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Commercial Law

DANIEL E. MURRAY*

The author surveys and discusses recent decisions and legislation touching on all aspects of commercial law. Among other topics, this survey examines decisions dealing with sales of goods, products liability, negotiable instruments, sureties and guarantors, mortgages, banking, consumer protection, security agreements, and newly enacted legislation on both the state and the federal level.

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* Professor of Law, University of Miami School of Law. This survey covers the cases reported in volumes 363 through 372 of the Southern Reporter, Second Series, and Florida legislation enacted in 1979.

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I. INTRODUCTION

This survey attempts to review all recent cases and legislation arising in Florida under the Uniform Commercial Code (U.C.C.) or in areas outside of the U.C.C. but within commercial law practice.

II. SALE OF GOODS

A. *Jurisdiction*

Recent developments demonstrate that an essential element of Florida long-arm jurisdiction is that nonresidents maintain a regular Florida marketing agent or trade associate. Thus, an out-of-state carpet manufacturer who had his Florida carpeting distributor effect a sale to a Florida installer thereby became subject to in personam jurisdiction in Florida.¹ Although the foreign manufacturer sent the carpet directly to the Florida installer and bypassed the distributor in the transaction in question, the court held that the manufacturer fell within section 48.193 of the Florida Statutes²

1. *Pacé Carpet Mills, Inc. v. Life Carpet & Tile Co.*, 365 So. 2d 445 (Fla. 4th DCA 1978).

2. FLA. STAT. § 48.193 (1979). The plaintiff effected service of process under subsection (1)(a) of the statute, which provides for jurisdiction over a nonresident who "[o]perates, conducts, engages in, or carries on a business or business venture in this state or has an office . . . in this state" for any cause of action arising out of such activity.

(the Florida long-arm statute). The court stated that the defendant corporation's conduct in carrying on business in Florida through its local distributor provided sufficient contact with Florida to satisfy due process standards.³

In *Aero Mechanical Electronic Craftsman v. Parent*,⁴ a California plastics manufacturer (Aero) injected plastic into toilet molds supplied by another California corporation. Aero then sold the toilets to a third California manufacturer, which used them to produce portable toilets. The third manufacturer then sold the finished toilets to a California distributor, which sold them to Sears, Roebuck & Co. in Chicago. Sears then distributed the toilets to a Sears store in Hollywood, Florida. The store sold one of the toilets to a customer who was injured when the toilet collapsed. The customer sued Sears and the California distributor; the defendants filed a third-party complaint impleading the original California plastics manufacturer, Aero, under section 48.193(1)(f)(2) of the Florida Statutes.⁵ The district court held that the statutory phrase "in the ordinary course of commerce" should be interpreted to mean that a nonresident manufacturer "must at least have some reason to anticipate that his product will reach another state in the ordinary course of interstate commerce"⁶ before he would be subject to long-arm jurisdiction. The mere presence of his product in this state was not sufficient to render a manufacturer subject to Florida jurisdiction. The court held that to allow jurisdiction over the original California manufacturer would offend "traditional notions of fair play and substantial justice"⁷ and give the Florida long-arm statute an unconstitutional interpretation.⁸

3. 365 So. 2d at 446.

4. 366 So. 2d 1268 (Fla. 4th DCA 1979).

5. FLA. STAT. § 48.193(1)(f)(2) (1979) provides that a corporation submits itself to the jurisdiction of the state if it:

(f) Causes injury to persons or property within this state arising out of an act or omission outside of this state by the defendant, provided that at the time of the injury either:

.....
2. Products [or] materials . . . manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade, or use, and the use or consumption resulted in the injury.

6. 366 So. 2d at 1270.

7. *Id.* at 1270 (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945)).

8. 366 So. 2d at 1271. Courts in Florida have traditionally required a more substantial contact with the state than the mere possibility that the product might enter the state. *Id.* at 1270. Under the *International Shoe* standard, the statute would be unconstitutional if applied to a foreign manufacturer who lacked minimum contacts with Florida.

In a similar case, an Illinois company which manufactured tilt mechanisms for office chairs sold one of these units to an Indiana chair manufacturer. The Indiana manufacturer then shipped the finished chair directly to a Florida buyer who was injured when the chair fell over. When the buyer sued, the manufacturer filed a third-party complaint against the tilt mechanism manufacturer for indemnity.⁹ The court held that Florida had no jurisdiction over the Illinois manufacturer under section 48.181 of the Florida Statutes,¹⁰ because the company had no corporate agent in Florida and no role in the sale of the finished chair.¹¹

B. Choice of Law

Recent Florida decisions have dealt variously with the choice of law conflict involving an interstate transaction and an international sale. One court applied traditional conflicts doctrine to an interstate sale, while another court, without apparent deliberation, applied the Florida U.C.C. to a sales contract between a Mexican and a Floridian.

In *Boat Town U.S.A., Inc. v. Mercury Marine Division of Brunswick Corp.*,¹² a Florida district court applied ordinary conflict of laws doctrine to an agreement in which a Wisconsin manufacturer granted a franchise to its Florida dealer for the sale of the manufacturer's products. The franchise-sales contract was renewable each year at the election of the manufacturer. The manufacturer refused to renew; the franchisee refused to pay for previously delivered goods, and the manufacturer sued to recover. The franchisee counterclaimed, alleging that the actions of the manufac-

9. *Seng Co. v. Burke*, 366 So. 2d 533 (Fla. 3d DCA 1979).

10. FLA. STAT. § 48.181 (1979). The statute provides that:

(1) The acceptance by . . . all foreign corporations . . . of the privilege extended by law to nonresidents and others to operate, conduct, engage in, or carry on a business or business venture in the state, or to have an office or agency in the state, constitutes an appointment by the persons and foreign corporations of the secretary of state of the state as their agent on whom all process in any action or proceeding against them, or any of them, arising out of any transaction or operation connected with or incidental to the business or business venture may be served.

11. 366 So. 2d at 534. If the chair manufacturer had given the tilt mechanism manufacturer notice of the suit which satisfied the requirements of § 672.607(5)(a) of the Florida Statutes, the tilt mechanism manufacturer's election not to come in and defend the action would have resulted in his being bound by factual findings made by the Florida court that would be common to any future litigation by the chair manufacturer against him. U.C.C. § 2-607(5)(a).

12. 364 So. 2d 15 (Fla. 4th DCA 1978).

turer in failing to renew violated the Wisconsin Fair Dealership Law.¹³ The franchisee asserted that Wisconsin law governed the contract because of the following clause:¹⁴

II. INTERPRETATION. This Agreement and all its provisions are to be interpreted and construed according to the laws of the State of Wisconsin. Any provision of this contract which in any wise contravenes or is unenforceable under any law of the nation of the state or states in which this agreement is effective shall be deemed separable and not to be part of this agreement.¹⁵

The appellate court held that this clause determined only what law applied in interpreting the contract, not what law was to govern the contract. The terms of the contract contained no ambiguities; thus, under Florida law, the court could not construe the contract. The interpretation clause, therefore, had no effect and provided no explicit choice of Wisconsin law to govern the parties' conduct.¹⁶

Nevertheless, the court held that under ordinary principles of conflict of laws, Wisconsin law governed the validity, interpretation, and rights and obligations because the contract was executed and most of the acts were performed in Wisconsin. Further, the Wisconsin legislative policy against conduct forbidden by the Fair Dealership Law was to be enforced by a Florida court in the absence of a compelling reason militating against such enforcement. The absence of such a countervailing policy, together with the protection afforded a Florida resident, led the court to apply Wisconsin law.¹⁷

In a decision that ignored a possible conflict of laws problem, the District Court of Appeal, Third District, recently applied Florida law to a sale between a Florida seller and a Mexican buyer.¹⁸ The sales contract contained neither an express agreement as to the risk of loss in transit, nor any of the commonly recognized delivery abbreviations, such as F.O.B. or C.I.F.¹⁹ The buyer con-

13. WIS. STAT. §§ 135.01-.07 (West Supp. 1979-1980).

14. 364 So. 2d at 17.

15. *Id.*

16. *Id.*

17. *Id.* at 18, 19.

18. *Pestana v. Karinol Corp.*, 367 So. 2d 1096 (Fla. 3d DCA 1979).

19. According to § 2-319(1)(a) of the U.C.C., when the term in a sales contract is F.O.B. place of shipment, the risk of loss passes to the buyer when the goods are duly delivered to the carrier for shipment to the buyer. Under § 2-319(1)(b) of the U.C.C., if the term is F.O.B. place of destination, the seller bears the risk of loss until tender of delivery to the buyer. Comment 1 to § 2-320 of the U.C.C. provides that a contract with the term C.I.F. is a

tended that the notation on their contract that the goods were to be sent to Mexico indicated that the contract was a destination contract. In a destination contract, the risk of loss on the goods sold would not pass to the buyer until delivery, so the seller would bear the loss for goods which failed to arrive in Mexico.²⁰

The court rejected this argument, stating that a "send to" or "ship to" term is a part of every contract which involves the transportation of goods; the use of these terms has no bearing on whether a contract is a shipment or a destination contract.²¹ The court held, under principles of the U.C.C., that a contract otherwise silent was a "shipment" contract with the risk of loss on the buyer from the moment the goods were properly delivered to the carrier in Florida. This holding is correct if one assumes that the U.C.C. governs the contract. Unfortunately, the court devoted no attention to the possible conflict of laws problem.²²

C. *Express Warranties*

An extension of warranty doctrine to the retail sale of a diamond ring underlines the need for sellers to distinguish product descriptions from opinions as to value. The District Court of Appeal, Third District, held that an express warranty arises by law when a retail seller gives a description of the ring which becomes the basis of the bargain. In *Carter Hawley Hale Stores, Inc. v. Conley*,²³ the seller had given the buyer a report from the GIA which described the ring as being flawless and of a "D" color grade, in addition to a document entitled "Jewelry Appraisal for Insurance Purposes," which used similar language as to quality and stated that the ring had a certain replacement value. The court held that the statements as to quality were part of the basis of the bargain, not mere opinions of the seller as to value.²⁴ Thus, the two

shipment contract, with the risk of loss for the goods passing to the buyer upon delivery by the seller to the carrier.

20. *Id.* at 1100.

21. *Id.*

22. The court applied FLA. STAT. ANN. §§ 672.319(1)(b), .503, Comment 5, .509(1) (West 1966). Under traditional conflict of laws analysis, questions of interpretation, such as risk of loss, are governed by the law of the place where the contract was made. If the court had analyzed this problem and had concluded that the contract had been entered into in Mexico, then the U.C.C. provisions adopted in Florida would not apply and Mexican law would have governed.

23. 372 So. 2d 965 (Fla. 3d DCA 1979).

24. *Id.* at 969. The court rejected the seller's attempt to come within subsection (2) of the statute (which stipulates that a statement of the seller's opinion would *not* create an express warranty) because the statute does not exclude the "opinions" of third parties. *Id.*

documents constituted express warranties under section 2-313 of the U.C.C.²⁵ The court then held that under section 2-714 of the U.C.C.²⁶ the buyer could recover damages equalling the difference between the value of the goods as accepted and the value of the goods as warranted.

This author submits that appraisal statements should now be labeled with conspicuous language to the effect that the appraisal is a matter of opinion and not of fact, since individual assessments will inevitably vary. Furthermore, the seller should expressly disclaim any intention to consider the appraisal part of the basis of the bargain.

D. *Miscellaneous Problems in the Sale of Goods*

Liberal application of legal doctrine and statutes has marked recent commercial decisions. For example, the District Court of Appeal, Third District, held that parol evidence can be introduced to ascertain the legal existence or binding force of a contract when there is a factual question whether the named purchaser was the actual purchaser. The court allowed the introduction of parol evidence that a car was actually purchased by a third party as an architectural fee for the named "purchasers," holding that this oral testimony created a question of fact which precluded summary judgment for the plaintiffs.²⁷

In three cases, the courts read statutes so as not to require the enforcement of particular agreements. In one, when a washing machine company entered into contracts with a condominium developer to supply the buildings with washing machines, service, and repairs, a court allowed the contract to be cancelled by the condominium association that took control of the buildings from the developer.²⁸ The court relied on former section 711.13(4) and current section 711.66(5) of the Florida Statutes,²⁹ construing the words

25. FLA. STAT. § 672.313 (1979). Subsection (1)(b) of the statute provides: "Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description."

26. FLA. STAT. § 672.714 (1979). Subsection 2 of the statute provides that: "The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted"

27. *Bleemer v. Keenan Motors, Inc.*, 367 So. 2d 1036, 1038 (Fla. 3d DCA 1979).

28. *Wash & Dry, Inc. v. Bay Colony Club Condominium*, 368 So. 2d 50 (Fla. 4th DCA 1979).

29. FLA. STAT. § 711.13(4) (1973) was replaced by FLA. STAT. § 711.66(5) (1975). The latter statute has since been incorporated into FLA. STAT. §§ 718.301, .302, 719.301, .302

"maintenance, management, or operation of condominium property" to include contracts to supply personal property, such as washing machines, used in the operation of the condominium. The court rejected the argument that the statutes were intended to apply only to real property.³⁰

In a second case, a contract for the production and grinding of sugar cane, which based the price on the formulas and regulations established by the United States Department of Agriculture under the United States Sugar Act of 1948,³¹ was held to be unenforceable after the Act expired. Basing the contract price on regulations and price formulas which no longer existed constituted a sufficient ground to terminate the contract.³²

Finally, in answering a certified question from the Court of Appeals for the Fifth Circuit, the Supreme Court of Florida held that the Florida wholesale liquor discount statute was not intended to follow the model of the comparable federal law.³³ Federal regulations permit discounts only to the extent that volume purchases by retailers bear a reasonable relationship to cost savings on behalf of the wholesaler.³⁴ The court held that under Florida law, a liquor wholesaler may sell to a retailer on the basis of a discount given "at the time of the sale and made available to all vendors buying similar quantities, regardless of laid-in cost or the savings attributable to quantity sales."³⁵ It was clear to the court that the legislature did not intend to regulate the amount of the discount, as long as the other statutory requirements were followed. Appellees had argued that the court's ruling would make it impossible for individual retailers to compete with retailers selling liquor at multiple locations, because the larger discounts given to retailers with multiple locations would allow them to sell at a lower price. The court responded that the legislature could best handle such a policy question.³⁶

(1977). The statute now applicable to these facts is FLA. STAT. § 718.302 (1979), which provides in part that a contract for the operation, maintenance, or management of a condominium association, made prior to the assumption of control of the association by unit owners other than the developer, may later be canceled by the unit owners.

30. 368 So. 2d at 51.

31. Sugar Act of 1948, ch. 519, § 1, 61 Stat. 922 (repealed by Pub. L. No. 89-554, § 8(a), 80 Stat. 649 (1966)).

32. *Osceola Farms Co. v. Wilder Bros. Farms, Inc.*, 364 So. 2d 43, 44 (Fla. 4th DCA 1978).

33. *Castlewood Int'l Corp. v. Simon*, 367 So. 2d 613, 614 (Fla. 1979).

34. See BUREAU OF ALCOHOL, TOBACCO AND FIREARMS Rulings 74-6, 74-8.

35. 367 So. 2d at 615.

36. *Id.* at 616.

E. Damages for Breach

The District Court of Appeal, First District, recently held that for a seller to recover prejudgment interest on an unpaid debt, the amount of interest due must be a liquidated sum.³⁷ If at the date the debt is due the amount of interest owed is unliquidated, no prejudgment interest should be granted.

Although most attacks on liquidated damage clauses spring from the premise that such damages exact a penalty when unreasonably large, a recent case found the stipulated damages to be unreasonably low. In *Varner v. B.L. Lanier Fruit Co.*,³⁸ the contract provided that the seller sell 22,000 boxes of oranges at \$1.25 per box, and that the buyer make an advance payment of \$11,000 to serve as liquidated damages. The buyer picked 12,000 boxes of fruit but refused to pick the equivalent of 9,500 boxes of oranges remaining on the trees. The buyer had paid the seller \$16,000 (including the deposit of \$11,000) before his failure to pick the remainder. The seller contended that the application of the liquidated damage clause could deny him any remedy for the unpicked fruit, as the buyer had picked enough fruit to use up his deposit. The court agreed with the seller that in accordance with comment 1 to section 2-718 of the U.C.C.,³⁹ an unreasonably small amount of liquidated damages might be unconscionable under section 2-302.⁴⁰ Further, even if the seller could not prove that the clause was unconscionable, section 2-719(2) of the U.C.C. might provide relief if, under the circumstances, the agreed upon remedy "failed of its essential purpose."⁴¹ Remedies would then lie as provided under other sections of article 2 of the U.C.C.⁴²

In the event that a buyer breaches a contract for the purchase of a business, damages are to be measured by subtracting the market value of the business at the time of the breach from the con-

37. *Parker's Mechanical Contractor's, Inc. v. Eastpoint Water & Sewer Dist.*, 367 So. 2d 665 (Fla. 1st DCA 1979).

38. 370 So. 2d 61 (Fla. 2d DCA 1979).

39. FLA. STAT. § 672.718 (1979). U.C.C. § 2-718, Comment 1 provides that "[a] term fixing unreasonably large liquidated damages is expressly made void as a penalty. An unreasonably small amount would be subject to similar criticism and might be stricken under the section on unconscionable contracts or clauses."

40. FLA. STAT. § 672.302 (1979). Subsection (1) provides: "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may . . . enforce the remainder of the contract without the unconscionable clause . . ."

