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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 the topics dealt with are decisions arising under various provisions of the UCC, products liability, negotiable instruments, mortgage and banking law, and newly enacted consumer and commercial legislation on both the state and federal levels.

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* Professor of Law, University of Miami School of Law. This article covers the cases reported from 338 So. 2d No. 6 through 350 So. 2d No. 3, and the legislation enacted by the 1977 Florida Legislature.

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I. SALE OF GOODS

A. Goods

A contract of sale for a growing orange crop will constitute a constructive severance of the oranges from realty and a conversion to goods. As a result, when a default in a mortgage occurs after the execution of the sales contract, the purchaser of the oranges will be entitled to them.¹ The foreclosing mortgagee has no claim to the oranges under a "rents, issues and profits" clause in the mortgage because the mortgagee is only entitled to the rents, issues and profits after he takes possession of the property, either through the consent of the owner or by the appointment of a receiver. The sales contract constitutes a constructive severance even though it is an open price contract, no date of performance is specified, no down payment is made, and it is provided in the contract that the buyer will take "all the fruit that meets the standards for the use agreed upon or specified in this contract at the time of picking the fruit."² The decision was based upon the following criteria: (1) "this type of sales agreement, with one or more terms left open, is common in the citrus industry and that greater harm would be done by holding this contract void for indefiniteness;"³ (2) prior case law; and (3) sections 2-107(2), 2-204, 2-204(3), 2-305, 2-309, 2-702, 2-706, 2-719(2) of the UCC uphold the decision.

A federal regulation,⁴ adopted under the Perishable Agricultural Commodities Act,⁵ provides that a broker of commodities "is not responsible for payment to the seller by the buyer" in the absence of a specific agreement to the contrary. Hence, when the invoices of the seller to the broker and his buyer merely provide that the broker is "to collect and remit,"⁶ there has been no guarantee by the broker of payment by the buyer.

1. *Bornstein v. Somersom*, 341 So. 2d 1043 (Fla. 2d Dist. 1977).

2. *Id.* at 1048.

3. *Id.*

4. 7 C.F.R. § 46.28(c) (1977).

5. 7 U.S.C. §§ 499a-499s (1970).

6. *C.H. Robinson Co. v. L & M Brokerage Co.*, 344 So. 2d 894, 895 (Fla. 1st Dist. 1977) (citing 7 C.F.R. § 46.28(c) (1977)).

A corporate seller, which falsely represents to a buyer of an aircraft that the seller is an authorized dealer for the manufacturer, uses the buyer's deposit to pay operating expenses and refuses to return the money, is not liable for punitive damages because his conduct was a breach of contract.⁷ Punitive damages may not be awarded unless the act complained of was a tort which was willfully committed "or was attended by fraud, malice or gross negligence."⁸ The author has no quarrel with the rule stated by the court, but in light of the analytic dissenting opinion, the majority opinion would seem to be an overly generous application of the rule.

B. *Products Liability*

1. JURISDICTION

The mere fact that Volkswagen of America is a wholly owned subsidiary corporation of the parent company, Volkswagen of Germany, is not a sufficient basis under section 48.181 of the Florida Statutes (1975) for service of process upon Volkswagen of America to be binding upon Volkswagen of Germany.⁹ There must also be a showing that Volkswagen of Germany exercised such a degree of control over its subsidiary that the subsidiary's actions in Florida were the actions of the parent. Furthermore, the designation of its American subsidiary as its agent under the National Highway and Traffic Safety Act¹⁰ was not the equivalent of a "business agent" under section 48.081(1)(d) of the Florida Statutes (1975). Since this section applies only to business agents residing in Florida, there was no proof that the subsidiary corporation was residing in Florida even though it was authorized to do business in this state.

A retail druggist in Georgia sold prescription drugs in that state to a Florida resident who died allegedly as a result of their mislabeling. Although the language of the long-arm statute, section 48.193(1)(f)(2) of the Florida Statutes (1975), seemingly applied, the court determined that insufficient contacts existed so that the druggist was not susceptible to process.¹¹ Inasmuch as he neither sold nor solicited the sale of the drugs in Florida, thus invoking the protection of Florida law, fundamental ideas of fairness would be violated if the druggist were forced into Florida courts.

7. *Charter Air Cent., Inc. v. Miller*, 348 So. 2d 614 (Fla. 2d Dist. 1977).

8. *Id.* at 616.

9. *Volkswagenwerk Atkiengelselischaf v. McCurdy*, 340 So. 2d 544 (Fla. 1st Dist. 1976), *cert. denied*, 348 So. 2d 950 (Fla. 1977).

10. 15 U.S.C. § 1399(e) (1970).

11. *Dunn v. Upjohn Co.*, 350 So. 2d 127 (Fla. 1st Dist. 1977).

2. WARRANTY AND TORT LIABILITY

In a unique case, a Florida district court held that although a retail seller of books may give an implied warranty as to the physical properties of his books (such as bindings, etc.), he does not give a UCC or common law warranty that the thoughts contained therein are of merchantable quality.¹² As a result, a retail seller of a cook-book would not be liable to a buyer for her injuries and damages incurred because of the lack of adequate warnings concerning the poisonous ingredients (a poison plant) used in a recipe. The court expressly noted, however, that it was not deciding the liability of the author or publisher. The court also suggested that the retail seller would of course be liable if he knew that there was a reason to warn the public about the information in the book and subsequently failed to do so.

A buyer of an antique car kit, who sues the seller for its failure to deliver a full and complete kit, is not entitled necessarily to recover the full contract price upon the entry of a default judgment against the seller since the seller is entitled to introduce evidence in mitigation of damages.¹³ The court failed to mention that this case was controlled by the UCC.

When a car manufacturer and its dealer are joined as defendants in a products liability case, and the trial court finds that the dealer was passively negligent while the manufacturer was actively negligent, the dealer is entitled to indemnification from the manufacturer for the amount of the plaintiff's judgment plus the dealer's reasonable attorney's fees and costs.¹⁴ The dealer is not to be denied attorney's fees and costs merely because the original plaintiff alleges active negligence by the dealer when the dealer is found (or admitted to be) not guilty of active negligence.

If a jury verdict is in accord with the experts' conclusions that the cause of a truck accident was a design defect in a nut which controlled the steering mechanism rather than a fracture which developed as a result of the crash, an appellate court should not overturn the verdict.¹⁵

In a products liability suit, it is proper to allow the introduction of evidence of prior accidents involving the product "where it was

12. *Cardozo v. True*, 342 So. 2d 1053 (Fla. 2d Dist. 1977). See also *Haralampopoulos v. Capital News Agency, Inc.*, 70 Ill. App. 2d 17, 217 N.E.2d 366 (1966).

13. *Bay Products Corp. v. Winters*, 341 So. 2d 240 (Fla. 3d Dist. 1976).

14. *Insurance Co. of N. Am. v. King*, 340 So. 2d 1175 (Fla. 4th Dist. 1976).

15. *Cromarty v. Ford Motor Co.*, 341 So. 2d 507 (Fla. 1977), *rev'g*, 308 So. 2d 159 (Fla. 1st Dist. 1975).

shown to have been a reasonably similar occurrence under similar circumstances."¹⁶

Although a manufacturer's recall letter for defects in its products may not be admissible for the purpose of showing that a defect existed in a particular product (a motorcycle) at issue in a trial, the letter is admissible "to show that the defect existed in the hands of the manufacturer."¹⁷

The doctrine of strict liability in tort, which was adopted in *West v. Caterpillar Tractor Company, Inc.*,¹⁸ cannot be applied in a case in which the trial has already begun or been completed and the doctrine had not been "appropriately and properly raised during some stage of the litigation."¹⁹

A rash of cases has arisen involving the potential liability of companies marketing burglar alarm systems. Where a burglary occurs and the system manifests a "trouble signal" (not an alarm) when telephone wires were cut by burglars and the alarm company's employees notified the telephone company instead of the police or the customer in accordance with the company's policy, the company may be held liable.²⁰ The court held that whether this practice is negligent is a jury question. The court rejected the view expressed in many cases that the burglary is an intervening, unforeseen cause which would bar recovery against the alarm company. The court found that the criminal act is sufficiently foreseeable.²¹

Along similar lines, a burglar alarm installation company which fails to wire all of the windows in a home as called for by its contract may be held liable in negligence and breach of warranty in the event that burglars make use of the unwired windows to break into the home.²²

The limitation period on a written warranty, not under seal, is five years under section 95.11(3) of the Florida Statutes (1973). It should be noted that section 95.11 has eliminated the seal as having any effect upon the limitation periods.

Section 762.2-316(5) of the Florida version of the UCC provides that the distribution or use of whole blood, plasma, etc., is a service

16. *Warn Indus. v. Geist*, 343 So. 2d 44, 46 (Fla. 3d Dist. 1977).

17. *Harley-Davidson Motor Co. v. Carpenter*, 350 So. 2d 360, 361 (Fla. 2d Dist. 1977).

18. 336 So. 2d 80 (Fla. 1976).

19. *Linder v. Combustion Eng'r, Inc.*, 342 So. 2d 474, 476 (Fla. 1977). The court also articulated a series of rules as to the application of the *West* doctrine in a variety of cases in differing stages of prosecution.

20. *Nicholas v. Miami Burglar Alarm Co.*, 339 So. 2d 175 (Fla. 1976), *approving in part and disapproving in part*, 297 So. 2d 49 (Fla. 3d Dist. 1974).

21. *Singer v. I.A. Durbin, Inc.*, 348 So. 2d 370 (Fla. 3d Dist. 1977).

