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## Commercial Law

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# 1980 DEVELOPMENTS IN FLORIDA LAW

## PART ONE

### Commercial Law

DANIEL E. MURRAY\*

*The author surveys and discusses recent decisions and legislation touching on all aspects of commercial practice in Florida. The survey covers such topics as the sale of goods, bulk sales, products liability, real property sales, shipping and warehousing, negotiable instruments, sureties and guarantors, mortgages, banks and banking, consumer protection, and security interests.*

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\* Professor of Law, University of Miami School of Law. This survey examines the Florida cases reported in volumes 373 through 387 of *The Southern Reporter, Second Series*, and Florida legislation enacted in 1980.

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## I. INTRODUCTION

This survey reviews and selectively criticizes all Florida cases and legislation arising under the Uniform Commercial Code (U.C.C.) and in areas outside of the U.C.C. but within commercial law practice.

## II. SALE OF GOODS

### A. Venue

Two recent cases leave Florida's venue rules untouched. In *Speedling, Inc. v. Krig*,<sup>1</sup> the District Court of Appeal, Second District, held that venue was proper in Hillsborough County because the seller's business was located there and the seller had failed to perform there. In that case, there was no basis for the buyer's claim that venue should have been in the county of his residence. Then, in a case decided in 1980 in which the contract was silent on where the buyer should make payment, an appellate court refused to upset the seller's choice of county for venue purposes in the absence of an express provision that the buyer should have made payment in another county.<sup>2</sup>

### B. Remedies

Buyers in Florida must meet certain prerequisites of reasonable notification for inspection of defective goods<sup>3</sup> and timely notification of breach<sup>4</sup> to have a remedy for breach of contract. In a recent case on this point, a grocery retailer destroyed defective canned goods, gave notice of the defect to the seller, and then sued the seller for breach of warranty.<sup>5</sup> The court barred the retailer's suit because he had given the seller no opportunity to inspect or test the destroyed goods; the court gave no weight to an out-of-state agency's finding that the goods were defective.

Another recent case held that to have a valid suit for overpayment, a debtor in Florida must seasonably object to an incorrect billing for goods purchased.<sup>6</sup> Five years after the purchase is not a reasonable time within which to object.

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1. 378 So. 2d 57 (Fla. 2d DCA 1979).

2. *Sheffield Steel Prods., Inc. v. Powell Bros.*, 385 So. 2d 161 (Fla. 5th DCA 1980).

3. FLA. STAT. § 672.515(1) (1979).

4. *Id.* § 672.607(3)(a) (1979).

5. *General Matters, Inc. v. Paramount Canning Co.*, 382 So. 2d 1262 (Fla. 2d DCA 1980).

6. *Dudas v. Dade County*, 385 So. 2d 1144 (Fla. 3d DCA 1980).

### C. *Parol Evidence Rule*

Although the parol evidence rule prevents parol testimony to vary, modify, or contradict a valid written contract, the parol evidence rule should not bar oral testimony on the terms of an alleged contract, if the issue in a case is whether or not there is in fact a contract.<sup>7</sup>

### D. *Buyer in Ordinary Course of Business*

The purpose of section 2-403 of the U.C.C. is to protect sales to buyers in the ordinary course of business.<sup>8</sup> The District Court of Appeal, Fourth District, gave a most liberal, but erroneous, interpretation to this section in a case decided in 1979. In *Carlsen v. Rivera*,<sup>9</sup> a Canadian auto leasing company leased one of its cars in Canada to a local car dealer, McEnroe. The lease was made out in the car dealer's individual name, and it included his home address rather than his business address. The car dealer obtained a fraudulent paper title to the car and then sold it to a rental agency, Expo, in Florida. Expo sold the car to a car dealer, Marlin Imports, which sold it to an individual purchaser, Carlsen, in Florida. The appellate court held that the lessor had entrusted the lessee, McEnroe, with possession of the car and that despite the form of the lease, the lessee was a merchant who dealt in goods of the kind. Thus far, the court's analysis was correct. But then the court got lost in its own rhetoric:

Should the result be any different because of the existence of intervening sales? We think not. Carlsen purchased the automobile from Marlin Imports, Inc., which was engaged in the business of selling automobiles. Carlsen had no notice of any defect in the title and in fact obtained a title certificate. Under these circumstances, Carlsen was clearly a buyer in the ordinary course of business. In pre-Code language, McEnroe conveyed voidable title to Expo, who conveyed voidable title to Marlin, who conveyed voidable title to Carlsen, a bona fide purchaser for value without notice. The Uniform Commercial Code does not change the result. The buyer in the ordinary course of business obtains good title by virtue of Subsection 2 of Section 672.403, Florida Statutes (1977).<sup>10</sup>

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7. *Deal Farms, Inc. v. Farms & Ranch Supply, Inc.*, 382 So. 2d 888 (Fla. 1st DCA 1980).

8. FLA. STAT. § 672.403 (1979).

9. 382 So. 2d 825 (Fla. 4th DCA 1980).

10. *Id.* at 827.

The court is quite wrong about pre-Code law. There could have been a string of 1,000 bona fide purchasers ending with the ultimate buyer and he would not have acquired good title. Under pre-Code law, a voidable title could not ripen into a good title merely as a result of a transfer to a bona fide purchaser. Secondly, the court is wrong in its assumption that for good title to pass to Carlsen, the car dealer (Marlin) had to be a merchant, and the ultimate buyer (Carlsen) had to be a buyer in the ordinary course. Section 2-403 deals with a buyer who buys, in the ordinary course of business from a merchant, goods entrusted to that merchant by the owner. In this case, the owner did not entrust Marlin with the car; hence, section 2-403 had no direct application to the Marlin-Carlsen transaction. The correct analysis is that the ultimate buyer got perfect title because the entrustee (McEnroe) gave perfect title to the car rental agency (Expo), if the agency acted in good faith and purchased the car for value. Expo passed perfect title to Marlin, which then conveyed perfect title to Carlsen, the ultimate buyer. Thus, the court arrived at the right result in spite of its incorrect analysis of section 2-403 and the facts of the case.

#### E. *De Facto Corporate Sellers and Buyers*

De facto status does not shield corporate sellers and buyers from personal liability when there is fraud or intentional misuse of corporate status in a transaction. A case in point is *Nessim v. DeLoache*.<sup>11</sup> In that case, the state dissolved a seller-corporation for nonpayment of its delinquent taxes. This involuntary dissolution occurred before the closing of a sale of goods. Although the corporation regained legal status after the sale, the court held the president and sole stockholder of the corporation personally liable under section 607.271(5) of the Florida Statutes (1979) for any alleged fraudulent representations about the quality of the goods sold. Furthermore, the court reasoned that the corporate seller could not avoid liability by hiring a broker who allegedly misrepresented the quality of the goods, even if the seller did not authorize or know about the misrepresentations.

Another case took a similar approach in holding the president of a firm personally liable for the price of goods purchased in the corporate name. In *Mobil Oil Corp. v. Thoss*,<sup>12</sup> the state had dissolved the corporation by the time of purchase, but later reinstated

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11. 384 So. 2d 1341 (Fla. 3d DCA 1980).

12. 385 So. 2d 726 (Fla. 5th DCA 1980).

it. The court stressed that its interpretation of section 607.397 of the Florida Statutes (1979) imposed liability only on officers who apparently acted for the corporation and who should have known of the corporation's dissolution. The court rejected the reasoning of *Futch v. Southern Stores, Inc.*,<sup>13</sup> which had held that officers are not personally liable unless the person dealing with the corporation demonstrates his reliance on the personal assets of the officers.

### F. Damages

The general measure of damages for breach of warranty under section 2-714 of the U.C.C.<sup>14</sup> is the difference at the time of acceptance between "the value of the goods accepted and the value they would have had if they had been as warranted."<sup>15</sup>

In *Bill Branch Chevrolet, Inc. v. Redmond*,<sup>16</sup> an appellate court applied this section of the Code to a breach of warranty of title. From the incomplete statement of facts in the case, it appears that a purported salesman of a car dealer sold one of the dealer's cars for \$1,000 less than its marked price. The buyer gave the "salesman" a \$1,000 cash deposit and the balance of \$5,200 when the "salesman" delivered the car. One month later, when the buyer asked for his car title, the dealer's employees informed him that he should consult the dealer's insurance company, since they had earlier reported the car stolen. The buyer could not obtain proper title and registration, so he sued the dealer for breach of warranty of title under section 2-312 of the U.C.C.<sup>17</sup> At trial, the buyer failed to show the difference between the value of the car as accepted and the value it would have had as warranted, the measure of damages under section 2-714(2) of the U.C.C.<sup>18</sup> But he did testify about monetary loss resulting from his inability to drive an unregistered car and his unsuccessful attempts to get a title certificate. The jury awarded him \$2,500 compensatory and \$7,000 punitive damages. The appellate court properly reversed the punitive damage award because this case was a simple breach of warranty, unaccompanied by any tort. The result of the appellate decision was that the buyer received \$2,500 instead of the \$6,200 he paid for the car. If there

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13. 380 So. 2d 444 (Fla. 1st DCA 1979).

14. FLA. STAT. § 672.714 (1979).

15. *Id.* § 672.714(2).

16. 378 So. 2d 319 (Fla. 2d DCA 1980).

17. FLA. STAT. § 672.312 (1979).

18. *Id.* § 672.714(2).

was indeed a total breach of warranty of title, the difference between the value of the car as accepted and the value it would have had with proper title should have been the total amount paid, because a car that cannot be registered has a zero value. Thus the trial court should have awarded \$6,200.

In a case decided in 1979, the District Court of Appeal, Fourth District, properly awarded damages for lost profits to an aggrieved buyer for a seller's failure to deliver units specified by the contract, but rested its decision only on a case involving no sale of goods and on *Florida Jurisprudence*.<sup>19</sup> The court seemed unaware that the Florida Statutes (the U.C.C.) covered this issue. Damages for lost profits are within the scope of section 2-713(1) of the U.C.C.,<sup>20</sup> which provides that when the seller is in breach the measure of damages is the difference between the market price at the time the buyer learned of the breach and the contract price, together with any incidental and consequential damages.

An appellate court took an interesting approach to the measurement of damages under section 2-714 of the U.C.C.<sup>21</sup> in *Adam Metal Supply, Inc. v. Electrode, Inc.*<sup>22</sup> A contract called for shipment of a particular kind of aluminum sheeting; the buyer discovered after shearing the aluminum that it was not the kind specified in the contract. The buyer promptly notified the seller of the improper aluminum and, in the meantime, used forty percent of it to manufacture goods. The purchaser of the finished goods then refused to take any more goods manufactured with this aluminum. The seller sued the buyer for the price. The trial court allowed the seller to retrieve the unused aluminum (sixty percent) and denied any other relief because it concluded that the buyer was entitled to a setoff of the full amount of the price of the aluminum. The appellate court reversed, holding that while the seller was entitled to its price, the buyer was entitled only to damages for breach of warranty measured by the difference between the value of the aluminum as accepted and its value as warranted. The buyer had accepted and used forty percent of the aluminum but failed to show that its value was less than the contract price. Therefore, the ap-

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19. *Shidiam Corp. v. M & D Research Corp.*, 374 So. 2d 553 (Fla. 4th DCA 1979).

20. FLA. STAT. § 672.713(1) (1979).

21. *Id.* § 672.714.

22. 386 So. 2d 1316 (Fla. 2d DCA 1980). See *Mikanto Constr. Corp. v. Dade County*, 379 So. 2d 138 (Fla. 3d DCA 1980) (when the un rebutted evidence shows that a buyer has paid a certain portion of the sales price it is reversible error for the trial court to fail to set off this sum against the total sales price).



pellate court allowed the buyer a setoff of sixty percent against the seller's right to the sales price. In addition, because the buyer proved that it had incurred shearing costs of \$200 before it discovered the seller's breach, the appellate court awarded the buyer a setoff of sixty percent of the shearing costs as incidental damages.

The case of *Tuttle/White Constructors, Inc. v. Montgomery Elevator Co.*<sup>23</sup> evidences the willingness of Florida courts to permit setoff claims against potential damage awards. In that case, a subcontractor sued a contractor who pleaded an affirmative defense of setoff for the subcontractor's delay in installing an elevator. The District Court of Appeal, Fifth District, allowed the setoff claim even though other subcontractors may have contributed to the delay and the general contractor could not show the proportionate liabilities of the subcontractors.

### G. Punitive Damages

Generally, punitive damages are not appropriate in an action for breach of contract unless the breach also constitutes a tort.<sup>24</sup> Even then, the defendant must have committed the tort with "malice, moral turpitude, wantonness or outrageousness."<sup>25</sup>

Pleading indicia of breach alone is insufficient to warrant an award of punitive damages. In *Overseas Equipment Co. v. Aceros Arquitectonicos*,<sup>26</sup> the buyer failed to establish an action in tort for conversion, even though the buyer alleged the seller's refusal to deliver all the goods under a contract, the seller's partial delivery of nonconforming goods, and the seller's refusal to return any part of the purchase price. With no compensatory award for tort, the court held there could be no punitive damages at all.

The case of *Hauser Motor Co. v. Byrd*<sup>27</sup> reiterates the rule that a compensatory award is necessary to support a punitive award. The undisputed facts showed that a car dealer had set back the odometer of a used car. In the buyer's action against the dealer under the Florida Deceptive and Unfair Trade Practices Act,<sup>28</sup> the jury awarded punitive damages without a compensatory award. The trial court granted a new trial and the appellate court affirmed that decision, even though the trial court had not articulated rea-

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23. 385 So. 2d 98 (Fla. 5th DCA 1980).

24. *Griffith v. Shamrock Village, Inc.*, 94 So. 2d 854 (Fla. 1957).

25. *Greer v. Williams*, 375 So. 2d 333, 334 (Fla. 3d DCA 1979).

26. 374 So. 2d 537 (Fla. 3d DCA 1979).

27. 377 So. 2d 773 (Fla. 4th DCA 1980).

28. FLA. STAT. § 501.201 (1979).

sons for the new trial.

When a breach of contract involves an intentional and fraudulent misrepresentation, however, punitive damages are appropriate. For example, in a 1979 case, the facts indicated that the buyer never intended to pay for the goods, and that he intended to resist payment "on spurious grounds."<sup>29</sup> The court ruled that the seller was entitled to both compensatory and punitive damages.

In another case, a jury awarded punitive damages under a count in quasi-contract for restitution as well as under a count in tort for fraudulent misrepresentation.<sup>30</sup> Because the sellers had intentionally and fraudulently misrepresented the weight of several loads of corn, the buyers had paid more than called for by the contract. This case has dubious precedential value, because the losing party failed to object to the jury instructions on punitive damages, and the judge submitted to the jury a general rather than a special verdict.

#### H. Tort Liability

In four recent decisions, the Florida courts dealt with the relationship between tortious conduct and the enforceability of contracts. In *Bill Terry's Inc. v. Westside Auto Radio, Inc.*,<sup>31</sup> the District Court of Appeal, First District, held that an alleged buyer of goods was liable for the purchase price of goods he had never ordered. Thieves had stolen the buyer's purchase orders and the buyer, who knew of the theft, did not inform the seller. In the past, the buyer had not required verification of the propriety of his purchase orders. In this case, the negligence of the alleged buyer was the direct cause of the seller's loss.

Another case touching on causation concluded that if direct interference with a contract is the cause of a contracting party's loss, that party may sue for tortious interference even though the contractual obligation is totally unenforceable.<sup>32</sup> Then, in *Ethyl Corp. v. Balter*,<sup>33</sup> an appellate court outlined the parameters of a

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29. *Gottsch v. Walker*, 376 So. 2d 879, 880 (Fla. 1st DCA 1979).

30. *Johnson v. Lasher Milling Co.*, 379 So. 2d 1048 (Fla. 1st DCA 1980).

31. 376 So. 2d 890 (Fla. 1st DCA 1979).

32. *United Yacht Brokers, Inc. v. Gillespie*, 377 So. 2d 668 (Fla. 1979).

33. *Ethyl Corp. v. Balter*, 386 So. 2d 1220, 1223-25 (Fla. 3d DCA 1980). In a companion case, the Third District held that an attorney involved in contract negotiations might have tortiously interfered with the withdrawal of one of the parties. Even if the contract in question was not legally enforceable, the parties would have honored their obligations if the attorney had not interfered. *Scussel v. Balter*, 386 So. 2d 1227 (Fla. 3d DCA 1980).

suit for tortious interference with a contractual relationship. A court cannot sustain a jury's finding of a tortious interference with a contractual relationship when the facts show that: (a) there was a total lack of direct interference between the defendant and the contracting parties; (b) the defendant's alleged interference did not invade any individual rights of the contracting parties; (c) the defendant was, in effect, a beneficiary of the contract; (d) the defendant was privileged to act the way it did to safeguard its own financial interests; and (e) despite any alleged illegality of the defendant's acts, the plaintiff based his interference claim merely on the malice or ill-will of the defendant's employees toward him.

A contract based on fraud and deceit is unenforceable and rescindable. Another recent Third District case points out that when a contracting party brings suit for damages instead of for rescission, the parties' expectation that the contract is enforceable warrants its total enforcement.<sup>34</sup> In that case, the plaintiffs sued for breach of a contract that provided for arbitration under Florida law. The court compelled enforcement of the arbitration clause because by suing for damages, the plaintiffs had affirmed all the terms of the contract.

### I. *Exculpatory Clauses*

In upholding a wordy exculpatory clause, the District Court of Appeal, Fourth District, recently demonstrated the benefits of precision in contract draftsmanship.<sup>35</sup> The clause at issue exculpated a burglar alarm company for any loss arising out of its negligence in installing and operating the system. The court found a clear intention to exonerate the company from its own negligence. The decision is correct so long as it is confined to the negligence counts of the complaint. Since the complaint also alleged breaches of implied

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34. *Vic Potamkin Chevrolet, Inc. v. Bloom*, 386 So. 2d 286 (Fla. 3d DCA 1980).