41. *Id.* § 672.719(2) (1979) provides in part: "Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this code."

42. 370 So. 2d at 63.

tract price, minus any prior payments. This may be supported by evidence of the amount for which the business was later sold.⁴³

III. PRODUCTS LIABILITY

A. *Express Warranty*

In two cases, the District Court of Appeal, Third District, strictly applied (or misapplied) warranty law to hold that the contracts at issue created no express warranty. In one case, the court correctly held that when a manufacturer expressly warrants its tires for use on American cars, the warranty will not apply if the tires are used on a foreign car.⁴⁴ The court neglected to consult the Code in the other case, however, in holding that a seller's oral statement that a warehouse had a "good ten year roof" was not an express warranty because it could not have induced the sale.⁴⁵ Apparently thinking the transaction was a sale of goods, the court cited the sales portions of *Corpus Juris Secundum*⁴⁶ and *American Jurisprudence*.⁴⁷ If a sale of goods had been involved, the court would have been well advised to have considered section 672.313 of the Florida Statutes⁴⁸ with its accompanying comments. That section provides that a seller's affirmation of fact relating to the goods creates an express warranty regardless of whether the buyer relies on the statement.⁴⁹ Of additional significance was the court's holding that roof repairs would not toll the running of the four-year statute of limitations.⁵⁰

43. *Redmond v. Prosper, Inc.*, 364 So. 2d 812 (Fla. 3d DCA 1978); see *Beverage Canners, Inc. v. Cott Corp.*, 372 So. 2d 954 (Fla. 3d DCA 1979), in which the court refused to award substantial damages to a franchisee for the breach of a contract for a soft drink bottling franchise. The court held that all of the proffered evidence was too speculative. *Id.* at 956. The terse opinion seems to indicate that the franchisor breached the agreement before the franchisee actually commenced bottling operations; thus, lacking a "track record," the franchisee unsuccessfully attempted to prove damages for lost profits by a number of speculative means.

44. *Stabinski v. Pirelli Tire Corp.*, 371 So. 2d 679 (Fla. 3d DCA 1979).

45. *K/F Dev. & Inv. Corp. v. Williamson Crane & Dozer Corp.*, 367 So. 2d 1078 (Fla. 3d DCA 1979).

46. 77 C.J.S. *Sales* § 309 (1952).

47. 67 AM. JUR. 2d *Sales* § 437 (1973).

48. FLA. STAT. § 672.313(1)(a) (1979) provides: "Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise."

49. FLA. STAT. ANN. § 672.313, Comment (West 1966) states: "Note that in subsection (1)(a), the element of reliance by the buyer has been eliminated from the definition of an express warranty."

50. 367 So. 2d at 1080.

B. *Implied Warranties*

During the past year, litigation based on implied warranty or product liability gave Florida courts abundant opportunity to resurrect or rebuke old doctrines.

In a case of first impression, the children and personal representative of a deceased sought damages for mental pain and suffering when the casket for their decedent fell apart during the burial. The court held that neither the manufacturer of the casket nor the funeral home that sold the casket was liable for such damages, under the long-established Florida rule that there can be no recovery for pain and suffering without a showing of impact.⁵¹ Plaintiffs did not fall within the narrow exception to the impact rule, which allows recovery for conduct so exceeding the bounds reasonably tolerated by society as to imply malice or entire want of care, because they failed to allege such conduct. Plaintiffs did, however, recover the cost of the casket and all damages except for mental pain and suffering⁵² based on breach of implied warranties of merchantability and fitness and on strict liability in tort.

In another case of first impression in Florida, the supreme court extended the "crashworthiness doctrine"⁵³ to cover motorcycles as well as automobiles.⁵⁴ The doctrine will apply in negligence cases as well as actions for breach of warranty of merchantability and for strict liability in tort⁵⁵ under section 402A of the Restatement of Torts.⁵⁶

A second doctrine that time had almost forgotten was apparently revived by the District Court of Appeal, First District.⁵⁷ The "patent danger" rule provides that a manufacturer is under no duty to warn users of its inherently dangerous products when the

51. *Estate of Harper v. Orlando Funeral Home, Inc.*, 366 So. 2d 126 (Fla. 1st DCA 1979).

52. *Id.* at 129.

53. 327 So. 2d 201 (Fla. 1976). The doctrine required the auto manufacturer to use reasonable care in the design and manufacture of its product to eliminate unreasonable risk of foreseeable injury. *Id.* at 204.

54. *Nicolodi v. Harley-Davidson Motor Co.*, 370 So. 2d 68 (Fla. 2d DCA 1979). The crashworthiness doctrine is an aspect of the basic principles of negligence and is based on the concept of foreseeability. Because motorcycles are as likely as cars to be involved in an accident, the doctrine should apply equally to motorcycles.

55. *Id.* at 72.

56. RESTATEMENT (SECOND) OF TORTS § 402A (1965) states that liability may be imposed on a manufacturer who produces a defective product which is unreasonably dangerous to the user or consumer or to his property, when such defect causes physical harm to the ultimate user or consumer or to his property.

57. *Hethcoat v. Chevron Oil Co.*, 364 So. 2d 1243, 1245 (Fla. 1st DCA 1978).

user should know of such dangers. In a case involving a hot asphalt machine which had exploded and killed a welder attempting to repair it, the court upheld a directed verdict in favor of the manufacturer of the machine, because the machine in this case was not defective. The manufacturer had no duty to warn, because the danger of using an acetylene torch in the presence of oil fumes (from the hot oil used to heat asphalt) was obvious.⁵⁸ Judge Smith dissented, arguing that the "patent danger" rule had been discarded and that whether the machine was improperly designed for venting and whether adequate warnings were given about the need for removing all fumes were questions for the jury.⁵⁹

Judge Smith's view prevailed when the Supreme Court of Florida subsequently rejected the "patent danger" doctrine.⁶⁰ According to the court, the rule operated to relieve manufacturers of all liability for dangerous products if the danger was obvious. The court held that the obvious nature of a danger constitutes not an exception to liability, but a defense to be used by the manufacturer to show that the injured party did not use the reasonable degree of care required under the facts of the particular case. The court added that the principles of comparative negligence may be used by a manufacturer making this defense.⁶¹

In *Lee v. C. & P. Service Corp.*,⁶² the District Court of Appeal, Third District, held that a truck servicer who merely fills the brake cylinder with brake fluid, and does no other brake work, cannot be said to give an implied warranty. Accordingly, the servicer was not liable for the death of a motorcyclist killed in a collision with the truck when the truck's brake failed. The court found that sections 672.314 and 672.315 of the Florida Statutes,⁶³ on which the plaintiff relied, applied only to a seller of goods, and that the truck servicer was not a seller of goods within the meaning of those sections. The court also held that a statement by an employee of the truck servicer that the brakes were in good condition and should give no trouble, did not constitute an express warranty, but only the serviceman's opinion.

A recent decision on evidence in products liability cases may

58. *Id.* at 1244.

59. *Id.* at 1245.

60. *Auburn Mach. Works Co. v. Jones*, 366 So. 2d 1167 (Fla. 1979), *aff'g* 353 So. 2d 917 (Fla. 2d DCA 1977) (overruling *Farmhand, Inc. v. Brandies*, 327 So. 2d 76 (Fla. 1st DCA 1976)).

61. 366 So. 2d at 1172.

62. 363 So. 2d 586 (Fla. 3d DCA 1978).

63. FLA. STAT. §§ 672.314, .315 (1979).

force defendants to hire plaintiffs' expert witnesses whose testimony proves adverse to plaintiffs. A trial judge may refuse a defendant's request to admit adverse deposition testimony of a plaintiff's expert where the plaintiff has decided not to call the expert as a witness at trial.⁶⁴ This author suggests that to avoid this result the defendant manufacturer must call the expert as its own expert witness, although this may require the defendant to pay the fees of the expert witness.

C. Negligence

Workers' compensation law played a role in two notable Florida negligence suits. In one action, the court pointed out that Florida Department of Commerce Workers' Compensation Bureau regulations apply only to relationships between employers and employees.⁶⁵ Accordingly, rules governing the construction of scaffolding have no application to scaffolding built by a supplier for use by the employees of the general contractor. Thus, in a suit by the employee against the supplier, a trial court should refuse to charge that a violation of this regulation by the supplier would be neither negligence per se under Florida Standard Jury Instruction No. 4.9 nor evidence of negligence under Instruction No. 4.11.⁶⁶

In another action, a court did apply the standards of workers' compensation law.⁶⁷ An employee sued the manufacturer of his employer's punch press to recover for injuries he suffered while using the machine. The court allowed the defendant manufacturer to show that the accident in 1973 was caused by the failure of the employer to attach a guard to the machine. Immune from suit under the workers' compensation law, the employer was not a party to the action.⁶⁸ The defendant had a right nevertheless to show that the fault of a third party had proximately caused the accident. Further, the manufacturer was entitled to introduce standards of the American National Standards Institute and the Occupational Safety and Health Act, which impose a duty on employers to install safety guards on machines manufactured before the pro-

64. *General Tire & Rubber Co. v. Maddox*, 372 So. 2d 123 (Fla. 4th DCA 1979) (per curiam).

65. *Jackson v. Harsco Corp.*, 364 So. 2d 808 (Fla. 3d DCA 1978).

66. *Id.* at 809; see FLA. STANDARD JURY INSTRUCT. No. 4.9, 4.11.

67. *Clement v. Rousselle Corp.*, 372 So. 2d 1156 (Fla. 1st DCA 1979).

68. Under the Florida Worker's Compensation Law, FLA. STAT. § 440.11 (1979), an employer is immune from suit in tort by his employee.

mulgation of the standards.⁶⁹

In the bizarre case of *Angel v. F. Avanzini Lumber Co.*,⁷⁰ the court held a seller liable for negligence, after the buyer's criminal act caused the death of a third person. A gun dealer had sold a rifle and ammunition to a woman whose eyes were glazed and who laughed and giggled as she hugged and kissed one of the dealer's employees (a total stranger). The woman had repeatedly pointed the rifle at the head of the dealer's salesman during the course of the sale and made numerous attempts to load the rifle. The salesman then telephoned the sheriff about the woman's strange behavior and was advised that he was not obliged to sell the rifle to her. He sold her the rifle nonetheless. The woman later shot and killed a third person; the seller was held liable in negligence to the victim's estate. The court held that the foreseeable harm to another from the sale of the firearm and ammunition to a buyer with such erratic behavior had proximately caused the injury. The seller's liability was not superseded by the intervening criminal act of the purchaser.

Finally, in *Matthews v. GSP Corp.*,⁷¹ the court insisted on proof of all the elements of a claim in a products liability suit against the alleged seller and alleged manufacturer. A cable supporting a scaffold had broken, causing the plaintiff to fall to the ground. The court held that the plaintiff must prove that the cable in question was in fact sold or manufactured by the defendants and that the cable was defective when it left the hands of the seller or manufacturer.

D. Counterclaims

In *Richards Paint Manufacturing Co. v. Onyx Paints, Inc.*,⁷² a wholesale paint dealer sued one of its customers for \$2,458 owed for paint purchased on an open account. The customer then counterclaimed for breach of express and implied warranties, alleging that the paint was unfit for use. The wholesaler filed a third party complaint for indemnification against the paint manufacturer for all such paint supplied to the customer and for all paint that the wholesaler had ever purchased from the manufacturer, a sum exceeding \$10,000. The court held that the third party complaint

69. 372 So. 2d at 1160.

70. 363 So. 2d 571 (Fla. 2d DCA 1978).

71. 368 So. 2d 391 (Fla. 1st DCA 1979).

72. 363 So. 2d 596 (Fla. 4th DCA 1978).

against the manufacturer had to be limited to the amount of the customer's claim against the wholesaler, under rule 1.180 of the Florida Rules of Civil Procedure.⁷³ The court noted that had rule 18(a) of the Federal Rules of Civil Procedure applied, the wholesaler could have asserted all claims which he might have had against the manufacturer for other paint not the subject matter of the original suit.⁷⁴

E. Indemnification

In a suit for indemnity in a products liability action, a court should withhold summary judgment in favor of the third party defendant "unless no version of the facts could support the indemnity claimed." This rule is particularly apt where the active or passive negligence of the parties is at issue because a jury must determine that issue of fact.⁷⁵

Under the general law governing indemnification agreements, all attorney's fees incurred are part of the indemnitee's damages. In *Brown v. Financial Indemnity Co.*,⁷⁶ the court held that attorney's fees were recoverable both in the trial court and on appeal, even though the contract of indemnity did not expressly provide for the payment of attorney's fees on appeal. The contract at issue predated, and the decision was reached independently of, section 59.46(1) of the Florida Statutes, which requires that a statute or contract providing for payment of attorney's fees be construed to include attorney's fees for the appeal.

Attorneys for lessors of machinery would be well advised to study the case of *Robstone Co. v. Southern Crane Rentals, Inc.*⁷⁷ The case illustrates that a lengthy provision disclaiming any warranty but failing to mention negligence, along with an indemnity provision failing to provide expressly that the lessee agrees to indemnify the lessor from the lessor's own negligence, have the cumulative effect of not exculpating the lessor from liability for its own negligence.

73. FLA. R. CIV. P. 1.180(a) provides in part that a defendant as a third party plaintiff can serve a complaint on a person not a party to the action who is or may be liable to him "for all or part of the plaintiff's claim against him"

74. 363 So. 2d at 597. FED. R. CIV. P. 18(a) allows a defendant asserting a third party complaint to join as many claims as he has against the opposing party. Florida has no counterpart to this provision.

75. *Commercial Union Ins. Co. v. Bayfront Medical Center*, 363 So. 2d 1124, 1125 (Fla. 2d DCA 1978).

76. 366 So. 2d 1273 (Fla. 4th DCA 1979).

77. 366 So. 2d 1274 (Fla. 4th DCA 1979).

F. Statute of Limitations

A recent supreme court decision invalidated as unconstitutional a statutory limitation which, when applied, presented an absolute bar to the courts. The decision may profoundly affect products liability law, particularly with respect to health-related products. Section 95.11(3)(c) of the Florida Statutes⁷⁸ barred lawsuits brought more than twelve years after the occurrence of events connected with the construction of improvements to real property. The court in *Overland Construction Co. v. Sirmons*⁷⁹ held that the statute violates the constitutional right of access to the courts guaranteed by article I, section 21 of the Constitution of the State of Florida,⁸⁰ as applied to a person injured after the expiration of the twelve-year period.⁸¹ The majority reasoned that if such a suit were barred, no access to the courts would ever have existed for the injured party. Because other provisions of chapter 95 (governing suits for breach of warranty in the sale of goods) parallel section 95.11(3)(c), they may be unconstitutional if their application would work an absolute bar.⁸²

Such an extension of *Sirmons*, however, would overrule decisions barring actions based on prescription drug injuries. For example, the District Court of Appeal, Third District, held that an action for damages resulting from the cancer-producing qualities of Stilbetin (also known as DES or diethylstilbestrol), which was filed twenty-one years after the delivery of the drug, was barred under section 95.031(2) of the Florida Statutes.⁸³ That provision requires that a products liability action be brought within twelve years after the date of delivery of the product to the original purchaser, re-

78. (1979). The relevant portion of the statute provides that an action founded on the design, planning, or construction of an improvement to real property must be brought against the professional engineer, registered architect, or licensed contractor within 12 years after completion of the improvements which produced the injury. In effect, this section destroys a cause of action before it exists.

79. 369 So. 2d 572 (Fla. 1979).

80. FLA. CONST. art. I, § 21 provides that: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."

81. 369 So. 2d at 575.

82. See *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973), in which the constitutional right of access to the courts was interpreted as precluding the legislature from abolishing a statutory or common law right of action without providing any reasonable alternative for redress of a particular injury. The only exception to this is a legislative showing of an overpowering public necessity for the abolishment of the right, where no alternative method of protecting public necessity can be found.

83. *Diamond v. E.R. Squibb and Sons*, 366 So. 2d 1221 (Fla. 3d DCA 1978) (per curiam).

ardless of the date the defect was or should have been discovered. Although the user did not learn of the defect until twenty years after her first use of the product, and never could have learned of the defect—much less have filed—within the twelve year period, the suit was barred.

Similarly, a patient whose eyesight became seriously impaired after ingestion of a prescribed drug, Tegretol, and who had consulted specialists about the problem, was barred by the running of the four-year period of limitations from suing the manufacturer of the drug.⁸⁴ Under section 95.031(2) of the Florida Statutes, the statute of limitations in actions for products liability begins running from the time the “facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence.”⁸⁵ Although on first reading the case seems correct, the court in effect required a lay patient to have a greater knowledge of “cause and effect” than the numerous medical specialists who were consulted during the course of treatment. In brief, the patient must discover something that all the medical specialists missed. Under the *Sirmons* access to courts reasoning, however, a prescription drug case like this one may have an opposite result.

In *Kelley Tractor Co. v. Gurgiolo*,⁸⁶ the court held that the statute of limitations barred a cause of action against a seller for breach of an express warranty of the future performance of boat engines. The buyer continuously experienced significant mechanical difficulties with the engines between the date of purchase in October 1968 and the time of suit in 1976. During that time, he had discovered or should have discovered that the defendant had breached his express warranties of future performance. Although the decision fails to state anything about the nature of the warranty, it is consistent with original section 2-725 of the U.C.C. (and repealed Florida Statute § 672.2-725(1)), that the limitations period begins to run from the date of delivery “except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.”⁸⁷ In this case, the buyer knew or should have known, because of the chronic breakdowns, that the breach had occurred.