22. *Fenner v. Florentine Forge, Inc.*, 342 So. 2d 136 (Fla. 1st Dist. 1977).

and not a sale, and, consequently, there are no warranties of merchantability or of fitness for a particular purpose. This statute has been held applicable to a transaction where the blood was furnished prior to the effective date of the statute, but the illness (serum hepatitis) was not discovered until after the effective date and suit was not instituted until three years after the discovery.²³

A developer-builder who fails to sound-proof party walls in a condominium, in accordance with specifications filed with the appropriate city's building department, will be liable to a purchaser for breach of implied warranties of fitness and merchantability.²⁴

3. DEFENSES TO LIABILITY

Under the decision in *Blackburn v. Dorta*,²⁵ assumption of the risk in Florida has been merged into the comparative negligence doctrine and is no longer an absolute defense. A district court, however, may have resurrected the assumption of the risk defense under the name of "causation."²⁶ A packing house worker was warned about the dangers of a rotating sampler arm in a sampling machine used in the fruit trade. The employee was supposed to work between ten and twenty feet from the rotating sampler arm. For an undisclosed reason, the employee crawled underneath the machine and the rotating sampler arm crushed his head, killing him. The court held that the death of the employee was caused solely by his own action and was not contributed to by any defect in the machine; the employee disregarded the warnings of his supervisor to stay away from the machine "which presented obvious dangers during operation."²⁷

This case should be compared with *Blaw-Knox Food & Chemical Equipment Corp. v. Holmes*,²⁸ decided by the District Court of Appeal, Fourth District, in which it was held that the patent danger doctrine in product liability cases (i.e., the defense of a manufacturer-seller that the dangerous defect in the goods was obvious to the plaintiff and he should be barred from recovery) has been merged into the defense of contributory negligence and the principles of comparative negligence with the result that the jury may now apportion the negligence of the user in light of the patent danger in the product.

23. *Lewis v. Associated Medical Inst., Inc.*, 345 So. 2d 852 (Fla. 3d Dist. 1977).

24. *David v. B. & J. Holding Corp.*, 349 So. 2d 676 (Fla. 3d Dist. 1977).

25. 348 So. 2d 287 (Fla. 1977).

26. *Watson v. Lucerne Mach. & Equip., Inc.*, 347 So. 2d 459 (Fla. 2d Dist. 1977).

27. *Id.* at 461.

28. 348 So. 2d 604 (Fla. 4th Dist. 1977).

In *Dayton Tire and Rubber Company v. Davis*,²⁹ a divided district court considered the application of the negligence doctrine of *res ipsa loquitur* to a products liability case. Testimony on the plaintiff's behalf indicated that the cause of the tire blowout, which was the basis of the suit, was of such a nature that it could only have happened within the control of the defendant. Defendant's expert disagreed, however, and testified that the blowout was the result of improper use of the tire. The court ruled that in a situation of conflicting testimony such as this the *res ipsa loquitur* instruction should properly be given, and that it is within the province of the jury to decide whether a defect was created while the tire was under the defendant's exclusive control.

C. Legislation

Section 319.21(2) of the Florida Statutes (1975) was amended to provide that a manufacturer's statement of origin for a motor vehicle may not be issued or reissued to any distributor, dealer, or person for the purpose of updating any motor vehicle that is for sale.³⁰ Updating was defined as a modification of the motor vehicle so that it resembles a current year model, or the replacement of the original identification number and chassis number so as to reflect a change in the year of manufacture, "or any other modification which misrepresents the actual year manufactured, or issuing another manufacturer's statement of origin changing the model year of manufacture."³¹

It is now an unlawful trust and an unlawful restraint of trade for any person who is chartered by or authorized to do business in Florida to grant or accept any letter of credit or other document which evidences the transfer of funds or credit or to enter into any contract for the exchange or purchase of commodities where the letter of credit, contract, or other document requires a party to discriminate against or to certify that it has not dealt or will not deal with any other person on the basis of sex, race, color, religion, ancestry or national origin, or on the basis of a person's lawful business associations.³² It is also unlawful to refuse to grant or to accept any of the foregoing instruments on the grounds that they do not contain a discriminatory certification in order to comply with a foreign boycott. It is similarly illegal to request or to furnish information with regard to a person's religion, race, sex, ethnic or national origin or

29. 348 So. 2d 575 (Fla. 1st Dist. 1977).

30. 1977 Fla. Sess. Law Serv., ch. 77-11 (codified at FLA. STAT. § 319.21(2) (1977)).

31. *Id.*

32. *Id.* ch. 77-9 (creating FLA. STAT. § 542.13 (1977)).

presence or absence on a blacklist for the use of a foreign country.³³

Chapter 320 of the Florida Statutes which deals with motor vehicles was extensively amended to provide that the sale of new recreational vehicles (such as travel trailers, motor homes, truck campers, etc.) must have the same warranties as those required in mobile homes sales.³⁴

II. WAREHOUSING AND TRANSPORTATION OF GOODS

A bill of lading requirement that the shipper must give a written claim of loss within nine months of the loss may be satisfied by a letter which identifies the shipments by invoice numbers and additional letters which complain about missing and damaged goods so that the carrier has sufficient written notice of the losses the shipper intends to claim. Furthermore, although the shipper did not pay all of the shipping charges prior to the filing of the suit as required by the carrier's tariff, he is not prevented from suing as the shipping charges and the damage claims can be adjudicated together in the suit.³⁵

A federally regulated air freight forwarder's tariff, which required the filing of a suit for damages within one year after the disallowance of a claim by the company, is effective to bar suits filed after the specified time.³⁶ The argument that the Florida statute of limitations, which allows a longer period, ought to apply was rejected because the tariff was filed in accord with federal regulations which normally preempt state statutes in the interstate aviation field.

Section 7-204(2) of the UCC, which permits a warehouse to limit its liability for bailed goods to an amount stipulated on the warehouse receipt, has been upheld by a Florida court and construed not to require the limitation of liability language to be in conspicuous print.³⁷ Unfortunately, the same court seemed to indicate that when goods disappear from the warehouse and the warehouse admits its negligence, then the liability of the warehouse is limited in accordance with its limitation clause. It is submitted that in unexplained disappearance cases, the rule is that the warehouse should be held liable for conversion for misdelivery and liable for the full value. Under the holding of this case, warehousemen are encour-

33. *Id.*

34. *Id.* ch. 77-357, § 42 (amending FLA. STAT. § 320.835 (1975)).

35. *Vogue Optical Mfg. Co. v. National Van Lines, Inc.*, 339 So. 2d 676 (Fla. 3d Dist. 1976).

36. *Life Sciences, Inc. v. Emery Air Freight Corp.*, 341 So. 2d 272 (Fla. 2d Dist. 1977).

37. *Sanfisket, Inc. v. Atlantic Cold Storage Corp.*, 347 So. 2d 647 (Fla. 3d Dist. 1977).

aged to sell bailed goods, claim that the goods disappeared through their own negligence, and then pay at the reduced rate.

A transportation insurance policy, providing for coverage from the time that the insured seller's goods leave his store in Miami until they are delivered to their destination (Japan) and "while the property is in due course of transit in the custody of a common carrier incidental to transportation," does not cover a two week period during which the goods are lying on a dock in Jacksonville, Florida (in a container) while the seller attempts to find a new buyer after the collapse of the original sale.³⁸ The court did not consider the goods to be in transit while they were on the dock awaiting the seller's decision to send them to another destination.

A carrier under Public Service Commission (PSC) jurisdiction may not enter into a special contract with a shipper for a rate less than PSC authorized rates. It may enter into a valid oral contract with a shipper to supply a sufficient number of tank cars so as to give the shipper the opportunity of shipping at the authorized rate of twenty-seven cents per 100 pounds when shipments exceed 12,000 tons per year rather than the authorized rate of forty-eight cents per 100 pounds when shipments are less than 12,000 tons per year. If the carrier fails to supply the agreed upon tank cars in sufficient number, it will be liable for the amount the shipper must spend to pay for trucking the goods, and the carrier will not be permitted to collect the higher rate per 100 pounds from the shipper.³⁹

III. NEGOTIABLE INSTRUMENTS

A. *Jurisdiction*

Section 48.193(1)(g) of the Florida Statutes (1975) provides for long-arm jurisdiction over any person "breaching a contract in this state by failing to perform acts required by the contract to be performed in this state." This statute has been interpreted to mean that a nonresident who signs a promissory note in this state is subject to jurisdiction here on the basis that his failure to pay constitutes a breach.⁴⁰

B. *Agency*

Under section 3-403(2)(b) of the UCC, a corporate officer who signs corporate checks without indicating his agency status (such as

38. *Allied Leisure Indus., Inc. v. American Mut. Liab. Ins. Co.*, 342 So. 2d 540 (Fla. 3d Dist. 1977).

39. *Florida E. Coast Ry. v. Sheffield*, 349 So. 2d 680 (Fla. 1st Dist. 1977).

40. *First Nat'l Bank v. Dunham*, 342 So. 2d 1021 (Fla. 4th Dist. 1977).

"treasurer," etc.) will be personally obligated on the check to a payee unless he is able to prove that it was the intention of the parties that he act in a representative capacity when signing the check. This intention may be difficult to prove when the corporation is insolvent and the payee-holder knows that he will never collect if the corporate officer prevails.⁴¹

Under this same section of the UCC, a maker of a promissory note who merely writes the word "by" before his name may not introduce parol testimony that he was signing in a representative capacity on behalf of a corporation.⁴² Although this section does provide that the maker may introduce parol evidence against immediate parties when the instrument "does not name the person represented but does show that the person signed in a representative capacity," the court was of the view that the word "by" alone would not indicate that he signed in a representative capacity.

C. *Foreign Corporations*

An officer of a foreign corporation who signed corporate checks cannot be held personally responsible for the debts of the corporation incurred in a commercial transaction in Florida simply because the corporation had failed to secure permission to do business in this state.⁴³

D. *Parol Testimony*

Although parol testimony is admissible to show a lack or a failure of consideration when a maker of a note is sued by the payee, parol testimony may not be introduced to show: (1) that the maker-guarantors and the payee-bank were involved in an oral joint venture; (2) that the bank would receive only profits from the venture and not the payments called for by the note; and (3) that the note was only a sham for the purpose of "regularizing" the transaction between the makers, guarantors and the payee of the note.⁴⁴

E. *Defenses*

A wife who cosigns a promissory note with her husband because of the implied threats of the payee to have her husband imprisoned for converting funds of the payee may not, after her husband's

41. *Medley Harwoods, Inc. v. Novy*, 346 So. 2d 1224 (Fla. 3d Dist. 1977).