35. *L. Luria & Son, Inc. ex rel. Firemen's Fund Ins. Co. v. Alarmtec Int'l Corp.*, 384 So. 2d 947 (Fla. 4th DCA 1980). See *Borrell-Bigsby Elec. Co. v. United Nations, Inc.*, 385 So. 2d 713 (Fla. 2d DCA 1980), holding that a fire alarm installer was not liable for a breach of warranty for a fire loss simply because the alarm system did not have an external or emergency power source for sounding the alarm in the event of a power loss. In addition, the court noted that there was un rebutted testimony that an arsonist had caused the fire and that this testimony supported an inference that the arsonist had damaged the alarm; the evidence did not show that the installer's breach of warranty had caused the loss. The court did not reach the question whether the installer of a fire alarm should be liable for a breach of warranty in the same way that an installer of a burglar alarm system should be liable for a burglary loss resulting from a defective alarm system. *Id.* at 714 n.2. The court stated, however, that it perceived no difference in principle between a burglar alarm and a fire alarm regarding liability for a defect.

warranties, the result seems questionable because there is no indication that the clause explicitly disclaimed the implied warranty of merchantability in conspicuous print as required by section 2-316 of the U.C.C.<sup>36</sup>

### J. Statutory Interpretation

A recent case decided under section 501.204 of the Florida Statutes (1979) held that a franchisee has no cause of action against a franchisor for unfair trade practices unless he shows that the franchisor's acts caused his injury. If the franchisee knew that some of the franchisor's statements were false, a jury could find that the statements did not cause any loss alleged by the franchisee, because the franchisor had not deceived him.<sup>37</sup>

A Florida court recently interpreted section 212.06(5)(a) of the Florida Statutes (1979) to mean that a dealer's expectation of the ultimate destination of his product determines sales tax consequences. Thus, if a Florida seller sells goods "F.O.B. [a foreign state]" and delivers them to a common carrier under this F.O.B. arrangement, or delivers goods to a licensed exporter for export to a foreign country, then Florida sales taxes are not payable.<sup>38</sup>

### III. BULK SALES

Article 9 of the U.C.C. entitles secured creditors to preference in the distribution of sales proceeds from the bulk sale of a business when the proceeds are insufficient to pay both secured and unsecured creditors in full.<sup>39</sup> Section 6-106(4) of the U.C.C.<sup>40</sup> requires pro rata payment of all the debts of the vendor; read in conjunction with Article 9, this section allows for the priority of secured creditors over any pro rata distribution.<sup>41</sup>

The protection afforded a bulk sales creditor under Article 6 of the Code depends on the satisfaction of the seller's due process rights. The recent case of *B & B Drugs St. Petersburg, Inc. v. McKesson & Robbins Drug Co.*<sup>42</sup> illustrates this constitutional limitation. In *B & B Drugs*, the seller, Kasper, had a security interest in

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36. FLA. STAT. § 672.316 (1979).

37. *Chicken Unlimited, Inc. v. Bockover*, 374 So. 2d 96 (Fla. 2d DCA 1979).

38. *Linder Indus. Mach. Co. v. Berry*, 385 So. 2d 742 (Fla. 2d DCA 1980). For an excellent literal interpretation of the statute, see Judge Campbell's dissent. *Id.* at 745.

39. *Huguelet v. M & M Assoc., Inc.*, 375 So. 2d 1150 (Fla. 4th DCA 1979).

40. FLA. STAT. § 676.106(4) (1979).

41. *Huguelet v. M & M Assoc., Inc.*, 375 So. 2d 1150; see FLA. STAT. § 679.306(2) (1979).

42. 380 So. 2d 1307 (Fla. 2d DCA 1980).

the inventory of Acorn Drugs. Kasper foreclosed and sold the inventory of Acorn to B & B Holding, which gave back a purchase money note and security agreement. B & B Holding then sold the inventory to B & B Drugs. Later, McKesson & Robbins obtained a judgment against Acorn; the judgment went unsatisfied. McKesson brought supplementary proceedings, and the trial court invalidated the sales between Kasper and B & B Holding and between B & B Holding and B & B Drugs on the ground that Acorn designed the sales to defraud its creditor, McKesson. Unfortunately for McKesson, Kasper was never served with process and never appeared in the proceedings. The appellate court held that the invalidation of the sale between Kasper and B & B Holding was unconstitutional because it would deprive Kasper of a property right—the collection of his note and security agreement—without due process.

In another case dealing with the issue of fraudulent bulk sales, the District Court of Appeal, Fourth District, indicated that a court should not deny a buyer all relief just because the requested relief is impossible.<sup>43</sup> In that recent case, the court stated that when a court cannot restore the status quo by rescinding a fraudulent sale of a going business (including inventory), the court should either award the buyer damages against the seller or award a setoff against the purchase money note and mortgage held by the seller. It is reversible error for the court to refuse to award any penalty against the buyer for failure to make payments on his note and mortgage.

#### IV. PRODUCTS LIABILITY

##### A. *Express Warranties, Strict Liability, and Negligence*

In 1980, the Florida courts continued to seek ways to impose liability on manufacturers of products causing injury to Florida consumers. The courts grounded liability on warranty, strict liability, and negligence. The District Court of Appeal, Third District, addressed the problem of a manufacturer's liability under warranty for the negligent assembly of a product by its franchised dealer.<sup>44</sup> In that case, the front wheel of a bicycle hit a bump and fell off, resulting in injury to the rider. The appellate court concluded that the trial court erred in directing a verdict for the retail

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43. *Vinyl Repair Serv., Inc. v. Menzel*, 385 So. 2d 1055 (Fla. 4th DCA 1980). For a case articulating the badges of a fraudulent sale of a business under § 726.01 of the Florida Statutes (1979), see *Stephens v. Kies Oil Co.*, 386 So. 2d 1289 (Fla. 3d DCA 1980).

44. *Caporale v. Raleigh Indus. of America, Inc.*, 382 So. 2d 849 (Fla. 3d DCA 1980).

dealer and the manufacturer, because expert testimony showed that the wheel would not have fallen off if the dealer had properly assembled the bicycle. Additionally, the court noted that the manufacturer warranted its bicycles to be free of any defects in material and workmanship, and that warranty extended to the full assembly of the bicycle. The court therefore held that the manufacturer would be liable if a jury found the dealer's assembly improper.

Applying the specialized rules on automobile manufacturer liability, the District Court of Appeal, Fourth District, considered a "second collision" (between a passenger and his vehicle) or "crash-worthy vehicle" case. In that decision in 1979,<sup>45</sup> the court held that the strict liability rule of *West v. Caterpillar Tractor Co.*<sup>46</sup> had overruled the holding of *Ford Motor Co. v. Evancho*<sup>47</sup> that an auto manufacturer's liability derives from a duty of reasonable care under ordinary negligence principles. The court, however, certified the question to the Supreme Court of Florida.

Two cases resolved that a plaintiff's knowledge of the potential danger in a product will not preclude his later negligence claim against the manufacturer. In one case, the court held the manufacturer of a forklift liable for a driver's injuries because the lift had no bumper or other device to safeguard the driver's feet during a collision.<sup>48</sup> The court concluded that the driver's knowledge of a similar accident involving a fellow worker did not bar the driver's negligence action, but might constitute a partial defense under comparative negligence theory. Similarly, the District Court of Appeal, First District, ruled that even if the plaintiff had knowledge of an obvious danger, that knowledge would not defeat his subsequent suit for negligence.<sup>49</sup> The court also held that the trial court erred in refusing to allow the plaintiff's expert witness to testify about the ineffectiveness of a remedial measure employed by the defendant. The court noted that although evidence of post-accident remedies is inadmissible to show a pre-existing danger, it is permissible to rebut the defendant's testimony that no changes in the product were necessary.

When two manufacturers assemble a finished product that causes an injury, a court may not find joint liability unless each

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45. *Ford Motor Co. v. Hill*, 381 So. 2d 249 (Fla. 4th DCA 1979).

46. 336 So. 2d 80 (Fla. 1976).

47. 327 So. 2d 201 (Fla. 1976).

48. *Martinez v. Clark Equip. Co.*, 382 So. 2d 878 (Fla. 3d DCA 1980).

49. *Hethcoat v. Chevron Oil Co.*, 383 So. 2d 931 (Fla. 1st DCA 1980).

manufacturer was negligent. In the case of *Shelton v. Wisconsin Motor Corp.*,<sup>50</sup> a lawnmower manufacturer installed a large gasoline engine made by another manufacturer, so that its rope starter was dangerous to the user and injured his eye. The court correctly ruled that although it was not negligence as a matter of law to install a rope-starting engine, a jury could find that the lawnmower manufacturer had negligently created a dangerous condition. In this case, the engine manufacturer was not liable because there was no design defect in the engine.

The issue of release from joint liability arose in a case decided in 1979, in which an insured released his fire insurer and "any other person [or] corporation . . . charged with responsibility for injuries to the . . . property of the" insured.<sup>51</sup> The court held that the release did not apply to a contractor who allegedly caused a fire loss by negligently installing heating and cooling equipment on the insured's property. The court reasoned that the insurer and contractor were not joint tortfeasors; thus, the contractor was liable for his own negligence.

A plaintiff sued on an unsuccessful but interesting negligence theory in one case reviewed in 1980 by the District Court of Appeal, Fourth District. The case represents an attempted extension of the foreseeability requirement in negligence actions. The defendant was a tire merchant who improperly placed a customer's spare tire upside down in her automobile trunk. The tire rattled and the customer tried to remove the tire. Unfortunately, she suffered a hernia while attempting to do so. The court held that the hernia was not foreseeably connected to the installation of the tire and that the seller was not negligent.<sup>52</sup>

The doctrine of foreseeability took a strange twist in *Kikis v. Ford Motor Co.*<sup>53</sup> In *Kikis*, a motorist was changing a flat tire when the hubcap flew off and the motorist caught it in mid-air. The motorist's fingers slid into a port hole in the hubcap and its rough edges cut the tendons and muscles in two fingers. The jury and the appellate court agreed that an injury of this nature was a likely

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50. 382 So. 2d 1270 (Fla. 3d DCA 1980).

51. *Newsome v. Finch*, 375 So. 2d 1144, 1145 (Fla. 1st DCA 1979).

52. *Firestone Tire & Rubber Co. v. Lippincott*, 383 So. 2d 1181 (Fla. 4th DCA 1980). See *Hurd v. Munford, Inc.*, 378 So. 2d 86 (Fla. 1st DCA 1979), in which Judge Ervin, concurring in part and dissenting in part, stated that a retail gasoline dealer may be liable under breach of warranty and strict liability theories if he permits a customer to fill a plastic milk container with gasoline, and the gasoline later spills from the container, igniting and injuring the customer.

53. 386 So. 2d 306 (Fla. 5th DCA 1980).

result of the sharp edges in the hubcap. The injury was foreseeable; therefore, the manufacturer was liable for its negligence.

Another recent case exemplifies the difficulty of resolving the question of a manufacturer's negligence as a matter of law. In *Hefernan v. Consolidated Aluminum, Inc.*,<sup>54</sup> the court held that the trial court erred in entering a summary judgment for the manufacturer of a ladder that allegedly failed to grip an asphalt surface properly. The only evidence submitted by the manufacturer was the ladder's accident-free record from other users. The court found that the evidence conclusively showed the ladder owner free of negligence, but the manufacturer's proof was inconclusive on the issue of negligence in designing and making the ladder.

### B. Statute of Limitations

Two cases touched on issues under the statute of limitations. In a case decided in 1979, the District Court of Appeal, Third District, found that the facts fell within a broad four-year statute of limitations rather than the two-year medical malpractice statute.<sup>55</sup> In that case, a paid blood donor contracted hepatitis allegedly from a blood laboratory's negligence in extracting blood. The court reasoned that since the donor was neither a patient nor the recipient of medical services by a "health care provider,"<sup>56</sup> section 95.11(4)(b) of the Florida Statutes (1979) did not apply to him. Instead, the court viewed him as a mere vendor of blood and applied the general four-year limitation of section 95.11(3)(a) to his action for negligence.

The Supreme Court of Florida has upheld the constitutionality of section 95.11(3)(c) of the Florida Statutes (1979), which provides that an action for products liability must commence within twelve years of delivery to the original purchaser regardless of the date when the purchaser discovered the defect. In *Purk v. Federal Press Co.*,<sup>57</sup> a punch press delivered in 1961 injured a worker before the statute took effect. The worker challenged the statute on access-to-court principles. The court based its decision on the statute's one-year saving clause that permitted the plaintiff to sue as late as January 1, 1976, for her injury of April 24, 1973. From

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54. 387 So. 2d 515 (Fla. 4th DCA 1980). But see *Tschudy v. Firestone Tire & Rubber Co.*, 378 So. 2d 56 (Fla. 4th DCA 1980), upholding a trial court's directed verdict that Firestone had no duty to warn against making certain kinds of repairs to its tires.

55. *Durden v. American Hosp. Supply Corp.*, 375 So. 2d 1096 (Fla. 3d DCA 1979).

56. *Id.* at 1099.

57. 387 So. 2d 354 (Fla. 1980).



the tenor of the decision and in light of *Overland Construction Co. v. Sirmons*,<sup>58</sup> the court will probably invalidate this section of the statute in any case in which it would absolutely bar an action before the plaintiff suffered injury.

### C. Indemnification

It is a well-established general rule that a court will not construe a contract of indemnity to require a user, lessee, or bailee of chattels to indemnify its supplier against the supplier's own negligence unless expressly provided by the contract. The Supreme Court of Florida followed this rule in a case decided in 1979,<sup>59</sup> in which the court also extended the indemnity rule to cases of joint indemnity.

In another case in 1979, the Supreme Court of Florida considered whether the manufacturer of a product could seek indemnity against the product's purchaser.<sup>60</sup> The court held that for a manufacturer to have a common law right of indemnity against a purchaser whose employee is killed by either a manufacturing defect or the purchaser's improper use, the manufacturer must prove itself completely faultless. The manufacturer must also show that all the fault lies with the purchaser. Furthermore, the trial court will not weigh the degrees of fault between the manufacturer and the purchaser.

A number of factors may affect the availability of indemnity in a particular set of circumstances. In one case decided in 1979, an appellate court held that the active negligence of a lessor of a mobile scaffold prevented his recovery under a theory of common law indemnity.<sup>61</sup> In that case, a Florida statute<sup>62</sup> also prevented the lessor's recovery even though the lessor asserted that the building's general contractor had agreed to indemnify the lessor for the lessor's own negligence. The statute invalidates this type of indemnity agreement in construction contracts unless the agreement

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58. 369 So. 2d 572 (Fla. 1979); see notes 76-77 and accompanying text *infra*.

59. *Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equip. Co.*, 374 So. 2d 487 (Fla. 1979), *aff'g in part and rev'g in part* *Spring Lock Scaffolding Rental Equip. Co. v. Charles Poe Masonry, Inc.*, 358 So. 2d 84 (Fla. 3d DCA 1978).

60. *Houdaille Indus., Inc. v. Edwards*, 374 So. 2d 490 (Fla. 1979), *rev'g* *Home Indem. Co. v. Edwards*, 360 So. 2d 1112 (Fla. 1st DCA 1979); see *Florida Power & Light Co. v. Schauer*, 374 So. 2d 1159 (Fla. 4th DCA 1979). For a fuller discussion of the *Houdaille* case, see Chesrow, Howard, & Howard, *Fault and Equity: Implied Indemnity After Houdaille*, 34 U. MIAMI L. REV. 727 (1980).

61. *A-T-O, Inc. v. Garcia*, 374 So. 2d 533 (Fla. 3d DCA 1979).

62. FLA. STAT. § 725.06 (1979).

places a monetary limit on the indemnification and the agreement is part of the project specifications or bid documents, or the indemnitee gives the indemnitor specific consideration as provided in the contract.<sup>63</sup>

The District Court of Appeal, First District, recently addressed the question whether a manufacturer has a duty to indemnify a retailer for the retailer's attorney's fees in defending a products liability suit by a consumer. The court held that although the retailer had won a summary judgment in the consumer's suit, the retailer had no indemnity claim, without a contract with the manufacturer providing for legal fees. The court stated that it knew of "no theory upon which it can be said that a manufacturer has a duty, absent an express contract, to insulate its retailers from unproven claims of dissatisfied customers."<sup>64</sup>

#### D. *Liability of a Manufacturer's Successor*

In a development in 1980, the District Court of Appeal, Third District, followed a general rule concerning the liability of a successor corporation for a manufacturer's defective products. The court held that an injured consumer may not impose liability upon the manufacturer's successor when there is no proof that the successor impliedly or expressly assumed the debts of the manufacturer and when the manufacturer demonstrably "is still a viable, ongoing entity, amenable to personal service and financially responsible."<sup>65</sup>

### V. REAL PROPERTY SALES

#### A. *Express Warranties*

Two recent cases illustrate the Florida courts' literal interpretation of the scope of express warranties to protect buyers without overstepping contractual bounds. In *Campbell v. Rawls*,<sup>66</sup> the sales contract provided: "Seller warrants air conditioning and heating systems . . . to be in working order at time of Closing. Buyer, at his expense, may inspect such systems 3 days prior to Closing, and

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63. *Id.*

64. *Maple Chair Co. v. W.S. Badcock Corp.*, 385 So. 2d 1036, 1038 (Fla. 1st DCA 1980). See *Old Dominion Iron & Steel Corp. v. Maryland Cas. Co.*, 374 So. 2d 57 (Fla. 1st DCA 1979), which held that a manufacturer had a contractual duty to indemnify an insurer for any loss incurred as the result of the insurer's negligence in inspecting the manufacturer's products.

