2d 1156 (Fla. 1st Dist. Ct. App. 1978).
78. Erskine, 557 So. 2d at 860 (quoting First Am. Title Insurance Co., 457 So. 2d at 472).
79. This was the point on which the trial court's judgment for the plaintiff had been reversed by the district court. See First Am. Title Insurance Co. v. Erskine Florida Properties, Inc., 528 So. 2d 1229 (Fla. 4th Dist. Ct. App. 1988).
80. Erskine, 557 So. 2d at 860.
81. Id. More informative is the dissent of Judge Letts in the district court's opin-
The court may seem to be adopting a rule that an abstractor must examine any secondary indexes which are available, but the court did not necessarily go so far. It only found that the evidence here was sufficient to uphold the trial court’s decision. Thus, the holding is merely that an abstractor can be found liable, without the introduction of expert testimony on the level of care and skill required, for failing to find a misindexed encumbrance which could not have been found in public records but could have been found in a secondary index. The court pointed out that “First American was free to introduce its own experts to show that it conducted a skillful and diligent search.” The outcome of this case might have been different if the abstractor had introduced expert evidence to show that the standard in that county did not require searching both indexes.

Furthermore, confusion is created by the fact that the court never stated whether the second index involved was an official index or a privately owned index. Nor is there anything in the district court’s opinion to clarify that point. It seems possible that the parcel identification index here was an official index, but even so, this case may be opening the door to a future holding that an abstractor cannot rely solely upon the official index if a highly regarded private index exists. Abstractors and title searchers should be concerned.

B. Lis Pendens

*American Legion Community Club v. Diamond*

Under the doctrine of lis pendens, once litigation has commenced...
regarding title to land, any subsequent purchaser is bound by the outcome of that litigation. By statute, Florida has modified that doctrine by requiring the recording of a notice of lis pendens in the office of the clerk of the circuit court in the county where the property is located. Under the statute, the filing of the notice acts as a bar to all subsequent claims and also to any prior unrecorded claims unless the claimant intervenes in the proceedings within twenty days. The notice is only effective for one year "unless the relief sought is disclosed by the initial pleading to be founded on a duly recorded instrument . . . ." The district courts had produced inconsistent interpretations of that phrase. In *Diamond*, the Florida Supreme Court eliminated the conflict by providing the authoritative interpretation.

In the first suit, the American Legion Community Club (hereinafter "Club") had sued to cancel a lease to Murray Diamond. Diamond counterclaimed and also filed a third party complaint against Del Rossi Enterprises, Inc. The trial court held that the lease was valid and awarded Diamond damages on its third party complaint. On the day of the trial court's decision, the Club conveyed the land to Del Rossi. Three years later, on November 19, 1987, Diamond sought the forced sale of the property to satisfy his judgment against Del Rossi. Unfortunately, in the interim, the property had already been the subject of a settlement agreement in another suit.

In the second suit, the American Legion Department of Florida (hereinafter "Department") had filed suit alleging, *inter alia*, that the

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87. *Fla. Stat.* § 48.23 (1985). Although the statute has not been modified since its 1985 enactment, this discussion will refer to the 1985 codification which was the topic of this case.

88. Id. at § 48.23(1)(b).

89. Id. at § 48.23(2).

90. See *Diamond* v. American Legion Community Club, 544 So. 2d 239 (Fla. 3d Dist. Ct. App. 1989) (the case which the Florida Supreme Court was reviewing); Albega Corp. v. Manning, 468 So. 2d 1109 (Fla. 1st Dist. Ct. App. 1985); Berkley Multi-Units, Inc. v. Linder, 464 So. 2d 1356 (Fla. 4th Dist. Ct. App. 1985); Mohican Valley, Inc. v. MacDonald, 443 So. 2d 479 (Fla. 5th Dist. Ct. App. 1984); Chapman v. L & N Grovel, Inc., 244 So. 2d 154 (Fla. 2d Dist. Ct. App. 1971).

91. The basis for this suit was the claim that the corporate officers who made the lease lacked the necessary authority.

92. The basis for the third party complaint was that Del Rossi had "intentionally and maliciously interfered with the lease agreement between American Legion Community Club and Diamond." 561 So. 2d at 270.

93. That decision was affirmed. See *American Legion Community Club v. Diamond*, 461 So. 2d 130 (Fla. 3d Dist. Ct. App. 1984).
deed to Del Rossi should be declared void. It filed a notice of lis pendens on June 27, 1985. In a settlement agreement, entered as a judgment on December 29, 1987, Del Rossi agreed to reconvey the property to the Department.

If the notice of lis pendens filed in the second suit was still effective when Diamond sought to execute its judgment from the first suit, then Diamond’s execution sale would fail because the sale would be subject to the outcome of the first suit, i.e., the agreed reconveyance to the Department, and Diamond had no basis for executing against the Department’s property. In other words, Diamond would not be able to force the sale of the property which belonged to the Department to satisfy his judgment against the Club. However, if the Department’s notice of lis pendens had expired when Diamond sought the execution sale, that sale would take priority over the agreement to reconvey to the Department. The sale was more than one year after the filing of the lis pendens in the second suit, so the notice would no longer be effective unless “the relief sought [was] disclosed by the initial pleading to be founded on a duly recorded instrument . . . .”

The second suit was based upon the claim that the deed was void because it was “neither considered nor approved by the requisite number of members of the Executive Committee, Board of Directors, and Board of Trustees . . . and there was a total absence of consideration.” The court noted that these were circumstances surrounding the execution of the deed. In pointing out the conflict among the districts, the court quoted from a Fourth District decision to the effect that the crucial point should be whether notice of potential litigation was afforded by the recorded instrument itself. It contrasted a recorded mortgage, which by its nature gives notice to all that there is the potential for foreclosure, with the recording of a warranty deed, as occurred here, which does not give any warning that an action may occur to test its validity. While the court never expressly approved the Fourth District’s decision, it did state that it was “better reasoned” than the other decisions. The court concluded that a notice of lis pendens is

94. Diamond, 561 So. 2d at 271.
95. Id.
97. Diamond, 561 So. 2d at 270.
98. Id. at 271-72; see Berkley Multi-Units, Inc. v. Linder, 464 So. 2d 1356, 1357-58 (Fla. 4th Dist. Ct. App. 1985).
99. Diamond, 561 So. 2d at 272.
founded upon a recorded instrument only when the claim is based upon the terms and provisions contained in the document. To do otherwise, it stated, would practically eliminate the one year limitation.

The court further dismissed any claim that Diamond was bound by the outcome of the second suit because he had constructive notice of it. The court relied upon the plain language of the statute that "[n]o notice of lis pendens is effectual for any purpose beyond one year . . . ." without further explanation, noting that the Department could have requested that the trial court extend the period of effectiveness of the notice. The implication is that any claim to extend the effectiveness of the recorded notice had been waived.

IV. WILLS - MORTMAIN

Shriners Hospitals for Crippled Children v. Zrillic

Florida Statute section 732.803 (1985) was a mortmain statute. It provided that the spouse or lineal descendant could avoid a devise made to a "benevolent, charitable, educational, literary, scientific, religious, or missionary institution, corporation, association, or purpose . . . or a county, city or town . . ." if made within the six months preceding the testator's death. When her mother left the substantial residue of

100. Id. at 271.
101. Id. at 272.
102. Why he had "constructive notice" of it is not suggested. Probably, the claim was that the expired notice of lis pendens should have been discovered in the title search and, consequently, its existence in the record should have put the world on constructive notice even though it had expired.
103. Id. at 272 (emphasis supplied by the court).
104. Id. The court can grant an extension on reasonable notice, for good cause and subject to such terms as the court concludes that justice requires. FLA. STAT. § 48.23(1)(b) (1985).
105. 563 So. 2d 64 (Fla. 1990). Justice Barkett wrote the opinion for the court, joined by Chief Justice Ehrlich and Justices Shaw and Kogan. Justice Grimes wrote an opinion concurring with the result. Justice McDonald wrote an opinion, joined by Justice Overton, concurring with the result and dissenting in part.
106. FLA. STAT. § 732.803 (1985). Actually there may be some academic argument about whether the statute was really a mortmain statute, but that is of no great importance. Justice McDonald did state in Zrillic: "Our statute is not a mortmain act. The Legislature never intended by the enactment of the statute to place any restriction upon the right of benevolent, charitable, educational, or religious institutions to take and hold property . . . ." Zrillic, 563 So. 2d at 72 (McDonald, J., concurring in part and dissenting in part) (quoting Taylor v. Payne, 154 Fla. 359, 364, 17 So. 2d 615,
her estate to the Shriners Hospitals for Crippled Children, Lorraine E. Zrillic invoked the statute. The circuit court held that she had standing to invoke the statute, but that the statute was unconstitutional. On the latter point, the Fifth District Court of Appeal reversed.

Before it could reach the constitutional issue, the supreme court had to deal with the standing issue. It had been argued that the daughter, Lorraine Zrillic, did not have standing to invoke the statute because she has been expressly disinherited, except for the specific bequest of certain antique dishes and figurines. The statute provided that the devise could be avoided by a spouse or lineal descendant "who would receive any interest in the devise, if avoided . . . ." There was no doubt that the daughter was testator's lineal descendant, but it was argued that the testator's clearly expressed intent was that her daughter receive only that specific property. To give her part of the residue would violate the testator's intent, and the general rule of will interpretation is that the intent of the testator controls.

The court rejected the argument. It held that the statute was a specific statute which would, following the rules of statutory interpretation, supersede general rules like the rules of will construction. Further, the plain meaning of the statute did not deny standing to any lineal descendant simply because that descendant would otherwise be limited to a specific devise. More importantly, the purpose of the statute would be undermined if the only ones to have standing would be those that the testator intended to receive the devise because the point of the statute is to deprive an intended beneficiary of the property which the testator expressly intended it to have.

The court, however, found that the statute was unconstitutional on

618, appeal dismissed, 323 U.S. 666 (1944)).
107. Id. at 66.
108. Zrillic v. Estate of Romans, 535 So. 2d 294 (Fla. 5th Dist. Ct. App. 1988) had held the statute constitutional. Consequently, the daughter could invoke it to avoid the residuary devise to the hospital and the residue would then pass to her by intestate succession. Plaintiff, the testator's daughter, would be entitled to an intestate share.
110. Zrillic, 563 So. 2d at 66. There is no mention of an alternate residuary legatee, so Lorraine E. Zrillic would apparently inherit all or part of the residue under the laws of intestate succession.
111. Id.
112. Possibly the Shriner's argument was that the statute could only be invoked by a lineal descendant who was a residuary legatee, but even that makes little sense. Moreover, the point seems moot since the statute was held unconstitutional.
two grounds. First, it violated article I, section 2 of the Florida Constitution. Second, it violated the equal protection clause of both the Florida Constitution and the United States Constitution.

The Florida Constitution provides that all natural persons have the right to "acquire, possess and protect property" subject only to the exception that "ownership, inheritance, dispossession and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law." The court relied upon "a common sense reading of the plain and ordinary meaning of the language to carry out the intent of the framers as applied to the context of our times." The court concluded that the historical treatment of devise as a statutory right, rather than a common law property right, is an anachronism to be discarded, and as a property right, it would be protected by this provision.

Since the right to devise property is protected by the constitution, a statute which interfered with that right would be constitutional only if it was "reasonably necessary." The court concluded that this statute was not. The historical justification of mortmain statutes was "to restrict the church's ability to acquire property" and there is no comparable need today. Nor did the statute protect the testator's dependent or needy family from disinheritance. Family members were already adequately protected by other Florida laws, so this statute merely provided windfalls to some relatives, contrary to the wishes of the testator. It is important to note that the "reasonably necessary" standard may now be used as the test of any statute, i.e., probate statutes, which in any way may interfere with this newly recognized constitutional right.

113. Id. at 68-69.
114. FLA. CONST. art 1, § 2.
115. U.S. CONST. amend. XIV.
116. FLA. CONST. art. 1, § 2.
117. Zrillic, 563 So. 2d at 67.
118. Id. at 68-69.
119. Id. at 68.
120. Id. at 69.
121. Id. at 68.
122. See, e.g., FLA. CONST. art. X, § 4 (homestead exemptions for real and personal property); FLA. STAT. §§ 732.401-.4015 (1985); FLA. CONST. art. X, § 5 (a coverture restriction); FLA. STAT. § 731.111 (1985); FLA. STAT. §§ 732.201-.215 (1985) (an elective share as provided by the Uniform Probate Code); FLA. STAT. § 732.402 (1985) (personal property exemptions); FLA. STAT. § 732.403 (1985) (family allowance); FLA. STAT. § 732.5165 (1985) (protection against fraud, duress, mistake, and undue influence).
to devise property.

The court also found that the statute violated the equal protection guarantees of the Florida and United States Constitutions by creating a class of testators whose final wishes would be ignored without rational justification. The court found the statute to be both underinclusive and overinclusive. It was underinclusive in that it did not protect against the evils of gifts being made without proper deliberation or as a result of undue influence if the testator happened to live more than six months after the will was executed. Furthermore, it only protected against the possible overreaching by a narrow group of beneficiaries, while failing to protect against the dangers posed by "unscrupulous and greedy relatives, friends, or acquaintances." Conversely, it was overinclusive because it would allow avoidance of a charitable devise or bequest even though none of the evils feared had occurred simply because the testator died within six months after the will was executed. Consequently, the use of the six month dividing line was irrational and the statute was unconstitutional.

Justice Grimes concurred with the result. He expressed agreement with the court's conclusion that the statute violated the equal protection clauses of both constitutions, but disagreed with the court's conclusion that the right to leave property in a will was a constitutional right under the Florida Constitution. He emphasized that the mortmain statute had been upheld in 1944 despite similar language in the version of the Florida Constitution then in effect and "[n]othing has occurred since that date to suggest that this analysis was wrong." The majority, however, had pointed to that very case as an example of "unquestioned allegiance to an antiquated way of thinking," i.e., that case was overruled, not because of subsequent events, but due to the precedent's failure to properly analyze the matter.

Justice McDonald concurred with the result, but dissented in part.
He would have upheld the constitutionality of the statute because the right to leave property in a will has continuously been held to be merely a statutory right in Florida and because it is a rational way to protect testators' families from the danger that a testator will exercise poor judgment in the face of impending death.\textsuperscript{129} However, he would never have reached that issue. He had concluded that the plaintiff in this case did not have standing to invoke the statute because "[u]nder these circumstances other lineal descendants would be the residual legatees who would receive any voided bequests, not Mrs. Zrillic."\textsuperscript{130}

This statement leaves the reader with some confusion over the facts of the case which, unfortunately, cannot be not cleared up by reading the district court's opinion. Were there, as Justice McDonald suggests, other legatees named in the will who would divide the residue including the hospital's interest if its devise was eliminated by the statute? If so, then it makes little sense to hold that Mrs. Zrillic had standing because she would not have benefitted by invoking the statute, and the only possible reason for her invoking it would have been to spite the intended beneficiary, the hospital.

If, as may have been the case, there was no other residuary legatee, the residue property would have been divided between those entitled to an intestate share. As the deceased's daughter, Mrs. Zrillic should have taken the property, or at least a share in it, and so she should have standing to invoke the statute because it would have produced a benefit for her, unless the statute provided otherwise. Unfortunately, the statute was less than clear on this point and this opinion does not eliminate the confusion about the standing issue.

The statute provided that the devise could be avoided by a spouse or lineal descendant "who would receive any interest in the devise . . . ."\textsuperscript{131} Was Mrs. Zrillic given standing because invoking the statute would result in her taking more of her mother's estate, or did she have standing because she had received a specific devise under the will, even though that interest would not be enlarged by invoking the statute? This author would be shocked to learn that it was the latter, but it is certainly possible to interpret this decision as indicating that.

The focus on standing under the statute may seem pointless since the statute was held unconstitutional. However, it is worth considering because the legislature might attempt to enact a replacement statute.

\textsuperscript{129} Id. at 71.
\textsuperscript{130} Id.
\textsuperscript{131} FLA. STAT. § 732.803(c) (1985) (emphasis added).
Hopefully, the legislature would avoid creating a statute with similar shortcomings. Moreover, this case may be applied by analogy to other statutes and any precedent which creates confusion about standing may cause unforeseen problems in the future.

V. CONCLUSION

The year has not produced any particularly noteworthy developments in real estate law from the Florida Supreme Court or, for that matter, from the legislature\textsuperscript{132} or elsewhere.\textsuperscript{133} These decisions do not

\textsuperscript{132} Some may disagree and the author acknowledges that the legislature did significantly amend Florida Statute chapter 713, Part I, the mechanics' lien laws, even transforming "mechanics' liens" into "construction liens." 1990 Fla. Laws 109. In addition, it did: create section 695.26, Florida Statutes, which provides that no instrument affecting title to real property executed after July 1, 1991 may be recorded unless certain formal requirements are satisfied (e.g., names must be typed, printed or stamped legibly beneath each signature and a one and one half inch square at the top right hand corner must be left empty for the clerk's use), 1990 Fla. Laws 183; enact a statute providing immunity from civil suit by a trespasser under the influence of drugs or alcohol, 1990 Fla. Laws 140; enact the Mortgage Lending Act which requires the licensing of certain mortgage lenders, 1990 Fla. Laws 353; enact 1990 Fla. Laws 149 regarding mortgage insurance; amend Florida Statute ch. 723, the Florida Mobile Home Act, 1990 Fla. Laws 198; repeal section 421.102, Florida Statutes, which provided that a tenant of public housing could be evicted for certain drug offenses, but only the guilty person could be evicted and not the other members of the household, 1990 Fla. Laws 137; and amend the Residential Landlord and Tenant Act by requiring smoke detectors in single-famil and duplex homes and by allowing the landlord and tenant to enter a separate agreement absolving the landlord of liability or responsibility for storage of tenant's personal property after surrender or abandonment by the tenant, 1990 Fla. Laws 133.

\textsuperscript{133} There are, of course, a plethora of cases and some are interesting. \textit{See} Gerber v. Longboat Harbor North Condo., Inc., 724 F. Supp. 884 (M.D. Fla. 1989) (concerning the constitutionality of a condominium's rule prohibiting a member from flying the United States flag); Fish v. Post of Amvets #85, 560 So. 2d 337 (Fla. 1st Dist. Ct. App. 1990) (regarding sufficiency of a complaint in a quiet title suit); Whitice Bonding Agency, Inc. v. Levitz, 559 So. 2d 755 (Fla. 4th Dist. Ct. App. 1990) (regarding the priority of a corrective mortgage); Hopkins-Easton & Assoc., Inc. v. Santana Properties, Inc., 557 So. 2d 70 (Fla. 3d Dist. Ct. App. 1990) (clarifying the broker's right to both part of the forfeited deposit of a defaulting buyer and a commission on the subsequent sale to another buyer); Hall v. City of Orlando, 555 So. 2d 963 (Fla. 5th Dist. Ct. App. 1990) (regarding the appropriateness of granting an injunction against over-use of a drainage easement); Pelican Island Property Owners Assoc., Inc. v. Murphy, 554 So. 2d 1179 (Fla. 2d Dist. Ct. App. 1990) (regarding waiver or estoppel and the violation of deed restrictions by the building of a carport without the association's approval).
break any new ground or depart from established trends. Some of these opinions should be viewed with caution because of the uncertainties which they create.

Like last year,\(^\text{134}\) no discernable voting or decision patterns have emerged. Of the six opinions, Justice Overton wrote two and Justices Barkett, Ehrlich, McDonald and Shaw each wrote one. Justice Grimes, who wrote more real property decisions last year than any other Justice, did not write any this year, but he did write a concurrence. Only Justice Kogan seems to be uninvolved in real property,\(^\text{135}\) but that may simply be a product of the small sampling available.\(^\text{136}\)


\(^{135}\) Justice Kogan did not write any opinion, simply joining with the majority opinion in each of the cases.

\(^{136}\) Last year Justice Kogan wrote the opinion in *Gibson v. Courtois*, 539 So. 2d 459 (Fla. 1989) (holding that a buyer could not recover attorney's fees provided for by a contract which the buyer had successfully argued had never come into existence because the offer had never been accepted before it was revoked).
I. INTRODUCTION

Increasingly, science and the law are intersecting. Today, most scientific or professional disciplines provide expert testimony in courts. Product liability cases may involve engineering testimony and personal injury cases may involve medical testimony. Some criminal cases cannot be tried without the assistance of experts, e.g., a homicide in which the cause of death is testified to by forensic pathologists. With the advent of even more advanced scientific techniques such as DNA testing\(^1\) of blood, semen and tissue and increased reliance on science, there has been a corresponding proliferation of court decisions involving scientific evidence and expert testimony. This survey collects and discusses significant Florida opinions on scientific evidence and expert testimony reported in Florida between October 1, 1988 and January 1, 1991.

II. LAY WITNESS OPINION

Black's Law Dictionary defines opinion evidence as "evidence of what the witness thinks, believes or infers in regard to facts in dispute, as distinguished from his personal knowledge of the facts themselves."\(^2\) Opinion testimony as to matters readily perceptible by the jury, within their common knowledge, is inadmissible.

However, a lay witness may testify under certain circumstances in the form of an opinion. The Florida Evidence Code section 90.701 permits opinion testimony by lay witnesses when: (1) the witness cannot readily, and with equal accuracy, communicate what he has perceived

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1. DNA testing identifies individuals by their patterns of deoxyribonucleic acid (DNA) contained in their cells. Every individual, except an identical twin, possesses a unique genetic "blueprint" in his DNA. The first appellate court ruling on the admissibility of DNA evidence was in Florida. Andrews v. State, 533 So. 2d 841 (Fla. 5th Dist. Ct. App. 1988).

without resort to opinion; (2) the witness' use of opinion will not mislead the trier of fact; and (3) the witness' opinion does not require special knowledge, skill, experience or training. Therefore, under this rule lay witnesses typically are permitted to testify to matters such as height, a person's emotional state, etc. \textit{(i.e., those things perceptible by the senses)} because such matters do not require specialized education, training or skill to render an opinion.

Historically, Florida law has permitted lay witness identification of an individual, including identification by voice. In \textit{State v. Cordia}, the defendant, a police officer, was charged with making a false report of a bomb. The caller's voice was recorded on tape. The state sought to call as witnesses two police officers who had spoken to the defendant over the telephone but were not the individuals who had received the phone call. The tape was "routinely destroyed." Cordia moved \textit{in limine} to exclude testimony regarding the officers' opinion as to the identity of the voice. The trial court granted the motion and the state appealed. The Second District Court of Appeal held that the officers' testimony would not constitute an impermissible opinion as to the guilt of the accused.

The court found the facts in \textit{Cordia} not unlike those in \textit{Hardie v. State}, in which a store theft was recorded by a surveillance camera. The views afforded by the pictures were limited so the state brought in police officers who knew Hardie to identify him as one of the thieves. The appellate court approved the identification procedure.

The court in \textit{Cordia} distinguished this case from \textit{Ruffin v. State}, in which three officers testified at trial, over objection of defense counsel, that in their opinion the defendant was the man in a videotaped transaction between himself and a plainclothes police officer who was purchasing two pieces of a rock-like substance reputed to have been cocaine. The court held that this identification was an invasion of the province of the jury, and that these factual determinations were within

\begin{enumerate}
\item \textsc{Fla. Stat.} § 90.701 (1989).
\item 564 So. 2d 601 (Fla. 2d Dist. Ct. App. 1990) (per curiam).
\item \textit{id.} at 602.
\item 513 So. 2d 791 (Fla. 4th Dist. Ct. App. 1987), \textit{rev. denied}, 520 So. 2d 586 (Fla. 1988).
\item \textit{Cordia}, 564 So. 2d at 602.
\item 549 So. 2d 250 (Fla. 5th Dist. Ct. App. 1989).
\end{enumerate}
the realm of an ordinary juror's knowledge and experience. Therefore, in order for lay witnesses' opinions regarding identification to be admissible, the witnesses should either be eyewitnesses, or witnesses capable of independently making an identification from photographs, tape recordings or similar evidence. This was the case in Cordia, where the witnesses claimed to possess special knowledge of Cordia's voice characteristics beyond what a jury could conclude on its own.

Even lay opinions must meet certain predicates before they will be admitted. In Lawlor v. State, a manslaughter case, the lay witness resided approximately 100 feet from the highway where the collision occurred and testified that he was inside his house and heard a car pass at very high speed. He stated that the car was traveling so fast he did not hear it approach, and about two seconds after it passed, he heard the impact of the collision. The court found the testimony improperly admitted because of the absence of a sufficient predicate. The court stated that an "opinion as to the speed of the vehicle should be predicated upon certain identifying factors such as the weight of the respective vehicles involved, road conditions, and the coefficient of friction." However, the court held that because the speed of the vehicle was not an essential element of the offense of manslaughter by intoxication, the error was harmless.

III. EXPERT OPINION TESTIMONY

When scientific, technical or other specialized knowledge will be helpful to the trier of fact in understanding the evidence, the traditional method of supplying such information is through an expert witness' opinion. Section 90.702 of the Florida Evidence Code allows expert witness testimony if the court determines the information will assist the trier of fact. As part of this inquiry the court may be re-
quired to determine if a reliable body of scientific, technical or specialized knowledge has been developed. The second aspect of the court’s inquiry is to determine whether the witness proffered is qualified to give the testimony sought. A witness may be qualified as an expert on the basis of either knowledge, skill, experience, training, education, or a combination thereof.18

Expert opinion testimony is only admissible when it assists the trier of fact and does not invade its province. In *Vega v. City of Pompano Beach*,19 the court held that the trial court did not err in excluding the testimony of the plaintiff’s expert witnesses who were to testify as experts in aquatic safety sports and recreational facilities.20 The trial court refused to allow the proffered testimony because it was within the common knowledge of the jury. The appellate court held that expert testimony, while desirable, was not essential because the facts did not require any special knowledge or experience in order for the jury to form its conclusion.21 The court noted that “Florida courts have held that the question of whether expert testimony is essential in proving a particular issue is determined by the issue involved.”22 The issue in this case was within the ordinary understanding of the jury.23

A. Qualifications of an Expert

In *Cheshire v. State*,24 the appellant appealed from an order imposing a death sentence. He was found guilty of killing his estranged wife. Among other issues on appeal, Cheshire alleged that the trial court improperly qualified a person as an expert on blood-spattered evidence. The expert’s qualifications consisted of a forty-hour course, three prior qualifications as an expert, and his own field experience. The court, while agreeing that these qualifications were open to reasonable question on cross-examination, held that the trial court did not

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18. *Id.*
20. *Id.* at 596.
21. *Id.*
22. *Id.* (citing Alten Box Board Co. v. Pantya, 236 So. 2d 452 (Fla. 1st Dist. Ct. App. 1970)).
23. *Id.*
24. 568 So. 2d 908 (Fla. 1990).
abuse its discretion by admitting his expert testimony, since a reasonable basis existed to qualify the expert. In *Williams v. State*, the court also held that the trial court did not err in permitting the state to introduce the testimony of an officer with specialized knowledge on drug transactions. The court found that a reasonable basis existed to qualify his opinion as expert on the relationship between a large amount of cash and drug transactions in a prosecution for possession of cocaine with intent to sell.

However, not all experience qualifies one to provide an expert opinion. In *Adamson v. State*, the appellate court held that the trial court acted within its bounds of discretion in ruling that a police officer was not qualified to testify as an expert regarding the effects of cocaine.

In *Tarin v. City National Bank*, the court held that the trial court did not commit reversible error by excluding the investigating police officer’s opinions regarding whether a parking lot created an illusion that both vehicles in the accident had the right-of-way. The officer was not qualified as an expert in traffic accident reconstruction. The officer’s only training was acquired through employment with the Florida Highway Patrol for six years prior to the accident. Although he was involved in trooper and homicide investigations, he could not even describe what it entailed. He testified that he attended the Florida Highway Patrol Academy and received a certificate representing forty hours of training in traffic homicide and forty hours of training in accident reconstruction with a professor from the University of Miami. He was unable to provide a description of the training received. He testified that he had handled accidents, but did not state how many or over what period of time. The court held that the showing was too sketchy to qualify the officer as an expert in accident investigation or reconstruction.

In *Mathieu v. Schnitzer*, the appellant attempted to have an accident investigator declared an expert in accident reconstruction. Upon

25. *Id.* at 913.
28. 569 So. 2d 495 (Fla. 3d Dist. Ct. App. 1990) (per curiam).
30. *Id.* at 633.
31. *Id.*
32. 559 So. 2d 1244 (Fla. 4th Dist. Ct. App. 1990).
defense objection the court recognized the witness only as an expert in accident investigation, concluding that her qualifications were inadequate for her to testify as an accident reconstructionist.\textsuperscript{33} The appellate court, while conceding that a trial court's decision on the qualifications of an expert is ordinarily conclusive and entitled to great weight on appeal, ruled that the trial court applied erroneous legal principles in arriving at its decision.\textsuperscript{34} The appellate court concluded that the witness' experience in investigating the cause of accidents, and her years of work experience were sufficient to qualify her as an expert in accident reconstruction. The court reasoned that because there was no evidence of skid marks, debris, or point of impact, an accident reconstructionist's expert opinion would not be necessary.\textsuperscript{35} The appellate court found, based on the evidence, that expert testimony concerning the correlation between the bumper of appellee's car and appellant's injury was already within her expertise as an accident investigator.\textsuperscript{36}

Thus, although a trial court's decision on the qualifications of an expert witness ordinarily will not be overturned on appeal unless it is determined the trial court abused its discretion,\textsuperscript{37} such an abuse of discretion may be found when the court excludes proffered experts whose specialized training or experience established a \textit{prima facie} case of their expertise.\textsuperscript{38}

\begin{itemize}
\item \textsuperscript{33} Id. at 1245.
\item \textsuperscript{34} Id.
\item \textsuperscript{35} Id.
\item \textsuperscript{36} Id.
\item \textsuperscript{37} See Lewis v. State, 592 So. 2d 908 (Fla. 1990) (per curiam). The Florida Supreme Court held it was not error to exclude a psychiatrist's opinion regarding the eyewitness identification process, the effects of drugs on memory, and the unwarranted reliance of jurors on eyewitness testimony. \textit{Id.} at 911. The court found no abuse of discretion, especially in light of the psychiatrist's admission that he could not testify regarding the reliability of any specific witness, but could only offer general comments as to how a witness would arrive at such conclusions. \textit{Id.; see also} Johnson v. State, 393 So. 2d 1069 (Fla. 1980).
\item \textsuperscript{38} See Lake Hosp. & Clinic, Inc. v. Silversmith, 551 So. 2d 538 (Fla. 4th Dist. Ct. App. 1989) (the appellate court held the trial court erred by excluding the appellant's expert witnesses because they were not qualified to testify to Joint Commission on Accreditation of Hospitals (JCAH) standards. The appellate court noted that both experts were experienced in hospital administration and had special training or experience with JCAH standards); see also, Tallahassee Memorial Regional Medical Center, Inc. v. Meeks, 543 So. 2d 770 (Fla. 1st Dist. Ct. App. 1989). Appellants argued that the trial court erred in admitting the pathologist's testimony concerning the decedent's pre-death symptoms. Appellants argued the pathologist was not qualified to express an opinion because he had no personal knowledge of the pre-death symptoms, for the de-
In the case of *Laffman v. Sherrod*, the court reversed a ruling by the trial court permitting a police officer, who was not an eyewitness, to testify on the basis of field examination that the head lamp on a moped involved in a collision was not on at the time of the accident. In fact, the officer arrived on the scene several minutes after the collision. Since the officer was not qualified as an expert, the trial court ruled that there could be no cross-examination as to the basis of his opinion. On appeal the court found that the officer was not competent to render such an opinion. The trial court’s denial of cross-examination was illogical because the basis of a lay witness’ opinion is no less important than that of an expert.

In the same case, an expert in accident reconstruction and metallurgy was permitted to render an opinion based on an examination of orthopedic x-rays as to the cause of Laffman’s injuries. Such examination required knowledge or training in radiology or orthopedic medicine, which the expert lacked. However, the trial court, inconsistently, permitted the expert to render his opinion on causation, which was based upon the same study which was excluded as evidence. The appellate court held that this constituted substantial prejudicial error and reversed and remanded the case.

The court held his statements on direct examination clarified that he, as a medical examiner, did not consider pre-death symptoms when performing an autopsy. *Id.* at 772. The court agreed that the trial judge correctly determined that the testimony objected to by the appellants was not beyond the expertise of the medical examiner who is a pathologist. *Id.* As a result, the testimony was admissible.

The court stated that the rule in Florida, as in most jurisdictions, is that absent a clear showing of error, a trial judge’s determination of admissibility will not be disturbed upon review. It concluded that the two criteria determining admissibility were met in this case: (1) the subject must be beyond the common understanding of the average layman; and (2) the witness must have such knowledge as will probably aid the trier of fact. *Id.* The court reasoned that if a pathologist was qualified to testify to more than what he directly observed from an autopsy, he could render an opinion regarding events preceding death. *Id.*

40. *Id.* at 761.
41. *Id.*
42. *Id.* at 762.
43. *Id.*
B. Scope and Basis of Expert Opinion Testimony

Under Florida law, it is fundamental error for an expert to testify beyond his qualifications. Such error is not harmless when the expert's testimony is the only testimony in the record supporting the findings of the trial court. Section 90.704 of the Florida Statutes also does not permit an expert witness in one field to testify about the expert opinion given to him by another expert. In *Harrison v. Savers Federal Savings and Loan Association*, an appraiser's expert opinion on the value of a shopping center was based upon the opinion of an architect who was not called to testify. The court held the appraiser incompetent to testify on the location and design of the shopping center. The only other evidence in the case regarding the design issue was the court's *sua sponte* view of the site, which was not found sufficient to serve as an independent basis for judgment. Thus, in order to avoid a new trial, a competent predicate must be laid for the expert's opinion.

In *Newell v. Best Security Systems, Inc.*, the trial court excluded a sheriff's deputy's testimony regarding prior criminal incidents in the area of a condominium, and also excluded a security expert's testimony regarding whether or not the security measures at the condominium were adequate in light of the criminal activity in the area. The appellate court upheld the trial court's exclusion of the expert testimony. The security expert did not consult the police records of the reported incidents but had relied solely on a police grid breakout. As such, he could not testify that the burglaries he reported were residential bur-

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45. FLA. STAT. § 90.704 (1989); see also Bunyak v. Clyde J. Yancey & Sons Dairy, 438 So. 2d 891, 893 (Fla. 2d Dist. Ct. App. 1983), rev. denied, 447 So. 2d 885 (Fla. 1984). Section 90.704 provides:
   The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, him at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject or support the opinion expressed, the facts or data need not be admissible in evidence.
FLA. STAT. § 90.704.
47. *Id.* at 713.
48. *Id.* at 714.
Because the expert's opinion was based on unconfirmed data and the appellant failed to establish the underlying facts on which it was based, the trial court did not abuse its discretion by refusing to admit the testimony.51

While section 90.704 of the Florida Statutes allows the expert to rely on facts or data of the type reasonably relied upon by experts in the field to support the opinion expressed, the expert may not introduce inadmissible matters in the course of his direct examination.52 In Smithson v. V.M.S. Realty Inc.,53 a wrongful death action, appellant argued that the trial court erred in permitting the defendant to use an expert witness on security, where he served as a conduit for the introduction of inadmissible and prejudicial hearsay.

The individuals who robbed and murdered the appellant's husband while he was attempting to make a deposit at a night depository at the mall were interviewed by V.M.S.'s expert witness. Upon direct examination, when questioned about the adequacy of V.M.S.'s security, the expert recited the murderers' out-of-court explanations about their plan and motive for committing the crime. The court stated that the witness was qualified to render an opinion on security matters and on the defendant's alleged negligence in security procedures, but not on the murderers' motives for choosing the decedent as their target.54

The same issue was raised in Kurynka v. Tamarac Hospital Corp., Inc.55 A 31-year old woman was being treated for asthma in a hospital emergency room when she went into cardiac arrest. The laboratory report reflected a urinalysis which found cocaine metabolite. The tests had been performed by an independent laboratory and had been placed in the hospital records. The defense sought to admit the report to support its position that cocaine withdrawal, not medical malpractice, was the cause of death. The defense argued that the results of the tests were admissible under the business records exception to the hearsay rule. It also argued that the evidence would be admissible since the report was used by the defense experts as a basis for their opinions. The appellate court concluded that medical records, just as any other type of business record, cannot be admitted without a predicate demon-

51. Id. at 397.
52. FLA. STAT. § 90.704 (1989).
53. 536 So. 2d 260 (Fla. 3d Dist. Ct. App. 1988).
54. Id. at 262.
55. 542 So. 2d 412 (Fla. 4th Dist. Ct. App. 1989).
strating the authenticity of the records. The appellate court pointed out that an expert's testimony may not be used merely to serve as a conduit to place otherwise inadmissable evidence before a jury. Here, there was no independent testimony regarding how the tests were conducted, or who performed them or even whether the samples used were those of the decedent. Considering the totality of the evidence, the appellate court concluded that the trial court's error in admitting the laboratory report required reversal and remand for a new trial.

Another case which held that expert testimony may not be used as a conduit to put inadmissable evidence before a jury is Riggins v. Mariner Boatworks, Inc. There, Riggins was struck and killed by defendants' automobile as he entered a crosswalk in an intersection patrolled by a traffic light. The defendants attempted to establish that the accident was caused in whole or in part by Riggins' intoxication. A police officer at the scene of the accident testified that Riggins had an odor of alcohol about him; however, neither the emergency medical technician who performed cardiopulmonary resuscitation upon Riggins, nor the medical technician who examined the body detected an odor of alcohol. There were no hospital records indicating Riggins was intoxicated at the time of the accident. During the autopsy the medical examiner took a sample of Riggins' ocular vitreous fluid and sent the material to the laboratory to determine its alcohol content. A sample of the fluid was utilized because there was not enough blood remaining in the body to obtain a blood sample. Neither the medical examiner nor the laboratory technician who performed the test was available to testify at trial.

The trial court ruled that the laboratory report was inadmissable hearsay. While it may have been a business record, the defendants did not present sufficient evidence to establish the foundation required by section 90.803(6) of the Florida Statutes. After the laboratory report

56. Id. at 413.
57. Id.
58. Id.
59. 545 So. 2d 430 (Fla. 2d Dist. Ct. App. 1989).
60. This is the fluid contained in the vitreous body. The vitreous body forms four-fifths of the entire globe of the eye. It fills the concavity of the retina for the reception of the lens. It is transparent, the consistence of thin jelly, and is composed of an albuminous fluid enclosed in a delicate transparent membrane. H Gray, Gray's Anatomy 839 (1974).
61. Riggins, 545 So. 2d at 431. Fla. Stat. § 90.803(6) (1989) provides:
(a) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by,
was excluded, the defendants called a chemical toxicologist. Over plaintiff's objection, the trial court permitted this expert to testify that the blood alcohol level was .11% at the time the ocular vitreous fluid sample was taken. The trial court permitted this testimony pursuant to section 90.704 of the Florida Statutes, which permits an expert to base his opinion upon inadmissible facts or data so long as "the facts or data are of the type reasonably relied upon by experts on the subject to support the opinion expressed." The appellate court reversed. While recognizing that experts are permitted to express opinions based partially upon inadmissible information, the court pointed out that the use of expert testimony merely to serve as a conduit to place otherwise inadmissible evidence before a jury is prohibited. The expert relied exclusively upon information that was not in evidence at trial. The expert opinion only helped the jury understand the inadmissible evidence rather than any evidence admitted at trial.

Additionally, the court concluded that section 90.704 does not permit an expert to render an opinion exclusively upon inadmissible facts or data. The court opined that even if the opinion was relevant it was unfairly prejudicial to the plaintiff and misled the jury by emphasizing otherwise inadmissible evidence and placing "an aura of scientific truth upon a document which is legally unreliable. Thus its probative value is substantially outweighed by its prejudicial effect." The court also noted that while an expert's testimony may not be used as a conduit for

or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances show lack of trustworthiness. The term "business" as used in this paragraph includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. (b) No evidence in the form of an opinion or diagnosis is admissible under paragraph (a) unless such opinion or diagnosis would be admissible under ss. 90.701-90.705 if the person whose opinion is recorded were to testify to the opinion directly.

63. Riggins, 545 So. 2d at 431-32.
64. Id at 432.
65. Id.
66. Id. (quoting Fla. Stat. § 90.704 (1987)).
the introduction of otherwise inadmissible evidence, the party against whom the expert opinion is offered may require the expert to reveal the content of the hearsay information on which the expert relied.

C. Evaluation of Expert Testimony

It is the general rule that the weight accorded expert testimony is properly a function of the trier of fact. A pretrial ruling by the court rejecting proffered testimony based on its weight as opposed to its admissibility usurps the jury function. Whether there was usurpation of the jury function was the issue in *Lombard v. Executive Elevator Service, Inc.* The trial court held a pretrial conference and instructed the plaintiff's counsel to make a proffer of the evidence he intended to produce to prove negligence on the part of the defendant. In the course of the involuntary proffer, counsel was cross-examined at length by the court because it was not satisfied with counsel's grasp of the expert evidence. The court then requested that the plaintiff's expert witness be produced the following week for a live proffer. The expert witness made a brief presentation and was cross-examined by the trial court for over an hour. The trial court, on its own motion, entered a summary judgment for the defendant.

On appeal the court stated its disapproval of the use of a pretrial conference to take testimony for the purpose of disposing of a case on the court's unnoticed summary judgment motion. The court further stated that summary judgment procedures should be applied with special caution in negligence actions where the showing of negligence is determined on expert testimony which should be evaluated by the jury and not by the court.

D. Psychiatric and Psychological Expert Opinion Testimony

The introduction of psychiatric and psychological expert testimony poses particular evidentiary problems. In Florida, a court-appointed psychiatrist may be offered as a witness in the State's case but may not testify directly about the facts surrounding the crime, when such facts

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67. *Id.*
69. 545 So. 2d 453 (Fla. 3d Dist. Ct. App. 1989).
70. *Id.* at 455.
71. *Id.*
have been elicited from the defendant during his compulsory medical examination.\textsuperscript{72}

In \textit{Ericson v. State},\textsuperscript{73} the court found that a court-appointed psychiatrist may testify regarding his opinion of the defendant's mental condition, but may not disclose incriminating statements made to him by other defendants, or disclose the facts surrounding the crime elicited from the defendant during the course of the examination.\textsuperscript{74} However, there is an exception when the defendant first opens the door to such inquiry by his own presentation of evidence.\textsuperscript{75} If on cross examination the defendant's counsel opens the inquiry to collateral issues, such as admissions or guilt, the state may inquire into those areas on redirect examination. Or if the defendant offered psychiatric testimony during his case and the defendant elicited testimony from his own expert about the offense which the defendant provided during the interview, then the defendant has opened the door and the state may explore the areas on cross.\textsuperscript{76} In either instance the jury must be given a cautionary instruction that these statements can be used as evidence of mental condition only and not as evidence of the truth contained in them.

Where the defense is voluntary intoxication, Florida courts have held that the defendant can be said to be testifying vicariously through the expert if the expert bases his testimony on the defendant's self-serving statement that he was intoxicated at the time of the offense.\textsuperscript{77} Thus, in those cases, the defendant is subject to impeachment by the state even though the defendant does not take the stand.\textsuperscript{78}

\textbf{E. The Use of Expert Testimony in Child Abuse Cases}

Increased prosecutions for child abuse and sex offenses raise the problem of integrating experts and their opinions into a justice system in which lay juries are the ultimate fact finders. Expert testimony is sometimes used in child abuse cases to determine the competency of the child witness to testify truthfully and accurately, but care must be

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{72} \textit{Id.} (citing Parkin v. State, 238 So. 2d 817, 820 (Fla. 1970)).
\item \textsuperscript{73} 565 So. 2d 328 (Fla. 4th Dist. Ct. App. 1990).
\item \textsuperscript{74} \textit{Id.} at 331.
\item \textsuperscript{75} \textit{Id.}
\item \textsuperscript{76} \textit{Id.}
\item \textsuperscript{77} See Cirack v. State, 201 So. 2d 706, 709 (Fla. 1967) (holding that a psychiatrist could not provide an expert opinion where the basis of the testimony was the self-serving statements of the defendant).
\item \textsuperscript{78} \textit{Id.}
\end{itemize}
\end{footnotesize}
taken to avoid invading the province of the jury to weigh and assess the testimony. Such cases also raise constitutional concerns about the use of victim hearsay. Several recent Florida cases illustrate this point.

*Tingle v. State*\(^{79}\) concerned an appeal from a conviction for sexual battery of a minor. Tingle was convicted of the sexual battery of his daughter. The state offered the expert testimony of an HRS intake counselor and a social worker with the University of Florida’s Department of Pediatrics Child Protection Team.\(^{80}\) On direct examination, both witnesses were asked whether they believed the child was telling the truth. The court agreed that it was error to have allowed the two witnesses to vouch for the victim’s credibility.\(^{81}\) The court stated that it is generally accepted that expert testimony may not be offered to directly vouch for the credibility of a witness.\(^{82}\) The court adopted the position taken by the Eighth Circuit Court of Appeals in *United States v. Azure*,\(^{83}\) that “some expert testimony may be helpful in cases such as this, but putting an impressively qualified expert stamp of truthfulness on a witness’ story goes too far.”\(^{84}\) Therefore, an expert may aid a jury in assessing the truthfulness of a child sexual abuse victim by generally testifying about a child’s ability to separate truth from fantasy; by summarizing the medical evidence and by expressing his or her opinion as to whether it was consistent with the victim’s story; or by discussing various patterns of consistency in the stories of child sexual abuse victims and comparing those patterns with patterns in the victim’s story.\(^{85}\) However, the ultimate conclusion as to the victim’s credibility must always rest with the jury.\(^{86}\)

A further issue of concern in the use of expert witnesses in child abuse cases is the extent to which witnesses are permitted to conclude not only that the child had been abused but that a particular person was the perpetrator. This issue was addressed in *Glendening v. State*.\(^{87}\) There, an expert in the area of child abuse testified that in her opinion the child had been sexually abused by her father. The Florida Supreme Court concluded that it was proper for an expert to express an opinion

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79. 536 So. 2d 202 (Fla. 1988).
80. *Id.* at 204-05.
81. *Id.* at 205.
83. 801 F.2d 336 (8th Cir. 1986).
84. *Tingle*, 536 So. 2d at 205 (quoting *Azure*, 801 F.2d at 340).
85. *Id.*
86. *Id.*
87. 536 So. 2d 212 (Fla. 1988).
as to whether a child had been the victim of sexual abuse, but "it was improper for the expert witness to testify that it was her opinion that the child's father was the person who committed this actual offense." The error did not require reversal because the defense counsel had neither objected to the answer, nor moved to strike it. Therefore, the issue was not properly preserved for appeal. Moreover, according to the court, the error was not of a fundamental nature.

In Page v. Zordan, an action for damages was brought by a minor through her parents on her behalf and by her parents individually. Plaintiffs alleged that when Page was married to the minor's maternal grandmother, he had on several occasions handled, fondled and touched the minor in a lewd, lascivious and indecent manner. The plaintiffs presented the testimony of five expert witnesses. The court was persuaded that the purpose of this expert testimony was to attest to the credibility of the minor. However, much of the expert testimony was inadmissible as being entirely irrelevant to the issues and highly prejudicial to the defendants. While the victim's counsel never directly asked any of the expert witnesses whether they had an opinion as to whether or not the defendant was guilty of the alleged act of child molestation, the court explained that it was not necessary for such questions to be asked directly to run afoul of the Tingle and Glendening rules. The court held that the appellees' expert witnesses impermissibly intruded into the function of the jury to determine such credibility questions.