42. *Giacalone v. Bernstein*, 348 So. 2d 679 (Fla. 3d Dist. 1977).

43. *Medley Harwoods, Inc. v. Novy*, 346 So. 2d 1224 (Fla. 3d Dist. 1977).

44. *First Nat'l City Bank (Interamerica) v. Metal Trading Co.*, 71 F.R.D. 363 (S.D. Fla. 1976).

death, successfully assert the legal defense of duress in the absence of proof that the payee's threats were illegal or wrongful.⁴⁵

It is reversible error to enter a judgment on the pleadings in favor of a payee-plaintiff on a promissory note when the maker has set up the defense of duress even though this affirmative defense was mistakenly stated in a counterclaim rather than in an answer. This defense can be considered as if it had been properly set forth in the answer as an affirmative defense.⁴⁶

In a suit on a promissory note, the court may enter summary judgment in favor of the payee when the alleged makers, in their answer, merely deny all allegations of the complaint without specifically denying their signatures.⁴⁷ Section 3-307(1) of the UCC provides that "unless specifically denied in the pleadings each signature on an instrument is admitted."

Fraud may be asserted as a defense by the maker against the payee of a negotiable note.⁴⁸ It should be noted, however, that in certain cases payees may be holders in due course⁴⁹ and will take free of certain kinds of fraud committed by third parties.⁵⁰

A default judgment entered in favor of a payee on a promissory note is *res judicata* as to liability and as to the total amount adjudged to be owing by the maker. This judgment is not *res judicata* in a subsequent suit by the maker against the payee for breach of contract for which the notes were payment, because this latter suit involves issues which were not involved in the prior default judgment.⁵¹

F. *Forgery*

In the absence of express authority from the client, an attorney has no power to settle a client's case without the client's knowledge and consent, nor has he the power to cash the settlement check without the client's consent. The settlement is a nullity, and the insurance company (with whom the attorney "settled") remains liable to the client.⁵² It should be noted that an opposite view has been taken by the highest courts in New York⁵³ and California.⁵⁴

45. *Norris v. Stewart*, 350 So. 2d 31 (Fla. 1st Dist. 1977).

46. *American Housing Sys. Corp. v. Country Club of Miami Corp.*, 342 So. 2d 1026 (Fla. 3d Dist. 1977).

47. *Lipton v. Southeast First Nat'l Bank*, 343 So. 2d 927 (Fla. 3d Dist. 1977).

48. *Poneleit v. Reksmad, Inc.*, 346 So. 2d 615 (Fla. 2d Dist. 1977).

49. U.C.C. § 3-302(2) & Comment 2 (codified at FLA. STAT. § 673.302(2) (1977)).

50. *Id.* § 3-305(2)(c) & Comment 7 (codified at FLA. STAT. § 673.305(2)(c) (1977)).

51. *Perez v. Rodriguez*, 349 So. 2d 826 (Fla. 3d Dist. 1977).

52. *Nehleber v. Anzalone*, 345 So. 2d 822 (Fla. 4th Dist. 1977).

53. *Hutzler v. Hertz Corp.*, 39 N.Y.2d 209, 347 N.E.2d 627, 383 N.Y.S.2d 266 (1976).

54. *Navrides v. Zurich Ins. Co.*, 5 Cal. 3d 698, 488 P.2d 637, 97 Cal. Rptr. 309 (1971).

G. *Stopping Payment*

In a case void of facts, a district court held that there was no evidence to support the award of punitive damages for stopping payment of a check. On the other hand, the trial court was in error for failing to tax interest on the amount of the check from its date to the date of final judgment.⁵⁵

H. *Legislation*

Section 673.122(1)(b) of the Florida Statutes (1975) (U.C.C. § 3-122(1)(b)) has been amended to provide that the cause of action against a maker or acceptor on demand instruments (other than demand notes), shall accrue upon their date, or if they are not dated on the date of issue.⁵⁶ In the case of demand notes, the cause of action accrues against the maker and any endorsers, guarantors or other persons secondarily liable under revised section 95.031 of the Florida Statutes (1975) upon the first written demand for payment.

Under an amendment to chapter 697 of the Florida Statutes (1975), "[a]ny note which is silent as to the right of the obligor to prepay the note in advance of the stated maturity date may be prepaid in full by the obligor or his successor in interest without penalty."⁵⁷ This amendment is troublesome for several reasons: (a) if it is meant to govern every note, then the amendment should have been made to Article 3 of the UCC in, for example, sections 673.109, 673.112, or 673.118 of the Florida Statutes (1975); (b) because it is located in chapter 697 it might be deemed to govern only those notes secured by mortgages, leaving unsecured notes outside of its scope; and (c) there is no mention as to whether or not it is intended to cover existing notes.

Section 4-106 of the Florida UCC (section 674.106 of the Florida Statutes (1975)) has been amended to provide that the receipt of any notice or order by, or the knowledge of, one branch or separate office of a bank is not actual or constructive notice to or knowledge of any other branch or separate office of the same bank. This does not impair the right of such other branch or separate office to be a holder in due course of an item. For the purpose of this section, a separate drive-in and walkup facility of the bank may be operated within one mile of the main office and still be considered as a separate office.⁵⁸

55. *Fort Pierce Toyota, Inc. v. Wolf*, 345 So. 2d 348 (Fla. 4th Dist. 1977).

56. 1977 Fla. Laws, ch. 77-54.

57. *Id.* ch. 77-318 (adding FLA. STAT. § 697.06 (1977)).

58. *Id.* ch. 77-384 (amending FLA. STAT. §§ 659.06 & 674.106 (1975)).

IV. SURETIES AND GUARANTORS

Although service of process is not made upon a guarantor of a mortgage note, if he should enter into an agreement with the mortgagee to stay the proceedings and to make changes in the mortgage, he has submitted himself to the jurisdiction of the court.⁵⁹

An accommodation party who signs a note which provides that "all endorsers and sureties agree that this note may in whole or in part be extended or renewed after maturity from time to time without notice to them and without release of their liability hereon" will not be discharged from liability under section 3-606(1) of the UCC in the event the maker extends the time of payment.⁶⁰ In this case, the parties agreed to more than one extension as allowed in section 3-118(f), which states that "unless otherwise specified" consent to extension authorizes a single extension for not longer than the original period.

A co-owner of a corporation who enters into a continuing guaranty agreement with a supplier of goods to ensure payment for goods supplied is not relieved from his agreement simply by selling his corporate interest to his fellow co-owner, informing the supplier of the change of ownership and furnishing the supplier an additional guaranty agreement from the remaining owner.⁶¹ The guaranty agreement had provided specifically for termination by written notice sent by the guarantor to the supplier, which was not followed. As a result, the estate of the guarantor remained liable for goods sold to the corporation.

Normally, the extension of a loan agreement between the principal debtor and the creditor will discharge any accommodation parties (sureties) on the note. If, however, the accommodation parties consent to the extension, they will not be discharged and their consent can be established by parol testimony showing that they, as officers of the principal debtor, requested the extension.⁶²

When a promissory demand note payable in one year provides that the signers, including accommodation parties, agree to any extensions or renewals of the note without notice which would be binding upon all parties, the holder may enter into a stipulation during the pendency of a lawsuit on the note that the note will be converted from a demand instrument to a time instrument which

59. *First Wis. Nat'l Bank v. Donian*, 343 So. 2d 943 (Fla. 2d Dist. 1977).

60. *Bay Nat'l Bank & Trust Co. v. Mason*, 349 So. 2d 810 (Fla. 1st Dist. 1977). Section 3-606(1) expressly provides that accommodation parties will not be discharged in the event of an extension of payment when the parties have so agreed.

61. *Kerr-McGee Chem. Corp. v. CHB Farms, Inc.*, 340 So. 2d 483 (Fla. 4th Dist. 1976).

62. *Vanguard Constr. Co. v. Lewis State Bank*, 348 So. 2d 72 (Fla. 1st Dist. 1977).

will come within the extension clause and will not be deemed to be a novation discharging any accommodation parties.⁶³ At the time that this stipulation was entered into, the accommodation parties could have paid the instrument and would then have had immediate recourse against the accommodated party; thus, they have not been harmed by the result.

V. MORTGAGES

A. *Documentary Stamps*

When a corporation purchases real property with its own funds, binds itself with a purchase-money mortgage and makes all payments on a mortgage for the construction of warehouses thereon held by the title holder-sole stockholder, then a conveyance of the title of the property to the corporation without actual payment of consideration is exempt from documentary stamp taxes pursuant to section 201.02 of the Florida Statutes and chapter 12A-4.14 of the Florida Administrative Code.⁶⁴

Under section 201.02, when the property is conveyed to a grantee subject to a mortgage or when the grantee agrees to assume the mortgage, documentary stamp taxes are due on the full sales price on the theory that the grantee has given consideration to the extent of the balance of the mortgage. However, if the grantee under a quit-claim deed is already bound to pay the mortgage under an indemnity agreement, he is not liable for an additional tax because only the form of the grantee's liability has changed.⁶⁵

B. *Execution of Mortgages*

The District Court of Appeal, Second District, held that two witnesses are no longer required to the execution of a mortgage on homestead property because the phrase "duly executed" had been omitted from article X, section 4(c) of the present constitution. Prior cases had used this phrase as the reason for requiring two witnesses.⁶⁶

Apparently a simple letter written by a client to his attorney may act as a lien on certain real property when the letter acknowledges that the client owes the attorney a sum of money for legal services.⁶⁷ The letter may be recorded and constitute a lien on the

63. *Taines v. Capital City First Nat'l Bank*, 344 So. 2d 273 (Fla. 1st Dist. 1977).

64. *American Foam Indus., Inc. v. Department of Fin.* 345 So. 2d 343 (Fla. 3d Dist. 1977).

65. *Abramson v. Straughn*, 348 So. 2d 1172 (Fla. 4th Dist. 1977).

66. *Wickes Corp. v. Moxley*, 342 So. 2d 839 (Fla. 2d Dist. 1977).