84. *Steiner v. Ciba-Geigy Corp.*, 364 So. 2d 47 (Fla. 3d DCA 1978).

85. *Id.* at 51. The four-year period is provided by FLA. STAT. § 95.11(3)(a), (e) (1979).

86. 369 So. 2d 992 (Fla. 3d DCA 1979) (per curiam).

87. FLA. STAT. § 672.2-725 (1973). This section was repealed, effective January 1, 1975, with the revision of chapter 95 of the Florida Statutes. 1974 Fla. Laws ch. 74-382, § 26.

G. Warranties and Negligence in Real Property Sales

The case of *Simmons v. Owens*⁸⁸ gave rise to "products liability" issues as applied to the sale of a house instead of to the sale of goods. In *Simmons*, the purchaser of a used house sued the original contractor for negligence in failing to follow a city building code by placing the wood siding of the house less than six inches from the ground. Placed so low, the wood was damaged by water rot and termite infestation. The second owner alleged that this was a latent defect not discoverable by reasonable inspection. The court held that even though the plaintiff was not the initial buyer from the builder, a cause of action was stated in negligence.⁸⁹ The *Simmons* court did not address implied warranty theory under the Code, which had already been held applicable in cases between the immediate buyer and his builder.⁹⁰

The Florida Legislature recently limited the availability of statutorily implied warranties of fitness and merchantability to buyers of condominiums for which construction began after the Florida U.C.C. became effective.⁹¹ Any buyer, however, retains a cause of action for breach of a warranty implied in common law, and is entitled to permission to amend his complaint to set forth this alternative theory.⁹²

H. Legislation

Although in general the Florida Legislature has accepted the 1972 official text of the U.C.C., the legislature recently enacted various laws affecting commercial relations both within and without the Code. Most of the changes appear in article 9 (discussed in the section on security agreements in this article), but some changes have been made in articles 1 and 2. For example, a 1979 amendment changes the implied warranty sections⁹³ to provide that a Florida seller of hogs or cattle will not be deemed to give an im-

88. 363 So. 2d 142 (Fla. 1st DCA 1978); see *Luciani v. High*, 372 So. 2d 530 (Fla. 4th DCA 1979), which held that an engineer employed by a general contractor to perform the necessary testing and examination of land upon which a residence was to be built, would be liable to third persons who might foreseeably be injured as a result of the negligent performance of his contractual duties. Thus, the engineer would be liable to the owner of the residence, as the owner was within the zone of foreseeability.

89. 363 So. 2d at 144.

90. See *Gable v. Silver*, 258 So. 2d 11 (Fla. 4th DCA 1972) (condominiums).

91. FLA. STAT. § 718.203 (Supp. 1978), as amended by 1979 Fla. Laws ch. 79-314, § 9. The effective date of the statute was July 1, 1974.

92. *Greenburg v. Johnston*, 367 So. 2d 229 (Fla. 2d DCA 1979).

93. U.C.C. §§ 2-314 to -318 (codified at FLA. STAT. §§ 672.314 to .318 (1979)).

plied warranty that the animals are free from sickness or disease. The exemption does not apply if the seller knowingly sells diseased animals.⁹⁴

The recent amendments adopt many of the 1972 recommended Code revisions. An amendment to section 671.201(9) of the Florida Statutes⁹⁵ deems certain persons who buy from sellers of minerals (including oil and gas) at the wellhead or mine head to be buyers in the ordinary course of business. To qualify, one must buy in ordinary course, in good faith, and without knowledge that the sale violates the ownership rights or security interest of a third party in the goods.⁹⁶

A further revision adopted last session in Florida makes a contract for the sale of growing timber a contract for the sale of goods, regardless of whether the buyer or the seller is to cut the timber.⁹⁷ Notwithstanding this change in the Code, the sponsors point out that to protect people dealing with timberlands, financing statements must be filed in the county in which the land is located, in the same manner as for the sale of fixture property.⁹⁸

A third adoption of recommended revisions to the Code followed the 1966 recommendations. The legislature amended section 672.702(3) of the Florida Statutes to protect a seller's right to reclaim goods against being cut off by a lien creditor or a trustee in bankruptcy.⁹⁹

Outside the Code, the legislature manifested some semantic magic in a recent amendment to the laws on motor vehicle title certificates.¹⁰⁰ Now, "when a [motor] vehicle is registered in the names of two or more persons as co-owners in the alternative by the use of the word 'or,' such vehicle shall be held in joint ten-

94. 1979 Fla. Laws ch. 79-141 (adding paragraph (d) to FLA. STAT. § 672.316 (1979)).

95. 1979 Fla. Laws ch. 79-398, § 2.

96. *Id.* The "buying" may be for cash or exchange of other property, and on either secured or unsecured credit; it cannot include a transfer in bulk or be considered security for, or in total or partial satisfaction of, a money debt.

97. *Id.* § 3 (amending FLA. STAT. § 672.107 (1977)).

98. *Id.* Sponsor's notes. The purpose of the change was to facilitate the financing of these transactions by treating the timber as goods instead of real estate.

99. *Id.* § 4 (amending FLA. STAT. § 672.702(3) (1977)). The statute as amended provides: "the seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser under this chapter (s. 672.403). Successful reclamation of goods excludes all other remedies with respect to them." The phrase "or lien creditor" following "purchaser" was deleted.

100. *Id.* ch. 79-333 (amending FLA. STAT. § 319.22(2) (1977)). The effective date of the amendment was January 1, 1980.

ancy."¹⁰¹ In accordance with this startling theory of property law, each co-owner is deemed to have granted the other the absolute right to dispose of title in the vehicle, with the signature of any co-owner constituting proper indorsement. Upon the death of a co-owner, the decedent's interest passes to the survivor as though title were held in joint tenancy. This provision is applicable "even if the co-owners are husband and wife,"¹⁰² so it appears that a tenancy by the entirety has now become a joint tenancy, at least for motor vehicle ownership purposes. In a more logical move, the legislature provided that when the vehicle is registered in the names of two or more owners connected by the conjunction "and," the signatures of all owners are required for a transfer of title.¹⁰³

Under a recent addition to the pawnbroker statute,¹⁰⁴ any person who sells or pledges goods to a pawnbroker must present a driver's license or other comparable identification to the pawnbroker. The pawnbroker is then required to record the date of the transaction, the type of identification presented, and the identifying number appearing thereon. This record must be signed by the person from whom the pawnbroker receives the property.¹⁰⁵ In addition, any lawful owner who discovers his stolen goods in the hands of a pawnbroker may recover them simply by informing any law enforcement agency of the location of the goods and providing proof of ownership. The agency is then authorized to recover the goods from the pawnbroker without expense to the owner. The pawnbroker will be able to defeat this right of recovery if he can present evidence that he received proof of ownership by the person who sold or pledged the goods to him.¹⁰⁶ There is a frontier-like quality to this extrajudicial quasi-replevin approach to the recovery of stolen goods, which raises questions about its sufficiency for due process.

IV. CARRIERS

In a case of first impression in Florida,¹⁰⁷ the supreme court held that cargo trailers and containers with temporarily affixed

101. FLA. STAT. § 319.22(2)(a)(1) (1979).

102. *Id.*

103. *Id.* § 319.22(2)(a)(2).

104. 1979 Fla. Laws ch. 79-249 (codified at FLA. STAT. § 715.041 (1979)).

105. FLA. STAT. § 715.041(1) (1979).

106. *Id.* § 715.041(2).

107. *Tropical Shipping & Constr. Co. v. Askew*, 364 So. 2d 433 (Fla. 1978) (construing FLA. STAT. § 212.08(a) (1973)).

wheels that are later boarded on ships for foreign commerce will receive the same partial tax exemption as vehicles used in interstate and foreign commerce. Under the Florida Use and Sales Tax Statutes,¹⁰⁸ therefore, owners of these trailers and containers will pay the percentage of the sales and use tax which represents "the number of miles traveled by the containers and trailers in Florida [divided by] the total miles traveled including the miles traveled 'fishy-back'" (i.e. while the trailers and containers are on board a vessel).¹⁰⁹

A motor carrier transporting goods in Florida without authorization by the Florida Public Service Commission may be subject to an injunction at the request of an authorized rival carrier under chapter 323 of the Florida Statutes. Even though this chapter is silent about an aggrieved carrier's right to damages, money damages may be awarded under the common law theory that one who is injured by a competitor's engagement in business in violation of a statute has a cause of action for the resulting damages.¹¹⁰

Unrelated to regulatory statutes, a decision by the District Court of Appeal, Third District, held that the existence of an agency relationship between freight forwarders was a question of fact for a jury to determine, where a Miami forwarder referred a shipper's problem to a Baltimore forwarder whose negligence in preparing the bill of lading caused loss to the shipper. Consequently, the trial court committed reversible error in charging the jury that the Miami forwarder would be liable as a matter of law for the negligence of the Baltimore forwarder.¹¹¹

V. NEGOTIABLE INSTRUMENTS

A. Agency

Under section 673.403 of the Florida Statutes, a court may admit parol evidence to determine the capacity in which corporate representatives have signed a note which contains the company name but does not specify the representatives' capacity. In *Placet, Inc. v. Ashton*,¹¹² a note was signed thus:

108. FLA. STAT. §§ 212.01-.22 (1979).

109. 364 So. 2d at 437.

110. *Smalley Transp. Co. v. Moed's Transfer Co.*, 373 So. 2d 55 (Fla. 1st DCA 1979).

111. *Latin Am. Shipping Co. v. Pan Am. Trading Corp.*, 363 So. 2d 578 (Fla. 3d DCA 1978).

112. 368 So. 2d 404, 408 (Fla. 3d DCA 1979). FLA. STAT. § 673.403(2) (1979) provides that "[a]n authorized representative who signs his own name to an instrument . . . [e]xcept as otherwise established between the immediate parties, is personally obligated if the instru-

Placet, Inc.—Ray Esser
Richard Jensen.

The court upheld the trial court's finding based on parol testimony that the signers were personally liable.

B. *Defenses*

As a general rule, the legal inception or valid existence of a negotiable instrument depends upon its delivery in accordance with the purpose and intention of the parties.¹¹³ Thus, when the drawer of a check made payable to a payee never delivers the check, but deposits it in the drawer's own account, the named payee acquires no rights in the unissued check and has no cause of action for conversion against the bank under section 673.419(1)(c) of the Florida Statutes.¹¹⁴

Judicial relief will also be denied a payee seeking to enforce a note from a maker with whom the payee was in *pari delicto* in a fraud scheme. In *Whitelock v. Geiger*,¹¹⁵ the payee, while acting in a fiduciary capacity as to the maker, devised a scheme with the maker to defraud creditors in bankruptcy proceedings concerning the maker's business. The court refused to help the parties settle their dispute.

A bank successfully raised a defense based on section 673.117 of the Florida Statutes, against a conversion claim by the purchaser of a cashier's check.¹¹⁶ Plaintiff had purchased a cashier's check made payable to "The Shores Corporation of Miami Escrow Acct. for Unit 401 D Bldg. 'C' B/O Pablo Goldszmidt," and the drawee bank had paid the check when endorsed "For deposit only, The Shores Corp. of Miami 009-726-6." The District Court of Appeal, Fourth District, held that the endorsement was valid and payment of the check was proper under the section of the statute which provides, in effect, that as long as the check was endorsed by the Shores Corporation, then the additional language describing the purpose for the issuance of the check was to be treated as surplusage. The bank would be liable to the customer in conversion only if it knew that the payee was making improper use of the

ment names the person represented but does not show that the representative signed in a representative capacity"

113. *City Nat'l Bank v. Wernick*, 368 So. 2d 934, 936 (Fla. 3d DCA 1979).

114. *Id.* at 937. FLA. STAT. § 673.419(1)(c) (1979). The statute provides that an instrument is converted when it is paid on a forged endorsement.

115. 368 So. 2d 372 (Fla. 2d DCA 1979) (*per curiam*).

116. *Pan Am. Bank v. Goldszmidt*, 364 So. 2d 505 (Fla. 3d DCA 1978) (*per curiam*).

check.¹¹⁷ The same result would obtain if a personal rather than a cashier's check was used.

Section 673.305 of the Florida Statutes defeats the defense of discharge of payment in favor of a holder in due course. If a holder in due course has no notice that the maker of negotiable promissory notes has paid the original payee prior to the negotiation of the notes by the payee to the holder in due course, he takes the instruments free of the defense of discharge of payment.¹¹⁸ The general rule, now incorporated into the above statute, is that a holder in due course takes and holds negotiable instruments free of all defenses of which he is not on notice. A maker may avoid suit on a discharged note by simply demanding the return of the note at the time of payment.

Two procedural issues were decided regarding defenses on negotiable instruments. In an action on a note a debtor raised affirmative defenses that the lender had (1) fraudulently agreed to consolidate the note with another note and (2) failed to consolidate the notes. The court struck these defenses because they did not refer to the maker's obligation on the note.¹¹⁹ In a second case, a plaintiff holder of a promissory note who failed to reply to affirmative defenses was not deemed to have admitted them when the plaintiff's evidence did not attempt to avoid the affirmative defenses but instead denied them.¹²⁰

Finally, the District Court of Appeal, Third District, has refused to read a promissory note "in an unnatural and unusual manner" to sustain a guarantor's assertion that the note was usurious. The court upheld a summary judgment against the defendants, who failed to assert any particularized defense of usury.¹²¹

C. Forgery

Some recent Florida decisions regarding instrument forgery are troubling because of procedural or substantive deficiencies. One court decided a complex forgery case even though plaintiff apparently had no standing to sue. In *Barnett Bank v. Lipp*,¹²² the

117. *Id.* at 507. For a case with substantially similar facts and holding, see *Pan Am. Bank v. Yanco*, 364 So. 2d 509 (Fla. 3d DCA 1978) (per curiam).

118. *Bank of Miami v. Florida City Express*, 367 So. 2d 683 (Fla. 3d DCA 1979).

119. *American Arlington Bank v. Cohen*, 369 So. 2d 369 (Fla. 1st DCA 1979).

120. *Treister v. Capital Bank*, 369 So. 2d 959 (Fla. 3d DCA 1979) (per curiam).

121. *Southern Shipping Co. v. Flagship First Nat'l Bank*, 366 So. 2d 855 (Fla. 3d DCA 1979) (per curiam).

122. 364 So. 2d 28 (Fla. 3d DCA 1978).

plaintiff was a customer of a stockbroker who, at the request of a dishonest employee, drew a check payable to the customer. The employee then forged the endorsement of the customer and cashed the check at his own bank; the customer's account with the stockbroker was debited for the amount of the check. The customer-payee then sued the cashing bank, which unsuccessfully asserted the so-called "fictitious payee" rule. That rule, under section 673.405(1)(c) of the Florida Statutes, did not apply to actions between a payee and a collecting bank, but was limited to actions between the drawer of a check and the drawee bank.¹²³ The cashing bank would be liable to the payee for conversion under section 673.419(3) of the Florida Statutes, unless the bank showed that it acted in good faith and in accordance with reasonable commercial standards in the cashing of the check.¹²⁴ The bank failed to present any evidence on the standards of the banking trade. The appellate court, agreeing with the trial court jury that the bank was negligent in cashing the check, based its decision in part upon the bank cashier's failure to obtain the initials of a bank officer prior to cashing the check, despite the large amount of the check (\$7,000) and the length of time since issuance (one month).¹²⁵ The troubling thing about this decision is that because the check was never issued to the payee, he had no property right in the check and thus had no standing to sue.¹²⁶ Yet the court did not address the issue of standing.

In *O.K. Moving & Storage Co. v. Eglin National Bank*,¹²⁷ an inadequate analysis of the facts and law led to the right result for the wrong reasons. For over thirteen months, an employee deposited checks made payable to her employer, O.K. Moving, in her private account at the Eglin National Bank. Each check was subject to a restrictive endorsement which read, "For Deposit Only, O.K. Moving & Storage Company, Inc., 80 Carson Drive, N.E., Fort Walton Beach, Florida 32548." O.K. Moving had no account or business relationship with the bank, and after discovering the transactions, it sued the bank. The trial court granted only partial

123. *Id.* at 29. The statute provides that an endorsement by any person in the name of a named payee is effective if an agent or employee of the maker or drawer has supplied him with the name of the payee, intending the latter to have no such interest. FLA. STAT. § 673.405(1)(c) (1979).

124. 364 So. 2d at 29.

125. *Id.* at 30.

126. *E.g.*, *Winn v. First State Bank*, 581 S.W.2d 21 (Ky. 1979); see note 113 and accompanying text *supra*.

127. 363 So. 2d 160 (Fla. 1st DCA 1978).

recovery, holding that although the bank was negligent, the employer was also negligent in not discovering the embezzlement for such a long period of time. On appeal, the court held that since the employer had committed no act inducing the bank to accept the deposit of these checks, it had committed no negligence "that proximately caused the bank to conduct its operation as it did."¹²⁸ The court then inexplicably cited authority for the proposition that when a depository bank collects on checks bearing the forged signature of the payee, it would be liable in conversion to the payee-employer.¹²⁹ Actually, if these signatures truly had been forgeries, then under section 673.419(3) of the Florida Statutes, the bank would *not* be liable, except for the check proceeds still remaining in its hands.¹³⁰ These signatures, however, were not forgeries; they were genuine. The Eglin Bank was liable not because it paid on forged signatures, but because it ignored restrictive endorsements. In this latter case, a bank is liable for the full proceeds of the checks and not just the proceeds still remaining in its hands, under sections 673.206(3) and 673.603(1)(b) of the Florida Statutes.¹³¹ The final decision by the court in *O.K. Moving* in favor of the payee is correct, but the faulty analysis may well mislead other courts.