65. *Kinsler v. Rohm Tool Corp.*, 386 So. 2d 1280, 1281 (Fla. 3d DCA 1980).

66. 381 So. 2d 744 (Fla. 1st DCA 1980).

in the event discrepancies exist, Seller will repair at Seller's expense."<sup>67</sup> Although covenants normally merge in the deed at closing, the court in *Campbell* concluded that the express warranty was an independent covenant that did not merge in the deed and survived the closing. In assessing damages for the buyer, however, the court carefully adhered to the literal wording of the clause and ordered that the seller owed the buyer the cost of putting the air conditioning and heating systems in working order.

When a condominium developer gives an express warranty, no matter how limited, he does not avoid implied warranties without an express disclaimer. The District Court of Appeal, Fourth District, followed this rule in *Rapallo South, Inc. v. Jack Taylor Development Corp.*<sup>68</sup> and held that a buyer could sue a developer for breach of implied warranties not expressly disclaimed in a written express warranty.

### B. Negligence

When lack of privity bars an action by condominium purchasers for breach of implied warranties of habitability, the remote purchasers may still sue the builder for negligence. In *Parliament Towers Condominium v. Parliament House Realty, Inc.*,<sup>69</sup> the District Court of Appeal, Fourth District, held that the damages caused by the negligence of the builder and architect were reasonably foreseeable and consequently actionable.

Although the court in *Parliament* focused on the issue of foreseeability, the District Court of Appeal, Second District, in a similar decision, concentrated on the question of a manufacturer's duty running to a remote purchaser.<sup>70</sup> The Second District found that a school board could sue for damages caused by defective roofing materials if there was "a duty between the parties independent of the contract."<sup>71</sup>

These decisions do not indicate that Florida courts will always strain to find the existence of a duty that overcomes the absence of privity of contract. The case of *Petty v. Houston Homes, Inc.*<sup>72</sup> expresses the view that a building contractor's liability is not eternal.

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67. *Id.* at 745.

68. 375 So. 2d 587 (Fla. 4th DCA 1979).

69. 377 So. 2d 976 (Fla. 4th DCA 1980).

70. *Highlands County School Bd. v. K.D. Hedin Constr., Inc.*, 382 So. 2d 90 (Fla. 2d DCA 1980).

71. *Id.* at 91.

72. 386 So. 2d 276 (Fla. 1st DCA 1980).

A contractor employed a termite exterminating company during the construction of a house. The exterminator agreed to treat the property for subterranean termites for a period of five years without cost to the owner, despite any change of ownership. Two years after the contractor sold the house, the new owner called the exterminator to treat the house for termites. Alleging that the poisons used by the exterminator caused the death of his minor child, the homeowner sued the contractor for the exterminator's negligence. The court held that because the exterminator was no longer associated with the general contractor and was instead the independent contractor of the owner, the general contractor was not liable for the acts of the exterminator.

In a similar vein, the case of *Blackton Building Supply Co. v. Garesche*<sup>73</sup> held that the distributor of a product found safe and nondefective by a jury is not liable for the negligence of an independent contractor when the distributor has no control over that contractor.

In a case in 1980, the District Court of Appeal, Second District, also dealt with this elusive interplay between degrees of control and duty.<sup>74</sup> The court acknowledged that a construction lender is not ordinarily under any duty to inspect construction work on a condominium and is not liable for defects to condominium buyers. But when the lender forecloses a project, completes construction, takes title, and advertises and sells units to buyers, then the lender acts like a developer, not a lender. The court concluded that, like a developer, the lender is responsible for its express representations to buyers and "for patent construction defects in the entire condominium project and for breach of any applicable warranties due to defects in the portions of the project completed by" the lender.<sup>75</sup>

### C. Statute of Limitations

In *Overland Construction Co. v. Sirmons*,<sup>76</sup> the Supreme Court of Florida declared section 95.11(3)(c) of the Florida Statutes (1979) invalid. The legislature responded by amending the statute.<sup>77</sup> The constitutionally offensive part of the statute was its absolute bar to lawsuits brought against a contractor, architect, or engineer, initiated more than a given number of years after events

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73. 383 So. 2d 250 (Fla. 5th DCA 1980).

74. *Chotka v. Fidelco Growth Investors*, 383 So. 2d 1169 (Fla. 2d DCA 1980).

75. *Id.* at 1170.

76. 369 So. 2d 572 (Fla. 1979); see notes 57-58 and accompanying text *supra*.

77. 1980 Fla. Laws ch. 80-322, § 1 (amending FLA. STAT. § 95.11(3)(c) (1979)).

connected with the construction of improvements to real property. The amendment in 1980 increased the time limitation from twelve to fifteen years and provided for an alternative starting point for the running of the limitation period. The period runs from the date of a certificate of occupancy or from the time of contracting or of ownership, whichever is later.

It is doubtful that the arbitrary addition of three years will have any substantial effect in light of the court's decision in *Overland*. The court did not premise that decision on mere numbers, but upon the unconstitutional taking of the right to sue from a person who has no knowledge of a defect or injury.

## VI. SHIPPING AND WAREHOUSING

### A. Shipping Problems

Three recent Florida decisions involved various aspects of the shipping industry. In the case of *Florida-Texas Freight, Inc. v. Hawkins*,<sup>78</sup> the Florida Public Service Commission proposed new rules governing the filing of tariffs by freight forwarders. The Commission did not prepare an economic impact statement, as apparently required by section 120.54(2)(a) of the Florida Statutes (1979). It found that the proposed rules had no economic impact because they resulted in no additional shipping costs, but merely implemented established procedures. The Supreme Court of Florida, in a 4-to-2 decision, held that when the Commission found no economic impact, it did not need to track the seven steps in the statute to declare that there would be no economic impact. The court interpreted section 120.54(2)(a) as a legislative attempt to "promote agency introspection in administrative rulemaking,"<sup>79</sup> and implied that the "no impact" declaration fulfilled the legislative purpose. The aggrieved party had introduced no evidence of economic impact at the public hearing and did not raise the issue until after the hearing examiner filed an unfavorable report.

A case decided in 1980 by the District Court of Appeal, Third District, exemplifies how an airline may be liable beyond the confines of the Warsaw Convention.<sup>80</sup> In *Compania de Aviacion Faucett, S.A. v. Mulford*,<sup>81</sup> an airline's employees deliberately or recklessly told passengers that their luggage was on board a flight

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78. 379 So. 2d 944 (Fla. 1980).

79. *Id.* at 946.

80. 49 U.S.C. § 1501 (1976).

81. 386 So. 2d 300 (Fla. 3d DCA 1980).

from the United States to Lima, Peru, when it had in fact been removed from the aircraft. The passengers spent the remainder of their vacation trying to find their luggage, which the airline did not return to them until after they arrived home in Iowa. The Third District upheld the trial court's ruling that because of the airline's "willful misconduct," the Warsaw Convention did not limit the passengers' recovery.<sup>82</sup>

Another Third District decision dealt with the ad valorem tax liability of shippers. Specifically, cargo containers used in seaborne foreign commerce are subject to ad valorem taxation in Florida even if they are in Florida for an average of only five months; year-round situs is not required.<sup>83</sup>

### B. Warehousing Problems

Florida courts commonly uphold limitation-of-liability clauses in warehouse receipts. A district court of appeal extended this notion to a limitation clause in a form entitled "Estimated Cost of Services and Order for Service,"<sup>84</sup> which gave estimated charges for hauling and storing. The bailor furnished a conservative estimate of the value of her goods and signed the estimate form in several places, including one place directly under the entered valuation figure. The court reasoned that the bailor's acceptance of the estimate was "tantamount to her acceptance of the bill of lading containing the same limitation of liability."<sup>85</sup> This extension is not in itself too troubling. The bailor's claim against the warehouse, however, was based on negligent loss or conversion. The appellate court's opinion, reversing a jury verdict in favor of the bailor, does not recite whether the verdict was on negligence or on conversion. If the jury based its verdict on a negligent loss, then the reversal is correct. But if the jury found a conversion by the warehouseman, then the decision is clearly wrong because no limitation clause will protect the warehouseman from liability for its own conversion of the goods.<sup>86</sup>

Amended section 7-403(1)(b) of the Florida U.C.C.<sup>87</sup> provides that in bailment cases involving goods worth more than \$10,000, the bailor must prove the warehouseman's negligence when the

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82. *Id.* at 301.

83. *Integrated Container Servs., Inc. v. Overstreet*, 375 So. 2d 1146 (Fla. 3d DCA 1979).

84. *Brandon Transfer & Storage Co. v. Hall*, 377 So. 2d 716, 717 (Fla. 4th DCA 1980).

85. *Id.* at 717.

86. FLA. STAT. § 677.204(2) (1979).

87. *Id.* § 677.403(1)(b).

goods are damaged, destroyed, lost, or delayed in redelivery. Conversely, the statute implies that the bailee must prove freedom from fault when the goods are worth \$10,000 or less. The Supreme Court of Florida has upheld the constitutionality of this amendment, concluding that the legislature made a reasonable finding that "mom and pop bailors"<sup>88</sup> lacked the money to investigate the cause of the loss in small bailments. This reasonable finding validated the statute under the equal protection clause of the state constitution. The author, however, is inclined to agree with the dissenting view of Justice Boyd that the law is "unreasonable because it embodies a classification based on financial status."<sup>89</sup>

In a case of apparent first impression in Florida, the District Court of Appeal, Fourth District, held that a court may define a marina as a warehouseman under Article 7 of the U.C.C..<sup>90</sup> To claim a warehouseman's lien for storage, however, the marina must issue a warehouse receipt under section 7-209 of the U.C.C..<sup>91</sup> If the marina does not issue a warehouse receipt, a court may invalidate any sale of the stored boat to a bona fide purchaser. In addition, under section 85.031 of the Florida Statutes (1979), a marina claiming a lien for labor or services must conduct a public sale, not a private sale like the one held in this case. There is no provision in the statutes, however, that a bona fide purchaser will necessarily prevail over a boat owner if the marina does not comply with the requirements of the statutory sale.

## VII. NEGOTIABLE INSTRUMENTS

### A. *Jurisdiction*

Florida courts will not liberally construe the Florida Statutes to extend long-arm jurisdiction over foreign individuals and business entities. For example, a housewife's isolated act of signing as an accommodation co-maker of her husband's promissory note, the proceeds of which benefited only his business, was not sufficient under section 48.181 of the Florida Statutes (1979) to show that she was engaging in business in Florida. Therefore, she was not amenable to substituted service of process.<sup>92</sup>

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88. *Reserve Ins. Co. v. Gulf Fla. Terminal Co.*, 386 So. 2d 550, 551 (Fla. 1980).

89. *Id.* at 533.

90. *Richwagen v. Lilienthal*, 386 So. 2d 247 (Fla. 4th DCA 1980).

91. FLA. STAT. § 677.209(1) (1979).

92. *Connell v. Ott Research Dev., Inc.*, 377 So. 2d 219 (Fla. 3d DCA 1979).

In *Caribe & Panama Investments, S.A. v. Christensen*,<sup>93</sup> a foreign corporation had executed and failed to honor a promissory note that provided for payment in Miami. The corporation conducted no business in Florida, owned no property there, and had no officers or employees performing work in Florida. The District Court of Appeal, Third District, held that the foreign corporation was not subject to the jurisdiction of the Florida courts under sections 48.081, 48.181(1), and 48.193 of the Florida Statutes (1979) merely because the corporation's president happened to reside in Dade County, Florida. It appears, however, that based on the breach of the contract calling for payment in Florida, jurisdiction could have attached under section 48.194 of the Florida Statutes (1979), if the plaintiff had made service of process in Panama.

### B. *Parol Evidence*

Courts usually allow parol testimony to explain an ambiguous signature. In a recent case, a corporate president executed a note in his corporate capacity: "A & H Plumbing Corporation, Jose Armenteros, President"; then, in executing the guarantee on the reverse side of the note, he wrote the word "President" next to his signature over the typed words "Jose Armenteros." The District Court of Appeal, Third District, held that the latter signature was ambiguous and parol testimony was appropriate to explain the ambiguity.<sup>94</sup>

Additionally, a district court of appeal held parol testimony permissible under section 3-403 of the U.C.C.<sup>95</sup> to show that a corporate officer signed a note in a representative rather than individual capacity when he signed in both his corporate and his individual name.<sup>96</sup>

Parol testimony was not proper, however, in a case dealing with an attempted repudiation of personal liability when the individual defendant signed ten promissory notes without indicating he was signing as an agent and without stating the name of the alleged principal. The appellate court's holding in that case was correct under section 3-403 of the U.C.C..<sup>97</sup> Based on one of the comments to section 3-403,<sup>98</sup> the court further held that parol evi-

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93. 375 So. 2d 601 (Fla. 3d DCA 1979).

94. *Bank of Miami v. Armenteros*, 382 So. 2d 1336 (Fla. 3d DCA 1980).

95. FLA. STAT. § 673.403 (1979).

96. *Oppenheim v. Jules Jergensen Corp.*, 385 So. 2d 1078 (Fla. 4th DCA 1980).

97. FLA. STAT. § 673.403 (1979).

98. FLA. STAT. ANN. § 673.403, Comment 3 (West Supp. 1980).



dence was inadmissible to reform the instrument for mistake.<sup>99</sup>

### C. *Statute of Limitations*

Section 95.03(1) of the Florida Statutes (1979), as amended in 1975, provides that a cause of action against makers, indorsers, and guarantors of demand notes without specific maturity dates accrues on the first written demand for payment. Former section 3-122(1)(b) of the Florida U.C.C.,<sup>100</sup> on the other hand, stated that a cause of action on a demand note accrues on its date or, if it has no date, on the date of its issue. Although Florida amended section 3-122 to give precedence to section 95.031(1) in 1977,<sup>101</sup> the conflict between the two statutes continues to generate litigation. For example, in a suit on a promissory note given in 1968, the District Court of Appeal, Third District, held in 1980 that the more specific terms of the amendment in 1975 to section 95.031(1) took precedence over the more general terms of the pre-1977 version of section 3-122(1)(b).<sup>102</sup> Because the time for bringing suit under the 1974 statute of limitations had not expired when the legislature adopted the amendment in 1975, the court allowed the plaintiff to take advantage of the amending statute, which gave additional time for bringing suit. The court did not rely on the amendment to section 3-122 in 1977, ostensibly because the statute merely codified the result in the case.<sup>103</sup>

Another recent case interpreting the amended statute of limitations demonstrates the enormous exposure associated with demand notes. In that case, the court held that the five-year statute of limitations might not bar a suit brought twenty years after the demand note was signed if the first written demand was the suit itself.<sup>104</sup>

### D. *Defenses to Nonpayment of Promissory Notes*

There are a number of statutory defenses available in suits on

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99. *Schwartz v. Disneyland Vista Records*, 383 So. 2d 1117 (Fla. 4th DCA 1980).

100. FLA. STAT. § 673.122(1)(b) (1976).

101. 1977 Fla. Laws ch. 77-54, § 1 (amending FLA. STAT. § 673.122(1)(b) (1975), which now states: "[i]n the case of a note payable on demand, as provided in s. 95.031(1)").

102. *Wetmore v. Brennan*, 378 So. 2d 79 (Fla. 3d DCA 1979).

103. *Id.* at 81 n.2: "Those amendments are not material to the issue in this appeal and are not considered."

104. *Jones v. Rainey*, 386 So. 2d 1319 (Fla. 2d DCA 1980). The Second District remanded the case for the trial court to determine when the first written demand for payment was made.

promissory notes. Under section 733.709 of the Florida Statutes (1979) dealing with claims against estates, if the holder of an unmatured promissory note has filed suit within a year after filing a probate claim, then he no longer has a claim.<sup>105</sup> This statute has no effect on the lien of a recorded mortgage or security interest, nor on the lien of any creditor who has possession of collateral. A simple delay in bringing suit on a promissory note will not constitute laches, because the statute of limitations provides the appropriate defense for the running of time.<sup>106</sup>

The maker of a note used the defense of *res judicata* in the case of *Truitt v. Truitt*.<sup>107</sup> The Truitts' dissolution of marriage followed a stipulation in which the husband conveyed certain real property to the wife and the wife, among other things, dismissed with prejudice her counterclaim on a promissory note. The husband had testified at the dissolution proceeding that the signature on the note was not his. More than two years after the dissolution, the wife sued her former husband on the note, and he asserted the defense of *res judicata*. The wife alleged that the husband had perjured himself on the authenticity of his signature; since he had committed a fraud upon the court, she could assert her claim after the one-year period prescribed in rule 1.540(b) of the Florida Rules of Civil Procedure. The trial court and appellate court concluded, however, that perjury during court proceedings was intrinsic fraud, not an extrinsic fraud upon the court. The wife's collateral attack on the judgment entered more than one year before her attack was impermissible. The matter was *res judicata* because the wife had had the opportunity to contest the husband's denial of his signature in the original action but had failed to do so.

The case of *Robinson v. Brunson*<sup>108</sup> presented the question whether the drawer of an undated check, never presented for payment by the payee, is discharged from honoring the underlying promissory note. In *Robinson*, the maker of a note, deceased at the time of the action, had borrowed money from the payee in exchange for his note and an undated check for the amount of the note. The payee-lender never presented the check for payment and later brought suit on the note against the maker's estate. The trial court held that the underlying obligation was discharged. The ap-

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105. *In re Estate of Utley*, 380 So. 2d 480 (Fla. 4th DCA 1980), which held that the enumeration of exceptions in the statute is exclusive.

106. *Kay v. Fernandez*, 373 So. 2d 946 (Fla. 3d DCA 1979).

107. 383 So. 2d 276 (Fla. 5th DCA 1980).