67. *Mason v. Antonacci*, 342 So. 2d 546 (Fla. 3d Dist. 1977).

property entitling the attorney to recover, provided he proves that the legal services were in fact performed. Furthermore, this recorded letter entitles the attorney to priority over a subsequently recorded federal tax lien filed against the client.

C. *Balloon Mortgages*

When attorneys for a mortgagor and mortgagee have negotiated the final terms of a promissory note (secured by a mortgage) and the attorney for the mortgagee prepared the final draft, the closing was at his office and both parties had knowledge of the contents of the instrument, the mortgagor is not estopped from pleading that the note and mortgage constituted a balloon mortgage (as forbidden by section 697.05 of the Florida Statutes) and subject to forfeiture of all interest and attorney's fees.⁶⁸ If both parties are deemed to have full knowledge of the facts, then neither party can be deemed to have relied upon the other and there cannot be any estoppel. In the course of the decision, the court pleaded with the legislature to ameliorate the harsh provisions of the statute.⁶⁹

The District Court of Appeal for the Fourth District held that the sanctions of the Balloon Mortgage Act may not be evaded by the mortgagee electing to sue on the note rather than attempting to foreclose the mortgage. Although the ultimate holding appears to be correct, the court seemed to have assumed that section 9-501(1) of the UCC has some application to a mortgage of land but then decided that the Balloon Mortgage Act controlled the case rather than section 9-501(1).⁷⁰ Section 9-501(1) of the UCC has no application to a real estate mortgage; it is confined to security interests in goods, etc. The court reached the correct result, but for the wrong reason.

The balloon mortgage statute provides for an exemption when the mortgage is created for a term of more than five years. This clause has been interpreted to mean that the five year period begins to run from the date of execution and delivery of the mortgage and not from the time over which the payments are to be made. Consequently, if the last payment is more than five years after the execution date, the mortgage is saved from the sanctions of the statute.⁷¹

The balloon mortgage statute also states that if a mortgage provides for periodic payments of interest only with one final payment of the entire principal, it is excepted from the requirements of the statute. A mortgage which provides for periodic payments of

68. *Overstreet v. Bishop*, 343 So. 2d 958 (Fla. 1st Dist. 1977).

69. *Id.* at 960-61.

70. *Slomovic v. Petryk*, 341 So. 2d 208 (Fla. 4th Dist. 1977).

71. *Perry v. Key W. State Bank*, 339 So. 2d 248 (Fla. 3d Dist. 1976).

interest only, but with principal payments of \$100 to become payable monthly in the event that the gross income from the encumbered property should exceed \$15,000 for the preceding year, is within the exception and thus exempt from the statute.⁷²

D. *Interpretation of Mortgages*

A release clause, contained in a letter sent to the mortgagors the day before they signed the mortgage, falls within the rule that where other instruments are executed contemporaneously with a mortgage and as part of the same transaction, all of the documents are to be read together in order to determine the intent of the parties. Furthermore, if the mortgagors tender payment under the release clause, it will be effective after a foreclosure suit is filed because the release clause is a vested right which may be exercised at any time until a decree of foreclosure is entered.⁷³

E. *Merger*

When mortgagors convey encumbered property to the mortgagee, this may constitute a merger with the result that the mortgage no longer exists. In the absence of an accord and satisfaction agreement, however, this conveyance does not satisfy the promissory note which was secured by the mortgage, and the holder of the note (the mortgagee) may sue and recover the unpaid balance.⁷⁴

When the mortgagor conveys mortgaged property back to the mortgagee, the mortgage is extinguished through the doctrine of merger. When, however, a judgment lien has been fastened upon the property after the execution of the mortgage and the lien creditor now claims that he is the senior creditor because the original mortgage has been extinguished, it is a question of the mortgagee's intention as to whether he intended this merger to occur. Furthermore, there is a rebuttable presumption that the mortgagee would not intend for a merger to result in subjecting his property to a lien having priority over his own mortgage.⁷⁵

F. *Construction Loans and Future Advances*

Section 697.04 of the Florida Statutes (1975) provides that mortgages "may, and when so expressed therein shall, secure not only existing indebtedness, but also such future advances . . ." In

72. *Davies v. Cox*, 349 So. 2d 218 (Fla. 4th Dist. 1977).

73. *Boyette v. Carden*, 347 So. 2d 759 (Fla. 1st Dist. 1977).

74. *Morton v. Rifai*, 339 So. 2d 707, 708 (Fla. 1st Dist. 1976).

75. *Gourley v. Wollam*, 348 So. 2d 1218 (Fla. 4th Dist. 1977).

a case of first impression, it was held that in light of the common law, it is not necessary for a construction mortgage to recite that it is to secure future advances in order for it to have priority over mechanic lien claimants whose rights intervene between the recording of the mortgage and the making of future advances.⁷⁶ This is particularly so when the mechanic lien claimant is a contractor who knew of the purpose of the construction mortgage and received disbursements from it.

It is no defense to a foreclosure action that the lender had allegedly agreed to fund a building project until its completion when it is shown that the lender did advance additional sums in order that the amount would be sufficient to complete construction. The lender, therefore, is not bound to advance further sums when the first advance is insufficient because of cost overruns.⁷⁷

In *Dunson v. Stockton, Whatley, Davin & Co.*,⁷⁸ the owners of land, pursuant to a contract, deeded the property to their building contractor in order to enable him to borrow construction money from a lender. The contractor, in turn, mortgaged the property to the lender. The mortgage contained a future advance clause and the lender was forced to lend more than the original contract price in order to complete the home. During the course of construction, the lender took effective control of the contractor in order to complete the work. The lender then sued to foreclose the mortgage for the originally agreed amount plus the subsequent advances. The original owners of the land contended that since the lender knew of their arrangement with the contractor, he could not claim to be a bona fide lender, and therefore it was subject to its terms. The court held, however, that the owners, by conveying to the contractor, were estopped from asserting anything in derogation of the deed. Nevertheless, at the moment the lender took effective control of the contractor, an equitable lien came into force for the benefit of the original owners to which the mortgage was subordinate. Any advances made after that date were subordinate to the construction contract with the apparent result (upon remand of the case) that the owners would not be liable for the amounts advanced after the date of the takeover of the contractor by the lender.

An appellate court in Florida declined to hold that a contractor, who has been forced to incur legal expenses in defending himself from the claims and suits brought by subcontractors as the result

76. *Snead Constr. v. First Fed. Sav. & Loan Ass'n*, 342 So. 2d 517, 519-20 (Fla. 1st Dist. 1977).

77. *Walter Harvey Corp. v. O'Keefe*, 346 So. 2d 617, 618 (Fla. 3d Dist. 1977).

78. 346 So. 2d 603 (Fla. 1st Dist. 1977).

of a failure of a lender to disburse loan funds, has a cause of action for these legal expenses against the lender.⁷⁹ The court was of the view that an affirmative decision "might have the effect of promoting a multitude of commercial litigation"

The District Court of Appeal, Third District, held that an officer of a construction lender may assure suppliers of labor and materials that there are sufficient funds to complete the condominium project, that there is no need to file mechanic's liens and that the officer would do everything in his power to see that they were paid without constituting a waiver of priority by the lender-bank against these claimants.⁸⁰ This conclusion was reached because of the trial court's finding that these statements were neither fraudulent nor untrue, and that no misrepresentations had been directed towards the claimants. In addition to inconsistent statements throughout the opinion, it does not appear to be in accord with those decided in other districts.

If a supplier of materials to a building site is in privity with the contractor but not with the bank financing the construction, the supplier is not entitled to an equitable lien superior to the bank's construction loan mortgage in the absence of some material misrepresentation, fraud, mistake or some fact showing that the bank affirmatively deceived the supplier in order to induce it to supply materials.⁸¹

When mortgages are perfected within one year after a notice of commencement has been filed under the Mechanic's Lien Act and they are then assigned more than one year after the filing of the notice of commencement, the assignees take subject to the recorded notice.⁸² Two separate grounds exist for this result: (1) that as mortgagees they do not have an interest in real property (under section 713.13 of the Florida Statutes (1975)); or (2) that as assignees they step into the shoes of their assignor with the same rights and duties.

A construction loan mortgagee who records his mortgage before any materialman supplies materials to the building site has priority over any liens asserted by these materialmen.⁸³

Under sections 713.21 and 713.22 of the Florida Statutes (1971), a mechanic's lien must be enforced within one year from the date

79. *Norin Mtg. Corp. v. Wasco, Inc.*, 343 So. 2d 940, 942 (Fla. 2d Dist. 1977).

80. *Palmer First Nat'l Bank v. Rinker Materials Corp.*, 348 So. 2d 1234 (Fla. 3d Dist. 1977).

81. *Gancedo Lumber Co. v. Flagship First Nat'l Bank*, 340 So. 2d 486 (Fla. 3d Dist. 1976).

82. *United of Fla., Inc. v. Illinois Fed. Sav. & Loan Ass'n*, 341 So. 2d 793 (Fla. 2d Dist. 1977); *accord*, *Southern Colonial Mtg. Co. v. Medeiros*, 347 So. 2d 736 (Fla. 4th Dist. 1977).

83. *Security Life Ins. Co. v. Travis*, 340 So. 2d 529 (Fla. 1st Dist. 1976).

of filing. If a mechanic's lien claimant should bring a suit to enforce the lien against the mortgagee within one year of filing the lien but should fail to make the fee holder a party to the action, the lien will die after the expiration of the one year period and will be invalid against the mortgagee.⁸⁴

A mortgagee has a cause of action against a judgment lien creditor who wrongfully destroys a part of the mortgaged property in the process of levying the writ of execution.⁸⁵

When a purchase-money lender in the financing of the purchase of individual condominium units pays money to the construction lender of the entire project (whose lien predated mechanic's lien claimants), his lien becomes subrogated to the first lien of the construction lender but will have priority over the mechanic's lien claimants.⁸⁶ This is true even though no formal assignment of mortgage is made by the construction lender to the purchase-money lender.