In another action, involving a true forgery, a payee who knew that checks on her account had been paid upon a forged endorsement by a business associate waited several months before pursuing the bank for conversion of the checks and was deemed to have ratified the forgery under section 673.404 of the Florida Statutes.¹³² As a result, the payee had no cause of action against the bank and could proceed only against her former associate.¹³³

A person who wrongfully signs the drawer's name to a check, then signs the payee's name, and adds an endorsement of a fictitious person to the check may be guilty of criminal forgery even though the last name signed was fictitious. Proving guilt of forgery

128. *Id.* at 162.

129. *Id.*

130. See note 124 and accompanying text *supra*.

131. FLA. STAT. § 673.603(1)(b) (1979) provides in part that liability is not discharged to the extent of payment when a party pays or satisfies the holder of an instrument, which has been restrictively endorsed, in a manner not consistent with the terms of the restrictive endorsement.

132. *Fulka v. Florida Commercial Banks, Inc.*, 371 So. 2d 521 (Fla. 3d DCA 1979). The statute provides that an unauthorized signature is wholly inoperative unless the person whose name is signed ratifies it or is precluded from denying it. FLA. STAT. § 673.404 (1979).

133. 371 So. 2d at 525.

requires a showing that the assumed name was used with intent to defraud.¹³⁴

D. Statute of Limitations

The Supreme Court of Florida upheld the constitutionality of sections 95.022 and 95.11(2)(b) of the Florida Statutes, which reduce the statute of limitations from twenty to five years for a suit on a contract (a promissory note) under seal. The court noted that these sections provide for a savings clause that permits suits by persons having an existing cause of action under a sealed instrument one year from the date of the act. This allows such a reasonable time that the retroactive application of the statute falls within constitutionally permissible limits and does not violate the constitutional prohibition against impairment of contractual obligations.¹³⁵

E. Legislation

A recent enactment increases from five dollars to ten dollars the maximum amount a payee may collect as a service charge on a worthless check.¹³⁶ Further, a payee who prevails in an action is now entitled to recover reasonable attorney's fees and costs of collection. The legislature failed, however, to amend the required form of the notice to the check issuer, which still provides for a five dollar service charge.¹³⁷

F. Letters of Credit

The District Court of Appeal, Third District, recently held that strict conformity with the terms of a letter of credit is necessary before payment will be required. In *Fidelity National Bank v. Dade County*,¹³⁸ the bank issued a letter of credit to the county to secure a customer's performance. The letter provided that the bank would pay the county upon receipt of the county's draft for the correct sum, accompanied by a certificate of the Director of Public Works stating that the customer had failed to complete the specified improvements. On the letter's expiration date, the county tendered its draft, a memorandum from the Director of Public

134. *Davis v. State*, 364 So. 2d 19 (Fla. 1st DCA 1978).

135. *Carpenter v. Florida Cent. Credit Union*, 369 So. 2d 935 (Fla. 1979).

136. 1979 Fla. Laws ch. 79-345 (amending FLA. STAT. § 832.07(1)(a)-(2) (1977)).

137. FLA. STAT. § 832.07(1)(a) (1979).

138. 371 So. 2d 545 (Fla. 3d DCA 1979).

Works directing the Finance Director to collect on the letter of credit, and a letter—not a certificate—to the bank, signed by the chief accountant and stating that the customer had failed to perform. The bank refused to pay the draft, on the ground that the terms of the letter of credit had not been complied with. The court agreed with the bank and reversed the circuit court's judgment for the county.

VI. SURETIES AND GUARANTORS

A. *Jurisdiction and Choice of Law*

Florida's long-arm statutes¹³⁹ are not to be given a retroactive application, according to the District Court of Appeal, Third District. As a result, the statute extending long-arm jurisdiction could not help guarantors perfect long-arm jurisdiction over debtors in a suit for payment, when the guarantors had paid the promissory note prior to the time that the statute became effective. The cause of action of the guarantor accrued at the time it paid its obligation on the debt, at which time the statutes were yet unavailable to confer jurisdiction over the nonresident makers.¹⁴⁰

Under section 48.181 of the Florida Statutes, however, a foreign corporation which guaranteed three promissory notes by executing the guarantee in Florida was held to be doing business in Florida. The corporation was found to have had sufficient minimum contacts with the state to satisfy due process standards and confer personal jurisdiction.¹⁴¹

In a case involving a promissory note and guarantee agreement made in Illinois, the payee suing on the note in Florida did not need to allege and prove the law of Illinois in order to recover. Either party to litigation may plead and prove the law that is applicable to the contract in question; if there is a failure to plead any applicable foreign law, the court will presume that the foreign law is the same as Florida law.¹⁴²

B. *Defenses*

As of May 1979, all of the district courts of Florida agreed that a secured party must give its debtor notice before disposing of col-

139. FLA. STAT. §§ 48.193, .194 (1979); see notes 2 & 5 *supra*.

140. *Connell v. Ott Research & Dev. Inc.*, 363 So. 2d 163, 164 (Fla. 3d DCA 1978).

141. *Compania Anonima Simantob v. Bank of America Int'l*, 373 So. 2d 68 (Fla. 3d DCA 1979); see note 10 *supra*.

142. *Watson v. First Nat'l Bank*, 367 So. 2d 732, 733 (Fla. 4th DCA 1979).

lateral or else forfeit the right to a deficiency judgment. The District Court of Appeal, First District, held that where a promissory note expressly provides that it is governed by the U.C.C. and that the lender will give the borrower reasonable notice of the time and place of any public or private sale, the failure to give the requisite notice prior to the sale or disposition of the collateral precludes an action for a deficiency judgment against the debtors.¹⁴³ In so holding, the court reaffirmed an earlier decision in which it aligned itself with the view of the Second, Third, and Fourth Districts, that a violation of the provisions of subsections 9-504(2) and (3) of the U.C.C.¹⁴⁴ precludes the lender from obtaining a deficiency judgment against the guarantors upon foreclosure of the note.¹⁴⁵

A continuing guarantee agreement is one which by its language contemplates a course of dealing in the future, a series of transactions in the future, or a continuing line of credit to the principal debtor.¹⁴⁶ Under this kind of guarantee, the lender need not give the guarantor notice of each extension of credit to the principal debtor, provided that the particular transactions fall within the description of the course of dealings contemplated by the terms of the guarantee. It is also not necessary that the lender inform the guarantor of a change in interest rates for the various extensions of credit. If the continuing guarantee agreement expressly provides that the lender need not give the guarantor notice, that is a further reason for dispensing with any necessity of giving notice.¹⁴⁷

In *Frank v. Intercontinental Bank*,¹⁴⁸ an attorney issued his promissory note to a bank in exchange for a note previously given to the bank by the attorney's client, and the bank sued the attorney on his note. Under section 3-408 of the U.C.C.,¹⁴⁹ the defense of lack of consideration was unavailing. Further, since the attorney had given a renewal note in place of his original note, neither the defense of a lack of consideration for the original note, nor the de-

143. *Southeast First Nat'l Bank v. LeGrace Co.*, 363 So. 2d 128, 129 (Fla. 1st DCA 1978).

144. FLA. STAT. § 679.504(2)-(3) (1979).

145. 363 So. 2d at 129 (citing *Barnett v. Barnett Bank of Jacksonville*, 345 So. 2d 804 (Fla. 1st DCA 1977)).

146. *Fidelity Nat'l Bank v. Melo*, 366 So. 2d 1218, 1221 (Fla. 3d DCA 1979).

147. *Id.*

148. 372 So. 2d 543 (Fla. 3d DCA 1979) (per curiam).

149. FLA. STAT. § 673.408 (1979) provides in part: "Want or failure of consideration is a defense as against any person not having the rights of a holder in due course, . . . except that no consideration is necessary for an instrument or obligation thereon given in payment of or as security for an antecedent obligation of any kind."

fense that the attorney issued the note as an accommodation party for the benefit of the bank (rather than the client) could prevail.

A novation contract, like most other contracts, must be supported by consideration. The mere showing that a guarantor agreed to make installment payments on a debt which his guarantee already obligated him to pay lacks the requisite consideration for a novation. In addition, without evidence that the creditor intended to cancel the original debt or cancelled the promissory note, there is no showing of a novation.¹⁵⁰

In *Jones v. W.L. Cobb Construction Co.*,¹⁵¹ the stockholders of a general contracting corporation gave this guarantee to landowners: "We unconditionally guarantee to [the owner] the due performance of all [the general contractor's] obligations under the above described construction contract."¹⁵² In a subcontractor's suit against the stockholders to foreclose a mechanic's lien, the court held that the stockholders were guarantors of a performance obligation, not a payment obligation. The guarantee thus did not inure to the benefit of mechanics' lien claimants; the guarantee extended no further than the promise solely to the landowners that the contract would be performed.¹⁵³

Under subsections 3-606(1) and (2) of the U.C.C.,¹⁵⁴ a holder of a promissory note may enter into a stipulation with some of the sureties on the note to dismiss them with prejudice as parties to a suit. At the same time, the holder may reserve his rights (including rights of contribution) against the remaining sureties, notwithstanding the agreement. This stipulation is actually a covenant not to sue, rather than a release; a release would have the effect of releasing all sureties.¹⁵⁵

C. Impairment of Collateral

In *Baitcher v. National Industrial Bank*,¹⁵⁶ a bank lender who had assured the guarantor of a loan that the lender would perfect a security interest in the goods securing the loan failed to do so.

150. *Miami Nat'l Bank v. Forecast Constr. Corp.*, 366 So. 2d 1202 (Fla. 3d DCA 1979) (per curiam).

151. 371 So. 2d 550, 551 (Fla. 2d DCA 1979).

152. *Id.* at 551.

153. *Id.* at 552.

154. FLA. STAT. § 673.606(1)-(2) (1979).

155. *Brunswick Corp. v. Concorde Yachts, Inc.*, 370 So. 2d 102 (Fla. 4th DCA 1979).

156. 368 So. 2d 439 (Fla. 3d DCA 1979). *See also* U.C.C. § 3-606 (FLA. STAT. § 673.606 (1979)).

Consequently, the collateral was lost to the trustee in bankruptcy. The court held that the failure to perfect released the guarantor to the extent that he was harmed by the loss of the collateral, although the court failed to cite section 9-207 of the U.C.C. (section 679.207 of the Florida Statutes) which controlled the case.

In another case, a wife acted as a guarantor in signing her husband's promissory note in return for the lender's making a loan to the husband. The court held that the wife's promise was supported by consideration and was binding on her.¹⁵⁷ In addition, since the guarantee agreement allowed the lender to impair collateral and provided that any impairment would not constitute a defense to the guarantor, the wife had contractually surrendered the defense of impairment of collateral.

In *Aetna Insurance Co. v. Buchanan*,¹⁵⁸ a surety bond was issued in consideration of an individual's agreeing to indemnify the surety company in the event of loss for a period of one year. The surety bond provided that either the surety company or the principal could terminate before the expiration of the one-year period. The indemnity agreement, however, had no provision allowing the indemnitor to terminate his obligation, and the court held that the indemnitor could not unilaterally terminate before the expiration of the one-year period. The terms of the surety bond could not be engrafted into the indemnity agreement.

VII. MORTGAGES

A. *Balloon Mortgages*

Strictly construing the Florida Statute on balloon mortgages, a district court held that when a balloon mortgage did not contain the final amount due upon maturity in accordance with the wording of section 697.05 of the Florida Statutes, the mortgagee forfeited interest, costs, and attorney's fees.¹⁵⁹ In addition, the maturity date was extended from three years to nine years, even though the mortgage was conspicuously labeled as a balloon mortgage and the boldface type followed most of the language of the statute.

In a multifaceted decision, the District Court of Appeal, First District, held that the assignee of a balloon note and mortgage was

157. *von Dunser v. Southeast First Nat'l Bank*, 367 So. 2d 1094 (Fla. 3d DCA 1979).

158. 369 So. 2d 351 (Fla. 2d DCA 1979).

159. *Overlock v. Marshall*, 363 So. 2d 131 (Fla. 4th DCA 1978) (per curiam). A dissenting judge would have reversed the trial judge's ruling on the grounds that the mortgage substantially complied with the statute.

subject to the provisions of the balloon mortgage statute.¹⁶⁰ Because the assigned balloon mortgage violated the statute, the assignee had to forfeit the interest it had received. The forfeiture was limited, however; the present mortgagor could not recover interest paid by a predecessor in title.

B. Construction Loans

A construction lender reserving the right in a mortgage agreement to enter and complete a project if the mortgagor stops construction should give serious attention to the case of *Gross v. City of Riviera Beach*.¹⁶¹ In *Gross*, a construction loan agreement provided that if construction ceased for ten days or if the owner abandoned the property, the mortgagee had the right to enter and complete the project. The mortgagor defaulted and ceased construction after completing ninety percent of the work. The lender foreclosed but did not take over possession and did not continue construction. The city building permit expired by operation of law ninety days after construction ceased, but before the expiration of that permit the city substantially reduced the density permitted in the area. After acquiring the property in the foreclosure sale, the lender sought a new building permit to complete the project at its original density. The city refused to grant a variance and a new building permit; the trial and appellate courts agreed. Because the lender had failed to exercise its right under the mortgage to step in promptly and complete the project, the lender's own failure to act had caused the loss.¹⁶²

In a similar case, a construction lender had continued to advance funds to a borrower despite the improbability that the borrower would complete construction by the date set in the loan agreement. The court held that the lender had thereby waived his right to declare a default. The court reasoned that the borrower had critically changed its position by giving up its opportunity to complete the building on time, in reliance upon the lender's advances. This waiver was binding on the lender without the bor-

160. *O'Neil v. Lorain Nat'l Bank*, 369 So. 2d 378 (Fla. 1st DCA 1979) (per curiam). The relevant portion of the statute provides: "Any mortgagee, creditor, . . . assignee, transferee . . . violating the provisions of this section shall forfeit the entire interest charged . . . , and only the principal sum of such mortgage can be enforced in any court in this state" FLA. STAT. § 697.05(4) (1979) (emphasis supplied).

161. 367 So. 2d 648 (Fla. 4th DCA 1979).

162. *Id.* at 651.

rower's paying any consideration.¹⁶³

C. Defenses

Among the defenses recently asserted in mortgage foreclosure actions are: fraud in the making or assigning of a mortgage, oral modification of the agreement, release, laches, nondelivery of a completion certificate as required by statute, and the superior rights of an intervening estate or innocent third party.

An assignor-mortgagee's use of fraud to obtain a note and mortgage constitutes an adequate defense by the mortgagor against a foreclosing assignee that does not hold in due course. In *Second National Bank v. G.M.T. Properties, Inc.*,¹⁶⁴ the bank which received the mortgage assignment without the endorsement of the note could not be a holder,¹⁶⁵ and hence could not be a holder in due course.¹⁶⁶ The bank's failure to inform the mortgagor of the assignment until payment of interest was due contributed to the decision against the bank.

In another instance, the defense of fraud did not suffice to prevent foreclosure without a showing that the mortgagee was involved in or had any knowledge of the alleged fraud.¹⁶⁷ The only parties alleged to have been involved in the fraud were third party defendants, whom the third party plaintiffs voluntarily dismissed.

If supported by consideration, an oral modification of a note and mortgage that extends the time for payment is a valid defense to foreclosure of the mortgage. Similarly, a lack of consideration in making the mortgage is a valid defense to a foreclosure action. These defenses are not mere "paper issues," and summary judgment should not be granted in favor of a lender making no effort to disprove them.¹⁶⁸

163. *Flagler Center Bldg. Loan Corp. v. Chemical Realty Corp.*, 363 So. 2d 344 (Fla. 3d DCA 1978) (per curiam).

164. 364 So. 2d 59 (Fla. 3d DCA 1978).

165. FLA. STAT. § 671.201(20) (1979).

166. FLA. STAT. § 673.202 (1979).

167. *Baron v. Estate of Clare*, 372 So. 2d 1005 (Fla. 4th DCA 1979).

168. *Howdeshell v. First Nat'l Bank*, 369 So. 2d 432 (Fla. 2d DCA 1979). The author questions whether the court meant waiver when it used the word "modification." A waiver would have eliminated the time requirement for payment. A modification would have extended the time requirement. See *Kerber v. Chadan, Inc.*, 364 So. 2d 1264 (Fla. 4th DCA 1978), which reversed the entry of a summary judgment in favor of mortgagors on their defense that the mortgagees were equitably estopped to foreclose because one of them had granted an extension of time; the alleged extension was denied and the court held that a trial was needed to resolve the factual questions.