108. 383 So. 2d 964 (Fla. 2d DCA 1980).

pellate court, in reversing the trial court, held that under section 3-502(1)(b) of the U.C.C.,<sup>109</sup> the deceased drawer of the check would escape liability on the underlying obligation only if the drawee bank had become insolvent during the period in which the payee unreasonably delayed presenting the check for payment. Since the bank was not insolvent, the drawer remained liable, and the trial court should have entered judgment for the payee.

### E. *Accord and Satisfaction*

Several recent cases addressed whether a creditor may effectively disclaim acceptance of a proposed accord and satisfaction after cashing his debtor's proposed settlement check.

In *Hannah v. James A. Ryder Corp.*,<sup>110</sup> the plaintiff sued for over \$150,000 in sales commissions. The defendant alleged that the parties had reached an accord and satisfaction for a \$20,000 settlement because the plaintiff had cashed three of defendant's checks totalling \$4,000. The defendant had mailed, along with his checks, letters indicating that when he paid the \$20,000 there would be no further liability. The plaintiff indorsed and deposited each check under an indorsement that stated that he was cashing the checks under protest and not in acceptance of the reduced figure of \$20,000. He did not return a signed copy of the defendant's letter of compromise as requested. The trial court entered summary judgment for the debtor on the grounds that there was an accord and satisfaction. The appellate court reversed, holding that: (1) The creditor had never signed the letters requested by the debtor to indicate acceptance of the compromise offer, and the checks he had cashed were only installments not tendered in full satisfaction of the claim; (2) Since the debtor had stopped sending checks after the third check when the creditor indicated he would not agree to the compromise, a jury could find "that this constituted a withdrawal or abandonment of the undertaking in acquiescence to its clear rejection"<sup>111</sup> by the creditor; and (3) If the new agreement was only partially executed, it could not operate as satisfaction of the original agreement. The court expressly declined to deal with *Miller v. Jung*,<sup>112</sup> which held that when a payee indorses a check

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109. FLA. STAT. § 673.502(1)(b) (1979).

110. 380 So. 2d 507 (Fla. 3d DCA 1980).

111. *Id.* at 510.

112. 361 So. 2d 788 (Fla. 2d DCA 1978); see *First Nat'l Bank v. Caribe Equip. Corp.*, 378 So. 2d 19 (Fla. 3d DCA 1980), in which defendant makers and guarantors of promissory notes successfully asserted the defense of accord and satisfaction when they were sued on

under protest, the protest alone may prevent an accord and satisfaction under section 1-207 of the U.C.C.<sup>113</sup> even though the check states that it is in complete accord and satisfaction of a debt.

Another aspect of accord and satisfaction appeared in *Yelen v. Cindy's, Inc.*<sup>114</sup> A franchisee alleged violations of the franchise agreement and sought to recover the franchise fee of \$10,000. The franchisor refused to return this amount, but offered to settle the dispute for \$6,000 and mailed a release and check for \$6,000 to the franchisee with a letter asking the franchisee to return the check if it was unwilling to accept the settlement offer. Apparently, the check also contained similar language, which the court mislabeled as a "restrictive endorsement."<sup>115</sup> The franchisee deleted this language and substituted the words "Received as partial agreement without prejudice, under protest, with full exclusive reservation of rights."<sup>116</sup> The franchisee cashed the check and then sued for the balance of the fee. The trial court entered summary judgment for the franchisor and the appellate court affirmed, holding that as a matter of law, the circumstances under which the franchisee had received and cashed the check established an accord and satisfaction.<sup>117</sup>

#### F. Documentary Stamp Taxes

In a case clarifying the exemption of renewal notes from documentary stamp taxes, the Supreme Court of Florida reversed a district court's declaratory judgment interpreting sections 201.08(1) and 201.09 of the Florida Statutes (1979).<sup>118</sup> The court ruled that when a debtor renews a promissory note in another note increasing the original obligation, he must pay documentary stamp taxes on the full amount of the second note. For example, if the debtor borrows \$10,000 and then later borrows an additional \$5,000 and signs a note for \$15,000 incorporating both the renewal and the additional loan, the debtor must affix stamps on his new note for the full \$15,000. If the borrower signs a separate note for the \$5,000 and a separate renewal note for the original \$10,000 owed, then he

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the notes. The bank claimed that the customer gave it accounts receivable and other assets for additional collateral rather than to effect an accord and satisfaction.

113. FLA. STAT. § 671.207 (1979).

114. 386 So. 2d 1234 (Fla. 3d DCA 1980).

115. *Id.* at 1235. A restrictive indorsement is defined by FLA. STAT. § 673.205 (1979).

116. 386 So. 2d at 1235.

117. *Id.*

118. Department of Revenue v. Miami Nat'l Bank, 374 So. 2d 1 (Fla. 1979).

pays taxes only on the increased amount.

### G. *Procedural Problems*

An appellate court considered an unusual procedural problem involving an unsuccessful counterclaim on dishonored cashier's checks in *Hilton Casinos, Inc. v. First National Bank*.<sup>119</sup> In that case, a bank issued four cashier's checks to the payee, who was planning a gambling excursion. When the payee arrived at the casino hotel he felt ill and the hotel's employees treated him with an injection that allegedly impaired his judgment. During the period of alleged incompetence, the payee gambled and incurred gambling losses. He indorsed his cashier's checks over to the casino to cover his gambling debt. The payee then had the issuing bank stop payment on the checks and agreed to indemnify the bank for any losses resulting from the dishonor. When the casino sued the bank for payment, the bank filed a third-party claim against the payee on his indemnity agreement. The payee filed a counterclaim against the casino, alleging that the hotel employees had intentionally impaired his judgment and that this tortious behavior induced him to indorse the cashier's checks. The payee attempted service of process on the casino by mailing the counterclaim to the casino's attorney. The casino moved to dismiss for lack of subject matter and personal jurisdiction and for inadequate service of process. The circuit court denied the motion and the casino appealed.

Without reaching the other issues, the appellate court dismissed for lack of subject matter jurisdiction. Under rule 1.180 of the Florida Rules of Civil Procedure, a third party defendant's claim against the plaintiff is not permissible unless it arises "out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff."<sup>120</sup> Because the original suit was for payment of the checks and the counterclaim asserted a tort by the casino employees, the court found no logical relationship and ruled that there was no jurisdiction over the casino on the counterclaim.

The appellate court's view of the transaction was needlessly restrictive. If the payee had succeeded in obtaining an injunction against payment to the casino, then the hotel could not have recovered from the bank and the payee would not have been liable on his indemnity agreement. The payee's liability to the hotel was

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119. 380 So. 2d 1061 (Fla. 3d DCA 1980).

120. *Id.* at 1062.

thus a crucial issue; the court should have found the counterclaim "logically related to the subject matter of the original complaint."<sup>121</sup> In light of this decision, attorneys who handle counterclaims would do well to emphasize the interrelation of the various aspects of the total transaction.

### H. *Conditional Promises*

In a case of apparent first impression in Florida, an appellate court held that when a borrower agrees orally to repay a loan when she has the financial ability to do so, the oral promise "creates only a conditional promise to pay so that the creditor is not entitled to recover on the promise unless the promisor is in fact able to pay the debt."<sup>122</sup> The court observed that in a minority of American jurisdictions, such conditional wording creates an obligation to pay within a reasonable time.

### I. *Indorsements*

Under section 633-116 of the U.C.C.,<sup>123</sup> when a check is payable to two or more parties jointly, all payees must indorse that check before a bank pays it. If a depository bank allows its customer to draw on a joint payee check in the absence of an indorsement by all the payees, it may be liable to the aggrieved payee in conversion under section 673.419 of the Florida Statutes.<sup>124</sup> A case in 1980 demonstrated that if the aggrieved payee has received the proper amount of money from the wrongful payee, however, then the aggrieved payee has no cause of action against the depository bank.<sup>125</sup> In that case, a contractor cashed a check payable to him and his materialman, and his bank paid it without the materialman's indorsement. Later, the contractor paid the materialman the amount due him (less four cents). The materialman sued the depository bank for wrongful payment of the first check. The court held that the bank was absolved from liability even though it could not show that the funds received by the materialman were proceeds of wrongful payment.

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121. *Id.*

122. *Hammond v. Bicknell*, 379 So. 2d 680, 681 (Fla. 2d DCA 1980).

123. FLA. STAT. § 673.116 (1979).

124. *Id.* § 673.419.

125. *First Independent Bank v. Stottlemeyer & Shoemaker Lumber Co.*, 384 So. 2d 952 (Fla. 2d DCA 1980).

### J. Legislation

The Florida Legislature made a number of changes to the state laws regarding worthless checks and taxation of negotiable instruments. For example, an amendment to section 201.08(3) of the documentary stamp statutes<sup>126</sup> provides that promissory notes executed by students for federal or state financial aid require no documentary stamps. This exemption unaccountably omits student financial aid given by private institutions.

Section 199.12(1) of the Florida Statutes, dealing with intangible personal property taxes, now includes "all bills, notes, or accounts receivable, obligations, or credits, wheresoever situated, arising out of, or issued in connection with"<sup>127</sup> the sale of services by any person representing business interests in the state, even though that person claims domicile elsewhere. To forestall the provision's potential ill effects on international sales, the amendment includes an exemption from the tax for all intangible personal property issued in or arising out of an international banking transaction.<sup>128</sup>

An amendment in 1980 to the "worthless check" statute encompasses bank service charges and intent to defraud.<sup>129</sup> Under the amendment, an issuing bank's service charge has increased from \$5.00 to \$10.00. Additionally, to make a *prima facie* showing that the drawer of a bad check had intent to defraud, a payee may now establish the drawer's identity more easily. Without writing all identification data on the check itself as he would in a face-to-face transaction, a payee who received the check by mail can simply present the original contract, order, or request, signed by the drawer. If a person cashes the check under a check-cashing card bearing the drawer's signature and other identification, production of the card is sufficient. Further, when a person draws a check on a closed or nonexistent account, there is now a presumption that the drawer had an intent to defraud, and he is not entitled to the normal seven days' notice accorded to those who issue checks backed by insufficient funds.

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126. 1980 Fla. Laws ch. 80-220, § 1 (amending FLA. STAT. § 201.08(3) (1979)).

127. *Id.* ch. 80-136, § 1 (amending FLA. STAT. § 199.112(1) (1979)).

128. *Id.*

129. *Id.* ch. 80-301, § 1 (amending FLA. STAT. § 832.07 (1979)).

## VIII. SURETIES AND GUARANTORS

### A. Jurisdiction

A promise to make payment in Florida under an assigned contract and guaranty may not be a sufficient contact to give a Florida court personal jurisdiction over the guarantor. In *Lakewood Pipe, Inc. v. D.I.H. Rubaii*,<sup>130</sup> the court held that a Texas company that was the assignee and guarantor of a Florida contract was not subject to Florida's long-arm statute. The mere fact that the assigned contract and guaranty required the Texas company to make payment in Florida was less than the minimum contact necessary to satisfy due process requirements under section 48.193 of the Florida Statutes (1979).

### B. Consideration

The defense of lack of consideration was an issue in a case in 1979.<sup>131</sup> The president of a corporation personally indorsed a note, acting as a guarantor; his corporation received all the funds. The court found that his guaranty indorsement was supported by consideration so that he was personally liable. The court reached the correct conclusion even though it did not cite section 3-415 of the U.C.C., which describes the liability of "accommodation parties."<sup>132</sup>

### C. Degree of Liability

The District Court of Appeal, Fifth District, distinguished between absolute and conditional guarantees in *Rooks v. Shader*.<sup>133</sup> In *Rooks*, a contract for sale of an enterprise, paid partially in stock, provided that the sellers would have the right to sell corporate stock to the guarantors "in the event [a corporation] is unwilling or unable to repurchase."<sup>134</sup> The court declared that this provision was an absolute guaranty making the guarantors liable as soon as the corporation failed to repurchase. Based on the court's rationale, had the agreement also declared the guarantors liable if the seller could not recover from the corporation, the guaranty would

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130. 379 So. 2d 475 (Fla. 2d DCA 1980).

131. *Gordon v. Corporate Ins. Servs., Inc.*, 374 So. 2d 603 (Fla. 3d DCA 1979).

132. FLA. STAT. § 673.415 (1979). Comment 3 to this section of the U.C.C. is relevant to these facts.

133. 384 So. 2d 681 (Fla. 5th DCA 1980).

134. *Id.* at 683.



have been conditional. In that event, the guarantors would not have been liable until the seller had first attempted recovery from the corporation.

When a jury verdict exonerating defendant-guarantors goes against the weight of the evidence, the appellate court will reverse. For example, in *Flagship Bank v. Bryan*,<sup>135</sup> evidence at trial established that the property foreclosed upon was worth substantially less than the debt and that the lender had obtained, but had not collected, deficiency judgments against the makers and other guarantors. The jury's verdict for the defendant-guarantors was thus contrary to the evidence. The District Court of Appeal, Third District, explained that although the guarantors were jointly liable for the entire debt, payment by any party would release the others for the portion paid.

Another Third District decision illustrates that a guarantor's liability for a lessee's performance may turn on a contractual provision as well as on the lessee's negligence. In that case, the court ruled that a guarantor was liable under a lease-bailment agreement providing that the lessee-bailee would be liable for all losses regardless of his negligence. The court observed that parties are always free to contract for greater liability than the law imposes, and that the surety steps into the shoes of the party whose performance he assures.<sup>136</sup>

## IX. MORTGAGES

### A. Documentary Stamp Taxes

Florida courts have recently addressed a number of issues dealing with documentary stamps on mortgages or mortgage-related documents. In 1979, the Supreme Court of Florida side-stepped a challenge to the constitutionality of section 201.02(3) of the Florida Statutes (1979).<sup>137</sup> This statute imposes documentary stamp taxes on purchases of ownership interests in cooperative apartments. The plaintiff apartment owners challenging the statute alleged that the Department of Revenue's retroactive application of the statute was an unconstitutional taking. The court agreed that the statute should apply only to future buyers, but ruled that the owners did not have standing to bring a constitutional challenge, because the statute did not affect them.

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135. 384 So. 2d 1323 (Fla. 3d DCA 1980).

136. *Elliott v. Sheridan, Inc.*, 385 So. 2d 1074 (Fla. 1979).

137. *Department of Revenue v. Swinscoe*, 376 So. 2d 1 (Fla. 1979).

Another ruling against the Department of Revenue position concerned a transfer for which the grantor received no consideration.<sup>138</sup> The grantor became liable on his guaranty to pay a mortgage. He quitclaimed the mortgaged property to his wholly-owned corporation, which never agreed to assume the mortgage, never made any payments, and in fact went bankrupt. The land was worth much less than the mortgage balance at the time of the quitclaim. The Department of Revenue nevertheless attempted to tax the quitclaim transfer on the theory that a grantee normally makes mortgage payments that constitute consideration because they relieve the grantor from his duty to pay. The court rejected this argument and did not order the grantor to pay documentary stamp taxes on his quitclaim deed.

In a case in 1980 upholding the Department of Revenue's position, a purchaser agreed to assume and pay an existing mortgage. Almost simultaneously, the mortgagee released the original mortgagor from part of the debt. Despite the release, the Department of Revenue assessed taxes on the assumption agreement. The court explained that the Department assesses taxes solely upon the documents and not upon "transactions contemplated by the documents . . . . The liability to pay the documentary stamp tax, as well as the amount of the tax, is to be solely determined by the form and face of the instrument and not by the proof of extrinsic facts."<sup>139</sup>

### B. Usury

In *North American Mortgage Investors v. Cape San Blas Joint Venture*,<sup>140</sup> the Supreme Court of Florida resolved a number of issues under Florida's usury laws. The court concluded that if a lender employs an agent to effectuate a loan and the agent charges a commission for his services, that commission is interest. If the total interest charged for the loan exceeds the lawful rate, the court may presume the corrupt intent necessary to establish usury. The court further held that the correct penalty for usurious interest exacted from a corporate borrower is "forfeiture of the interest reserved or collected by the lender regardless of the principal amount of the obligation."<sup>141</sup> On this point, the court specifically

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138. *Gruman v. Department of Revenue*, 379 So. 2d 1313 (Fla. 2d DCA 1980).

139. *Hialeah, Inc. v. Department of Revenue*, 380 So. 2d 562, 563 (Fla. 3d DCA 1980).

140. 378 So. 2d 287 (Fla. 1979).

141. *Id.* at 295. See *Hamm v. St. Petersburg Bank & Trust Co.*, 379 So. 2d 1300 (Fla. 2d DCA 1980), which in several pages of dictum (less than a page is devoted to the facts of

disapproved of the holding of the District Court of Appeal, Third District, in *Continental Mortgage Investors v. Sailboat Key, Inc.*<sup>142</sup> that the Florida Statutes section 687.11(4) (1979) mandates forfeiture of double the usurious interest charged.

### C. Subordination

Attorneys who make mortgage subordination agreements should make certain that the parties executing the agreements have the legal authority to subordinate. The recent case of *Williams, Salomon, Kanner & Damian v. American Bankers Life Assurance Co.*<sup>143</sup> illustrates the importance of this requirement. In *Williams*, a first mortgagee loaned additional money, relying on a subordination agreement. The subordination agreement provided that the second mortgage was inferior to the new mortgage embracing the first mortgagee's first and third mortgages. Unfortunately, the second mortgagee had assigned its mortgage as collateral to its own creditor before making the subordination agreement. In foreclosure proceedings brought by the first mortgagee, who now claimed first mortgage status for both its loans, the appellate court concluded that the second mortgagee had no power to subordinate the rights of its assignee-creditor. The foreclosing mortgagee could thus claim first mortgage status for only its original loan; the later advance was inferior to the second mortgage.