G. Acceleration

An agreement for deed (treated as a mortgage in Florida) which does not provide for acceleration of the balance owing upon the default of the vendee may not be accelerated by the vendor. The vendor may foreclose upon default of the vendee, and the property may be sold to satisfy the amount then due, with the sale subject to payment by the purchaser of the remaining balance of the agreement.⁸⁷

H. Defenses

A mortgagee who receives a check drawn on an account of a stranger to the mortgage, upon condition that the mortgagee extend the mortgage, cannot keep the check after refusing to comply with the condition.⁸⁸

A mortgagor's alleged easement (of ingress and egress to adjacent lands) on mortgaged land is not a sufficient affirmative defense to a foreclosure action because the easement could only be effective if the mortgage were foreclosed. In the event of foreclosure, it would be possible to adjudicate the issue of the existence of the easement in the suit.⁸⁹

84. *Diversified Mtg. Inv. v. Benjamin*, 345 So. 2d 392 (Fla. 3d Dist. 1977).

85. *Moseley v. Bi-Lo Supermarket, Inc.*, 341 So. 2d 222 (Fla. 3d Dist. 1977).

86. *Southern Colonial Mtg. Co. v. Medeiros*, 347 So. 2d 736, 738-39 (Fla. 4th Dist. 1977).

87. *Adkinson v. Nyberg*, 344 So. 2d 614 (Fla. 2d Dist. 1977).

88. *Southeast First Nat'l Bank v. Taines*, 339 So. 2d 275 (Fla. 3d Dist. 1976).

89. *Tower Estates, Inc. v. Slewett*, 346 So. 2d 637 (Fla. 3d Dist. 1977).

A court may, of course, refuse to enforce a mortgage by foreclosure when it finds that the mortgagors have proved by a preponderance of evidence that the mortgage was without consideration and that the mortgagees had unclean hands.⁹⁰

I. *Usury*

It would appear that when lenders have exacted usurious interest and then perjured themselves at one stage in the court proceedings regarding the amount of money actually lent to the borrowers, the court may enter a judgment in favor of the lenders for the amount actually lent, deny any interest, refuse foreclosure of the mortgage, and then cancel the mortgage.⁹¹

The fact that a lender has received more money (allegedly interest) than is permitted by law does not prove the exaction of usurious interest. Usurious intent must be shown; if there is a genuine question as to this intent, a summary judgment should not be entered in favor of the borrower.⁹² In addition, attorney's fees are not authorized to be awarded to a successful borrower under section 687.04 of the Florida Statutes (1975).

A claim by a lender for interest over fifteen percent per annum is not usurious when the loan agreement, as construed by the court, does not provide for over fifteen percent interest.⁹³

The mortgagor's bare allegations that a mortgage was usurious is not sufficient to withstand a motion for summary judgment when his affidavit contained no calculations (as requested by the trial court) to support them.⁹⁴

If a foreign state or territory has a real and vital connection with a construction loan transaction encumbering land in Florida so as to permit the disbursement of the loan in the foreign territory rather than in Florida, and the contract calls for the application of the law of the foreign territory, then the loan may be upheld over the contention that it would be usurious under the law of Florida. However, if the facts show that the transaction was arranged so as to evade Florida law and, therefore, was in bad faith, Florida law would control.⁹⁵

In a mortgage foreclosure action, a mortgagor who counterclaims for the forfeiture of usurious interest under section 687.04 of

90. *Pelle v. Glantz*, 349 So. 2d 732 (Fla. 3d Dist. 1977).

91. *Wasman v. Rubinson*, 341 So. 2d 802 (Fla. 3d Dist. 1977).

92. *Wells v. Freedman*, 342 So. 2d 983 (Fla. 3d Dist. 1977).

93. *McTigue v. American Sav. & Loan Ass'n*, 344 So. 2d 254 (Fla. 4th Dist. 1977).

94. *Eastland Inv. Co. v. Baker*, 344 So. 2d 882 (Fla. 3d Dist. 1977).

95. *Bella Isla Constr. Corp. v. Trust Mtg. Corp.*, 347 So. 2d 649 (Fla. 3d Dist. 1977).

the Florida Statutes (1975) is, in reality, claiming damages and is, therefore, entitled to a jury trial on this issue if he requests it.⁹⁶

J. Foreclosure

A trial court does not have the power to dismiss the counterclaim of a mortgagor in a mortgage foreclosure suit unless the mortgagor posts in the registry of the court (or in a comparable alternative method) the amount claimed due on the mortgage by the mortgagee plus delinquent interest and taxes.⁹⁷ This would be an unconstitutional deprivation of the mortgagor's right to free access to the courts.⁹⁸

In a mortgage foreclosure action, the trial court may try equitable issues without a jury and then empanel a jury to hear law issues raised by the mortgagor.⁹⁹ The mortgagor is not entitled to a jury trial of all issues, both legal and equitable.

A trial court should not dismiss a construction mortgagor's defenses to a construction mortgagee's foreclosure action as a sham unless the defenses are plainly fictitious. The trial court is not authorized to weigh issues and resolve conflicts in order to dismiss defenses as sham.¹⁰⁰

When a foreclosing mortgagee fails to show by the slightest evidence that its mortgage is superior to the interest claimed by a party who filed an answer stating that the latter was without knowledge of the mortgagee's allegations, the mortgagee is not entitled to summary judgment against this party.¹⁰¹ The burden of proof was on the plaintiff-mortgagee; the foreclosed party need make no showing.

A foreclosure sale will not be set aside when it is shown that the successful bidder, the City of Miami, had one announced agent bidder who bid and then withdrew from the sale while an unannounced agent made the successful bid apparently in his own right and then tendered a City of Miami check in payment, in the absence of proof that this "highly suspicious"¹⁰² conduct depressed the price or restrained the bidding.

The fee simple owner of realty is an indispensable party to a foreclosure action by a mortgagee. When there are a number of

96. *Smith v. Barnett Bank*, 350 So. 2d 358 (Fla. 1st Dist. 1977).

97. *G.B.B. Inv., Inc. v. Hinterkopf*, 343 So. 2d 899 (Fla. 3d Dist. 1977).

98. *Id.* at 901.

99. *Penmont Enterprises, Inc. v. Dysart*, 340 So. 2d 1285 (Fla. 3d Dist. 1977).

100. *Reif Dev., Inc. v. Wachovia Mtg. Co.*, 340 So. 2d 1267 (Fla. 4th Dist. 1976).

101. *Hamilton v. Bank of Palm Beach & Trust Co.*, 348 So. 2d 1190 (Fla. 4th Dist. 1977).

102. *Devanzo v. Resolute Ins. Co.*, 345 So. 2d 365, 366 (Fla. 3d Dist. 1977) (Hubbart, J., concurring).

mortgages, the court has no power to adjudicate priorities as to a mortgagee who filed no pleadings, took no part in the hearings, and apparently (the decision is not clear on this point) was not joined as a party defendant.¹⁰³

The trustees of a business trust founded under the law of California, but qualified in Florida, may not maintain a suit on a note and mortgage in Florida on behalf of the trust. The trust which has been granted permission to do business in Florida must be joined as a party plaintiff.¹⁰⁴

In a case of apparent first impression in Florida, it was held that when a mortgage with a balance of \$1,988,061.25 has been foreclosed and the mortgagee bids in \$1,000 at the foreclosure sale, the mortgagor could not redeem by paying only \$1,000, but instead had to pay the entire unpaid amount.¹⁰⁵

Under sections 95.11(2)(c) and 95.281 of the Florida Statutes (1975), when a mortgage does not contain an acceleration clause and its final maturity date is ascertainable from the record of the mortgage, the limitation statute of five years begins to run from the date of the prescribed final payment and not from the date of an earlier default in paying a monthly installment.¹⁰⁶

K. Attorney's Fees

An attorney was given a note and mortgage as security for an attorney's fee for \$8,000 representing ten percent of the value of property of the client. When the attorney then stated that the property was worth \$120,000 and received a note and mortgage for \$12,000 and the property was then sold for \$80,000 pursuant to the original sales contract, the additional \$4,000 was unsupported by consideration because the attorney in the \$12,000 contract was already bound under the \$8,000 contract.¹⁰⁷

Property was sold to a buyer under a contract which provided that the buyer had the right to rescind the transaction within six months after the closing, with the sales price to be refunded to the buyer. To secure this contingent obligation the seller had a corporation give its note and mortgage to the buyer. The buyer subsequently foreclosed the mortgage when the seller was unable to return the purchase price. The corporate mortgagor was held liable for

103. *Davanzo v. Resolute Ins. Co.*, 346 So. 2d 1227 (Fla. 3d Dist. 1977).

104. *Corcoran v. Brody*, 347 So. 2d 689 (Fla. 4th Dist. 1977).

105. *Sun First Nat'l Bank v. R.G.C.*, 348 So. 2d 620 (Fla. 4th Dist. 1977).

106. *Conner v. Coggins*, 349 So. 2d 780 (Fla. 1st Dist. 1977).

107. *General John J. Pershing Auxiliary No. 6 v. Murphy*, 341 So. 2d 809 (Fla. 3d Dist. 1977).

attorney's fees as provided for by the mortgage.¹⁰⁸ On the other hand, the individual seller whose sales and repurchase contract did not provide for attorney's fees was not so liable.

The imposition of receiver's fees and fees for the receiver's attorney are of great importance to the mortgagor. When the receiver's time logs and records are not made available to the mortgagor until just prior to the hearing setting these fees, a trial court should grant the mortgagor's motion for a continuance to enable it to contest the amount of the award.¹⁰⁹

L. *Legislation*

Section 687.03(3) of the Florida Statutes (1975), which was amended in 1976, was again amended in 1977 to define the concept of spreading advance payments over the term of the loan in order to avoid the taint of usury. The spreading shall be:¹¹⁰

calculated by first computing the advance or forbearance as a percentage of the total stated amount of the loan. This percentage shall then be divided by the number of years, and fractions thereof, of the loan according to its stated maturity date, without regard to early maturity in the event of default. The resulting annual percentage rate shall then be added to the stated annual percentage rate of interest to produce the effective rate of interest for purposes of this chapter.