In *Ratner v. Miami Beach First National Bank*,¹⁶⁹ the District Court of Appeal, Third District, applied the defense of release to prevent foreclosure on a parcel of land. The rule is that when land is subject to a mortgage, and the mortgagor sells a portion of the land, the remaining unsold land becomes the primary source for the payment of the mortgage. The mortgagee's release of any unsold portion from the mortgage discharges the mortgage lien to the extent of the value of the land released, provided two conditions are met: (1) the mortgagee knows of the purchaser's rights but releases the remainder without the purchaser's assent and (2) the part released is sufficient to satisfy the entire debt.¹⁷⁰

In a foreclosure action by the mortgagees against the successor in interest to the purchaser of two-thirds of the mortgaged parcel, the court applied the rule to deny foreclosure. First, the court charged the mortgagee with knowledge of the purchase because the buyer's deed was recorded nine years before the release. Second, "the value of the part released . . . was more than sufficient to satisfy the amount of the original debt."¹⁷¹ As Judge Schwartz pointed out in dissent, the majority decision overlooked the fact that over \$60,000 in interest was due on the mortgage, while the value of the released land would suffice to pay only the original balance of the mortgage.¹⁷²

An independent basis for the majority decision in *Ratner* was that even though the statute of limitations had not run, the mortgagee would be barred from foreclosing under the theory of laches. Judge Schwartz again dissented on the ground that there was no showing that the aggrieved party had relied to its detriment upon the mortgagees' delay in asserting their rights.¹⁷³

Under section 520.81(1) of the Florida Statutes,¹⁷⁴ a contractor who received a mortgage from a customer under a home improvement contract and who failed to obtain a completion certificate from the customer as required by the statute had no right to foreclose the mortgage.¹⁷⁵

In a suit by a second mortgagee against the mortgagor, the

169. 368 So. 2d 1326 (Fla. 3d DCA 1979).

170. *Ellis v. Fairbanks*, 38 Fla. 257, 21 So. 107 (1897).

171. 368 So. 2d at 1328 (Schwartz, J., dissenting).

172. *Id.*

173. *Id.*

174. The Home Improvement Sales and Finance Act, FLA. STAT. § 520.81(1) (1979). The statute requires that on completion of the home improvements, the contractor shall prepare a certificate which both parties will sign.

175. *Gissendan v. Rich*, 365 So. 2d 454 (Fla. 1st DCA 1979) (per curiam).

mortgagor may not implead the first mortgagee under rule 1.180 of the Florida Rules of Civil Procedure. The rule precludes a claim against a third party defendant who could not be liable for all or part of the original claim. In *Sapp Brothers Construction Co. v. Home Loan Federal Savings and Loan Association*,¹⁷⁶ the defendant mortgagor tried to implead the first mortgagee on the grounds that it had interfered with the mortgagor's relationship with the second mortgagee, causing the failure to pay the second mortgagee. The court correctly dismissed the third party action; the first mortgagee was neither a proper nor a necessary party to the action because the first mortgagee could not be liable to the second mortgagee for payment of the second mortgage. To pursue a claim against the first mortgagee, the mortgagor would have to bring a separate action.

In *Lonergan v. Lippman*,¹⁷⁷ the rights of an innocent third party in an intervening estate defeated a summary judgment motion for foreclosure based on the merger doctrine. In *Lonergan*, a long-term lessee had subleased part of the premises; the sublease had provided that the sublessee had the option to renew his lease for a twenty-five year period if the lessee also chose to renew its lease for at least twenty-five years. The lessee chose to renew its lease for a fifty-year period, but later sold its leasehold to a company which purchased the fee simple on the same day. The sellers conveyed their fee to the company, which gave back a purchase money mortgage for the express purpose of merging the lease into the fee. The sublessee continued to occupy the property, made his rental payments, and soon elected to renew the lease. The company that had purchased the fee defaulted on its mortgage; foreclosure was sought against the company and the sublessee. Holding that the merger of the base lease and the fee had wiped out the sublessee's interest, the lower court entered summary judgment against the sublessee. The district court reversed, holding that the doctrine of merger would not, as a matter of law, apply automatically to deprive the sublessee of his vested right to renew. The district court noted that if the mortgagees conveyed the fee and took back the note and mortgage without notice of the sublessee's rights, then the trial court, upon remand, might apply the merger doctrine and allow foreclosure. The court noted, however, that the recorded conveyance of the leasehold estate did recite the fact of

176. 367 So. 2d 722 (Fla. 3d DCA 1979).

177. 365 So. 2d 420 (Fla. 1st DCA 1978) (per curiam).

the sublessee's interest and that the sublessee's actual occupancy of the premises served to give the mortgagees notice of the sublessee's interest in the property.¹⁷⁸

D. *Documentary Stamp Taxes*

In a case apparently of first impression in Florida, the District Court of Appeal, First District, held that under section 199.032(2) of the Florida Statutes, intangible taxes must be paid upon notes which are secured by mortgages on leaseholds, because such leaseholds are interests in real property.¹⁷⁹ In addition, even though the recording clerk does not require the intangible tax to be paid at the time the mortgage is recorded, the Department of Revenue may claim the tax three years after the filing. The mortgagee's alleged reliance on two opinions of the Attorney General and an opinion of the Department of Revenue that an intangible tax was not due, resulting in the mortgagee's failure to charge the mortgagor the amount of the tax, did not estop the Department from claiming the tax. The court would not consider the alleged custom in Florida that lenders charge borrowers for the intangible tax, because the bank failed to prove the existence of such a custom.

The District Court of Appeal, Fourth District, held that when partners conveyed real estate subject to a mortgage to a general partnership, there was a shifting of an economic burden, and thus sufficient consideration under Florida law to warrant the payment of the documentary stamp tax and surtax by the partnership.¹⁸⁰ The court also held, however, that the Department of Revenue should not apply section 12A-4.13(10)(c) of the Florida Administrative Code strictly in determining the amount of tax liability because "[i]f one partner's transfer reduces his actual liability then the consideration for this transfer is proportionately increased. When another partner's actual liability is increased as a result of the transfer the consideration for that transfer is proportionately reduced."¹⁸¹ Finally, the court held that the Department of Revenue had no discretion in assessing a penalty for nonpayment and could not reduce the statutory amount.

The Supreme Court of Florida, in affirming a decision of a district court, has held that because the Florida Bar is an arm of the

178. *Id.* at 421.

179. *First Nat'l Bank v. Department of Revenue*, 364 So. 2d 38 (Fla. 1st DCA 1978).

180. *Andean Inv. Co. v. Department of Revenue*, 370 So. 2d 377 (Fla. 4th DCA 1978).

181. *Id.* at 379.

judiciary, it is unconstitutional to impose a documentary stamp tax on a promissory note issued by the Florida Bar to a lending bank.¹⁸² Chief Justice England, in dissent, noted that the tax is imposed not upon the borrower (the Florida Bar) but upon the lender. He argued that the borrower's agreement to bear the financial burden of the tax is legally irrelevant. To require the Department of Revenue to look beyond the legal incidence of the tax, he asserted, would be "absurd" and "probably unlawful."¹⁸³

E. Usury

In a case of first impression, the District Court of Appeal, Third District, held that under section 687.03(3) of the Florida Statutes,¹⁸⁴ variable interest charges are not to be spread over the term of the loan in order to determine the interest rate. The spreading of "any payment or property charged, reserved, or taken as an advance or forbearance . . . over the stated term of the loan for the purpose of determining the rate of interest," refers only to the spreading of an advance or forbearance.¹⁸⁵ A 1974 loan with a variable interest rate of 4.5% over the prime rate (equivalent to 15% per annum) was not controlled by the 1973 version of section 687.03,¹⁸⁶ under which the loan would have been usurious. The court interpreted the loan under the 1977 version of the statute,¹⁸⁷ in which the express legislative intent was not to allow for variable interest charges to be spread over the stated term of the loan.¹⁸⁸ The court noted that remedies provided by a usury statute created no vested rights, but only an enforceable penalty. This penalty, not immune from repeal or modification by the enactment of legislation, could therefore be abated even during the pending of an appeal based on a prior statutory penalty.¹⁸⁹ Although the current version of section 687.03 of the Florida Statutes specifically provides against its retrospective application, the language of section 687.03 in the 1973 and 1975 versions¹⁹⁰ of the Florida Statutes is so similar to the current version that any of the versions would call

182. *Lewis v. Florida Bar*, 372 So. 2d 1121, 1122 (Fla. 1979) (per curiam).

183. *Id.* at 1123 (England, C.J., dissenting).

184. FLA. STAT. § 687.03(3) (1979).

185. *Sailboat Apt. Corp. v. Chase Manhattan Bank*, 363 So. 2d 564, 568 (Fla. 3d DCA 1978).

186. FLA. STAT. § 687.03(1) (1973) (amended 1977).

187. *Id.* § 687.03(3) (1979).

188. 363 So. 2d at 568.

189. *Id.* at 567.

190. FLA. STAT. § 687.03(1)-(2) (1973); *id.* § 687.03(3) (1975).

for the same disposition of this case.

In a separate case, the Third District also determined that a chancellor had not abused his discretion in refusing to foreclose a usurious mortgage where the lender was "without clean hands." Instead, the chancellor had entered a money judgment for the amount of the loan, less civil usury penalties. The district court noted that the chancellor also could have held it against the public policy of Florida to enforce a usurious mortgage.¹⁹¹

VIII. FORECLOSURE

A. *Jurisdiction*

A wide range of jurisdictional issues arose before the Florida courts in 1979. Of particular note were three decisions enforcing a foreign judgment on Florida defendants, applying *res judicata* in a deficiency action to bar claims omitted from the previous foreclosure, and allowing an arguably premature foreclosure action by a third mortgagee under the doctrine of "anticipatory breach."

In *First National Bank v. Collins*,¹⁹² an Arkansas court asserted long-arm jurisdiction over Florida residents. A Florida husband and wife owned land in Arkansas which they mortgaged to an Arkansas bank. The Arkansas bank brought foreclosure proceedings and, in accordance with Arkansas law, mailed a letter to the owners in Florida with return receipt requested. A copy of the complaint, an affidavit, and a notice of *lis pendens* accompanied the letter. After a default judgment against the owners, the property was sold, and a deficiency judgment was entered. The bank then instituted suit to domesticate the Arkansas deficiency judgment in Florida. The defendants resisted on the grounds that the Arkansas court lacked jurisdiction over them. The District Court of Appeal, Third District, held that the service of process was made properly in accordance with Arkansas law,¹⁹³ and that the Arkansas court had personal jurisdiction over the owners. Furthermore, the court found no violation of due process standards, because (1) the owners had acted purposefully in Arkansas by owning land there, (2) the cause of action arose from the owners' actions in Arkansas, and (3) these acts had substantial connection with the

191. *Indianapolis Morris Plan Corp. v. Portela*, 364 So. 2d 840 (Fla. 3d DCA 1978) (*per curiam*).

192. 372 So. 2d 111 (Fla. 2d DCA 1979).

193. Service of process was perfected under Arkansas' long-arm statute, ARK. STAT. ANN. §§ 27-2502, -2503 (1979).

State of Arkansas, the forum state.¹⁹⁴

In *Horne v. Smith*,¹⁹⁵ second mortgagees foreclosed and acquired title to the property subject to the first mortgage, but failed to claim taxes and ground lease payments allegedly due. Under the doctrine of *res judicata*, the second mortgagees could not later claim these omitted items in a second action for a deficiency judgment. Moreover, the second mortgagees could not recover these items under the terms of the first mortgage (which the second mortgagor had assumed and agreed to pay), because as present owners of the property they were merely making payments for their own benefit. Although the plaintiffs had remitted the taxes and ground lease payments after the foreclosure of the second mortgage, the court denied them relief because of the presumption that a buyer's bid at a foreclosure includes an allowance for prior liens.

In a case of apparent first impression in Florida, the District Court of Appeal, Third District, ruled on a foreclosure action filed before default. The court held that a mortgagor's unequivocal declaration to a third mortgagee that he was not going to pay the mortgage payments on the first and second mortgages and that he was going into bankruptcy constituted an anticipatory breach of the first and second mortgages. The third mortgagee was thus allowed to accelerate payments on the third mortgage, which had provided that failure to pay senior mortgages constituted a breach of the third mortgage.¹⁹⁶ The rationale of the court was that under the peculiar facts of this case, it was necessary to apply the concept of anticipatory breach¹⁹⁷ in order to allow the third mortgagee to file foreclosure proceedings in advance of bankruptcy proceedings. If foreclosure proceedings were filed after the filing of the bankruptcy proceedings, the foreclosure would be delayed during the bankruptcy.¹⁹⁸ In a well-reasoned dissent, Judge Schwartz noted that the majority's exception to the general rule on anticipatory breaches had the effect of rewriting the parties' mortgage contract.¹⁹⁹

Four other cases arose in the Third District. One panel held

194. 372 So. 2d at 112.

195. 368 So. 2d 392 (Fla. 1st DCA 1979).

196. *Poinciana Hotel v. Kasden*, 370 So. 2d 399 (Fla. 3d DCA 1979).

197. As a general rule, the doctrine of anticipatory breach is not applicable to a unilateral contract where the only obligation is to pay money. The court recognized this, but felt that the peculiar circumstances constituted a "rare exception" to the general rule. *Id.*

198. *Id.* at 402.

199. *Id.* (Schwartz, J., dissenting).

that in a mortgage foreclosure action, a trial court should set aside a default judgment against the mortgagor on the ground of improper service of process if: (1) the record fails to show that the plaintiff-mortgagee diligently sought to ascertain the defendant-mortgagor's residential address and (2) the only notice and complaint delivered to the defendant did not list him as a party defendant.²⁰⁰

Another Third District panel held that when a trial court has jurisdiction over both the mortgage foreclosure action and the parties, the mortgagor may not later collaterally attack the foreclosure judgment as to a portion of the subject property.²⁰¹ Furthermore, the final judgment may not be modified or vacated more than a year later, either by a motion under rule 1.540(b) of the Florida Rules of Civil Procedure²⁰² or by collateral attack in a separate suit.

The Third District decided that it is reversible error for a trial court to suspend the interest on a mortgage during two periods: between the date of the mortgage and the date when a specific written demand for payment was made, and between the time the plaintiff-mortgagor was served with the complaint and the date of final judgment. Nor does a trial court have the power to order that sporadic payments made by the mortgagor be applied to the reduction of principal, if both the note and mortgage provided that payments be applied to the accrued interest. Rather, the payments must be applied in accordance with the written contracts.²⁰³

In *United States Freedom Tower, Inc. v. Citibank*,²⁰⁴ the Third District held that "the covenant of a mortgagor to pay real estate taxes is a contract right conferred upon the mortgage holder and gives the holder the right to enforce this provision upon the mortgagor's default."²⁰⁵

B. Deficiency Judgments

In *Provident National Bank v. Thunderbird Associates*,²⁰⁶ a

200. *McAlice v. Kirsch*, 368 So. 2d 401 (Fla. 3d DCA 1979).

201. *Sailboat Key Developers v. Sun Bank*, 367 So. 2d 1093 (Fla. 3d DCA 1979) (per curiam).

202. FLA. R. Civ. P. 1.540(b) provides that a party may be relieved from a final judgment only if motion for such relief is made within one year after the judgment was entered.

203. *Florance v. Johnson*, 366 So. 2d 527 (Fla. 3d DCA 1979).

204. 372 So. 2d 124 (Fla. 3d DCA 1979) (per curiam).

205. *Id.* at 125.

206. 364 So. 2d 790 (Fla. 1st DCA 1978).

Florida district court of appeal decided a case of apparent first impression in the United States. The court held that when a mortgagee bid at the foreclosure sale the entire amount adjudicated as owing, and the property's market value was less than the amount bid, the foreclosing mortgagee-bidder had no right to a deficiency judgment. The court rejected the argument that in fixing the amount of the deficiency, "the true market value, rather than the foreclosure sale high bid, should be the benchmark."²⁰⁷ The court declared:

Although the amount for which mortgage property sells at a foreclosure sale is not conclusive as to either the value of the property nor the right to a deficiency judgment, the deficiency may not exceed the difference between the [sale price of] the property and the amount of the indebtedness secured by the final judgment of foreclosure.²⁰⁸

The mortgagee had a right to compensation only for those items secured by the final judgment of foreclosure, plus interest.

The court in *Thunderbird* further held that when the successful bidder made substantial payments to the first mortgagee after the date of foreclosure judgment, but before the sale, in order to prevent it from foreclosing, these payments would not be secured by the second mortgage because the final judgment of foreclosure fixed the amount owed.²⁰⁹ Finally, any amounts paid by the foreclosing mortgagee prior to the foreclosure judgment, but not included in it, could not be included later in a hearing for the deficiency, because the foreclosure judgment had become final and could not be amended.²¹⁰

In a different situation, the District Court of Appeal, Third District, held that when a deficiency judgment is sought, the price bid at a foreclosure sale does not conclusively determine the value of the property. The court may consider the bid as one factor in ascertaining a deficiency. Moreover, the burden is on the mortgagor to prove the fair market price of the property. In the absence of other evidence, however, the court may use the bid price as the market value of the property.²¹¹

Normally, the award of a deficiency judgment rests in the

207. *Id.* at 795.

208. *Id.* at 796.

209. *Id.*

210. *Id.* at 795.

211. *Fara Mfg. Co. v. First Fed. Sav. & Loan*, 366 So. 2d 164 (Fla. 3d DCA 1979); see FLA. STAT. § 45.013(7) (1979).

sound discretion of the trial court, but in *Horne v. Smith*,²¹² the District Court of Appeal, First District, reversed a trial court's award as "not supported by the evidence, . . . fallacious, and overlook[ing]" certain facts.²¹³ The second mortgagee had invested a substantial sum of money in the property, including payment of substantial penalties caused by the prior mortgagor's default. Thus, the trial court erred in limiting the deficiency judgment by crediting the mortgagors with the amount by which the market value exceeded the balance of the first mortgage.