Another issue raised by the appellant in Page was the admissibility of testimony of a clinical psychologist regarding a "sexual abuse legitimacy scale" which he used to evaluate the credibility of the minor's statement that she had been sexually molested. The expert was allowed to testify about the minor's score on this test even though no predicate had been established by the appellees regarding the acceptance of the test in the scientific community. The appellate court ruled that in the absence of such supporting evidence, the trial court had abused its discretion in admitting the testimony. The court relied on Fay v. Mincey, where it was held that the admissibility of evidence

88. Id. at 220-21.
89. Id. at 221.
90. 564 So. 2d 500 (Fla. 2d Dist. Ct. App. 1990).
91. Id. at 502.
92. Id.
93. Id.
94. Id.
95. 454 So. 2d 587 (Fla. 2d Dist. Ct. App. 1984).
relating to a relatively new scientific medical test, experiment, or procedure lies largely within the discretion of the trial court.\textsuperscript{96} However, before such a new procedure and its results are admissible the court must determine that the new test has some reasonable degree of recognition and acceptability among the experts who studied, diagnosed, tested and dealt with the particular subject to be examined and diagnosed by the test.\textsuperscript{97}

\textit{Weatherford v. State}\textsuperscript{98} concerned an appeal from a conviction for committing a lewd act upon a child in violation of section 800.04 of the Florida Statutes.\textsuperscript{99} During trial, a member of the Child Protection Team, an affiliate of the Department of Pediatrics of the University of Florida, was qualified as an expert in the field of investigating and interviewing children with regard to alleged sexual abuse. The expert, as well as other witnesses, testified to the child's out-of-court statements. The court did not comply with the requirement set forth in section 90.803 (23)(C) of the Florida Statutes, requiring the court to make specific findings of fact on the record setting forth the reasons the court determined the out-of-court statements to be reliable.\textsuperscript{100} The appellate

\begin{footnotesize}
\textsuperscript{96} Page, 564 So. 2d at 502 (citing Fay, 454 So. 2d 587).
\textsuperscript{97} See Fay, 454 So. 2d at 593-94.
\textsuperscript{98} 561 So. 2d 629 (Fla. 1st Dist. Ct. App. 1990).
\textsuperscript{99} FLA. STAT. § 800.04 (1990) provides that any person who:
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\item Handles, fondles or makes an assault upon any child under the age of 16 years in a lewd, lascivious, or indecent manner;
\item Commits actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse, actual lewd exhibition of the genitals, or any act or conduct which simulates that sexual battery is being or will be committed upon any child under the age of 16 years or forces or entices the child to commit any such act: 
\item Commits an act defined as sexual battery under s. 794.011 (1)(h) upon any child under the age of 16 years; or
\item Knowingly commits any lewd or lascivious act in the presence of any child under the age of 16 years, without committing the crime of sexual battery, commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. Neither the victim's lack of chastity nor the victim's consent is a defense to the crime proscribed by this section.
\end{enumerate}
\textsuperscript{100} Weatherford, 561 So. 2d at 633; see FLA. STAT. § 90.803(23), which provides:
\begin{enumerate}
\item Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 11 or less describing any act of child abuse
\end{enumerate}
\end{footnotesize}
court found that this was clear error.\textsuperscript{101} The court relied on \textit{Fricke v. State},\textsuperscript{102} where it was held such error violates the defendant's sixth amendment right of confrontation. The appellate court also concluded that the trial court erred in admitting the expert's testimony that she used a number of techniques to determine whether the child's statements were reliable and that she was satisfied these statements were truthful.\textsuperscript{103} The expert was not introduced as an expert in determining whether a child exhibited symptoms consistent with those of sexually abused children. She was tendered as an expert in the so-called field of "investigating and interviewing children involved in alleged sexual abuse."\textsuperscript{104} Therefore, her qualifications were limited to investigating incidents and interviewing children. The court stated that it could not

or neglect, any act of sexual abuse against a child, the offense of child abuse, the offense of aggravated child abuse, or any offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:

1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate and

2. The child either:
   a. Testifies, or
   b. Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to s. 90.804(1).

   (b) In a criminal action, the defendant shall be notified no later than 10 days before trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be offered as evidence at trial. The notice shall include a written statement of the content of the child's statement, the time at which the statement was made, the circumstances surrounding the statement which indicate its reliability, and such other particulars as necessary to provide full disclosure of the statement.

   (c) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this subsection.

102. 561 So. 2d 597 (Fla. 3d Dist. Ct. App. 1990).
103. \textit{Weatherford}, 561 So. 2d at 634.
104. Id.
treat this error as harmless because the testimony vouching for the child's credibility was provided by an expert witness. Allowing such testimony would be putting an impressively qualified expert's stamp of truthfulness on the witness' story.105

F. Hypnosis

"Hypnosis is a state of heightened concentration with diminished awareness of peripheral events."106 The use of hypnosis in crime investigation has increased in the past twenty years. Its increased use has caused the courts to examine its admissibility. The principle issues concerning the admissibility of hypnotic evidence involve: (1) statements made by a person while under hypnosis; and (2) the testimony of a witness whose memory has been "refreshed" by hypnosis. Florida courts have recently had occasion to address such issues.

In Morgan v. State,107 the appellant was convicted of first degree murder and sentenced to death for brutally murdering an elderly woman. The appellant was at the deceased's home to mow her yard. He entered the house presumably to telephone his father, then killed the woman by crushing her skull with a crescent wrench and stabbing her face, neck and hands numerous times. He also bit her breast and traumatized her genital area. There was no dispute that appellant committed the homicide. The single issue was his sanity at the time of the offense.108 The court held that the trial court erroneously excluded medical expert opinion testimony based on a diagnosis derived from Morgan during hypnosis.109

Morgan was hypnotized by a psychologist in a psychiatrist's presence. Both experts concluded from their examination of Morgan, his history, and the hypnotic session that he was insane at the time of the

105. Id.
107. 537 So. 2d 973 (Fla. 1989).
108. This was the third time the case was before the Florida Supreme Court. In the initial Morgan v. State, the court remanded the case because the bifurcated insanity procedure had been held unconstitutional. In the second proceeding, the Florida Supreme Court remanded the case because the trial court denied Morgan an opportunity to present an insanity defense.
109. Morgan, 537 So. 2d at 975. Prior to the trial, a psychologist met with Morgan on three occasions. After his second session, he decided to hypnotize Morgan with a psychiatrist's assistance, to obtain further details concerning the incident.
offense under the M'Naghten Test. Both doctors testified at trial that "hypnosis is a medically-accepted diagnostic technique used by mental health professionals." Additionally, both experts testified at trial that they were not able to assess the defendant's sanity without using the information from the hypnotic session. The trial court excluded the expert witnesses' testimony during the trial on the ground that their opinions were partially based on statements made while Morgan was under hypnosis. The Florida Supreme Court concluded that the United States Supreme Court decision in Rock v. Arkansas was controlling.

In Rock, the defendant was charged with the manslaughter of her husband. Since she could not remember the details surrounding the incident, she was hypnotized by a licensed neuropsychologist to refresh her memory. After the hypnosis, she was able to recall that she did not have her finger on the trigger at the time of the shooting; the gun had discharged when her husband grabbed her arm during a fight. At trial, the court limited the defendant's testimony to only those matters remembered and stated prior to being placed under hypnosis. On appeal, the Supreme Court of Arkansas rejected the appellant's claim that the limitations on her testimony violated her right to present her defense. The U.S. Supreme Court held that a state may not apply rules of evidence that permit a witness to take the stand but arbitrarily exclude material portions of his testimony. Therefore, when it is the defendant who submits to pretrial hypnosis, and not merely a defense witness, the experience of being hypnotized will not render his testimony inadmissible if he elects to take the stand.

The Florida Supreme Court stated that even without reliance upon Rock, it would conclude that expert testimony in this case must be allowed. It found the issue was not whether the hypnotic statements

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110. Id. In a majority of jurisdictions, the M'Naghten test is used to determine insanity. The test is derived from M'Naghten's Case, 8 Eng. Rep. 718 (1843) and provides that an accused is not criminally responsible if, at the time of committing the act, he was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it that he did not know what he was doing was wrong.

111. Morgan, 537 So. 2d at 975.

112. Id.


114. Morgan, 537 So. 2d at 975.

115. Rock, 483 U.S. at 56.

116. Id.
were reliable, but rather, whether mental health experts could testify about Morgan’s sanity if their opinion was based in part on information received from hypnotic statements obtained through medically approved diagnostic techniques.\textsuperscript{117}

The court in \textit{Morgan} noted that because the use of hypnosis is an evolving issue, safeguards are necessary to assure its reliability.\textsuperscript{118} Safeguards should include recording the hypnosis session to ensure compliance with proper procedures and practices. When hypnosis is used to refresh a defendant’s memory or to facilitate a medical diagnosis, reasonable notice should be given to the opposing party.\textsuperscript{119}

The Supreme Court of Florida has had several occasions to examine the reliability and practical application of post-hypnotic testimony. In \textit{Bundy v. State},\textsuperscript{120} the Supreme Court of Florida held that hypnotically refreshed testimony is \textit{per se} inadmissible in a criminal trial.\textsuperscript{121} However, it found that a witness who has been hypnotized is still competent to testify to those facts recalled prior to hypnosis.\textsuperscript{122} In a subsequent case, \textit{Stokes v. State},\textsuperscript{123} the Supreme Court of Florida again reviewed the problems raised by the use of hypnosis in court. Based on previous studies, the court recognized three major concerns: heightened suggestibility; the tendency of the hypnotized subject to “confabulate,” a phenomenon of inventing details that the subject has not actually recalled, \textit{i.e.}, a tendency to “fill in the blanks” of the subject’s memory; and the phenomenon known as “memory hardening.”\textsuperscript{124} Basically, one who has been hypnotized becomes more certain of his

\begin{itemize}
\item \textsuperscript{117} \textit{Morgan}, 537 So. 2d at 976.
\item \textsuperscript{118} \textit{Id}.
\item \textsuperscript{119} \textit{Id}.
\item \textsuperscript{120} 471 So. 2d 9 (Fla. 1985), cert. denied, 479 U.S. 894 (1986) (known as \textit{Bundy II}).
\item \textsuperscript{121} \textit{Id}. at 18. Even though \textit{Bundy II} prohibited the offering of the hypnotically-refreshed testimony as direct evidence, it did not preclude all use of hypnosis.
\item \textsuperscript{122} \textit{Id}.
\item \textsuperscript{123} 548 So. 2d 188 (Fla. 1989). Stokes moved \textit{in limine} to exclude the eyewitness’ post-hypnotic description, the identification of his brother’s car, and the hypnotic session in its entirety from the trial testimony. The trial court excluded the session but ruled that because the post-hypnotic statements were substantially similar to the pre-hypnotic statements, the descriptions and the identification were admissible. \textit{Id}. at 196.
\item \textsuperscript{124} \textit{Id}. at 190-91 (citing Diamond, \textit{Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness}, 68 CALIF. L. REV. 313 (1980)). “Memory hardening” affects one’s ability to resolve doubts and uncertainties, resulting in the subject becoming more certain of his or her memories regardless of the accuracy of those memories. \textit{Id}.
\end{itemize}
The court in Stokes reasoned that the practical effect of these concerns is that the hypnotized witness is extremely difficult to cross-examine on any subject raised in the hypnosis session. Cross-examining a hypnotized witness becomes futile because previously hypnotized witnesses develop an unshakable certitude about their memories that ordinary witnesses seldom exhibit. This effect in turn can be viewed as an infringement, if not a denial, of the defendant's sixth amendment right to confront witnesses against him. Thus, the court reviewed four approaches to the admissibility of hypnotically-refreshed testimony in light of these evidentiary concerns: 1) per se inadmissibility; 2) conditional admissibility provided the federal procedural safeguards have been fulfilled; 3) per se admissibility; and 4) a balancing approach in accordance with Rule 403 of the Federal Rules of Evidence.

Upon consideration of the four approaches to this problem, the Supreme Court of Florida, in Stokes, decided that the Frye test was the appropriate test of admissibility for post-hypnotic testimony. Therefore, the court found that it was required to examine the research and literature to determine if hypnosis is generally accepted in the scientific community. Its examination of the available literature revealed that the scientific community was divided or leaned towards disapproval of hypnosis as a reliable means of accurately enhancing memory. The court adopted this view, finding the procedural safeguards insufficient to protect against the inherent unreliability of hypnotically-refreshed testimony. Thus, the testimony of a witness who has undergone hypnosis for the purpose of refreshing his memory of the event at issue is inadmissible as to all additional facts relating to those events from the time of the hypnotic session forward. The witness who has been hypnotized may testify to the statements made before the hypnotic session if they are properly recorded, which means that the statement must be taken down on paper, recorded on video or audio tape, or reduced to writing in a police officer's notes or report. Consequently, the court found that under these rules, a hypnotic session activates a time bar-

125. Id. at 191.
126. Id.
127. Id.
128. Id. at 195 (see infra note 189 for an explanation of the Frye test).
129. Stokes, 548 So. 2d at 195.
130. Id.
131. Id. at 196.
132. Id.
G. Compelled Mental Examinations

In *Florida v. Rhone*, the First District Court of Appeal held that a mental examination of a victim should be ordered only under the most compelling circumstances where it is necessary to ensure a just and orderly disposition of the case, even in a sexual battery and kidnapping case. However, at the same time, the court did not expressly reject the concept of the trial court possessing inherent power to compel a mental examination of a victim. The court stated that it would discourage the practice in all but the most extreme instances. The court reached this conclusion by relying on *Dinkins v. State*.

In *Dinkins*, the defense moved for psychiatric examination of a victim to furnish possible basis for impeachment. The Fourth District Court of Appeal refused to order the examination. The *Rhone* Court also discussed *State v. Coe*, in which the defense moved for the psychiatric examination of a rape victim. The Second District Court of Appeal quashed the trial court's order, following the *Dinkins* rationale that strong and compelling reasons must exist to warrant such an examination. Unlike *Rhone*, in neither *Dinkins* nor *Coe* was the state introducing psychological testimony as part of its case-in-chief.

In *Rhone*, the defense moved for an order requiring the sexual batterer to submit to an independent psychological examination contending an examination was essential to refute the state's case. The state sought to introduce evidence from a psychological expert on the "battered woman syndrome" to bolster its case regarding the element of lack of consent.

133. *Id.*
134. 566 So. 2d 1367 (Fla. 4th Dist. Ct. App. 1990).
135. *Id.* at 1369.
136. 244 So. 2d 148 (Fla. 4th Dist. Ct. App. 1971).
137. *Id.* at 150.
139. *Id.* at 376.
140. The battered woman syndrome is described as when "a man physically and psychologically abuses a wife or loved one, gains her forgiveness, seeks her love and reconciliation and then repeats the cycle over and over so many times that the woman, at all times hoping the relationship will last, is reduced to a state of learned helplessness." *See* L. WALKER, *THE BATTERED WOMAN* (1979); *Note, A Trend Emerges: A State Survey on the Admissibility of Expert Testimony Concerning the Battered Woman Syndrome*, 25 J. FAM. L. 373 (1986-87).
The victim accompanied the defendant (apparently voluntarily) to his home or his relatives' home and remained there for a twelve to twenty-four hour period during which the alleged sexual battery occurred. The victim did not immediately attempt to escape and remained at the house with the defendant and his relatives - even eating breakfast together, without making the relatives aware that anything was wrong. 141

In Rhone, the court held that there were strong and compelling reasons for the examination. 142 The court distinguished State v. Leblanc, 143 in which the Third District Court of Appeal quashed an order compelling a psychological examination by defense doctors of three children regarding whether the children manifested symptoms of sexual abuse. 144 That examination was intended to counter the testimony of another expert which the state intended to call. In the Leblanc case, the state's expert was appointed as an independent examiner by another trial court and other evidence was available to evaluate the children. 146 Neither of these two situations existed in Rhone. 146

H. Insanity Defense

In Hall v. State, 147 the Florida Supreme Court addressed the issue of expert testimony in an insanity defense context. In 1987, Hall and three acquaintances planned to travel to Virginia to work with a carnival. Because they had no money or means of transportation, they planned to stop a car on the road, rob whomever had stopped, and steal the person's car. Two of the individuals posed as hitchhikers with Hall, while another co-defendant hid nearby. After the victim stopped, they overpowered him, bound his ankles, wrists, mouth, and head with tape; placed him in the car trunk; and drove north from Orlando. They removed the victim from the trunk in Volusia County and dragged him into a wooded area where one of the defendants, an alleged satanist, carved an inverted cross on his chest and abdomen. Hall and a co-

141. Rhone, 566 So. 2d at 1367.
142. Id. at 1369.
143. 558 So. 2d 507 (Fla. 3d Dist. Ct. App. 1990).
144. Id. at 510.
145. The expert was provided with psychologist's reports, reports of the interviewer of the victims at the Children's Center, and video-taped interviews of the children. Id. at 508-09.
146. 566 So. 2d 1367.
147. 568 So. 2d 882 (Fla. 1990).
defendant shot the victim seven times.\textsuperscript{148}

The trial judge refused to allow Hall to present expert testimony during the guilt phase of the trial to support his insanity defense.\textsuperscript{149} The Supreme Court of Florida held this was reversible error.\textsuperscript{150} At the end of Hall's case in chief and after Hall had testified in his own defense, Hall's counsel proffered the written reports of a Professor of Religion, and a Clinical Psychiatrist, as expert testimony. In his Notice of Insanity Defense, counsel proffered that both experts could testify that "the nature of the temporary insanity at the time of the offense is that the defendant acted under the influence of Satan and/or Bernie Dixon, his co-defendant," and therefore was robbed of his free will; he did not know right from wrong under the \textit{M'Naghten} Rule\textsuperscript{151} at the time of the offense.\textsuperscript{152} The trial court refused to admit the expert testimony, stating "there is no defense in Florida . . . that says the Devil made me do it."\textsuperscript{153} On appeal the court held that the trial court erred by refusing to allow the experts to testify. The experts were found to be qualified to provide expert testimony on Hall's sanity or lack of sanity and their testimony was found to be relevant to that issue.\textsuperscript{154} The expert was a clinical psychologist with experience in evaluating the mental health of patients and had examined the defendant. The expert doctor did not base his opinion on the defendant's inability to distinguish right from wrong solely on his alleged influence of Satan. Instead, the doctor explained that the defendant displayed characteristics of individuals with schizophrenic disorders, and on the day of the shooting, defendant was in a state of altered consciousness brought on by extreme stress.\textsuperscript{155} Therefore, according to the doctor, Hall was unable to distinguish right from wrong at the time of the offense. The court found that such evidence met the requirement of the \textit{M'Naghten} Rule\textsuperscript{156} and clearly was relevant to Hall's defense of insanity.\textsuperscript{157}

The trial court's ruling effectively prevented Hall from presenting

\textsuperscript{148} \textit{Id.} at 883.
\textsuperscript{149} \textit{Id.}
\textsuperscript{150} \textit{Id.} at 886.
\textsuperscript{151} \textit{Id.} at 884.
\textsuperscript{152} \textit{Hall}, 568 So. 2d at 884.
\textsuperscript{153} \textit{Id.}
\textsuperscript{154} \textit{Id.} at 885-86.
\textsuperscript{155} \textit{Id.} at 885.
\textsuperscript{156} See supra note 110.
\textsuperscript{157} \textit{Hall}, 568 So. 2d at 885.
his insanity defense to the jury. On this basis, reversal was required. On the other hand, the Florida Supreme Court found no error in the trial court's refusal to allow the religion professor to testify as to Hall's alleged insanity. The court noted that the professor freely admitted in his written report that he was not qualified to testify to the sanity or insanity of an individual. The court conceded that although the professor may be qualified to offer expert testimony on religious subjects such as satanism, defense counsel did not proffer his report for that purpose.

I. Psychological Autopsy

A psychological autopsy is a retrospective look at an individual's suicide to try to determine what led the subject to choose suicide. The defendant in Jackson v. State was convicted in Broward County of child abuse arising out of the suicide death of her daughter, a nude dancer. The Fourth District Court of Appeal held that the state presented sufficient evidence establishing that a psychological autopsy is accepted in the field of psychiatry as a method of evaluation in cases involving suicide, and that the judge acted within his discretion in admitting this evidence at trial. The expert witness reviewed the relevant data which included the child's school records, police records, all the state's evidence, the defendant's statements and medical records, a report regarding the child's earlier suicide attempt and witnesses testimony from the trial. The expert's opinion was that the nature of the relationship between the defendant and her daughter was the substantial contributing factor in the daughter's decision to commit suicide.

J. Tool Marks

There are three basic types of tool marks: (1) an impression, which is a negative reproduction of a portion of the tool which contacted the marked surface; (2) an abrasion, friction, or scrape marking; and (3) a combination of an abrasion or an impression in the
same mark.\textsuperscript{165} When identifying a tool mark, one must look at both class and individual characteristics in the mark and on the tool surfaces.

Class characteristics include such things as size and general configuration of tools. Individual characteristics, on the other hand, include structure or combinations of structure which are unique and distinctive of just one specific implement. Such individual characteristics are random in nature and normally result from wear, from devices used in the manufacturing process, and from grinding or other finishing procedures. They are also produced by wear and breakage occurring through use of tools after manufacture.\textsuperscript{166}

There is a sizable body of case law which provides precedent for the admission of a vast array of tools and tool markings.\textsuperscript{167} Tools matched with markings made by them include drills, screw drivers, crow bars, tire irons, hammers, paper punches, bolt cutters and pliers.\textsuperscript{168}

In \textit{Ramirez v. State},\textsuperscript{169} the Supreme Court of Florida dealt with the admissibility of tool mark evidence discovered on the decedent’s cartilage. Mr. Ramirez was convicted of first degree murder and sentenced to death for the homicide of a 27-year-old woman who was a night courier at the Federal Express office in Miami. The cause of death was multiple stab wounds to her body and blunt trauma to her head. A bloody fingerprint was recovered on a door jamb near the victim’s body. The fingerprint technician positively identified the fingerprint as belonging to Mr. Ramirez, an employee of the janitorial company which serviced the Federal Express offices. Mr. Ramirez was arrested and charged with first degree murder based upon the finger-

\textsuperscript{165} These usually consist of an abrasion mark at the end of which is an impression of at least part of the end of the tool. \textit{See} Burd & Greene, \textit{Tool Mark Examination Techniques}, 2 J. FORENSIC SCI. 297-98 (1957).


\textsuperscript{168} \textit{Id.}

\textsuperscript{169} 542 So. 2d 352 (Fla. 1989).
print identification.\textsuperscript{170}

During the autopsy, the assistant medical examiner noticed a mark made on the cartilage in the victim's chest. An evidence technician who had qualified as an expert in tool marks and ballistics was asked to examine the marks and compare them with a knife found in the defendant's girlfriend's car. At trial, the defendant's girlfriend testified that she usually kept the knife in her car for protection. After the incident, she found the knife in her kitchen sink and washed it. When the knife was examined by the laboratory, traces of blood were detected on it but in insufficient amounts to determine their origin.\textsuperscript{171}

At a hearing prior to trial and at trial, the evidence technician was qualified as a tool mark expert and testified that the knife found in the car was the specific knife which produced the victim's chest wound. On appeal, Mr. Ramirez argued that his conviction should be set aside because the trial court erroneously allowed a ballistics and tool mark expert to identify the knife as the murder weapon.\textsuperscript{172}

The Florida Supreme Court stated that no scientific predicate was established from independent evidence to show that a specific knife can be identified from the marks made on the cartilage. According to the court, "the only evidence received was the expert's self-serving statement supporting this procedure."\textsuperscript{173} The court conceded that the qualification of the witness was not the primary issue in the case, rather, it was the reliability of testing the testing methods which formed the basis of the witness' conclusion.\textsuperscript{174}

The Florida Supreme Court ruled that new scientific methods of establishing evidence will be accepted only after a proper predicate has established the reliability of the new scientific method.\textsuperscript{175} The court relied upon \textit{Ramos v. State},\textsuperscript{176} where it was held that there was no proper predicate to establish the reliability of dog scent discrimination line-ups. In \textit{Ramos}, the only evidence concerning the scent discrimina-

\textsuperscript{170} \textit{Id.} at 353.
\textsuperscript{171} \textit{Id.} at 354.
\textsuperscript{172} \textit{Id.} Ramirez also argued that portions of his sworn statement in the motion to suppress were improperly introduced at trial by the state; the state attorney failed to supply the defense with the name of the cellmate to whom Ramirez allegedly confessed; there was insufficient circumstantial evidence to support a finding of guilt; and the trial court improperly denied his motion to suppress physical evidence.
\textsuperscript{173} \textit{Id.} at 355.
\textsuperscript{174} \textit{Id.}
\textsuperscript{175} \textit{Id.}
\textsuperscript{176} 496 So. 2d 121 (Fla. 1986).
tion line-up's reliability was the testimony of the dog handler. The court also compared *Ramirez* to *Bundy v. State*,\(^{177}\) in which the court rejected hypnotically refreshed testimony because of an improper predicate of scientific reliability, and to *Delap v. State*,\(^{178}\) in which the admissibility of polygraph tests was addressed.\(^{179}\)

Since the statements made by the tool mark expert which linked the murder weapon to the defendant possibly could have influenced the jury verdict, the court held that such testimony could not be viewed as harmless error. There was some limited evidence from which the jury could infer Ramirez did not commit the offense.\(^{180}\) The court stated that it would have held that the knife itself could have been properly admitted as relevant evidence because it was an instrument which could have caused the victim's wounds based on the medical examiner's testimony and other evidence linking the knife to Ramirez. In light of the fundamental error though, the conviction was reversed and the case remanded for a new trial.\(^{181}\)

Unfortunately, the court seemed to ignore significant testimony which would serve as a predicate for the admission of this evidence.\(^{182}\) Technician Hart testified about the general study of tool marks and their identification as a recognized field of scientific endeavor. In addition, during the motion hearing and trial the state also referred to *State v. Churchill*,\(^{183}\) a Supreme Court of Kansas case which approved the admissibility of similar evidence. At trial, the medical examiner, Dr. Rao, testified that "cartilage can sometimes retain shapes of particular injuries, a particular instrument or weapon."\(^{184}\) Mr. Hart testified that the procedures he used were the standard procedures applicable to striation tool marks which are accepted within the field of tool mark identification by experts throughout the country.\(^{185}\) He also testified to his qualifications\(^{186}\) and stated that he had co-authored a scholarly arti-

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180. *Id.* at 356.
181. *Id.* Ramirez is presently being retried before Judge Sepe in Dade County Circuit Court.
182. *Id.* at 354-55.
185. *Id.* at 1549.
186. *Id.* at 1598-99.
cle which positively identified a knife as the tool that caused a particular stab wound to human cartilage in another case. The expert presented the paper prior to its publication at the 35th Annual Meeting of the American Academy of Forensic Sciences (AAFS) in Cincinnati, Ohio in February, 1983. Clearly, if there were any objections by the scientific community to this method of identification of knives, it would have been made known at the AAFS presentation, or in letters to the editor after the article was published. Because there were no negative comments, one could conclude this evidence not only met the reliability test, but also met the Frye test.

K. Trace Evidence

Crime scenes often yield physical evidence that can be compared with known materials to determine the origin of the evidence. This evidence is often termed trace evidence. It includes such items as hair, fibers, wood, paint chips, soil and glass. Because of the minute size of the particles involved and the necessity of examining the microscopic characteristics of the evidence to make a comparison, the science of


188. The American Academy of Forensic Sciences is a professional society dedicated to the application of science to the law. It includes in its membership approximately 3700 physicians, criminalists, toxicologists, attorneys, dentists, physical anthropologists, document examiners, engineers, educators and others who practice and perform research in the many diverse fields of forensic science. The members of the Academy reside in all 50 states and possessions, in Canada, and in over 30 other countries. The Academy is committed to the promotion of education and the elevation of accuracy, precision, and specificity in the forensic sciences. It does so via the Journal of Forensic Sciences, newsletters and the conduct of seminars and meetings. It conducts an annual scientific meeting wherein hundreds of scientific papers are presented and workshops are held.

189. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). The Frye “general acceptance” test for admissibility of novel scientific evidence is drawn from the oft-quoted language of the case:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Id. at 1014.
analyzing trace evidence is called microanalysis. A recent Florida case discusses one type of trace evidence, hair.

In *State v. Sawyer*, the court held that hair evidence was inadmissible where the evidence could have seriously prejudiced the defendant. In this case the trial court granted the defendant’s motion *in limine* to exclude hair as evidence in a first degree murder case. The victim was discovered beaten, tortured and murdered in her apartment. During the course of the investigation several unknown hairs were found on or around the victim’s body in her upstairs bedroom, and one unknown hair was found beneath the kitchen window. During the motion hearing, a hair and fiber expert from the Federal Bureau of Investigation testified the one unknown pubic hair found under the kitchen window had not been forcibly removed and did not match the other unknown hairs found in the victim’s apartment. The hair matched Sawyer’s pubic hair sample in twenty observable characteristics. The expert testified that this did not mean the hair was absolutely identified as belonging to Sawyer but rather the hair came from someone within a class of individuals having the same hair characteristics as the defendant.

The expert also testified that the hair could have been transferred by other means. Numerous people walked in and out of the crime scene where evidence was being collected, violating the concept of preserving the crime scene, may have contaminated the scene. The agent could not testify as to how a given hair could get to a particular location, especially in light of extensive contamination. Because the hair could not be positively identified as being from Sawyer and was not probative in proving that Sawyer was in the victim’s apartment at the time of the murder, the appellate court held that the trial judge properly ruled the evidence to be inadmissible.

L. *Blood Alcohol Tests*

In *State v. Miller*, the court held that the State is not necessarily required to prove an accused’s blood alcohol level was greater than

190. 561 So. 2d 278 (Fla. 2d Dist. Ct. App. 1990).
191. *Id.* at 283.
192. *Id.*; see also *Scientific Evidence in Criminal Cases*, supra note 168, at 475-95 (discussing the identification characteristics of hair).
193. *Sawyer*, 561 So. 2d at 283.
194. *Id* at 284.
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.1% at the time of driving in order to convict him of driving under the influence of alcohol. The State need only prove that based on the totality of admissible evidence, the defendant’s normal faculties were impaired. The question of timeliness is for the trier of fact in each case, although the timing of the blood alcohol level test may affect accuracy. The court held that based upon the statute and the weight of authority, the result of a properly administered test measuring the accused’s blood alcohol level is relevant evidence, and any failure of the State to extrapolate the result back to the time of driving goes to the weight of the evidence rather than to its admissibility.

IV. IMPROPER USE OF THE MEDICAL TREATISE

In Chorzelewski v. Drucker, the appellate court held that the trial court erred in permitting the plaintiff’s attorney to read text from the medical treatise to the plaintiff’s expert witness, and in permitting the expert witness to bolster his own opinion testimony by using the medical treatise during his direct examination. Section 90.706 of the Florida Statutes permits introduction of a medical treatise only in the cross-examination of an expert witness.

V. CONCLUSION

From 1988 to 1991 the supreme court and district courts of appeal in Florida have rendered significant and interesting decisions regarding scientific evidence and expert witness testimony. In fact, some of the decisions such as Ramirez have been unique among all scientific evi-

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196. Id. at 393. The court found that any time lapse in the test administration or failure to extrapolate the result back to the time of the driving goes to the weight of the evidence, not its admissibility.
197. Id. at 393-94.
198. 546 So. 2d 1118 (Fla. 4th Dist. Ct. App. 1989).
199. Id. at 1118.
200. FLA. STAT. § 90.706 (1989) provides:
Statements of facts or opinions on a subject of science, art, or specialized knowledge contained in a published treatise, periodical, book, dissertation, pamphlet, or other writing may be used in cross-examination of an expert witness if the expert witness recognizes the author or the treatise, periodical, book, dissertation, pamphlet or other writing to be authoritative, or, notwithstanding nonrecognition by the expert witness, if the trial court finds the author or the treatise, periodical, book, dissertation, pamphlet, or other writing to be authoritative and relevant to the subject matter.
dence decisions in the country. Florida courts also seem to continue the trend toward acceptance of novel scientific evidence begun by Andrews v. State, provided the evidence is reliable, not prejudicial, and a proper predicate has been laid for its admissibility. What remains to be seen is whether the Florida Supreme Court will soon provide a definitive statement regarding the test for the admissibility of scientific evidence in Florida since recent decisions have discussed both the Frye test and the test under section 90.702 of the Florida Statutes, without stating which is the better or correct view.

201. See supra notes 169-189 and accompanying text.
202. 533 So. 2d 841 (Fla. 5th Dist. Ct. App. 1988).
203. See supra note 189.
204. See supra notes 17-18 and accompanying text.
Torts

Michael L. Richmond*

I. INTRODUCTION

Florida courts experienced an unusually active period during the last survey year, handing down a large number of significant opinions in the area of torts. Of these, the Florida Supreme Court’s doctrinally sound and well-reasoned opinion in First Florida Bank, N.A. v. Max Mitchell & Co. led the way. Mitchell, an accountant, attempted to negotiate a loan from the bank on behalf of his client, C.M. Systems (C.M.). Mitchell showed the bank audited financial statements of C.M., which he had prepared, indicating that C.M. had no liability to any bank. Mitchell, in the course of oral negotiations, reaffirmed that C.M. owed no money to any bank. Ultimately, the bank extended a $500,000 line of credit to C.M. which C.M. fully utilized and never repaid. The bank later discovered that at the time Mitchell prepared the audited statement and made the oral representations, C.M. owed over $750,000 to a number of banks.

The bank sued Mitchell, the trial court granted summary judgment to Mitchell, and the Second District Court of Appeal uneasily affirmed, believing itself bound by precedent to dismiss any claim against an accountant brought by a person not in privity. Granting certiorari to review a question of great public importance, the Florida Supreme Court reversed:

Because of the heavy reliance upon audited financial statements in the contemporary financial world, we believe permitting recovery only from those in privity or near privity is unduly restrictive. On the other hand, we are persuaded by the wisdom of the rule which limits liability to those persons or classes of persons whom an ac-

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1. 558 So. 2d 9 (Fla. 1990).
2. Id. at 10-11.
accountant "knows" will rely on his opinion rather than those he "should have known" would do so because it takes into account the fact that an accountant controls neither his client's accounting records nor the distribution of his reports.4

Particularly impressive in Justice Grimes' literate opinion was his handling of the formative cases written by Justice Cardozo, then sitting on the New York Court of Appeals. Most courts focus on the directly relevant Ultramares Corp. v. Touche, Niven,5 in which an accounting firm was held not liable for negligently auditing a financial statement when sued by plaintiffs not in privity. However, Justice Grimes went further and recognized that any discussion of Ultramares is incomplete without a collateral consideration of Cardozo's earlier opinion in Glanzer v. Shepard.6 In that case, a public weigher, hired by the seller of beans, was contractually bound to transmit the weight of the beans not only to the seller, but to the buyer as well. When the beans arrived weighing less than the certificate indicated, the buyer sued the weigher even though no privity of contract existed between the two. As the weigher actually knew of the buyer's existence, he incurred liability for his misstatement despite the lack of privity.7

Justice Grimes correctly noted that privity of contract between a professional and one injured by that professional's malpractice normally forms an integral part of the plaintiff's cause of action.8 However, Justice Grimes added that the plaintiff can also satisfy the duty proven by privity through a showing that the defendant knew his or her acts would necessarily affect the plaintiff as well as persons in privity with the professional.9 Stressing the uniqueness of the facts in the instant case, Justice Grimes concluded that "Mitchell vouched for the integrity of the audits and that his conduct in dealing with the bank sufficed to meet the requirements of the rule which we have adopted in this opinion."10

4. First Florida Bank, 558 So. 2d at 15.
5. 255 N.Y. 170, 174 N.E. 441 (1931).
7. Id. at 238-39, 135 N.E. at 275.
8. First Florida Bank, 558 So. 2d at 16.
9. Id.
10. Id. A lower court, however, noted that privity would bar a suit by a member of the public at large against a physician who approved of a psychotic patient's return to work as a member of the police force. See Joseph v. Shafey, 15 Fla. L. Weekly D2343 (Fla. 3d Dist. Ct. App. Sept. 28, 1990).
The Florida Supreme Court also decided *Upjohn Co. v. MacMurdo*,11 which clarified the often difficult task of determining the adequacy of warnings in cases involving products liability. Upjohn manufactured the contraceptive pharmaceutical, Depo-Provera, with which MacMurdo was injected by her physician. The insert in the Depo-Provera package warned that the drug might cause vaginal bleeding.12 MacMurdo, after a second injection of Depo-Provera, experienced continual vaginal bleeding which ultimately resulted in her doctor performing a hysterectomy. MacMurdo sued Upjohn, and at trial the judge permitted the issue of the adequacy of the warning to go to the jury. The Fourth District Court of Appeal affirmed,13 but on conflict certiorari the Florida Supreme Court reversed, holding that the warnings were so “accurate, clear, and unambiguous” the judge should have found them adequate as a matter of law.14

The plaintiff’s experts failed to demonstrate “that the package insert was insufficient to put a doctor on notice that the symptoms . . . could result from the use of Depo-Provera.”15 Although MacMurdo’s bleeding was more than the breakthrough bleeding or spotting mentioned in the package insert, the company did not have the duty to warn specifically of the degree of blood flow the product might induce.16 Thus, the test for adequacy of warnings after *Upjohn Co.* seems to be whether the warning would adequately convey the danger to the person the warning was designed to reach. As *Upjohn Co.* dealt with warnings to a learned intermediary, the warnings needed to convey the danger to that intermediary. In cases of direct consumer warnings, a judge can take the issue of warnings from the jury if the warnings

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11. 562 So. 2d 680 (Fla. 1990).
12. The package insert specifically warned of vaginal bleeding in several sections, with the clearest statement coming in the “Adverse Reactions” portion, which noted: “The following adverse reactions have been observed in women taking progestin including Depo-Provera: breakthrough bleeding[,] spotting[, and] change in menstrual flow . . . .” Id. at 682.
14. *Upjohn Co.*, 562 So. 2d at 683 (quoting *Felix v. Hoffman-LaRoche, Inc.*, 540 So. 2d 102 (Fla. 1989)).
15. Id.
16. “It would be unreasonable to hold Upjohn liable for not characterizing the bleeding as excessive, continuous, or prolonged.” Id. In dissent, Justice Shaw argued that because Upjohn knew prolonged bleeding had resulted from Depo-Provera and because the physician anticipated lack of bleeding rather than increased bleeding, the package insert should have been more specific and the jury could have found it was inadequate. Id. at 684 (Shaw, J., dissenting).
clearly conveyed the danger to the person purchasing the product.\textsuperscript{17}

In 1987, in \textit{Bankston v. Brennan},\textsuperscript{18} the court determined that a social host could not be liable to a third party injured by a minor guest who had become intoxicated at the host's home. This year, in \textit{Dowell v. Gracewood Fruit Co.},\textsuperscript{19} it faced the issue of damages caused by an inebriated guest served alcoholic beverages by a host who knew the guest was a chronic alcoholic. Gracewood Fruit employed Abbey, and knew that he suffered from alcoholism. At a company outing, Abbey drank alcoholic beverages and later caused an automobile accident injuring Dowell. Dowell sued Gracewood, the trial court entered summary judgment in favor of the defendant, and the Fourth District Court of Appeal affirmed.\textsuperscript{20} Dowell then obtained certiorari from the Florida Supreme Court based on a question of great public interest.

The court clarified its 1987 opinion in \textit{Bankston}, stating that "[w]hile Dowell attempts to characterize \textit{Bankston} as only deciding the liability for serving alcoholic beverages to a minor, the opinion unmistakably rejected the contention that section 768.125 created a cause of action against a social host."\textsuperscript{21} The court continued to stress that in matters where the legislature has spoken, any variation from the language of the statute must rest with the legislature itself.\textsuperscript{22} Again the court demonstrates that while it might willingly change judge-made law, it will continue to defer to the legislature in any case where the legislature has not specifically covered a situation within the bounds of an existing general statute.\textsuperscript{23}

These three cases, although coming from different fields of tort

\begin{itemize}
  \item \textsuperscript{17} See 5 F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS § 28.7 at 378 nn.27-30 (2d ed. 1986).
  \item \textsuperscript{18} 507 So. 2d 1385 (Fla. 1987).
  \item \textsuperscript{19} 559 So. 2d 217 (Fla. 1990). Florida statutes impose liability on a "person who willfully and unlawfully sells or furnishes alcoholic beverages to a person who is not of lawful drinking age or who knowingly serves a person habitually addicted to the use of any or all alcoholic beverages . . . ." \textsc{Fla. Stat.} § 768.125 (1989) (emphasis supplied). \textit{Bankston} dealt with the first clause of the statute; \textit{Dowell} addressed the second.
  \item \textsuperscript{20} Dowell v. Gracewood Fruit Co., 544 So. 2d 1131 (Fla. 4th Dist. Ct. App. 1989).
  \item \textsuperscript{21} \textit{Dowell}, 559 So. 2d at 218.
  \item \textsuperscript{22} As the legislature had not addressed the subject since the court decided \textit{Bankston}, the court concluded that "the legislature is content with our interpretation of the statute." \textit{Id}.
\end{itemize}
Richmond law, seem to signal a resurgence of concentration by the Florida Supreme Court on the duty element of tort law. First Florida Bank certainly stresses the requirement that the defendants must owe a duty to the plaintiffs who sue them. The entire concept of privity arose as an alternative means of expressing the necessity for a prior, litigatable relationship between two parties in order for one to successfully pursue a tort action against the other.\textsuperscript{24} Upjohn Co., in permitting the judge — instead of the jury — to decide clear-cut matters, treats the question of warnings in a duty-oriented manner instead of a causation-oriented one.\textsuperscript{25} Finally, Dowell stresses that in the absence of common-law duties and a clearly defined legislatively created duty, the court will take no steps to enlarge on a highly specific, limited duty the legislature may have enacted. The concentration on the necessity for plaintiffs to demonstrate duty reaffirms Florida’s continuing approval of the principles espoused by Justice Cardozo in the misrepresentation cases and embodied in the famous \textit{Palsgraf} opinion.\textsuperscript{26}

\section*{II. NEGLIGENCE}

\subsection*{A. Negligence Per Se}

Courts confronted with plaintiffs attempting to prove negligence through violation of a statute occasionally must cope with the effect a violation of an administrative regulation will have in a civil suit. This has proven a knotty issue, particularly when the regulating agency is not of the same state as the court hearing the issue. Courts have split on the dignity to accord the regulation.\textsuperscript{27} Dicta in the recent Fifth District Court of Appeal decision in \textit{Murray v. Briggs}\textsuperscript{28} indicates that Florida courts will not accord federal regulations the same status as Florida statutes and ordinances. Briggs ran his pick-up truck into the rear of a parked flat bed truck owned by Hughes Supply. Briggs’ passenger, Murray, sued Hughes, arguing that the truck was used in interstate commerce and its violation of a safety regulation promulgated by

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\textsuperscript{25} The judge decides questions of duty; the jury decides questions of causation. See generally 3 F. Harper, F. James \& O. Gray, \textit{The Law of Torts} ch. 16 (2d ed. 1986).
\textsuperscript{26} Palsgraf \textit{v. Long Island R.R. Co.}, 248 N.Y. 339, 162 N.E. 99 (1928).
\textsuperscript{27} See generally \textit{Restatement (Second) of Torts} § 286 (1965).
\textsuperscript{28} 569 So. 2d 476 (Fla. 5th Dist. Ct. App. 1990).
\end{flushright}
the Interstate Commerce Commission (I.C.C.) proximately caused his injuries.\textsuperscript{29} At trial, the court refused to instruct the jury on Hughes' failure to have a rear bumper which met the I.C.C. regulation. The jury found for Hughes, and Murray appealed to the Fifth District Court of Appeal, which affirmed.\textsuperscript{30}

Judge Griffin's opinion actually turns on the determination that Hughes was not engaged in interstate commerce and that the regulation did not apply to its trucks.\textsuperscript{31} However, Judge Griffin went on to note that even had the regulation applied to Hughes, the trial judge correctly refused to give the requested instruction: "[A]lthough several courts seem comfortable with the concept, we are not satisfied that a federal regulation should necessarily control state law questions of negligence by enlarging common law duties or creating new duties."\textsuperscript{32} According to the court, the regulation itself fails to provide definite standards for the design of the bumper, and in fact does not even specify the proper location of the bumper. Furthermore, a court cannot permit such a vague regulation to supplant traditional common law notions of reasonable prudence.\textsuperscript{33}

B. \textit{Vicarious Liability}

1. \textit{Respondeat Superior}

Two significant opinions from the Third District Court of Appeal solidified the rule that employers will not incur vicarious liability for the acts of their employees in driving to and from work, even though those same acts might entitle the employees to workers' compensation benefits. In the first opinion, the wife of the president of a corporation also served as a part-time employee of the corporation.\textsuperscript{34} The corpora-

\textsuperscript{29} See \textit{Rear End Protection}, 49 C.F.R. § 393.86 (1989). This regulation provides that vehicles engaged in interstate commerce must have rear bumpers meeting certain specifications designed for the protection of other vehicles in rear-end collisions. Murray alleged that Hughes' bumper failed to meet the specific requirements of the regulation. \textit{Murray}, 569 So. 2d at 478.

\textsuperscript{30} \textit{Id.} at 481.

\textsuperscript{31} Although Hughes engaged in interstate trading, it had two fleets of trucks. The truck in question was used exclusively in \textit{intrastate} transactions within Florida. \textit{Id.} at 479-80.

\textsuperscript{32} \textit{Id.} at 480.

\textsuperscript{33} \textit{Id.} at 481.

\textsuperscript{34} Robelo v. United Consumers Club, Inc., 555 So. 2d 395 (Fla. 3d Dist. Ct. App. 1989).
tion was a franchise of United Consumers Club (UCC), and admittedly the agent of UCC. The corporation provided its president with a van, which his family was entitled to use. One day, the president called his wife to request that she come in to work. While driving the corporation's van, she caused an accident which injured Robelo. Robelo sued UCC, arguing that the wife's actions caused UCC to incur vicarious liability. 35

The trial court granted UCC's motion for summary judgment, and the Third District Court of Appeal affirmed. 36 Robelo attempted to use two theories of liability, both of which the court rejected. He first argued that the wife's travel subjected UCC to liability either because it was in the nature of a special errand or because she was an "on call" employee. The court rejected the first prong of the argument simply because the facts demonstrated that she "was merely traveling to the office," 37 and the second because even though she did not work unless needed, her employment relationship did not require her to come in each time she was summoned. As to the second theory, even though the corporation provided the van which she drove, since she was allowed to drive it for other purposes than business the simple use of the van without a specific employment connection would not subject the employer to liability. 38

In the second opinion, the Third District Court joined with the Fourth District Court of Appeal in noting the difference between the workers' compensation test for "course of employment" and the respondent superior test for "scope of employment." 39 In Sussman v. Florida East Coast Properties, Inc., 40 the manager of a health spa called Paraiso, one of his fitness instructors, and asked her to stop on her way to work and pick up a birthday cake for another employee. She bought the cake, testifying later that she did so without regard to her manager's instructions. 41 As she drove from the supermarket, the cake be-

35. Id. at 396.
36. Id. at 397.
37. Id. at 396.
38. Id. at 397.
40. 557 So. 2d 74 (Fla. 3d Dist. Ct. App. 1990).
41. "[W]e were friends, like aerobics teachers and fitness instructors and we just decided to give him a cake because it was his birthday . . . . I didn't do it because it was my boss. I didn't do it because my boss said so . . . ." Id. at 76 n.1.
gan to slip from the seat next to her. She reached for the cake and lost control of the car, which careened into Sussman as he sat on a bus bench. Sussman sued Paraiso’s employer and appealed to the Third District Court of Appeal when the trial court granted the defendant’s motion for summary judgment.  

On appeal, Sussman argued that Paraiso’s unquestioned entitlement to workers’ compensation benefits also demonstrated that she acted within the scope of her employment for purposes of vicarious liability. The appellate court disagreed. According to the court, different policy considerations govern workers’ compensation qualification than govern vicarious liability. Respondeat superior demands a “narrower analysis.” Thus, even though Paraiso was enroute to her place of employment . . . she was outside the scope of the employer’s business as a matter of law.”  

As noted in an earlier survey of tort law, the reasoning adopted by the these two district courts of appeal has the firmest base in logic, and the rule they have stated should take precedence over conflicting cases from other districts.  