An "Interest Rate Parity" statute was adopted which permits various specified lenders licensed under Florida law or licensed or chartered under federal law "to charge interest on loans or extensions of credit to any person . . . or any firm or corporation, at the maximum rate of interest permitted by law to be charged on similar loans or extensions of credit made by any lender or creditor in the State of Florida"¹¹¹ This act does not, however, permit a lender to make loans that he is not otherwise permitted to make; this act simply attempts to allow all lenders who are authorized to make the same types of loans to charge the same interest rates. The act increases the number of competing lenders, but makes certain that the legal rate of interest of ten percent per annum will be used in fewer and fewer loans.

The Mortgage Brokerage Act was extensively amended. Among other things, a Mortgage Brokerage Guaranty Fund was created to

108. *Meyerson v. Cohen*, 348 So. 2d 930 (Fla. 3d Dist. 1977).

109. *955 N.E. 125th St. Corp. v. County Nat'l Bank*, 349 So. 2d 758 (Fla. 3d Dist. 1977).

110. 1977 Fla. Laws, ch. 77-374 (amending FLA. STAT. § 687.03(3) (1975)).

111. *Id.* ch. 77-391 (creating FLA. STAT. § 687.12 (1977)).

be funded from license fees for mortgage brokers. This fund is designed to compensate any person who has been adjudged by a court to have suffered monetary damages as the result of a violation of the act, e.g., the making of false promises by a mortgage broker, misrepresentation, failure to disburse, failure to account, failure to deposit in escrow, etc. Inasmuch as the fund is to have a ceiling of \$750,000, it is problematical whether it will be of much protection in the event of large defalcations.¹¹²

VI. BANKS AND SAVINGS AND LOAN ASSOCIATIONS

A. *Suits Against Banks*

The federal statute, which prohibits an "attachment, injunction, or execution" from being issued against a national bank by a state court prior to final judgment,¹¹³ has been interpreted by the Supreme Court of the United States as not prohibiting a mortgagor-debtor of a national bank from seeking a preliminary injunction in a state court to enjoin the bank from allegedly wrongfully foreclosing its mortgage.¹¹⁴

Constructive service of process upon a foreign national bank under section 48.181(1) of the Florida Statutes (1975) cannot be made when the complaint does not allege that the cause of action arose in Florida, or that it arose from a business or business venture of the bank in Florida.¹¹⁵

A federal statute provides that venue of an action against a national bank must be in the state and county in which the bank is located, unless the bank has waived it.¹¹⁶ The mere fact that a national bank located in Illinois has entered into a contract in Florida is not to be construed as a waiver of its right to be sued in Illinois.¹¹⁷

In agreeing with the Third District, the Supreme Court of Florida (in a four to three decision) has held that the repossession of a car in Duval County by a national bank does not constitute a waiver of its venue privilege of asserting that any suit brought against it for wrongful repossession must be filed in Broward County, wherein it was located. The dissenting justices were of the view that when a national bank commits a tortious act in another county it "locates"

112. *Id.* ch. 77-397 (amending FLA. STAT. §§ 494.01-.11 (1975)).

113. National Bank Act, 12 U.S.C. § 91 (1970).

114. *Third Nat'l Bank v. IMPAC, Inc.*, 432 U.S. 312 (1977).

115. *Chase Manhattan Bank v. Banco del Atlantico*, 343 So. 2d 936 (Fla. 3d Dist. 1977).

116. National Bank Act, 12 U.S.C. § 94 (1970).

117. *Exchange Nat'l Bank v. Rotocast Plastics Prod., Inc.*, 341 So. 2d 787 (Fla. 3d Dist. 1977).

itself in that county, and this constitutes a waiver of its venue privilege in regards to suit on that tortious act.¹¹⁸

B. Governmental Controls

Section 658.10(1) of the Florida Statutes (1975) provides that all bank reports, information, etc., submitted to the Comptroller are to be deemed confidential communications and shall not be made public "unless with the consent of the department." The Supreme Court of Florida held that the above quoted words constituted an unconstitutional delegation of legislative power to the Comptroller.¹¹⁹ The court subsequently enjoined him from releasing to the press the names and stock holdings of the stockholders of certain banks.

Under section 120.57 of the Florida Statutes (1975), a bank which is protesting the award of a branch charter to another bank is entitled to a hearing in order to present its protests because it is a "party" under Florida Administrative Code Rules 3-2.20, 3-2.26 and 3-3.73. The bank is also entitled to judicial review of the Department's action under section 120.68 of the Florida Statutes (1975).¹²⁰

The Administrative Procedure Act¹²¹ requires the Department of Banking and Finance, Division of Banking, to follow the findings of its hearing officers in applications for bank charters "unless the findings of fact were not based upon competent substantial evidence." The relevant statute provides that an appellate court may not substitute its judgment for that of the appropriate agency.¹²² If the Department of Banking and Finance should refuse to follow the findings of its hearing officer, which of these two conflicting rules should guide the appellate court? In a case of first impression involving the denial of a bank charter by the Department despite the favorable findings by its hearing officer, the District Court of Appeal, First District, in a very scholarly opinion, held that in light of the view expressed by the Supreme Court of the United States,¹²³ the appellate court should give weight to the findings of the hearing officer (which were discarded by the Department) in determining

118. *Landmark Bank v. Giroux*, 358 So. 2d 180 (Fla. 1978), *rev'g*, 345 So. 2d 847 (Fla. 1st Dist. 1977).

119. *Lewis v. Bank of Paco County*, 346 So. 2d 53 (Fla. 1977).

120. *Gadsden State Bank v. Lewis*, 348 So. 2d 343 (Fla. 1st Dist. 1977); *Jefferson Nat'l Bank v. Lewis*, 348 So. 2d 348 (Fla. 1st Dist. 1977); *Central Bank v. Lewis*, 348 So. 2d 348 (Fla. 1st Dist. 1977).

121. FLA. STAT. § 120.57(1)(b)9 (1977).

122. *Id.* § 120.68(10) (1977).

123. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

whether substantial evidence supported the Department's findings. Furthermore, the Department's final order must clearly support the basis of its decision and follow the criteria articulated in section 659.03(1) of the Florida Statutes (1975).¹²⁴

C. *Bank Collection Problems*

A complaint which alleged that a depository bank transferred a checking account of a corporation to another bank in North Carolina pursuant to a fraudulent telephone request which was honored without the signature of authorized persons of the corporation, with the result that the telephoning individual absconded with the funds, is sufficient to allege a cause of action under section 3-404 of the UCC.¹²⁵ This section states that an unauthorized signature is wholly inoperative.

Under section 4-302 of the UCC, a drawee-payor bank which fails to dishonor by its midnight deadline (midnight of the banking day following the banking day of receipt) becomes liable for the face amount of the check even though the account of its customer is insufficient to cover the check. Normally, in order to trigger this liability, presentment has to be made to the drawee-payor bank itself. If, however, the drawee-payor bank has contracted with another bank for data processing services and has designated this bank as the place for presentment of checks drawn on the drawee-payor bank, then the time for honor or dishonor begins to run from the time these checks are presented for payment (through a clearing-house) to the data processing bank rather than when the checks actually reach the drawee-payor bank. As a result, the attempt by the drawee-payor bank to dishonor at a point later than the midnight deadline after its data processing bank had received the check was ineffective.¹²⁶ The check had been paid under Section 4-213(1)(d) of the UCC, and the depository bank was not liable to the data processing bank.

The fact that a drawee bank dishonors a check of its drawer customer which was payable to another bank because of inside information as to the cash-flow problems of the drawer corporation does not constitute a fraud upon the payee bank. Thus, the drawee bank is not liable under section 3-409(1) of the UCC.¹²⁷

124. *McDonald v. Department of Banking & Fin.*, 346 So. 2d 569 (Fla. 1st Dist. 1977).

125. *David Miller Dist. Co. v. Florida Nat'l Bank*, 342 So. 2d 856 (Fla. 1st Dist. 1977).

126. *Capital City First Nat'l Bank v. Lewis State Bank*, 341 So. 2d 1025 (Fla. 1st Dist. 1977).

127. *Barnett Bank v. Capital City First Nat'l Bank*, 348 So. 2d 643 (Fla. 1st Dist. 1977).

D. Garnishment

Sections 77.031, 77.04, 77.06, and 77.07 of the Florida Statutes (1975) which permit prejudgment garnishment have been held unconstitutional by the Supreme Court of Florida in that they permit a taking of property without due process of law. The court found the sections infirm in that: (1) they allow the writ to issue without judicial supervision; (2) they do not require a sworn-to complaint by the plaintiff and he need not allege any facts justifying the garnishment; and (3) they do not require an immediate post-seizure hearing but merely keep the courts open to hear dissolution motions.¹²⁸

Section 222.11 of the Florida Statutes (1975) prohibits the garnishment of salary and wages payable to the head of a household. However, when the head of the household receives the wages and deposits them in a bank account, this account may be garnished because it is no longer due him for personal services but it is payable to him by his bank.¹²⁹

In a case of first impression, it was held that the State of Florida, under the doctrine of sovereign immunity, may not be garnished as the debtor of a judgment debt.¹³⁰

An order which commands the county to distrain funds owed to a building contractor is the equivalent of garnishment proceedings.¹³¹

A federal statute¹³² which permits the garnishment (in child support and alimony matters) of the United States Government for money due to employees (including servicemen) as compensation is not inconsistent with sections 222.11 and 222.12 of the Florida Statutes (1975). Another section (section 61.12 of the Florida Statutes (1975)) also permits the garnishment of the state for wages due to "any person or public officer, state or county, whether the head of a family residing in this state or not" to enforce court orders for alimony, suit money or child support. Although section 61.12 does not mention the word "judgment" and even though the word "decree" was previously deleted from the statute, with only the word "orders" being left in the section, it was further held that the section was to be construed as permitting a writ of garnishment to be entered on a judgment of a Florida court which established a foreign alimony judgment in Florida.¹³³

128. *Ray Lein Constr., Inc. v. Wainwright*, 346 So. 2d 1029 (Fla. 1977).

129. *Hertz v. Fisher*, 339 So. 2d 1148 (Fla. 1st Dist. 1976).