C. Redemption

In an action to foreclose a mortgage, it is improper for a trial court to condition the mortgagor's right to redeem upon the payment of mechanic's liens; only the amount claimed by the foreclosing mortgagee, plus costs, is due.²¹⁴ The defendant mortgagor may not be required to pay an amount in excess of the mortgagee's claim before being permitted to save his property from foreclosure.

In *Dove Investments v. Forman*,²¹⁵ the district court affirmed a trial court's final judgment extending a mortgagor's period for redemption beyond the ten-day period provided by statute.²¹⁶ In a case of first impression, the court held that because the trial court had partially adopted the statutory procedures for judicial sales and because the court clerk had issued no certificate of title at the time of trial, the order had lain within the trial court's discretion.

D. Attorney's Fees

It is reversible error for a trial court to award attorney's fees based solely on the self-serving testimony of the interested attorney in a mortgage foreclosure action. In *Mullane v. Lorenz*,²¹⁷ the district court held that there was an inadequate basis to determine what "reasonable attorney's fees" were without independent expert testimony on the record, so the court remanded the cause for a further hearing.

212. 368 So. 2d 392 (Fla. 1st DCA 1979).

213. *Id.* at 394.

214. *Flagler Center Bldg. Loan Corp. v. Chemical Realty Corp.*, 363 So. 2d 344 (Fla. 3d DCA 1978).

215. 369 So. 2d 650 (Fla. 3d DCA 1979).

216. FLA. STAT. § 45.031(1) (1979) provides in part that a court will not specify a time for redemption, but that the person may redeem the property at any time before the sale.

217. 372 So. 2d 168 (Fla. 4th DCA 1979).

E. *Miscellaneous*

In *Harbor Village v. Cahm*,²¹⁸ a land sale contract provided that if the seller failed to convey, the seller would return the buyer's deposit and be released from all liability. The contract provided further that it was subordinate to an existing mortgage. The District Court of Appeal, Third District, held that the buyer did not have a lien which would prevent foreclosure of a mortgage, but that the claim of purchase was a mere cloud on the title which could be removed by foreclosure.

Under section 697.04 of the Florida Statutes,²¹⁹ which authorizes "open-end" mortgages (mortgages with a future advance clause), the promissory notes subsequently executed for the future advances need not contain a notation that they are secured by the original mortgage. Other evidence may prove the key factor that the parties intended that the mortgage would secure the notes.²²⁰ The author suggests that it would be a wiser practice for the notes to manifest this intent expressly.

Under the standard A.I.A. Building Contract, the general contractor does not assume responsibility to make certain that the drawings and specifications comply with the applicable laws and building codes. As a result, when a bank mortgagee sued the sureties on the contractor's bond for an alleged failure to install fire-resistant walls in a motel, the contractor was not liable for simply following the plans and specifications prepared by the architect for the owner and the mortgagee.²²¹

F. *Legislation*

Important new legislation raised allowable interest rates, removed certain brokerage fees from possible characterization as interest, and lessened the severity of usury penalties under certain conditions.

The legislature amended sections 687.04 and 687.11(1) of the Florida Statutes to provide that the forfeiture sanctions for usurious lending will not apply if: (1) the lender notifies the borrower of the usurious interest rate and (2) the lender refunds the amount of

218. 367 So. 2d 1100 (Fla. 3d DCA 1979).

219. FLA. STAT. § 697.04 (1979) contains no provision requiring that subsequent notes make reference to the security of the mortgage.

220. *Cabot, Cabot & Forbes Land Trust v. First Nat'l Bank*, 369 So. 2d 89 (Fla. 1st DCA 1979).

221. *Atlantic Nat'l Bank v. Modular Age, Inc.*, 363 So. 2d 1152 (Fla. 1st DCA 1978).

the overcharge plus interest on the overcharge at the maximum lawful rate, or, if the borrower is a corporation, at fifteen percent per annum. But these exceptions apply only if the lender notifies the borrower before the borrower brings suit or asserts this defense in a suit by the lender, or before the lender has received written notice from the borrower of the usurious interest rate.²²²

Of the various amendments made to the Mortgage Brokerage Act,²²³ the most important change provides that when a mortgage broker or solicitor lends its own funds and charges fees or commissions authorized by the Act, the charges are not to be considered interest under the usury statute if the broker or solicitor assigns the loan to another lender within ninety days of the date of the loan.²²⁴

Extensively amended, the usury statutes now allow loan companies (under chapter 516), industrial savings banks (under chapter 656), credit unions (under chapter 657), banks for loans not in excess of \$50,000 and for loans or credit extended under bank credit cards not exceeding \$10,000 (under chapter 659), savings associations (under chapter 665), and other lenders (under chapter 687) to charge eighteen percent per annum simple interest.²²⁵ Retail installment contracts may now call for a finance charge of twelve dollars per one hundred dollars per year in place of the former ten-dollar ceiling.²²⁶ The ceiling for finance charges in the sales of new motor vehicles also rose, from ten dollars to twelve dollars per one hundred dollars per year.²²⁷ Loans in excess of \$500,000 may bear interest of twenty-five percent per annum.²²⁸

IX. BANKING

A. Governmental Controls

An existing bank was a "substantially affected party" in a proceeding conducted by the Department of Banking and Finance upon the application of others to operate a bank. As an "affected party," however, the bank had no right to formal notice or service

222. 1979 Fla. Laws ch. 79-90, §§ 1-2 (amending FLA. STAT. § 687.04, .11(1) (1977)).

223. *Id.* ch. 79-296, §§ 1-4 (amending §§ 494.044(1), .08(3), .08(4), .08(7), .081 (1977)).

224. *Id.* § 3 (amending § 494.081(2) (1977)).

225. *Id.* ch. 79-274 (amending FLA. STAT. §§ 516.02, .031(1), .18(1), .21, 656.17, 657.14, 659.18, .181, 665.381(4), .381(5), 687.02, .03, .11 (1977)).

226. *Id.* § 6 (amending FLA. STAT. § 520.34(5) (1977)).

227. *Id.* § 5 (amending FLA. STAT. § 520.08(1)(a) (1977)).

228. *Id.* § 13 (amending FLA. STAT. § 687.03(1) (1977)); see Weaver, *The Florida Legislature's Liberalization of Florida Interest Rate Laws*, 53 FLA. B.J. 535 (1979).

for the proceeding. The bank's principals had actual knowledge of the proceedings and its representatives attended the public hearing held pursuant to the statute; hence the bank had ample opportunity to file a protest to the other bank's application but failed to do so. The bank was therefore not a party under section 120.52(1) of the Florida Statutes.²²⁹

The District Court of Appeal, First District, has upheld the constitutionality of section 659.03(1)(b) and (c) of the Florida Statutes.²³⁰ This statute charges the Department of Banking, upon the filing of an application for a bank charter, to make an investigation to determine the need for a new bank in light of existing banking facilities, the need for further banking facilities, and the present and future ability of the community to support the proposed bank. Unsuccessful bank charter applicants contended that the sections completely lack "legislative standards and guidelines and, therefore, constitute an improper delegation of legislative authority."²³¹ Acknowledging that the law required discretionary decisions by the Department of Banking, the court upheld this discretion as limited because the Department was required to meet due process standards and basic criteria set by the legislature and to "expose and elucidate its reasons for discretionary action [taken]."²³²

B. Usury

In two companion cases, the Supreme Court of Florida upheld the constitutionality of Florida statutes creating exceptions to the former rule that legal interest could not exceed ten percent per annum.²³³ In the first case, *Cesary v. Second National Bank*,²³⁴ the court held that section 656.17(1),²³⁵ permitting industrial savings banks and Morris Plan banks to charge interest at the rate of 14.3% per annum, and section 687.031,²³⁶ complementing section

229. *Sun Bank v. Department of Banking & Fin.*, 366 So. 2d 184 (Fla. 1st DCA 1979) (per curiam).

230. *Bigler v. Department of Banking & Fin.*, 368 So. 2d 449 (Fla. 1st DCA 1979).

231. *Id.* at 450; see *Gulf State Bank v. Department of Banking & Fin.*, 367 So. 2d 671 (Fla. 1st DCA 1979), wherein the Department of Banking elucidated its reasons for denying the application for a bank in Pensacola Beach, Florida on the grounds that the population was too small and the activity and population too seasonal to "assure reasonable promise of success." *Id.* at 672 (citing *McDonald v. Department of Banking & Fin.*, 346 So. 2d 569, 586 (Fla. 1st DCA 1977)).

232. 368 So. 2d at 451 (citing 346 So. 2d at 584).

233. See note 224 and accompanying text *supra*.

234. 369 So. 2d 917 (Fla. 1979).

235. FLA. STAT. § 656.17(1) (1979).

236. *Id.* § 687.031 provides that usury statutes shall not be construed to modify or limit

656.17(1), are not "special laws" prohibited by article III, section 11(a)(9) of the Constitution of the State of Florida.²³⁷ The court reasoned that the two sections of the statutes are general laws of statewide application and that the classification made therein is reasonable.²³⁸

In the second case, *Catogas v. Southern Federal Savings & Loan Association*,²³⁹ the court held that section 665.395,²⁴⁰ which exempts "building and loan associations" from the general usury laws, also exempts federal savings and loan associations under section 665.511.²⁴¹ Finally, in accord with the *Cesary* case, the court decided that section 665.395 does not violate the prohibition of special laws in article III, section 11(a)(9) of the Constitution of the State of Florida²⁴² and further, that the statute does not violate the equal protection clause. Savings and loan associations are thereby bound by the marketplace rather than by ceilings on legal interest rates.²⁴³

In a third case, the District Court of Appeal, First District, held that pursuant to a loan agreement, a bank may charge the borrower the amount of intangible tax levied by the state on the note, as a reasonable expense of the loan rather than as interest restricted by the usury laws.²⁴⁴

C. *Checking and Savings Accounts*

There is a strong presumption of a joint tenancy between a depositor and a joint signer when the signature card states unmis-

existing statutory exceptions.

237. FLA. CONST. art. III, § 11(a)(9) prohibits special laws fixing interest rates on private contracts.

238. 369 So. 2d at 920.

239. 369 So. 2d 922 (Fla. 1979).

240. FLA. STAT. § 665.395 (1979).

241. *Id.* § 665.511. The court thereby overturned the decision in *Financial Fed. Sav. & Loan Ass'n v. Burleigh House, Inc.*, 305 So. 2d 59 (Fla. 3d DCA 1974), which held that former § 665.40 did not exempt federal savings and loans from the usury statutes. 369 So. 2d at 926.

242. See note 237 *supra*.

243. In *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978), the Supreme Court of the United States held that a national bank in Nebraska has the right, under 12 U.S.C. § 85 (1976), to charge its credit card customers in Minnesota the interest rate permitted by Nebraska law, even if the Nebraska rate is usurious under the law of Minnesota. Under the federal statute, "[a]ny association may take, receive, reserve and charge on any loan or discount made, . . . interest at the rate allowed by the State . . . where the bank is located . . ." 12 U.S.C. § 85 (1976).

244. *Brannen v. Southeast Beach State Bank*, 365 So. 2d 422 (Fla. 1st DCA 1978). See also notes 179-83 and accompanying text *supra*.

takably that all the money is joint property. Nevertheless, in a case in which a father and daughter opened savings and checking accounts as joint tenants with rights of survivorship, the father rebutted this presumption, establishing his equitable ownership of all of the funds. According to the court, sections 659.29 and 665.271 of the Florida Statutes, dealing with joint accounts, were designed to protect banks and savings and loan associations, not to bind the tenants in their rights to the accounts.²⁴⁵

Under section 659.29 of the Florida Statutes, a bank may pay out all the funds from a joint account to one of the joint tenants, without being liable to the other joint tenant, even though the aggrieved joint tenant possesses the sole passbook. The District Court of Appeal, Second District, so concluded even though the passbook provided that "[t]he depositor must present this passbook together with a written order, to be entitled to withdraw funds."²⁴⁶ The court viewed this legend as designed to protect depositors from third persons, not to require either joint tenant to present the passbook.²⁴⁷

In another case, a bank had issued a certificate of deposit providing that the bank reserved the right not to renew the certificate at the expiration of the original period. The court held that the bank had automatically renewed the certificate by failing to give written notice in accordance with the bank's own contractual provision.²⁴⁸

D. Garnishment

In a garnishment proceeding, a grant of attorney's fees to an intervening bank under section 679.504 of the Florida Statutes²⁴⁹ is not justified if the bank did not acquire its collection under that section and no testimony supports such a fee allowance.²⁵⁰

Although section 222.11 of the Florida Statutes exempts from garnishment any wages due to the head of a household, once these wages are deposited in a bank account they are no longer "due for

245. *Constance v. Constance*, 366 So. 2d 804 (Fla. 3d DCA 1979).

246. *Gray v. Landmark Trust Bank*, 364 So. 2d 1256, 1257 (Fla. 2d DCA 1978). The court refused to follow the seemingly contrary case of *Badders v. Peoples Trust Co.*, 236 Ind. 357, 140 N.E.2d 235 (1957).

247. 364 So. 2d at 1257.

248. *Miami Nat'l Bank v. Weinstock*, 365 So. 2d 431 (Fla. 3d DCA 1978) (per curiam).

249. U.C.C. § 9-504 (codified at FLA. STAT. § 679.504 (1979)).

250. *Modern Wood Indus., Inc. v. Dixie Plywood Co.*, 368 So. 2d 441 (Fla. 3d DCA 1979) (per curiam).

the personal labor . . . of such person" and are subject to garnishment.²⁵¹

In *Sentry Indemnity Co. v. Hendricks Enterprises*,²⁵² the District Court of Appeal, Fourth District, held that when a garnishee's agent receives a writ of garnishment and a motion for writ of garnishment after judgment and mails them to its out-of-state home office, a subsequent default judgment may not be set aside for excusable neglect. "A showing of gross abuse of the trial court's discretion is necessary to reverse a ruling on a motion to vacate and set aside a default."²⁵³ The court held there was no such gross abuse where the garnishee failed to show what happened to the papers or offer an excuse for its failure to respond. It was improper, however, for the trial court to enter a default judgment for an amount greater than that claimed by the garnishor.

E. Legislation

State banking legislation in the last year provided for savings and loan associations to handle "convenience accounts," increased the asset reserve requirements of international banking agencies licensed in Florida, imposed new citizenship requirements on bank and trust company directors, and established fingerprint requirements for proposed officers, directors, promoters, and holders of at least five percent of the voting stock of proposed banking institutions.²⁵⁴

An amendment to section 659.11(2) of the Florida Statutes²⁵⁵ requires that at least a majority of the directors of a state bank or trust company be United States citizens during their whole term of service.

Another amendment requires that all organizers, proposed directors, proposed chief executive and operational officers, and persons subscribing to five percent or more of the voting stock of proposed state banks, trust companies, and state savings and loan associations submit to the Department of Banking a complete set of fingerprints taken by an authorized law enforcement officer. The Department must submit these fingerprints to appropriate law en-

251. *Holmes v. Blazer Financial Serv., Inc.*, 369 So. 2d 987, 989 (Fla. 4th DCA 1979).

252. 371 So. 2d 1105 (Fla. 4th DCA 1979).

253. *Id.* at 1106.

254. For a discussion of recent developments in banking legislation, see Baena, *Banking Law, 1979 Developments in Florida Law*, 34 U. MIAMI L. REV. 375 (1980).

255. FLA. STAT. § 659.11(2) (1979).

forcement agencies for processing.²⁵⁶

A change in the Banking Code²⁵⁷ provides that certificates of deposit are not included under the definition of "convenience account." The amendment also authorizes agents of convenience accounts to deposit or withdraw funds in these accounts.²⁵⁸

The Savings Association Act²⁵⁹ was amended to allow Florida savings and loan associations to handle convenience accounts.²⁶⁰ The amendment also authorizes these associations to pay the balance of convenience accounts, upon the principal's death or incompetence, to the following: (1) the guardian of the property of the principal of these accounts; (2) any persons designated in a court order pursuant to section 735.206 (summary administration distribution) of the Florida Statutes;²⁶¹ (3) any person designated by letter or other writing under section 735.301 (disposition without administration) of the Florida Statutes;²⁶² or (4) the personal representative of the deceased principal's estate. Under this provision, the payment by the association discharges it from all claims for payment. In addition, if the principal is indebted to the association and there are no contractual provisions to the contrary, the association has a right to set-off against the account.

A recent amendment requires an international banking corporation to have assets with a value of at least twenty-five million dollars in excess of its liabilities in order to establish an international bank agency, and ten million dollars in excess of its liabilities to establish a representative office. Furthermore, any international banking corporation licensed as an international bank agency under section 659.67 of the Florida Statutes²⁶³ may, if authorized by rules of the Department of Banking, make any loan or investment or exercise any power which the agency could make or exercise if it were operating in Florida as a federal agency under the Federal International Banking Act of 1978.²⁶⁴ Finally, international bank agencies may maintain reserves similar to those re-

256. 1979 Fla. Laws ch. 79-144, § 1 (adding FLA. STAT. § 659.02(3) (1979)).

257. *Id.* §§ 658.01-666.44.

258. 1979 Fla. Laws ch. 79-22, § 1 (amending FLA. STAT. § 659.292(1), .293 (1977)).

259. FLA. STAT. §§ 665.011-.717 (1979).

260. 1979 Fla. Laws ch. 79-21, §§ 1-2 (amending FLA. STAT. § 665.271 (1977) and adding *id.* § 665.272).