2. Borrowed Servants  

Two cases during the last survey year cast new light on the interface between workers’ compensation immunity and suits by borrowed servants. The Florida Supreme Court determined conclusively that the lending employer of a negligent worker can block a suit by the employee of the borrowing employer, based on workers’ compensation immunity. In *Halifax Paving, Inc. v. Scott & Jobalia Construction Co.*, Halifax gratuitously loaned a crane and operator to the Scott & Jobalia Construction Co. (S & J). Obeying hand signals from S & J’s employees, the Halifax operator attempted to move pipe by using a sling attached to the crane. The pipe slipped from the sling and injured Grier, an employee of S & J. Grier collected workers’ compensation benefits from S & J, and then sued Halifax, seeking damages on a respondeat superior theory. After a jury found that the operator was a

42. *Id.* at 75.  
43. *Id.*  
44. *Id.*  
45. *Id.* The court relied on the nature of the errand — purchasing refreshments for a social occasion — as well as Paraiso’s statement that the purchase was not work-related to determine that the trip was outside the scope of her employment. *Id.*  
47. 565 So. 2d 1346 (Fla. 1990).
borrowed servant and held in favor of Grier, the Fifth District Court of Appeal reversed, finding the lending employer was entitled to the workers' compensation immunity accorded to the borrowing employer. The Florida Supreme Court granted conflict certiorari and approved the Fifth District Court's opinion.

The crane operator, working under the specific control of S & J's employee, was a borrowed servant. Since prior opinions establish that leased equipment becomes "the working tool of the employer," injuries caused by use of the equipment are exclusively remedied through the workers' compensation process. The court reasoned that if the owner of leased dangerous equipment can claim workers' compensation immunity, it seems only logical that the owner of loaned dangerous equipment can claim the immunity as well. Although the owner of the crane "certainly had no duty to provide worker's compensation to the injured party, neither did the third party [owner] in any logical sense contribute to the work-place injury that actually occurred."

In Maxson v. Air Products & Chemicals, Inc., the First District Court of Appeal considered the obverse side of the borrowed servant coin — whether an injured employee can successfully sue a borrowing employer in negligence, or is limited to workers' compensation remedies. Project Construction furnished manpower to Air Products under an agreement providing that Project would pay the workers and Air Products would reimburse Project. Maxson worked under this agreement for a period of time, but then requested a transfer to a different job, supervised exclusively by Air Products' personnel, and which offered him a significantly higher chance of promotion. Maxson was injured on the job, and sued Air Products in negligence. The trial court reserved ruling on Air Products' motion to dismiss and, after a jury verdict for Maxson, set aside the verdict. The First District Court of

49. The First District Court of Appeal had reached a contrary result in Mann v. Pensacola Concrete Constr. Co., 448 So. 2d 1132 (Fla. 1st Dist. Ct. App.), review denied, 461 So. 2d 115 (Fla. 1984).
51. Halifax Paving, 565 So. 2d at 1347.
52. Id. at 1348. The court also discussed the function of the workers' compensation remedy: "[T]he central policies of worker's compensation are to provide employees with a swift and adequate means of compensation for injury, and to insulate employers from potentially bankrupting tort liability for work-place accidents." Id. at 1347.
Appeal affirmed. 54

The testimony at trial conclusively demonstrated that Maxson was doing work exclusively to benefit Air Products, and performing his duties exclusively under the control of Air Products' employees. Regardless of the contractual relationship between the two employers, the court had to look at the actual employment relationship governing the employee. Even though there was no specific contract between Maxson and Air Products, the facts clearly demonstrated that the "work being done . . . was essentially that of the special employer, and . . . that the special employer had the right to control the details of the work." 55 Thus, Air Products was the de facto special employer of Maxson, and entitled to raise workers' compensation immunity as a defense to the suit. 56

C. Defenses

The Florida Supreme Court decided two significant cases dealing with different defenses to actions in negligence. In one, the court refused to permit workers' compensation immunity to block a suit alleging sexual harassment. 57 In the other, the court attempted to further define the distinction between express assumption of risk and implied assumption of risk. 58 The assumption of risk case did little more than further cement the Blackburn v. Dorta 59 fallacious treatment of assumption of risk into Florida law. The sexual harassment case, however, may have paved the way for substantial inroads into workers' compensation immunity in the limited case of intentional torts.

A number of Richardson-Greenfields' female employees experienced frequent sexual advances, both verbal and physical, from male employees. They sued the company, claiming various intentional torts and sought damages for the emotional distress and humiliation occasioned by the sexual harassment. The company moved to dismiss the suit, arguing that the plaintiffs' sole remedy lay in workers' compensation. The trial court granted the motion and the Second District Court

54. id. at 1213-14.
55. id. at 1213 (citing Shelby Mut. Ins. Co. v. Aetna Ins. Co., 246 So. 2d 98, 101 (Fla. 1971)).
56. id. at 1214.
58. Mazzeo v. City of Sebastian, 550 So. 2d 1113 (Fla. 1989).
59. 348 So. 2d 287 (Fla. 1977).
The Florida Supreme Court granted certiorari to review the issue as one of great public interest.\(^6\)

The workers' compensation statute provides an exclusive remedy for any "injury or death" arising in the course of employment, but permits tort suits against employers for damages other than those arising from injury or death.\(^6\) Thus, the Florida Supreme Court first had to determine whether the emotional distress suffered by the plaintiffs in Byrd constituted an injury within the meaning of the statute. The workers' compensation statute has been liberally construed in the past, and courts have read the definitional sections to include damage-causing occurrences so that workers would not go without a remedy for their harm.\(^6\) However, the inclusion of sexual harassment claims in workers' compensation actions would work to frustrate legislative intent. As the Byrd court noted, "both the state of Florida and the federal government have committed themselves strongly to outlawing and eliminating sexual discrimination in the workplace, including the related evil of sexual harassment."\(^6\) An examination of the various statutes enacted by the Florida legislature supports the conclusion that the courts should read statutes to effectuate this policy of doing away with sexual harassment in employment. To permit an employer the shield of workers' compensation immunity would run contrary to all existing Florida law.\(^6\) Thus, the complaint alleged an injury not protected by the workers' compensation statute — one "to intangible personal rights."\(^6\)

The Florida Supreme Court has yet to determine whether the exclusivity of the workers' compensation remedy will bar suits based on intentional torts. Byrd will give no guidance in those instances where


61. The certified question read: "Whether the workers' compensation statute provides the exclusive remedy for a claim based on sexual harassment in the workplace." Byrd, 552 So. 2d at 1100.


64. Byrd, 552 So. 2d at 1102.

65. "Public policy now requires that employers be held accountable in tort for the sexually harassing environments they permit to exist, whether the tort claim is premised on a remedial statute or on the common law." Id. at 1104.

66. Id.
plaintiffs claim damages for physical injury or death.\textsuperscript{67} However, where a plaintiff claims emotional damages or nominal damages due to an intentional tort, it would seem that the plaintiff seeks to remedy harm to the very intangible rights of which the Florida Supreme Court spoke. Thus, \textit{Byrd} should open the door to substantial claims involving punitive damages against employers, but only for intentional torts not involving personal injury.

With \textit{Blackburn v. Dorta}\textsuperscript{68} in 1977, the Florida Supreme Court drew the distinction between “strict assumption of the risk” and “qualified assumption of the risk.” The court reiterated this reasoning in \textit{Mazzeo v. City of Sebastian},\textsuperscript{69} stating again the hypothetical situation it used in \textit{Blackburn}:

The tenant returns from work to find the premises on fire with his infant child trapped inside. He rushes in to save the child and is burned in the fire. Under the pure or strict doctrine of assumption of risk, the tenant is precluded from recovery because he voluntarily exposed himself to a known risk even though his conduct was reasonable under the circumstances.\textsuperscript{70}

Unfortunately, the very example given by the court demonstrates the lack of distinction the court seeks to draw. Can we truly say the act of saving one’s own child from a burning building is voluntary in nature? One commentator argues that

[w]here the defendant puts [the plaintiff] to a choice of evils, there is a species of duress, which destroys the idea of freedom of election . . . . Those who dash in to save their own property, or the lives or property of others, from a peril created by the defendant’s negligence, do not assume the risk where the alternative is to allow the threatened harm to occur.\textsuperscript{71}

\textsuperscript{67}. In Fisher v. Shenandoah General Construction Co., 498 So. 2d 882 (Fla. 1986), the Florida Supreme Court procedurally declined to consider the effect of workers’ compensation on intentional tort claims. However, in \textit{Fisher} the plaintiff died as the result of an intentional industrial accident. \textit{Byrd} would have no effect on a case of this nature. \textit{See generally} Richmond, 1986 Survey of Florida Law (Torts), 11 NOVA L. REV. 1519, 1535-37 (1987).

\textsuperscript{68}. 348 So. 2d 287 (Fla. 1977).

\textsuperscript{69}. 550 So. 2d 1113 (Fla. 1989).

\textsuperscript{70}. \textit{Id.} at 1115 (emphasis supplied).

Thus, there is no true distinction between the two types of assumption of risk perceived by the Florida Supreme Court. Carrying the logic further, with the breakdown of the logic underlying *Blackburn v. Dorta*, the Florida Supreme Court's decision to merge assumption of the risk in with comparative negligence also fails.

*Mazzeo* presents a clear example of the evils of the rule espoused in *Blackburn*. An experienced swimmer, after standing in the shallow water at the base of a platform at a municipal lake, and after hearing the warnings of her boyfriend that the water was too shallow to permit diving, dove headfirst off the platform. She broke her neck and sued the city which maintained the park. There were no signs warning swimmers not to dive, but there was a faded statement reading “no diving” painted on the dock itself. The trial court permitted the jury to consider whether Mazzeo had assumed the risk. The jury found the city negligent, but also found that Mazzeo knew perfectly well the risk in diving from the platform “and having had a reasonable opportunity to avoid it, voluntarily and deliberately exposed herself to the danger by diving into the water.” On appeal, the Fourth District Court of Appeal affirmed. The Florida Supreme Court granted certiorari, as the case involved a matter of great public interest, and reversed.

The court first reviewed *Blackburn*, and then discussed the extremely limited exception it had carved out for cases involving assumption of the risks for participation in contact sports. It then refused to extend the exception to the instant case: “To expand this exception to include aberrant conduct in noncontact sports collides with the merger of assumption of risk into comparative negligence . . . .” Yet the court willingly characterized Mazzeo's behavior as “foolhardy conduct.” To permit a jury to award damages in such a situation, particularly where the plaintiff's conduct rises to the level of recklessness in comparison with the defendant's mere negligence, seems contrary to the concepts of fault which underlie our system of tort law. Justice McDonald, joined by Justice Overton, also found problems with the majority's opinion. They, however, would have avoided the *Blackburn*

72. Although conflicting evidence existed, these are the facts taken in the light most favorable to the losing party — the defendant. *Mazzeo*, 550 So. 2d at 1114.
73. *Id.*
75. *See, e.g.*, Kuehner v. Green, 436 So. 2d 78 (Fla. 1983).
76. *Mazzeo*, 550 So. 2d at 1116.
77. *Id.* at 1117.
problem by holding that the city’s failure to post signs did not cause Mazzeo’s harm since her deliberate and intentional conduct would have broken any claimed causal nexus.78

D. Causation

1. Generally

An interesting and troubling case from the Second District Court of Appeal presented the question of the adequacy of a plaintiff’s proof on the issue of foreseeability. In *Florida Power Corp. v. McCain*,79 the blade of a mechanical trencher severed a subsurface power line, injuring the trencher’s operator. He sued the power company, and testimony at trial demonstrated that the company had designed the power line to deenergize the moment it was severed. A power company employee also testified that he knew of no instance in an eight year period when the person who severed a power cable received an electric shock. The plaintiff presented no other evidence on the issue. The defendant moved for a directed verdict, but the court denied the motion and the jury found for the plaintiff. The Second District Court of Appeal reversed.80

In order to recover, a plaintiff must demonstrate that the defendant could have foreseen the harm which occurred. A judge may properly determine the issue of foreseeability, or causation, although normally the court should submit it to the jury. The court found that if a plaintiff fails to produce evidence that the defendant could have anticipated the type of harm which the plaintiff suffered, the court should take the issue of foreseeability from the jury.81 From the limited proof adduced by the plaintiff at trial, he failed to demonstrate “that Florida Power reasonably could have foreseen any injury resulting from a trencher severing this type of power cable.”82

Judge Threadgill, in dissent, would have left the issue of foreseeability in the case to the jury. Quoting from the trial court’s opinion denying the motion to dismiss, Judge Threadgill noted that a jury should have determined whether “Florida Power could not foresee that if an insulated electrical line carrying 7,200 volts of electricity were cut by a mechanical device the operator of the device might receive an

78. *Id.* (McDonald, J., dissenting).
80. *Id.* at 1269-70.
81. *Id.* at 1271.
82. *Id.* at 1270.
Richmond
electrical shock and an accompanying injury." Indeed, the majority's opinion leaves behind a nagging doubt. If Florida Power had designed the power line to deenergize upon being severed, it must have had some concern that severing the line would cause a shock to the person causing the break were the line not deenergized. In other words, Florida Power's own actions demonstrated it actually foresaw the possibility of this type of harm occurring. If the "fail-safe" mechanism failed to deenergize the line, then the electric shock could have readily resulted. The fact that the employee knew of no instances of electrocution does not mean that Florida Power could not have foreseen the type of harm, but it might permit a jury to find Florida Power had taken reasonable care to prevent the harm.

2. Superseding Intervening Causes

In the last year, courts have begun to deal with questions involving the conduct of plaintiffs not as a defense, but as a superseding intervening cause which will destroy the causal nexus between the act of the defendant and the injury to the plaintiff. The dissent in Mazzeo suggested this approach with a plaintiff who had acted intentionally. District courts of appeal have also determined that a plaintiff's negligence might supersede that of the defendant. Although one cannot at this early point identify these cases as creating a trend, they do tend to show the germ of a dissatisfaction by intermediate Florida courts with the merger of assumption of risk into comparative negligence.

For example, in Garcia v. Metropolitan Dade County, a mother was walking to school with her child. When they came upon an intersection, the child walked out into the street without his mother's permission. The county had not maintained a crosswalk at the intersection even though it had suggested the intersection as a safe one for children going to school. The child stopped in the middle of the intersection, and a car struck and injured him. He and his parents sued the county. The trial court entered summary judgment for the defendant, and the Third District Court of Appeal affirmed.

The court emphasized that had the county maintained traffic signals, the boy still would have been injured:

83. Id. at 1272 (Threadgill, J., dissenting).
84. See supra text accompanying note 78.
85. 561 So. 2d 1194 (Fla. 3d Dist. Ct. App. 1990).
86. Id. at 1195.
No number of traffic signals, traffic control devices, or safe route to school maps can provide any greater protection for a child than the attendant supervision of his parent. . . . The sole proximate cause of George’s injuries was his act of stepping into the street without keeping a proper lookout, while under his mother’s control.87

Thus, the negligence of the parent and child combined to supercede any possible negligence of the county in failing to provide proper safety precautions at the intersection.

A later panel of the Third District Court of Appeal, however, reached a contrary result where the child’s parent did not accompany the child.88 An additional distinction lay in the special instructions given to that plaintiff regarding the route to school, and in the plaintiff’s special status. Lagarian Brunson needed a speech therapist, and the Dade School Board transferred him to a school some distance from his home. The school board failed to provide a school bus for Lagarian, and his father took him to school via public transportation by a route designated by the school board. The route involved crossing a dangerous city intersection. After two weeks, the nine-year old boy’s father ceased to accompany him. As Lagarian crossed the intersection, a car struck and killed him.89

In the ensuing action by Lagarian’s estate, the school board acknowledged that it had breached a duty to provide transportation to the new school. However, it moved for and was granted summary judgment on the theory that the father’s intervening negligent act of failing to accompany his son on the dangerous trip superseded any breach of duty in failing to provide the school bus. On appeal, the Third District Court of Appeal reversed.90

Were it not for the failure to provide transportation, the father would not have had the opportunity to act negligently. Since his “allegedly deficient conduct ‘was set in motion by the original wrongful act [it was] not such a new and independent cause as to create an intervening cause.”91 Yet the question remains open whether, had the father accompanied the child to the intersection and negligently permitted him to attempt to cross the street, the second panel from the Third

87. Id.
88. See Brunson v. Dade County School Board, 559 So. 2d 646 (Fla. 3d Dist. Ct. App. 1990).
89. Id. at 647.
90. Id.
91. Id. at 648 (citations omitted).
District would have found the father’s negligence superseded that of the school board.

Later in the year, the First District Court of Appeal found that the act of a man in attempting to board a moving freight train constituted a superseding intervening cause, relieving the railroad company of any liability for his injuries.92 Pickard, a man who traveled from place to place by hitchhiking or hopping a moving freight train and subsisted by working odd jobs, asked two men he believed to be railroad company employees where he could hop a train. They directed him to a bridge over the tracks. After some equivocating, and having left the premises of the railroad and then returning, Pickard made up his mind to jump a train. As he approached the tracks in the rain, a train came towards him at about 30 miles per hour. He tried to hop the train, but was instead thrown from it when it suddenly lurched. Pickard sustained severe injuries. He sued the railroad company and successfully won a jury verdict after the trial court denied the company’s motion to dismiss. On appeal, the First District Court of Appeal reversed.93

After a lengthy discussion of Pickard’s status as trespasser or licensee, the court considered whether the acts of the railroad company employees caused Pickard’s injuries at law.94 Although the employees may have been the cause in fact of the injuries in directing Pickard to the bridge crossing, their acts were not the cause at law of the injuries. “[T]he inquiry becomes whether the negligence of FEC’s employees set in motion the chain of events leading to Pickard’s injuries or simply provided the occasion for Pickard’s own gross negligence.”95 Stressing Pickard’s own lack of resolve and the extreme danger of his attempt to board the fast freight in bad weather, the court held his actions constituted “an active, independent and efficient intervening cause that severed the tenuous chain of causation between the negligence of FEC’s employees and Pickard’s injuries.”96

The utilization of proximate causation to limit the liability of defendants to plaintiffs who take unusual risks, or whose injuries come

93. Id. at 852-53.
94. The court seems to have assumed that Pickard’s identification of the two men as employees of the railroad sufficed to send that issue to the jury, which found in Pickard’s favor.
95. Id. at 858.
96. Id. at 859.
about due to negligence occurring subsequent to that of the named defendant, seems a natural development. Intentional torts have always superseded negligence, although when the intentional act was that of the plaintiff courts have spoken of it in terms of assumption of the risk. The rationale of both doctrines is the same: a defendant incurs liability only for those injuries which one can anticipate at the time of the negligent conduct. At law, one cannot anticipate an intervening intentional harmful act — whether the act jeopardizes third parties or the plaintiffs themselves.

E. Premises Liability

1. Dangerous Interior Conditions

The nature of proof required of the plaintiff in a slip and fall case provided the basis for two district court of appeal opinions this past year. In the first, the plaintiff slipped on a foreign substance on the floor of a grocery store. At trial, she introduced no evidence that the store's employees caused the material to fall to the floor, and also produced nothing to demonstrate that they knew the material was there. Additionally, she produced nothing indicating the length of time the substance had been on the floor before she slipped on it. Despite her lack of evidence, the trial court denied defendants' motion to dismiss at the close of the plaintiff's case and sent the case to the jury. The jury found for the plaintiff, but on appeal, the Fifth District Court of Appeal reversed.

The court explained that a plaintiff in a slip and fall case can recover from the owner of the premises by demonstrating that the owner failed to use due care, either in keeping foreign materials from the floor or in removing them within a reasonable period of time. As to the second alternative, the plaintiff can show either that the owner knew of the dangerous condition and failed to remedy it, or that the owner should have known of the dangerous condition because, in the exercise of due care, the owner would have discovered it within the period of time it had existed. Where the plaintiff fails to introduce evidence demonstrating any of these three ways the owner failed to exercise reasona-

98. Id.
99. Id. at 214-15.
ble care, the plaintiff cannot reach the jury. Any jury determination in the absence of this evidence would be mere speculation.100

The second case, from the Second District Court of Appeal, accorded with the first.101 Wilson, shopping in a supermarket, returned to an aisle he had visited shortly before. He slipped on some liquid detergent on the floor, which had spilled from a tipped-over bottle on the top shelf, and injured himself. On his earlier trip down the aisle, he had not seen any detergent on the floor. Wilson sued the supermarket. At trial, the store manager testified that he had inspected the aisle no more than fifteen minutes prior to the accident and had not noticed any spill. The case went to the jury, and after it rendered a verdict in Wilson's favor, the trial judge granted a judgment notwithstanding the verdict, which the Second District Court of Appeal affirmed: "Appellants' case fails in its required burden of proof for lack of any evidence that appellee had actual knowledge of a dangerous condition prior to Mr. Wilson's injury. There is likewise no evidence as to the length of time a dangerous condition existed prior to Mr. Wilson's fall."102

In Fitzgerald v. Cestari,103 the Fourth District Court of Appeal determined that a homeowner has no duty to discover whether a sliding glass door contains safety or plate glass, and the Supreme Court of Florida later affirmed.104 Brandi Fitzgerald, visiting a house owned by the Cestaris, walked through a plate glass door and suffered severe injuries. When she sued the Cestaris, the trial judge granted their motion

100. Id. at 215. The court continued:
Where, as here, there is no evidence the premises possessor had actual knowledge of the dangerous condition prior to the injury, and there is no evidence as to the length of time the dangerous condition existed prior to the injury, the premises possessor is entitled to a judgment as a matter of law and a jury is not authorized to speculate or arbitrarily impose strict liability based on the mere contention or general assertion that the premises possessor "should have known of" the dangerous condition.

102. Id. at 263-64.
103. 553 So. 2d 708 (Fla. 4th Dist. Ct. App. 1989).
104. Fitzgerald v. Cestari, 569 So. 2d 1258 (Fla. 1990). The Florida Supreme Court echoed the rationale of the Fourth District. This case presents the difficulty the author of a survey faces when a case during the survey year is considered by a superior tribunal in an opinion which appears subsequent to the survey year. The author of this survey has elected to preserve the integrity of the survey year, but notes the later affirmation for those seeking precedential guidance.
for summary judgment and the appellate court affirmed. The Cestaris had submitted to the trial court an affidavit demonstrating they had no knowledge that the glass door, which was the same one installed by the builders of the house, contained plate glass rather than safety glass. The affidavit also noted that a reasonable inspection would not have disclosed the type of glass in the door. The court held that under these circumstances, the owner of the house had no duty to go beyond a reasonable inspection to determine the nature of the glass. Although the plaintiff had a cause of action against the original builder of the house, she had no cause of action against the owners.

The First District Court of Appeal had occasion to consider the duty owed by the owner of a building to those individuals working to correct a dangerous condition within the building. Champion owned a pre-world war II building and hired Brown & Root to demolish it. Brown & Root subcontracted the removal of asbestos to A & A Insulation, and Mozee worked for A & A. During the course of removal, A & A’s superintendent asked Champion to turn off the electricity to the building, but Champion’s contact person could not comply with this request. He told the superintendent that there were no schematics for much of the old wiring, and A & A should assume the wiring was still hot. Mozee was working in a part of the building with charged wires, grasped a wire, and was electrocuted. His estate sued Champion, which recovered a summary final judgment from the trial court, and the plaintiff appealed to the First District Court of Appeal.

The owner of property incurs liability to independent contractors working on the property only if the owner intermeddles with the work, or if the owner creates or approves of a dangerous condition on the property. Even though Champion did not attempt to take control of the work performed by A & A, Mozee’s estate argued that Champion approved of the dangerous condition in failing to give adequate warning. However, the district court agreed with the trial judge, who concluded that “under the circumstances Champion adequately informed the contractor of the existence of electrical lines in the building and to assume

105. See, e.g., Holl v. Talcott, 191 So. 2d 40 (Fla. 1966).
106. Fitzgerald, 553 So. 2d at 709. Florida law seems to run contrary to that of some other jurisdictions, noted by Judge Dell in his exhaustively researched dissent. Id. at 709-12 (Dell, J., dissenting).
108. Id. at 596-97.
that they were hot, and the contractor's supervisor knew of the existence of hot lines in the building and especially those lines [in the area of the accident].109 The appellate court affirmed the summary judgment in favor of Champion.

2. Dangerous Exterior Conditions

In *Sullivan v. Silver Palm Prop., Inc.*,110 the Florida Supreme Court determined that the owner of property from which subterranean roots protrude will incur no liability for damages from those roots. An automobile went out of control on a bumpy road. Roots from Australian pine trees on Silver Palm's property caused the bumps in the road, and a passenger in the car, Sullivan, sued Silver Palm for her injuries. The trial court allowed the case against Silver Palm to reach the jury. The Third District Court reversed, and the Florida Supreme Court, hearing the case as a matter of great public interest, affirmed.111 It quoted extensively from the lower court's opinion, stressing the distinction between unobservable root growth and obvious danger from overhanging limbs and vision-obstructing shrubbery. The court noted that Florida has now adopted a rule of law consistent with that of several sister states.112

Unlike *Sullivan, Dawson v. Ridgley*113 presented the case of a landowner maintaining an entrance to a public road in such a way that a telephone pole partially obstructed the view of the road by exiting motorists. In leaving the defendant's shopping center, motorists would have their view of the street partially blocked by a concrete telephone pole which did not lie on the property. Dawson, a passenger on a motorcycle travelling on a public road adjacent to the shopping center, suffered injuries in an accident caused by a car leaving the shopping

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109. *Id.* at 598. Judge Smith, in dissent, felt the warning inadequate under the circumstances, particularly because Champion's contact person "did not know the location of the proper switch and . . . made no effort to seek the assistance of other Champion personnel who did know." *Id.* at 599 (Smith, J., dissenting).

110. 558 So. 2d 409 (Fla. 1990), *affg* Silver Palm Prop., Inc. v. Sullivan, 541 So. 2d 624 (Fla. 3d Dist. Ct. App. 1989); *see also* Richmond, 1988 Tort Survey, supra note 23, at 1270-71.

111. *Sullivan*, 558 So. 2d at 410. The question certified read as follows: "Does a landowner have a duty to retard the subterranean root growth of trees which are located adjacent to a public right of way?" *Id.*

112. *See id.* at 411.

center and striking the motorcycle. The trial court granted the defendant’s motion for summary judgment, and the Third District Court of Appeal affirmed.\textsuperscript{114} Although the landowner might owe a duty of reasonable care to business invitees, the duty does not extend to those travelling along an adjacent public road.\textsuperscript{115}

In \textit{Aventura Mall Venture v. Olson},\textsuperscript{116} the Third District Court of Appeal held that maintaining a normal sidewalk curb without painting it to distinguish it from the adjacent roadway does not constitute an act of negligence which would subject a landowner to liability to a business invitee. Olson fell when stepping off a sidewalk curb adjacent to the Aventura Mall. The mall had not painted the curb, and at trial Olson introduced evidence that other malls in the same county with similar curbs had painted the curbs yellow to warn of the difference in levels. The jury found for Olson, but on appeal the Third District reversed.\textsuperscript{117}

Undeniably, a landowner owes a duty to business invitees to warn them of latent or concealed dangers. On the other hand, a landowner owes no duty to warn of an overt danger. Since nothing obstructed Olson’s view, the normal curb presented nothing more than a danger she could have easily observed. As one early Florida case held, raised curbs adjacent to sidewalks are a common instance of life in the United States, and people should not need warning of their location.\textsuperscript{118} The \textit{Aventura Mall} court reasoned that “[t]o hold that an ordinary sidewalk curb, without more, is inherently dangerous would make every municipality and business establishment the virtual insurer of the safety of every pedestrian.”\textsuperscript{119}

As noted earlier,\textsuperscript{120} Florida courts have begun to hold that the act of the plaintiff, while perhaps not serving as a defense to a cause of action in negligence, will act as a superseding intervening cause to cut off liability stemming from the defendant’s negligence. This concept also found its way into the jurisprudence of premises liability. In \textit{Ruiz}
Richmond

v. Westbrooke Lake Homes, Inc.,\textsuperscript{121} a young boy, playing tag on a set of monkey bars, jumped from one bar to another and broke his collarbone when he failed to catch the second bar. He sued the owner of the property on which the monkey bars were situated, arguing negligence in maintenance of the apparatus. The trial court granted the defendant's motion for summary judgment, and the Third District Court of Appeal affirmed.\textsuperscript{122}

The \textit{Ruiz} court pointed out that cases from Florida and other jurisdictions consistently hold that where children suffer injuries from objects on real property, and they have acted in a way to misuse the objects, the owner of the property will incur no liability to them.

In other words, whatever negligence there may have been on the part of the landowner, the negligence of the child superseded it and became, as a matter of law, the proximate cause of the child's injury. Applying this to \textit{Ruiz}, although faulty maintenance was alleged, this is of no consequence, as the proximate cause of Dennis' injuries was that of his own careless attempt to jump from the monkey bar to the slide.\textsuperscript{123}

Indeed, the court specifically points out that it adopts the causation analysis to avoid the removal of the strict bar to recovery created by \textit{Blackburn v. Dorta}'s abrogation of the defense of implied assumption of risk.\textsuperscript{124}

\section*{III. Professional Negligence}

\subsection*{A. Medical Malpractice}

Florida courts this past term turned their attention to when the statute of limitations should begin to run in medical malpractice actions. The Florida Supreme Court noted that the statutory period com-

\begin{footnotesize}
\begin{enumerate}
\item[121.] 559 So. 2d 1172 (Fla. 3d Dist. Ct. App. 1990).
\item[122.] \textit{Id.} at 1173.
\item[123.] \textit{Id.} at 1174. Of particular interest is the court's dicta indicating that "liability will not lie where the child's own act, \textit{rather than an alleged insufficiency of supervision}, is the sole cause of the injury." \textit{Id.} (emphasis supplied). The court thus suggests that the case may be taken from the jury even when the plaintiff might argue that, but for the negligent supervision, the child would not have been allowed to act negligently.
\item[124.] \textit{Id.} at 1174 n.1. Judge Jorgenson's dissent notes his belief that the causation analysis is inappropriate in light of \textit{Blackburn v. Dorta}. See \textit{id.} at 1174 (Jorgenson, J., dissenting).
\end{enumerate}
\end{footnotesize}
mences when the plaintiff first knows either of the negligence of the defendant or of the injury itself.125 Subsequent to an operation to remove polyps in his colon, Shapiro began to lose his eyesight. Less than three months after the operation, in December of 1979, doctors diagnosed Shapiro as blind. In January, 1982, Shapiro received the opinion of another physician that Dr. Barron, who removed the polyps, had caused Shapiro's blindness when he neglected to give Shapiro antibiotics prior to the operation. In late January of 1982, Shapiro sued Barron, who moved for summary judgment, arguing that Shapiro instituted the suit more than two years after the cause of action accrued.126 The trial court granted the motion but the Fourth District Court of Appeal reversed.127 Accepting the case on conflict certiorari with its earlier decision in Nardone v. Reynolds,128 the Florida Supreme Court reversed.

Nardone concerned an earlier, four-year, statute of limitations. After a series of operations, a young boy left the hospital comatose, blind, and with irreversible brain damage. More than four years later, his parents sued for medical malpractice. The Florida Supreme Court held the case time-barred. The plaintiff in Shapiro argued that the new statute of limitations meant Nardone no longer governed. The court disagreed. The consequences of surgery were immediately apparent, and the plaintiff had constant and total access to all medical records. As to the argument that the legislature's enactment of a new statute meant Nardone was no longer good precedent, the court concluded:

While the current statute does not say that the cause of action occurs at the time of the injury, neither did the statute under consideration in Nardone. In fact, it could be argued that by using the word "incident" the legislature envisioned that there would be some factual circumstances in which the statute would begin to run before either the negligence or the injury became known.129

126. The statute in effect read: "An action for medical malpractice shall be commenced within 2 years from the time the incident giving rise to the action occurred or within 2 years from the time the incident is discovered, or should have been discovered with the exercise of due diligence. . . ." FLA. STAT. § 95.11(4)(b) (1979).
128. 333 So. 2d 25 (Fla. 1976).
129. Barron, 565 So. 2d at 1321. Accord, Jackson v. Georgeopolous, 552 So. 2d 215 (Fla. 2d Dist. Ct. App. 1989). Justice Shaw, however, dissented in Barron, as he believed the term "incident" applied only to the negligent act and not to its consequences as well. Barron, 565 So. 2d at 1322 (Shaw, J., dissenting).
However, a First District Court of Appeal opinion pointed out that regardless of when the statute should begin to run, the start can be delayed if the physician in some way prevents the plaintiff from discovering either the injury or its cause.\(^1\) Dr. Drylie performed a surgical procedure in October of 1982 to relieve Martin's urological problems. Unfortunately, Martin had difficulty walking, which Drylie told her was due to positioning of her body during surgery. Drylie assured her the problems with her leg were temporary and she should suffer no permanent injury as a result. In December of 1982, Martin's family doctor told her Drylie was at fault for the problems with her leg, but Martin continued to see Drylie until August of 1983, when a colleague of Drylie's told her nothing further could be done for her leg. In March of 1985, Martin sued Drylie for malpractice. Drylie moved for summary judgment, which the trial court granted. On appeal, the district court reversed: "[A] fact issue was created when Dr. Drylie continued to treat her and assure her that the condition of her leg was only temporary and would presumably clear up with the passage of time."\(^2\)

B. Other Professions

As it did with medical malpractice, the Florida Supreme Court considered a case involving the statute of limitations applicable to professional negligence generally.\(^3\) In an action for negligent preparation of and advice regarding a tax return by an accountant, the plaintiff brought suit more than two years from the date the Internal Revenue Service issued a Notice of Deficiency, but less than two years from the date of an order by the United States Tax Court determining the matter.\(^4\) Believing that the statute of limitations began to run on the same date as the Notice of Deficiency, the trial court granted the accountant's motion for summary judgment. The Third District Court of Appeal disagreed and reversed.\(^5\) On conflict certiorari, the Florida

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131. Id. at 1288. The court also disagreed with Drylie's contention that he should have been granted summary judgment as an employee of the state at the time of treating Martin. The court held that the case presented the factual issue of whether Drylie was wearing two hats — state employee as a teaching physician and private treating physician — and that the jury must determine which of the hats Drylie was wearing when treating Martin.
133. Peat, Marwick, Mitchell & Co. v. Lane, 565 So. 2d 1323 (Fla. 1990).
134. Lane v. Peat, Marwick, Mitchell & Co., 540 So. 2d 922 (Fla. 3d Dist. Ct.}
Supreme Court agreed that the statute did not begin to run until the final order by the Tax Court.

Undeniably, the Lanes had reason to know of the malpractice by their accountants at the time they received the I.R.S. notice. However, in contesting the assessment of deficiency, the Lanes had to adopt the position that the return in question was correct. If the statute of limitations began to run when they received the notice, they would then have to pursue their malpractice action at the same time they contested the I.R.S. deficiency assessment. According to the Florida Supreme Court,

Such a course would have placed them in the wholly untenable position of having to take directly contrary positions in these two actions. In the tax court, the Lanes would be asserting that the deduction Peat Marwick advised them to take was proper, while they would simultaneously argue in a circuit court malpractice action that the deduction was unlawful and that Peat Marwick’s advice was malpractice. To require a party to assert these two legally inconsistent positions in order to maintain a cause of action for professional malpractice is illogical and unjustified.135

The court seems to have created a conflict with its medical malpractice determination that the statute started running for medical malpractice when the plaintiff knew either of the injury or of the negligence.136 However, the court adroitly avoided this conflict by noting that the Lanes’ action in prosecuting the appeal from the I.R.S. determination of deficiency meant they did not have notice of the negligence of Peat, Marwick: “Until the tax court determination, both the Lanes and Peat Marwick believed the accounting advice was correct; consequently, there was no injury.”137

Like the Florida Supreme Court in First Florida Bank,138 lower Florida courts turned their attention to questions of privity in cases involving professionals. The first of these, decided without the benefit of the First Florida Bank decision, reached the same conclusion. Athans’ daughter, Nickitas, sought assistance of counsel to sell a parcel of land


135. Peat, Marwick, 565 So. 2d at 1326.
136. See supra notes 125-129 and accompanying text.
137. Peat, Marwick, Mitchell, & Co., 565 So. 2d at 1326.
138. 558 So. 2d 9 (Fla. 1990). See supra notes 1-10 and accompanying text.
which Athans owned. She retained James Soble, and Soble dealt exclusively with her, although he knew that Athans owned the property. Having found a buyer, Soble drafted a contract for sale of the property, providing that notice to seller go to "Nicholas Athans c/o Irene J. Nickitas," and providing for a deposit which Soble would retain as escrow agent. The buyer paid the deposit, but the sale fell through and Soble lost the deposit. Athans sued Soble in a malpractice action to recover the amount of the deposit, and Soble moved to dismiss the action based on lack of privity. The trial court granted the motion, but the Second District Court of Appeal reversed.

In his deposition, Soble admitted knowing Athans was the true owner of the property. In any event, ample documentary evidence bolsters the conclusion that Soble knew Nickitas was acting for Athans. Accordingly, "the legal services . . . rendered were on [Athans'] behalf." The Second District Court thus seems to have avoided the issue of privity by looking to traditional agency principles, although it stops short of fully discussing the issue. Nickitas acted on Athans' behalf in engaging Soble, and thus acted as Athans' agent. Since Soble knew of Athans' true ownership of the property, and knew of the agency between Nickitas and Athans, Athans as a disclosed principal of Nickitas had every right to sue on the contract.

The same concept that knowledge of the affected party will defeat privity supports the Fourth District Court of Appeal per curiam opinion in a legal malpractice case. Satchell prepared Rosenstone's will, which allegedly did not adequately convey Rosenstone's wishes as to the disposition of his property. Rosenstone's wife sued Satchell, claiming alternatively that she was a client as well as her husband or that Satchell knew that Rosenstone intended for her to benefit from the will. The appellate court reversed the trial court's dismissal of the complaint, noting that established law holds that "an attorney may be held liable for breach of his duties to one who engages his services or to one who he knows is the intended beneficiary."
IV. STRICT LIABILITY

A. Dangerous Activities and Instrumentalities

Florida courts have consistently adhered to the traditional rule of Rylands v. Fletcher and held owners of property strictly liable for harm to adjacent property from non-normal usage of their own land. However, Florida courts have rarely received the opportunity to define what will constitute a non-normal usage. In Midyette v. Madison, the Florida Supreme Court considered damage caused by smoke from a deliberately-set brush fire which obscured vision on an adjacent public highway. The trial court had granted the motion for summary judgment of the landowner, Midyette, on the grounds that he could not incur vicarious liability for the acts of the independent contractor he hired to clear his land. The First District Court of Appeal reversed, holding that the independent contractor exception would not apply where the principal hired the agent to perform an inherently dangerous activity, and that burning brush was such an activity. Granting certiorari to review a question of great public interest, the Supreme Court of Florida affirmed.

The court initially determined that an activity is one of inherent danger when, "[a]s is self-evident, all parties . . . are on notice as to its dangerous propensities." Setting a fire constitutes a dangerous activity, and just as fire creates a danger from burning, so does it create a danger from the smoke it engenders. Accordingly, Midyette had contracted for an activity involving inherent danger, and was vicariously liable for the automobile accident caused by the blowing smoke.

However, the court refused to hold that Midyette would have been strictly liable for the burning. It needed to go no farther to impose vicarious liability than to find that the smoke from the fire constituted an inherent danger, much as an automobile is a dangerous instrumentality. "[A] danger that is merely 'inherent' does not give rise to strict liability."
liability.” \textsuperscript{150} The court merely sent the case back to the trial court for a determination of whether the person burning brush acted negligently. If he did not, Midyette would not incur liability for his acts. \textsuperscript{151}

Accordingly, the Florida Supreme Court has again refused an opportunity to clarify what acts will expose a person to strict liability for their consequences. It continues to elaborate on the middle ground of “inherent” danger, however, and this may well lead to semantic confusion. Acts of inherent danger expose the person instigating them to vicarious liability for the negligence of the actor, as the negligence of the user of a dangerous instrumentality exposes the owner \textsuperscript{152} to vicarious liability to injured third parties. \textsuperscript{153}

B. Animals

Floridians owning dogs may avoid statutorily-imposed liability for harm their pets might cause by posting “bad dog” signs on their property. \textsuperscript{154} Porter owned a junkyard, on which he maintained guard dogs. \textsuperscript{155} On the fence surrounding the yard he had posted four “Bad Dog” signs immediately adjacent to the entrance gate. Registe, a Haitian immigrant, could neither read nor speak English. He claims he went to the junkyard, did not see the signs, and entered the yard. \textsuperscript{156} Even if he had seen the signs, he would not have understood them. Porter’s dogs attacked and injured Registe, and he sued Porter. The trial court grant Porter’s motion for summary judgment. Registe ap-

\textsuperscript{150} Id. at 1128 n.2 (emphasis in original).
\textsuperscript{151} Id. at 1128 n.3.
\textsuperscript{152} The owner of a vehicle leased on a long-term basis, however, will not be vicariously liable for the negligence of the user. See Enterprise Leasing Co. v. Almon, 559 So. 2d 214 (Fla. 1990); Kottmeier v. General Motors Acceptance Corp., 561 So. 2d 1366 (Fla. 2d Dist. Ct. App. 1990); Folmar v. Young, 560 So. 2d 798 (Fla. 4th Dist. Ct. App. 1990); Raynor v. De La Nuez, 558 So. 2d 141 (Fla. 3d Dist. Ct. App. 1990); Kraemer v. General Motors Acceptance Corp., 558 So. 2d 431 (Fla. 2d Dist. Ct. App. 1990).
\textsuperscript{153} The lower Florida courts were not silent in this area during the past year. The Second District Court of Appeal added forklifts driven on a public highway to the growing list of “dangerous instrumentalities,” noting that if a golf cart belongs on the list, so does “this larger, four-wheel vehicle with protruding steel tusks . . . .” Harding v. Allen-Laux, Inc., 559 So. 2d 107 (Fla. 2d Dist. Ct. App. 1990).
\textsuperscript{156} The court noted that Porter’s witnesses conclusively established “existence of the visible, conspicuous signs surrounding [Porter’s] junkyard.” Id.
pealed, and the Second District Court of Appeal affirmed.

The court held that where a sign clearly and prominently displays the warning of the presence of a dog on premises, it satisfies the statutory demands. \[157\] Although the Supreme Court of Florida has noted in dicta that in a given case the plaintiff had actual notice of the presence of a dog on property, \[158\] the court has never actually held the statute demands the visitor to the property receive actual notice. According to the court, the statute itself merely demands that the words posted be "easily readable," and this means "[c]apable of being read easily; legible." \[159\] Accordingly, the statute requires "a sign that is capable of being read and is not a requirement that any possible victim of a dog-bite be 'capable of reading' the sign." \[160\]

The court did note the Fifth District Court of Appeal's earlier decision in Flick v. Malino, \[161\] which held that a sign would not protect a dog owner from a suit by a young child incapable of reading its language. However, the court held the inability of a child to read the words not analagous to the inability of an adult to comprehend the words when conspicuously posted in English:

If that were the case . . . it would force a return to the common law to determine the respective rights and duties of the parties because no dog owner could be expected to post a sign in the particular language of every conceivable victim. We do not believe that to have been the legislative intent. \[162\]

C. Products Liability

The Third District Court of Appeal determined that the manufacturer of a product does not incur strict liability for injuries to a worker dismantling the product after its useful life has passed, even when the product contains highly toxic materials. \[163\] Westinghouse manufactured transformers, using valuable metals as well as PCB's. \[164\]

157. Registe, 557 So. 2d at 215.
159. Registe, 557 So. 2d at 216 (citing THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (New College Ed. 1979)).
160. Id. (emphasis in original).
161. 374 So. 2d 89 (Fla. 5th Dist. Ct. App. 1979).
162. Registe, 557 So. 2d at 215-16.
164. PCB's, or "polychlorinated biphenyls," are highly toxic materials contained
Richmond & Light purchased the transformers and at the end of their useful life sold them to a scrap metal salvage dealer. His employee, High, dismantled the transformers, seeking to salvage the metals used by Westinghouse to make the transformers. In the course of dismantling, High poured the liquid containing the PCB’s on the ground and received injuries when the liquid came in contact with his body. High sued Westinghouse, and the trial court granted Westinghouse’s motion for summary judgment. The Third District Court of Appeal affirmed. 165

The court held that “[w]hile the transformers were sealed and intact there was no harm. . . . Westinghouse’s product as it had originally been sold to FP&L, for practical purposes, had ceased to exist at the time the alleged injuries occurred.” 166 Although the court might have based its decision on the termination of the useful life of the product, instead it chose to affirm the summary judgment “based upon a substantial change in the product from the time it left the manufacturer’s control . . . .” 167 The defect accordingly stemmed from the transformation of the product, rather than from its manufacture. In resting its decision on these grounds, the court paid lip service to cases from federal district courts holding that manufacturers could not foresee salvage operations which involved the dismantling of their products. 168 However, the court elected not to adopt foreseeability as its ratio decidendi.

In Knox v. Delta International Machinery Corp., 169 the Third District Court of Appeal, in a per curiam decision, reiterated the rule that manufacturers who supply their products with safety devices incur no liability to those injured by the product after the device has been removed, even though the manufacturer may not have warned against its removal. Delta manufactured a jointer machine with a safety guard, but the guard could be easily removed. It did not warn against removal of the guard, and Knox used the machine after the guard had been removed. Knox lost two fingers, and sued Delta. The trial court granted Delta’s motion for summary judgment, and the appellate court affirmed: “[A] manufacturer is, as a matter of law, under no duty to

within electrolytic fluids in the transformer. Id. at 229.
165. Id.
166. Id. at 228.
167. Id.
169. 554 So. 2d 6 (Fla. 3d Dist. Ct. App. 1989).
produce a fail-safe product, so long as the product poses no unreasonable dangers for consumer use." The jointer machine, when it left Delta’s factory, was perfectly safe. Delta had no duty to prevent users from removing those design elements which contributed to its safety.

V. EMOTIONAL DISTRESS

Over the years, Florida’s protective attitude regarding causes of action for emotional distress has consistently withstood numerous challenges. Most recently, with its decision in Eastern Airlines, Inc. v. King, the Florida Supreme Court reiterated its commitment to allowing damages for emotional distress not stemming from physical injury only in restricted circumstances. Improper inspection and maintenance caused engine failure on an Eastern flight on which King was a passenger. Although at one point all three engines failed to operate and the passengers prepared to ditch, the crew managed to restart one engine and the plane limped to a safe landing. King sued Eastern, alleging reckless or intentional infliction of emotional distress and after judgment for Eastern on the pleadings, the Third District Court of Appeal reversed. Accepting the case on conflict certiorari, the Florida Supreme Court reversed.

Florida recognizes the tort of intentional infliction of emotional distress as expressed in the Restatement (Second) of Torts, which requires the defendant act in an “extreme and outrageous” manner before liability will attach. King’s pleadings alleged Eastern’s mechanics had failed to discover a missing O-ring in the engines, which caused them to fail. Additionally, King alleged that Eastern mechanics had failed to discover missing O-rings on at least a dozen prior occasions. However, as the court noted, these allegations at best amount to claims of mere negligence. The court found that Eastern’s conduct did not rise to the level of outrageousness needed to support the tort

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170. Id.
171. 557 So. 2d 574 (Fla. 1990).
173. The court noted conflict with Metropolitan Life Ins. Co. v. McCarson, 467 So. 2d 277 (Fla. 1985), and Brown v. Cadillac Motor Car Div., 468 So. 2d 903 (Fla. 1985).
174. "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress . . . ." RESTATEMENT (SECOND) OF TORTS § 46 (1965).
claimed by King.\textsuperscript{175}

Chief Justice Ehrlich, in his concurring opinion, noted that King's complaint did not even allege adequate facts to support a cause of action for negligent infliction of emotional distress.\textsuperscript{176} Although Florida no longer limits recovery for the tort to those instances in which the distress accompanies physical impact, the plaintiff seeking to recover must still demonstrate "a clearly demonstrable physical impairment [accompanies] or occur[s] within a short time after the negligently inflicted psychic injury."\textsuperscript{177} King failed to demonstrate either impact or resulting physical harm.