130. *State v. Gordon Bros. Concrete*, 339 So. 2d 1156 (Fla. 2d Dist. 1976).

131. *Wesley Constr. Co. v. Biscayne Constr., Inc.*, 341 So. 2d 786 (Fla. 3d Dist. 1977).

132. 42 U.S.C. § 659 (1970).

133. *Hall v. Air Force Fin. Center*, 344 So. 2d 1340 (Fla. 1st Dist. 1977).

In a case of first impression in Florida, a promissory note which was given to a bank provided that the bank-holder had the right of offset against the maker as to any deposit account and that the offset could be exercised after default without notice or other formality. The court held that the bank could exercise its offset rights against the debtor's account after it had been garnished by a judgment lien creditor even though the note was not in default as to monthly payments. The note was, however, in default because the maker did not maintain insurance coverage and had sold some of the collateral (equipment) without permission. The note did not contain an acceleration clause, but the court seemed to use the offset clause as a kind of a quasi-acceleration clause.¹³⁴

The District Court of Appeal, Second District, has expressed doubt that a trial court has the power in a suit by a garnisher against a mortgagor of his judgment debtors to order the mortgage satisfied upon payment of the mortgage when the action did not include the judgment debtors as parties. The appellate court, however, affirmed the actions of the trial court on the basis that a court of equity could protect the mortgagors from any possibility of being held liable to the judgment debtors on the mortgage.¹³⁵

A garnishee bank which was garnished for a judgment of \$2,780 when there was only \$28.77 in the judgment debtor's account was awarded attorney's fees of \$60.00, over the protests of the creditor that the amount was excessive.¹³⁶

E. Garnishment Legislation

Garnishment of a wage earner's salary for child support may now be made on a "continuing basis for so long as the court may determine or until otherwise ordered by the court or a court of competent jurisdiction in a further proceeding."¹³⁷

F. Banking Legislation

Banks incorporated in foreign countries are now permitted to open one banking facility in Florida in order to transact only such limited business in this state as is clearly related to and is usual in international or foreign business and in financing international commerce. No foreign bank may exercise fiduciary powers or receive deposits except for credit balances necessarily incidental to or aris-

134. *Barsco, Inc. v. H.W.W., Inc.*, 346 So. 2d 134 (Fla. 1st Dist. 1977).

135. *Bowling v. Rocket Wheels Indus., Inc.*, 344 So. 2d 1300 (Fla. 2d Dist. 1977).

136. *Shult Homes Corp. v. Maurice*, 348 So. 2d 1217 (Fla. 1977).

137. 1977 Fla. Laws, ch. 77-26, § 1 (amending FLA. STAT. § 61.12 (1975)).

ing out of the exercise of its lawful powers. Newly enacted section 659.67 of the Florida Statutes (1977) states that foreign banks must comply with most of the Florida Banking Code and must submit to the supervision and control of the Florida Department of Banking and Finance.¹³⁸

Section 658.10 of the Florida Statutes (1975), relating to bank reports to the Department of Banking and Finance, was amended to provide for more disclosure of records which were previously considered confidential. At the same time, the amendment also attempts to protect the privacy of banks, individual stockholders, officers, etc. The Department was given the unenviable authority to draft rules balancing the public's right to know against the banks' and individuals' rights of privacy.¹³⁹

For the purpose of establishing "common trust funds," a bank or trust company is now defined as including two or more banks or trust companies which are members of the same affiliated group as defined in section 1504 of the Internal Revenue Code of 1954.¹⁴⁰

Credit unions may now make loans secured by second as well as first mortgages on real property.¹⁴¹

Section 659.292 of the Florida Statutes (1975) has been created to permit the use of "convenience accounts" in banks. A "convenience account" is a demand deposit account in the name of one individual (a principal) in which one or more other individuals have been designated as agents with the right only to withdraw funds from or draw checks on such account. Any balance in the convenience account will be paid to the principal's guardian in the event of his incompetency or to any person designated by court order in the event of the principal's death, including his personal representative. The bank which holds such an account is protected from claims as long as it makes payments in accordance with this section. In addition, the bank has the right of offset against this convenience account in the event the principal owes money to the bank.¹⁴²

Section 665.381 of the Florida Statutes (1975) was amended to provide that savings and loan associations, in making improvement loans to home owners and mobile home owners, shall not charge more than fourteen percent simple interest per annum, and said

138. *Id.* ch. 77-157 (creating FLA. STAT. § 659.67 (1977) & adding subsections (3)(i) & (5) to FLA. STAT. § 658.08 (Supp. 1976)).

139. *Id.* ch. 77-94 (amending FLA. STAT. §§ 119.07(2)(b), 658.10 & 659.25 (1975)).

140. *Id.* ch. 77-42 (amending FLA. STAT. § 660.11 (1975)).

141. *Id.* ch. 77-151 (amending FLA. STAT. § 657.16 (1975)).

142. *Id.* ch. 77-160.

interest may not be precomputed. The act affects only those loans made after its effective date, July 1, 1977.¹⁴³

Section 532.04 of the Florida Statutes was created to authorize the payor of wages to deposit them directly to the account of the payee-employee in a financial institution by electronic or other medium with the written consent of the employee.¹⁴⁴

Any banking drive-in and walkup facility which is being operated on June 27, 1977, is now to be deemed a branch bank, but it shall not be counted as one of the two branches authorized by section 659.06(1)(a) of the Florida Statutes (1975).¹⁴⁵

Section 659.06 was simplified by eliminating the requirement that the Department of Banking had to consider any bank application when a competitor filed a branch application.¹⁴⁶ Subsection (2) of the same section was amended by the addition of language which provides for facilities of branch banks.¹⁴⁷

Section 516.11 of the Florida Statutes (1975) has been amended so that the Department of Banking and Finance is only required to examine the records of licensed lenders once annually.¹⁴⁸

VII. CONSUMER PROTECTION

A. Case Law

The Florida Consumer Collection Practices Act,¹⁴⁹ which prohibits certain debtor harassment practices and which gives a remedy for violations, has been construed as creating a cause of action for the invasion of privacy. Thus, an insurance company, which provides insurance coverage for a collection agency when it is sued for violation of any person's right of privacy, is obligated to furnish coverage when the collection agency is sued under these sections of the statutes.¹⁵⁰

Section 559.72(7) of the Florida Statutes (1975) provides that in collecting consumer claims no person shall "willfully communicate with the debtor or any member of his family with such frequency as can reasonably be expected to harass the debtor or his

143. *Id.* ch. 77-179 (amending FLA. STAT. §§ 665.381(4)-(5) (1975)).

144. *Id.* ch. 77-296.

145. *Id.* ch. 77-376 (repealing FLA. STAT. § 659.06(2)(b) (Supp. 1976)).

146. *Id.* ch. 77-389.

147. *Id.* ch. 77-383 (amending FLA. STAT. § 659.06(2)(a) (Supp. 1976)).

148. *Id.* ch. 77-356 (previously, the Department of Banking and Finance was required to make semi-annual inspections).

149. FLA. STAT. §§ 559.72-.77 (1977).

150. *Collection Bureau, Inc. v. Continental Cas. Co.*, 342 So. 2d 1019 (Fla. 4th Dist. 1977).

family." In a case of first impression in Florida,¹⁵¹ it was held that both the frequency and purpose of the creditor's telephone calls must be considered by the trier of fact. Proof of numerous calls is not sufficient if the calls were made merely to remind the debtor, to determine his reasons for non-payment, to negotiate differences, or to persuade him to pay. If, however, the calls continue after the debtor has fully communicated the above facts to the lender, then they would constitute a violation of the statute. For example, a question for the jury would be present when the lender telephoned the debtor more than 100 times within a five month period after the debtor told the lender to stop calling and sue him for payment. If the calls were without invective, made within normal business hours, and the lender did have cause, then an award of punitive damages should not be made.

The Act has been held to apply to a lender who was an individual making a noninterest-bearing loan to a friend. Furthermore, when the lender informed an intimate friend of the debtor about the loan, this communication was not privileged under the wording that a lender shall not "disclose to a person other than the debtor or his family"¹⁵² information about the loan, because this intimate friend was not living with the debtor as a member of her family. Finally, when the debtor filed a counterclaim for violation of this statute (when the lender filed suit to collect the loan) based upon the lender's single communication to the intimate friend of the debtor, this counterclaim was found not to be "ill-founded or brought for purposes of harassment."¹⁵³ As a result, the trial court would not be justified in awarding attorney's fees against the debtor because of her counterclaim. The subject matter of the counterclaim was a matter of first impression in Florida, and her cause of action was proved with the exception that she was unable to demonstrate that her reputation was damaged as a result of the unprivileged communication.

A complaint which alleges the mailing of a letter in a window envelope which permits the word "debtor" to appear directly above the plaintiff's name and address and which was allegedly done to embarrass the debtor states a cause of action, provided that the complaint further alleges that the sender of the letter was engaged in collecting consumer claims. In the absence of this latter allegation, no cause of action is stated.¹⁵⁴

151. *Stry v. J.M. Fields, Inc.*, 343 So. 2d 675 (Fla. 1st Dist. 1977).

152. *FLA. STAT.* § 595.72(5) (1977).

153. *Heard v. Mathis*, 344 So. 2d 651 (Fla. 1st Dist. 1977).

154. *Hansen v. Central Adjustment Bureau, Inc.*, 348 So. 2d 608 (Fla. 4th Dist. 1977).

In a case of first impression in Florida, it was decided that the lender in a home improvement transaction which is covered by the Truth in Lending Act must, under section 1635(a) of Title 15 of the United States Code, inform both the husband and the wife of their right to rescind the transaction within three days when both parties encumber jointly owned real property. Notice to one spouse is not sufficient to prevent the other from exercising his or her right to rescind.¹⁵⁵

B. *Legislation*

Sellers of goods to retail consumers who ship or deliver the goods in sealed boxes which hide the goods from view and who also require their buyers to sign a certificate of satisfaction as a condition for delivery are now required to add the following legend on the certificate:

BUYER'S RIGHT TO CANCEL

If the goods you have received are not in satisfactory condition or operation, you may cancel this statement of satisfaction by mailing a notice to the seller. This notice must indicate that you do not want the goods in the condition in which they were delivered and must be postmarked before midnight of the fifth business day after you sign this statement.