### D. Payment and Satisfaction

Normally, when a mortgagor delivers a cashier's check to a mortgagee, the mortgagor has made final payment and is entitled to his cancelled note and a satisfaction of mortgage. In a recent case, however, the District Court of Appeal, Third District, held that a mortgage satisfaction delivered in exchange for a cashier's check drawn on a foreign bank was merely conditional.<sup>144</sup> The opinion indicated that the mortgagee had not delivered the original note with the satisfaction and that he might have doubted the solidarity of the bank, which had no address except a foreign post-office box. The court held that acceptance of this check by the mortgagee created only a presumption of payment that was rebut-

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the case) attempts to show the various ways of interpreting FLA. STAT. § 687.03(3) (1979) when a bank makes loan charges at the inception of the loan, and later accelerates the loan.

142. 354 So. 2d 67 (Fla. 3d DCA 1977).

143. 379 So. 2d 119 (Fla. 3d DCA 1980).

144. *Cooper v. Wolkowitz*, 375 So. 2d 1099 (Fla. 3d DCA 1979).

ted by proof that the check was dishonored. In addition, the court rejected an argument that the parties had reached an accord and satisfaction. Neither the court nor the parties seemed aware of the relevance of section 3-802 of the U.C.C.<sup>145</sup> This section would discharge the mortgagor when he tendered a check issued by a bank unless recourse to him appeared on the instrument or the parties had agreed otherwise.

In another recent case, a rather indignant opinion by the District Court of Appeal, Fifth District, quickly disposed of a dispute about an overpayment. The attorneys for both parties miscalculated the amount of a mortgagee prepayment; thus, the mortgagor overpaid the mortgagees. The recipients of this windfall did not return it, but alleged that rescission was inappropriate because the mortgagor had made a unilateral mistake. The court showed no interest in the subtle distinctions between unilateral and mutual mistake argued by counsel and summarily ordered that the overpaying party recover the overpayment.<sup>146</sup>

The complicated case of *Capital America, Inc. v. Industrial Discounts, Inc.*<sup>147</sup> points out the dangers for a secondary mortgagee who loans money to pay off a mortgage without taking possession of the cancelled note and without dealing directly with the mortgagee. In that case, three mortgages held by a first mortgagee secured certain property. The property owner borrowed money from a third party and agreed to pay off the three mortgages to give first mortgagee status to the third party. The third party made the loan in exchange for three satisfactions; however, the property owner had forged the satisfactions, and the first mortgagee still held the original promissory notes. To prevent discovery of his fraud, the property owner continued to make payments on the "paid" mortgages. The property owner later sold the property to a purchaser who knew of the third party's mortgage but did not know of the first three mortgages still outstanding. When the third party's mortgage came due, the purchaser paid it. The purchaser received an unpleasant surprise when the first mortgagee demanded payment of the first three mortgages. The purchaser refused to pay. The court held that the innocent purchaser could not rescind payment to the innocent third party lender, because both were equally the victims of the property owner's fraud. Nor was the third party

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145. FLA. STAT. § 673.802 (1979).

146. *Ferguson v. Cotler*, 382 So. 2d 1315 (Fla. 5th DCA 1980).

147. 383 So. 2d 936 (Fla. 4th DCA 1980).

lender liable to the purchaser in negligence for not taking possession of the original promissory notes. Because of his failure to search the public records, the purchaser had to pay all four mortgages. But if the purchaser had not paid the third party's mortgage, the third party would have been in the unenviable position of holding a fourth mortgage. The third party could have avoided the entire problem if he or his attorney had dealt directly with the first mortgagee and had conditioned the loan of money on receipt of the cancelled promissory notes.

### E. *Foreclosure Proceedings*

#### 1. PROCEDURE

Three recent cases touched on the procedural ramifications of mortgage foreclosures. Invalid service of process became an issue in one case when notice of suit by publication ordered the defendants to file an answer.<sup>148</sup> Before the answer was due, the clerk entered a default. The District Court of Appeal, Third District, held this premature entry of default void and subject to the defendants' collateral attack. The court also held that the defendants need not show a meritorious defense under rule 1.540 of the Florida Rules of Civil Procedure because the court lacked jurisdiction over the defendants.

A trial court's reservation of jurisdiction to decide the disposition of any surplus from a foreclosure sale was an important factor in a case decided in 1979.<sup>149</sup> In that case, the judicial sale generated proceeds in excess of the first mortgage, but the mortgagor-owners did not file an answer to the foreclosure suit. The appellate court held that this failure did not preclude their later claim to the proceeds; their security interest had priority over the claims of junior creditors. Apparently, the court based its decision on another creditor's earlier request for distribution of the excess proceeds by the court and the court's retention of jurisdiction over the matter. The court also stated that in such a case, the trial court should determine the interests of the mortgagors and other defendants at an evidentiary hearing.

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148. *Overholser v. Overstreet*, 383 So. 2d 953 (Fla. 3d DCA 1980).

149. *Schroth v. Cape Coral Bank*, 377 So. 2d 50 (Fla. 2d DCA 1979). See *Westminster Foundation, Inc. v. Amerifirst Fed. Sav. & Loan Ass'n*, 383 So. 2d 1147 (Fla. 4th DCA 1980), holding that the trial court did not abuse its discretion in ordering a receiver to pay the holder of an alleged first mortgage the monthly accrued income of the property during the foreclosure proceeding. In that case, the mortgagee, a prosperous savings and loan association, agreed to repay any funds received with interest, in the event that it lost the case.

Another recent case dealt with the assumption of unpaid taxes before a foreclosure sale.<sup>150</sup> A foreclosing mortgagee bid to buy property for the full amount of his judgment on the note but did not pay the taxes owed on the property. He asked the trial court to add the taxes to the amount owed by the mortgagor. The court held that the mortgagee could not obtain the taxes from remaining funds held by the property's receiver. The court reasoned that the mortgagee's bargain, made by its successful bid, was to surrender its entire judgment for the property as encumbered, including unpaid taxes. A court should not enhance this bargain by requiring someone else to pay taxes voluntarily assumed by the purchasing mortgagee.<sup>151</sup>

## 2. DEFENSES

A mortgagor in Florida has a number of valid defenses available in a foreclosure proceeding. When a mortgagee takes possession of mortgaged property abandoned by the mortgagor, however, a later suit by the mortgagor for misconduct by the mortgagee, such as conversion, does not bar the mortgagee's contractual right to foreclosure. Following this rule, the District Court of Appeal, First District, held in *Hannah v. Perego*<sup>152</sup> that the subsequent misconduct of the mortgagee did not prevent acceleration of the mortgage balance and foreclosure after the mortgagor's breach. In *Hannah*, the mortgagees accelerated a mortgage and sued for foreclosure because the mortgagor had defaulted in payments and failed to pay taxes or insurance. The mortgagor abandoned the property, a funeral home, and the mortgagees took possession of it and operated it. The mortgagor counterclaimed for the mortgagees' alleged conversion of some of the business's property, and a jury found for the mortgagor on this claim. Because of the success of the conversion counterclaim, the trial court denied foreclosure, a result reversed on appeal.

Although a defaulting mortgagor may not justifiably rely on his mortgagee's misconduct he may assert as a valid defense an oral agreement to limit the mortgagee's remedy upon the mortgagor's default. In *Lauderdale North Properties, Inc. v. Seacrest Homes, Inc.*,<sup>153</sup> a mortgagor proved that it would not have pur-

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150. *Patron v. American Nat'l Bank*, 382 So. 2d 156 (Fla. 5th DCA 1980).

151. *Id.* at 158.

152. 381 So. 2d 1085 (Fla. 1st DCA 1979).

153. 382 So. 2d 386 (Fla. 4th DCA 1980).

chased the property nor given back a purchase-money note and mortgage had the mortgagee-seller not orally agreed that its sole remedy in case of default would be foreclosure. This remedy excluded any personal claims against the mortgagor. The court held that parol evidence of the agreement was admissible; the mortgagor, however, was not entitled to attorney's fees for defending the foreclosure action. The mortgagor was asserting his rights under the prior oral agreement and not under the written agreement that provided attorney's fees to the winning party.

In another case, the District Court of Appeal, Third District, held that an alleged mortgagee's lack of proof that it was the holder of the note was a valid defense for the mortgagor. Further, the mere submission of a copy of the note showing a third party bank as the payee was insufficient to allow foreclosure by the alleged mortgagee.<sup>154</sup>

In attempting to protect borrowers from unjust accelerations of due-on-sale clauses, Florida courts generally allow the borrowers to assert equitable defenses. For example, one Florida court recently held that a court of equity may deny foreclosure under a "due-on-sale" clause in the absence of any demonstrated impairment of the lender's security by the unauthorized sale.<sup>155</sup>

### 3. ATTORNEY'S FEES

Before awarding attorney's fees in foreclosure proceedings, Florida courts ordinarily allow the submission of testimony and full cross-examination of witnesses for both sides. Consequently, the District Court of Appeal, Fourth District, recently held that a

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154. *International Center of the Americas, Inc. v. Chemical Bank*, 384 So. 2d 725 (Fla. 3d DCA 1980). The bank's failure to explain why it did not present the original note, showing an indorsement to it, is quite astounding to the author. *Id.* at 726. *See also* *International Center of the Americas, Inc. v. Chemical Bank*, 386 So. 2d 589 (Fla. 3d DCA 1980) (companion case).

155. *First Fed. Sav. & Loan Ass'n v. Lockwood*, 385 So. 2d 156 (Fla. 2d DCA 1980). *See* *Northside Bank v. Melle*, 380 So. 2d 1322 (Fla. 3d DCA 1980), upholding the trial court's summary judgment against a bank mortgagee that had attempted to accelerate and foreclose, because of the bank's unconscionable behavior and estoppel. The mortgagor apparently based the estoppel defense upon the bank's long history of accepting late payments; the decision failed to detail the alleged unconscionable acts; *Padgett v. First Fed. Sav. & Loan Ass'n*, 378 So. 2d 58 (Fla. 1st DCA 1979), refusing to reverse the trial court's foreclosure judgment despite the legal causes of action and the mortgagors' request for a jury trial because those issues were separately triable. *But cf.* *First Fed. Sav. & Loan Ass'n v. Peterson*, No. TCA 79-940 (N.D. Fla. June 22, 1981) (state courts preempted from allowing equitable defenses to due-on-sale clauses when federally chartered savings and loan institutions provide mortgage).

trial court cannot award attorney's fees in a foreclosure suit based solely on the lawyers' affidavits, especially over the objection of the mortgagor. The court must permit testimony and cross-examination of the witnesses.<sup>156</sup> Similarly, the Fourth District ruled in another case that a trial court cannot award attorney's fees to the mortgagee based solely on the testimony of the mortgagee's attorney, when the mortgagor's attorney has objected to this procedure.<sup>157</sup>

Another appellate court considered the award of attorneys' fees in the foreclosure of a mortgage tainted by usurious interest.<sup>158</sup> That court held that the award must be limited to the attorneys' work in foreclosing the mortgage for the legally enforceable portion of the loan; the trial court thus properly refused to award fees for efforts spent on the usurious part of the loan. Furthermore, a reasonable attorney's fee awarded under a mortgage provision is "properly limited to the reasonable (read: non-excessive) expense actually incurred."<sup>159</sup> The mortgagee may recover "the amount he must pay his lawyer, or a reasonable fee, whichever is lower."<sup>160</sup>

#### 4. REDEMPTION

Florida law has historically favored redemption by anyone having an interest in mortgaged property that might be lost through foreclosure. The right to redeem belongs to the mortgagor and those claiming under or through him. This right continues until the court confirms the foreclosure sale, or, if there is no objection, until the issuance of a certificate of title.<sup>161</sup> Observing this rule, a decision in 1980 held that a mortgagor's grantee has the same redemption rights upon foreclosure as the mortgagor would have had by continuing to own the property. The right may be exercised by tendering into court the amount awarded in the foreclosure suit before the sale's confirmation.<sup>162</sup>

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156. *Geraci v. Kozloski*, 377 So. 2d 811 (Fla. 4th DCA 1979).

157. *Walker v. Kremer*, 382 So. 2d 338 (Fla. 4th DCA 1980).

158. *Trustees of Cameron-Brown Inv. Group v. Tavormina*, 385 So. 2d 728 (Fla. 3d DCA 1980).

159. *Id.* at 731.

160. *Id.* See *Walker v. Senn*, 376 So. 2d 410 (Fla. 1st DCA 1979), which upheld an award of an attorney's fee in excess of 26% of the principal balance due on the note and mortgage. The fee was reasonable because the attorneys had to defend a counterclaim of the defendant-mortgagors for rescission and cancellation of the mortgage.

161. *All-State Mortgage Corp. v. Strasser*, 286 So. 2d 201 (Fla. 1973).

162. *John Stepp, Inc. v. First Fed. Sav. & Loan Ass'n*, 379 So. 2d 384 (Fla. 4th DCA 1980).



## 5. CONFIRMATION AND VACATION OF SALES

The general rule in Florida is that inadequacy of sales price alone is not a sufficient ground for setting aside a judicial sale of foreclosed property. Only when the inadequacy is gross and results from mistake, accident, fraud, surprise, or misconduct will equity provide relief.<sup>163</sup>

Interpreting this rule, the District Court of Appeal, Fourth District, held that a trial court abused its discretion by vacating a sale in which the sales price on a home worth \$48,000 was only \$5,000. The court's reasons for vacating, in addition to the low price, were the mortgagor-wife's destruction of the summons and complaint because of an "emotional condition of unresolved anxiety"<sup>164</sup> and her failure to notify her husband-mortgagor about the foreclosure suit. In that case, the husband did not learn of the suit until he received a motion for writ of assistance for possession and a notice of hearing.

The case of *Dubois v. Fried*<sup>165</sup> also dealt with the validity of notice not received by a husband-mortgagor. That case, however, held that since the estranged husband mortgagor had not received notice of trial because the notice had been mailed to the former marital home and his wife had not informed him, the trial court had abused its discretion by refusing to vacate a mortgage judgment against the husband. In that case, a prior court order had enjoined the husband from entering the home.

Another Florida court held that a guarantor of a mortgage loan who does not assert any irregularity in a foreclosure sale and does not raise the fairness of the price on appeal waives the issue of lack of a hearing on the property's market value.<sup>166</sup> There, the guarantor-defendant did not defend the action, apparently relying on his codefendants' defenses, and waited until after the sale to file a formal notice of appearance.

One Florida court was apparently confused when it upheld a

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163. *Arlt v. Buchanan*, 190 So. 2d 575, 577 (Fla. 1966).

164. *John Crescent, Inc. v. Schwartz*, 382 So. 2d 383, 384 (Fla. 4th DCA 1980). See *Kaplan v. Dade Fed. Sav. & Loan Ass'n*, 381 So. 2d 1184 (Fla. 4th DCA 1980), which upheld the trial court's action in setting aside a foreclosure sale on the grounds of mistake when the bidder bid on property for \$150.00, the lender's representative thought that the bid figure was \$150,000.00, and the mortgage judgment was for \$34,472.13. Although inadequacy of price alone is not enough to set the sale aside, inadequacy of price coupled with surprise, mistake, and the like, will justify setting aside the sale.

165. 378 So. 2d 1350 (Fla. 3d DCA 1980).

166. *Winfield v. Second Nat'l Bank*, 381 So. 2d 1160 (Fla. 4th DCA 1980).

foreclosure sale.<sup>167</sup> In that case, the mortgagor filed a motion to set aside the foreclosure and the subsequent sale. The trial court reserved ruling on the motion to vacate the foreclosure judgment, based on the need for further evidence, but entered a writ of possession favoring the purchaser. The appellate court held that when a court vacates a foreclosure judgment it must also set aside the sale. Similarly, if the court sets aside the sale, the purchaser is not entitled to possession. Thus, the basic issue in the case was the validity of the final judgment, upon which all further proceedings (such as the sale) depended. The trial court should have addressed this issue first.

## 6. DEFICIENCY JUDGMENTS

Generally, the granting of a deficiency judgment is the rule more than it is the exception, unless equitable considerations lead a court to deny the judgment. An appellate court will not disturb a deficiency decree in a mortgage foreclosure unless it finds a clear abuse of sound judicial discretion.<sup>168</sup>

If a court reserves jurisdiction to enter a deficiency judgment later, it has the right to enter it at any time, subject to Florida Rule of Civil Procedure 1.420. That rule requires dismissal for inactivity in a suit during a one-year period, in the absence of a showing of good cause. The District Court of Appeal, Second District, interpreted the one-year rule and concluded that the trial court had abused its discretion by dismissing a mortgagee's request for a deficiency decree as untimely. The facts showed that the mortgagee was embroiled in other litigation concerning the foreclosed property while the foreclosure suit lay dormant for over a year. The court found that the mortgagee had good cause for its lack of activity; it had taken substantial actions to mitigate its loss by seeking recovery from other sources and by pursuing its right to deficiency against the mortgagors.<sup>169</sup>

### F. *Miscellaneous*

In one recent case, county commissioners upzoned property at the request of the owner who intended to sell it.<sup>170</sup> The purchaser

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167. *Cull v. Hurth*, 384 So. 2d 295 (Fla. 3d DCA 1980).

168. *S/D Enterprises, Inc. v. Chase Manhattan Bank*, 374 So. 2d 1121 (Fla. 3d DCA 1979).

169. *Steketee v. Ballance Homes, Inc.*, 376 So. 2d 873 (Fla. 2d DCA 1979).

170. *Jones v. United States Steel Credit Corp.*, 382 So. 2d 48 (Fla. 2d DCA 1980).

agreed to secure a purchase money mortgage far exceeding the land's value before the upzoning; the commissioners reaffirmed their zoning action, knowing of the proposed loan. When the lender eventually sued for foreclosure against the purchaser-mortgagor, the court held that the commissioners were equitably estopped to downzone the property later. Before this case, courts applied the doctrine of equitable estoppel in zoning cases only to property owners. The court held that on these extraordinary facts, the mortgagee's status as a lienor or successor in title under foreclosure was not important, but its good faith reliance on the commissioners' actions was decisive.