Also noteworthy is Justice Barkett's brief concurrence:

I concur in the Court's judgment that prior decisions would bar relief for the intentional infliction of mental distress in this case. I believe, however, that persons who have suffered great mental anguish through the extreme negligence of a tortfeasor, such as Eastern's in this case, should be permitted a remedy.\textsuperscript{178}

VI. CONCLUSION

As noted last year,\textsuperscript{179} the Florida Supreme Court continues on a relatively even keel, favoring on an overall basis neither defendants nor plaintiffs. During the past year, however, Florida judges have shown an increasing distaste for awarding damages to litigants who, having voluntarily placed themselves in existing positions of danger, seek to recover damages from those who created the danger. Blocked by precedent from dismissing these claims based on the defense of assumption of risk, Florida courts at all levels have instead viewed the actions of the plaintiffs as the single effective cause of their harm. Accordingly, they have found as a matter of law that the negligence of the defendant did not cause the injuries of which the plaintiff complains.

In this instance, what seems an end run around an unworkable rule instead mirrors the philosophy underlying tort law. Plaintiffs recover from others for their injuries only because the others have acted

\begin{footnotes}
\item[175] King, 557 So. 2d at 578.
\item[176] Id. at 579 (Ehrlich, C.J., concurring).
\item[177] Id. (citations omitted).
\item[178] Id. at 580 (Barkett, J., concurring).
\end{footnotes}
in a socially irresponsible manner, and because the irresponsibility has led directly to the harm the plaintiffs have suffered. Danger caused by irresponsibility does not produce harm to people when they have recognized the danger and, confronting it without compulsion, suffered the type of harm they could have anticipated the danger would produce. The irresponsibility has done no more than give people the potential for harming themselves, and in this light, courts cannot fairly expect one who merely establishes a potential for voluntary injury to recompense those who willingly take the risk of harm on themselves.

The stand of Florida courts on this issue underlies a more significant truth about the development of Florida tort law. Although at times courts in our state may seek to bend the fabric of the law in an effort to award damages to an injured person, the law will ultimately spring back to comport with its underlying theory. This resilience shows that Florida courts have maintained a keen sense of the theory of law, even when the equities of the case might seem to militate otherwise. Unfortunately, as an English jurist noted years ago, “[h]ard cases, it has been frequently observed, are apt to introduce bad law.” Fortunately, Florida’s courts have continued to resist the temptation to alter the law to permit unjustified recovery in the isolated case.

180. See, e.g., King, 557 So. 2d at 580 (Barkett, J., concurring), discussed supra note 178 and accompanying text.

David S. Felman*

I. INTRODUCTION

Effective July 1, 1990, the Florida Legislature revamped Florida’s corporate law by enacting the Florida Business Corporation Act.1 Except for provisions concerning foreign corporations doing business in Florida, the Act generally applies only to corporations incorporated in Florida.2 The Act repeals the Florida General Corporation Act,3 and with significant exceptions, adopts the Revised Model Business Corporation Act.4 This article addresses the financial provisions in chapter VI

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2. One exception to this general rule is section 607.0902, the control shares acquisitions statute, which covers some corporations that have their principal office or place of business in Florida but are not necessarily incorporated in Florida. See FLA. STAT. § 607.0902 (1990).

3. FLA. STAT. § 607 (1989) (repealed 1990) (generally referred to as the “prior” or “former” law).

4. REVISED MODEL BUSINESS CORP. ACT (1984) [hereinafter RMBCA]. The
of the Act—those governing capital structure, issuances of equity securities, and distributions.  

The Act's financial provisions principally are set forth in sections 607.0601 through 607.06401. These provisions are a credit to the Act's drafters and the drafters of sections 6.01 through 6.40 of the RMBCA, on which they are based, because they are more simple, logical, and flexible, and better attuned to commercial and economic reality than the former law. The Act scraps complex, cumbersome, and unnecessary concepts and limitations of the former law, adopts current scholarly thoughts on corporate capital structure, and brings Florida the benefits of conforming to the RMBCA, which is likely to be widely adopted among the states. One commentator notes the benefits of adopting the RMBCA as follows:

The advantages of following the national model are obvious. The provisions have been thoroughly considered by a number of very prominent practitioners and scholars. The Official Comments to each section of the Model Act should serve as a guide to the inter-

RMBCA reflects a complete revision of the Model Business Corporation Act developed over a five-year period by the Committee on Corporate Laws of the Section of Corporation, Banking and Business Law of the American Bar Association and completed in 1984. The RMBCA is “designed to be a convenient guide for revision of state business corporation statutes, reflecting current views as to the appropriate accommodation of various commercial and societal interests involved in modern business corporations.” MODEL BUSINESS CORP. ACT ANN. xxiii (1990) [hereinafter MBCAA].

This article occasionally refers to the official comment that accompanies the RMBCA (the “official comment”) and to the commentary to the Act that was prepared by its drafters. The official comment is set forth in the MBCAA, supra, and the drafters' commentary on the Act are compiled in T. O'BRIEN, FLORIDA LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS (1990).

5. To limit its scope and length, this article does not address in detail the following matters that the author considered more or less peripheral to the principal subjects: fractional shares, subscriptions for shares, shareholders' preemptive rights, restrictions on transfers of shares, form and content of certificates, share voting rights (including voting groups), and directors' fiduciary duties in connection with the corporation's issuance and its repurchase of shares. This article also generally does not address other state and federal laws that apply to these matters, such as the laws governing the sale of securities and the corporation's repurchase of its securities.


7. Persons following the federal tax “simplification” efforts of the 1980's might be skeptical, but please continue reading. Except for section 6.22, which is based on the former law and concerns shareholders' liability for shares issued before payment, the Act generally adopts the RMBCA, supra note 4. As discussed in this article, the Act modifies those provisions in some respects.
pretation of the Revised Statute's provisions. The evolving case law from jurisdictions having substantially the same provisions can be persuasive authority in the interpretation and application of the Revised Statute.⁸

The Act also facilitates the adoption of anti-takeover measures by Florida corporations. Corporations considering Florida incorporation should evaluate the Act favorably.

The changes affecting the financial provisions that are discussed in this article were part of revolutionary amendments to the Model Business Corporation Act made in 1980 and 1984.⁹ In particular, these amendments: (a) eliminated the established concepts of par value, stated capital, and treasury shares; (b) eliminated limitations on acceptable consideration for sales of shares; (c) eliminated specific references to “common” and “preferred” shares in recognition of the blurring between those types of shares that has occurred in the market place; and (d) adopted uniform rules governing all transactions in which consideration is paid to shareholders with respect to their shares, called distributions. The objectives of most of the changes were to eliminate obsolete and ineffective restrictions, and to allow the corporation, its creditors, and shareholders to freely determine their relationship through negotiation and contract. This article analyzes these and other more subtle changes, their policy underpinnings and practical implications, and several omissions and inconsistencies in the financial provisions of the Act that are proposed for revision in a bill pending before the Florida Legislature.

Although the Act's financial provisions are derived from the RMBCA, the provisions actually enacted by the Florida Legislature in the Act vary in significant respects from the RMBCA. The most important substantive variances are in section 607.0601(1) and section 607.0624(2). Section 607.0601(1) omits a sentence requiring that all shares of a class be granted equal rights, limitations, and preferences, except for variations caused by series.¹⁰ Section 607.0624(2) confirms

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⁹ The premier authority on the legal guidelines governing corporate capital structures observes that following these changes, the new law “is substantially at variance with the learning that today's judges and practitioners gained when they were in law school.” Manning, Assets In and Assets Out: Chapter VI of the Revised Model Business Corporation Act, 63 TEX. L. REV. 1527 (1985).

the validity of poison pill devices involving rights that discriminate against persons acquiring more than a certain number of shares.¹¹ Both modifications facilitate use of anti-takeover defenses.

II. WHAT'S AVAILABLE ON THE SHELF—AUTHORIZED SHARES AND BLANK CHECK AUTHORIZATION (SECTION 607.0601 AND SECTION 607.0602)

Authorized shares are the shares of all classes that the corporation is authorized to issue as set forth in its articles of incorporation.¹² The Act generally requires that shareholders approve amendments to the articles of incorporation that increase the number of authorized shares or change the terms of any shares that have been issued.¹³ Consequently, authorized shares are the limit of what is available "on the shelf" for directors to issue to raise capital for the corporation.¹⁴ The number and terms of authorized shares vitally concern shareholders because each authorized share represents potential dilution of their interests in the corporation (voting, dividends, liquidation rights) and will reduce their share value if earnings from the capital raised do not offset the increase in the number of shares.

Section 607.0601 prescribes what may be in the articles of incorporation concerning authorized shares.¹⁵ Section 607.0602 permits a corporation to delegate to the board of directors authority to establish the terms of classes and series of shares before they are issued.¹⁶

A. Authorized Shares (Section 607.0601)

Following the precepts of the RMBCA, the Act does not limit rights, preferences, and limitations that the corporation may specify for its shares, except in the one respect discussed below, and except for

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¹¹. Id. at § 607.0624(2).
¹². Id. at § 607.0601(2).
¹³. See id. at § 607.1004(1).
¹⁴. See id. at §§ 607.0601, .0621. The one exception to this rule is an amendment to increase the corporation's authorized shares to accommodate a stock split or stock dividend if the corporation has only one class of stock outstanding. Id. at § 607.1002(5).
¹⁵. FLA. STAT. § 607.0601 (1990). Section 607.0202 generally specifies all matters to be covered by the articles, including authorized shares while section 607.0601 concerns only authorized shares. See id. at §§ 607.0202, .0601.
¹⁶. Id. at § 607.0602.
provisions that are inconsistent with other provisions of the Act. Section 607.0601 allows the corporation and its shareholders to freely agree on all the terms of the corporation’s capital stock. These terms include voting rights, redemption and conversion rights (at any person’s option), shareholder distributions, and relative preferences among classes with respect to distributions. The official comment calls the terms on this list the “principal features that are customarily incorporated into classes of shares.” The official comment also sets forth illustrative examples of “innovative” classes of shares that are permitted by the RMBCA, including classes authorized to elect a specified number of directors, classes entitled to vote as a separate voting group on certain transactions, variations of voting rights among shares (including nonvoting, fractional, and multiple votes per share), and variations among classes in dividend rights and rights on dissolution. To cover terms that they might have missed and to encourage market innovation, the drafters add for good measure in subsection four that this list “is not exhaustive.” The Act specifically does not limit a corporation’s ability to differentiate among classes with respect to voting rights, clearly authorizing nonvoting shares and shares with fractional or multiple voting rights. However, other regulations, such as stock exchange requirements, might restrict a corporation’s discretion in this respect.

17. An example of a provision that would be inconsistent with other provisions of the Act is the elimination of the voting protections to which all shares are entitled pursuant to Florida Statutes section 607.1004 (1990).
18. Id. at § 607.0601.
19. Id. at § 607.0601(1), (3).
20. MBCAA, supra note 4, at 357.
21. Id. at 360.
22. Id.
23. FLA. STAT. § 607.0601 (1990). Section 607.0601(3)(a), concerning voting rights provisions, states that the articles of incorporation may authorize shares that “[h]ave special, conditional, or limited voting rights, or no rights, or no right to vote, except to the extent prohibited by this act . . . .” Id. at § 607.0601(3)(a) (emphasis added). The emphasized language was added in error to text taken from section 6.01(c) of the RMBCA, supra note 4, and is proposed for deletion pursuant to the Second Corrections Bill, because shares with “no rights” are worthless. Authorization to issue shares with no voting rights is covered by the next clause, “or no right to vote.” Id.
24. See, e.g., NEW YORK STOCK EXCHANGE LISTED COMPANY MANUAL § 313.00 (1990) (generally requiring that an exchange listed issuer not have a class of shares with voting rights not in proportion to the class equity interests).
Section 607.0601 is basically enabling rather than restrictive.25 The Act recognizes that each corporation and its shareholders face their own unique financial and control circumstances and should be permitted to structure the corporation's capital structure to accommodate those particular circumstances. Implicitly, the Act completes the shift in emphasis away from restrictive and protective corporate statutes to reliance on the following elements:

(a) the interest and sophistication of informed parties to the security purchase transaction in vigorously defending their own interests;

(b) full disclosure requirements and anti-fraud rules mandated by the state and federal securities laws, to ensure that the buyer is completely and accurately informed before it makes the purchase and that the transaction itself is not subject to manipulation by the issuer; and

(c) fiduciary duties of directors that require them to act reasonably and in good faith, especially in transactions in which they are interested, which involve the greatest potential for abuse.

The Act completes the deregulation of corporate law governing the specifications of capital stock.

Practically, this new law concerning authorized shares is not revolutionary, because the former law permitted most types of equity securities, either expressly or implicitly. The Act more clearly welcomes innovation, and permits some kinds of equity and hybrid securities which had unclear status under the former law.26 Section 607.0601(2) im-


26. By implication, the former law provided broad authorization to the corporation to issue shares with a wide range of attributes. Under this former law, Fla. Stat. § 607.044(1) (1989) (repealed 1990) provided that "shares may be divided into one or more classes, any or all of which may consist of shares . . . with such designations, preferences, limitations, and relative rights as shall be stated in the articles of incorporation." Subsection two of this section listed permitted terms for "special and preferred" classes of shares, but prefaced the list by stating that it did not limit the foregoing general authority of section 607.044(1). Id. at § 607.044(2). By implication, section 607.044(1) granted the corporation broad plenary authority to create a wide range of equity securities. The corporation's plenary authority under the Act is confirmed more clearly, however, with the "not exhaustive" provision in section 607.0601(4). See Fla. Stat. § 607.0601(4) (1990).

The former law listed specifically permitted terms for "special and preferred shares" but left unclear whether common shares could be subject to those terms. Fla. Stat. § 607.044(2) (1989) (repealed 1990). Whether the term "special" classes included common shares was unclear, because that term was not defined. The former law did not expressly address whether common shares could be redeemed by the corporation. Also, unlike the Act, the former law did not expressly permit (a) shares converti-
poses a blanket limitation that was not expressly established under the former law. The corporation must authorize one or more classes of shares that together have unlimited voting rights and one or more shares that together have rights to the net assets of the corporation upon dissolution. These attributes are associated with traditional common stock.

Unlike corporate law in many states, the Act does not restrict the corporation from: (a) creating shares that are convertible at the shareholder’s option into cash (shares with a “put option”), into other classes of shares that have preferential financial rights, or into debt securities of a corporation (shares with “upstream” conversion privileges); or (b) creating a class of voting shares without preferential financial rights that is callable by the corporation (redeemable common shares). The official comment to section 6.01 of the RMBCA reasons that this change has little practical effect because the corporation and its shareholders generally could agree separately in a buy-sell agreement to redemption of the shares at either person’s option.

An upstream conversion feature eliminates the permanence associated with common shares that favors the corporation. Because the

ble into debt or debt convertible into shares, or (b) shares subject to conversion or redemption at the option of a third person or on the occurrence of a designated event. Finally, the blank check provision of the former law, section 607.047, limited to a list the particular terms that could be the subject of variations between series, but its counterpart in the Act, section 607.0602(1), refers back to the relatively unlimited provisions of section 607.0601 of the Act.

28. RMBCA, supra note 4, at § 6.01 (official comment). The former law expressly permitted conversions of “preferred or special classes” to any other class of shares and redemption of “preferred or special classes” at the shareholder or corporation’s option, but did not expressly address redeemable or puttable common stock. See FLA. STAT. § 607.0601(2).
29. The comment states: “If it is possible to create what is essentially a callable voting share by agreement, there is no reason why such provisions should not be built directly and publicly into the capital structure of the corporation if that is desired.” RMBCA, supra note 4, at § 6.01 (official comment). In Florida, this statement might underestimate the practical effect of the change, because nothing in the former law expressly addressed the enforceability of an agreement granting the corporation a right to call its common stock in the absence of a proposed transfer by the shareholder. Even section 607.0627, which was added by the Act and governs agreements restricting a shareholder’s right to transfer his shares, does not expressly state that an agreement between the corporation and its shareholder may authorize the corporation to simply call its common shares, even if the shareholder does not initiate a transfer. See FLA. STAT. § 607.0627 (1990).
holder might cash out or convert to a relatively more senior security when the corporation’s prospects dim and the corporation most needs cash or equity. Conversely, by agreeing to redemption at the corporation’s option, the common shareholder forfeits the relatively permanent nature of his interest in the corporation and the prospect of benefitting to an unlimited extent from future value appreciation. Even without redemption provisions, the shareholder might be squeezed out by a merger, reverse stock split or similar event, but these are extraordinary events and typically invoke dissenters’ rights. The Act permits the common shareholder to agree in advance to redemption of his shares precisely when the corporation’s prospects become favorable, although the corporation’s exercise of power to redeem common stock might be restricted by securities laws or fiduciary duty principles.\(^\text{30}\)

The Act permits creation of “hybrid securities” that have mixed debt and equity attributes, for example, convertible debt (debt to equity or equity to debt) and debt that is entitled to participate in earnings or dividends.\(^\text{31}\) However, the official comment to section 6.01 of the RMBCA states that only securities characterized as “shares” may be given the right to vote.\(^\text{32}\) Therefore, a corporation could not issue a debt security that entitles the holder to vote on a default, although a debt security that is convertible into an equity security on default is permitted.

The RMBCA does not generally define or use the terms “common” and “preferred” stock. The official comment explains this policy decision:

Traditional corporation statutes work from a perceived inheritance of concepts of “common shares” and “preferred shares” that at one time may have had considerable meaning but that today often do not involve significant distinctions. It is possible under modern cor-


32. RMBCA, supra note 4, at § 6.01.
poration statutes to create classes of “common” shares that have important preferential rights and classes of “preferred” shares that are subordinate in all important economic aspects or that are indistinguishable from common shares in either voting rights or entitlement to participate in the assets of the corporation upon dissolution. The [RMBCA] breaks away from the inherited concepts of “common” and “preferred” shares and develops more general language to reflect the actual flexibility in the creation of classes of shares that exists in modern corporate practice. 33

The former law did not define those terms or expressly refer to common and preferred shares in describing share attributes, so this change is not revolutionary in Florida. 34 In a slight variance from the RMBCA, the Act still uses these terms in one confusing reference in section 607.0202, discussed below, 35 and in the following sentence of section 607.0601(5): “Shares which are entitled to preference in the distribution of dividends or assets shall not be designated as common shares, shares which are not entitled to preference in the distribution of dividends or assets shall be common shares and shall not be designated as preferred shares.” 36 This text was derived from the former law, section 607.044(4), 37 not from the RMBCA. Apparently, the Act’s drafters were not willing to rely on federal and state securities laws to deter misleading characterizations of common and preferred stock.

The elimination of statutory definitions of share rights causes the share descriptions in the articles of incorporation to assume great importance. These descriptions constitute the shareholders’ “contract” with respect to their shares. 38 The official comment states that in some limited circumstances, shares still may be described simply. 39 A capital structure consisting of only a single class of “common shares” may be described as such; all voting and residual equity financial interests will vest in that class, without further delineation. Additionally, for a capital structure consisting of two classes, one with a liquidation preference, “it is necessary to specify only the preferential liquidation rights

33. Id.
35. See infra note 46 and accompanying text.
38. RMBCA, supra note 4, at § 6.01 (official comment).
39. Id.
of that class; in the absence of a contrary provision in the articles, the remaining class would be entitled to receive the net assets remaining after the liquidation preference has been satisfied." 40 Otherwise, all preferences and special rights of shares should be well described, because those rights are not spelled out in the Act and exist only to the extent specifically stated in the articles of incorporation. 41 Each class must be given a "distinguishing designation," for example, "nonvoting common shares" or "class A preferred shares."

In section 607.0601, the Act varies from the RMBCA by omitting the following sentence: "All shares of a class must have preferences, limitations, and relative rights identical with those of other shares of the same class except to the extent otherwise permitted by section 6.02." 42 The purpose of omitting this sentence was to facilitate anti-takeover measures that involve securities discriminating against hostile bidders, but its omission leaves a gap. Generally, the RMBCA contemplates uniformity of share attributes within the class except for variations between series within the class. The omission of the sentence, however, permits the corporation to vary the rights, preferences, and limitations of shares within a class, even if the corporation does not use series. The Act does provide in section 607.0602(3) that each share of a series be identical and that it be identical with the other shares of the class, except to the extent distinguished by the terms of the series. However, this provision would not apply if the corporation does not have series.

The omission of the foregoing sentence supports the conclusion that corporations may vary share attributes within classes without using series. This raises several issues. Did the drafters of the Act contemplate that a corporation might issue numerous shares within a single class, each share with different rights, preferences, and limitations? Why should a corporation use series at all, if it can otherwise establish shares with variable rights within the class? Does not the RMBCA's scheme contemplate that variations within a class will take the form of series? What unintended results might follow from tinkering with this

40. Id.
41. See, e.g., Judah v. Delaware Trust Co., 378 A.2d 624 (Del. 1977) (the provisions of the articles of incorporation control the rights of preferred shareholders, and those shares have only those rights granted or provided in the articles); see generally Buxbaum, Preferred Stock—Law and Draftsmanship, 42 CAL. L. REV. 243 (1954) (an excellent discussion of drafting points for preparation of preferred stock provisions).
42. RMBCA, supra note 4, at § 6.01.
traditional scheme of classes with uniform share attributes? Might the new scheme facilitate new, as yet unseen, versions of the poison pill? For example, a corporation seemingly may provide in its articles that any shareholder owning more than a certain number of shares automatically loses the benefits of its share ownership, including voting rights, dividends, and liquidation rights. This discrimination among the holders of shares (not just rights or options as contemplated by section 607.0624(2)) of a single class might be considered authorized by the Act.43

B. Blank Check Authority (Section 607.0602)

Section 607.0602 confirms that the articles of incorporation may give "blank check" authority to the board of directors to determine the preferences, limitations, and relative rights of any class or series of shares before the shares are issued.44 The Act provides for extension of blank check authority to common shares as well as preferred. The former law referred only to designations of "preferred" and "special" shares, and left unclear whether "special" classes included common shares.45 The Act also permits extension of blank check authority to

43. The drafters' commentary to section 607.0601 does not address these issues. See Fla. Stat. § 607.0601 (1990). The commentary states, briefly and incorrectly, that the proposed provision does not differ materially from the former law. The former law provided for equality among the shares of a class, as follows: "[A]ll shares of the same class shall be identical except as to the following relative rights and preferences, as to which there may be variations between different series . . . ." Fla. Stat. § 607.047(1) (1989) (repealed 1990). Professor Stuart Cohn, a member of the drafting committee, told the author that the modification omitting the share equality sentence occurred after preparation of the commentary.


44. Fla. Stat. § 607.0602 (1990). Before issuing blank check shares, the corporation must deliver to the Department of State "articles of amendment" to the articles of incorporation that set forth the terms of the class or series of shares and become part of the corporation's articles of incorporation. Once shares of the class or series are issued, the terms can be changed only with shareholder approval. Id. at § 607.1004(1)(d). Conversely, the terms may be changed without shareholder approval before the shares are issued. Id. at § 607.0602(1).

classes. Prior law permitted authorization of the directors to establish the terms of series only. The Act's intent on these matters is clear, although the Act mistakenly retains vestiges of the former law in section 607.0202(1)(d) and (e) that seem to contemplate limiting blank check authority to series and to "preferred" and "special" shares.46

46. FLA. STAT. § 607.0202(1)(d), (e) (1990). The drafters added potentially confusing language in section 607.0202(1), which provides in part:

"The articles of incorporation must set forth: . . .

(d) If the shares are to be divided into classes, the designation of each class and the statement of the preferences, limitations, and relative rights in respect of the shares of each class; . . . [and]

(e) If the corporation is to issue the shares of any preferred or special class in series, the designation of each series and a statement of the variations in the relative rights and preferences as between series insofar as the same are to be fixed in the articles of incorporation and a statement of any authority to be vested in the board of directors to establish series and fix and determine the variations in the relative rights and preferences between series . . . .

Id. at § 607.0202(1) (Section 607.0202 is derived from section 2.02 of the RMBCA, supra note 4, except for these subsections, and section 607.0202(f), concerning preemptive rights, which were added by the Act.). The quoted text is confusing because it is derived from the former law, which allowed blank check provisions for series, but not classes. Part (d) does not clarify that in some cases terms of classes might not be established when the articles are initially filed. This language might confuse, because it seems to require that the articles initially spell out the terms of each class, rather than leaving them for future determination by the board of directors. Compare section 607.0601(1) (derived from the RMBCA) which states as follows: "If more than one class of shares is authorized, the articles of incorporation must prescribe a distinguishing designation for each class, and prior to the issuance of shares of a class, the preferences, limitations and relative rights of that class must be described in the articles of incorporation. Id. at § 607.0601(1) (emphasis added). This language clarifies that only the class designation initially must be stated in the articles and that specification of the terms of each class can be reserved for later determination pursuant to blank check power, to be evidenced by articles of amendment filed before issuance. Section 607.0202(1)(d) also does not refer to any requirement that the terms of series must be described in the articles of incorporation, even though similar to classes, their terms eventually must be described in an amendment to the articles. Id. at § 607.0202(1)(d).

Part (e) furthers this confusion by referring to the delegation to the board of authority to "establish series and fix and determine the variations in the relative rights and preferences between series." Id. at § 607.0202(1)(e). This subsection does not refer to blank check authority for classes, again inconsistently with section 607.0602, which grants authority to directors to establish the terms of not only series but also of classes. Also, subsection (e) refers to blank check provisions for "preferred and special series," reintroducing language of the former law that left unclear whether blank check authority could be extended to common shares. The Second Corrections Bill proposes deletion of parts (d) and (e), which would eliminate the inconsistencies and make section
This change probably will have little practical significance because classes and series are not inherently different, and the board of directors may do little more with blank check classes than with blank check series. A series is simply a subset of a class, but with the same potential attributes. An exception is the requirement in Florida that shares of the same series be identical, but apparently not shares of the same class.

Blank check authority historically has served two important purposes: to enhance capital-raising efforts; and to facilitate adoption of anti-takeover measures. For its capital-raising efforts, the board of directors receives broad and instant flexibility to determine share attributes without prior shareholder approval. This flexibility facilitates transactions that involve last-minute negotiations between the issuer and share purchasers concerning the securities' attributes.

Blank check authority enables the issuer to quickly take advantage of favorable changes in market variables such as stock prices, interest rates, and currency trading rates. Typically, the class of shares is described in the articles with key market-dependant economic terms left open. The terms of each series within the class are determined according to market conditions when shares of the series are issued. For example, the market-dependant terms of a series of preferred stock might include the dividend rate (variable or fixed—if variable, the formula for determination), timing for payment of dividends, conversion and redemption rights, and special voting rights. Generally, all shares of the series are issued concurrently, because changes in market conditions quickly make these market-dependant terms obsolete.

Existing shareholders might be concerned with the potential dilutive effect of blank check shares on their shares. Each existing shareholder must rely on the good business judgment of the corporation's directors not to issue shares on more favorable terms, and then only to suit real capital needs. In normal circumstances (no self dealing or interest in the transaction), the business judgment rule will insulate directors from shareholder challenges to their actions in issuing blank check shares. Therefore, shareholders might desire to restrict directors'
blank check authority by negotiating restrictions on that authority as part of their purchase of shares.

III. SHARE OPTIONS (SECTION 607.0624)

Section 607.0624(1) of the Act conforms to section 6.24 of the RMBCA, and confirms that, unless otherwise provided in its articles of incorporation, the corporation may issue rights, options, and warrants for the purchase of its shares. The directors establish the terms of these securities and the consideration for which the underlying shares are issued. Generally, shareholder approval is not required.

Section 607.0624(2) expressly permits a corporation to impose conditions or restrictions that deprive specified persons of the options' benefit, including "persons owning or offering to acquire a specified number or percentage of the outstanding common shares or other securities of the corporation . . . ." This provision carries over the provisions of former law, section 607.058, authorizing poison pill rights plans that discriminate against persons acquiring or threatening to acquire the corporation's shares.

IV. A SPECIAL APPLICATION—POISON PILL PLANS

In recent years, statutes similar to section 607.0602 (blank check authorization) and section 607.0624 (share options) have been used by corporations to implement "poison pill" or "shareholder rights" plans without prior shareholder approval, to the dismay of many institutional investors. The Act includes provisions that are designed to facilitate these plans and to avoid challenges based on grounds that have been

49. Shareholder approval may be obtained as a discretionary matter, to comply with listing requirements, see New York Stock Exchange Listed Company Manual § 309.00 (1990), or to obtain the benefits of federal law conditioned on shareholder approval, see S.E.C. Rule 16b-3(a).
52. See, e.g., "K-mart Won't Oppose Holder's Bid for Vote on Poison-Pill Plan," Wall Street J., Dec. 7, 1990, at A4 ("The Wisconsin board . . . has campaigned for years against what it sees as the improperly unilateral means by which poison-pill measures are put in place by a simple vote of the board. Implementing other anti-takeover defenses, such as staggered terms for directors, typically requires prior holder approval."). Institutional holders have proposed that the federal proxy rules be amended to require a shareholder vote for adoption of poison pills.
successful in other states.

"Poison pill" or "shareholder rights" plans come in many forms, but generally involve distribution by the corporation of rights or securities that have redemption or conversion provisions. Once triggered by a hostile takeover attempt or a party acquiring a specified percentage of a class of the issuer's securities, the plans make the securities excessively or prohibitively expensive to buy. The principal poison pill provisions are as follows: (a) a "flip-in provision" that grants each shareholder (other than the bidder) an option to purchase the issuer's securities at a substantial discount on the occurrence of the triggering event (usually acquisition or tender for a certain amount of shares, such as 20%); (b) a "flip-over provision" that permits each shareholder to purchase the acquiring corporation's securities at a discount following a merger or consolidation; and (c) a "back-end" provision that permits each shareholder (other than the bidder) to exchange its shares for a package of the issuer's securities following completion of a hostile takeover.

Reduced to their simplest forms, the flip-in provision grants a shareholder an option to purchase the issuer's shares at a discount, a flip-over provision grants a shareholder an option to purchase the acquiror's shares at a discount in a manner similar to anti-dilution provisions, and a back-end provision grants the shareholder the right to force redemption of his shares on favorable terms. Many plans include combinations of these provisions. The key element of the flip-in and back-end plans is discrimination against the person making the acquisition or takeover attempt. That person is denied the opportunity to exercise option or redemption rights on the same favorable, often financially ruinous to the issuer, terms as other security holders. The practical effect of the poison pill plan is to preclude a hostile tender offer until the plan is canceled by the directors or declared void by a court. Its ostensible purpose is to give directors leverage to negotiate a favorable purchase price with a hostile bidder.55


54. For an example of a flip-over plan, see Moran v. Household Int'l, Inc., 500 A.2d 1346 (Del. 1985).


Even where an offer is noncoercive, it may represent a 'threat' to share-
Most poison pill litigation concerns the directors' proper exercise of their fiduciary duties in adopting and implementing poison pill plans. Underlying this issue, however, is the question whether directors have corporate authority to issue the securities that constitute the poison pill. In Delaware, this issue has been settled in favor of directors. The drafters of the Act evidently were concerned with contrary decisions of courts in other states. For example, in *Amalgamated Sugar Co. v. NL Industries*, a federal district court applying New Jersey law held that a flip-in provision was *ultra vires* and void because it "effects a discrimination among shareholders of the same class or holder interests in the special sense that an active negotiator with power [conveyed by a poison pill], in effect, to refuse the proposal may be able to extract a higher or otherwise more valuable proposal, or may be able to arrange an alternative transaction or a modified business plan that will present a more valuable option to shareholders."

*with* Dynamics Corp. v. CTS Corp., 794 F.2d 250, 255 (7th Cir. 1986) (Posner, J.) ("Personally we are rather skeptical about the arguments for defensive measures . . . . We are especially skeptical about the arguments used to defend poison pills.").


57. In *Moran v. Household Int'l, Inc.*, 500 A.2d 1346 (Del. 1985), the Delaware Supreme Court rejected a challenge to a plan based on allegations that the directors lacked authority to implement the plan under the Delaware General Corporation Law. The court accepted the directors' position that they had the requisite authority under section 157 and section 151 of the Delaware General Corporation Law, which are roughly the same as Florida Statutes section 607.0624(1) (1990) (share options) and section 607.0602 (1990) (blank check authority). *Moran*, 500 A.2d at 1346. The court rejected the plaintiffs' argument that those provisions were not intended to be the basis of anti-takeover measures, but rather were limited to corporate financing and other conventional uses. *Id.* at 1352.

In *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 180 (Del. 1986), the Delaware court upheld the directors' authority to implement a back-end poison pill that discriminated against the bidder. The court reached this conclusion even though Delaware did not have a counterpart to section 607.0624(2) of the Act, which authorizes discrimination among shareholders with respect to the exercise rights of options. Courts construing Delaware law also have upheld the authority of directors to implement flip-in provisions that discriminate against the bidder, based on *Moran*. See, e.g., BNS, Inc. v. Koppers Co., 683 F. Supp. 458, 474 (D. Del. 1988) (the plaintiffs conceded that the board was authorized to implement the plan); see also Dynamics Corp. v. CTS Corp., 637 F. Supp. 406 (N.D. Ill.), aff'd, 794 F.2d 250 (7th Cir. 1986) (Indiana law); but see *Unilever Acquisition v. Richardson-Vicks Inc.*, 618 F. Supp. 407 (S.D.N.Y. 1985) (federal court construing Delaware law before *Moran*, 500 A.2d 1346, invalidated plan because of discrimination effects among shareholders of a series).
series.\textsuperscript{58} Under the plan, the voting rights and equity of the acquiring shareholder are diluted upon the triggering event.\textsuperscript{59} The court invalidated the flip-in poison pill despite the existence of blank check and share option provisions under New Jersey law comparable to sections 151 and 157 of the Delaware Code, which were the basis for validating poison pills in that state.\textsuperscript{60}

Florida courts have not addressed the authority of a board of directors to establish a poison pill or shareholder rights plan. To preclude future judicial invalidity, the Act addresses these potential challenges to a poison pill plan. Section 607.0624(2) expressly permits issuance of options or rights that discriminate against persons acquiring or offering to acquire more than a certain percentage of shares, validating flip-in plans that involve the issuance of rights. Further, section 607.0601 omits the sentence from section 6.01 of the RMBCA providing that all shares of a class must have identical preferences, limitations, and relative rights.\textsuperscript{61} This omission sanctions discrimination among shareholders within a class with respect to share terms, such as plans involving preferred stock with a discriminatory conversion or redemption right. For example, the corporation might distribute to its shareholders a dividend consisting of preferred shares convertible, by all shareholders except the bidder into common shares on favorable terms, based on the occurrence of a triggering stock event.\textsuperscript{62} The Act allows discriminatory limitations denying the conversion right to persons holding more than a certain number of shares, which otherwise might run afoul of share equality precepts.

\textsuperscript{58} 644 F. Supp. 1224, 1234 (S.D.N.Y. 1986).

\textsuperscript{59} Id. at 1299. The court reasoned that the plan in substance constituted a restructuring of voting and equity rights within the class, which could not be effected without a shareholder vote. Id. at 1234-35. The court also found that the plan had a preclusive effect on prospective tender offers. Id. at 1239.

\textsuperscript{60} Id. at 1234-35; see also Minstar Acquiring Corp. v. AMF Inc., 621 F. Supp. 1252 (S.D.N.Y. 1985) (rights plan that discriminated between shareholders based on date of share acquisition held void under New Jersey law); Asarco Inc. v. M.R.H. Holmes A Court, 611 F. Supp. 468 (D.N.J. 1985).


\textsuperscript{62} This type of security, commonly known as “poison pill preferred stock,” is discussed at length in Comment, Protecting Shareholders Against Partial and Two-Tiered Takeovers: The “Poison Pill” Preferred, 97 Harv. L. Rev. 1964 (1984).
V. **FUNDAMENTAL CHANGES TO THE FLORIDA CORPORATION'S CAPITAL STRUCTURE**

The Act generally eliminates par value, stated capital, capital surplus, and treasury shares. Par value was an arbitrary amount assigned to each share (e.g., $1.00 per share), below which the corporation was prohibited from selling its shares. Par value was eliminated for well-recognized reasons. Generally, they added complexity without any offsetting benefit. Par value was an arbitrary dollar amount. The former law did not require directors to establish a par value having any particular relation to the shares' actual market value, and par value did not fluctuate with changes in share market value. For this reason, par value misled investors who equated par value and actual share market value or net asset value. Further, the sole restrictive effect of par value—to place a floor on the purchase price of shares—was rendered meaningless by widespread use of nominal par value amounts (e.g., $.01 per share) that were far below the shares' actual value. Par value did nothing to stop the corporation from selling at a price less than fair value.

Further, the amount of stated capital bore no relationship to the

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64. **Fla. Stat.** §§ 607.004(15), 061 (1990). This article does not discuss in detail the provisions of prior law concerning par value, no-par shares, stated capital, and related concepts, because the Act repealed them. For a detailed explanation of these provisions and their history, purpose, and operation, see B. Manning & J. Hanks, *Legal Capital* (3d ed. 1990).
65. See RMBCA, supra note 4, at § 6.21 (official comment and historical background). Par value and stated capital have been cannon fodder for scholars for many years. See, e.g., B. Manning & J. Hanks, supra note 64, at 91-97 (“The legal capital schemes embedded in the nation's state corporation acts are inherently doomed to a low level of effectiveness (perhaps even zero).”); Cohn, *Capital Structure. Dividends and Redemption—Time for a Change to Florida's Corporate Code*, 56 Fla. B.J. 574 (June 1982) (the Act grants Professor Cohn his fervent wish for change); Hackney, *The Financial Provisions of the Model Business Corporation Act*, 70 Harv. L. Rev. 1357 (1957) (describing the difficulties of accurately calculating surplus); Note, *The Inadequacy of Stated Capital Requirements*, 40 Cinn. L. Rev. 823 (1971).
66. As discussed below, Florida's documentary stamp tax on the par value of shares virtually compels the Florida corporation to set a very low par value such as $0.01 per share, because it is assessed on the shares' par value rather than their market value. See *Fla. Stat.* § 201.05(1) (1990).
actual amount of capital necessary for the corporation's business operations. Stated capital did not protect creditors by providing an "equity cushion," because nothing required that the amount be sufficient to provide a cushion against operating losses and because the amount could be changed at the shareholders' option, after credit had been extended. Creditors today rely on other mechanisms for credit protection, such as financial covenants in their loan documents, close monitoring of the corporation's financial condition, and legal restrictions (retained by the Act) that limit transfers and distributions if the corporation is insolvent.

Par value and the related concepts of stated capital, capital surplus, and other similar provisions added great complexity to the corporation's capital structure. For example, a stock split required an amendment to the articles of incorporation to change the corporation's par value. The par value and stated capital concepts required three different definitions of surplus—surplus, earned surplus, and capital surplus. Consider the following language of the former law that governed the conversion of a share without par value into a share with par value:

[S]hares without par value shall not be converted into shares with par value unless that part of the stated capital of the corporation represented by such shares without par value is, at the time of conversion, at least equal to the aggregate par value of the shares into which the shares without par value are to be converted, or the amount of any such deficiency is transferred from surplus to stated capital.

The official comment to the Act in the RMBCA clarifies that following this change, a corporation need not differentiate on its balance sheet between stated capital and surplus accounts, even if it elects to

67. For example, a corporation with the common par value of $.01 per share and 1,000,000 outstanding shares would have stated capital of only $10,000, which is insufficient for a corporation with operations of any substance.


69. Fla. Stat. §§ 607.004(4), (6), (17) (1989) (repealed 1990). A treatise is devoted to explaining these subjects. See B. Manning & J. Hanks, supra note 64. Significantly, in the 1990 edition, the authors required 176 pages to explain the "labyrinth" of legal capital doctrine and critique its failures, but only 15 pages to explain its repeal and the current provisions of the RMBCA, supra note 4.

70. Fla. Stat. § 607.044.
retain par value. The corporation may use a single simple entry, "paid-in capital," to reflect the amounts received for its shares. A corporation may retain the historic classifications of stated capital and capital surplus if it so desires.

Corporations still should consider using a nominal par value (such as $.01 per share) even though it lacks any legal significance under the Act, because of the Florida documentary stamp tax on shares. This tax is assessed on the shares' par value or, if the share is without par value, on its actual market value. Accordingly, the use of nominal par value will avoid taxation based on the shares' market value. The Second Corrections Bill would amend the documentary stamp tax law to provide that each share without par value will be taxed based on a par value of $.01 per share. Enactment of this amendment to the documentary stamp tax law should eliminate the last reason for a Florida corporation to use par value.

VI. THE CORPORATION'S ISSUANCE OF SHARES (SECTIONS 607.0603 AND 607.0621)

According to section 607.0603(3), a corporation must have at all times one or more outstanding classes of shares that together have the attributes associated with common shares—unlimited voting rights and entitlement to receive the net assets of the corporation on dissolution. This provision is the counterpart to section 607.0601(2), which requires that the corporation authorize shares with these attributes. Generally, following the elimination of par value, except for fiduciary duty standards, the only limitations imposed by the Act on a corporation's issuance of shares and the make-up of its capital are that the shares be authorized, that the directors determine that the consideration to be received for the shares is adequate, that the consideration established

71. RMBCA, supra note 4, at § 6.21 (official comment).
72. Id.
73. Id.
74. FLA. STAT. § 201.05(1) (1990). The tax is 32 cents per $100 of value.
75. Id. at § 607.0603(3). Section 607.0603 was adopted verbatim from section 6.03 of the RMBCA, supra note 4. In other words, some person must own the residual interests of the corporation.
76. FLA. STAT. § 607.0601(2).
77. The fiduciary standards governing directors' actions are set forth in section 607.0830. Id. at § 607.0830.
for the shares be paid, and that one or more classes of outstanding shares together have the traditional attributes of common stock described above.

Section 607.0621 sets forth the terms on which a corporation may sell its shares. Shareholders must rely on the directors' honest and fair judgment to determine (a) the number of shares to be issued and the amount of capital to be raised from time to time, (b) an appropriate price for any additional shares that are issued, and (c) the adequacy of consideration, if non-cash consideration is received. By so providing in the articles of incorporation, shareholders may reserve these rights to themselves or, more practically, limit the board's discretion with respect to these matters. Again, the Act leaves the capital structure to the dynamics of negotiation among the corporation, its shareholders, and its creditors, rather than mandating restrictions or limitations on that structure.

A corporation may issue shares in exchange for "any tangible or intangible property or benefit to the corporation." The official comment to section 6.21 of the RMBCA clarifies that "the term 'benefit' should be broadly construed to include, for example, a reduction of a liability, a release of a claim, or benefits obtained by a corporation by contribution of its shares to a charitable organization or as a prize in a promotion." Significantly, the Act departs from the former law by expressly permitting shares to be issued in consideration of a promissory note and future services, if evidenced by a written contract. The requirement that the contract be written departs from the RMBCA. Although both of these forms of consideration involve future performance, the Act treats the shares as "paid" when the commitment is given, rather than when it is fulfilled (the note is paid or the services

78. Id. at § 607.0621. A separate section, section 607.0623, covers share dividends. Id. at § 607.0623.
79. Id. at § 607.0621(1).
80. Id. at § 607.0621(2).
81. RMBCA, supra note 4, at § 6.21 (official comment).
82. FLA. STAT. § 607.0621(2) (1990). Former section 607.054(6) stated: "Future services shall not constitute payment or part payment for the issuance of shares of a corporation." FLA. STAT. § 607.054(6) (1989) (repealed 1990); see also Lewis v. Compton, 416 So. 2d 1219 (Fla. 1982). Although not authorized by the statute, a promissory note was acceptable consideration under the former law. Lundquist v. Gulfshore Television Corp., 328 So. 2d 202 (Fla. 2d Dist. Ct. App. 1976). The commentary to section 607.0621 states that the former law was unclear on this point.
The official comment to section 6.21 of the RMBCA, on which section 607.0621 is based, notes the real concerns of the former law:

The issuance of some shares for cash and other shares for promissory notes, contracts for past or future services, or for tangible or intangible property or benefits, like the issuance of shares for an inadequate consideration, opens the possibility of dilution of the interests of other shareholders. For example, persons acquiring shares for cash may be unfairly treated if optimistic values are placed on past or future services or intangible benefits being provided by other persons. The problem is particularly acute if the persons providing services, promissory notes or benefits of debatable value are themselves connected with the promoters of the corporation or with its directors.84

The RMBCA allows these forms of consideration anyway because: commitments for future performance or payment often have substantial present value;85 consistently with other provisions, the RMBCA's drafters were prepared to rely on the standards governing directors' actions that are intended to protect against abuses; and the practical problems associated with these forms of consideration can be resolved through skillful structuring of the share sale transaction.86 Once again, the RMBCA eliminates an "artificial" or "arbitrary" rule in favor of relying on the directors' business judgment. The official comment might have added that the practice of offering incentive stock to employees as consideration for future services is widespread and generally recognized as effective in aligning employees' interests with shareholders' interests. The Act requires that a corporation issuing shares for future services inform its shareholders of the issuance before the corporation's next

84. RMBCA, supra note 4, at § 6.21 (official comment).
85. One author hypothesizes a contract with Barbara Streisand, Doug Flutie, or a promissory note of Morgan Guaranty. Manning, supra note 9, at 1533. Of course, that article was written before Flutie retired from football and before the financial institution crisis.
86. The comment to the Act adds another reason—easy avoidance of the prohibition: "[T]he express prohibition in [section] 607.054(6) (1989) against future services as consideration is easily avoided by an advance bonus (immediately repaid to the corporation for the shares), the issuance of a separate class of low or no-par value stock, forgivable loans, or other means limited only by the ingenuity of the parties." RMBCA. supra note 4, at § 6.21 (official comment).
Because the shares will be fully paid when issued, the corporation should assure that the shares do not freely vest before the note is paid or services rendered, to protect against a purchaser default. Section 607.0621(5) provides a mechanism to assure receipt of consideration for the shares through escrow or restriction methods. The shares are issued to the shareholder in escrow or subject to restriction, but if the relevant payments or services are not received, the shares may be canceled. The Act leaves unclear whether an escrow arrangement must be with an independent third party. The Act seems to expressly permit an arrangement in which all escrowed or restricted shares are canceled without any compensation, even though the shareholder partially pays or performs before reneging: "[I]f the services are not performed, the shares escrowed or restricted and the distributions credited may be canceled in whole or part." Nothing in the former law expressly provided for a corporation to cancel shares if future payments or services due for them were not received. Indeed, the shares could not be issued at all without up-front payment of all consideration.

The Act subtly changes the former law with respect to the directors' determinations regarding value and adequacy of consideration, which are important to legal opinions regarding the status of shares as fully paid and nonassessable. The Act provides for directors to use their business judgment to establish adequate consideration for shares, without any floor or other limitation. That adequacy determination is conclusive for purposes of the determination whether shares are fully paid and nonassessable. The former law also provided that the directors must value non-cash consideration received and provided that this de-
termination regarding valuation of consideration was “conclusive” in the absence of fraud.\textsuperscript{91} However, the Act does not require this value determination at all.\textsuperscript{92} The directors’ adequacy determination need not be set forth in a resolution—that conclusion may be inferred from the decision to issue shares for the designated consideration.\textsuperscript{93} Following the Act’s elimination of par value and definitive resolution against applying any hindsight evaluation to the directors’ business judgment in establishing appropriate consideration, the lawyer may opine that shares of a Florida corporation are fully paid and nonassessable by confirming that the consideration for the shares established by the board was actually paid.\textsuperscript{94} The Act makes the adequacy determination conclusive, eliminating the possibility of hindsight judicial review of that matter.