Certificates of satisfaction which do not comply with this wording shall be null and void.¹⁵⁶

Under an amendment to section 516.18(3) of the Florida Statutes (1975) (The Florida Consumer Finance Act), loans made to nonresident consumers in foreign states at an interest rate in excess of that permitted in Florida, may be enforced in Florida "where that state has in effect a regulatory small loan or consumer finance law similar in principle to this act."¹⁵⁷

Sections 520.07(4) and 520.34(7) of the Florida Statutes (1975) were altered to provide that, at the holder's option, unearned finance charges resulting from the cancellation of any insurance policy insuring automobiles and goods bought on credit will either be credited to the final maturing installments of the contract or paid to the buyer of the goods.¹⁵⁸

The credit life insurance laws were changed to state that the amount of credit life insurance on the life of the debtor shall not

155. *Yslas v. D.K. Guenther Builders*, 343 So. 2d 859 (Fla. 2d Dist. 1977).

156. 1977 Fla. Laws, ch. 77-346 (codified at FLA. STAT. § 501.141 (1977)).

157. *Id.* ch. 77-256 (amending FLA. STAT. § 516.18(3) (1975)).

158. *Id.* ch. 77-245 (amending FLA. STAT. §§ 520.07(4) & 520.34(7) (1975)).

exceed \$20,000 "except that loans not exceeding 1 year's duration shall not be subject to such limits and on such loans not exceeding 1 year's duration, the limits of coverage shall not exceed \$20,000 with any one insurer."¹⁵⁹

Universities in the state university system are now authorized to accept credit card payments as compensation for goods and services which might be in competition with private business.¹⁶⁰

The relatively recent practice of some real estate brokers to issue warranties covering the structural components of used homes for a period of usually one year has now come within the licensing requirements of the Florida Department of Insurance under statutory procedures designed to facilitate the continued solvency of "home warranty associations."¹⁶¹

Under the general provisions of the Florida Consumer Protection Statutes,¹⁶² home solicitation sales now include those made by telephone.¹⁶³ The buyer has three business days (not the former calendar days) in which to cancel a home solicitation sale.¹⁶⁴ Furthermore, all businesses conducting home solicitation sales are now required to furnish identification, name, address, telephone number, etc., to the prospective buyer.¹⁶⁵ The Division of Consumer Services of the Department of Agriculture and Consumer Services is empowered to investigate complaints, and it may institute proceedings to enjoin any violator.¹⁶⁶ In practice, however, the injunctive process comes too late in most cash sales to home solicitation victims.

A federal "Fair Debt Collection Practices Act"¹⁶⁷ has been enacted to prevent the harassment of consumer debtors by "debt-collectors" whose principal purpose is the collection of debts or who regularly collect or attempt to collect consumer debts owed to others.¹⁶⁸ The debt collector may not (1) communicate with the debtor, without his consent, at any unusual times or places; (2) communicate with third parties (except as provided by the Act) regarding the debt;¹⁶⁹ (3) harass the debtor by threats of violence or obscenity; (4)

159. *Id.* ch. 77-246 (amending FLA. STAT. §§ 627.553(3) & 627.679(2) (1975)).

160. *Id.* ch. 77-298 (amending FLA. STAT. § 239.665 (1975)).

161. *Id.* ch. 77-339 (codified at FLA. STAT. §§ 634.301-.328 (1977)).

162. FLA. STAT. §§ 501.011-.135 (1977).

163. 1977 Fla. Laws, ch. 77-350 (amending FLA. STAT. § 501.021(2) (1975)).

164. *Id.* (amending FLA. STAT. § 501.021(3) (1975)).

165. *Id.* (codified at FLA. STAT. § 501.046 (1977)).

166. *Id.* (codified at FLA. STAT. § 501.052 (1977)).

167. Pub. L. No. 95-109, 91 Stat. 874 (1977) (amending the Consumer Credit Protection Act, 15 U.S.C. § 160 *et seq.* (1970)).

168. *Id.* § 803(6).

169. *Id.* § 805(2)(1).

publish debtor lists; or (5) make repeated telephone calls to harass.¹⁷⁰ Lawyers are expressly excluded from the definition of "debt collector."¹⁷¹ A debt collector who is found guilty in a civil action for a violation of the Act can be forced to pay actual damages and either "additional damages" (a euphemism for punitive damages) as allowed by the court or reasonable attorney's fees and court costs.¹⁷² If the consumer action is brought in bad faith to harass the debt collector, reasonable attorney's fees may be awarded to the debt collector.¹⁷³ In class actions by consumers against a debt collector, "additional damages" are limited to either \$500,000 or one percent of the net worth of the debt collector, whichever is less.¹⁷⁴ Any inconsistent state statutes which govern debt collection activities will be annulled or altered by this Act. If any state statute, however, has greater consumer protection than the federal act, the state statute will not be affected. As a result, Florida case law which has included persons collecting their own debts within the ambit of the Florida Act will continue to be viable.

VIII. SECURITY INTERESTS

A. *Perfection and Priorities of Security Interests*

Although Article 9 does not apply to a lien on real estate, it does apply to a case wherein a developer of land enters into installment contracts for the sale of the land and gives a lender a security interest in these installment land contracts. This result is unaffected even though the loan is also secured by a mortgage on the realty given by the developer to the lender. If the perfection of the security interest is made within four months of the bankruptcy of the developer, it may be set aside as a voidable preference.¹⁷⁵

B. *Repossessions and Collections*

The Supreme Court of Florida held that section 78.065(2) of the Florida Statutes (1975), which deals with the procedure in replevin actions, is not specifically contrary to Rules 1.140 and 1.500 of the Florida Rules of Civil Procedure. Therefore, Rule 1.010, which provides that the procedure in replevin shall be set by statute unless

170. *Id.* § 805(b).

171. *Id.* § 806.

172. *Id.* § 803(6)(F).

173. *Id.* § 813(a).

174. *Id.* § 816.

175. *In re* Equitable Dev. Corp., 20 U.C.C. Rep. 1349 (S.D. Fla. Bankr. No. 75-751-BK-JKL-H 1976).

the Rules of Civil Procedure specifically provide to the contrary, along with the other statutory rules, is constitutional.¹⁷⁶

C. Notice of Sale of Repossessed Goods

A district court held that an informal telephone conversation between the repossessing creditor and the debtor, which indicated that the creditor was "going to have to sell"¹⁷⁷ the goods, was sufficient notice of sale where the debtor tried to find a buyer for the goods, the debtor knew that the creditor's business included the sale of used goods, and the goods were sold in the normal course of business within three months of the telephone conversation. Whether the court would have upheld the notion of oral notice in the absence of the above facts is uncertain.

Guarantors of a promissory note and a security agreement are to be deemed "debtors" under Section 9-105 of the UCC and are entitled to notice of sale of repossessed goods under section 9-504 and 9-506. This right to notice cannot be waived in advance of default under section 9-501(3) even though under the guaranty agreement the guarantors expressly waived notice of disposition of the collateral. Consequently, the guarantors will not be liable for a deficiency judgment in favor of the creditor if they never received notice of the sale.¹⁷⁸

In *First National Bank v. State ex rel. Department of Insurance*,¹⁷⁹ bonds and stock were delivered as security to a bank by an insurance company on July 5, 1974. However, the bank did not bind itself to lend any money until July 19, 1974, when the insurance firm gave its collateral note to the bank. The bank subsequently disbursed the first funds of the loan on July 22, 1974. The insurance firm was placed in receivership on January 16, 1975. The court held that the date of "transfer" of the stock (under section 631.262(2) of the Florida Statutes) was on July 19, 1974, which was within six months of the receivership and constituted a voidable preference under section 631.262(1) of the Florida Statutes (1975). The court noted that under section 9-303 of the UCC a security interest cannot be perfected until it has attached, and it cannot attach until value is given under section 9-204. Inasmuch as the bank did not give a binding promise to lend (value) until July 19, 1974, the security interest attached and became perfected as of that date which was within six months of the date of receivership.

176. *Gonzalez v. Babcock's Home Furnish Cent.*, 343 So. 2d 7 (Fla. 1977).

177. *Bondurant v. Beard Equip. Co.*, 345 So. 2d 806, 807 (Fla. 1st Dist. 1977).

178. *Barnett v. Barnett Bank*, 345 So. 2d 365 (Fla. 1st Dist. 1977).

179. 350 So. 2d 365 (Fla. 1st Dist. 1977).

D. Legislation

Section 534.49 of the Florida Statutes (1975) was amended to provide that when livestock are sold at a livestock market and livestock drafts are given as payment, the drafts shall not be considered as an extension of credit and "shall not defeat the creation of a lien on such animal and its carcass and all products therefrom and proceeds thereof, to secure all or a part of its sale price" ¹⁸⁰ It is also unlawful for the buyer to delay payment of the draft upon its presentment at "the payor's bank." ¹⁸¹ The quoted words may cause confusion in light of section 3-120 and 4-105 of the UCC. ¹⁸² Furthermore, it should be noted that any lien under this section would be subservient to a prior perfected security interest in the livestock buyer's inventory and after acquired property under the traditional view. ¹⁸³ However, if the maverick decision in *International Harvester Credit Corp. v. American National Bank of Jacksonville* ¹⁸⁴ is adhered to, the statutory lien would probably take priority.

180. 1977 Fla. Laws, ch. 77-362, § 1 (amending FLA. STAT. § 543.49 (1975)).

181. *Id.* § 2 (codified at FLA. STAT. § 534.501 (1977)).

182. U.C.C. § 3-120 provides: "An instrument which states that it is 'payable through' a bank or the like designates that bank as a collecting bank to make presentment but does not of itself authorize the bank to pay the instrument." *Id.* § 4-105(2) defines "Payor Bank" as "a bank by which an item is payable as drawn or accepted."

183. *E.g., In re Samuels & Co.*, 526 F.2d 1238 (5th Cir. 1976).

184. 296 So. 2d 32 (Fla. 1974).