The question of intent to create an equitable lien arose in a case decided in 1979 in the context of an agreement not to encumber certain property.<sup>171</sup> In that case, a lender loaned money in exchange for an agreement by the borrowers not to encumber certain real estate without the lender's consent. The agreement was recorded in the public records. The borrowers then obtained a mortgage on the property without the lender's consent. The appellate court held that entry of summary judgment giving the lender priority over the mortgagee and other creditors was erroneous because a mere description of real estate in a recorded agreement not to encumber does not conclusively establish the intention of the parties to create an equitable lien on the property. A trial court must ascertain the intention of the parties from all the circumstances of the loan transaction. Based on this equitable lien concept, it appears that a potential lender who finds a no-sale agreement in the title abstract acts at the peril of a court's later determination of the intent of the borrower and the prior lender.

The case of *Ran Investment, Inc. v. Indiana Insurance Co.*<sup>172</sup> decided that a mortgagor may sue as third party beneficiary for breach of a mortgagee's loss-payable clause. The mortgagee-lessee had agreed to and did obtain fire coverage at the insistence of the lessor. Fire broke out, but the mortgagee, as loss payee, refused to sue the insurer, who had denied payment. The court held that even though not a named insured, the lessor could sue as a third party beneficiary. The lessor's loss in the property, however, was limited to the balance due on the loan at the time of the loss, plus interest on this amount.

Three other recent cases touched on different issues of bor-

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171. *Manatee Fed. Sav. & Loan Ass'n v. Pace*, 378 So. 2d 95 (Fla. 2d DCA 1979).

172. 379 So. 2d 991 (Fla. 4th DCA 1980).

rower-lender relationships. Standby fees for loan commitments received attention. The District Court of Appeal, Third District, decided a case in which a business loan applicant deposited money with a potential lender, who then refused to make the loan or return the deposit.<sup>173</sup> The court held that it was reversible error to grant an injunction ordering the lender to deposit the money in the court registry. It was also error to restrain the lender from removing or transferring its assets. The appellate court's rationale was that the applicant in such a case had an adequate remedy at law for money damages.

Another court dealt with the mortgagee's right to maintain or possess the mortgaged property after the mortgagor's default.<sup>174</sup> It held that a second mortgagee who had taken possession and managed the property with the consent of one joint owner was not liable in trespass to the other owner, because the mortgagee had adequately protected both owners' interests.

A further development in 1979 concerned the vicarious liability of a mortgagee for the acts of its independent contractor in managing abandoned property.<sup>175</sup> In this case, the mortgagee engaged an independent contractor to manage the property but failed to give the mortgagor the requisite notice of its intent to enter the premises to protect its security interest. The contractor converted some of the mortgagor's personal property and damaged the premises. The court held the mortgagee liable for its contractor's acts. Although the general rule is that one is not liable for the negligent acts of an independent contractor, an exception arises when the act authorized by contract between the principal and the agent is itself tortious (e.g., requiring a trespass). In that event, liability will extend to the contractor's negligent acts, authorized by the contract, and to his unauthorized collateral acts.

### G. Legislation

The Florida Legislature made some noteworthy changes in the

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173. *Digaetano v. Perotti*, 374 So. 2d 1015 (Fla. 3d DCA 1979). See *First Fed. Sav. & Loan Ass'n v. Sailboat Key, Inc.*, 375 So. 2d 625 (Fla. 4th DCA 1979), deciding that when a lender agreed to issue its commitment to give a mortgage in return for a nonrefundable commitment fee, the borrower was not entitled to a return of the fee based upon the alleged failure of the lender to issue its formal commitment. See also *Blouin v. American Liberty Ins. Co.*, 375 So. 2d 326 (Fla. 3d DCA 1979), which implicitly held that client mortgagors defrauded by a mortgage broker may share pro rata in a \$5,000 bond posted by the broker under former § 494.04 of the Florida Statutes (1975).

174. *Wilson v. Southern Discount Co.*, 385 So. 2d 169 (Fla. 3d DCA 1980).

175. *Davis v. Charter Mortgage Co.*, 385 So. 2d 1173 (Fla. 4th DCA 1980).

statutes governing mortgages. Section 701.04 of the Florida Statutes<sup>176</sup> now provides that it is no longer permissible to note a satisfaction on the margin of a mortgage, notice of lien, or judgment. Furthermore, the person satisfying a mortgage, lien, or judgment must now send the recorded satisfaction to the paying person within sixty days of the receipt of full payment. In a civil action arising under this section, the prevailing party may now recover attorney's fees and costs.

The legislature amended the usury statutes to provide that usurious contracts shall cover a "line of credit" or "obligation"<sup>177</sup> in addition to a loan, advance of money, and the like. The statute defines the term "line of credit" as an arrangement "under which one or more loans or advances of money may be made available to a debtor in one or a series of related transactions."<sup>178</sup> Also, the special provisions relating to loans in excess of \$500,000 now define a loan as exceeding \$500,000 in three situations: 1) if the amount advanced initially exceeds \$500,000; or 2) the aggregate principal indebtedness of such loan "may reasonably be expected to exceed \$500,000 during the term thereof, notwithstanding the fact that less than that amount in the aggregate is initially or at any time thereafter advanced in one or a series of related transactions;"<sup>179</sup> or 3) "such loan [or] advance of money . . . exceeds \$500,000 at any time, notwithstanding the fact that such indebtedness is or is not subsequently reduced to less than \$500,000 and thereafter additional amounts are advanced in one or a series of related transactions which in the aggregate do not exceed \$500,000."<sup>180</sup> This author predicts that the quoted language will be a marvelous source of employment for the trial bar, given the ambiguity inherent in this definition.

## X. BANKS AND BANKING

### A. *Customer Suits*

Several recent cases have spoken on banks' duties towards their customers. The question of a bank's obligation to pay only the named payee of a check, absent any negligence of the bank's customer, arose in the case of *Baxter v. Southern National*

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176. FLA. STAT. § 701.04 (Supp. 1980).

177. *Id.* § 687.02(1).

178. *Id.* § 687.0303.

179. *Id.* § 687.03(3)(b).

180. *Id.* § 687.03(3)(c).

*Bank*.<sup>181</sup> In that case, the District Court of Appeal, Fourth District, held that a complaint alleging payment to the wrong payee was sufficient to state a cause of action against the bank for breach of contract.

At issue in another Fourth District case was whether a bank that allowed an unauthorized person access to a safety box had effectively disclaimed liability for losses from the box when the contract containing the exculpatory clause also included the bank's specific promise to preclude access of unauthorized persons to the box.<sup>182</sup> The contract provided that "[n]o person other than the renter or approved deputy named in the books of the Bank . . . shall have access to the safe . . . ."<sup>183</sup> The court held the bank liable for the depositor's loss that resulted when the bank allowed his ex-wife to have access to the box. If the court had upheld the exculpatory clause, the contract between the bank and the depositor would have been worthless since the depositor would have received nothing for his fee.<sup>184</sup>

For a bank to have a contractual duty to loan money to a customer, there first must be a mutually binding loan contract. A case decided in 1980 points out that preliminary negotiations are not binding on either a bank or its customer. The parties in that case had not yet agreed on any of the essentials of a loan, such as interest rate and repayment terms. The court concluded that there was no valid claim against the bank for breach of a loan agreement.<sup>185</sup>

### B. *Interbank Disputes*

The District Court of Appeal, Second District, recently considered the issue of liability among banks when a check is dishonored. In *First National Bank v. Brandon State Bank*,<sup>186</sup> a customer deposited a \$48,000 check with a depository bank; the bank credited that amount to his account with no restriction on withdrawal. The customer withdrew most of the funds. The drawee-payor bank dishonored the check and revoked its provisional credit, returning the dishonored check to the Federal Reserve by midnight on the banking day following the day of receipt. But the drawee-payor bank was unable to contact the Federal Reserve by telephone until the

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181. 382 So. 2d 1375 (Fla. 4th DCA 1980).

182. *Sniffen v. Century Bank*, 375 So. 2d 892 (Fla. 4th DCA 1979).

183. *Id.* at 893.

184. *Id.* at 893-94.

185. *Balter v. Pan Am. Bank*, 383 So. 2d 256 (Fla. 3d DCA 1980).

186. 377 So. 2d 990 (Fla. 2d DCA 1979).

following morning. The trial court construed section 4-213(1)(d) of the U.C.C.<sup>187</sup> to require that the drawee-payor bank both revoke its credit and return the item to the depository bank before the midnight deadline. The Second District disagreed with the trial court's interpretation of section 4-213(1)(d) and concluded that the payor bank was not statutorily liable under that section and section 4-302(1) of the U.C.C..<sup>188</sup> Additionally, the court noted that the payor bank did not send wire advice of the dishonor of the check until the day after the midnight deadline. Since Federal Reserve Operating Circular No. 16, requiring a dishonoring bank to give wire advice of nonpayment of any item of \$2,500 or more, does not contain a time limit, it was a question of fact whether the delay in sending wire advice constituted a lack of due care as defined in section 4-103(1) of the U.C.C..<sup>189</sup> The Second District thus reversed and remanded to the trial court for further proceedings. Unfortunately, the court brushed lightly over section 4-302(1) of the Code, which was the real statutory fulcrum in this case.<sup>190</sup>

### C. Joint Accounts

Until recently the rule concerning the rights of a bank depositor vis-a-vis the guardian of his incompetent joint depositor was that of *Cape Coral Bank v. Kinney*.<sup>191</sup> In that case a guardian, standing in the shoes of her incompetent ward who was a joint owner of a savings account, had the right to withdraw funds from the account to the detriment of the joint depositor. The District Court of Appeal, Second District, receded from its *Cape Coral* decision in *Drozinski v. Straub*<sup>192</sup> by holding that "except to the extent necessary to obtain funds for the incompetent's care and support, the guardian of an incompetent joint depositor may not withdraw funds from a checking or savings account standing in the joint names of the incompetent and another."<sup>193</sup> If there is no need for the guardian to invade the account, and the incompetent dies before the other tenant, the survivor will receive the entire ac-

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187. FLA. STAT. § 674.213(1)(d) (1979).

188. *Id.* § 674.302(1).

189. *Id.* § 674.103(1).

190. *Id.* § 674.302(1), providing that a payor bank is liable for the amount of an item if it retains the item beyond the midnight deadline or "does not pay or return the item or send notice of dishonor until after its midnight deadline." *Id.* § 674.302(1)(a).

191. 321 So. 2d 597 (Fla. 2d DCA 1975).

192. 383 So. 2d 301 (Fla. 2d DCA 1980).

193. *Id.* at 303.

count. The court analyzed sections 656.33, 659.29, 665.271, 665.301, and 744.444 of the Florida Statutes (1979) and determined that none of them authorized the *Cape Coral* rule.<sup>194</sup> In effect, this decision temporarily freezes the status quo in joint accounts until the death of the incompetent tenant or his restoration to competency. This case does not resolve the question whether the competent tenant can withdraw all the funds after the other tenant is adjudicated incompetent.

#### D. Governmental Controls

Four recent cases resulted from challenges to or noncompliance with the regulation of banks and banking. Two of these cases dealt specifically with the constitutionality of two Florida statutes regulating the creation of new banks. The Supreme Court of the United States struck down one such statute, holding that section 659.141(1) of the Florida Statutes (1979) directly burdened interstate commerce in contravention of the commerce clause, because it attempted to prevent out-of-state banks, bank holding companies, and trust companies from owning or controlling a Florida business that sold investment advisory services.<sup>195</sup> The Court further held that the Bank Holding Company Act of 1956<sup>196</sup> gives states the power to permit that kind of activity but not the power to enjoin it.<sup>197</sup>

The District Court of Appeal, First District, on the other hand, upheld the constitutionality of section 120.60(3)(a)(2) of the Florida Statutes (1979).<sup>198</sup> That statute requires applicants for a new bank to request a hearing within twenty-one days of publication of the application for their charter. The court in that case also concluded that although it was error for the Department of Banking and Finance to include data not in the record in its final order, the error was harmless because there was sufficient evidence in the record to support its conclusion.

In another case concerning the establishment of branch banks, the First District held that when the Department of Finance and Banking complies with Florida's Administrative Code and statutes in approving a branch, it need not explain why it rejected an addi-

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194. *Id.* at 303-07.

195. *Lewis v. BT Inv. Managers, Inc.*, 100 S. Ct. 2009, 2019 (1980).

196. 12 U.S.C. § 1842(d) (1976).

197. 100 S. Ct. at 2021.

198. *Peoples Bank v. Department of Banking & Fin.*, 378 So. 2d 328 (Fla. 1st DCA 1980).



tional standard proposed by a protesting bank.<sup>199</sup>

At issue in *Pan American Bank v. Sullivan*<sup>200</sup> was whether a debtor may use a bank's violation of a federal statute to avoid its loan obligation. In that case, the court held that when a bank violates a statute prohibiting loans to finance the borrower's purchase of the lending bank's stock, which the lending bank takes back as collateral, the obligor may not use this illegality as a defense for nonpayment.

### E. Setoff and Garnishment of Deposited Funds

When a depositor has funds in his bank account, a number of his creditors can reach those funds. Not the least among these creditors is the bank itself. Generally, a bank has a right of setoff against a customer's deposit for a debt due the bank, so long as there is no express agreement to the contrary and the deposit is neither a special one nor specifically applicable to some other purpose. Two recent cases left this right to setoff untouched. In *Aetna Casualty & Surety Co. v. Bank of Palm Beach & Trust Co.*,<sup>201</sup> the court held that when a contractor deposits customer checks in its account, the depositary bank may exercise its right of setoff against these funds for a debt owed to the bank by the contractor. The bank's setoff claim took priority even over a surety company that issued a completion bond on a construction project unrelated to the checks deposited by the contractor. The bank, despite its knowledge that the contractor had not paid workmen and materialmen, had no duty to freeze the funds for the benefit of these persons and the surety company. Similarly, the District Court of Appeal, Third District, held that a bank's right of setoff will also prevail over a garnishing judgment creditor.<sup>202</sup>

The reach of a judgment creditor who is not competing with a bank for a debtor's funds may not extend as far as a third party's bank account. In one recent case a creditor attempted to garnish the account of a third party.<sup>203</sup> There was evidence that the debtor and the third party had collaborated to defeat the debtor's creditors. The court held that even though the evidence indicated collu-

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199. *Peoples Bank v. Department of Banking & Fin.*, 387 So. 2d 432 (Fla. 1st DCA 1980).

200. 375 So. 2d 338 (Fla. 4th DCA 1979).

201. 373 So. 2d 687 (Fla. 4th DCA 1979).

202. *Coyle v. Pan Am. Bank*, 377 So. 2d 213 (Fla. 3d DCA 1979).

203. *National Car Rental Sys., Inc. v. Bruce A. Ryals Enterprises*, 380 So. 2d 529 (Fla. 5th DCA 1980).

sion between the third party depositor and the debtor, the judgment creditor could not garnish the account unless it proved that the funds were in fact fraudulently transferred from the garnishee-debtor.

#### F. *Corporate Securities Transactions*

A recent case demonstrates the importance of timely transfer of stock when a bank acts as a stock transfer agent. In *Kaw Valley State Bank v. Pan American Bank*,<sup>204</sup> a bank, acting as a stock transfer agent, delayed transferring stock for almost three months, and in the interim the SEC suspended trading so that the owner was unable to sell the shares. The district court of appeal reversed the lower court's conclusion that the bank was not negligent in delaying to transfer the stock. The dissenting judge would have affirmed because, in his view, the transfer agent's delay was not the legal cause of the loss. The shares were negotiable, and the owner could have transferred title by delivering them and the blank stock power to a buyer, even though title was not transferred on the corporation's books.<sup>205</sup> Although the dissent cites section 678.313(1)(a) of the Florida Statutes (1979), that statute seems to support the majority's stance. It states that the transfer of a security to a purchaser occurs only at the time when he or his agent acquires possession of a certificated security. Since the transfer agent had possession the owner could not transfer its stock.<sup>206</sup>

#### G. *Legislation*

There was an abundance of banking legislation in the past year and the legislature abolished several statutes. For example, the legislature repealed chapter 654 of the Florida Statutes, relating to savings banks, effective June 12, 1980.<sup>207</sup> The \$10,000 ceiling limitation for credit card and overdraft financing arrangements is no longer extant; now, any bank can make such credit extensions without limit.<sup>208</sup> The legislature revamped the statute dealing with real estate loan plans, deleting the old requirement that savings and loan associations lend only on first lien mortgages.<sup>209</sup> The leg-

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204. 383 So. 2d 668 (Fla. 5th DCA 1980) (per curiam).

205. *Id.* at 669.

206. FLA. STAT. § 678.313(1)(a) (1979).

207. 1980 Fla. Laws ch. 80-101 (repealing FLA. STAT. ch. 654 (1979)).

208. FLA. STAT. § 658.50 (Supp. 1980) (amending *id.* § 663.510 and renumbering *id.* § 659.181 (1979)).

209. FLA. STAT. § 665.0731(4) (Supp. 1980).

islature amended and readopted chapter 560, the Sale of Money Orders Act, providing that fees collected under the Act need no longer be used in the administration of the Act.<sup>210</sup>

The Florida legislature has completely revamped the statute governing industrial savings banks, savings associations, credit unions, and banks. For the purposes of this survey the most significant areas are those that affect the bank customer. Several provisions will be fertile sources of litigation. An industrial savings bank may now pay any item drawn by a customer notwithstanding his death if presentment is made within thirty days after receipt of notice of his death.<sup>211</sup> Further, if the industrial savings bank does not receive written notice, it may pay the item at any time. The statute may cause problems because of its inconsistent use of the terms "notice" and "written notice."<sup>212</sup> This inconsistency means that if a bank has constructive notice of a customer's death, it may choose when to make payment.