The conclusive presumption concerning the adequacy of consideration received for shares does not extend to challenges based on self-dealing and other fiduciary duty grounds or fraud of the person receiving the shares.\textsuperscript{95} However, directors are entitled to the presumption offered by the business judgment rule with respect to decisions to offer shares in transactions in which they are not interested.\textsuperscript{96}

Consistently with the former law, section 607.0622 confirms that a shareholder who pays the consideration due for purchased shares generally has no further liability to the corporation, its creditors, and other

\textsuperscript{91} Id. at § 607.054(7). In some early cases, at creditors’ request, courts objectively appraised the value of consideration paid to determine whether the consideration was worth the value attributed to it by the corporation and adequate given the par value of the shares. Shareholders might be found liable for any deficiency. \textit{See}, \textit{e.g.}, \textit{See v. Heppenheimer}, 69 N.J. Eq. 36, 61 A. 843 (1905); \textit{Van Cleve v. Berkey}, 143 Mo. 109, 44 S.W. 743 (1898); \textit{see generally} RMBCA, \textit{supra} note 4, at § 6.21 (historical background). This “true value” rule was reversed by the former law which presumed the directors’ judgment of value to be correct. \textit{Fla. Stat.} § 607.054(7).

\textsuperscript{92} \textit{See} RMBCA, \textit{supra} note 4, at § 6.21 (official comment) (“Of course, a specific value must be placed on the consideration received for the shares for bookkeeping purposes, but bookkeeping details are not the statutory responsibility of the board of directors.”).

\textsuperscript{93} Id.

\textsuperscript{94} \textit{Fla. Stat.} § 607.0621(3), (4) (“When the corporation receives the consideration for which the board of directors authorized the issuance of shares, the shares issued therefor are fully paid and nonassessable.”).

\textsuperscript{95} \textit{See, e.g.}, Biltmore Motor Corp. v. Roque, 291 So. 2d 114, 115-16 (Fla. 3d Dist. Ct. App. 1974) (ordering directors to revoke and rescind recapitalization plan that involved sale of new stock at considerably less than market value because the transaction lacked any business purpose and violated the directors’ fiduciary duties).

\textsuperscript{96} \textit{Fla. Stat.} § 607.0831(1) (1990).
shareholders with respect to those shares. With the elimination of the legal significance of par value, shareholders are no longer subject to alleged liability for the difference between the par value and the consideration that they actually paid for their shares, or "watered stock liability." This is true even if the corporation elects to retain par value, because the statutory connection between par value and the amount due for shares is eliminated.

In a departure from the RMBCA, Florida rejected the RMBCA's section 6.22, and instead adopted verbatim, as section 607.0622, the provisions of the former law, section 607.074, except for the addition of a five-year limitation period on actions to collect consideration due for shares. Section 607.0622(1) retains provisions spelling out who may sue a shareholder who fails to pay full consideration (the corporation, another shareholder, and creditors). Section 607.0622(2), (3), and (4) clarify transferor, transferee, pledgor, and pledgee liability for consideration due for unpaid shares (transferor and pledgor liable; pledgee not liable; transferee not liable if bona fide purchaser of the shares).

Presumably, despite the broad statutory language of section 607.0622(1), the shareholder remains potentially liable for the corporation's actions pursuant to equitable theories such as piercing the corporate veil, even though the Act in section 607.0622 rejects, as to open ended, the language of section 6.22(b) of the RMBCA confirming the validity of such actions. In cases decided before the Act, Florida courts have upheld actions based on veil-piercing theories notwithstanding this statutory language. These decisions were probably based on reasoning that the action is not "with respect to the . . . shares," but rather based on the shareholder's conduct.

97. Id. at § 607.0622(a).
98. Id. at § 607.0622(5). The limitations period is measured from the earlier of the date of stock issuance or the date of the subscription on which the assessment is sought.
99. Id. at § 607.0622(1) ("A holder of . . . shares . . . shall be under no obligation to . . . creditors with respect to such shares . . . other than to pay the full consideration.").
100. RMBCA, supra note 4, at § 6.22(b) provides as follows: "Unless otherwise provided in the articles of incorporation, a shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he may become personally liable by reason of his own acts or conduct."
102. Id.
VII. SHARE DIVIDENDS (SECTION 607.0623)

Share dividends are governed by section 607.0623, which adopts the text of section 6.23 of the RMBCA. 103 The Act simplifies the law governing share dividends and stock splits: all distributions of the corporation's shares are treated as share dividends; share dividends are not subject to restrictions on ordinary dividends and share repurchases; and with the elimination of par value, stated capital, and capital surplus, no reallocations among various capital accounts need follow a share dividend and no adjustments to par value amounts need follow a stock split. 104

The principal distinction between a stock split and a share dividend under the former law was that a share dividend involved a book transfer from capital surplus to stated capital, and a stock split required a change to the corporation's par value per share. 105 A share dividend was treated similarly to a cash dividend, and subject to the restriction that the corporation have adequate surplus to cover the aggregate par value of distributed shares. 106 The current modifications recognize that share dividends differ fundamentally from cash dividends and the transactions characterized as "distributions" under the Act. A share dividend is a paper transaction without economic effect on the corporation, its shareholders, or its creditors. 107 Nothing happens to the corporation's assets and the shareholders' interests in the corporation remain the same, only evidenced by more shares. 108

The Act does recognize the dilutive impact on a class or series of shares when shares of its class or series are distributed as a share dividend to shareholders of another class or series. 109 The Act permits those transactions only if the articles of incorporation authorize them, a majority of the relevant class or series approves the transaction, or no shares of the relevant class or series are outstanding. 110

103. See FLA. STAT. § 607.01401(8) (1990) (expressly excluding share dividends from the definition of "distributions" to shareholders).
104. Id. at § 607.0623.
106. Id. at § 607.137(4).
107. RMBCA, supra note 4, at § 6.23 (official comment).
108. Id.
110. Id. at § 607.0623(2).
VIII. THE CORPORATION'S DISTRIBUTIONS TO ITS SHAREHOLDERS (SECTION 607.06401)

Many commentators call the distribution provisions the most significant of the extensive amendments to the Model Act's financial provisions that were effected in the 1980s. In a significant departure from the former law, the Act adopts a uniform definition for distributions and modifies the restrictions on distributions so that they do not consider the corporation's relative amounts of surplus and stated capital following the distribution.

Instead of a single definition and standard for distributions, the former law provided different standards for redemptions, consensual repurchases, and ordinary dividends. Redemptions were subject only to the limitation that they not render the corporation insolvent in the equity sense (unable to pay its debts as they became due in the ordinary course of business). Dividends and consensual repurchases were subject to this equity insolvency limitation and also to the limitation that they could be made only from unreserved and unrestricted surplus (the portion of the corporation's capital other than stated capital). Generally, the Act modifies this surplus-based limitation (assets must equal the sum of liabilities, stated capital, and reserved or restricted surplus) to a net worth limitation (assets must equal liabilities plus liquidation preferences), because the surplus-based limitation was complex and ineffective in protecting creditors. The Act applies this net worth limitation and the equity insolvency limitation to all shareholder "distributions," including dividends, redemptions, and consensual

111. See, e.g., Manning, supra note 9, at 1534 ("Section 6.40 is the centerpiece that controls asset distributions to shareholders."); Murphy, supra note 8, at 82 ("[Section 6.40] is probably the capstone of the financial provisions in the Revised Statute.").

112. Fla. Stat. § 607.06401. This discussion focuses on the tests adopted for distributions. Full treatment of the subject should consider fraudulent transfer law and the fiduciary duties of directors. See id. at §§ 607.0834, .0830 (each of which is discussed cursorily here).

113. For a thorough explanation of the scheme governing distributions under the former law, see B. Manning & J. Hanks, supra note 64, at 63-90.


115. Id. at §§ 607.017(1), .137; see also Baxter v. Lancer Indus., Inc., 213 F. Supp. 92, 96 (E.D.N.Y. 1963); Coast Cities Coaches, Inc. v. Whyte, 102 So. 2d 848 (Fla. 3d Dist. Ct. App. 1958) ("Obviously, corporate funds other than those lawfully allocable to dividends could not be used to pay for the purchase of the stock from Whyte and Hickling.").

116. RMBCA, supra note 4, at § 6.40 (official comment).
repurchases.\textsuperscript{117} 

The purpose of the law governing distributions is to protect the relative priority status of creditors and senior equity holders. Shareholders are subordinate to these persons with respect to their claim to the corporation's assets in liquidation.\textsuperscript{118} Assets are supposed to be available to fund the payment of liabilities and liquidation preferences, if necessary. As stated by one commentator:

If the hierarchical relationship of creditor to shareholder is to have any meaning at all, then the management must not be left free to shovel all the assets in the corporate treasury out to the shareholders when the corporation has insufficient assets to pay its creditors or when the shareholder distribution itself renders the corporation unable to pay its creditors. The central point is to avoid insolvency.\textsuperscript{119} 

The Act is carefully structured to achieve this purpose, but no more. The Act abandons the concept of mandating an asset cushion over and above the amount of liabilities to be available if assets prove insufficient to pay them.

The principal significance of these provisions governing distributions is the directors' potential liability "to the corporation" for distributions made improperly pursuant to section 607.0834 of the Act. Generally, a director is potentially liable for an improper distribution only if he voted for or assented to the action and the director need only comply with the usual standard of conduct for his actions, which is described in section 607.0830.\textsuperscript{120} The director has available all defenses typically associated with his actions, including the common law business judgment rule.\textsuperscript{121} The statute and case law leave unclear whether and how this liability "to the corporation" may be enforced by creditors, directly or derivatively by shareholders, or by a bankruptcy trustee succeeding to the corporation's rights.\textsuperscript{122}

This new standard governing distributions varies from the stan-

\textsuperscript{118} Id.
\textsuperscript{119} B. Manning & J. Hanks, supra note 64, at 63.
\textsuperscript{120} Fla. Stat. § 607.0830 (1990).
\textsuperscript{121} Id. at § 607.0834; RMBCA, supra note 4, at § 8.33 (official comment).
\textsuperscript{122} See B. Manning & J. Hanks, supra note 64, at 88-90 (noting "the almost complete absence of cases imposing liability on directors or shareholders").
dards governing fraudulent transfers in Florida. For example, one of the standards for a fraudulent transfer focuses on the intent of the transferor, which is irrelevant under section 607.0834. The official comment to section 6.40 of the RMBCA acknowledges the difference and justifies it based on the different purposes for which the various statutes are intended. The fraudulent transfer statute is designed to permit the trustee to recover for the benefit of creditors transfers made to others (such as shareholders), but section 6.40 was intended to determine the potential liability of directors to the corporation for improper distributions. The laws governing fraudulent transfers apply to the corporation's distributions to its shareholders and must be reviewed by the corporation planning an unusual distribution.

The Act conveniently defines "distribution" to include any transfer of money or other property or incurrence of indebtedness by the corporation to or for the benefit of its shares. Only the corporation's distributions of its own shares (stock dividends) are excluded and treated in a separate section, because those transfers do not cause any real change in the corporation's capital structure from the creditors' standpoint. For this reason, a conversion of an outstanding security into an equity security typically would not be considered a distribution, because the issued security constitutes a share of the corporation. Examples of distributions include cash dividends, special dividends of property (including stock of other companies or subsidiaries), liquidating distributions, repurchases and redemptions of the corporation's shares, and distributions of indebtedness.

The Act relies on a deceptively simple two-pronged test to determine whether a distribution is permitted:

No distribution may be made if, after giving it effect: (a) The corporation would not be able to pay its debts as they become due in the usual course of business; or (b) the corporation's total assets would be less than the sum of its total liabilities plus (unless the

124. Id. at § 726.105(1)(a), (2); see also 11 U.S.C. § 548 (1986) (concerning fraudulent transfers under the Bankruptcy Code).
126. RMBCA, supra note 4, at § 6.40 (official comment).
127. Id.
129. Id. at § 607.0623.
130. RMBCA, supra note 4, at § 6.40 (official comment).
articles of incorporation permit otherwise) the amount that would be needed, if the corporation were to be dissolved at the time of the distribution, to satisfy the preferential rights upon dissolution of shareholders whose preferential rights are superior to those receiving the distribution. 131

The first prong of the test carries over from the former law the "equity insolvency" test. The second prong adopts what is commonly referred to as a "balance sheet" or "net worth" insolvency test.

The equity insolvency test requires that following the distribution, the corporation must be able to pay its debts as they become due in the usual course of business. 132 Older versions of the comment to section 6.40 of the RMBCA stated that the equity insolvency test was the "most important and fundamental test for the permissibility of distributions." 133 This prong of the test is unfortunately subjective and if not applied carefully, might subject the director to hindsight judicial reevaluation of his actions if the corporation soon fails. The official comment to section 6.40 of the RMBCA provides some comfort and clarification. 134 It states that the existence of significant shareholder equity and continuation of normal operations typically will be sufficient to establish that the equity insolvency test is satisfied. 135 The absence of a going concern qualification in the company's financial statements is called "normally decisive." 136

131. FLA. STAT. § 607.06401(3).
132. "Insolvent" is generally defined in the definitions section of the Act to mean inability of a corporation to pay debts as they become due in the usual course of its business. Id. at § 607.01401(15). The Act inadvertently uses this full statement, rather than using the defined term and simply stating that the distribution must not render the corporation "insolvent."
134. RMBCA, supra note 4, at § 6.40 (official comment).
135. Id.
136. Id. The official comment states that: "Indeed, in the case of a corporation having regularly audited financial statements, the absence of any qualification in the most recent auditor's opinion as to the corporation's status as a 'going concern,' coupled with a lack of subsequent adverse events, would normally be decisive." This issue certainly will not arise unless subsequent adverse events occur—the author assumes that the drafters meant a lack of subsequent adverse events before the measuring date of the distribution, because the directors should not be accountable for unforeseeable events subsequent to that date. See also Current Issues on the Legality of Dividends from a Law and Accounting Perspective: A Task Force Report, 39 BUS. LAW. 289, 306 (1983) (suggesting a presumption against insolvency if the corporation receives an au-
If the corporation is “encountering difficulties, or is in an uncertain position concerning its liquidity and operations,” the directors should carefully document the basis for their decision as they would other potentially controversial actions.\textsuperscript{137} The comment emphasizes that, consistent with the standard for their actions in section 8.30 of the RMBCA (section 607.0830), directors may rely on reports from management, accountants, and other persons and may make judgments or assumptions regarding the corporation’s future that are “customarily justified, absent clear evidence to the contrary.”\textsuperscript{138} The comment states that having made these judgments and relied on information made available to them, directors “should not, of course, be held responsible as a matter of hindsight for unforeseen developments.”\textsuperscript{139}

The comment contains somewhat helpful examples of assumptions regarding product demand, short-term indebtedness, and contingent liabilities that may be made by directors in evaluating whether a distribution will render the corporation insolvent and that should be reviewed carefully by counsel advising the corporation on this issue.\textsuperscript{140} For example, with respect to contingent liabilities, it states: “[t]o the extent that the corporation may be subject to asserted or unasserted contingent liabilities, reasonable judgments as to the likelihood, amount, and time of any recovery against the corporation, after giving consideration to the extent to which the corporation is insured or otherwise protected from loss, may be utilized.”\textsuperscript{141} The obvious problem, notwithstanding the comment, is that directors’ judgments might look unreasonable to a trier of fact if the contingent liabilities that were thought unlikely to result in liability become real liabilities.

The second prong is a balance sheet test, a limitation based on a comparison following the transfer of the corporation’s assets to its liabilities plus the amount of any liquidation preference of senior equity holders.\textsuperscript{142} Simply stated, the corporation may make distributions to its shareholders only to the extent of its net worth, plus the liquidation preferences. For distributions payable to any but the most senior class of stock, the preferential amount payable to relatively more senior class-

\textsuperscript{137} RMBCA, \textit{supra} note 4, at § 6.40 (official comment).
\textsuperscript{138} \textit{Id}.
\textsuperscript{139} \textit{Id}.
\textsuperscript{140} \textit{Id}.
\textsuperscript{141} \textit{Id}.
\textsuperscript{142} FLA. STAT. § 607.06401(3)(b).
ses of preferred stock must be added to liabilities to determine whether the distribution is permitted. In comparison, the former law compared liabilities to assets plus stated capital and reserved and restricted surplus. The Act eliminates the amount of stated capital, and reserved and restricted surplus from the formulation, and adds the liquidation preference. The Act accords flexibility; the balance sheet may be “prepared on the basis of accounting practices and principles that are reasonable in the circumstances or on a fair valuation or other method that is reasonable in the circumstances.” The Act does not mandate generally accepted accounting principles (GAAP) and continues to allow a fair market valuation.

Again, the official comment to section 6.40 of the RMBCA clarifies that directors may rely on opinions, reports, or statements, including audited financial statements and other financial data in making this prong of the determination. The comment introduces a safe harbor to assure those troubled by the uncertainty of the “reasonableness” standard—use of GAAP is always reasonable under the circumstances. Also, the corporation may rely on its last balance sheet “unless the board is then aware that it would be unreasonable to rely on the financial statements because of newly-discovered or subsequently arising facts or circumstances.”

The comment recognizes that use of GAAP, or other accounting principles, might result in an overstatement of assets’ value:

Accordingly, the revised Model Business Corporation Act contemplates that generally accepted accounting principles are always ‘reasonable in the circumstances’ and that other accounting principles may be perfectly acceptable, under a general standard of rea-

143. Id. at § 607.06401.
144. Id. at § 607.06401(4).
146. RMBCA, supra note 4, at § 6.40 (official comments 2, 4).
147. Id. (official comments 3, 4).
148. Id.; see also Baxter v. Lancer Indus., Inc., 213 F. Supp. 92 (E.D.N.Y. 1963). The Baxter court considered the former law and held that a corporation could not base the balance sheet determination whether dividends were permitted solely on its financial statements. The court stated that “[w]hat little authority there is suggests that actual values, albeit conservatively applied, rather than book values, are determinative of the existence of surplus.” Baxter, 213 F. Supp. at 95. Certainly, this holding is no longer good law.
149. RMBCA, supra note 4, at § 6.40 (official comments 2, 3, 4).
sonableness, even if they do not involve the 'fair value' or current value concepts that are contemplated by section [607.06401(4)].

The RMBCA thereby avoids forcing directors to evaluate whether the financial statements were overstating value at the time of each distribution and inserting judicial oversight into accounting practice. Even though the comment seems to sanction systems that overvalue assets based on a cost rather than fair value system, directors of corporations with financial statements not within the GAAP safe harbor might be wise to confirm that the fair value of assets roughly approximates book value, to avoid a charge that the accounting method was not reasonable under the circumstances. Although ordinarily not a concern, this point might be especially relevant in this time of declining asset prices.

The official comment also confirms that asset valuations may be made using a going concern valuation rather than a liquidation valuation, unless the corporation is selling its assets. This conclusion might not follow from a reasoned assessment. Typically, going concern values will be difficult to attain if the corporation’s financial condition is seriously troubled and it needs to sell assets quickly. Yet, this point is the only one at which creditors will look to asset values for recovery of amounts due them. The going concern valuation test virtually assures that actual asset recoveries will be insufficient, unless the going concern valuations substantially exceed liabilities. To the extent that a distribution is based on a current asset valuation, this fact must be specifically identified and the amount per share paid on the basis of the valuation disclosed to shareholders when the distribution is made.

150. Id. (emphasis added).


   It appears to the task force that when it comes to applying statutory financial tests to dividend declarations, corporate directors are in the same position as the courts: they are generally not trained or competent to be responsible for accounting standards that represent extremely complex assumptions and judgments . . . . [W]e question whether it is reasonable for the statute to require a director to make a judgment among accounting principles.

Id. at 300.

152. RMBCA, supra note 4, at § 6.40 (official comments 2, 3, 4).

153. FLA. STAT. § 607.06401(4). This identification language was added to the Act based on language from the former law. FLA. STAT. § 607.137 (1989) (repealed 1990).

https://nsuworks.nova.edu/nlr/vol15/iss3/18
Section 607.06401(6) and (8) sets forth straightforward rules for determining the dates on which the effect of a distribution should be measured. These dates depend on the nature of the distribution (dividend or repurchase) and the consideration paid (cash/property or debt). In the case of stock repurchases for debt, the effect of the transaction generally will be measured when the transaction occurs (the earlier of the date the debt is incurred or the date the shareholder ceases to be a shareholder) and not when the debt is paid. This result reverses Florida precedent that precluded a corporation from paying debt incurred in connection with a share purchase if the corporation was insolvent when payment of the debt was due. Section 607.06401(8) provides that indebtedness may be disregarded for purposes of determining whether a distribution is permitted, if expressly made payable only to the extent that its payment at that time would be a permitted distribution. In that instance only, each payment of principal and interest of the indebtedness will be considered a separate distribution, the effect of which is measured on the date that it is made. This provision facilitates an agreement to repurchase significant blocks of shares with deferred payments at a price that exceeds the corporation’s net worth, without violating the balance sheet restriction. However, the corporation must be able to comply with both elements of the restrictions on distributions when the payments are actually made.

155. Id.
156. Id.
157. One court has held:

Promises to repurchase, such as that involved in the instant case, must be viewed as conditioned by the requirement that, at the time the corporation is called on to perform, it must have sufficient funds so that disbursement for the repurchase will not involve the use of funds not authorized to be so used by the applicable state law.

Baxter, 213 F. Supp. at 96 (applying Florida law); see also In re Charter Co., 68 Bankr. 225 (Bankr. M.D. Fla. 1986) (applying Florida law); In re Charter Co., 63 Bankr. 680 (Bankr. M.D. Fla. 1986) (applying Florida law). The court essentially held in the two Charter Co. cases that the corporation must be solvent both when the debt is incurred and when it is paid. Cf. Williams v. Nevelow, 513 S.W.2d 535 (Tex. 1974) (payment considered made when note delivered; secured note enforceable even though corporation insolvent when note payment due).
IX. SHARE ACQUISITIONS AND TREASURY SHARES (SECTIONS 607.0603 AND 607.0631)

Section 607.0631, concerning share reacquisitions, departs from the former law in two significant respects: it revises the rules governing the corporation's repurchases of its own shares; and it generally eliminates "treasury shares" and characterizes reacquired shares as authorized but unissued shares.158 Share repurchases are now governed by the general rules set forth in section 607.06401 applicable to all shareholder distributions, which scrap limitations based on the preservation of stated capital in favor of the much simpler equity insolvency and net worth insolvency tests.159

Shares that are reacquired or redeemed generally will be simply designated as authorized but unissued shares, with no distinction from shares that have never been issued.160 The Act also adds clarifying language from the Virginia corporate statute providing that acquired shares constitute authorized but unissued shares of the same class, but undesignated as to series.161 This rule makes sense; the shares should not be designated as part of the same series, because series terms are usually established when shares of the series were initially issued, based on market conditions at that time. Treasury shares were generally eliminated under the RMBCA because the drafters perceived no substantive difference between reacquired shares and shares that had never been issued.162

159. Id. at § 607.06401. The restrictions on share repurchases and redemptions under the former law were set forth in section 607.017. See FLA. STAT. § 607.017 (1989) (repealed 1990). Generally, the corporation’s right to repurchase its own shares is subject to restrictions imposed by federal and state securities laws and fiduciary duty obligations.
160. FLA. STAT. §§ 607.0603(1), .0631(1).
162. RMBCA, supra note 4, at § 6.03 (official comment). Under the former law, "treasury shares" were issued and outstanding shares that the corporation reacquired, but did not cancel and restore to the status of authorized but unissued shares. FLA. STAT. § 607.004(18) (1989) (repealed 1990). Until canceled, the shares were considered issued (but not outstanding) and their aggregate par value included in stated capital. See B. MANNING & J. HANKS, supra note 64, at 84-86 (briefly discussing the complexities and problems caused by reacquired shares before the RMBCA, note 4. "The entire topic of share reacquisition, treasury shares, resale, retirement and the like is technical and sorely vexed under the legal capital statutes and under accounting practice and generalization is not reliable.").
The historical notes accompanying section 6.03 observe that the concept of treasury shares initially arose as a mechanism to evade restrictions on share issuance, such as those associated with par value and preemptive rights. With the elimination of the legal significance of par value and the general decline in the use of preemptive rights, treasury shares no longer serve these purposes. This change eliminates an entry on the corporation's balance sheet for "treasury shares," unless use of treasury shares is retained.

In section 607.0631, the Act adds to the core text of section 6.31 of the RMBCA provisions that the corporation may retain treasury shares in two instances: through an express provision to that effect in its articles of incorporation; or by not canceling or disposing of shares that constituted treasury shares before July 1, 1990, the effective date of the Act.163 A corporation might elect to retain the status of acquired shares as treasury shares to avoid paying listing fees again when it reissues them.164

In one instance, the corporation's authorized shares are reduced by the number of repurchased shares — if the corporation's articles of incorporation prohibit reissue of acquired shares. This reduction becomes effective when an amendment to the articles of incorporation is filed with the Department of State. According to the comment to 6.31 of the RMBCA, during the interim period before this amendment is filed, the shares may be issued and if issued will constitute valid shares in the hands of purchasing shareholders.165 However, any such issuance would violate the prohibition on reissue in the articles of incorporation and probably constitute an improper action by the board of directors.166

X. CONCLUSION

Chapter VI of the Act simplifies and clarifies Florida law gov-

163. FLA. STAT. § 607.0631(1), (4).
164. Id. at § 607.0603(1). This section concerns the same matter, and was derived without modification from § 6.03 of the RMBCA. It states, inconsistently with section 607.0631, that without any exception, issued shares are "outstanding shares until they are reacquired, redeemed, converted, or canceled." Id. A proposal to amend this section to clarify that this general rule is subject to the exceptions for treasury shares in section 607.0631(1) and (4) is pending as part of the Second Corrections Bill.
165. RMBCA, supra note 4, at § 6.31 (official comment).
166. Id. at § 6.31 (official comment 2) (The author would not render an opinion concerning the "validly issued" status of shares issued in violation of the prohibition on reissue.).
erning capital structure, share issuances, and distributions. The Act adopts the RMBCA, except for several instances in which it diverges from the uniform provisions, principally to facilitate anti-takeover measures. The result—a much improved law that should make Florida an attractive place of incorporation.
Indemnification of Corporate Officers and Directors

Robert L. Jennings*
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I. INTRODUCTION

Doing business through the legal fiction\(^1\) of a corporate entity dates back to the Middle Ages.\(^2\) The primary purpose for the creation of corporations is to insulate the principals from personal liability,\(^3\) which tends to encourage new enterprise. However, there are many circumstances under which officers and directors may be personally liable as a result of their acts or status in connection with the affairs of a

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1. The corporation is an "artificial being, invisible, intangible, and existing only in contemplation of law." Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819). Apart from the persons through whom it acts, "a corporation is a mere incorporeal legal entity created by government." Smetal Corp. v. West Lake Inv. Co., 126 Fla. 595, 626, 172 So. 58, 71 (1936).

2. Many towns and guilds sought protection for their business ventures by royal charter from the eleventh century onward. B. TIERNEY & S. PAINTER, WESTERN EUROPE IN THE MIDDLE AGES 240 (2d ed. 1970). Joint stock companies became prevalent as a means for funding and promoting overseas commerce in the sixteenth and seventeenth centuries. R. K. WEBB, MODERN ENGLAND 17 (1968). The right to form joint stock companies was severely limited in England after the disastrous collapse of speculative stocks in the "South Sea Bubble" of 1720. Id. at 24-25 (1968). The original purpose of joint stock companies was simply to spread the risk of an enterprise by increasing the number of investors, as the investors were individually liable for the company's obligations. Limited liability companies were not generally recognized until the mid-nineteenth century. See id. at 17; LANDES, THE UNBOUND PROMETHEUS 198 (1969).

3. State ex rel. Continental Distilling Sales Co. v. Vocelle, 158 Fla. 100, 102, 27 So. 2d 728, 729 (1946). It is not considered fraudulent or contrary to public policy to limit liability through use of the corporate form. Miller v. Honda Motor Co., 779 F.2d 769, 773 (1st Cir. 1985).
corporation. Even if ultimately exonerated from personal liability, corporate officers and directors may be subjected to substantial expense and anxiety in defending claims asserted against them.

In recent years, the exposure of officers and directors has greatly expanded, as new theories of liability are developed by plaintiffs in search of a deep pocket. While a certain amount of personal accountability may be desirable, this trend may discourage qualified persons from serving as officers and directors.

Corporations have attempted to mitigate the risk to their officers and directors by providing for their indemnification. The right to indemnification by an insolvent corporation may be of dubious value. Nevertheless, the law governing corporate indemnification is of critical concern where creditors are competing to recover against scarce corpo-


6. Formation of a corporation is not a matter of right, but a privilege granted by the state. Cook v. J.T. Case Plow Works Co., 88 Fla. 421, 426-27, 96 So. 292, 294 (1923)(Whitfield, J., concurring). It therefore follows that the privilege should not be abused by individuals seeking to avoid the consequences of their own wrongdoing.

7. See, e.g., 1987 Fla. Laws ch. 245, § 1(2)("The Legislature further finds that the service of qualified persons on the governing boards of corporations...is in the public interest and that...such persons should be permitted to perform without undue concern for the possibility of litigation arising from the discharge of their duties as policy makers...")(preamble to enactment of legislation precluding corporate directors from suffering personal liability for money judgments for litigation stemming from corporate acts, subject to exceptions); M. SHAFTLER, THE LIABILITIES OF OFFICE: INDEMNIFICATION AND INSURANCE OF CORPORATE OFFICERS AND DIRECTORS 2 (1976).
rate assets, particularly where a victim of fraud or mismanagement may be subordinated to the individual who caused his loss.

In the wake of the troubles in the savings and loan and banking industry, and the failure of other businesses in the present economic downturn, there will be increasing pressure to identify responsible parties and hold them accountable. Conversely, corporate officers and directors will look to their indemnification rights, not only for actual reimbursement, but as a deterrent to potential plaintiffs.

This article will discuss the history of corporate indemnification, its present status, and offer comment on how the law may be improved to strike a better balance between the competing policies of promoting business interests and encouraging responsible corporate conduct.

II. HISTORICAL BACKGROUND

Prior to the enactment of statutory indemnification provisions, corporate indemnification was a matter of contract and the common law. If corporate articles and by-laws failed to provide for it, officers and directors were generally not entitled to indemnification. Like most states, Florida developed little law on the topic. Some jurisdictions evolved conflicting principles that failed to satisfy the corporate need for certainty.

Within the context of shareholders' derivative suits, officers and directors who did not prevail could rarely obtain indemnification, and

10. Shareholders' derivative suits are brought by plaintiffs purporting to act by or in the right of the corporation, and usually challenge some aspect of management's past or current actions. Black's Law Dictionary 1419 (6th ed. 1990) defines a "stockholder's derivative action," as

[a]n action by a stockholder for purpose of sustaining in his own name a right of action existing in the corporation itself, where corporation would be an appropriate plaintiff. It is based upon two distinct wrongs: the act whereby corporation was caused to suffer damage, and the act of corporation itself in refusing to redress such act.

These types of suits are entirely distinct from a shareholder's direct action, which is "a suit by a stockholder to enforce a right of action existing in him." Wolfe v. American Sav. & Loan Assoc., 539 So. 2d 606, 607 (Fla. 3d Dist. Ct. App. 1989). Of course, third parties may also assert claims against the corporation, its officers, and directors. See e.g., cases cited supra note 4.
could be held liable for misappropriation of corporate assets if they indem-
nified themselves over objection. Distinctions eventually arose be-
tween officers and directors who acted in good faith in legitimate internal policy disputes, and those who were defeated in suits stemming from purely personal power contests. The problem with this approach was that power struggles are usually couched in the language of policy disputes, and it became difficult to intelligently distinguish between “personal” and “policy” disputes.

The law was little clearer in cases involving officers and directors who successfully defended derivative suits. Although some early decisions assumed it was appropriate to indemnify successful officers and directors, subsequent cases distinguished situations where they were successful, yet were sued on causes of action arising from personal dealings only indirectly involving their corporate responsibilities.

Some states refined the standard by requiring successful officers and directors seeking indemnification to demonstrate some direct benefit to the corporation. However, the “direct benefit” requirement was also unsatisfactory. Entirely blameless officers and directors were sometimes forced to bear the expense of defending acts taken in their corporate capacities, due to failure to demonstrate that the litigation had directly benefitted the corporation. In the landmark case of New York Dock Co. v. McCollum, a corporation and its directors were denied indemnification despite their having successfully defended a derivative suit seeking appointment of a receiver. After incurring substantial expense, the directors sought a declaration from the court that they were entitled to indemnification. Although the court concluded that the corporation had benefitted by avoiding appointment of the receiver, it denied indemnification after finding that the successful defense was the result of corporate counsel’s efforts, rather than those of the defendants. McCollum was widely criticized, and resulted in the 1941 enactment of the nation’s first corporate indemnification statute.

Direct benefit cases were based on the concept that, absent the

11. E.g., Wickersham v. Crittenden, 106 Cal. 329, 39 P. 603 (1895); Persey v. Millaudon, 8 Mart. (N.S.) 68 (Orleans 1829).
12. G. WASHINGTON & J. BISHOP, JR., supra note 9, at 79-82.
13. Id. at 81.
14. Id. at 83.
15. Id. at 84.
17. See G. WASHINGTON & J. BISHOP JR., supra note 9, at 87-90.
benefit, the corporation was without the power to indemnify. Some jurisdictions rejected the direct benefit requirement, and reasoned that successful officers and directors should be indemnified because they should have no lesser rights than would a trustee at common law. These courts concluded that indirect benefits, such as demonstrating corporate management’s honesty, were of value to the corporation. Still other courts allowed indemnification following successful defense upon the broader public policy grounds that without indemnification, it might be difficult to induce responsible persons to accept corporate office.

The law was also unclear in non-derivative actions such as suits brought by third parties or criminal prosecutions. Some courts permitted indemnification under an agency theory, and required a cause or link between the action taken as an agent and the subsequent litigation. In Hoch v. Duluth Brewing and Malting Co., a corporate director had briefly held title to a parcel of land as security for a debt to the corporation. Many years after the debt was paid, the federal government brought a civil fraud and conspiracy action against Hoch and various others in the chain of title charging that they had conspired to defraud the government of its land. Although the director defended successfully, the court refused to allow indemnification. The court reasoned that the director’s loss was caused by entirely unpredictable government misconduct, for which the corporation was in no way responsible. Other courts used the corporate benefit standard to find corporate power to voluntarily indemnify unsuccessful directors who had benefitted the corporation in the process of being defeated.

20. Solimine v. Hollander, 129 N.J. Eq. 264, 19 A.2d 344 (1941)(trustees at common law enjoyed right to indemnification, and corporate directors should enjoy the same right, based on their similar responsibilities). Officers and directors occupy a fiduciary or quasi fiduciary position, and though not technically trustees, occupy positions of trust and have analogous duties. Etheredge v. Barrow, 102 So. 2d 660 (Fla. 2d Dist. Ct. App. 1958).
23. 173 Minn. 374, 217 N.W. 503 (1928).
24. Id. at 375, 217 N.W. at 504.
Florida courts did not address these particular issues, however, Florida common law did require corporations to reimburse expenses necessarily incurred by corporate officers in the performance of their corporate duties, where the performance of those duties conferred a benefit on the corporation. The obligation was based on an implied contract theory.

III. Florida Statutory History

After the McCollum case, nearly all jurisdictions adopted statutes permitting officer and director indemnification in various circumstances. Florida’s first statutes on the subject were former sections 608.13 and 608.131, enacted in 1963.

Under section 608.13(14), corporations had the power to indemnify officers and directors in suits by or in the right of the corporation for reasonable fees and expenses “actually and necessarily incurred” in defense or settlement, except where the officers or directors were adjudged guilty of negligence or misconduct in the performance of their corporate duties. Under subsection (15), applicable to third party actions including criminal proceedings, corporations were authorized to indemnify officers and directors for reasonable expenses “actually and necessarily incurred as a result” of the proceeding. This included amounts paid in settlement, to satisfy judgments, or in paying fines. The indemnification for defensive actions under subsection (15) was considerably broader than for suits as plaintiff under subsection (14), which did not provide for indemnification of amounts paid in settlement.

However, persons seeking indemnification in third party actions were required to demonstrate a good faith reasonable belief that their actions were taken “in the best interests of the corporation.” In criminal proceedings, the officer or director was also required to prove that he had no reasonable ground for belief that his actions were unlawful. The statute further provided that termination of civil or criminal ac-

26. Flight Equip. and Eng’g Corp. v. Shelton, 103 So. 2d 615, 625 (Fla. 1958).
27. Id.
28. N. FEUER, supra note 5, at 205.
29. 1963 Fla. Laws ch. 286; § 1, ch. 304, § 1.
32. § 608.13(15).
tions by settlement, conviction, judgment or plea of *nolo contendere* did not itself create a presumption that the above standards were violated.\(^{33}\) The power to indemnify under section 608.13 existed unless otherwise provided by the corporation's certificate of incorporation.\(^{34}\)

Section 608.131(5) allowed successful plaintiffs in derivative actions to obtain the reasonable expenses of maintaining the suit, including attorneys' fees.\(^{35}\) Under subsection (4), plaintiffs holding less than five percent of the corporation's outstanding shares could be required to post security for reasonable expenses, including attorneys' fees, for which the corporation might become liable for indemnification under section 608.13(14).\(^{36}\) The security provisions were designed to prevent so-called "strike suits" by shareholders, and did not apply to plaintiffs owning stock valued in excess of $50,000.00.\(^{37}\)

The 1963 indemnification statutes remained unchanged until 1970 and 1971, when they were substantially expanded. Under the 1971 statute, not only parties, but those threatened to be made parties, could be indemnified.\(^{38}\) Additionally, the expenses to be indemnified did not have to be incurred in an action, but could also be incurred in a "threatened, pending or completed action, suit or proceeding."\(^{39}\) Under subsection 14(a), applicable to non-derivative actions, the class of persons eligible for indemnification was expanded from officers and directors to include employees and agents.\(^{40}\) Additionally, indemnification was made available to those affiliated with partnerships, joint ventures, trusts or other enterprises.\(^{41}\) These expansions also applied to derivative actions.\(^{42}\)

The 1971 statute also significantly changed the provisions applicable to derivative actions. Indemnification was only available upon meet-

\[^{33}\text{Id.}\]
\[^{34}\text{FLA. STAT. \$ 608.13 (1963) (repealed 1975).}\]
\[^{35}\text{FLA. STAT. \$ 608.131(5) (1963) (repealed 1975).}\]
\[^{36}\text{FLA. STAT. \$ 608.131(4) (1963) (repealed 1975).}\]
\[^{37}\text{See Citizens Nat'l Bank v. Peters, 175 So. 2d 54 (Fla. 2d Dist. Ct. App. 1965); "Strike suits" are defined as derivative actions brought by shareholders with the ulterior purpose of inducing the defendants to buy the plaintiff's shares. Leppert v. Lakebreeze Homeowners Assoc., Inc., 500 So. 2d 250, 252 (Fla. 1st Dist. Ct. App. 1987).}\]
\[^{38}\text{FLA. STAT. \$ 608.13(14) (1971).}\]
\[^{39}\text{Id.}\]
\[^{40}\text{\$ 608.13(14)(a).}\]
\[^{41}\text{Id.}\]
\[^{42}\text{\$ 608.13(14)(b).}\]
ing the good faith and reasonable belief standards already applicable to third party actions. However, the former statute’s automatic exclusion from indemnification of those adjudged guilty of negligence or misconduct was relaxed to allow indemnification, if the court approved in view of all the circumstances.

In addition to altering the requirements for permissive indemnification in derivative and third party actions, the 1971 statute also incorporated the first mandatory indemnification provision. Under subsection 14(c), indemnification of expenses “actually and necessarily incurred” was available to those found “successful on the merits or otherwise in defense of any action, suit or [other] proceeding . . . or in defense of any claim, issue or matter therein.”

The statute also provided mechanisms for approval of permissive indemnification, and broadened its availability. Subsection 14(d) established a requirement that permissive indemnification be approved by a majority vote of a quorum of disinterested members of the board of directors, or by non-party shareholders. Under subsection (15), corporations were also empowered to advance expenses prior to the conclusion of the suit. This also required a majority vote of a quorum of disinterested directors or a majority vote of disinterested shareholders, and required that the person to be indemnified, or someone on his behalf, undertake to repay the advancement if it was not ultimately determined that indemnification was appropriate. Subsection (16) created a non-exclusivity provision expressly recognizing that statutory indemnification under subsections (14) and (15) did not preclude other indemnification rights created under “by-law, agreement, vote of shareholders or disinterested directors, or otherwise.” Additionally, indemnification under subsections (14) and (15) was available for actions taken in an official capacity, or taken in another capacity while holding office. Moreover, such indemnification was required to continue after the official’s position terminated, and to inure to the benefit of the indemnitee’s heirs, executors, and administrators.

Finally, under subsection (17), Florida adopted its first provision

43. Id.; cf. FLA. STAT. § 608.13(15).
44. Id.
46. § 608.13(14)(d).
47. § 608.13(15).
48. § 608.13(16).
49. Id.
50. Id.
allowing corporations to purchase and maintain directors' and officers' insurance. Such insurance could cover any liability asserted based upon acts in an official corporate capacity, or upon official status, and was not limited by the constraints of subsection (14).51

These statutes remained unchanged until 1975, when they were automatically repealed.52 Following repeal, the Legislature enacted a substantially revised statutory scheme based on the 1969 Model Corporation Business Act.53 These revisions were part of the first comprehensive overhaul of Florida's corporation act since 1953,54 but the new statute did not enact the Model Act verbatim.55 The principal purpose of the revisions was described as clarification.56 However, review of the 1975 statute demonstrates that a number of substantive changes were implemented.

The new statute, section 607.014, relaxed the permissive indemnification requirement from good faith and a reasonable belief that the acts taken were in the best interest of the corporation, to good faith belief that the acts taken were "not opposed to" the best interests of the corporation.57 The statute also permitted indemnification of expenses "actually and reasonably incurred,"58 although the prior statute required that the expenses be "actually and necessarily incurred." Section 607.014(5), providing for advancement of expenses, was clarified to require a finding that the subsection (1) or subsection (2) "good faith" and "reasonable belief" standards had been met.59 Under sub-

51. § 608.13(17). The statute was also designed to facilitate the speedy provision of a defense during litigation. See Senate Staff Analysis and Economic Impact Statement, S.B. 1096, 10th Leg. (April 23, 1987) ("[s]ince the section permits insurance coverage in areas not clearly indemnifiable by the corporation, directors and others were able to arrange with an insurance carrier for the funding of legal fees associated with the defense of a claim without having a preliminary determination by ... procedures defined in the statute").
52. 1975 Fla. Laws ch. 250, § 139.
54. Senate Judiciary-Civil Committee, Staff Analysis, S.B. 520, 4th Leg. (May 23, 1975).
55. Id.
56. Letter from C. McFerrin Smith, III, Executive Director to the Law Revision Council, to the Office of the Governor (June 9, 1975).
58. § 607.014(1)(2).
section (6), the non-exclusivity provision was also clarified and set new limits. Under the new non-exclusivity provision, applicable to permissive indemnification by the corporation but not to court-approved indemnification as otherwise provided, indemnification was not allowed for acts involving gross negligence or willful misconduct. Additionally, under subsection (9), corporations were required to provide notice to shareholders of indemnifications not authorized by a court, by the shareholders themselves, or paid for by insurance.

Section 608.131 was also renumbered to 607.147 and revised. In addition, the Legislature enlarged the potential class of derivative plaintiffs by including those who were stockholders at the time of suit, although not necessarily at the time a cause of action accrued. The Legislature also enacted the first provision authorizing courts to order unsuccessful plaintiffs to pay the defendants' reasonable expenses, including attorneys' fees, where the action was brought "without reasonable cause."

The 1975 version remained virtually unchanged until 1980, when the Legislature created a new alternative to approval of indemnification by disinterested directors or shareholder vote. Section 607.014(4)(b) permitted approval of indemnification by written opinion of independent legal counsel, in the absence of a quorum of disinterested directors, or if directed by such a quorum. Additionally, section 607.014(5) was amended to provide that only the board of directors could authorize advance indemnification. A 1981 amendment made clear that the Legislature intended the subsection (6) non-exclusivity provisions to apply equally to officers, directors, employees and agents.

IV. THE CURRENT STATUTE

The statute was substantially revised in 1987, and again in 1989.

64. Fla. Stat. § 607.147(4) (1975) (repealed 1989). However, the possibility of an unsuccessful plaintiff having to pay fees was apparently contemplated under former section 608.131(4).
66. Id.
The 1989 revisions updated the entire Corporation Act to more closely follow the Revised Model Business Corporation Act adopted by the American Bar Association in 1984. The statute was further reorganized in 1990, but the present indemnification provisions are substantially unchanged from the 1987 version.

In 1987, section 607.014(2), which applies to derivative suits, was amended to permit indemnification of amounts paid in settlement which did not exceed the board of directors' estimate of the expense necessary to litigate the proceeding to a conclusion. Previously, only amounts paid in settlement of third party actions could be indemnified. The purpose of the amendment was to encourage settlement of derivative actions. Additionally, the previous restrictions on permissive indemnification of those found liable for negligence or misconduct were broadened to include all those found liable in a proceeding. The more liberal restriction, however, did not apply to court-ordered indemnification. The Legislature also provided that any court of competent jurisdiction, not only the one where the proceeding was brought, could order indemnification.

Subsection (4) was also expanded in 1987 to allow indemnification approval by a committee designated by the board of directors. Interested directors could participate in selecting the committee. Additionally, if independent legal counsel was utilized, the means of selecting that counsel was expanded to permit selection by a disinterested board committee. Subsection (5) was amended to provide that independent legal counsel could determine whether permissive indemnification con-
duct standards were met, but could not authorize the indemnification.\textsuperscript{77}

Subsection (6) was amended to make advancement of expenses virtually automatic upon a promise to repay, and to put the burden on the corporation to determine whether the party receiving advancement was not ultimately entitled and should repay after the conclusion of the action.\textsuperscript{78} For employees and agents, even a promise to repay was unnecessary for advancement.\textsuperscript{79} Under subsection (7), the non-exclusivity provision was clarified to demonstrate that it applied to advancement.\textsuperscript{80} However, it was limited because it provided that indemnification was not allowed where a person's acts were material to a cause of action and (1) violated the criminal law without reasonable cause to believe that the conduct was lawful, (2) resulted in an officer receiving an improper personal benefit, (3) involved an improper dividend distribution, or (4) in derivative actions, involved willful misconduct or conscious disregard for the best interests of the corporation.\textsuperscript{81} The effect of these amendments was to sharply curtail the statute's non-exclusivity provisions for permissive indemnification. However, in the case of corporate directors, this was offset by the 1987 enactment of new liability limitations precluding a director's personal liability for monetary damages unless serious misconduct was demonstrated.\textsuperscript{82}

The continuing indemnification provisions of subsection (8) were amended to clarify their application to advancement, as well as indemnification. They were also amended to allow corporations, at the time they initially authorized indemnification or advancement, to limit its extent for persons no longer officers, directors, employees or agents, or their heirs.\textsuperscript{83} Subsection (9) was also amended. The new version provided that unless a corporation's articles of incorporation stated otherwise, persons seeking indemnification or advancement could apply directly to a court.\textsuperscript{84} Subsections (10) and (11) defined terms under the statute, and expanded the term "agent" to include volunteers.\textsuperscript{85} Additionally, the "not opposed to the best interests of the corporation" stan-

\begin{itemize}
\item \textsuperscript{78} Fla. Stat. § 607.014(6) (1987) (repealed 1989); Senate Staff Analysis and Economic Impact Statement, S.B. 1096, 10th Leg. (April 23, 1987).
\item \textsuperscript{79} § 607.014(6).
\item \textsuperscript{80} Fla. Stat. § 607.014(7) (1987) (repealed 1989).
\item \textsuperscript{81} Id.
\item \textsuperscript{82} See 1989 Fla. Laws ch. 154, § 85.
\item \textsuperscript{83} Fla. Stat. § 607.014(8) (1987) (repealed 1989).
\end{itemize}
standard was defined to include consideration of the best interests of the participants and beneficiaries of employee benefit plans. 86

The 1987 Legislature also supplemented the indemnification provisions with new sections 607.1645 and 607.165, limiting corporate directors' personal liability for money judgments stemming from acts or failures to act concerning corporate management or policy decisions. 87 Under the new sections, directors were exempted from personal liability to the corporation, or any other persons, for acts or omissions regarding corporate management or policy, unless the director breached or otherwise failed to perform his duties and (1) violated the criminal law without reasonable cause to believe his conduct was lawful, (2) was engaged in a transaction from which he derived an improper personal benefit, (3) made an improper distribution, (4) engaged in willful misconduct or consciously disregarded the best interests of the corporation in a shareholders' derivative proceeding, or (5) in a non-derivative proceeding, committed reckless, bad faith, or malicious acts exhibiting willful and wanton disregard of human rights, safety or property. 88 “Recklessness” was defined as a director's conscious disregard of a risk known, or so obvious that it should have been known, and from which harm was “highly probable” to follow. 89

Certain limitations precluded a finding of improper personal benefit where the benefit and underlying transaction were not prohibited by state or federal authorities. 90 In non-derivative actions, a finding of improper personal benefit is precluded where the benefit was disclosed, approved by the directors or shareholders, and is fair and reasonable. 91 Although a judgment or “other final adjudication” against a director in a criminal proceeding estopped him from contesting that his acts were a violation of the criminal law, 92 the director was still entitled to attempt to prove that he had reasonable cause to believe his conduct was lawful, or no reasonable cause to believe it was unlawful. 93

Although this provision might appear to sharply curtail the need for director indemnification, it applies only to judgments, and has no

88. § 607.1645(1).
89. § 607.1645(2).
90. § 607.165(1).
91. § 607.165(1)(a)(b)(c).
92. § 607.1645(1)(b).
93. Id.
effect on a director’s potential liability for attorneys’ fees and other expenses of defense, or monies paid in settlement. To date, no judicial decisions have interpreted the statute.