261. FLA. STAT. § 735.206 (1979).

262. *Id.* § 735.301.

263. FLA. STAT. § 659.67 (1979).

264. International Banking Act of 1978, Pub. L. No. 95-369, §§ 21-213, 92 Stat. 607 (amending 29 U.S.C. §§ 21-213 (1976)).

quired for agencies under the Federal International Banking Act of 1978,²⁶⁵ or other reserves appropriate to the nature of the business being conducted by the international bank agency.²⁶⁶

Recent amendments also relaxed usury restrictions on foreign loans. Loans made by any international bank agency or Edge Act Corporation to borrowers who are neither residents nor citizens of the United States will not be subject to the usury provisions of chapter 687 of the Florida Statutes,²⁶⁷ provided that the loans are clearly related to and usual in international or foreign business.²⁶⁸ Such loans will continue, however, to be subject to the loan-sharking provisions of Florida Statutes section 687.071.

F. *Miscellaneous*

In an action to collect the balance due from an individual who issued one promissory note and guaranteed another payable to a liquidated bank, the mere allegation that the Federal Deposit Insurance Corporation (FDIC) had been appointed as liquidator of the bank's assets did not suffice to give the FDIC standing to sue. In *Weisser v. FDIC*,²⁶⁹ a copy of the order of the federal district court in New York appointing the FDIC as liquidator was inadmissible as evidence under section 92.10 of the Florida Statutes, which requires authentication by the attestation and seal of the officer having charge of the records of the court. Left with the bare allegation, the FDIC failed to carry its burden of proving it was a party to or privy with any of the subject instruments.

In *Touche Ross & Co. v. Sun Bank*,²⁷⁰ a hospital had sued its accountant for an alleged failure to discover and report a continuing embezzlement by the hospital's officer. The accounting firm then brought against the hospital's bank a third party complaint for contribution, on the theory that the bank had allowed the embezzlement to occur by honoring checks signed by the embezzler. The court held that the accounting firm had no right of contribution from the bank, because each party was not exposed to the hospital under the same set of circumstances, and they did not share a

265. *Id.*

266. 1979 Fla. Laws ch. 79-145, § 1 (amending FLA. STAT. § 659.67(5)(a), .67(7)(a) (1977), and adding *id.* § 659.67(6)(f), .67(6)(g)).

267. FLA. STAT. §§ 687.01-.12 (1979).

268. 1979 Fla. Laws ch. § 79-138, § 1 (adding FLA. STAT. § 687.13 (1977)).

269. 365 So. 2d 1034, 1035 (Fla. 3d DCA 1979) (per curiam).

270. 366 So. 2d 465 (Fla. 3d DCA 1979).

common burden.²⁷¹

X. CONSUMER PROTECTION

A. Case Law

Section 501.211(3) of the Florida Statutes²⁷² provides that in a proceeding under the Florida Deceptive and Unfair Trade Practice Law,²⁷³ a court may order the plaintiff to post a bond when the defendant asserts that the case is frivolous and lacks legal merit. Declaring that a court may require the posting of a bond, after hearing evidence as to the necessity therefor,²⁷⁴ the statute has been construed as requiring a hearing before a court may order a plaintiff to post a bond.²⁷⁵

In two cases, the district courts limited the application of consumer credit statutes. First, the District Court of Appeal, Second District, held that where a construction contract called for cash within sixty days of the completion of real property improvements, a subsequent note and second mortgage taken by the contractor after the property owner failed to pay was not within the Federal Truth in Lending Act.²⁷⁶ Noting that the original contract was a cash transaction, the court held that "the nature and character of the underlying obligation" determine whether the Act applies.²⁷⁷ Consequently, when the contractor tried to foreclose, the owner had no right to rescind the contract since his case did not come under the Act.

Second, in *Carter Opticians, Inc. v. Davis*,²⁷⁸ a woman ordered prescription glasses from an optician, who ground the lenses and tendered the glasses to her on the same day of the order. The woman refused to pay on the same day of the order. The woman refused to pay for and accept the glasses because she no longer wanted them. After the optician explained that he could not sell the glasses to anyone else because the lenses had been ground especially for her, he informed the woman's employer that she had

271. *Id.* at 467.

272. FLA. STAT. § 501.211(3) (1979).

273. Florida Deceptive and Unfair Trade Practices Act, FLA. STAT. §§ 501.201-.213 (1979).

274. *Id.* § 501.211(3) (1979).

275. *Hamilton v. Palm Chevrolet-Oldsmobile, Inc.*, 366 So. 2d 1233 (Fla. 2d DCA 1979).

276. 15 U.S.C. §§ 1601-1667e (1976).

277. *Florida State Constructors Serv., Inc. v. Randall*, 368 So. 2d 421, 422 (Fla. 2d DCA 1979).

278. 367 So. 2d 227 (Fla. 1st DCA 1979).

refused to pay for the glasses. The optician then sued the woman for payment, and she counterclaimed on the ground that the optician's communication to her employer violated section 559.72 of the Florida Statutes,²⁷⁹ which forbids a creditor with a consumer claim from communicating with a debtor's employer. The court held that although the optician had not received payment in advance, he had not extended credit; it was a cash-on-delivery sale. Since there had been no extension of credit within the meaning of the statute, the optician had committed no violation.²⁸⁰

In *Marchion Terrazzo, Inc. v. Altman*,²⁸¹ the district court reversed the trial court's award of attorney's fees under the Florida Deceptive and Unfair Trade Practices Act.²⁸² Defendant pled a violation of the Act as a defense to an action to recover the balance due on a construction contract, and the trial judge allowed \$500 for his attorney, despite an uncontroverted affidavit showing at least twenty-five hours spent on that aspect of the litigation. The court noted, however, its preference that expert witnesses testify on the factual issue of attorney's fees, although the court may base an award on affidavits if neither party objects.

The Court of Appeals for the Fifth Circuit held that in a suit by the debtor against the lender for a breach of the Truth in Lending Act,²⁸³ a creditor's counterclaim for the amount of the unpaid debt is compulsory. Therefore, the district court had jurisdiction to hear the counterclaim even though it would not have had jurisdiction had the lender's claim been brought as an independent action. The court ruled, however, that the counterclaim for the debt could not be offset against an award of attorney's fees for the suing debtor, because the offset would tend to thwart the purpose of the Act.²⁸⁴

B. Legislation

Important legislation amended the Consumer Finance Act with respect to interest chargeable after default and to a lender's ability to relocate within a county, enacted a Sale of Business Opportunities Act to protect purchasers intending to start a business,

279. FLA. STAT. § 559.72 (1979).

280. 367 So. 2d at 229.

281. 372 So. 2d 512 (Fla. 3d DCA 1979).

282. FLA. STAT. §§ 501.201-.213 (1979).

283. 15 U.S.C. §§ 1601-1667e (1976).

284. *Plant v. Blazer Financial Serv., Inc.*, 598 F.2d 1357, 1365-66 (5th Cir.), *rehearing en banc denied*, 604 F.2d 555 (1979).

and amended the Deceptive and Unfair Trade Practices Law to broaden the definition of "consumer" and provide attorney's fees for prevailing parties in actions brought by an enforcing authority.

Under an addition to the Florida Consumer Finance Act,²⁸⁵ licensed lenders may continue to charge interest on the balance of an unpaid loan, at the permitted contractual rate, for a period not in excess of twelve months after default. Thereafter, interest may not exceed ten percent per annum.

A licensed lender under the Consumer Finance Act²⁸⁶ may now, with the permission of the Department of Banking and Finance, remove its place of business to a different location in the same county. Prior to the amendment, licensed lenders could move only within the same city or town.²⁸⁷

The Sale of Business Opportunities Act²⁸⁸ will regulate the purchase and lease of products, equipment, supplies, or services for the purpose of starting a business. The Act aims at preventing the fraudulent and deceptive practices of sellers who represent that they will help the buyer find a certain location or purchase needed equipment, or who offer to provide a sales program or marketing device at a cost of more than fifty dollars.²⁸⁹ The Act requires the seller to furnish a detailed disclosure statement to the buyer at least seventy-two hours before the purchaser signs the contract or the seller receives any consideration, whichever comes first.²⁹⁰ Sellers must file the disclosure statements with the Division of Consumer Services of the Department of Agriculture and Consumer Services before advertising the sale of a business opportunity. The Act also delineates the specific terms that must appear in the contract. In the event that the seller fails to comply with the Act, the buyer may rescind the sale and recover attorney's fees.²⁹¹

The legislature made various amendments to the Deceptive and Unfair Trade Practices Law.²⁹² Two of the most important changes included, first, the redefinition of the term "consumer": " 'Consumer' means an individual; child, by and through its parent or legal guardian; firm; association; joint adventure; partnership;

285. 1979 Fla. Laws ch. 79-59 (adding FLA. STAT. § 516.035 (1979)).

286. FLA. STAT. §§ 516.001-.37 (1979).

287. 1979 Fla. Laws ch. 79-340 (amending FLA. STAT. § 516.09 (Supp. 1978)).

288. *Id.* ch. 79-374 (creating the Sale of Business Opportunities Act, FLA. STAT. §§ 559.80-.815 (1979)).

289. FLA. STAT. § 559.801 (1979).

290. *Id.* § 559.803.

291. *Id.* § 559.811.

292. 1979 Fla. Laws ch. 79-386 (amending FLA. STAT. §§ 501.201-.213 (1977)).

estate; trust; business trust; syndicate; fiduciary; corporation; or any other group or combination."²⁹³ Under this sweeping definition, the largest multinational corporation apparently could bring a complaint against one of its smallest suppliers under the Act; the word "consumer" appears to have lost all meaning.

Second, in any civil litigation initiated by the enforcing authority, the court may now award to the prevailing party reasonable attorney's fees and costs if the court finds "a complete absence of a justiciable issue of either law or fact raised by the losing party, or if the court finds bad faith on the part of the losing party."²⁹⁴ Attorney's fees may also be awarded to the enforcing authority in any administrative proceeding.²⁹⁵

XI. SECURITY AGREEMENTS

Most security agreements are in writing, but section 9-203(1) of the U.C.C.²⁹⁶ permits a security agreement to be oral, provided that the collateral is in the hands of the lender. A recent case held that the possessory requirements of section 9-203(1) were met when a lender advanced funds to his borrower to enable the borrower to purchase stock from a broker. The broker had delivered the stock to the lender's attorney, who then delivered it to the lender, who then redelivered it to the broker to be held pending a court adjudication of ownership.²⁹⁷

In *C.Q. Farms, Inc. v. Cargill, Inc.*,²⁹⁸ the court reached an anomalous result by allowing a claim by a debtor to enforce an agreement that the creditor arguably could not have enforced. The lender allegedly made it a practice to enter parol agreements with the debtor-farmer to extend credit in return for the debtor's accounts receivable. In an action by the lender for an account due and owing, the borrower counterclaimed for business damages resulting from the lender's failure to extend the promised line of credit. The court held that the amount orally agreed upon was a jury question. The decision appears unfair, because under section 9-203(1) of the U.C.C., a security interest "is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless: (a) the collateral is in the possession of

293. FLA. STAT. § 501.203(a) (1979).

294. *Id.* § 501.210(5).

295. *Id.* § 501.210(6).

296. 1979 Fla. Laws ch. 79-398 (amending FLA. STAT. § 679.203(1) (1977)).

297. *Hartzog v. Dixon*, 366 So. 2d 848, 850 (Fla. 1st DCA 1979).

298. 363 So. 2d 379 (Fla. 1st DCA 1978).

the secured party . . . or the debtor has signed a security agreement."²⁹⁹ Since there is no way to possess accounts receivable, the creditor could not have enforced the parol security agreement against the debtor or third parties; yet the *Cargill* court permitted the debtor to enforce the loan against the creditor.

A used car seller, who holds the title certificate as collateral for the buyer's installment purchase, has the legal title to the car while the buyer has the beneficial title. Thus, in *McCall v. Garland*,³⁰⁰ when the debtor-buyer was involved in a fatal accident five days after taking possession, the seller was not liable for the negligent operation of the car simply because he had held the naked legal title.

*Borg-Warner Acceptance Corp. v. Atlantic Bank*³⁰¹ was a case of first impression under the Florida version of the U.C.C. The District Court of Appeal, Fourth District, held that a floor plan financier, who perfects a security interest by filing a financing statement covering all present and after-acquired inventory of a motor home retailer, has priority over the lien of a subsequent lender filed prior to the issuance of a title certificate for one of the mobile homes still in inventory. The court pointed out that section 319.27(1) of the Florida Statutes, governing title certificates, provides that no lien is effective upon a motor vehicle unless the lien is noted upon the certificate of title, but the statute expressly exempts from this procedure any "motor vehicle floor plan stock of any motor vehicle dealer."³⁰² Section 9-302(3)(b) of the U.C.C.³⁰³ provides that it, rather than Florida's certificate of title procedure, applies to perfection of inventory or "floor plan" security interests. The court therefore reasoned that the first to perfect under the Code has a right to rely on that filing and should prevail. The court also held correctly that the second lender did not cut off the first lender's security interest as a buyer in ordinary course of business³⁰⁴ under sections 1-201(9)³⁰⁵ and 9-307(1)³⁰⁶ because the sec-

299. 1979 Fla. Laws ch. 79-398 (amending FLA. STAT. § 679.203(1) (1977)). Comment 1 to U.C.C. § 9-305 provides that a security interest in accounts may be perfected under article 9 only by filing, as it is property not ordinarily represented by any writing whose delivery operates to transfer the claim.

300. 371 So. 2d 1080 (Fla. 4th DCA 1979) (per curiam).

301. 364 So. 2d 35 (Fla. 4th DCA 1978).

302. FLA. STAT. § 319.27(1) (1979).

303. 1979 Fla. Laws ch. 79-398, § 14 (amending FLA. STAT. § 679.302(3)(b) (1977)).

304. The court was incorrect, however, in stating that the second lender was not a "purchaser." It was a purchaser under section 1-201(33), FLA. STAT. § 671.201(33) (1979), but it was not a "buyer" under section 1-201(9), 1979 Fla. Laws ch. 79-398, § 2 (amending FLA. STAT. § 671.201(9) (1977)). The words "purchaser" and "buyer" are words of art under the

ond lender was a lender, not a buyer.³⁰⁷ The court failed to mention that a second lender in a situation of this kind can never gain priority over a first lender, unless the second lender is a purchase-money lender complying with the rigid requirements of section 9-312(3) of the Code.³⁰⁸

A perfected security interest in inventory motor vehicles also has priority over a subsequently recorded warrant for unpaid sales taxes issued under section 212.15 of the Florida Statutes.³⁰⁹ Although section 197.056 of the Florida Statutes provides that "[a]ll taxes . . . shall be a first lien, superior to all other liens, on any property against which the taxes have been assessed,"³¹⁰ the District Court of Appeal, Fourth District, held that this provision "is obviously intended to apply to ad valorem taxes on real and personal property and *not* to sales taxes."³¹¹

A security agreement must describe encumbered goods so that third persons would be reasonably able to identify the goods. The security agreement at issue in *American Restaurant Supply Co. v. Wilson*³¹² described the collateral as: "Food service equipment and supplies delivered to San Marco Inn at St. Marks, Florida,"³¹³ but attempted to cover only some of the food service equipment and supplies. This description might have sufficed for the financing statement, but not for the security agreement.³¹⁴ The description did not "do its assigned job of making possible the identification of the equipment and supplies in which [the lender] claim[ed] an interest."³¹⁵

Code and should not be confused.

305. 1979 Fla. Laws ch. 79-398, § 2 (amending FLA. STAT. § 671.201(9) (1977)).

306. FLA. STAT. § 679.307(1) (1979).

307. 364 So. 2d at 37.

308. 1979 Fla. Laws ch. 79-398, § 22 (amending FLA. STAT. § 679.312(3) (Supp. 1978)).

309. 1979 Fla. Laws ch. 79-359 (amending FLA. STAT. § 212.15 (Supp. 1978)).

310. FLA. STAT. § 197.056(1) (1979).

311. *General Motors Acceptance Corp. v. Tom Norton Motor Co.*, 366 So. 2d 131, 132 (Fla. 4th DCA 1979) (emphasis by the court).

312. 371 So. 2d 489 (Fla. 1st DCA 1979).

313. *Id.* at 490.

314. *Id.*; U.C.C. § 9-208, Comment 2 (1978) notes that unless a copy of the security agreement itself is filed as the financing statement, third parties are told neither the amount nor the particular assets concerned.

315. 371 So. 2d at 491; see FLA. STAT. § 679.110 (1979).

XII. REMEDIES

A. *Repossession, Replevin, and Related Matters*

Under section 9-503 of the U.C.C.,³¹⁶ the secured party has a right of repossession of the collateral upon default by the debtor; if self-help will not avail, then the secured party may replevy the goods. In *Midland-Guardian Co. v. Hagin*,³¹⁷ the court held that an assignee of the original lender, having recourse against the lender in the event of the debtor's default, retains the same right to replevin. That the debtor or his assignee and not the secured party has title to the goods does not affect the right to replevin because under section 9-202 of the U.C.C., title is immaterial.³¹⁸

Upon the filing of a replevin complaint, a court must, under section 78.065(2)(e) of the Florida Statutes,³¹⁹ allow the owner of the goods an opportunity to appear personally or by way of an attorney to present testimony at a show-cause hearing. Where a show-cause order contains such a provision, it is error for a trial court to bar the defendant owner's testimony and to enter an order of replevin.³²⁰ Further, since section 78.068(3) of the Florida Statutes³²¹ sets the replevin bond at the lesser of twice the value of the goods or twice the balance due on the debt, the trial court may not set an arbitrary amount as bond.