Another statute provides that unless joint tenants in a savings association have given the association written notice to the contrary, any tenant may, by written direction to the association, delete the name of a joint tenant. There will undoubtedly be substantial litigation about this provision.<sup>213</sup>

An amendment to section 665.062 of the Florida Statutes provides that when minors have savings accounts in savings associations, their parents or guardians do not have the power to transfer or attach any account in the name of the minor, except in the event of the minor's death. In that case, the signature of the parent or guardian will be a valid discharge of the institution for any sums not exceeding an aggregate of \$2,500.<sup>214</sup>

Recent legislation has liberalized the regulation of savings and loan associations. State and federal savings and loan associations may now have accounts in the names of trustees "whether or not such account is opened for a named beneficiary or beneficiaries."<sup>215</sup> This anonymity is comparable to numbered accounts in foreign banks.

Florida savings and loan associations may now allow deposi-

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210. 1980 Fla. Laws ch. 80-22, §§ 1-2 (amending FLA. STAT. § 560.151 (1979)).

211. 1980 Fla. Laws ch. 80-255, § 10 (amending and renumbering FLA. STAT. § 656.36 (1979) as § 662.132).

212. *Id.*

213. FLA. STAT. § 665.063(1)(b)-(c) (Supp. 1980).

214. *Id.* § 665.062 (Supp. 1980) (renumbered from *id.* § 665.262 (1979)).

215. *Id.* § 665.063(2) (Supp. 1980) (amending, combining, and renumbering *id.* §§ 665.271, .272, .301, and .311 as § 665.063)).

tors to make withdrawals or transfers in the form of negotiable orders or authorizations unless negotiability is forbidden by federal law. Although the statute does not use the term, it authorizes what are commonly known as "negotiable orders of withdrawal" or "NOW Accounts."<sup>216</sup> The legislature placed Florida savings and loan associations on a parity with federal associations insofar as acceleration clauses are concerned; if federal law prohibits them, then Florida law prohibits them also. Although the legislature obviously designed the statute to deal with "due-on-sale" acceleration clauses, it does not mention this topic.<sup>217</sup>

Banks with safe deposit facilities now have additional protection against nonpayment of rent. The bank has a lien on the contents of the box "to the extent of any rental due and owing plus the actual reasonable costs of removing the contents from the safe-deposit box."<sup>218</sup>

The liberalizing trend in banking legislation extends to foreign banks. Foreign banks having their principal place of business outside of Florida may now make loans or loan commitments to any person located in Florida, and these foreign banks may solicit "compensating deposit balances in connection therewith."<sup>219</sup> The legislature probably enacted this statute in response to the decision of the Supreme Court of the United States that invalidated a Florida statute prohibiting investment advice services by out-of-state banks.<sup>220</sup>

Not all the new legislation is liberalizing or innovative. For example, the legislature reinstated Florida's parochial post-dated check rule. A bank is not liable for paying a post-dated check unless the customer furnishes the bank with written notice describing the check in detail.<sup>221</sup>

## XI. CONSUMER PROTECTION

### A. Case Law

Four cases affected consumer financing in 1979. Two of those cases defined anew how far creditors may go to collect consumer debts. In *White v. Federal Financial Corp.*,<sup>222</sup> a Minnesota corpo-

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216. *Id.* § 665.067 (Supp. 1980) (renumbered from *id.* § 665.341 (1979)).

217. *Id.* § 665.0731(8) (Supp. 1980).

218. *Id.* § 661.553(1).

219. *Id.* § 68.75(1)(d).

220. See text accompanying note 154 *supra*.

221. FLA. STAT. § 658.64 (Supp. 1980) (renumbered from *id.* § 658.36 (1979)).

222. 379 So. 2d 136 (Fla. 5th DCA 1980).

ration purchased the accounts receivable of a Florida bankrupt and attempted to collect debts owed by consumers by harassing them through the telephone and the mail. The corporation simulated legal process in its notes and correspondence and communicated notice of an alleged debt to a credit bureau without disclosing that the debt was disputed. The District Court of Appeal of Florida, Fifth District, held that the Minnesota corporation was engaged in the collection of the debts of another within the meaning of section 559.55(8)(a) of the Florida Statutes (1979) and was subject to Florida's long-arm jurisdiction.

Similarly, the District Court of Appeal, First District, held that when collection practices are especially egregious, the harassed debtor may maintain an action for the intentional infliction of emotional distress.<sup>223</sup> In that case, an automobile credit company attempted to learn the address of a delinquent debtor. To do so, the credit company telephoned the debtor's mother and told her that his children had been injured in an automobile accident. When the debtor learned this information he spent seven hours telephoning hospitals and police departments before he discovered the information was false. The court concluded that the debtor could sue for emotional distress without accompanying physical symptoms because the conduct of the credit company was "so outrageous in character, and so extreme in degree, as to go beyond all bounds of decency."<sup>224</sup> Since some prior case law was to the contrary, the court certified the question to the Supreme Court of Florida.

Two other cases dealt with the claims and defenses of debtors in Florida. In *Devlin v. Aetna Finance Co.*,<sup>225</sup> the District Court of Appeal, Fifth District, determined that under the Truth in Lending Act,<sup>226</sup> when a seller sues a buyer for an unpaid consumer loan, the debtor may not assert a setoff of up to twice the amount of the finance charges after the expiration of the one-year limitation in the Act. The court noted that although the courts are split on this statute of limitations problem, Congress should determine whether to treat the finance penalty as an affirmative cause of action or as a defense.

In the other case,<sup>227</sup> a consumer and the seller of a copy ma-

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223. *Ford Motor Credit Co. v. Sheeha*, 373 So. 2d 956 (Fla. 1st DCA 1979).

224. *Id.* at 960.

225. 379 So. 2d 972 (Fla. 5th DCA 1980).

226. 15 U.S.C. §§ 1601-1693 (1976).

227. *Xero Graphic Supplies Corp. v. Hertz Comm'l Leasing Corp.*, 386 So. 2d 299 (Fla.

chine entered into a sales contract containing a disclaimer of all warranties. To finance the purchase, the customer agreed to sell the machine and lease it back from the new owner. The copy machine proved defective, and the consumer sued the original seller and the lessor for declaratory relief to excuse performance of his lease obligation. The lessor filed a cross-claim seeking indemnification from the seller for breach of warranties of merchantability. Although the lease agreement did not contain a federally mandated provision that the debtor could assert against a holder of the contract all claims and defenses he would have against the seller, the trial court read the provision into the lease agreement. The trial court concluded that the debtor had a defense against both the lessor and the seller because the original disclaimer in the sales contract was ineffective; the lessor's indemnity cross-claim was therefore permissible. The appellate court reversed, holding that the seller had effectively disclaimed all warranties. The seller was not liable to the buyer for breach of warranties and thus was not liable to the lessor.

### B. *Legislation*

The Florida legislature has reached out to protect consumers by enacting or amending statutes on health studio services, automobile dealerships, repair shops, condominium maintenance organizations, retailers, and finance companies. For example, every contract for the sale of health studio services must now be in writing. Additionally, every health studio that sells contracts for health services must maintain a \$25,000 bond before and for three years after commencing business. The Department of Agriculture and Consumer Services may waive the bond requirement if the studio can prove sufficient financial responsibility to justify waiver. Studios that have operated at the same location under the same ownership since July 1, 1977, need not comply with this act.<sup>228</sup>

Florida may now deny, suspend, or revoke a motor vehicle dealer's license if he has a history of bad credit. These sanctions also apply if the dealer has knowledge of damage to a new car requiring repairs that actually cost more than three percent of its retail price<sup>229</sup> and fails to disclose such knowledge to a customer. Furthermore, the state may deny a license to dealers in mobile

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3d DCA 1980).

228. FLA. STAT. § 501.012 (Supp. 1980).

229. The three percent cap does not apply to tires, bumpers, or glass.

homes and recreational vehicles when, *inter alia*, "the applicant has failed to provide warranty service."<sup>230</sup>

Beginning on January 1, 1981, motor vehicle repair shops must give written repair estimates whenever repairs will exceed \$50, unless the customer signs a written waiver of his right to such an estimate. If the repair shop determines that the actual repairs will exceed the estimate by \$10 or ten percent, whichever is greater, the repair shop must then obtain the customer's permission to make the repairs. The repair shop must note the authorization and the amount of money authorized on the repair form. The consumer may, of course, cancel the contract if the actual cost of repairs will exceed the original estimate. The statute seems unduly complicated. Any mechanic who can understand and apply this statute should lay down his tools and hang up his attorney-at-law shingle.<sup>231</sup>

Section 634.401(2) of the Florida Statutes (Supp. 1980) now provides that a "service warranty" shall not include "service contracts entered into between consumers and nonprofit organizations or cooperatives whose members consist of condominium associations and condominium owners, whose contracts require the performance of repairs and maintenance for appliances or maintenance of the residential property."<sup>232</sup>

The Retail Installment Sales Act<sup>233</sup> now requires that retail installment contracts caution the consumer to "keep [the contract] to protect your legal rights."<sup>234</sup> In addition, the department may now order a seller to refund any amounts charged on a retail installment contract that exceed the maximum charges permitted by the act or rules of the department.<sup>235</sup>

Upon the request of an installment contract buyer, the holder of the contract may now extend the scheduled due date of all or part of any installment. If the time is so extended, the holder may charge for each thirty day extension an amount not to exceed one-twelfth of the maximum allowable rate per annum of the unpaid balance at the time of the extension.<sup>236</sup>

In addition to the finance charges under the retail installment

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230. FLA. STAT. § 320.27 (Supp. 1980).

231. *Id.* §§ 559.901, .902, .903, .905, .908, .909, .911, .915, .917, .919, .921, .923.

232. *Id.* § 634.401(2).

233. *Id.* §§ 520.30-.42.

234. *Id.* §§ 520.07(2)(b), .34(1)(b).

235. *Id.* § 520.07(8).

236. *Id.* § 520.34(5)(b).

contract, the buyer:

may be charged for . . . reasonable fees and costs actually to be paid for construction authorizations and similar permits issued by public agencies and for title search, title insurance, and services of an attorney relating to any real property mortgage, lien or other encumbrance taken, granted or reserved pursuant to the contract.<sup>237</sup>

The legislature amended sections 516.031(2) and (3) and 516.20(2) of the Florida Statutes to increase the limit of consumer finance loans from \$2,500.00 to \$25,000.00, and to provide that on loans in excess of \$2,500.00 the simple interest on the entire principal sum shall not exceed eighteen percent per annum. The consumer lender may now also charge the borrower for genuine charges the lender incurs in paying "for title insurance or appraisal of real property."<sup>238</sup> Common sense dictates that the disjunctive "or" is in error; the legislature must have intended the conjunctive "and." Finally, on loans of \$2,500 or less, no lender may provide for scheduled repayment of principal for more than thirty-six months and fifteen days from the date the loan is made. If, however, the loan is in excess of \$2,500, the scheduled repayments may exceed that time period.<sup>239</sup>

## XII. SECURITY INTERESTS

### A. *Perfection*

The courts did not escape definitional problems with Article 9 of the U.C.C.. In response to questions certified by the United States Court of Appeals for the Fifth Circuit, the Supreme Court of Florida held that a nonnegotiable bank certificate of deposit prohibiting assignments without the bank's consent is an "instrument" under section 679.105(1)(g) of the Florida Statutes (1979).<sup>240</sup> The court categorized the owner's assignment of the certificate to a lender as a secured transaction under Article 9 but stated that the bank issuer was not an account debtor within the meaning of section 9-105(1)(a) of the U.C.C..<sup>241</sup> Since the bank was not an account debtor, section 9-318 of the U.C.C.<sup>242</sup> did not invalidate the

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237. *Id.* § 520.78(4).

238. *Id.* §§ 516.031(1), .031(3), .20(2).

239. *Id.*

240. *Citizens Nat'l Bank v. Bornstein*, 374 So. 2d 6 (Fla. 1979).

241. FLA. STAT. § 679.105(1)(a) (1979).

242. *Id.* § 679.318.



restrictions on transfer contained in the certificate. Finally, the court held that the bank's alleged right of setoff did not arise under section 9-318 of the U.C.C..<sup>243</sup> The court implied that the bank's right of setoff would be effective against the assignee, although the Code itself excludes the setoff concept from the coverage of Article 9.<sup>244</sup>

A recent case decided that a lending bank has a duty to learn whether the president of a corporation has the authority to pledge corporate assets for a personal loan to himself. In the absence of approval by the corporate board of directors, the bank must return to the corporation any corporate property pledged by the president.<sup>245</sup>

### B. Priorities

The question of priorities among security interests continued to generate much litigation in Florida. The cases addressed competing interests in mobile homes, inventory, equipment, and a contractor's receivables. In *Barnett Bank v. Rompon*,<sup>246</sup> the District Court of Appeal, Second District, concluded that a perfected security interest in a mobile home could have priority over the interest of the owner of real property. That case concerned a dispute between a bank with a recorded security interest and an execution lien creditor who purchased the land under the mobile home at a sheriff's sale. The creditor claimed title to the home, arguing that it was a fixture to the land. Although the court acknowledged that the mobile home was indeed a fixture, it nevertheless ruled in favor of the bank. The court reasoned that Florida law still required a mobile home to have a license plate; therefore, the mobile home remained subject to the motor vehicle registration laws,<sup>247</sup> regardless of its annexation to the land. Since the bank had perfected its security in the mobile home, its prior perfected security interest prevailed over the creditor's lien.

Another case touching on title to mobile homes presented an unusual aspect of the buyer-in-ordinary-course doctrine. In *Milnes v. General Electric Credit Corp.*,<sup>248</sup> a married couple purchased a

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243. *Id.*

244. *See id.* § 679.104(1).

245. *American Bus. Credit Corp. v. First State Bank*, 385 So. 2d 1080 (Fla. 4th DCA 1980).

246. 377 So. 2d 981 (Fla. 2d DCA 1979).

247. 1979 Fla. Laws chs. 79-329, 79-320.

248. 377 So. 2d 725 (Fla. 3d DCA 1980).

mobile home and gave back a security agreement to the seller, who assigned it to a finance company, GEC. The seller recorded the "lien" of the security interest on the Florida certificate of title. When the couple could not continue their payments, they delivered the mobile home to a mobile home dealer and informed GEC of the delivery. GEC agreed to this arrangement when the dealer promised not to sell the mobile home without GEC's consent. The dealer sold the mobile home to another couple, who gave back a security agreement that the dealer assigned to another finance company. The dealer then issued its check to GEC, but it was dishonored; the dealer had gone out of business. GEC brought suit against the second purchasers and their finance company. The court held that GEC had entrusted the mobile home to the dealer, which dealt in goods of the kind; thus, the second purchasers, as buyers in the ordinary course of business, took free of the recorded security interest held by GEC.<sup>249</sup> The court noted in dicta that if the original purchasers had entrusted the mobile home to the second dealer without the knowledge and consent of GEC, then the second sale would not have cut off GEC's prior perfected security interest. This decision is clearly correct; the lender must be an entrustor before a sale to a buyer in ordinary course destroys his interest.

Another case illustrates that it is not necessary for a buyer in ordinary course to be without knowledge of a perfected security interest to have priority in goods purchased from a dealer.<sup>250</sup> In that case, an appellate court ruled that a bank with a floor plan security interest in a retailer's inventory could not replevy inventory sold to a buyer who knew of the security interest, if the bank had consented to the sale and required the buyer to make his installment payments to the bank itself.

A case of first impression in Florida, *Gulfstar, Inc. v. Advance Mortgage Corp.*,<sup>251</sup> demonstrates that a court may conclude that a manufacturer is not negligent when it issues duplicate statements of origin to a retailer who uses one copy to arrange financing on a boat after selling it to a bona fide purchaser. In that case, the court held that there was no privity of contract between the manufacturer and the lender. The dealer's criminal act was an intervening cause that broke whatever chain of foreseeability might have ex-

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249. See FLA. STAT. §§ 672.403(2), .403(3), 679.307(1) (1979).

250. *Michigan Nat'l Bank v. Haierhoffer*, 382 So. 2d 318 (Fla. 3d DCA 1980).

251. 376 So. 2d 243 (Fla. 3d DCA 1979).

isted, and therefore the manufacturer was not negligent.

Another case of first impression held that priority rules of the Florida U.C.C. supersede section 726.09 of the Florida Statutes (1979), which provides that an unrecorded conditional sales contract is valid for two years.<sup>252</sup> As a result, when a seller sold air conditioning equipment to a customer on a conditional sales contract and failed to file a financing statement, the equipment became subject to a savings and loan association's prior perfected security interest in all the equipment owned by the customer. This holding is correct if one assumes that the prior security interest had an after-acquired property clause or that the description of the property secured was broad enough to encompass the later-acquired air conditioning equipment. But the case failed to mention this issue.

The case of *J.E. Joyner, Inc. v. Emlinger*<sup>253</sup> specifically addressed the effect of an after-acquired property clause on priorities. The court correctly held that a purchase money lender on equipment had priority over a prior lender's after-acquired property interest; it incorrectly held that the prior lender's after-acquired property clause would fasten on the borrower's equity in the equipment. Additionally, the court held that the purchase money lender, although entitled to possession of the equipment after the debtor's default, was not entitled to use the equipment under section 9-207(4) of the U.C.C..<sup>254</sup> It should have given notice to the first lender under section 9-505(2) of the U.C.C..<sup>255</sup> if it intended to keep the collateral in satisfaction of the debt.