In 1989, no significant amendments were made to Section 607.014 pertaining to indemnification in general.94 However, in 1990, the Legislature renumbered the statute as section 607.0850.95 As part of its statutory reorganization, the Legislature separated subsection (13) indemnification notice requirements from the rest of the indemnification statute. The new notice provisions are found at newly created section 607.1621.96 The Legislature also reenacted former section 607.147, pertaining to derivative actions, which had been automatically repealed in 1989,97 as new section 607.07401.98 Under the current version, a court may no longer require shareholders’ derivative suit plaintiffs to post security for the reasonable costs and expenses of the action.99 The new director liability limitation provisions were also combined, renumbered and transferred to section 607.0831.100

Subsection (1) of section 607.0850 provides for indemnification in third party actions and continues to employ the “good faith” and “reasonable belief” standards for actions taken in, or not opposed to, the best interests of the corporation.101 In criminal proceedings, indemnification remains available if the person had no reasonable cause to believe his conduct was unlawful.102 Subsection (2), applicable to actions by or in the right of the corporation, also continues to utilize the “good faith” and “reasonable belief” standards. However, it precludes indemnification for persons adjudged liable unless the court concludes that indemnification is “fair and reasonable” under the circumstances.103 No standards are articulated to assist the court in making its

94. See generally Senate Staff Analysis and Economic Impact Statement, S.B. 0851, 11th Leg. (May 9, 1989).
100. 1989 Fla. Laws ch. 154, § 85.
102. Id.
103. § 607.0850(2).
Subsection (3) continues to provide mandatory indemnification for officers, directors, agents and employees who are "successful on the merits or otherwise" in defense of a proceeding. Subsection (4) limits the corporation to permissively indemnify only those persons meeting subsection (1) and (2) standards, and prescribes who may make the determination. Subsection (5) provides a method for determining whether claimed expenses are reasonable, and continues to limit independent legal counsel to determining whether indemnification should be allowed while requiring others to set the amounts. Advance indemnification remains available under subsection (6), and the subsection (7) non-exclusivity provisions remain intact although subject to exceptions. Under subsection (8), indemnification and advancement remain. Under subsection (9), a court of competent jurisdiction remains empowered to order indemnification upon application and proof of certain standards. Subsections (10) and (11) provide various definitions and subsection (12) allows a corporation to purchase directors' and officers' insurance. Section 607.1621 continues to require notice to shareholders for indemnification other than by court order, insurance, or the shareholders themselves. The notice must be sent prior to the next shareholders' meeting, and requires specification of the persons paid, amounts paid, and the nature of the litigation involved.

Under section 617.028, section 607.0850 indemnification is also available to the directors, managers and trustees of non-profit corporations and rural electric cooperatives. The section 607.0831 director liability limitation provisions remain unchanged from the 1989 version, but former section 607.147(4) provisions providing for payment of expenses including attorneys' fees in shareholders' derivative actions brought without reasonable cause, was rewritten when it was trans-
ferred to section 607.07401(5).

V. ANALYSIS AND COMMENT

A. Derivative Actions

Although not strictly speaking an indemnification statute, the provisions of current statute section 607.07401(5)(a) effectively supplement Florida’s statutory indemnification scheme and provide as follows: “On termination of the proceeding, the court may require the plaintiff to pay any defendant’s reasonable expenses, including reasonable attorneys’ fees, incurred in defending the proceeding if it finds that the proceeding was commenced without reasonable cause.”

Several points concerning section 607.07401(5) merit comment. First, the claim for fees arises upon “termination of the proceeding.” Former statute section 607.147(4) applied only “upon final judgment,” apparently barring any claim on a case settled short of judgment.

Second, the court must find that the proceeding was brought without reasonable cause, which has been interpreted to require that there be no merit to any of the claims advanced against any of the parties. In Winner v. Cataldo, the Third District Court of Appeal observed that to allow a single successful defendant fees against the plaintiff would have a chilling effect on meritorious derivative claims. Perhaps the court was concerned that minority shareholders would ordinarily not be in a position to determine which of the officers or directors were at fault, and believed it was appropriate to permit the plaintiff to sue them all and require the defendants to establish among themselves who was responsible.

However, as the award of fees is purely discretionary, the deterrent effect against meritless claims is questionable. The defendant could establish a stronger claim to fees merely by offering a nominal settlement under Rule 1.442, Florida Rules of Civil Procedure.

118. 559 So. 2d 696 (Fla. 3d Dist. Ct. App. 1990).
120. The court may impose sanctions equal to reasonable attorneys’ fees and all
The absence of reasonable cause is a difficult standard in view of the modest requirements for bringing a derivative suit. Cases interpreting earlier versions of the statute held that plaintiff stockholders were not required to have direct knowledge of misconduct in order to bring a derivative action. If the record reflected colorable support for the claims asserted, the action was considered viable. The current statute requires a verified complaint alleging with particularity the action taken to obtain remedial board action, but does not otherwise appear to require direct knowledge. Additionally, the plaintiff need not be a stockholder at the time the action is brought; it is sufficient if he was a stockholder at the time the cause of action arose.

Finally, as "reasonable cause" is understood to be something less than "probable cause," and initiating an action without probable cause is actionable as malicious prosecution, there appears to be little if any benefit to asserting a claim for fees under section 607.07401(5). A successful defendant who could establish the absence of probable cause in a separate action would be absolutely entitled to recover. The same defendant claiming fees at the conclusion of a successful defense against a derivative action could recover only if he could satisfy the more stringent absence of reasonable cause standard, and recovery would still be subject to the virtually unbridled discretion of the trial court.

Balanced against the defendant's potential indemnification or recovery of fees is the successful plaintiff's claim for fees. Section 607.07401(6) permits the court to award the successful plaintiff in a derivative action his reasonable expenses, including attorneys' fees.

The court must first find, however, some benefit to the corporation or reasonable costs of the litigation from the date of an offer of judgment which was unreasonably rejected, where the damages awarded to the offeree are less than 75 percent of the offer. FLA. R. Civ. P. 1.442(h), superseding in part FLA. STAT. §§ 768.79, 45.061 (1990). See The Florida Bar Re: Amendment to Rules, 550 So. 2d 442 (Fla. 1989).

122. Id. at 94.
123. FLA. STAT. § 607.07401(2) (1990).
124. § 607.07401(1).
126. See Burns v. GCC Beverages, 502 So. 2d 1217, 1218 (Fla. 1986).
the other shareholders.\textsuperscript{128}

The defendants cannot thwart recovery by voluntarily granting the plaintiff's requested relief before judgment. Where the case is rendered moot by corporate action, the corporation has the burden of establishing the action was not caused by the lawsuit.\textsuperscript{129} However, although section 607.07401(4) requires court approval for settlement of derivative claims, and subsections (5) and (6) permit the court to award fees, the court is without authority to require payment of fees as part of a settlement.\textsuperscript{130}

B. \textit{Other Indemnification}

Little case law interprets the permissive indemnification provisions of section 607.0850 and its predecessor statutory versions. As earlier outlined, sections 607.0850(1),(2) and (9), Florida Statutes, permit a corporation to indemnify its officers and directors, and subsection (6) permits advancement of expenses of defense prior to determination of the controversy.\textsuperscript{131} These provisions are subject only to the conflict of interest limitations of section 607.0850(4), which generally require the interested officer or director to abstain from the corporation's determination of indemnification.

Although it has been argued that the language of subsection (4) implies that the court may order indemnification under sections (1) or (2) if the corporation refuses, the Third District Court of Appeal ruled in \textit{Mosley v. DeMoya}\textsuperscript{132} that these provisions merely permit the corporation to indemnify if it sees fit.

The only mandatory indemnification provision is found in 607.0850(3).\textsuperscript{133} Subsection (3) mandatory indemnification is self-executing, and does not depend on a corporation's enactment of an ena-

\textsuperscript{128} \textit{Id.; see also} Lane v. Head, 566 So. 2d 508 (Fla. 1990); United Parts, Inc. v. Tillis, 432 So. 2d 674 (Fla. 5th Dist. Ct. App. 1983)(both interpreting former section 607.147(5), Florida Statutes).


\textsuperscript{131} FLA. STAT. § 607.0850(1),(2) and (9) (1990). \textit{See infra} Appendix.

\textsuperscript{132} 497 So. 2d 696 (Fla. 3d Dist. Ct. App. 1986)(interpreting former section 607.014(1)(2)(4), Florida Statutes).

\textsuperscript{133} \textit{See infra} Appendix.
bling provision in its articles of incorporation or elsewhere. The only apparent limitation on this entitlement to indemnification is that the conduct giving rise to the claim must not have been ultra vires. Although Florida’s jurisprudence has not addressed any particularly egregious examples of claims arising from corporate status but based upon ultra vires acts of corporate officials, the problem has occasionally arisen in other states with similar statutes.

The “successful on the merits or otherwise” language is one of the statute’s more controversial provisions and has not been uniformly adopted by all Model Act jurisdictions. Under the Model Act and statutes following it, a defense must be “wholly successful on the merits or otherwise.” Other jurisdictions have adopted the more rigorous standard of “successful on the merits.” It is difficult to understand why adding “or otherwise” was deemed necessary. A defendant who prevails for any reason is absolutely entitled to indemnification, which is the identical result achieved if the statute simply required indemnification for any successful defendant. Equally mysterious is why the Legislature determined that a corporate defendant who escaped liability on a mere technicality should be entitled to indemnification at all. Although the proponents of the Model Business Corporation Act explained that it would be “unreasonable to require a defendant with a valid procedural defense to undergo a possibly prolonged and expensive trial on the merits in order to establish eligibility for mandatory indem-

135. See, State ex rel. Blatt v. Panelfab Int’l Corp., 314 So. 2d. 196 (Fla. 3d Dist. Ct. App. 1975)(mandamus compelling indemnification under former section 607.014(3), Florida Statutes, inappropriate for successful defense of criminal charges where record disclosed a fact dispute as to whether the underlying conduct resulted in whole or in part from conduct outside scope of corporate duties).
136. E.g., Kaufman v. CBS, Inc., 135 Misc. 2d 64, 514 N.Y.S.2d 621 (N.Y. City Civ. Ct. 1987). Kaufman, a former CBS vice president, was sued by a female employee for a variety of intentional torts after he allegedly “grabbed” a piece of her clothing and made a lewd remark about her at a business dinner. Interpreting New York’s analogous statute, the court found that the conduct was an “obvious deviation” from Kaufman’s work responsibilities and could not reasonably be construed as an act within the scope of employment. Id., 514 N.Y.S.2d at 621.
nification,” this does not explain why the expenses of the litigation should be shifted from the wrongdoer to the corporation. Officers and directors who happen to be sued and win should be required to make a case to the corporation for permissive indemnification, or at very least be subject to the “good faith” and “reasonable belief” requirements of section 607.0850(1) and (2).

Moreover, Florida’s omission of the Model Act’s “wholly successful” standard may make it necessary to indemnify those who are partially successful in defending an action but may be unsuccessful as a whole. Jurisdictions lacking this language have faced difficult problems in separating expenses subject to indemnification from those which are not. In *Merritt-Chapman & Scott Corp. v. Wolfson*, a Delaware court was forced to determine whether a criminal defendant who had successfully obtained dismissal of a federal securities fraud element of a conspiracy count, but was later convicted on the count, was entitled to mandatory indemnification. Although the court concluded that Delaware’s indemnification statute did not allow indemnification for this type of partial success, another appellate panel subsequently had to resolve whether Wolfson was entitled to mandatory indemnification for dismissal of some counts despite conviction on others. Reasoning that statutory language did not require success in all aspects of the suit, and that in a criminal action, any result other than a conviction was a success, the court concluded that Wolfson was entitled to indemnification for counts dismissed under a plea bargain agreement.

What constitutes “success on the merits or otherwise” has been heavily litigated. Voluntary dismissals with prejudice, dismissals for failure to post security for expenses (even where the suit was subsequently refiled), failure to indict following an investigation, dismissal of some although not all charges, outright acquittal, a plaintiff

139. W. KNEPPER & D. BAILEY, supra note 8, at § 20.11.
voluntarily requesting a non-suit, and dismissal with prejudice due to bar by the statute of limitations, have all been found encompassed within the phrase "or otherwise."

Some courts have found it necessary to draw a line and refuse indemnification for technical successes without substantive meaning. In Galdi v. Berg, a federal district court construing Delaware's indemnification statute refused to permit indemnification for a defendant after the plaintiff voluntarily dismissed its case without prejudice. The court noted that another suit was currently being litigated which involved exactly the same issues, and concluded that despite the dismissal, the issue remained unresolved because it survived in the other suit. Accordingly, the court determined that the defendant had failed to obtain success on the merits or otherwise. In another instance, a court technically required to acquit a defendant of criminal charges, expressed its belief that the defendant should or would still be punished in civil actions. Nevertheless, that same defendant subsequently obtained indemnification for his successful defense of the criminal charges after the court concluded that Delaware's subsection 145(a) and 145(b) requirements for good faith, were not incorporated by reference into section 145(c) "successful on the merits or otherwise" standard.

In the context of the current troubles with failed financial institutions, the Office of Thrift Supervision has promulgated regulations allowing administrative authorities to object to indemnification of some former savings and loan officers and directors under applicable statutes. Under the federal regulations, the objection will automatically prohibit indemnification.

Eliminating the "or otherwise" language would limit required indemnification to situations where a judicial determination has been made on the merits. For example, in American National Bank and

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151. Green, 492 A.2d 260.
152. id. These provisions are analogous to section 607.0850(1)(2)(3), Florida Statutes. See infra Appendix.
Trust Co. v. Schigur, a California court refused to allow mandatory indemnification following a settlement and voluntary dismissal with prejudice. Contrasting the California provision requiring "success on the merits" with the Model Act provision requiring "success on the merits or otherwise," the court held that because the merits were not judicially determined, no indemnification was required.

Since permissive indemnification is still available under subsections (1) and (2) of Florida Statutes section 607.0850, elimination of the "or otherwise" language would still allow indemnification in most situations where procedural defenses prevailed, should the corporation decide it was appropriate. If, as suggested by some courts, the purpose of the mandatory indemnification provision is to prevent vindicated officers and directors from a corporation's refusal to indemnify after change in management, this problem could be treated by drafting a mandatory indemnification provision broad enough to encompass adverse managerial shifts while not requiring mandatory indemnification of those who escape liability other than on the merits.

Further statutory clarification of mandatory indemnification may also be necessary in other contexts. At least one court has concluded that the word "successful" requires appellate finality, thereby precluding mandatory indemnification where a judgment has been rendered in an officer's or director's favor but an appeal still remains pending. Other courts have wrestled with the necessity of indemnifying former attorneys for corporations who successfully defend malpractice suits brought against them by their prior clients. In this context, a California court concluded in Katayama v. Interpacific Properties, Inc., that former corporate counsel was clearly "an agent" of the corporation and was encompassed within the meaning of section 317(d) of California's Corporation Act during the time he represented the corporation and committed the acts for which he was later sued. The court found the statute "straightforward and unambiguous" and held that its "literal terms" required considering attorneys as agents for the corporation

160. This section is analogous to section 607.0850(3), Florida Statutes.
who would therefore be eligible for indemnification upon successfully defending a legal malpractice action.161

However, at least one other court reached precisely the opposite conclusion. In Western Fiberglass, Inc. v. Kirton, McCorkie & Bushnell,162 a Utah court decided that "agent" as defined by section 16-10-4(2)(c), Utah Statutes,163 did not include law firms engaged by corporations to give legal advice. The would-be "agent" seeking indemnification in Western Fiberglass was an attorney sued for malpractice after rendering advice to a corporation. While the jury found for the attorney on one count, it found the attorney and the corporation equally negligent on another. The Western Fiberglass court used a combination of policy and statutory analysis to reach its determination, and dismissed the Katayama analysis as "one unpublished decision" without any further discussion.164 The court concluded that the statutory definition of "agent" referred to persons with management discretion and the ability to bind the corporation.165

If the statute were truly intended to be limited to managing or controlling persons, why was the broad language of "agent or employee" chosen? This reasoning would also preclude mandatory indemnification of attorneys who were sued by third parties along with the corporation and its management, for acts done at the corporation's discretion. Eliminating attorney entitlement to mandatory indemnification in all instances could have serious ramifications. Corporations could be deprived of the full assistance of counsel based upon the chilling effect of claims either not necessarily covered by malpractice insurance, or excessive premiums based from loss experience. The court in Western Fiberglass was obviously reaching for a means to avoid the unconscionable indemnification of an attorney found negligent.

Moreover, although the Legislature may never have intended section 607.0850(3) to apply to derivative actions, there is nothing in the statute to dictate otherwise. To the contrary, the Third District Court of Appeal indicated in dictum contained in Winner166 that former 607.014(3), now 607.0850(3), would apply to derivative actions.

161. Id. The court also saw no policy reasons why this construction should not be allowed, as corporations were often subjected to rules not imposed on real persons, and were likely to be able to pursue expensive litigation more easily than an individual.
163. This section is analogous to section 607.0850, Florida Statutes.
164. 789 P.2d at 36.
165. Id. at 38.
Section 607.07401(5), which assumably was supposed to strike a careful balance between the rights of majority and minority stockholders, is undermined. The policy of encouraging meritorious derivative claims is frustrated by the availability of mandatory indemnification under 607.0850(3), which is apparently available to any successful corporate official defendant, regardless of the culpability of his codefendants, or even his own wrongdoing, so long as he prevails. Even plaintiffs with meritorious claims may be reluctant to sue if they face a "stonewall" defense, and the prospect of paying not only their own fees, but funding management’s defense indirectly through their investment in the corporation.

Section 607.0850(3) should either be expressly excepted from application to derivative actions, or the Legislature should arrive at a consistent approach to indemnification. We suggest at the very least requiring success on the merits.

Corporate officials who are innocent or merely negligent are entitled to protection. Otherwise, there is little purpose in establishing a corporation at all. Furthermore, excessive risks to officers and directors will tend to discourage any responsible individual from serving. What possible justification can there be, however, for rewarding the intentional wrongdoer?

APPENDIX

Section 607.0850 is entitled: “Indemnification of officers, directors, employees, and agents” and provides:

(1) A corporation shall have power to indemnify any person who was or is a party to any proceeding (other than an action by, or in the right of, the corporation), by reason of the fact that he is or was a director, officer, employee, or agent of the corporation or is or was serving at the request of the corporation as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust, or other enterprise against liability incurred in connection with such proceeding, including any appeal thereof, if he acted in good faith and in a manner he reasonably believed to be in, or not opposed to, the best interests of the corporation and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful. The termination of any proceeding by judgment, order, settlement, or conviction or upon a plea of nolo contendere or its equivalent shall not, of

167. See supra notes 123-30 and accompanying text.
itself, create a presumption that the person did not act in good faith
and in a manner which he reasonably believed to be in, or not opposed
to, the best interests of the corporation or, with respect to any criminal
action or proceeding, had reasonable cause to believe that his conduct
was unlawful.
(2) A corporation shall have power to indemnify any person, who
was or is a party to any proceeding by or in the right of the corporation
to procure a judgment in its favor by reason of the fact that he is or
was a director, officer, employee, or agent of the corporation or is or
was serving at the request of the corporation as a director, officer, em-
ployee, or agent of another corporation, partnership, joint venture,
trust, or other enterprise, against expenses and amounts paid in settle-
ment not exceeding, in the judgment of the board of directors, the esti-
mated expense of litigating the proceeding to conclusion, actually and
reasonably incurred in connection with the defense or settlement of
such proceeding, including any appeal thereof. Such indemnification
shall be authorized if such person acted in good faith and in a manner
he reasonably believed to be in, or not opposed to, the best interests of
the corporation, except that no indemnification shall be made under
this subsection in respect of any claim, issue, or matter as to which
such person shall have been adjudged to be liable unless, and only to
the extent that, the court in which such proceeding was brought, or any
other court of competent jurisdiction, shall determine upon application
that, despite the adjudication of liability but in view of all circum-
stances of the case, such person is fairly and reasonably entitled to in-
demnity for such expenses which such court shall deem proper.
(3) To the extent that a director, officer, employee, or agent of a
corporation has been successful on the merits or otherwise in defense of
any proceeding referred to in subsection (1) or subsection (2), or in
defense of any claim, issue, or matter therein, he shall be indemnified
against expenses actually and reasonably incurred by him in connection
therewith.
(4) Any indemnification under subsection (1) or subsection (2),
unless pursuant to a determination by a court, shall be made by the
corporation only as authorized in the specific case upon a determination
that indemnification of the director, officer, employee, or agent is
proper in the circumstances because he has met the applicable standard
of conduct set forth in subsection (1) or subsection (2). Such determi-
nation shall be made:
(a) By the board of directors by a majority vote of a quorum con-
sisting of directors who were not parties to such proceeding;
(b) If such a quorum is not obtainable or, even if obtainable, by majority vote of a committee duly designated by the board of directors (in which directors who are parties may participate) consisting solely of two or more directors not at the time parties to the proceeding;

(c) By independent legal counsel:
   (1) Selected by the board of directors prescribed in paragraph (a) or the committee prescribed in paragraph (b); or
   (2) If a quorum of the directors cannot be obtained for paragraph (a) and the committee cannot be designated under paragraph (b), selected by majority vote of the full board of directors (in which directors who are parties may participate); or

(d) By the shareholders by a majority vote of a quorum consisting of shareholders who were not parties to such proceeding or, if no such quorum is obtainable, by a majority vote of shareholders who were not parties to such proceeding.

(5) Evaluation of the reasonableness of expenses and authorization of indemnification shall be made in the same manner as the determination that indemnification is permissible. However, if the determination of permissibility is made by independent legal counsel, persons specified by paragraph (4)(c) shall evaluate the reasonableness of expenses and may authorize indemnification.

(6) Expenses incurred by an officer or director in defending a civil or criminal proceeding may be paid by the corporation in advance of the final disposition of such proceeding upon receipt of an undertaking by or on behalf of such director or officer to repay such amount if he is ultimately found not to be entitled to indemnification by the corporation pursuant to this section. Expenses incurred by other employees and agents may be paid in advance upon such terms or conditions that the board of directors deems appropriate.

(7) The indemnification and advancement of expenses provided pursuant to this section are not exclusive, and a corporation may make any other or further indemnification or advancement of expenses of any of its directors, officers, employees, or agents, under any bylaw, agreement, vote of shareholders or disinterested directors, or otherwise, both as to action in his official capacity and as to action in another capacity while holding such office. However, indemnification or advancement of expenses shall not be made to or on behalf of any director, officer, employee, or agent if a judgment or other final adjudication establishes that his actions, or omissions to act, were material to the cause of action so adjudicated and constitute:

(a) A violation of the criminal law, unless the director, officer, em-
ployee, or agent had reasonable cause to believe his conduct was lawful or had no reasonable cause to believe his conduct was unlawful;

(b) A transaction from which the director, officer, employee, or agent derived an improper personal benefit;

(c) In the case of a director, a circumstance under which the liability provisions of s. 607.0834 are applicable; or

(d) Wilful misconduct or a conscious disregard for the best interests of the corporation in a proceeding by or in the right of the corporation to procure a judgment in its favor or in a proceeding by or in the right of a shareholder.

(8) Indemnification and advancement of expenses as provided in this section shall continue as, unless otherwise provided when authorized or ratified, to a person who has ceased to be a director, officer, employee, or agent and shall inure to the benefit of the heirs, executors, and administrators of such a person, unless otherwise provided when authorized or ratified.

(9) Unless the corporation’s articles of incorporation provide otherwise, notwithstanding the failure of a corporation to provide indemnification, and despite any contrary determination of the board or of the shareholders in the specific case, a director, officer, employee, or agent of the corporation who is or was a party to a proceeding may apply for indemnification or advancement of expenses, or both, to the court conducting the proceeding, to the circuit court, or to another court of competent jurisdiction. On receipt of an application, the court, after giving any notice that it considers necessary, may order indemnification and advancement of expenses, including expenses incurred in seeking court-ordered indemnification or advancement of expenses, if it determines that:

(a) The director, officer, employee, or agent is entitled to mandatory indemnification under subsection (3), in which case the court shall also order the corporation to pay the director reasonable expenses incurred in obtaining court-ordered indemnification or advancement of expenses;

(b) The director, officer, employee, or agent is entitled to indemnification or advancement of expenses, or both, by virtue of the exercise by the corporation of its power pursuant to subsection (7); or

(c) The director, officer, employee, or agent is fairly and reasonably entitled to indemnification or advancement of expenses, or both, in view of all the relevant circumstances, regardless of whether such person met the standard of conduct set forth in subsection (1), subsection (2), or subsection (7).
(10) For purposes of this section, the term “corporation” includes, in addition to the resulting corporation, any constituent corporation (including any constituent of a constituent) absorbed in a consolidation or merger, so that any person who is or was a director, officer, employee, or agent of a constituent corporation, or is or was serving at the request of a constituent corporation as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust, or other enterprise, is in the same position under this section with respect to the resulting or surviving corporation as he would have with respect to such constituent corporation if its separate existence had continued.

(11) For purposes of this section:
(a) The term “other enterprises” includes employee benefit plans;
(b) The term “expenses” includes counsel fees, including those for appeal;
(c) The term “liability” includes obligations to pay a judgment, settlement, penalty, fine (including an excise tax assessed with respect to any employee benefit plan), and expenses actually and reasonably incurred with respect to a proceeding;
(d) The term “proceeding” includes any threatened, pending, or completed action, suit, or other type of proceeding, whether civil, criminal, administrative, or investigative and whether formal or informal;
(e) The term “agent” includes a volunteer;
(f) The term “serving at the request of the corporation” includes any service as a director, officer, employee, or agent of the corporation that imposes duties on such persons, including duties relating to an employee benefit plan and its participants or beneficiaries; and
(g) The term “not opposed to the best interest of the corporation” describes the actions of a person who acts in good faith and in a manner he reasonably believes to be in the best interests of the participants and beneficiaries of an employee benefit plan.

(12) A corporation shall have power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee, or agent of the corporation or is or was serving at the request of the corporation as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust, or other enterprise against any liability asserted against him and incurred by him in any such capacity or arising out of his status as such, whether or not the corporation would have the power to indemnify him against such liability under the provisions of this section.

Companion section 607.0831, entitled “Liability of directors,” provides:
(1) A director is not personally liable for monetary damages to the corporation or any other person for any statement, vote, decision, or failure to act, regarding corporate management or policy, by a director, unless:

(a) The director breached or failed to perform his duties as a director; and

(b) The director's breach of, or failure to perform, those duties constitutes:

1. A violation of the criminal law, unless the director had reasonable cause to believe his conduct was lawful or had no reasonable cause to believe his conduct was unlawful. A judgment or other final adjudication against a director in any criminal proceeding for a violation of the criminal law estops that director from contesting the fact that his breach, or failure to perform, constitutes a violation of the criminal law; but does not estop the director from establishing that he had reasonable cause to believe that his conduct was lawful or had no reasonable cause to believe that his conduct was unlawful;

2. A transaction from which the director derived an improper personal benefit, either directly or indirectly;

3. A circumstance under which the liability provisions of s. 607.0834 are applicable;

4. In a proceeding by or in the right of the corporation to procure a judgment in its favor or by or in the right of a shareholder, conscious disregard for the best interest of the corporation, or willful misconduct; or

5. In a proceeding by or in the right of someone other than the corporation or a shareholder, recklessness or an act or omission which was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

(2) For the purposes of this section, the term "recklessness" means the action, or omission to act, in conscious disregard of a risk:

(a) Known, or so obvious that it should have been known, to the director; and

(b) Known to the director, or so obvious that it should have been known, to be so great as to make it highly probable that harm would follow from such action or omission.

(3) A director is deemed not to have derived an improper personal benefit from any transaction if the transaction and the nature of any personal benefit derived by the director are not prohibited by state or federal law or regulation and, without further limitation:
(a) In an action other than a derivative suit regarding a decision by the director to approve, reflect, or otherwise affect the outcome of an offer to purchase the stock of, or to effect a merger of, the corporation, the transaction and the nature of any personal benefits derived by a director are disclosed or known to all directors voting on the matter, and the transaction was authorized, approved, or ratified by at least two directors who comprise a majority of the disinterested directors (whether or not such disinterested directors constitute a quorum);

(b) The transaction and the nature of any personal benefits derived by a director are disclosed or known to the shareholders entitled to vote, and the transaction was authorized, approved, or ratified by the affirmative vote or written consent of such shareholders who hold a majority of the shares, the voting of which is not controlled by directors who derived a personal benefit from or otherwise had a personal interest in the transaction;

(c) The transaction was fair and reasonable to the corporation at the time it was authorized by the board, a committee, or the shareholders, notwithstanding that a director received a personal benefit.

(4) Common or interested directors may be counted in determining the presence of a quorum at a meeting of the board of directors which authorizes, approves, or ratifies such a transaction.

(5) The circumstances set forth in subsection (3) are not exclusive and do not preclude the existence of other circumstances under which a director will be deemed not to have derived an improper benefit.

(6) The provisions of this section shall also apply to officers of non-profit organizations as provided in s.617.0285.

Section 607.07401, transferred from section 607.0740 by section 148, Chapter 90-179 Florida Laws, is entitled “Shareholders’ derivative actions,” and provides:

(1) A person may not commence a proceeding in the right of a domestic or foreign corporation unless the person was a shareholder of the corporation when the transaction complained of occurred or unless the person became a shareholder through transfer by operation of law from one who was a shareholder at that time.

(2) A complaint in a proceeding brought in the right of a corporation must be verified and allege with particularity the demand made to obtain action by the board of directors and that the demand was refused or ignored. If the corporation commences an investigation of the charges made in the demand or complaint, the court may stay any proceeding until the investigation is completed.

(3) The court may dismiss a derivative proceeding if, on motion by
the corporation, the court finds that one of the groups specified below has made a determination in good faith after conducting a reasonable investigation upon which its conclusions are based that the maintenance of the derivative suit is not in the best interests of the corporation. The corporation shall have the burden of proving the independence and good faith of the group making the determination and the reasonableness of the investigation. The determination shall be made by:

(a) A majority vote of independent directors present at a meeting of the board of directors, if the independent directors constitute a quorum;

(b) A majority vote of a committee consisting of two or more independent directors appointed by a majority vote of independent directors present at a meeting of the board of directors, whether or not such independent directors constitute a quorum; or

(c) A panel of one or more independent persons appointed by the court upon motion by the corporation.

(4) A proceeding commenced under this section may not be discontinued or settled without the court’s approval. If the court determines that a proposed discontinuance or settlement will substantially affect the interest of the corporation’s shareholders or a class, series, or voting group of shareholders, the court shall direct that notice be given to the shareholders affected. The court may determine which party or parties to the proceeding shall bear the expense of giving the notice.

(5) On termination of the proceeding, the court may require the plaintiff to pay any defendant’s reasonable expenses, including reasonable attorney’s fees, incurred in defending the proceeding if it finds that the proceeding was commenced without reasonable cause.

(6) The court may award reasonable expenses for maintaining the proceeding, including reasonable attorney’s fees, to a successful plaintiff or to the person commencing the proceeding who receives any relief, whether by judgment, compromise, or settlement, and require that the person account for the remainder of any proceeds to the corporation; however, this subsection does not apply to any relief rendered for the benefit of injured shareholders only and limited to a recovery of the loss or damage of the injured shareholders.

(7) For purposes of this section, “shareholder” includes a beneficial owner whose shares are held in a voting trust or held by a nominee on his behalf.
Note: The Personal Liability of Directors in Florida: Whose Corporation is it Anyway?

I. INTRODUCTION

During the 1980's a serious crisis developed in the insurance industry which threatened to expose corporate directors to personal liability. In addition, in 1985, the Delaware Supreme Court decided in Smith v. Van Gorkom that directors who failed to adequately inform themselves of corporate matters were grossly negligent, and therefore would be held personally liable for their uninformed decisions. The decision has been viewed as one of the worst in the history of corporate law, and one which will adversely affect the quality of directors who serve on corporate boards.

In keeping with the flurry in almost every state to amend their corporate acts in response to the crisis in the Director and Officer insurance industry and the Smith v. Van Gorkom decision, in 1987 the Florida Legislature made sweeping changes to the Florida General Corporation Act. Specifically, the Legislature added a new statute relating to the personal liability of directors for decisions which they

* The author would like to thank Professor Marilyn Cane for her suggestion of the title and her assistance generally.

1. A number of commentators have written about the crisis in the director and officer liability insurance industry. See, e.g., Block, Barton & Garfield, Advising Directors on the D & O Insurance Crisis, 14 SEC. REG. L.J. 130 (1985); Note, New York's Response to the Director and Officer Liability Crisis: A Need to Reexamine the Importance of D & O Insurance, 54 BROOKLYN L. REV. 1305 (1989).

2. 488 A.2d 858 (Del. 1985).


make in their capacity as directors. Rather than follow the lead of the Delaware Legislature, which allowed corporations to limit or eliminate liability of directors in their charters, the Florida Legislature took a different approach. The lawmakers decided to grant directors immunity from personal liability for money damages in respect to "any statement, vote, decision, or failure to act, regarding corporate management or policy," unless there is a breach of duty by the director and the breach constitutes one of five circumstances. Whereas the Delaware amendment sought to protect informed shareholders by giving them the choice of deciding whether or not to relieve their directors of liability, the Florida Legislature took choice out of the hands of the shareholder. In effect, the Florida statute relieves directors of accountability for their actions except in the most grievous circumstances, and indeed, reduces the rights of shareholders.

The 1987 amendment had two stated legislative purposes. The first was to reduce the concerns of directors to the possibility of being personally liable for damages arising out of decisions they make in their capacity as directors. The second was to define more clearly the standard of care owed to the corporation and the shareholders by the director. In order to satisfy the stated legislative purpose of making directors' jobs less worrisome, and to attract high calibre directors, the legislature also modified the provisions with regard to indemnification. These provisions were altered to increase the circumstances in which directors may be indemnified where they are found liable for acts taken on behalf of the corporation.

The approach of the Florida Legislature in amending its corporation statute has been described as "[t]he most radical legislative approach to director liability [as it directly alters] the standard of liability necessary to recover money damages from directors." Moreover, one commentator noted that the 1987 amendment so dilutes a share-

5. Fla. Stat. § 607.0831 (1989). This amendment will be referred to in this paper as "the 1987 amendment."
7. § 607.0831; See infra Part II
9. Id. at § 1(2). Quoted in full infra Part II.
10. The indemnification provisions can be found at § 607.0850. The new provisions are at §§ 607.0850(2) and (7).
holder’s right of action against a director for money damages that its constitutionality may be in doubt.\(^{12}\) Whereas some thirty five states have already amended their corporation acts to provide for a lower standard of culpability, only five other states have enacted such obviously pro-director legislation similar to Florida.\(^{13}\)

The 1987 amendment has the effect of reducing the concerns which directors have regarding their personal liability, but other questions remain. The statute clarifies the appropriate standard of care owed by the director to the corporation and its shareholders only in so far as it generally eliminates liability for monetary damages. However, directors must continue to be concerned with the standard of care since they may still be restrained from action by injunction or their actions may be subject to rescission by the court.\(^{14}\) Nevertheless, because the burden on the shareholder seeking to obtain equitable relief is so great, directors probably have no real need to be concerned. This Note considers the present state of the law relating to liability of directors in Florida, and considers whether the new legislative changes can or will have the intended effect. Part II analyzes the legislative changes, describes in detail the provisions of section 607.0831 and considers how the new provisions differ from the state of the law prior to 1987. Part III examines the policy considerations in determining the parameters of director liability, and focuses particularly on the part that the director and officer liability insurance industry played in effecting the legislative change. Part IV considers what effect, if any, the statutory changes can or will have on corporations and their directors, and concludes that thus far, the positive effects anticipated by the legislature have not occurred.

\(^{12}\) See McGuigan, *Legislative Developments in Director’s Liability Ch. 87-245*, FlA. B.J. 41, 43 (1987)(discussing the constitutionality of the 1987 amendment and concluding that it is probably constitutional).


\(^{14}\) McGuigan, *supra* note 12, at 42.
II. THE 1987 AMENDMENT

In making the "radical" amendment to the Florida Corporation Act, the Legislature found

that the service of qualified persons on the governing boards of corporations, . . . is in the public interest and that within reasonable limitations, such persons should be permitted to perform without undue concern for the possibility of litigation arising from the discharge of their duties as policy makers. The Legislature further finds that the case law of the state does not adequately delineate the liability of those serving on governing boards, and that such delineations through the clarification of the appropriate standard of care due an individual and a corporation by a member of a governing board is essential in encouraging the continued service of qualified persons on such governing boards.16

In the Staff Analysis of the House of Representatives, Committee on the Judiciary, it was noted that Florida case law had not yet defined the "parameters of liability of a director of a corporation . . . in this state."16 The House Analysis went on to find that the state of the law was such that it was foreseeable that a director could be held personally liable where he failed to take "all reasonable and necessary precautions to ensure that any action [which] he took as a director would not result in damage to another."17 Under these circumstances, the committee recommended that the law should be changed to define more clearly the standards to which directors should be held.18 The Senate Committee pinpointed two main reasons why the need for the change arose: the need to make the position of director attractive in order to encourage corporations to incorporate in Florida; and the difficulty of obtaining director and officer liability insurance.19

This part examines the provisions of the 1987 amendment. A discussion of the state of the law regarding the personal liability of directors in 1987 puts in context the reason the position of director may have been unattractive at that time.

16. FLA. H.R., COMM. ON THE JUDICIARY, STAFF ANALYSIS at 1 (1987)[hereinafter HOUSE ANALYSIS].
17. Id.
18. For the proposals of the House Committee see id. at 2-5.
19. See FLA. SENATE, STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT at 7-8 (1987)[hereinafter SENATE ANALYSIS].
A. The Provisions of the 1987 Amendment

Section 607.0831 of the Florida Statutes eliminates director liability for monetary damages except in five defined circumstances. Rather than outlining the standards by which directors should be guided, the statute virtually eliminates director liability for monetary damages, and restates the law regarding the acts for which director liability may still attach. Furthermore, the statute requires a two-step test before liability may be established. The first and threshold requirement is that the director must have breached or failed to perform his duties as a director. The second step is that the breach must also constitute: 1) a violation of criminal law, unless the director had reasonable cause to believe that his act was lawful or no reasonable cause to believe it was unlawful; or 2) a transaction from which the director derived a personal benefit; or 3) the director has voted or assented to an unlawful distribution and is liable pursuant to section 607.0834; or 4) conscious disregard for the best interest of the corporation, or wilful misconduct in any derivative action or other action by or against the corporation; or 5) recklessness or any act or omission which was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and wilful disregard of human rights, safety, or property.

The first step of the 1987 amendment neither changes nor clarifies the standard of care of directors as it refers to duties which it does not define. However, the real meat of the statute is the second step, for even if the court finds a breach of duty, it must still find one of the five violations for any liability for monetary damages to attach. The five exceptions encompass such improper conduct, “so clearly without any societal benefit,” that under no circumstances should society validate it.

B. The Duties of Directors

Since the 1987 amendment does not define the “duties” which the director must breach in order to attract liability, the common law duties of care and loyalty, and the standards as previously codified under

20. See McGuigan, supra note 12, at 42.
21. § 607.0831(1)(a).
22. § 607.0831(1).
23. § 607.0830 outlines general standards in codifying the business judgment rule. See also infra Part II, section C.
24. Changes, supra note 11, at 701.
sections 607.0830 and 607.0832 must be examined to determine whether there has been a breach of duty.

Historically, courts have wrestled with the type of duty owed by directors to the corporations they serve. The Florida Supreme Court noted in 1932 that "[w]hile directors of a corporation may not be in the strict sense trustees, it is well established by the decisions that they occupy a quasi-fiduciary relation to the corporation and its stockholders." The present state of the law is that directors owe the twin duties of care and loyalty to the shareholders and the corporation in managing and administering the corporation's property, assets and affairs. Directors must act with fidelity and in good faith when discharging their functions.

In discharging his duties, a director must act with ordinary care and skill. Even though the director may delegate his authority in the active management of the business to officers, he must still exercise reasonable supervision. Directors have a "continuing obligation to keep informed about the activities of the corporation," and if they do not, they cannot set up a defense of lack of knowledge needed to exercise the requisite degree of care. Indeed, "[a] director is not an ornament, but an essential component of corporate governance. Consequently, a director cannot protect himself behind a paper shield bearing the motto 'dummy director.'" The director owes a duty to the shareholders to exercise "supervision and control over the policies and practices of the corporation."

The duty of loyalty prohibits faithlessness and self dealing, includ-

25. See, e.g., Charitable Corp. v. Sutton, 26 Eng. Rep. 642, 645 (1742) (the court found that directors were trustees and required them to act "with fidelity and due diligence"); see also Note, An Historical Perspective on the Duty of Care, the Duty of Loyalty, and the Business Judgment Rule, 40 Vand. L. Rev. 605 (1987) (for a more detailed discussion of the history of the duty of directors).
30. See id.
32. Id.
33. Id. at ---, 432 A.2d at 823 (citing Campbell, 62 N.J. Eq. at 415, 50 A. 120).
34. Id. at ---, 432 A.2d at 824.
ing fraud and bad faith. The duty is based on the rationale that the director, by virtue of his office, owes allegiance to the corporation and therefore the best interest of the corporation must prevail over his own. 35 However, a director is not absolutely precluded from entering into transactions in which he may be personally interested and which arise as a result of his relationship with the corporation. 36 At common law, transactions between a corporate director and an outsider which resulted from the director’s office were voidable without regard to the fairness of the transaction. 37 The Florida statute now provides that the transaction is not void or voidable if the relationship is disclosed or is known to the directors or the shareholders. 38

C. The Business Judgment Rule

The business judgment rule is a policy of judicial restraint, which recognizes that directors are more qualified than judges to make business decisions. 39 The rule provides that, for matters that the law vests in the board, the board has wide discretion and a court will not generally substitute its judgment for that of the directors. 40 Thus, absent any wrong doing, the court will generally not scrutinize the decisions of a board to determine the merits of its decision. 41 Traditionally, directors have always been protected by the “business judgment rule.” 42 A director who acted with care and loyalty was not subject to any personal liability. 43

The rule is rooted in the notion that in exchange for the confidence and trust which shareholders place in them, directors must act in good faith, and “in accepting the office they impliedly undertake to give the enterprise the benefit of their best care and judgment, and to exercise

35. Animashaun, supra note 3, at 350.
36. See e.g., Procacci v. Soloman 317 So. 2d 467 (Fla. 4th Dist. Ct. App. 1975)(director who purchased corporation’s property from bank, after corporation defaulted on promissory note, found not liable for breach of fiduciary duty).
37. See Animashaun, supra note 3, at 350.
38. § 607.0832.
40. Id.
41. Id.
42. Id. at 1458-59.
43. Id.
the powers conferred solely in the interest of the corporation."\(^{44}\) Indeed, equity has always held them liable as trustees.\(^{46}\)

However, courts have not allowed directors to shelter behind the business judgment rule where directors have acted in bad faith, without due care, abused their discretion, or participated in a transaction in which they were interested.\(^{46}\) The rule has been characterized as having five elements, which courts generally examined before "second guessing" the decision of the board.\(^{47}\) The decision must be a business decision, the board should be disinterested, have acted with due care, in good faith and even if it satisfies all the other elements, must still not have abused its discretion.\(^{48}\) Courts have been reluctant to find liability unless the decision could not be attributed to any rational business purpose, or there was abuse of discretion.\(^{49}\)

The burden lay on the person alleging breach of duty to overcome the presumption of due care, good faith and disinterestedness.\(^{50}\) Only if he did, then the burden shifted to the director to show the contrary. In any event, the plaintiff also had to establish causation and damage.\(^{51}\)

In Florida, even prior to the 1987 amendment, the business judgment rule had been codified as the duty of care provision.\(^{52}\) An individual who performs duties as a director, in good faith and in the best interests of the corporation, with such care as an ordinarily prudent person in like position would exercise under similar circumstances, is relieved from liability.\(^{53}\) However, under this general provision, similar to that in Delaware and many other states, it was left to the court to define and apply the phrase "such care as an ordinarily prudent person in like position".