Principles applicable to security agreements for sales of goods may similarly apply to leases, when the facts reveal that the parties to a lease intend to create a security interest. In *BVA Credit Corp. v. Fisher*,³²² an equipment lease provided for the filing of a financing statement which designated the lessor as a "secured party." Hence, the lessor could take possession of the equipment upon the lessee's default in rent payments, lease it to a second lessee, repossess upon a second default, and finally sell the equipment and recover, from the original lessee, any deficiency in amount due under the entire first lease. The court applied principles of mitigation of damages and the Code rule that the second lease and subsequent sale did not constitute an election of remedies and did not bar the proceeding against the first lessee.

316. FLA. STAT. § 679.503 (1979).

317. 370 So. 2d 25 (Fla. 2d DCA 1979).

318. FLA. STAT. § 679.202 (1979).

319. *Id.* § 78.065(2)(e) (1979) (as amended by 1979 Fla. Laws ch. 79-396).

320. *Vega v. Hughes*, 370 So. 2d 1187 (Fla. 4th DCA 1979).

321. FLA. STAT. § 78.068(3) (1979).

322. 369 So. 2d 606 (Fla. 1st DCA 1978).

A recent case revealed a startling gap in the protection afforded mobile home buyers by section 320.77(11) of the Florida Statutes.³²³ The statute requires that mobile home dealers in Florida be bonded to ensure the dealer's compliance "with the conditions of any *written contract* made by him in connection with the sale or exchange of any mobile home."³²⁴ In *CMI Credit Insurance, Inc. v. United States Fidelity and Guaranty Co.*,³²⁵ a mobile home dealer sold three mobile homes for the plaintiff's credit insurance company under an oral agreement and did not pay the proceeds to the credit company. The court held that because the agreement was oral, the credit company's loss was not covered by the statute or the terms of the surety bond, which tracked the language of the statute.³²⁶

The general rule in Florida in any action, including repossession cases, is that an award of punitive damages must rest on an underlying award of compensatory damages.³²⁷ In *Raffa v. Dania Bank*,³²⁸ a case involving the alleged wrongful conversion of a car by a bank, the District Court of Appeal, Fourth District, reversed a punitive damage award of \$25,000 because the jury had awarded no compensatory damages.

B. *Deficiency Judgments*

When a security agreement tracks the language of section 9-504(3) of the U.C.C.,³²⁹ by providing that after repossession of the collateral the lender would give the debtor reasonable notice of any public sale or of the time after which any private sale or other disposition would be made, the lender will be denied a deficiency judgment against the debtor for failure to give such notice. In *Thomas v. Sutherland*,³³⁰ the security agreement provided that no notice was necessary if the collateral was perishable, threatened to decline speedily in value, or was of a type customarily sold on a recognized market. In the absence of any of those factors, the court denied a deficiency judgment to the lender, who had failed to no-

323. FLA. STAT. § 320.77(11) (1979).

324. *Id.* (emphasis in original).

325. 365 So. 2d 459 (Fla. 1st DCA 1978).

326. *Id.* at 460.

327. *McLain v. Pensacola Coach Corp.*, 152 Fla. 876, 13 So. 2d 221 (1943); *Sonson v. Nelson*, 357 So. 2d 747 (Fla. 3d DCA 1978).

328. 372 So. 2d 1173 (Fla. 4th DCA 1979).

329. 1979 Fla. Laws ch. 79-398 (amending FLA. STAT. § 679.504(3) (1977)).

330. 370 So. 2d 12, 13 (Fla. 1st DCA 1978).

tify the debtor.

A federal district court has extended the notice requirement imposed by Florida law. Formerly, a guarantor of an obligation was deemed a "debtor" and entitled to notice of sale after repossession before a lender could recover a deficiency judgment.³³¹ In *Commercial Credit Corp. v. Lane*,³³² the court extended the rule to apply to the guarantor of a guarantor. In *Lane*, a mobile home retailer took back security agreements, assigning them to a finance company. The assignments were made with recourse, with the retailer promising to reimburse the finance company for any resulting losses, or to repurchase the chattel paper—in effect agreeing to repossess the mobile homes and guarantee payment. The individual owners of the retail company also individually guaranteed the performance of the retailer to the finance company. When some consumers defaulted, the retailer failed to repossess the mobile homes. The finance company repossessed and sold the homes—without giving notice to the individual guarantors. The federal court held, extending Florida decisional law, that the guarantors of the retail guarantor had a right to notice of sale and were not liable for a deficiency judgment to the finance company that failed to give notice.³³³

C. Forfeiture of Collateral

It is commonly stated that a car is not subject to forfeiture unless it is used for drug trafficking (as distinguished from the mere personal possession and use of narcotics).³³⁴ A district court recently held that a single sale of narcotics triggers a forfeiture when negotiations, delivery, and payment all occur in the car.³³⁵

Under sections 943.43 and 943.44 of the Florida Statutes,³³⁶ a vehicle used in transporting contraband cannot be forfeited if the owner or lienholder had no express or implied knowledge of that use by another person.³³⁷ The federal rule is to the contrary; the

331. *Hepworth v. Orlando Bank & Trust Co.*, 323 So. 2d 41 (Fla. 4th DCA 1975); *Turk v. St. Petersburg Bank & Trust Co.*, 281 So. 2d 534, 536 (Fla. 2d DCA 1973).

332. 466 F. Supp. 1326 (M.D. Fla. 1979).

333. *Id.* at 1332-33.

334. *Griffis v. State*, 356 So. 2d 297, 299 (Fla. 1978) (interpreting the Florida Uniform Contraband Transportation Act, FLA. STAT. §§ 943.41-44 (1979)).

335. *Mosley v. State ex rel. Broward County*, 363 So. 2d 172, 175 (Fla. 4th DCA 1978). If the car is used as part of a scheme to deliver drugs, it will, of course, be subjected to forfeiture. *State ex rel. Fort Lauderdale v. Franzer*, 364 So. 2d 62 (Fla. 4th DCA 1978).

336. FLA. STAT. §§ 943.43-44 (1979).

337. *One 1973 Cadillac v. State*, 372 So. 2d 103, 104 (Fla. 2d DCA 1979).

innocence of the owner or lienholder is immaterial.³³⁸

D. Legislation

The legislature has adopted most of the provisions of the 1972 Official Text of the Uniform Commercial Code,³³⁹ but neither the legislature nor the sponsors have acknowledged the source of these amendments.³⁴⁰ In addition, the sponsors have made some substantive and cosmetic changes.³⁴¹ The cosmetic changes in language and punctuation are, in the opinion of this author, unnecessary at best and irritating at worst. Moreover, the sponsors made annoying changes in format, such as breaking large paragraphs into separately numbered paragraphs, which might lead to misinterpretation of the law, and changing the official number of subsections to an alphabetical system. The sponsors also made a few minor changes in substance, not worth discussing.³⁴²

One change of great importance is the omission of subsection 9-301(4),³⁴³ which attempts to give secured parties priorities over a federal tax lien in certain circumstances. The drafters intended this subsection to mesh with subsections 6323(c)(2) and (d) of the Internal Revenue Code as amended by the Federal Tax Lien Act of 1966.³⁴⁴ Without subsection 9-301(4), secured parties in Florida will have less protection than secured parties in other states.³⁴⁵

Unfortunately and unaccountably, the legislature also omitted

338. *United States v. One 1967 Cadillac Coupe Eldorado*, 415 F.2d 647 (9th Cir. 1969); *United States v. One 1950 Burger Yacht*, 395 F. Supp. 802 (S.D. Fla. 1975).

339. U.C.C. (1972 version).

340. 1979 Fla. Laws ch. 79-398.

341. *Id.* (amending FLA. STAT. §§ 671.201, 679.102, .103(1)(d), .104, .105, .107, .203, .302, .304, .306, .308, .312(4), .403, .408 & .504 (1977)).

342. *Id.* (amending FLA. STAT. §§ 679.403-.407 (1977)).

343. U.C.C. § 9-301(4) (1972) provides:

A person who becomes a lien creditor while a security interest is perfected takes subject to the security interest only to the extent that it secures advances made before he becomes a lien creditor or within 45 days thereafter or made without knowledge of the lien or pursuant to a commitment entered into without knowledge of the lien.

Other parts of U.C.C. § 9-301 (1972) can be found in 1979 Fla. Laws ch. 79-398 (amending FLA. STAT. § 679.301 (1977)).

344. Pub. L. No. 89-719, 80 Stat. 1125 (1966).

345. The Federal Tax Lien Act of 1966 contemplated the priority of security interests for advances over a federal tax lien for 45 days after the federal tax lien had been filed. This priority, however, is operational only where so provided by state law. U.C.C. § 9-301(4) was designed to bring state law into conformity with the Act, so that secured parties within the state would henceforth be protected to its full extent. See U.C.C. § 9-301, Reasons for 1972 change, reprinted in ALI UNIFORM COMMERCIAL CODE 942-43 app. II (West 1978).

subsection 3 of section 9-307 of the Official Text.³⁴⁶ That provision attempts to state priorities between buyers (other than buyers in ordinary course of business) and secured parties relative to future advances.

Section 9-302(1)(c) of the Code³⁴⁷ lists exceptions to the filing requirements to perfect a security interest. The Florida version omits the words "trust or" contained in the official text. Thus, it appears that in Florida, a financing statement must be filed to perfect a security interest created by an assignment of a beneficial interest in a trust, but not to perfect a security interest in the assignment of a beneficial interest in a decedent's estate.

Section 9-401,³⁴⁸ which governs the place of filing, was drastically changed. In Florida, one must file with the clerk of the circuit court to perfect a security interest when collateral consists of one of the following: crops (growing or to be grown), timber to be cut, minerals (including gas and oil) or an interest in minerals that attaches at extraction or attaches to an account resulting from sale at the wellhead or minehead, or fixtures or goods that are to become fixtures. In all other cases, filing is to be with the Secretary of State. When crops are the collateral, one must file with both the Secretary of State and the clerk of the circuit court. Double filing is required for crops because the sponsors thought that potential lenders had difficulty searching local records, since many Florida farms and groves cross county lines,³⁴⁹ yet it is doubtful that this phenomenon is unique to Florida.

This amendment to the filing section also requires that consumer financing statements now be recorded in the office of the Secretary of State, instead of the office of the local circuit court clerk. This change protects lenders giving credit to an increasingly mobile group of consumers.³⁵⁰ The amendment should eliminate the problem of vendors and lenders improperly classifying consumer goods as equipment, then filing in the wrong place. Confu-

346. 1979 Fla. Laws ch. 79-398 (amending FLA. STAT. § 679.307 (1977)); U.C.C. § 9-307(3) (1972) provides:

A buyer other than a buyer in ordinary course of business (subsection (1) of this section) takes free of a security interest to the extent that it secures future advances made after the secured party acquires knowledge of the purchase, or more than 45 days after the purchase, whichever first occurs, unless made pursuant to a commitment entered into without knowledge of the purchase and before the expiration of the 45 day period.

347. 1979 Fla. Laws ch. 79-398 (amending FLA. STAT. § 679.302(1) (1977)).

348. *Id.* (amending FLA. STAT. § 679.401 (1977)).

349. *Id.* (sponsor's notes to amended FLA. STAT. § 679.401 (1977)).

350. *Id.*

sion about which filing office to consult should no longer arise, as lenders try to determine whether claims have been perfected on collateral that could change in nature. Central filing of consumer financing statements seems a good change, unless a flood of consumer filings will cause delay in the furnishing of information by the office of the Secretary of State.

Under the 1972 Official Text of the U.C.C. section 9-505(2),³⁵¹ a secured creditor who proposes to keep collateral (after repossession) in satisfaction of a debt must communicate this intention to the debtor and, except in the case of consumer goods, to any junior secured lender from whom he has received written notice of the junior lender's interest before the senior lender sends notice to the debtor. In consumer goods cases, a junior lender has no standing to object to this retention by the prime lender. Under the new Florida version of this subsection,³⁵² the prime lender must communicate, except in the case of consumer goods, to all junior lenders who have duly filed a financing statement. A junior lender has standing to object in writing within thirty days after the prime lender has secured possession, even in the case of consumer goods. Further, junior lenders in Florida have no duty to make their presence known to the prime lender; the prime lender must check the records. The Florida version of this section is a hybrid of the 1962 and 1972 official versions of the Uniform Commercial Code. The Florida version also provides that a debtor or junior lender that wishes to give up its rights under this section must sign a *conspicuous* statement renouncing or modifying its rights; the 1972 Official Text does not require conspicuous print.

Florida has similarly modified section 9-504(3).³⁵³ The Official Text provides that a prime lender must notify the debtor *and the junior lenders* (if they have filed financing statements covering the collateral) of the time and place of any public sale or the time after which a private sale of repossessed collateral will take place. There is an exception when collateral is perishable, threatens to decline speedily in value, is of a type customarily sold on a recognized market, or consists of consumer goods. The sponsors in Florida have amended the section to provide that the debtor may, after default, renounce or modify his rights to notification of sale by a signed conspicuous statement to that effect. It seems incongruous

351. U.C.C. § 9-505(2) (1972).

352. 1979 Fla. Laws ch. 79-398 (amending FLA. STAT. § 679.505(2) (1977)).

353. *Id.* (amending FLA. STAT. § 679.504(3) (1977)).

to this author that a junior secured consumer lender has standing under amended section 679.505(2) to object to the prime lender's retention of the collateral in satisfaction of the prime lender's claim, but may not object to the prime lender's method of foreclosure sale under amended section 679.504(3).

Under newly enacted section 817.562 of the Florida Statutes,³⁵⁴ a debtor under a security agreement, which authorizes him to sell the property and requires him to account for the proceeds to the lender, commits criminal fraud if he sells the property and wrongfully and willfully fails to account for the proceeds. If the security agreement does not authorize the sale or disposition of the collateral, the debtor commits criminal fraud if he "knowingly secretes, withholds, or disposes of such property in violation of the security agreement."³⁵⁵

The limited scope of this article precludes an exhaustive analysis of the differences between the 1962 and 1972 Official Texts of the U.C.C., but the Florida lawyer should take heed that there is no shortcut method of learning the numerous and significant changes. Only a careful reading and analysis of the 1972 Official Text³⁵⁶ and the Florida changes³⁵⁷ will suffice.

E. *Miscellaneous*

In a suit to enforce a stock-purchase contract between employee-purchasers and certain officers of the corporation, the trial court committed reversible error in ordering the rescission or cancellation of the contract because of its ambiguity, when neither party had asserted that claim in the pleading. The order was also premature because the court should have ruled only on the defendants' motion for a directed verdict, allowing the defendants to present their case if they lost that motion.³⁵⁸

One may purchase property from an owner with knowledge of a suit against the owner and still be a bona fide purchaser for a good and valuable consideration. The purchaser should establish his bona fides at trial; the court should not grant the judgment creditor a summary judgment before trial if the purchaser offers an affidavit asserting his bona fide purchase. Furthermore, there is a presumption against the existence of fraud, and proof to the con-

354. 1979 Fla. Laws ch. 79-113 (creating FLA. STAT. § 817.562 (Supp. 1979)).

355. FLA. STAT. § 817.562(2)(b) (Supp. 1979).

356. U.C.C. (1972 version).

357. 1979 Fla. Laws ch. 79-398.

358. *Spencer v. Devine*, 364 So. 2d 22, 23 (Fla. 1st DCA 1978).

trary requires clear and convincing evidence.³⁵⁹

In a case of apparent first impression in Florida, the District Court of Appeal, Third District, held that a lender who refuses to lend more money to a mortgage company until the borrower reduced its overhead is not liable for tortious interference with a contractual relationship when the borrower company cuts the salary of all corporate officers. The court in *Nitzberg v. Zalesky*³⁶⁰ held that the actions of the lender were reasonable and privileged under the law because a contracting party has a privilege to interfere with another contractual relationship "where the interference is necessary to protect his own contractual rights provided such interference is without malice."³⁶¹

Franchisors and business licensors should take note of an addition to the antimonopoly legislation in Florida:

The licensee, or any person deriving title from the licensee, of the use of trademark and identifiable business format or system may agree with the licensor to refrain from carrying on or engaging in a similar business and from soliciting old customers of such licensor within a reasonably limited time and area, so long as the licensor, or any person deriving title from the licensor, continues to carry on a like business therein. Said agreements may, in the discretion of a court of competent jurisdiction, be enforced by injunction.³⁶²

Finally, the new Federal Bankruptcy Reform Act of 1978³⁶³ provides for exemptions of property by the bankrupt, unless the various states reject the federal exemptions in favor of state exemptions. Florida has responded to this invitation by rejecting the federal exemptions in favor of those provided to Florida residents by the Constitution of the State of Florida and the Florida Statutes.³⁶⁴

359. *McCrary v. Bobenhausen*, 366 So. 2d 77 (Fla. 1st DCA 1978) (per curiam).

360. 370 So. 2d 389, 392 (Fla. 3d DCA 1979).

361. *Id.* at 391.

362. 1979 Fla. Laws ch. 79-43 (creating FLA. STAT. § 542.12(2)(b) (1979)).

363. Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified in scattered sections of tit. 11 U.S.C.A. (West 1979)).

364. 1979 Fla. Laws ch. 79-363 (creating FLA. STAT. § 222.20 (1979)).