Like a purchase money lender, a surety usually occupies a preferred position vis-a-vis a prior secured lender. Under general suretyship rules, a surety who both pays for a general contractor's debts and completes his construction work is entitled to priority over a perfected security interest in the contractor's receivables. A recent case shows, however, that when the surety bond stipulates that the principal must reimburse the surety for any payments made by the surety, payments made in the absence of default by the principal create only a contractual right to reimbursement.<sup>256</sup> This right does not have a priority over a prior perfected security

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252. *Suburbia Fed. Sav. & Loan Ass'n v. Bel-Air Conditioning Co.*, 385 So. 2d 1151 (Fla. 4th DCA 1980).

253. 382 So. 2d 27 (Fla. 1st DCA 1980).

254. FLA. STAT. § 679.207(4) (1979).

255. *Id.* § 679.505(2).

256. *Waterhouse v. McDebitt & Street Co.*, 387 So. 2d 470, 472 (Fla. 5th DCA 1980).

interest. The priority of a surety over earlier perfected interests is premised on the doctrine of equitable subrogation, not contractual subrogation.

### C. *Proceeds*

Two cases illustrate the wide range of interpretation that a court may give to the 1962 version of section 9-306 of the U.C.C.. The Supreme Court of Florida applied a narrow reading of section 679.306(3) of the Florida Statutes (1975) in the case of *Barnett Bank v. Applegate*,<sup>257</sup> in which a first lender neglected to check the proceeds box in its recorded financing statement covering cattle, and the second lender loaned on the cattle. The second lender did claim the proceeds. The court held that the first lender had no claim to the proceeds of the sale of the cattle over the valid claim of the second lender. Under the 1972 version of section 9-306(3),<sup>258</sup> adopted in Florida after the transaction in *Barnett Bank*,<sup>259</sup> a secured lender does not have to check the proceeds box in its financing statement to claim proceeds; rather, the first lender may claim the proceeds automatically.

The second case, *Kahn v. Capital Bank*,<sup>260</sup> addressed the question whether insurance proceeds from a fire loss are proceeds of goods under the pre-1972 version of section 9-306, as well as under the 1972 version. The District Court of Appeal, Third District, recognized that the case arose under the 1962 version, which does not define casualty losses as proceeds. The court stressed however, that the adoption of the 1972 amendment, specifically including insurance proceeds, merely codified the existing case law in Florida.<sup>261</sup> The court therefore concluded that under the 1962 version, the insurance proceeds were proceeds from the sale of goods.

### D. *Enforcement*

Four recent cases involved the enforcement of security interests. In *Alderman Interior Systems, Inc. v. First National Heller*

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257. 379 So. 2d 1284 (Fla. 1st DCA 1978). The Supreme Court of Florida later quashed the reversal of the trial court's grant of a constructive trust for the vendors of the cattle. 377 So. 2d 1150 (Fla. 1979).

258. FLA. STAT. § 679.306(3) (1979).

259. Florida adopted the 1972 version in 1979, effective on January 1, 1980.

260. 384 So. 2d 976 (Fla. 3d DCA 1980).

261. See *Paskow v. Calvert Fire Ins. Co.*, 579 F.2d 949 (5th Cir. 1978), in which the court held that insurance proceeds from a fire loss or damage to personal property located in a building subject to a security interest constituted proceeds under Florida law.

*Factors, Inc.*,<sup>262</sup> an appellate court concluded that when a seller's assignee sues a buyer and the buyer's guarantor, the assignee cannot recover unless he proves that the assignor of the account delivered goods to the buyer under a valid open account. The assignee must also prove the amount of the sales price remaining unpaid on the open account. Further, if the assignee's claim against the debtor is defective, so is his claim against the debtor's guarantor.

The District Court of Appeal, First District, faced a rather intricate problem of enforcement under a letter of credit in *Chrysler Motors Corp. v. Florida National Bank*.<sup>263</sup> In that case, Chrysler sold motor vehicles to a dealer under a properly perfected purchase money security interest. A bank issued a letter of credit on behalf of the dealer. The bank then informed Chrysler that it was terminating its letter of credit. The court held that Chrysler had no duty to the bank to mitigate its loss by repossessing vehicles from the dealer. In light of the facts of the case, it seems strange that the parties arranged for Chrysler, rather than the bank, to have a security interest in the dealer's inventory.

Further problems of enforcement arose in *Gilmore v. State Board of Administration*,<sup>264</sup> a suit in the First District over a sale-repurchase agreement between a brokerage house and its customer. The broker had sold U.S. treasury bills and notes to the customer and agreed to repurchase them. The brokerage house failed to repurchase because it went bankrupt. The buyer sold the instruments at a profit. The brokerage house then sued for the profits, alleging that the buyer had breached the repurchase agreement. The court did not agree that the brokerage house was entitled to any excess under sections 9-502 and 9-504 of the U.C.C.,<sup>265</sup> instead, the court held that the buyer had not breached the repurchase agreement and was not liable to the defaulting brokerage house.

Finally, in *Rug Mart, Inc. v. Pellicci*,<sup>266</sup> the District Court of Appeal, Second District, considered whether a carpet installer with a security interest in carpeting could proceed against the homeowner under the Florida mechanic's lien statute. The court stressed that even though the carpet installer had viable remedies under Article 9, he could forego those remedies and enforce his interest in the installed carpet by treating the carpet as affixed to

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262. 376 So. 2d 22 (Fla. 2d DCA 1979).

263. 382 So. 2d 32 (Fla. 1st DCA 1980).

264. 382 So. 2d 861 (Fla. 1st DCA 1980).

265. FLA. STAT. §§ 679.502, .504 (1979).

266. 384 So. 2d 1325 (Fla. 2d DCA 1980).

realty and suing to foreclose under chapter 713 of the Florida Statutes.

### E. *Forfeiture of Motor Vehicles*

Under the aegis of sections 943.41-.44 of the Florida Statutes (1979), the state may seize any motor vehicle allegedly used in criminal activity. Two recent cases touched on these sections of the statute. In *Metropolitan Dade County v. Garcia*,<sup>267</sup> the District Court of Appeal, Third District, concluded that section 943.44(1) did not preclude release of a seized motor vehicle to the circuit court, although the statute provided for release of the motor vehicle only to its innocent owner or lienholder.

The second case involved the seizure of a motor vehicle used in the transportation of drugs.<sup>268</sup> In that case, the owner was not in the car when it was seized. The court held that, under sections 943.41-.44, the owner does not lose his vehicle unless the state can show that he had express or implied knowledge of its illegal use.

### F. *Wrongful Repossession*

Three wrongful repossession cases highlight the drawbacks to an imprudent repossession. For example, in *Puzzo v. Ray*,<sup>269</sup> a debtor sued for conversion when a creditor seized furniture and appliances without first making certain that he and three other creditors actually had a secured interest in the goods. The court held that a judgment creditor could reach any damages the debtor obtained because the debtor's conversion suit was a chose in action, a property right subject to execution under section 56.29(5) of the Florida Statutes (1979).

The extent of a wrongful reposessor's liability was at issue in another case decided in 1980.<sup>270</sup> In that case, the District Court of Appeal, Fifth District, held that the conditional seller of goods who had wrongfully repossessed them was liable to the buyer in conversion not for the full value of the goods but only for the value of the buyer's special interest in the goods. The special interest was the

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267. 375 So. 2d 45 (Fla. 3d DCA 1979).

268. *In re 1975 Pontiac Grand Prix*, 374 So. 2d 1119 (Fla. 2d DCA 1979). See *One Douglas DC-3 Aircraft v. State*, 376 So. 2d 46 (Fla. 2d DCA 1979) (abandonment, plain view, probable cause, and exigent circumstances were sufficient grounds to justify the seizure and forfeiture of an aircraft for the transportation of contraband, under FLA. STAT. § 943.43 (1979)).

269. 386 So. 2d 49 (Fla. 4th DCA 1980).

270. *Page v. Matthews*, 386 So. 2d 815 (Fla. 5th DCA 1980).

conditional buyer's payment towards principal up to the time of the wrongful repossession.<sup>271</sup>

The District Court of Appeal, First District, also considered the issue of damages for wrongful repossession in *Elgin Federal Credit Union v. Curfman*.<sup>272</sup> In *Elgin*, a finance company wrongfully repossessed the owner's car. The jury subsequently found a wrongful conversion and awarded punitive damages unsupported by a compensatory award. The First District held that the mere establishment of liability for conversion was sufficient to support punitive damages.

### G. Execution

The question of who may levy on what property continued to generate litigation in Florida. In a case of first impression, the District Court of Appeal, Fifth District, expanded the scope of execution by permitting levy on stock in a nonprofit corporation under section 56.061 of the Florida Statutes (1979).<sup>273</sup>

In *Salina Manufacturing Co. v. Diner's Club, Inc.*,<sup>274</sup> an appellate court had to decide which of two judgment creditors should reach the debtor's assets. One creditor, Diner's Club, obtained a writ of execution but was unable to collect any portion of its judgment because it could not discover any assets subject to execution. The other creditor, Salina Manufacturing Co., after extensive investigation over a number of years, learned that the debtor and his wife had purchased a boat. Because the debtor and his wife owned the boat as tenants by the entirety, the sheriff could not levy on it. Salina then initiated supplementary proceedings to subject the boat to levy under section 56.29 of the Florida Statutes (1979). The county court granted the requested relief and ordered the sheriff to levy on the boat and sell it to satisfy Salina's judgment. Even though Salina was not the initial creditor, the appellate court held that Salina had priority over Diner's Club because, of the two creditors, Salina was the more diligent in discovering the debtor's assets.

### H. Legislation

Numerous changes to the Florida Statutes in 1980 affected Ar-

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271. *Id.* at 817.

272. 386 So. 2d 860 (Fla. 1st DCA 1980).

273. *Icardi v. Nat'l Equip. Rental*, 378 So. 2d 113 (Fla. 5th DCA 1980).

274. 382 So. 2d 1309 (Fla. 3d DCA 1980).

ticle 9. For example, the legislature made farm filings even more complicated by amending sections 9-401(1)(a) and (d):

(1) The proper place to file in order to perfect a security interest is as follows:

(a) If the collateral is equipment used in farming operations, or farm products, or accounts, or general intangibles arising from or relating to the sale of farm products by a farmer, by recording:

1. In the office of the clerk of the circuit court in the county of debtor's place of business if he has one, in the county of his chief executive office if he has more than one place of business, otherwise in the county of his residence; or

2. If the debtor is not a resident of this state, in the office of the clerk of the circuit court in the county where the [foregoing] collateral is located; and

3. In addition, if the collateral is crops, in the office of the clerk of the circuit court in the county where the land is located on which the crops are growing or to be grown.

....

(6) A financing statement or continuation statement filed on collateral described in paragraph (a) of subsection (1) which is perfected only by filing with the Department of State during the period January 1, 1980, until May 20, 1980, shall be effective as provided in s. 679.403; except that the financing statement or continuation statement may be continued upon expiration by filing a new financing statement conforming to s. 680.109(4) in the office described in paragraph (a) of subsection (1).<sup>275</sup>

Under the newly amended Motor Vehicle Repair Act, chapter 559 of the Florida Statutes,<sup>276</sup> a motor vehicle repair shop that intends to sell a motor vehicle to satisfy repair costs must notify the owner and lien holders by registered or certified mail at least forty-five days before the proposed sale. After the shop completes the repairs, it must wait at least sixty days before conducting a sale. The lien holder may then contest the right of the motor vehicle repair shop to possess and sell the vehicle, by filing his claim with the clerk of the circuit court. The secured party may demand a hearing, which the court must hold before the sale. The court will then determine the rights of the parties and may award attorney's fees and costs to the prevailing party. If the court determines that the motor vehicle repair shop has the right to sell the vehicle, the

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275. FLA. STAT. § 679.401 (Supp. 1980) (the bracketed word appeared in 1980 Fla. Laws ch. 80-29, § 1).

276. See note 231 *supra*.



shop may sell it at public or private sale. In the case of a private sale, every aspect of the sale, including the method, manner, time, place, and terms must be commercially reasonable. The repair shop may then deduct the amounts of its charges (repair, storage, and sales expenses) from the proceeds of the sale, and deposit the remainder, if any, with the clerk of the circuit court. Under court order, the clerk pays the surplus to the secured party and to the owner of the vehicle. The certificate of compliance by the clerk of the circuit court constitutes sufficient proof (of compliance) for an application to the Department of Highway Safety and Motor Vehicles for a transfer of title. When a repair shop complies with this statute and sells a vehicle to a purchaser for value, the purchaser takes title free and clear of all claims. Although the statute does not specify that the buyer must be in good faith, the courts should hold that this requirement is implicit in the concept of a commercially reasonable sale.

The legislature changed the name of the statutes dealing with state seizure of motor vehicles from the "Florida Uniform Contraband Transportation Act" to the "Florida Contraband Forfeiture Act."<sup>277</sup> The legislature also placed a more stringent burden of proof on the owner of a seized vehicle to show that he is entitled to release of his vehicle. Under amended section 943.43, an owner must show that he did not know or have reason to know "after a reasonable inquiry"<sup>278</sup> that someone used his vehicle improperly. Subsequent interpretation of this wording remains a matter of some doubt.

### I. *Duties of Secured Lenders*

Four recent Florida cases dealt with the varying duties of secured parties. In *Pan American Bank v. Osgood*,<sup>279</sup> an obligee on a note and security agreement allegedly telephoned the bank's loan officer to obtain pay-off figures. The obligee then sent in a check for the amount allegedly owed. Months later, the bank informed a credit bureau that the obligee's credit rating was bad because he had not paid the entire balance due on his obligation. The obligee then sued the bank and recovered compensatory and punitive damages for negligent injury to his credit reputation. A majority of

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277. 1980 Fla. Laws ch. 80-68, §§ 1-13 (amending FLA. STAT. §§ 943.41, .43, .44, .205(1), .206, 562.27(6), .35, 849.36(1), 893.12(2), 705.01(2), .19(1), 790.08(6), and adding § 943.42(4) (1979)).

278. *Id.* § 2.

279. 383 So. 2d 1095 (Fla. 3d DCA 1980).

the appellate court affirmed, apparently concluding that the bank had a duty to give accurate pay-off information, to attempt to collect the alleged balance of the loan, or to notify the obligee of the report sent to the credit bureau. The majority seemed to agree with the trial court that the original loan was fully paid with the obligee's check for less than the amount owed. The court relied on section 3-408 of the U.C.C.,<sup>280</sup> which states that "no consideration is necessary for an instrument or obligation . . . given in payment . . . for an antecedent obligation of any kind."<sup>281</sup> This author submits that section 3-408 had no application to the transaction in the case. If the court was focusing on the concept of accord and satisfaction, it should have researched its own prior decisions for the proper authority. The dissent noted that the obligee was unable to cite any case law or statutory authority<sup>282</sup> that created any duty for the bank to give notice of the outstanding loan balance, collect the alleged balance of the loan, or to notify the obligee that it would give loan status information to a credit bureau. The dissent concluded that the trial court should have directed a verdict against the obligee, noting that if the case had been properly tried as a libel action instead of a negligence action, the bank could have asserted the defense of a qualified privilege for the statements made to the credit bureau.

A bank unsuccessfully contended that erroneous statements made about a customer's credit were absolutely privileged in another case decided in 1980.<sup>283</sup> In that case, the bank official made the erroneous statements during earlier litigation commenced by the bank against the customer for an unpaid account. The court had dismissed that proceeding for lack of jurisdiction. The District Court of Appeal, Second District, ruled that the statements complained of were made in connection with a nonjudicial proceeding and therefore were not absolutely privileged.

The case of *Midlantic National Bank v. Commonwealth General Ltd.*<sup>284</sup> examined the extent of a bank's duty in lending money under the somewhat nebulous term "line of credit." The court in that case concluded that the term does not imply that the lender has a duty to loan up to the amount stated nor that the borrower

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280. FLA. STAT. § 673.408 (1979).

281. *Id.*

282. The obligee relied on 15 U.S.C. §§ 1681-1681t (1976), the Fair Credit Reporting Act, which had no bearing on the case.

283. *Kent v. Connecticut Bank & Trust Co.*, 386 So. 2d 902 (Fla. 2d DCA 1980).

284. 386 So. 2d 31 (Fla. 4th DCA 1980).

has a concomitant duty to borrow up to the limit. Also, if the lender learns of derogatory information about the borrower, it need not "fund the entire line of credit."<sup>285</sup>

A bank's duty to use reasonable care in the preservation of collateral was an issue in *Tepper v. Chase Manhattan Bank, N.A.*<sup>286</sup> In that case, the District Court of Appeal, Third District, held that under section 9-207 of the U.C.C.<sup>287</sup> the pledgee bank was not responsible for a decline in the value of stock pledged as collateral when the debtor did not request the sale of the stock. The bank had the discretion "but not the obligation to sell the stock."<sup>288</sup>

### J. *Mechanics' Liens: Due Process Considerations*

Section 713.76 of the Florida Statutes (1979) provides that when a provider of services claims a lien on personal property for labor and services and has possession of the property, the lienor may secure the release of the property by posting a cash or surety bond for the amount claimed. The Supreme Court of Florida held that this statute does not deprive a lienor of his property without due process, because even though he loses possession of the property, he has available a liquid fund with which to pay the amount of his claim.<sup>289</sup> The court interpreted the statute as striking a constitutional balance between the interests of a property owner in the use and possession of his property and the interests of a laborer in securing collateral equal in value to his services.<sup>290</sup>

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285. *Id.* at 33.

286. 376 So. 2d 35 (Fla. 3d DCA 1979).

287. FLA. STAT. § 679.207 (1979).

288. 376 So. 2d at 36.

289. *State v. Miller*, 373 So. 2d 677 (Fla. 1979).

290. *Id.* at 681.