Florida courts have long relied on Delaware corporate law for guidance in deciding cases involving corporation law, and "to establish

44. *Orlando Orange Groves Co.*, 107 Fla. at 314, 144 So. at 677 (quoting 7 R.C.L. 456, 457).
45. *Id.*, 144 So. at 677.
47. *Id*.
48. *Id*.
49. *International Ins. Co.*, 874 F.2d at 1461.
50. *See Van Gorkom*, 488 A.2d at 872.
51. *See, e.g., id.* (Delaware Supreme Court remanding the matter to the trial court for a hearing to determine the damage sustained).
52. § 607.0830. The Legislature did not change this section in any way after the 1987 amendment.
53. *Id.*
their own corporate doctrines.\textsuperscript{54} In \textit{Aronson v. Lewis},\textsuperscript{55} the Delaware Supreme Court decided that in making a business decision, directors would be protected by the business judgment rule only in so far as the decision was informed. Furthermore, the standard for determining whether the decision was informed was one of "gross negligence."\textsuperscript{56}

\textit{Van Gorkom},\textsuperscript{57} decided by the Delaware Supreme Court one year later, "shocked the corporate world" by deciding that the directors of Trans Union Corporation had been "grossly negligent" in approving a cash-out merger proposal after a short meeting, and would not be protected by the business judgment rule.\textsuperscript{58}

The board's decision was made at a special board meeting called by Jerome W. Van Gorkom, Trans Union's Chairman and Chief Executive Officer, who did not inform the directors of the purpose of the meeting.\textsuperscript{59} In fact, senior management learned of the proposal approximately one hour before the meeting.\textsuperscript{60} Apart from Van Gorkom's twenty minute presentation at the meeting, the directors had no other substantive information about the merger.\textsuperscript{61} It appears that none of the directors had read the merger agreement prior to signing.\textsuperscript{62} The court held that the directors did not adequately inform themselves as to Van Gorkom's role in the transaction and as to how he arrived at the decision to force the sale and set the price of the shares.\textsuperscript{63} In addition, they were not informed as to the value of the corporation.\textsuperscript{64} The court found the directors "grossly negligent in approving the 'sale' of the Company upon two hours' consideration, without prior notice, and without the

\textsuperscript{54} \textit{International Ins. Co.}, 874 F.2d at 1459 n.22.
\textsuperscript{55} 473 A.2d 805, 812 (Del. 1984).
\textsuperscript{56} \textit{See}, \textit{e.g.}, \textit{id.} at 812 & n.6; \textit{Van Gorkom}, 488 A.2d at 873. Indeed, Florida courts have long held that directors who acted with gross negligence, causing waste to the corporation's assets, could not seek shelter behind the business judgment rule; \textit{see Skinner}, 103 Fla. at 716, 138 So. at 771 (citations omitted). Since 1985, Florida courts have extended the standard even further. In \textit{Cottle v. Storer Comm., Inc.}, 849 F.2d 570, 577 (11th Cir. 1988), the United States Court of Appeals, applying Florida law, held that the plaintiff must prove gross inadequacy of price in order to overcome the business judgment rule.
\textsuperscript{57} 488 A.2d 858.
\textsuperscript{58} \textit{Id.} at 874; \textit{see also} Radin, \textit{supra} note 3, at 707.
\textsuperscript{59} \textit{Van Gorkom}, 488 A.2d at 867.
\textsuperscript{60} \textit{Id.}
\textsuperscript{61} \textit{See id.} at 868-69.
\textsuperscript{62} \textit{See id.} at 868 & n.7.
\textsuperscript{63} \textit{Id.} at 874.
\textsuperscript{64} \textit{Id.}
exigency of a crisis or an emergency.\textsuperscript{65}

Many viewed the \textit{Van Gorkom} decision as the courts having opened the door to exposing directors to personal liability for their actions.\textsuperscript{66} Based on the facts of the case, the view in the insurance industry and within the business community was that the standard of care required of a director was now much higher, and indeed almost impossible to achieve.\textsuperscript{67}

In actions involving monetary damages, the 1987 amendment, in effect requires the courts to apply the business judgment rule only as a first step to determine whether a duty has been breached.\textsuperscript{68} For even if the director breached a duty, he will not be liable for damages unless the court finds that the breaching act falls into one of the five exceptions.\textsuperscript{69}

D. \textit{The Five Exceptions}

Under the first exception, the director's breach or failure to perform his duty must constitute

\texttt{[a] violation of the criminal law, unless the director had reasonable cause to believe his conduct was lawful or had no reasonable cause to believe his conduct was unlawful. A judgment or other final adjudication against a director in any criminal proceeding for a violation of the criminal law estops the director from contesting the fact that his breach or failure to perform, constitutes a violation of the criminal law; but does not estop him from establishing that he had reasonable cause to believe that his conduct was lawful or had no reasonable cause to believe that his conduct was unlawful.} \textsuperscript{70}

This exception does not create new law, because as part of their duty of care, directors have traditionally had a duty to act lawfully. According to the ALI Principles of corporate governance, a director violates his duty of care and good faith if he "knowingly" causes the corporation to violate the law.\textsuperscript{71} To eliminate problems which have

\begin{itemize}
\item \textsuperscript{65} \textit{Id.}
\item \textsuperscript{66} \textit{See supra} note 3.
\item \textsuperscript{67} \textit{Id.}
\item \textsuperscript{68} § 607.0831(1)(a).
\item \textsuperscript{69} § 607.0831(1)(b).
\item \textsuperscript{70} § 607.0831(1)(b)(1).
\item \textsuperscript{71} \textit{See Gelb, Director Due Care Liability: An Assessment of the New Statutes,} 61 TEMP. L. REV. 13, 36 (1988).
\end{itemize}
arisen over the interpretation of the word "knowingly," the Florida Legislature chose instead to define it as "having reasonable cause to believe."72 Undoubtedly, litigation will still arise as to the meaning of "reasonable cause," since inevitably, directors will attempt to further insulate themselves from liability by claiming that they did not believe that their actions were criminal.

Under the second exception, the director's breach or failure to perform must constitute "[a] transaction from which the director derived an improper personal benefit, either directly or indirectly."73 The statute goes on to define an "improper personal benefit." The director is deemed not to derive an improper personal benefit if: a) the transaction and the nature of the benefit were not prohibited by federal or state law;74 b) the transaction was known or disclosed to the all directors and/or shareholders;75 and c) the transaction was fair and reasonable to the corporation.76 The statute also does not rule out the possibility of other circumstances under which the benefit may be deemed to be improper.77

In this second exception the Legislature addressed the director's duty of loyalty. The exception must be viewed in conjunction with section 607.0832, which outlines the standards for directors in situations where there may be a conflict of interest.78 Although, section 607.0832 deals primarily with the enforceability of the contract, it is interesting to note that it may be possible for the contract to be unenforceable because of a conflict of interest under section 607.0832, but for the director not to be liable under section 607.0831(1)(b)(2).

This second exception only alludes to that aspect of the duty which requires the director to act in the corporation's best interest and to refrain from self-interested behavior. Other aspects of the duty of loyalty such as fraud or bad faith are not addressed in this exception. In addition, the definition of "improper" does not include a benefit to the director's family or financial associates.79 Consequently, although this ex-

72. See § 607.0831(1)(b)(1).
73. § 607.0831(1)(b)(2).
74. § 607.831(3).
75. § 607.831(3)(a),(b).
76. § 607.831(3)(c).
77. § 607.0831(5).
78. § 607.0832 does not address the issue of director liability.
79. See Gelb, supra note 71, at 40, for a discussion of the merits of including members of the director's family and his associates in determining whether he has an interest in the transaction.
ception saves some liability for breach of duty of loyalty, it relieves the director of much responsibility.

Under the third exception, the director's breach or failure to perform must constitute a circumstance whereby the director votes or assents to a distribution of dividends in violation of section 607.06401 or the articles of incorporation. The statute merely reiterates the director's liability for unlawful distributions which had previously been statutorily established. The intent of the provision is to continue to protect the creditors of the corporation against directors who may want to reward shareholders for their investments before creditors are satisfied.

Under the fourth exception, the director's breach or failure to perform must constitute "[i]n a proceeding by or in the right of the corporation to procure a judgement in its favor or by or in the right of a shareholder, conscious disregard for the best interest of the corporation, or wilful misconduct." Once more the legislature tried to preserve the duty of loyalty to some extent. In a derivative action, this exception puts the onus on the director to act with good faith. However, the words "conscious" and "wilful" indicate that the standard of care required is relatively low and a level of behavior bordering on outrageousness is probably what is required for liability to be established.

The fifth and final exception requires that the director's breach or failure to perform constitute, "in a proceeding by or in the right of someone other than the corporation or a shareholder, recklessness or an act or omission which was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and wilful disregard of human rights, safety or property." The section goes on to define "recklessness" as "the action, or omission to act, in conscious disregard of a risk," and which the director knew or should have known because it was obvious, would be so great as to probably cause harm. This exception refers to actions brought by third parties. The standard established by the section is even lower than in the previous section. Criminal intent may have to be established in order to find a director liable under this exception.

80. § 607.0831(1)(b)(3). § 607.06401 provides the circumstances under which the board may authorize distributions to shareholders. See Fla. Stat. § 607.0640 (1989) and § 607.08401 (Supp. 1990). The restrictions are mainly out of concern for creditors. See also Changes, supra note 11, at 702.
81. See Changes, supra note 11, at 702.
82. § 607.0831(1)(b)(4).
83. § 607.0831(1)(b)(5).
84. § 607.0831(2).
Florida courts have not yet had an opportunity to examine the provisions of the 1987 amendment.\textsuperscript{85} Indeed, the exceptions require such exceptional misconduct by directors that it is unlikely that litigation is forthcoming. However, a re-examination of the \textit{Van Gorkom} case in the light of the 1987 amendment is instructive.

Delaware Supreme Court Justice Andrew G.T. Moore, a member of the \textit{Van Gorkom} court, stated that the case “doesn’t stand for new law. The court was just applying old law to egregious facts.”\textsuperscript{86} Some commentators have concluded that “absent egregious conduct,” the court has not changed its traditional application of the business judgment rule’s presumption that director’s conduct is informed and taken in good faith.\textsuperscript{87} The Delaware court found the board to have been grossly negligent because it approved a multi-million dollar takeover in a two hour board meeting without regard to proper reports or investigation. However, if the action had taken place where current Florida law was applicable, the directors would have escaped liability because their actions did not fall into any of the five exceptions.\textsuperscript{88}

The 1987 amendment defines egregious conduct under the five exceptions, and basically requires the courts to go beyond the business judgment rule in order to find director liability in circumstances in which monetary damages are claimed. Apart from these few exceptional circumstances, the legislature has limited the power of the courts to deal with the director who has abused his discretion. The legislature has also stymied the right of the owners of the corporation to decide how culpable their directors should be.

\section*{III. The Legislature’s Concerns}

In amending the corporation act, the Senate believed that the new provisions in themselves would give directors an incentive to serve on boards, since they would serve free from the worry of personal ruin,

\textsuperscript{85} There are no reported cases which have called upon the courts to determine whether the action falls within the amendment.


\textsuperscript{87} \textit{Id.} at 720.

\textsuperscript{88} In contrast, under present Delaware law, the directors would have escaped liability only if Trans Union had amended its certificate of incorporation to include a provision relieving directors of liability. The issue of who controls the votes of shareholders’ which are necessary for an amendment of this nature is beyond the scope of this article.
and secure in the knowledge that they would likely be indemnified by
the corporation for any liability which may be determined against
them. Further, it anticipated that Florida would benefit as it would
remain an attractive place for corporations to incorporate.

This part reviews the state of the director and officer liability insu-
rance industry, particularly from the standpoint of directors. It also
examines whether the indemnification provisions of the corporation act,
together with the 1987 amendment can achieve the legislature's stated
objective.

A. Director and Officer Liability Insurance

It is indisputable that a crisis exists, and has existed since the
early 1980's, in the director and officer insurance industry. The prac-
tice of corporations insuring their directors against personal liability in-
curred for their corporate actions is quickly disappearing. On the one
hand, premiums have become exorbitant, and on the other, some in-
surance companies are no longer issuing such policies. Corporate di-
rectors must now face the reality of potential personal liability for sim-
ple errors in judgment.

Shareholders derivative claims represent the majority of claims
filed against directors of corporations. Indeed there has been an in-
crease in both the number of suits and the severity of such claims.
Director and officer claims rose at a rate of fifteen to twenty percent
per year over a ten year period from 1977 to 1987. Indeed, directors

89. Senate Analysis, supra note 19, at 7.
90. Id. This prediction has not been borne out since there has been no significant
increase in the number of corporations being registered in Florida annually.
91. See supra note 1.
92. A corporation may purchase and maintain insurance on a director in respect
of any liability incurred by him. § 607.0850(12).
93. Premiums on director and officer liability policies increased by an average of
506 per cent nationwide in 1986 according to a survey of 256 chairman of Fortune
1,000 companies by Heidrick & Struggles, a Chicago based executive search firm. See
Senate Analysis, supra note 19, at 7.
94. The Department of Insurance identifies nine companies who have rate filings
with the department for director and officer insurance. Of these, at least two had no
writings in Florida in 1986 and others were very selective in their underwriting. See
Senate Analysis, supra note 19, at 7-8.
95. Note, Corporate Directors, supra note 3, at 504.
96. Id.
of public companies have a one in five chance of being sued.\textsuperscript{98}

While ninety percent of the corporations carry director and officer insurance, one third have seen a rise in premiums of over three hundred per cent.\textsuperscript{99} Premium increases have resulted from large payouts not only in quantity, but also in size. Over a ten year period, the size of claims increased, and the percentage of claims with payments of over one million dollars jumped by seventy three percent.\textsuperscript{100} Insurance carriers are reluctant to provide adequate director and officer liability insurance at any premium. The risk has become too great.\textsuperscript{101} Policies that are issued are more restrictive in nature and contain numerous exclusions.\textsuperscript{102}

Many outside directors\textsuperscript{103} have reevaluated their decisions to serve on boards, while several have resigned or declined appointment where the corporation has failed to provide adequate director and officer liability insurance.\textsuperscript{104} Three hundred and seventy directors were surveyed by the National Association of Corporate Directors and their responses indicated that one in seven would refuse to sit on any board without insurance protection, and approximately four percent had already resigned from boards without director and officer coverage.\textsuperscript{105} A 1986 Peat Marwick poll of nearly eight thousand chief executives and directors in the corporate and not-for-profit sectors showed that the problem of providing adequate director and officer coverage was damaging the calibre of management.\textsuperscript{106} Six in ten reported that this problem affected the way in which they managed their organizations and forty three per cent believed that the situation had reached crisis proportion.\textsuperscript{107}

The corporate legal fiction allows individuals to pool their resources and act as one "person" in conducting commercial activity. Traditionally management of the corporation rests in a board of direc-

\textsuperscript{98} Senate Analysis, supra note 19, at 8.
\textsuperscript{99} Id. at 9.
\textsuperscript{100} Note, New York's Response, supra note 1, at 1308.
\textsuperscript{101} Block, Barton & Garfield, supra note 1, at 131 & nn.5 & 6.
\textsuperscript{102} Note, New York's Response, supra note 1, at 1314-15 & n.56.
\textsuperscript{103} An insider director is one who is also an officer or employee of the corporation. Conversely, an outside director is not an employee.
\textsuperscript{104} Note, Corporate Directors, supra note 3, at 505 n.73.
\textsuperscript{105} Senate Analysis, supra note 19, at 8.
\textsuperscript{106} Peat Marwick, Directors' and Officers' Liability: A Crisis in the Making 4 (1986).
\textsuperscript{107} Id.
tors. However, whereas in the earliest small private corporations the board was usually made up of the shareholders, as corporations grew in size and became more sophisticated, the composition of the board also changed. In order for the corporation to be managed properly, the seats on the board of directors had to be filled by people of reputation, expertise and specialized knowledge. Even so, the modern view is that the board cannot effectively “manage” a corporation. The board can only act in meetings and since in practice meetings are held only a few times a year, the modern board must in effect rely on the officers and executives of the corporation.

Today, the wealth of information that is available on any given topic, and the speed with which it becomes available can make the director’s job even more onerous. Fear of liability for not accessing and reading all that is available also acts as a deterrent to busy, yet qualified, persons to serve on corporate boards. The problem corporations face if they are unable to afford or obtain director and officer insurance is in recruiting and retaining a high calibre of director. Confronted with the prospect of risking his financial future for token remuneration, a former or future director prefers to take the safer course of not serving on a corporate board. Ultimately, the lack of qualified directors must create a crisis in the business world. Boards will run less efficiently and certainly, those directors who can be inveigled into taking

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108. “All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, its board of directors, subject to any limitation set forth in the articles of incorporation.” Fla. Stat. § 607.0801(2). See generally N. Lattin, LATTIN ON CORPORATIONS, 239-342 (1971) (discussion of the development of the role of directors in the management of a corporation).

109. Florida corporate law still reflects this position, as corporations with 35 or fewer shareholders may provide for no board of directors or may limit the power of the board if it has one. § 607.0801(3).


111. Section 607.0824(3) provides that a vote of the majority taken at a meeting of directors at which a quorum is present, is the act of the board of directors. Directors can act without a meeting only if the action is taken by all the directors. § 607.0821.


113. In discharging his duties, a director may rely on “information, opinions, reports, or statements, including financial statements” which has been prepared by competent employees or officers, experts, accountants, legal counsel and/or committees of the board of which he may not be a member. § 607.0830(2). See also supra Part II.
the positions will act with extreme caution. Directors will be less inclined to take business risks if their personal assets are at stake. Indeed, "the opportunities for 'innovation and creative activities' may be lost." 115

In the light of the foregoing and in order to provide greater protection for directors than the courts are willing to give, in recent years, more than thirty-five states have amended their corporation acts. 116 Most states have taken one of three approaches: 1) the "charter option" approach 2) the "cap on money damages" approach, and 3) the "self-executing" approach. 117

Delaware was the first state to enact the "charter option" approach in 1986. This approach allows the shareholders, with some exceptions, to decide whether to adopt a provision in the corporation's charter which eliminates or limits the personal liability of a director for money damages. 118 Several other states have followed Delaware's lead in adopting this approach. 119

The "cap on money damages" approach limits, with some exceptions, the amount of money damages for which a director may be liable. 120 The statute would provide a maximum figure beyond which liability could not extend. 121

The "self-executing" approach, as the name implies, means that the standard of liability is determined by the statute itself. 122 Shareholders have no input into whether liability for monetary damages should attach to their directors in circumstances other than those prescribed by the statute. 123

The Committee on Corporate Laws of the American Bar Association recommends that shareholders should be allowed to decide whether

114. Block, Barton & Garfield, supra note 1, at 131-2.
116. See Changes, supra note 11, at 696.
117. Id.
118. Id.
119. Id. at 696-97.
120. Id. at 698; see also Titus, supra note 3, at 4 n.7 for a discussion concerning the states which followed the Delaware approach.
121. See Titus, supra note 3, at 5. Virginia has placed the cap at $100,000 or the amount of compensation in cash which the director received in the twelve months immediately preceding the act. VA. CODE ANN. § 13.1-692.1(2).
122. Changes, supra note 11, at 698.
123. See id.
to eliminate liability of directors for their conduct, unless "important societal values are at stake." The Committee therefore recommends that the Model Business Act should adopt the charter option approach.

The Florida Legislature chose the self executing approach. Although Florida directors, like directors in every other jurisdiction, owe the corporations they serve and shareholders the fiduciary duties of care and loyalty, they are now statutorily protected regarding decisions they make as directors. As explained in the previous part, a director's liability for monetary damages is completely eliminated unless the action is one which falls into one of the five exceptions. The Florida approach is by far the most radical approach since it eliminates the traditional right of shareholders to decide the manner in which the corporation they own should be run. Taking decision making out of the hands of the shareholder and into the hands of the state is a dangerous precedent and violates the very essence of capitalism.

B. Indemnification Provisions

In addition, in keeping with its decision to give directors as much protection as possible, the Legislature also amended the indemnification provisions in 1987 to increase the circumstances under which a director may be indemnified by the corporation. Three major changes were effected. The first two concern derivative actions. Directors are now entitled to be indemnified for expenses incurred in derivative actions which have been a) settled; and b) in which they have been found liable, if a court of competent jurisdiction determines that it is fair and reasonable so to do. The third major change was in determining under what circumstances and to what extent the corporation will indemnify a director. The corporation may not indemnify a director whose action constituted one of the exceptions under section 607.0831.

The present position is that indemnification is available under the statute in four operative categories. The first is that prior to the

124. Id. at 700.
125. Id.
126. See supra note 13, for other states adopting the Florida approach.
127. § 607.0850(2).
128. § 607.0850(7).
129. Fields, Indemnification of Officers and Directors Under Revised Florida Statute, in Responsibilities and Liabilities of Corporate Directors, Officers
event, the corporation may decide in what circumstances indemnification is allowed by adopting by-laws and executing agreements.\(^{130}\) Second, after the event, the corporation may elect to indemnify the director, except that it may not indemnify the director in respect of actions which fall under one of four of the five exceptions under section 607.0831.\(^{131}\) Furthermore, the statute distinguishes between indemnification in derivative and non-derivative actions.\(^{132}\) Third, a director who successfully defends a suit is unconditionally entitled to expenses to the extent of his success.\(^{133}\) Finally, a new addition provides that a court of competent jurisdiction may order indemnification even if the director has been unsuccessful, but only if it is fair and reasonable in the circumstances.\(^{134}\)

The new additions to the statute provide an incentive to directors to settle cases without fear of paying their own out of pocket expenses.\(^{135}\) However, it is difficult to rationalize why the corporation should reimburse a director for actions he has taken to hurt the corporation in an action brought against him on behalf of the corporation.\(^{136}\) The policy reasons for adopting such a provision could be only to make the position of director more attractive and to insulate directors further from financial loss as a result of their office.

Viewed in conjunction with the director liability statute, indemnification for expenses is not available if the act constitutes four of the five exceptions. Consequently in an action for money damages which is settled or in which the director is found liable, he may not be reimbursed unless the act falls into the fifth exception - that the director acted recklessly, in bad faith or in a manner exhibiting wanton disregard for life and human safety.\(^ {137}\) In effect the Legislature has made indemnifi-

**AND ATTORNEYS, 2.1, 2.4 (1987).**

130. § 607.0850(7).
131. Id.
132. Id.
133. A director may be indemnified for liability in respect of actions not brought on behalf of the corporation (i.e. non-derivative actions) under § 607.0850(1). In respect of derivative actions, the director may be indemnified in respect of expenses and, as amended in 1987, sums paid in settlement not exceeding what it would have cost to litigate the action under § 607.0850(2). See Fields, supra note 129, at 2.5-2.6, for a lengthy discussion.
134. § 607.0850(2).
135. See Fields, supra note 129, at 2.6.
136. Id.
137. § 607.0831(b)(5).
cation possible in circumstances in which the director should be most culpable. Such a result defies logic, leaving one to conclude that leaving out the fifth exception must have been an oversight by the Legislature.

IV. CONCLUSION

Prior to the 1987 amendment, directors in Florida were not exposed to liability for monetary damages unless they breached their duties to the corporation.138 Shareholders had some measure of assurance that the directors would act responsibly in making decisions on their behalf, or at least be legally accountable to shareholders for their actions. The 1987 amendment in addition to giving little protection to the shareholder, also does not achieve its stated legislative goal of making the position of director more attractive.139

Moreover, the predictions of dire consequences to corporate directors arising out of Van Gorkom have not materialized, nor have the fears that the courts would lower the standard of culpability for directors.140 One author's examination of case law in the three years following Van Gorkom has found that "the courts have repeatedly rejected due care allegations in cases in which the challenged board conduct did not approach the level of gross negligence present in Van Gorkom."141 The study concluded that only six courts found violations of due care within the period, and in all the cases, the conduct approached the level of conduct in the Van Gorkom case.142 The author concluded that the decisions showed no indication of "a change in the courts' traditional adherence to the business judgment rule's presumption . . . ."143

Of particular interest, and perhaps warning, to Florida directors is that in all six cases the parties requested and the court granted injunctive relief after having found a lack of due care.144 The 1987 amendment did not address the question of injunctive relief, so director liability in that arena remains a question to be determined by consideration of the business judgment rule. However, a plaintiff shareholder will have to anticipate board action in order to stop it by injunction, and in

138. See supra Part II.
139. Id.
140. Radin, supra note 3, at 720.
141. Id. at 720, 754 & n.359.
142. Id.
143. Id. at 755.
144. Injunctive relief may have been the only relief available because of the legislative responses to the Van Gorkom decision.
order to get rescission must prove that the action was so grossly unfair that it should not be allowed to stand. Ultimately, "as a practical matter the lack of a monetary damage remedy may deprive stockholders or the corporation of an effective remedy when the stockholder is unaware of director action until it is completed."145

An important question not considered by the Florida Legislature was the effect that the amendment had on the rights of shareholders. Incorporation allows investors to pool their resources into one business entity which hopefully will result in greater returns for the individual in the long run. In exchange for limited liability, the shareholder gives up participation in the everyday running of the business to the board of directors. The fiduciary duties were imposed by the courts to honor the trust and confidence placed in the directors by the shareholders.146 The 1987 amendment effectively says to the shareholder in a Florida corporation that a director may mismanage the corporation without any fear of sanction except in the most reprehensible circumstances. Directors may be encouraged to act negligently or even with gross negligence if there is no fear of legal penalty.147 While the 1987 amendment provides protection for the director, it virtually leaves the shareholder out in the cold.148

Prior to the 1987 amendment, approximately 90,000 organizations were incorporated annually in Florida.149 The statistics presently available for 1990 indicate that as of November 1990, less than 80,000 incorporations had been filed.150 Although one may argue that the economy may have had a negative effect on incorporations in Florida, undoubtedly the stated goal of making Florida a more attractive place to incorporate has not come to pass.

An interesting view is that the amendment may affect the cost of

145. Gelb, supra note 71, at 32.
146. See Note, Corporate Directors, supra note 3, at 497 n.11.
147. See id. at 513 for a discussion regarding the anticipated reaction of directors when faced with no legal penalty for their actions.
148. It may be argued that if shareholders can act in time and get past the procedural hurdles, they are not precluded from seeking injunctive relief against a board’s decision; or that the shareholders may replace unsatisfactory directors by initiating proxy contests. See Titus, supra note 3, at 17. However, proxy contests are exceedingly expensive and there is no evidence that the price of shares has any effect on the behavior of directors. See id. at n.52.
149. Senate Analysis, supra note 19, at 8.
150. Statistics given over the telephone from the Division of Corporations.
director and officer insurance by causing rates to fall substantially. 151 The view is based on the theory that insurance premiums are based on the degree of risk, and that the degree of risk is significantly lowered because of the heightened culpability standard. 152 Consequently, it is argued, once the insurance industry recognizes the reduced risk, premiums should also fall. 153 While it is true that the position of director has been made more attractive, whether the amendment has a positive effect on insurance rates will ultimately determine its success viz-a-viz the stated legislative goal. 154 Furthermore, diluting the voice of shareholders in organizations in which they place their financial well being, while at the same time giving directors free reign, may have negative social and economic effects.

Finally, perhaps if insurance rates fall and the courts interpret the legislation in a manner which favors directors, the “radical” changes in the act may eventually have some “positive” effect on the law or the corporate arena in Florida. However, when weighed against the known effect of diluting the voice of the shareholder in the corporation in which he owns and invests his money by reducing the circumstances in which he may obtain redress for misconduct and mismangement by his fiduciaries, the net effect cannot be positive. Indeed, the actions of the legislature prompts one to ask “whose corporation is it anyway?”

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152. Id. (citing J. Marks, Sharing the Risk 109 (1981)).
153. Id. at 1350 n.275. In Florida, although data is currently unavailable to determine whether premiums have fallen, statistics from the Supervisor of Insurance indicate that the sums paid out in claims for director and officer liability has fallen significantly since 1987.
154. Supra Part II.
Exceptions to Discharge: The Supreme Court Adopts A Preponderance of the Evidence Standard of Proof in Section 523 Proceedings

I. INTRODUCTION

Section 523 of the Bankruptcy Reform Act lists ten categories of debts which are excepted from discharge. The standard of proof necessary to establish the nondischargeability of debts under this section was until recently unclear. The problem stemmed from the fact that neither the Code nor its legislative history directly addressed the issue. Both the bankruptcy courts and the appellate courts were split on the appropriate standard to apply. However, the controversy was resolved by the Supreme Court of the United States in the case of Grogan v. Garner. The question before the Court was whether exceptions to discharge under Bankruptcy Code section 523(a) must be proven by a 'preponderance of the evidence' standard or by a 'clear and convincing evidence' standard. Although the underlying case only involved the

5. Id. at 656.

Although the particular facts of Garner are not essential to an understanding of this article, they may aid the reader in appreciating the context in which the issue of dischargeability arises and will therefore be briefly summarized. Grogan was awarded a money judgment against Garner in a civil trial for common law fraud. Garner, 881 F.2d at 580. The jury was instructed on a preponderance of the evidence standard. Id. Garner filed for relief under the Bankruptcy Code and requested that Grogan's judgment against him be discharged. Id. Garner objected to the discharge based on Bankruptcy Code section 523(a)(2) which denies a debtor a discharge from any debt obtained under false pretenses, through a false representation, or actual fraud. Id. To prove fraud, Grogan presented the civil court judgment to the bankruptcy court argu-
fraud exception, the Court decided that a preponderance of the evidence standard should be applied to all the exceptions to discharge. The Court's decision will obviously have an immediate effect on the way that cases under this section are decided, however, there may be broader, and perhaps more important, implications in the Court's decision. First, the decision will help ease the caseloads of the bankruptcy courts which in a period of economic recession are seriously overburdened. Second, the decision reflects the relative importance that the Court attaches to the "fresh start" policy embodied in the Code as compared to the necessity of relitigating issues in the bankruptcy court already decided in a state court.

The first step towards the debtor's "fresh start" is the filing of a petition in bankruptcy. When an individual debtor files a petition in bankruptcy, he does so in hopes of obtaining a discharge. A discharge relieves the debtor from all debts that arose prior to the filing of the bankruptcy petition. The grant of a discharge is intended to give the debtor a fresh start in life free from the burden of indebtedness. However, there are certain categories of debts which are nondischargeable. Among these are certain tax obligations, payments of alimony and child support, repayment of educational loans, and debts incurred as a result of the debtor's operation of a motor vehicle while

Id. at 581-82.

8. Grogan, 111 S. Ct. at 661.
9. The caseload will be affected because the bankruptcy courts will be able to apply the doctrine of collateral estoppel to avoid relitigating issues that have been previously litigated in state court. See infra part VI.
10. Under the Code, the term "bankrupt" is abolished in favor of the term "debtor". See 11 U.S.C. § 101(12).
11. B. WEINTRAUB & A. RESNICK, BANKRUPTCY LAW MANUAL ¶ 3.01 (1986) [hereinafter BANKRUPTCY LAW MANUAL].
13. BANKRUPTCY LAW MANUAL, supra note 11, at ¶ 3.01.
15. § 523(a)(5).
16. § 523(a)(8).
intoxicated.\(^\text{17}\) Non-compensatory fines and penalties owed to a governmental unit are not dischargeable.\(^\text{18}\) Also debts not listed on the appropriate schedules,\(^\text{19}\) or not discharged in a prior bankruptcy\(^\text{20}\) are excepted from discharge. Because they involve intentional conduct on the part of the debtor, the last exceptions are the most litigated,\(^\text{21}\) they include debts incurred through various types of fraud\(^\text{22}\) or willful and malicious injury.\(^\text{23}\) It is the creditor's obligation to request that a particular debt owed to him not be discharged in bankruptcy.\(^\text{24}\) The creditor who wishes to obtain a determination of nondischargeability in a

\(^\text{17}\) § 523(a)(9).
\(^\text{18}\) § 523(a)(7).
\(^\text{19}\) § 523(a)(3).
\(^\text{20}\) § 523(a)(10).
\(^\text{21}\) The basis for this statement is a finding during the research for this article that the majority of cases reported involve the fraud and willful and malicious exceptions. The distinguishing factor between the fraud and willful and malicious exceptions and the other exceptions is that the former involve intentional conduct on the part of the debtor. Since intent is often difficult to establish, the standard of proof used to establish this element will often play a decisive role in the outcome of the proceeding.
\(^\text{22}\) 11 U.S.C. § 523(a)(2)-(a)(4). The text of these sections is as follows:

\(\text{(a)}\) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

\(\text{(2)}\) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—

\(\text{(A)}\) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

\(\text{(B)}\) use of a statement in writing—

\(\text{(i)}\) that is materially false;

\(\text{(ii)}\) respecting the debtor's or an insider's financial condition;

\(\text{(iii)}\) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

\(\text{(iv)}\) that the debtor caused to be made or published with intent to deceive; or

\(\text{(4)}\) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.

\(^\text{23}\) 11 U.S.C. § 523(a)(6). The text of this section is as follows:

\(\text{(a)}\) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

\(\text{(6)}\) for willful and malicious injury by the debtor to another entity or to the property of another entity.

\(^\text{24}\) See 11 U.S.C. § 523(c); BANKR. R. 4007(a).
bankruptcy court\textsuperscript{25} must file a complaint to commence an adversary proceeding.\textsuperscript{26}

The standard of proof necessary to except a debt from discharge had been the source of much controversy in the bankruptcy and appellate courts. With some courts following a preponderance of the evidence standard and others following a clear and convincing standard, both creditor and debtor were left in a state of confusion.\textsuperscript{27} The issue of the appropriate standard of proof usually arose in conjunction with either the fraud\textsuperscript{28} or the willful and malicious injury\textsuperscript{29} exceptions, although there were a few cases involving the exception of debts incurred through the operation of a motor vehicle while legally intoxicated.\textsuperscript{30} In

\textsuperscript{25} The Code requires that a creditor who wishes to have a debt declared nondischargeable as one falling within the second, fourth, or sixth exception must bring the action in the bankruptcy court within a specified amount of time. There is no time limit for commencing an action to determine the dischargeability of a debt falling within one of the other exceptions, and this may, in some instances, be determined by a state court. \textit{See} 11 U.S.C. \$ 523(e); BANKR. R. 4007.

\textsuperscript{26} BANKR. R. 4007(e), 7001(6).

\textsuperscript{27} The standard of proof utilized in dischargeability proceedings affects the certainty with which either party can predict the outcome of the proceeding. In deciding whether to file a petition in bankruptcy, it is important for the debtor to know whether he will receive a complete discharge. On the other hand, the certainty with which a creditor feels he can prove the debt is nondischargeable will often determine whether he files a complaint. If the debt the creditor is seeking to except from discharge is a consumer debt, the certainty with which he can predict the outcome of the case has special significance. If a creditor seeks to have a consumer debt declared nondischargeable, and such debt is discharged, the court may, at its discretion, award the debtor costs and attorney's fees. \textit{See} 11 U.S.C. \$ 523(d).


Fraud cases applying the clear and convincing evidence standard: \textit{see}, e.g., \textit{In re} King, 96 Bankr. 413 (D. Mass 1989); \textit{In re} McQueen, 102 Bankr. 120 (Bankr. S.D. Ohio 1989); \textit{In re} Zack, 99 Bankr. 717 (Bankr. E.D. Va. 1989); \textit{In re} Adleman, 90 Bankr. 1012 (Bankr. D. S.D. 1988).


\textsuperscript{30} Drunk driving cases holding a preponderance of the evidence standard ap-
some districts, courts applied different standards of proof depending on the exception to discharge at issue.31

This article, by adopting the reasoning of the Supreme Court and expanding upon its analysis, explains why the preponderance of the evidence standard of proof is the correct standard to apply in section 523 proceedings. First, the article will describe the use of the different standards of proof and their origins. Next, it will look at the history of discharge in bankruptcy and explain why, although discharge is a fundamental part of bankruptcy law, it is not so important as to justify the imposition of a higher standard of proof than the preponderance standard normally applied in civil proceedings. From that point, the article will examine the "fresh start" policy of the Code as a reason to construe the Code's provisions against the creditor and in favor of the debtor. Then, the article will argue that the reasons the courts of equity required fraud to be proven by clear and convincing evidence are inapplicable in dischargeability proceedings. Finally, the benefits of the doctrine of collateral estoppel will be discussed.

II. THE STANDARD OF PROOF: ITS USE AND ORIGIN

Up until the Supreme Court rendered its decision in Grogan, the determination of the appropriate standard of proof to apply in proceedings under section 523 was complicated by the fact that many bankruptcy courts found it easier to avoid the issue rather than justify its use of either standard.32 In holding in favor of the debtor, some courts simply stated that the plaintiff failed to prove its case by even a preponderance of the evidence,33 or did not mention a standard at all.34
Courts deciding in favor of the creditor found that the case was proven by clear and convincing evidence.\textsuperscript{35} Other courts, without explanation, simply applied the higher standard.\textsuperscript{36} Those courts that did attempt to select one standard over the other, often confused the reader by utilizing "loose language" in describing the standard being applied. For instance, courts presumably meaning to apply a preponderance standard also used the term "fair preponderance"\textsuperscript{37} while courts applying the clear and convincing standard used phrases such as "clear, cogent, and convincing," "clear and conclusive," and "clear, unequivocal, and convincing."

The differing and varied expressions courts used in applying the standard of proof made it difficult to establish a uniform rule.

Although at times it may be difficult to distinguish between the two different standards of proof,\textsuperscript{38} the purpose of establishing different

\hspace{1cm} other grounds, In re Shuler, 21 Bankr. 643 (Bankr. D. Idaho 1982) ("The preponderance of the evidence does not establish . . . ."); In re Walker, 7 Bankr. 216, 219 (Bankr. D. R.I. 1980) ("[T]he plaintiff has proved neither by clear and convincing evidence, nor a preponderance thereof . . . ."); see also In re Watkins, 90 Bankr. 848, 851, n.7 (Bankr. E.D. Mich. 1988) ("Most courts, I surmise, do what the court in In re Horldt, 86 Bankr. 823 (Bankr. E.D. Pa. 1988) did and 'punt'. They merely avoid the issue by saying that the plaintiff has failed to meet even the lower standard. Until now that is precisely what I have been able to do.").

35. See In re Powell, 88 Bankr. 114 (Bankr. W.D. Tex. 1988). "The grounds for denial of discharge have been proven by clear and convincing evidence, though this court is not satisfied that such a heightened evidentiary standard is either mandated by the statute or appropriate to achieve the purpose of the Bankruptcy Code." Id. at 118.
36. In re Brink, 30 Bankr. 28, 30 (Bankr. W.D. Wis. 1983); In re Ashley, 5 Bankr. 262, 264 (Bankr. E.D. Tenn. 1980) ("It must be proved by clear, cogent, and convincing evidence.").
38. See 37 AM. JUR. 2D Fraud and Deceit § 468, p. 645 (1968). There are at least twenty-five additional varieties of the clear and convincing standard listed in this section.
39. Whereas the preponderance standard lends itself to a workable definition, the clear and convincing standard does not. The preponderance standard has been defined as:

[T]he evidence which, when weighed with that opposed to it as [sic] more convincing force and is more probably true and accurate. If upon any issue in the case, the evidence appears to be equally balanced, or if it cannot be said upon which side it weighs heavier, then plaintiff has not met his or her burden of proof.

In re Clark, 50 Bankr. at 125-26 (citing Smith v. United States, 726 F.2d 428 (8th
standards of proof should not be overlooked. "[T]he labels used for alternative standards of proof [may be] vague and not a very sure guide to decision-making," but they nevertheless, "represent[] an attempt to instruct the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions." In this way, "[t]he standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." Thus, "when the individual interests at stake... are both 'particularly important' and 'more substantial than the mere loss of money,'" such as proceedings to terminate parental rights, the Supreme Court has applied the clear and convincing evidence stan-

Cir. 1984)). There is no comparable definition to utilize in applying the clear and convincing evidence standard. The bankruptcy courts have not come up with a workable definition. Those that attempt to define it, simply say it requires evidence more convincing than a mere preponderance, but less convincing than beyond a reasonable doubt. See In re Bonnett, 72 Bankr. 715, 717 (C.D. Ill. 1987), rev'd on other grounds, 895 F.2d 1155 (7th Cir. 1989) (citing In re Delano, 50 Bankr. 613, 617 (Bankr. D. Mass. 1985)) ("[T]he clear and convincing burden of proof standard creates a greater burden of proof than the normal preponderance of the evidence standard."). Other courts have indicated:

"[T]he term 'clear and convincing' does not lend itself to preciseness in definition. It is pretty much a relative term. The measure of proof required by this designation falls somewhere between the rule in ordinary civil cases and the requirement of our criminal procedure, that is, it must be more than a preponderance but not beyond a reasonable doubt. It is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegation sought to be established. Evidence need not be voluminous or undisputed to accompany this."

Brown v. Warner, 78 S.D. 647, 653, 107 N.W.2d 1, 4 (1961) (citation omitted). At least one bankruptcy court, in the case of In re Dubian, 77 Bankr. 332, has stated that "terms such as 'clear and convincing' and 'not of doubtful character' are helpful in emphasizing a careful approach to the decision of certain important issues, but are too vague to serve generally as a practical guide in the trial of cases." Id. at 338 (citations omitted). In holding that a preponderance of the evidence standard applied in proceedings under sections 523(a)(2) and 523(a)(6), the court stated that an application of the clear and convincing standard would be a pure abstraction and an unwarranted judicial gloss on the statute." Id. at 339 (In footnote 5 of the court's opinion, it states that "[t]he origin of a higher standard in dischargeability proceedings seems to be more the result of some flowery language in the decisions than any sound analysis."). 40. In re Winship, 397 U.S. 358, 369-70 (1970) (Harlan, J., concurring).
41. Id.
However, as the Court noted in Grogan, where particularly important individual rights or interests are not at stake, the preponderance of the evidence standard is presumed to be the standard applicable in civil actions between private litigants. This is "[b]ecause the preponderance of the evidence standard results in a roughly equal allocation of the risk of error between the litigants." It was therefore necessary for the Court in Grogan to consider whether the right to a discharge in bankruptcy approaches a constitutional level of importance, making it appropriate to apply a higher standard of proof in section 523 proceedings than that of a preponderance of the evidence. In considering this issue, the Court began by stating it had "previously held that a debtor has no constitutional or 'fundamental' right to a discharge in bankruptcy." The Court then quickly disposed of the issue by stating that "in the context of provisions designed to exempt certain claims from discharge, [it does not believe] a debtor has an interest in discharge sufficient to require a heightened standard of proof." From the Court's opinion, it is not exactly clear why the Justices do not believe a debtor has an interest in discharge sufficient to require a heightened standard of proof. However, a closer look at the history of discharge in bankruptcy and an expansion of the Court's analysis may aid the reader in an understanding of the Court's position.

III. HISTORY OF DISCHARGE

In order to provide the debtor with a new opportunity in life, the

44. See Santosky, 455 U.S. 745 (proceeding to terminate parental rights); Addington, 441 U.S. 418 (involuntary commitment proceeding); Woodby v. INS, 385 U.S. 276 (1966) (deportation); Cruzan v. Missouri Dep't of Health, 110 S. Ct. 2841 (1990) (withholding of nutrition and hydration from a person in a persistent vegetative state).

45. Grogan, 111 S. Ct. at 659. For cases where the Court has applied a preponderance of the evidence standard, see Rivera v. Minnich, 483 U.S. 574 (1987) (paternity could be established by a preponderance of the evidence despite "serious economic consequences" to the defendant); Huddleston, 459 U.S. 375 (establishment of securities fraud under section 10(b) of the Securities Exchange Act of 1934); Steadman v. SEC, 450 U.S. 91 (1981) (sanctions under the Investment Advisors Act, including permanently barring an individual from practicing his profession); SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344 (1943) (establishment of securities fraud under section 17(a) of the Securities Act of 1933); United States v. Regan, 232 U.S. 37 (1914) (proof of acts exposing a party to criminal prosecution).

46. Grogan, 111 S. Ct. at 659.

47. Id. (citing United States v. Kras, 409 U.S. 434, 445-46 (1973)).

48. Id.
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Code grants the debtor a discharge from his pre-petition debts.\(49\) The discharge of the debtor is the heart of the "fresh start" policy of the Code.\(50\) In order to appreciate the importance of the discharge in bankruptcy, it is necessary to look back to its origin, its development throughout the years, and its position today in bankruptcy law.

Bankruptcy law today, and at its inception, appears to have two main objectives: to provide for an equitable distribution of an insolvent debtor's property, and to prevent the insolvent debtor from acting in a manner which is detrimental to the interests of his creditors. Protecting the honest debtor from his creditors by means of a discharge, although a fundamental feature in today's bankruptcy law, has not historically been a feature of bankruptcy law.\(51\) Early English bankruptcy law, which provided the foundation for American bankruptcy law, was instituted for the benefit of the creditor.\(52\) Not only did the early laws fail to provide the debtor with a discharge from his debts, they allowed creditors to involuntarily seize and distribute the debtor's property and place him in prison.\(53\) Even the first discharge provision, which appeared in an English bankruptcy law in 1705,\(54\) was introduced for the benefit of creditors; it was a way to induce debtors to disclose and deliver all their assets to their creditors.\(55\) If the debtor honestly surrendered all his assets and cooperated fully with the creditors, he was granted a discharge of the unpaid balance of his debts.\(56\) A debtor that failed to make a full disclosure was considered a felon and imprisoned.\(57\)

The first American bankruptcy laws followed the model of the English laws. The Bankruptcy Act of 1800\(58\) provided for involuntary

\(53\) Id. at 811-12.
\(54\) Id. at 812. (citing 4 Anne, Ch. 17 (1705)).
\(55\) J. MacLachlan, Handbook of the Law of Bankruptcy § 100 (1956).
\(56\) When the law was first enacted, a discharge was granted only after approval by all of the creditors. Later, it was amended so as to only require approval of a majority of claims in number and amount. Note, Essentials of Bankruptcy: Prevention of Fraud, and Control of Debtor, 23 VA. L. REV. 373, 380 (1937).
\(57\) See Countryman, supra note 52, at 812.
\(58\) Bankruptcy Act of 1800, Ch. 19, 2 Stat. 19 (1800) (repealed 1803).
proceedings to be initiated on creditors petitions only, and provided the debtor with a discharge if he made a full disclosure to his creditors. The discharge was conditioned on the debtor receiving the consent of two-thirds of the creditors who had claims against two-thirds of the total value of all outstanding debts. A failure to honestly disclose resulted in the debtor's imprisonment for not less than one year, nor more than ten years. The position of the debtor gradually improved with the enactment of the latter Bankruptcy Acts of 1841 and 1867. Under the 1867 Act, both voluntary and involuntary petitions could be filed. Along with the discharge a debtor received by cooperating with his creditors, he was granted certain limited exemptions in clothing, furniture, and other necessaries. Also by this time, imprisonment for debt was curtailed by many state constitutions and statutes.

Under the 1898 Act, the debtor could file a voluntary petition and would be granted a discharge, regardless of creditor consent, as long as he acted in accordance with the Act's provisions. As enacted, the Act excepted certain debts from discharge. These included, among others, debts incurred through fraud or for the willful and malicious injury to the person or property of another. By including provisions in the Act which except certain debts from discharge, it is evident that Congress concluded the debtor was only entitled to a discharge when he dealt honestly with his creditors. Although Congress limited the discharge to a certain extent, it improved the debtor's position after bankruptcy by granting debtors liberal exemptions. For the first time, states were permitted to expand upon the exemptions granted by bankruptcy law.

With the enactment of the Bankruptcy Act of 1898, and the additional allowances granted to the debtor therein, the original purpose of the discharge, that of facilitating the liquidation of the debtor's assets, began to give way to the "fresh start" policy currently embodied in the

59. Countryman, supra note 52, at 813.
60. Id.
63. Countryman, supra note 52, at 815.
64. Id. at 814.
67. Id. at § 17, 30 Stat. at 550.
68. Bankruptcy Act, § 6, 30 Stat. at 548.
Kessler

The bankruptcy laws no longer served the interests of the creditors to the detriment of the debtors.

[The new Act was] designed not only to distribute the property of the debtor, not by law exempted, fairly and equally among his creditors, but as a main purpose of the act, intends to aid the unfortunate debtor by giving him a fresh start in life, free from debts, except of a certain character, after the property which he owned at the time of bankruptcy has been administered for the benefit of creditors. Our decisions lay great stress upon this feature of the law-as one not only of private but of great public interest in that it secures to the unfortunate debtor, who surrenders his property for distribution, a new opportunity in life.69

By following the development of discharge, one can see that the discharge has become a fundamental part of bankruptcy law today. However, one “cannot allow the apparent importance of these rights in the limited context of this area of the law to skew their opinions concerning the relative importance of bankruptcy rights within the overall context of the law.”70 It may be true that the debtor has a important personal interest in obtaining a discharge,71 but the discharge remains a privilege.72 As the Court noted in United States v. Kras,73 and later reiterated in Grogan, there is no constitutional right to be relieved of one’s debts in bankruptcy.74 In United States v. Kras, the Court denied the debtor a “fresh start” by refusing to allow him to proceed in forma pauperis so that he could receive a discharge of his debts.75 The Court recognized that a discharge was important, but felt it did not reach the same constitutional level of particularly important individual rights or interests involved in other proceedings, which warranted a waiver of

70. In re Watkins, 90 Bankr. at 857.
74. See id. at 446.
75. Under the Bankruptcy Act, the payment of all bankruptcy fees was required before a discharge could be granted. The policy is continued under the Code. See 11 U.S.C. § 707(a)(2) (The court may dismiss a case for nonpayment of any fees or charges under chapter 123 of title 28).
fees. Thus, the Court has found that a "[b]ankruptcy [discharge] is hardly akin to free speech or marriage . . . which are imbedded in the [f]irst [a]mendment, [and which] the Court has come to regard as fundamental." Since the right to a discharge is not fundamentally important, there is no compelling reason for moving away from the general rule that in a "typical civil suit for money damages, plaintiffs must prove their case by a preponderance of evidence." A proceeding under section 523 is equivalent to a civil suit for money damages. The creditor is simply trying to collect money he believes is owed to him by the debtor. By excepting a particular debt from discharge, the court is merely leaving the debtor "subject to the same risks and burdens of any other debtor outside of bankruptcy." Since in a discharge proceeding, the only interest of the debtor which is at stake is that of his "economic freedom," an interest which is not afforded constitutional protection, there is no basis for requiring a heightened standard of proof.

IV. Fresh Start Policy

After deciding that a debtor does not have an interest in discharge sufficient to require the clear and convincing evidence standard of proof, the Grogan Court next addressed the "fresh start" policy of the Code as a reason for applying a heightened standard of proof. One of the principal reasons many courts held a clear and convincing evidence standard was required to except a debt from discharge was a belief that such a standard was necessary to preserve the debtor's "fresh start." The Court stated that it was "unpersuaded by the argument that the clear and convincing standard is required to effectuate the 'fresh start' policy of the Bankruptcy Code." The Court does not point out exactly

76. See Kras, 409 U.S. at 444-45, where the Court compared a divorce proceeding in which they allowed the payment of fees to be waived, in Boddie v. Connecticut, 401 U.S. 371 (1971), with a bankruptcy discharge. In a divorce proceeding the parties' inability to dissolve their marriage seriously impairs their "freedom to pursue other protected associational activities." Id. at 444-45. Whereas in a bankruptcy discharge, the debtor's interest in eliminating the burden of his debt, and "in obtaining his desired new start in life, although important and so recognized by the Bankruptcy Act, does not rise to the same constitutional level." Id. at 445.

77. Id. at 446 (citations omitted).
78. Huddleston, 459 U.S. at 387 (citing Addington, 441 U.S. at 423).
79. In re Watkins, 90 Bankr. at 856.
80. Grogan, 111 S. Ct. at 659.
which argument it is referring to, but there is one particular maxim which the courts frequently used to back up their position: “[E]xceptions to [discharge] should be strictly construed against the objecting creditor and liberally in favor of the debtor.” The maxim, most likely gained popularity through a remark made by the Supreme Court in *Gleason v. Thaw*, where the Court stated that “[i]n view of the well-known purpose of the [b]ankrupt[cy] law, exceptions to the operation of a discharge . . . should be confined to those plainly expressed.” The Court in *Gleason* indicated that the bankruptcy courts should not expand on the exceptions listed in the Bankruptcy Act. It was not specifying the standard of proof required to prove an exception. Thus, the maxim should not be applied to establish a standard of proof, but rather should be utilized to determine whether the debt is of the type which falls within the exception. The Court in *Grogan* recog-


83. *Id.* at 562.

84. The issue before the Court was whether the professional services of an attorney and counselor at law were property within the meaning of paragraph 2, section 17 of the Bankruptcy Act. *Id.* at 558. This section excepted “from the general release of a discharge ‘liabilities for obtaining property by false pretenses or false representations.’” *Id.* The Court concluded that Congress never intended the term property to include professional services. *Id.* at 561.

85. See *Combs v. Richardson*, 838 F.2d 112, 116 (4th Cir. 1988) (“Although the ‘fresh start’ philosophy of bankruptcy law requires that exceptions to discharge ‘be confined to those plainly expressed’ (citation omitted), this policy does not justify judicial imposition of a heavier burden of proof on creditors . . . .’’); see also *In re Watkins*, 90 Bankr. at 856:

However, I believe that the maxim is applicable only when construing the breadth of a statutory exception to discharge and not to the quantum of proof necessary to establish one of the factual elements of the cause of action. A creditor may, for example, bring an action alleging that a certain debt is nondischargeable under [section] 523(a)(6) and may prove all the elements of the cause of action by a preponderance of the evidence, yet such debt must be held to be dischargeable if the conduct alleged and proven is not within the exception narrowly construed.

*Id.*; *In re Wellever*, 103 Bankr. 856, 861 (Bankr. W.D. Mich. 1989) (“[P]olicy is best served by construing the **scope** of the exceptions narrowly, not by arbitrarily making their proof more difficult.”) (emphasis in original); 3 W. COLLIER ON BANKRUPTCY ¶ 523.05A, at 523-16-17. (15th ed. 1979) (“In determining whether a **particular debt**
nized that although bankruptcy law generally favors the granting of a discharge, the Code should be construed to protect the debtor only in those cases where there is no intent to violate its provisions. "The statutory provisions governing nondischargeability reflect a congressional decision to exclude from the general policy of discharge certain categories of debts . . . Congress evidently concluded that the creditors' interest in recovering full payment of debts in these categories outweighed the debtors' interest in a complete fresh start." In other words, the exceptions to discharge reflect "Congress' belief that debtors do not merit a fresh start to the extent that their debts fall within section 523." In a section 523 proceeding it is the debtor's honesty that is called into question. Requiring a clear and convincing standard of proof "tends to presume the very issue in question, namely the debtor's honesty." It follows, therefore, that the Court's reasoning is correct when it states that "[r]quiring the creditor to establish by a preponderance of the evidence that his claim is not dischargeable reflects a fair balance between [the] conflicting interests" of the debtor and the creditor. Applying a clear and convincing standard would express a preference for the debtor, and "it is unlikely that Congress, in fashioning the standard of proof that governs the applicability of [the nondischargeability] provisions, would have favored the interest in giving perpetrators of fraud a fresh start over the interest in protecting victims of fraud."

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Falls within one of the exceptions of section 523, the statute should be strictly construed against the objecting creditor and liberally in favor of the debtor." (emphasis added) (citations omitted).

86. See Grogan, 111 S. Ct. at 659 ("[A] central purpose of the Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy 'a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.' ").

87. See id. ("But in the same breath that we have invoked this 'fresh start' policy, we have been careful to explain that the Act limits the opportunity for a completely unencumbered new beginning to the 'honest but unfortunate debtor.' ").

88. Id.

89. In re Braen, 900 F.2d 621, 625 (3d Cir. 1990) (emphasis in original) (citation omitted).

90. In re Powell, 88 Bankr. at 118.

91. Grogan, 111 S. Ct. at 659.

92. See Huddleston, 459 U.S. at 390 ("Any other standard expresses a preference for one side's interests"). See also Combs, 838 F.2d at 116 (referring to a debt under section 523(a)(6), but it applies equally to all section 523 proceedings).

V. PROOF OF FRAUD

Where the exception to discharge requires proof of fraud, some courts required clear and convincing evidence because they believed this was the prevailing standard, for both section 523 and common law purposes, at the time of the Code's adoption. The Court rejected this idea. "Because it seems clear that a preponderance of the evidence is sufficient to establish [some of] the nondischargeability" exceptions, the court reasoned that "the structure of section 523(a), which groups together in the same subsection a variety of exceptions without any indication that any particular exception is subject to a special standard of proof" supports the conviction that Congress intended the preponderance standard to apply to all the exceptions, including those involving fraud.

In addition to the reason given by the Supreme Court, there are other persuasive arguments for not applying a higher standard of proof to the fraud exceptions. The bankruptcy court case, In re Huff, was frequently cited for the rationale behind making a creditor prove by "clear and convincing" evidence that a debt falling within the section 523(a)(2) exception is nondischargeable. That court ruled that where dishonesty or fraud is at issue, a higher standard of proof is required to overcome the presumption that all men are honest and fair dealing. The court in Huff, quoting from section 94 of Corpus Juris Secundum, stated that the higher standard is based on considerations that "fraud is regarded as criminal in its essence, and involves moral turpitude at least, while, on the other hand, the presumption is that all men are honest, that individuals deal fairly and honestly, that private transactions are fair and regular, and that participants act in honesty and good faith." There are two problems with the court's reliance on section

94. In re Garner, 881 F.2d at 582.
95. Grogan, 111 S. Ct. at 660.
96. Id. at 659-660.
100. In re Huff, 1 Bankr. at 357, quoting from 37 C.J.S. Fraud § 94, p. 398 et seq. (1943) (citations omitted).
94 to support its proposition. First, the cited section deals with imposing the burden of proof on the one alleging fraud, it mentions nothing about a "clear and convincing" standard of proof.\textsuperscript{101} Second, the presumption of fair dealing does not justify the imposition of a higher standard of proof than that normally applied in civil cases. The presumption can be overcome "by producing facts and circumstances in evidence which cannot fairly or reasonably be reconciled with fair dealing and honesty of purpose."\textsuperscript{102}

The original reason for which the clear and convincing evidence standard was created by the courts of equity is inapplicable to section 523 proceedings. The Supreme Court has recognized that the "clear and convincing" standard of proof was created by the courts of equity for a particular class of claims.

A higher standard of proof apparently arose in courts of equity when the chancellor faced claims that were unenforceable at law because of the Statute of Wills, the Statute of Frauds, or the parol evidence rule. Concerned that claims would be fabricated, the chancery courts imposed a more demanding standard of proof. The higher standard subsequently received wide acceptance in equity proceedings to set aside presumptively valid written instruments on account of fraud.\textsuperscript{103}

An article cited by the Supreme Court in \textit{Huddleston} states that "[t]he

\textsuperscript{101} In fact, a later section of C.J.S. entitled "weight and sufficiency," states that fraud need only be proved by a preponderance of the evidence:

\begin{quote}
Fraud must be established by a preponderance of the evidence. Although a court or jury should be cautious in arriving at conclusions prejudicial to character and honesty, a preponderance of evidence such as required in civil cases generally is ordinarily sufficient to show fraud, provided the proof is clear and strong enough to preponderate over the general and reasonable presumption that men are honest and do not ordinarily commit fraud or act in bad faith.
\end{quote}

\textsuperscript{102} 37 AM. JUR. 2D \textit{Fraud and Deceit} § 470 p.649 (1968) (citations omitted).

Requiring the "clear and convincing" standard to overcome the presumption of honesty has also been attacked on another level. In \textit{In re Watkins}, 90 Bankr. at 852 n.9, Judge Spector, intrigued with why some courts had such solicitude for the feelings of the allegedly dishonest, admitted it would hurt to be called a fraud or a cheat; but then asked whether it was less hurtful to be called a murderer, rapist, or vandal. If not, he posited, "then there is no good reason to require clear and convincing evidence in cases of 'dishonesty' but not in cases of other sorts of depravity." \textit{Id.}

\textsuperscript{103} \textit{Huddleston}, 459 U.S. at 388 n.27 (citations omitted).
requirement in civil actions of more than a preponderance of the evidence was first applied in equity to claims which experience had shown to be inherently subject to fabrication, lapse of memory, or the flexibility of conscience.

The adversary proceedings brought under section 523(a)(2) for debts obtained by false pretenses, false representations, or actual fraud are not the type of claims which the courts of equity were concerned about when they developed the clear and convincing evidence standard. First, since debts have to be confirmed by the bankruptcy court prior to the holding of a hearing to determine their dischargeability, the danger that the facts of fraud claims will be fabricated or subject to a lapse of memory, is minimal. Second, in applying the clear and convincing evidence standard to actions seeking to set aside the terms of written instruments, the courts of equity were concerned with protecting the validity of written instruments and the reliance placed upon such documents. Since in dischargeability proceedings, the validity of written agreements is rarely an issue, and since the claims in these proceedings are no more likely to be fabricated than in other types of proceedings, the clear and convincing standard is inappropriate.

VI. CLEAR AND CONVINCING STANDARD APPLIED BY “ACCIDENT”

One issue which was not addressed by the Grogan Court, but should not be overlooked, is the manner in which some of the lower courts came to apply the clear and convincing evidence standard. The courts which applied a clear and convincing standard did so “almost by historical accident.” The historical accident, according to Judge Stewart’s opinion in In re Curl, was the result of courts citing to cases that did not stand for the proposition stated. For instance, in Sweet v. Ritter Finance Co., a case which is repeatedly cited on the elements of fraud and the burden of proof in dischargeability proceedings, the court unequivocally stated that the elements must be proven

107. Id.
by a preponderance of evidence. However, numerous cases cited *Sweet* for the proposition that the standard of proof is clear and convincing evidence. In fact, at least two circuit court opinions, which are supposed to serve as binding precedent for the bankruptcy courts, adopted the clear and convincing standard of proof by citing to cases which relied on *Sweet*. Another circuit court opinion, which applied a clear and convincing standard, cited to a bankruptcy court decision which did not even mention the standard of proof. Perhaps the clearest episode of misstating a proposition was done by the court in *In re Pallo*.

In this case, the court stated "[i]t is *unquestioned* that the party seeking to have its debt excepted from discharge pursuant to [s]ection 523 bears the burden of proof by clear and convincing evidence." To support its statement, the court cited two bankruptcy court cases which unequivocally held that a fair preponderance of evidence is all that is required to except a debt from discharge. The fact that these courts applied the clear and convincing standard by "accident" lends further support to the Supreme Court's adoption of the preponderance standard.

VII. APPLICATION OF COLLATERAL ESTOPPEL

Applying a preponderance of the evidence standard to proceedings under section 523(a) will allow bankruptcy courts to give prior state...
court judgments preclusive effect, thereby avoiding duplicative relitigation of identical issues. The doctrine of collateral estoppel or "issue preclusion" bars relitigation of issues in a subsequent proceeding which were actually litigated in a previous adjudication.\textsuperscript{116} The application of collateral estoppel in bankruptcy cases was left open in \textit{Brown v. Felsen}\textsuperscript{117} where the court stated that "[i]f in the course of adjudicating a state-law question, a state court should determine factual issues using standards identical to those of [section] 17, then collateral estoppel, in the absence of countervailing statutory policy, would bar relitigation of those issues in the bankruptcy court."\textsuperscript{118} There is no countervailing statutory policy which would preclude the application of collateral estoppel in dischargeability proceedings:

The application of a collateral estoppel bar obviously serves important interests. These interests do not disappear simply because the subsequent proceedings are in bankruptcy. Judicial resources are always conserved by avoiding duplicative relitigation of identical issues. . . . There is also no reason here to prefer the fact-finding of a bankruptcy judge to that of a jury so long as the same issue was presented in each proceeding."\textsuperscript{119}

In \textit{Grogan}, the Court clarified any confusion which existed by expressly stating "that collateral estoppel principles do indeed apply in discharge exception proceedings."\textsuperscript{120} Although collateral estoppel can properly be applied in dischargeability proceedings, if the standard of proof used to establish the requisite elements of the cause of action in state court is lower than the applicable standard in bankruptcy cases, then the bankruptcy court cannot give the state court judgment preclusive effect.\textsuperscript{121}

\begin{itemize}
  \item \textsuperscript{116} Allen v. McCurry, 449 U.S. 90, 94-95 (1980).
  \item \textsuperscript{117} Brown v. Felsen, 442 U.S. 127 (1979).
  \item \textsuperscript{118} Id. at 139 n.10. (the reference to section 17 is to section 17 of the Bankruptcy Act of 1898, which is essentially the same as section 523 under the Code). In Brown, the Court decided that the doctrine of res judicata should not apply in dischargeability proceedings because of the exclusive jurisdiction granted to the bankruptcy courts by the 1970 amendments to the Bankruptcy Act to decide dischargeability issues. Brown, 442 U.S. at 138-39.
  \item \textsuperscript{119} Combs, 838 F.2d at 115 (citation omitted).
  \item \textsuperscript{120} Grogan, 111 S. Ct. at 658 n. 11.
  \item \textsuperscript{121} See \textit{Restatement (Second) of Judgments} § 28, p.273 (1982) which provides:

  Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation

https://nauworks.nova.edu/nlr/vol15/iss3/18
Since in most civil proceedings the standard of proof is a preponderance of the evidence, a state court judgment presented to the bankruptcy court will, more likely than not, have been decided under a preponderance standard. Although it is true that many states require a higher standard in cases involving fraud, there is still a significant of the issue in a subsequent action between the parties is not precluded in the following circumstances:

(4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action.

number of states that only require a preponderance of the evidence to prove fraud.\textsuperscript{128} To require a higher standard in dischargeability cases would often require that the holder of a state court judgment retry the entire case in a bankruptcy court. This would be an “unnecessary exercise in judicial machinery.”\textsuperscript{124}

In addition to state court judgments which would have to be relitigated, a clear and convincing standard of proof would require that judgments awarded under important federal non-bankruptcy laws, which only require a preponderance of the evidence to prove fraud, be relitigated.\textsuperscript{125} For instance, fraud actions brought by the United States under the False Claims Act\textsuperscript{126} only require the claim be established by a preponderance of the evidence.\textsuperscript{127} Congress also expressly provided that the preponderance standard applies to civil penalties for fraud involving financial institutions.\textsuperscript{128} In addition, courts have judicially

\begin{itemize}
\item \textsuperscript{124} In re Daboul, 85 Bankr. 197, 201 (Bankr. D. Mass. 1988).
\item \textsuperscript{125} See Grogan, 111 S. Ct. at 660 (“Unlike a large number, and perhaps the majority, of the States, Congress has chosen the preponderance standard when it has created substantive causes of action for fraud.”).
\item \textsuperscript{126} 31 U.S.C. § 3729.
\item \textsuperscript{127} See 31 U.S.C. § 3731(c).
\item \textsuperscript{128} See 12 U.S.C.A. § 1833a(e) (West 1989).
\end{itemize}
adopted the preponderance of the evidence standard for other federal antifraud statutes.129

VIII. CONCLUSION

As the nation moves into a period of economic recession and the number of bankruptcy filings continues to rise, the Court's adoption of a preponderance of the evidence standard for section 523 proceedings will avoid wasteful litigation. Persons who have successfully litigated claims under the preponderance standard in state court actions will be able to utilize the doctrine of collateral estoppel in a bankruptcy court. Repeated actions will not have to be brought by the government, or individuals, who have won judgments under a federal antifraud statute.130 Currently, the government, in hopes of recovering large monetary judgments, is filing numerous lawsuits against persons accused of defrauding federal savings and loan institutions. Should the government be successful with these lawsuits, and if any of the "accused" subsequently file a petition in bankruptcy (a very good possibility due to the large sums of money involved), the government will be able to avoid relitigating these cases in bankruptcy court, because the original judgments, as well as the dischargeability proceeding, will be based upon the preponderance of the evidence standard. Adoption of a higher standard would force the government to retry these types of cases and would result in an extreme waste of the taxpayers' money. This could not have been what Congress intended in prescribing the preponderance standard for these federal antifraud statutes. The application of a clear and convincing standard in federal bankruptcy dischargeability proceedings, while maintaining a preponderance standard for other federal antifraud laws, would cause a conflict in federal law.131 Adoption

129. See Huddleston, 459 U.S. at 390 (preponderance standard applies in cases brought under Section 10(b) of the Securities Exchange Act and Commission Rule 10b(5)); Cullen v. Margiotta, 811 F.2d 698, 731 (2d Cir. 1987) (preponderance standard applies in civil actions brought under the Racketeer Influence and Corrupt Organizations Act); First Nat'l Monetary Corp. v. Weinberger, 819 F.2d 1334, 1340 (6th Cir. 1987) (preponderance standard applies in actions brought under the fraud provisions of the Commodity Exchange Act).

130. See supra, notes 126-28.

131. See Grogan, 111 S. Ct. at 658 n.10. Noting that dischargeability was a matter of federal law, the Court explained that prior to 1970 the bankruptcy courts and the state courts had concurrent jurisdiction to decide the dischargeability of debts. However, with the enactment of the 1970 amendments to the Bankruptcy Act of 1898,
of a preponderance of the evidence standard, on the other hand, avoids the conflict. In addition, it allows bankruptcy courts to apply the principles of collateral estoppel in dischargeability proceedings and thereby avoid wasteful and costly litigation of issues already decided by other courts.

Andrew Kessler
Florida v. Bostick: Voluntary Encounter or the Power of Police Intimidation?

I. INTRODUCTION

On August 27, 1985, two officers from the Broward County Sheriff's Department boarded a Greyhound bus in Fort Lauderdale, Florida. One of the officers, Detective Nutt, carried in his hand a zippered pouch containing a pistol. The bus driver immediately left the bus, closing the door behind him. The officers proceeded directly to the back of the bus to Terrence Bostick. They identified themselves, asked for his bus ticket and identification, and for consent to search his luggage. 1 During the search they found 400 grams of cocaine. 2

In a 4-3 decision, the Florida Supreme Court found the search illegal, because any consent given was tainted by Bostick's belief that he was not free to leave. 3 Since Bostick, a number of Florida courts have mirrored the state supreme court's reasoning. 4 The Bostick decision has also been followed in jurisdictions other than Florida, 5 and applied in other contexts such as border searches, 6 trespass warnings, 7 and seizure of firearms. 8

During the October 1990 term, the United States Supreme Court

4. Nazario v. State, 554 So. 2d 515 (Fla. 1990); Mendez v. State, 554 So. 2d 1161 (Fla. 1990); Jones v. State, 559 So. 2d 1096 (Fla. 1990); Serpa v. State, 555 So. 2d 1210 (Fla. 1990) (decided the same day as Bostick); Avery v. State, 555 So. 2d 351 (Fla. 1989) (decided the same day as Bostick); Smith v. State, 556 So. 2d 761 (Fla. 4th Dist. Ct. App. 1990); State v. Florius, 563 So. 2d 820 (Fla. 4th Dist. Ct. App. 1990). But see United States v. Fields, 909 F.2d 470 (11th Cir. 1990) (similar facts, but appellate court upheld trial court's finding that consent to search baggage was freely given); Anderson v. State, 566 So. 2d 371 (Fla. 4th Dist. Ct. App. 1990).
granted certiorari to hear *Florida v. Bostick*. The Court will decide whether the Broward County Sheriff's Office policy on drug searches breaches bus passengers’ fourth amendment rights when the police board a bus without articulable suspicion, and randomly ask passengers for “consent” to search their luggage. The decision the Court renders will impact on the manner in which law enforcement officers throughout the nation may collect evidence.

The Supreme Court cannot allow police officers to continue to approach individuals in this intimidating manner. Although the United States is fighting a war on drugs, there is no need to place the citizen in the position of the enemy. The Court must clarify the difference between “voluntary encounter” and “lawful seizure” categories. Current standards are too vague, and applying these standards tends to give greater leeway to the police than is necessary.

The first section of this article gives factual and procedural background leading to the court’s decision as well as the rationale followed by the majority and the minority on the court. The second section focuses on the current standards: the governmental and individual interests to be protected; and the requirements for a lawful seizure. The third section calls for a narrower definition of the “voluntary encounter.”

II. BACKGROUND ON BOSTICK

On the morning of August 25, 1985, two Broward County Sheriff’s Officers boarded a bus bound from Miami to Atlanta during a stopover in Fort Lauderdale. The bus driver immediately left the bus, closing the bus door behind him. The officers, Detective Nutt and Officer Rubino, proceeded directly to the back of the bus where Terrence Bostick, a passenger, was lying with his head on a red tote bag.

The officers asked Bostick for his ticket and identification. They admitted that at this point they did not have any articulable suspicion. Bostick’s ticket matched his identification, and both were immediately

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10. The three categories of police contact with individuals are: “voluntary encounters;” “brief, investigatory stops,” the lesser level of lawful seizure; and “arrest,” the ultimate seizure. See infra note 42 and accompanying text.
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returned to him.\textsuperscript{13}

The two police officers explained their presence as narcotic agents on the lookout for illegal drugs. Detective Nutt then asked Bostick whether the red tote bag, which he was using as a pillow, could be searched for drugs. Bostick looked for approval to another passenger, to whom the bag belonged, and handed the bag to Nutt, who searched it. No contraband was found. Detective Nutt then asked for Bostick’s permission to search a blue bag that Officer Rubino had found on the overhead rack. The evidence was unclear as to whether the defendant consented to the search of the second bag in which the contraband was found.\textsuperscript{14}

Detective Nutt, testified that they had entered the bus wearing raid jackets clearly identifying them as sheriff’s officers, and approached Bostick as he sat in the rearmost seat. During questioning, this officer stood in a position that partially blocked the only exit from the bus. Bostick also testified that Officer Nutt had his hand in a black pouch which appeared to contain a gun. Bostick was not able to leave the bus, as it was ready to depart, and he could only move about the bus if the officers would allow him to do so.\textsuperscript{15}

The officers found over 400 grams of cocaine in a blue bag belonging to Bostick. Bostick pled guilty and was sentenced to five years.\textsuperscript{16}

The Fourth District Court of Appeal issued a per curiam affirmance. However, the court agreed to certify the following question to the Florida Supreme Court: May the police without articulable suspicion board a bus and ask at random, for, and receive, consent to search a passenger’s luggage where they advise the passenger that he has the right to refuse consent to search?\textsuperscript{17}

The Florida Supreme Court rephrased the issue as follows: Does an impermissible seizure result when police mount a drug search on buses during scheduled stops and question boarded passengers without articulable reasons for doing so, thereby obtaining consent to search the passengers’ luggage?\textsuperscript{18}

The court answered the question in the affirmative and quashed

\textsuperscript{13} Bostick, 554 So. 2d at 1154.
\textsuperscript{14} Brief for Respondent, supra note 1, at 4.
\textsuperscript{15} Bostick, 554 So. 2d at 1157.
\textsuperscript{16} Lipman, Broward Drug Case Hinges on Permission for Search on Bus, Palm Beach Post, February 26, 1991, at 3A, col. 5.
\textsuperscript{17} Bostick v. State, 510 So. 2d 321 (Fla. 4th Dist. Ct. App. 1987).
\textsuperscript{18} Bostick, 554 So. 2d at 1154.
the opinion of the district court. It found Bostick had been seized by the officers and that any consent he had given to the search of his luggage had been tainted by the illegal detention.\(^{19}\)

The Florida Supreme Court found that under all the circumstances, the "reasonable traveler would not have felt that he was 'free to leave' or that he was 'free to disregard the questions and walk away.' There was, in fact, . . . no place to which he or she might walk away."\(^{20}\) The court concluded that although the seizure did not amount to an arrest, it was the lesser form of seizure requiring constitutional protection.\(^{21}\)

In arriving at this conclusion, the court looked to the area in which the "seizure" occurred and the surrounding circumstances. Bostick was in a bus which he could not leave because it was scheduled to depart soon.\(^{22}\) Furthermore, the officers partially blocked the only possible exit from the bus. The fact that one of the officers had his hand on what appeared to be a gun added to the intimidation.\(^{23}\)

Having concluded that there was a detention, the court next looked to the propriety of the seizure. The court properly followed the principle of federal and Florida law that the officers must have had, at a minimum, a reasonable articulable suspicion before detaining Bostick.\(^{24}\) By their own testimony, the officers never had any basis for suspecting illegal activity.\(^{25}\) Thus the court's inquiry was at an end. Bostick had been unlawfully and unjustifiedly detained.\(^{26}\)

In his dissent to the majority's opinion in \textit{Bostick}, Justice Grimes admitted that he was uncomfortable with the Broward County Sheriff's practice of routinely boarding stopped buses to inquire of its passengers

\textbf{19.} \textit{Id.} at 1155.

\textbf{20.} \textit{Id.} at 1157.

\textbf{21.} \textit{Id.}

\textbf{22.} \textit{Id.} The court compared this circumstance with that of \textit{Alvarez v. State}, 515 So. 2d 288 (Fla. 4th Dist. Ct. App. 1987). In \textit{Alvarez}, the defendant had already boarded his train and begun his journey. To leave in the sense contemplated by \textit{Terry} and \textit{Mendenhall} would have meant to abandon his private berth and possibly miss his destination. The fourth district concluded that the police activity was tantamount to a detention. However, the Florida Supreme Court ignored the fact that one would have a greater expectation of privacy in a private berth than on a bus. Note also that Officer Nutt, one of the officers who "detained" Bostick, was also an officer involved in the seizure of \textit{Alvarez}.

\textbf{23.} \textit{Bostick}, 554 So. 2d at 1157.

\textbf{24.} \textit{Id.} at 1157-58.

\textbf{25.} \textit{Id.} at 1158.

\textbf{26.} \textit{Bostick}, 554 So. 2d at 1158.
whether they would consent to a search of their luggage.\textsuperscript{27} However, law enforcement agents are permitted to board buses, and are free to communicate with passengers.\textsuperscript{28} Although the location is a factor in determining whether a seizure has taken place, he found that whether a reasonable person would have felt free to terminate the encounter was a question of fact to be determined by the totality of the circumstances.\textsuperscript{29} Justice Grimes noted that in this case, the trial judge had not considered Bostick to be seized.\textsuperscript{30}

III. CURRENT REQUIREMENTS FOR A LAWFUL SEIZURE

The fourth amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated . . . ."\textsuperscript{31} The U.S. Supreme Court has long recognized the right of every individual to be "free from all restraint or interference of others, unless by clear and unquestionable authority of law."\textsuperscript{32} In other words, the fourth amendment does not protect citizens from all searches and seizures, but only unreasonable searches and seizures.\textsuperscript{33}

The basic premise of fourth amendment protection is that every person has the right to live his life without impediment from others.\textsuperscript{34} However, the citizen loses this right of personal autonomy when he acts

\textsuperscript{27} Id. at 1159 (Grimes, J., dissenting).

\textsuperscript{28} Id. at 1160.

\textsuperscript{29} Id.

\textsuperscript{30} Id. In Florida, findings of fact by a trial court are presumed to be correct. Marsh v. Marsh, 419 So. 2d 629, 630 (Fla. 1982); Strawgate v. Turner, 339 So. 2d 1112, 1113 (Fla. 1976); see also Medina v. State, 466 So. 2d 1046, 1049 (Fla. 1985) (presumption of correctness for ruling on motions to suppress). The appellate court may disturb the trial court's conclusion only when there is a lack of substantial evidence to support the court's conclusion. Strawgate, 339 So. 2d at 1113 (citing Chakford v. Strum, 87 So. 2d 419 (Fla. 1956)). Otherwise, the appellate court would be improperly substituting its judgment for the trial court's in reaching a contrary decision. Id.

\textsuperscript{31} U.S. CONST. amend. IV. The fourth amendment is enforceable against the states pursuant to the due process clause of the fourteenth amendment. Mapp v. Ohio, 367 U.S. 643 (1961). Florida's constitution also provides against unreasonable searches and seizures. FLA. CONST. art. I §, 12.

\textsuperscript{32} Terry v. Ohio, 392 U.S. 1, 9 (1968) (quoting Union Pac. R. Co. v. Botsford, 141 U.S. 250, 251 (1891)).

\textsuperscript{33} Id.; see also Elkins v. United States, 364 U.S. 206, 222 (1960).

\textsuperscript{34} Bostick, 554 So. 2d at 1155.
to harm another.\textsuperscript{35} Therefore, the state has the power to interfere with the individual's autonomy through search or seizure when it has reason to believe that an individual has committed a crime.\textsuperscript{36} This power to interfere does fall within constitutional constraints.\textsuperscript{37} For "[t]he right protected by the [f]ourth [a]mendment include[s] the right to be immune from conviction on the basis of unconstitutionally seized evidence."\textsuperscript{38}

In \textit{Bostick}, the state had a compelling interest in finding those who traffic in illegal drugs. The drug problem affects the health and welfare of our society.\textsuperscript{39} Therefore, the Broward County Sheriff's Office had a legitimate interest in finding the contraband in Bostick's luggage. However, Bostick did have a "privacy interest in continuing his travels without governmental intrusion."\textsuperscript{40} He also had a well established privacy interest in the luggage he carried during his travels.\textsuperscript{41}

The question is whether, given the government's compelling interest in stemming the drug flow, Bostick's fundamental right to privacy, and the particular circumstances of the case, the state violated Bostick's personal autonomy with an unreasonable search and seizure.

In determining whether the state's interference with the individual is lawful, courts must take into account the degree of contact and its basis. The United States Supreme Court has recognized three main types of encounters: "voluntary encounters," or "mere communication," which do not involve the fourth amendment; the "short detention," or \textit{Terry} stop, involving some seizure and requiring reasonable suspicion; and an arrest requiring probable cause.\textsuperscript{42} Thus, courts must ask whether the individual has been seized, and on which level.\textsuperscript{43} But the "central inquiry under the [f]ourth [a]mendment [is] the reasonableness in all the circumstances of the particular governmental invasion

\textsuperscript{35.} \textit{Id.}
\textsuperscript{36.} \textit{Id.}
\textsuperscript{37.} \textit{Id.}
\textsuperscript{38.} B. \textsc{Wilson}, \textsc{Enforcing the Fourth Amendment}: A Jurisprudential History (1986).
\textsuperscript{39.} United States v. Mendenhall, 446 U.S. 554, 561 (1980).
\textsuperscript{40.} \textit{Bostick}, 554 So. 2d at 1157 (quoting 3 W. \textsc{LaFave, Search and Seizure} § 11.3 at 571 (1978)).
\textsuperscript{41.} \textit{Id.} (citing United States v. Chadwick, 433 U.S. 1, 13 (1977)).
\textsuperscript{42.} \textit{Terry} v. Ohio, 392 U.S. 1 (1968). This article does not deal with the arrest.
of a citizen's personal security."

The first mode of interference, the voluntary encounter, does not raise any fourth amendment issues. For "[o]bviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons." Nothing in the Constitution prevents a policeman from addressing questions to citizens on the street. The police officer enjoys "the liberty (again, possessed by every citizen) to address questions to other persons." But by the same token, the "person addressed has an equal right to ignore his interrogator and walk away."

The voluntary encounter is considered permissible because the purpose of the fourth amendment is not to eliminate all contacts between the police and the individuals, but "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." Therefore, as long as the individual encountering the governmental official is free to walk away without answering any questions, the state has not intruded upon the citizen's expectation of privacy. Under these conditions, the U.S. Constitution does not require any specific justification.

Nonetheless, once an officer uses physical force or a show of authority to restrain the citizen's freedom, the officer has "seized" him within the meaning of the Constitution. The test is whether "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."

44. Terry, 392 U.S. at 19.
45. Id. at 19 n.16.
46. Id. at 34 (White, J., concurring).
47. Id. at 32 (Harlan, J., concurring).
48. Id. at 33.
50. Id. at 554.
51. Id. at 553. At this point, there is a brief, investigatory (Terry) stop. A brief detention is justifiable under the fourth amendment if there is a reasonable, articulable suspicion that a person has committed or is about to commit a crime. Royer, 460 U.S. at 498. "[S]pecific articulable facts, together with rational inferences from those facts, [must] reasonably warrant suspicion of a crime." Bostick, 554 So. 2d at 1158. There is no set standard as to what constitutes a reasonable suspicion. Instead the standard seems to be based on a variety of factors: the seriousness of the offense; the likelihood that the detainee committed or will commit the offense; consequences of delay; and the extent of the intrusion. 3 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.1(d) (2d ed. 1987) [hereinafter W. LAFAVE, TREATISE].
52. Id. at 554.
For a person to come under the protection of the fourth amendment, he must "have exhibited an actual (subjective) expectation of privacy and . . . the expectation [must] be one that society is prepared to recognize as 'reasonable.'" Thus, the area in which a person encounters the police will have some impact on whether his expectation of privacy is reasonable, and whether he has been "seized." In the context of public transportation, there would be a greater expectation of privacy in a sleeper car where one would not expect to encounter anyone in one's own cabin, and only a few other passengers in the hallway. But the individual has a lesser expectation of freedom from governmental interference in an airport, which requires extensive hijacking surveillance and equipment.

Examples of circumstances indicating a seizure include: the threatening presence of several officers; display of a weapon by an officer; some physical touching of the individual; and use of language or tone of voice indicating that compliance with the officer's request might be compelled. These are circumstances which might reasonably make the individual think he is not free to leave.

There is some question as to the relevance of a government agent's intent to detain an individual. Under the Mendenhall test, whether an officer intends to detain the citizen is irrelevant, except to the extent to which he conveys his intention. However, a more recent Supreme Court case, Brower v. Inyo County, held that a "[v]iolation of the [f]ourth [a]mendment requires an intentional acquisition of physical control . . . . [T]he detention or taking itself must be willful . . . . [It must be] a governmental termination of freedom of movement through

53. 1 W. LAFAVE, TREATISE § 2.1(b) (quoting Katz v. United States, 389 U.S. 347 (1967) (Harlan, J., concurring)). Although the Court generally identifies the protection of privacy as the fourth amendment's paramount purpose, it has also recognized that the amendment is intended to protect other interests such as bodily integrity, freedom of movement, and possession of property. Strossen, The Fourth Amendment in the Balance: Accurately Setting the Scales through the Least Intrusive Alternative Analysis, 63 N.Y.U. L. REV. 1173, 1174 n.2 (1988).
55. Id.
57. Mendenhall, 446 U.S. at 554 (citing Terry, 392 U.S. at 19, n.16; Dunway v. New York, 442 U.S. 200, 207 (1979); 3 W. LAFAVE, SEARCH AND SEIZURE at 53-55).
58. Id. at 555, n.6.
means intentionally applied."\(^{60}\)

Although based on one or more of the above circumstances an individual might be considered "seized," these situations are not absolutely determinative in and of themselves as to whether there has been a seizure. Indeed, the United States Supreme Court has failed to find a seizure where the police officer requested production of an airline ticket and identification.\(^{61}\) The court could not come up with a "litmus-paper" test:

\[\text{[T]here will be endless variations in the facts and circumstances, so much variation that it is unlikely that the courts can reduce to a sentence or a paragraph a rule that will provide unarguable answers to the question whether there has been an unreasonable search or seizure in violation of the [f]ourth [a]mendment.}\]

Hence, each court must balance these factors and determine whether the individual has been seized.

As evidenced by the \textit{Bostick} court's split decision,\(^{63}\) in practice, this balancing of factors is difficult to apply. In two other cases with similar facts involving the Broward County Sheriff's Office practice of routinely boarding stopped buses, the Eleventh Circuit Court of Appeals found that the district court had sufficient evidence to warrant its finding that the defendant had not been seized.

In the later case, \textit{United States v. Fields},\(^{64}\) two Broward County Sheriff's officers boarded a north-bound bus that had just arrived from Miami, Florida. The detectives had no information regarding the defendant suggesting that he was carrying illegal drugs. Both men were armed, but concealed their weapons under their jackets which bore the insignia of the Broward County Sheriff's Department. In accordance with usual procedure, the officers proceeded to the rear of the bus with the intention of working their way to the front. The detectives identi-
fied themselves to Fields and his seatmate, and explained that they were seeking the permission of passengers to search their luggage in an effort to obstruct the flow of illicit drugs. The detectives and Fields diverge as to whether the defendant was informed of his right to refuse consent. The officers found cocaine.

The court took an interest in the *Bostick* opinion, as well as the D.C. Circuit's opinion in *United States v. Lewis*:

The very nature of the encounter between Detective Hanson and Mr. Lewis placed the latter in a position in which he could reasonably believe that he was not free to walk away. To walk away from this encounter, Mr. Lewis, who was waiting for the bus to depart for his Richmond destination, would have had to stand up from his seat, work his way out of the narrow row in which he was situated, and then negotiate his way past Detective Hanson, who was positioned in the narrow exit aisle. In effect, he would have had to leave the bus, give up his seats, and lose his ability to travel to Richmond in accordance with his travel plans.

The *Fields* court found the *Bostick* and *Lewis* opinions disturbing, and the court was reluctant to effectuate "the gradual erosion of the [f]ourth [a]mendment." However, the eleventh circuit was bound by its previous decision in *United States v. Hammock*. In *Hammock*, the eleventh circuit had already examined the Broward County Sheriff's Office policy regarding random searches on buses. The court found that under the circumstances, the defendant would have felt free to leave the bus.

It would appear that given the totality of the circumstances, under current standards, a court would be justified in both finding there was a detention, and finding there was not a detention. The standards with which the courts are working are too vague. With *Bostick*, the Court will have an opportunity to redefine what is meant by "whether the reasonable person would have felt free to walk away."

65. *Id.* at 471-72.
67. *Fields*, 909 F.2d at 473 (quoting *Lewis*, 728 F. Supp. at 787)). *Lewis* has since been overruled. 921 F.2d 1294 (D.C. Cir. 1990). The circuit court distinguished the *Bostick* opinion on the basis that in *Lewis*, the officers did not wear badges or carry visible weapons. *Id.* at 1299.
68. 909 F.2d at 473.
70. *Fields*, 909 F.2d at 473.
IV. NARROWING THE SCOPE OF THE "VOLUNTARY ENCOUNTER"

The evidence in this cause has evoked images of other days, under other flags, when no man traveled his nation's roads or railways without fear of unwarranted interruption, by individuals who held temporary power in the Government. The spectre of American citizens being asked, by badge-wielding police, for identification, travel papers - in short a raison d'être - is foreign to any fair reading of the Constitution, and its guarantee of human liberties. This is not Hitler's Berlin, nor Stalin's Moscow, nor is it white supremacist South Africa. Yet in Broward County, Florida, these police officers approach every person on board buses and trains ('that time permits') and check identification, tickets, ask to search luggage - all in the name of 'voluntary cooperation' with law enforcement - to the shocking extent that just one officer, Damiano, admitted that during the previous nine months, he, himself, had searched in excess of three thousand bags! In the Court's opinion, the founders of the Republic would be thunderstruck.71

The Bostick court found that the government had "exceeded its power to interfere with the privacy of an individual citizen who is not even suspected of any criminal wrongdoing."72 In arriving at this conclusion, the court was acting on its fear that these "repressive measures, even to eliminate a clear evil, usually result only in repression more mindless and terrifying than the evil that prompted them."73 The Florida Supreme Court's decision seems to go beyond the facts of the Bostick case to fears regarding police conduct in general. However, the issue raised by Bostick is fact specific:

Whether two police officers violated the [f]ourth [a]mendment when, as a routine practice unprovoked by any suspicion, they boarded an interstate bus during a scheduled stop and, while the door to the bus was closed and one officer carried a pistol in his hand and partially blocked the aisle, questioned respondent and obtained permission to search his luggage.74

71. Bostick, 554 So. 2d at 1158 (quoting State v. Kerwick, 512 So. 2d 347 (Fla. 4th Dist. Ct. App. 1987)).
72. Id. at 1158.
73. Id. at 1159.
74. Brief for Respondent, supra note 1, at (i) (Question Presented).
The Supreme Court should go beyond the facts of Bostick, and address police conduct in general. The Court should not only clarify the differences between the “voluntary encounter” and the “Terry stop,” but also decrease the amount of police contact which would come within the scope of the “voluntary encounter.”

The Court needs to redefine what is meant by “whether the reasonable person would have felt free to walk away.” This standard, as applied now, seems to use the reasonable person who is looking at the set of circumstances, but is not experiencing them. For example, one can say that Bostick should have known that he did not have to answer the officers’ questions, and that he could have ignored them. The average law student or practitioner knows this; however, the average person traveling on a bus does not. Most people are brought up considering the law enforcement officer as an authority figure, and many see the officer as the law.

It is generally accepted that citizens rarely feel free to end an encounter initiated by a police officer and walk away. If taken literally, the test would make almost all police-citizen encounters seizures, eliminating the voluntary encounter. In the place of the true reasonable person, courts have constructed an artificial reasonable person, one who is much more assertive than the average citizen when encountering a police officer. In doing so, courts have described many situations as voluntary encounters, when in fact, the individual could not feel free to walk away.

The Court’s interpretation of the voluntary encounter does not take this view of the police officer into account. This is probably because there is an underlying attitude that the innocent person has nothing to fear. Indeed, courts have asked the question, “what a reasonable man, innocent of any crime, would have thought had he been in the defendant’s shoes.” Nonetheless, in deciding “whether a reasonable person would feel free to walk away,” courts must necessarily remem-

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75. “All he had to do was to literally say ‘no’ to the officers.” Palm Beach Post, February 26, 1991, at 3A, col. 5 (quoting Joan Fowler, Assistant Florida Attorney General).


77. Id.

ber the average person's awe of authority, whether reasonable or not. Anything beyond a cordial greeting can be intimidating.

This includes an officer's request for the individual's identification and bus ticket. Currently, the Court considers such a request as a "non-seizure." It is only when the officer does not promptly return the documents that he has seized the individual. However, the Court should define this intrusion into the citizen's privacy as a detention, and demand that the officer have reasonable suspicion. "It is simply wrong to suggest that a traveler feels free to walk away when he has been approached by individuals who have identified themselves as police officers and asked for, and received, his airline ticket and driver's license."81

Furthermore, courts should give greater weight to the area in which the contact takes place. A bus is a very small, often crowded, place. A reasonable person brought up to give deference to the police would not be comfortable refusing to answer questions while remaining in the continued presence of an officer in such tight confines.

In addition, if the passenger does move from his seat, he may be acting against his own interest. A "reasonable person would fear engaging in such a suspicious act as a sudden exit from a departing bus when he is being questioned by a police officer." Indeed, such abnormal behavior would raise the suspicion of any law enforcement official. In United States v. Lewis, the District of Columbia Circuit Court rejected such an argument because "it is clear that a mere refusal to cooperate cannot spawn the reasonable suspicion required to justify more intrusive police methods." Justified or not, the police officer's suspicion is raised, and the person avoiding questioning must pay the consequences:

If she [the passenger] gets off the bus, she has nowhere to go. If she nonetheless attempts to leave who will probably be stopped for further inquiry and confronted by dogs. If she refuses permission to search she may be confronted again by police at the next stop pursuant to police alert. She is without any practical option except to

79. See supra notes 61 and accompanying text.
80. Royer, 460 U.S. at 503.
81. Id. at 512 (Brennan, J., concurring in the result).
83. Id. at 495.
84. 921 F.2d 1294 (D.C. Cir. 1990).
85. Id. at 1300.
capitulate to police demands. She is, in a word, seized. And she is illegally seized because all of this occurred without any grounds for suspicion. 86

It follows that any time an officer requests consent to search a person's luggage, he is in effect detaining that individual. 87 In Schneckloth v. Bustamonte, 88 the Court recognized that a search pursuant to a valid consent is constitutionally permissible. In reaching this conclusion, it looked to a line of cases dealing with voluntary confessions. 89 The Court balanced the need for police questioning as a tool for the enforcement of criminal laws, with "society's deeply felt belief that criminal law cannot be used as an instrument of unfairness, and that the possibility of unfair and even brutal police tactics poses a real and serious threat to civilized notions of justice." 90 In applying this balance, it reached the conclusion that the government could present evidence resulting from a voluntary consent to search. 91 However, the state has the burden of proving that the consent was voluntarily given. 92

The Court did not specifically define "voluntary." Instead, it contrasted voluntary consent with "the result of duress or coercion, express or implied." 93 The Court held voluntariness to be a question of fact to be determined from all the circumstances. 94 But the same fears of in-
timidation apply to the voluntary consent as to the Terry stop. The fact that Officer Damanio was able to search over 3000 bags in nine months demonstrates the power of police intimidation.65 Once a person has been asked for consent to search his luggage, it is not likely he will feel “free to walk away.” At this point, a person should therefore be considered “seized,” and the police officer should at least be required to meet the “reasonable suspicion” standard required for the Terry stop.66

V. Conclusion

The Court would be correct in deciding that Bostick had been seized within the meaning of the fourth amendment. The two sheriff’s officers boarded the bus and asked him for his ticket and identification.97 They were wearing raid jackets which clearly identified them, and one of the officers had his hand on what appeared to be a gun.98 Who wouldn’t be intimidated? The Court can not possibly expect that a person with any respect for the law would reasonably “feel free to walk away.” The Court should find that Bostick was seized, and therefore require reasonable suspicion of the officers.

Even without a prior seizure, the Court should find that upon being asked to consent to a search of his luggage, Bostick was seized. The police were attempting to intrude into a private area, his luggage. Such an intrusion should not be permissible without reasonable suspicion. Only after reasonable suspicion has been proven should the Court look into the validity of the consent. In determining whether the consent was valid, the Court should look to the same set of circumstances involved in a seizure. The Court should examine the possibility of intimidation, even if the officer had no intention of coercing the citizen.

Although Broward County’s measures may not be as oppressive as those of Soviet Russia and South Africa, there is an unsettling resemblance. Intimidation is a powerful tool in authoritarian countries, but it

95. See supra note 71 and accompanying text.
96. See supra note 51 and accompanying text.
97. Bostick, 554 So. 2d at 1154.
98. Id. at 1157.
has no place in the United States. It is up to the United States Supreme Court to narrow the scope of voluntary encounters, and to protect the American citizen from these oppressive measures.

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