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## Commercial Law

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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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## I INTRODUCTION

This survey<sup>1</sup> attempts to cover all cases and legislation encompassed by the ever spreading umbrella of the Uniform Commercial Code (UCC) as well as areas outside of the UCC but within commercial law practice.

## II. SALE OF GOODS

### A. *Goods*

A contract for the compiling, editing, and publishing of pamphlets by a printer has been construed to refer to the sale of goods.<sup>2</sup> Likewise, a contract for the furnishing of fabricated steel pipe to a construction site has been held to be for the sale of goods rather than a furnishing of services.<sup>3</sup>

1. This survey covers the cases reported in volumes 316 So.2d through 338 So. 2d and federal and Florida legislation enacted in 1976.

2. *Lake Wales Publishing Co. v. Florida Visitor, Inc.*, 335 So. 2d 335 (Fla. 2d Dist. 1976).

3. *United States Fidelity & Guar. Co. v. North Am. Steel Corp.*, 335 So. 2d 18 (Fla. 2d Dist. 1976); FLA. STAT. § 762.105 (1975).

### B. *Jurisdiction and Foreign Sellers*

A single large (\$41,999.95) mail-order purchase of goods from a foreign corporate seller, which does not have "the necessary substantial connection with the forum state so as to make the exercise of jurisdiction reasonable and consonant with the due process tenets of fair play and substantial justice,"<sup>4</sup> will not be sufficient for substituted service of process upon the corporation on the basis that it was allegedly carrying on a business or a business venture in Florida.

Under subsections (1) and (3) of Florida Statutes section 48.181 (1975), in order to secure jurisdiction over a nonresident corporation which manufactured goods that allegedly caused harm in Florida, it is necessary to allege and prove that the manufacturer had control over brokers, jobbers, wholesalers or distributors or control over the goods in the hands of these parties. The element of control is determinative.<sup>5</sup>

In the absence of a statute, an officer-salesman who sells goods in Florida for a foreign corporation has been held not personally bound on the contract, even though his corporation has not qualified to do business in Florida.<sup>6</sup> The fact that the corporation cannot sue on the sales contract because it has not qualified to do business neither affects the title to the goods sold nor imposes liability upon the individual who carried out the sales transaction.

### C. *Statute of Frauds*

When an owner of land orally guarantees payment of a subcontractor's debt to a materialman in return for the materialman's continuing to furnish materials to the construction site and refraining from filing a lien against the property, the Statute of Frauds section of the UCC (section 2-201)<sup>7</sup> has been held to be inapplicable.<sup>8</sup> Assuming (without deciding) that a sale of goods had taken place, there would have been a receipt and acceptance of the goods delivered after the making of the oral guaranty, thus satisfying UCC

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4. *Elmex Corp. v. Atlantic Fed. Sav. & Loan Ass'n*, 325 So. 2d 58, 63 (Fla. 4th Dist. 1976).

5. *AB CTC v. Morejon*, 324 So. 2d 625 (Fla. 1975).

6. *Mysels v. Barry*, 332 So. 2d 38 (Fla. 2d Dist. 1976).

7. FLA. STAT. § 672.201 (1975).

8. *Jim & Slim's Tool Supply, Inc. v. Metro Communities Corp.*, 328 So. 2d 213 (Fla. 2d Dist. 1976).

section 2-201(3)(c).<sup>9</sup> Further, those goods furnished prior to the making of the oral guaranty would not have been delivered pursuant to a contract for sale under UCC section 2-106;<sup>10</sup> hence, the Statute of Frauds section would not have been applicable. The court in the instant case also upheld the validity of the oral guaranty under Florida's general Statute of Frauds. It reasoned that the materialman's agreement not to file a lien against the property was a new consideration flowing to the guarantor-owner and since this was the "leading object" which was to benefit the promisor-guarantor, it was not within the purview of a promise to pay the debt of another under section 725.01 of the Florida, Statutes (1975).

#### D. *Products Liability*

In a landmark opinion, *West v. Caterpillar Tractor Co.*,<sup>11</sup> the Supreme Court of Florida in response to certified questions from the Court of Appeals for the Fifth Circuit, adopted section 402(A) of the *Restatement (Second) of Torts*. The court held that a manufacturer is strictly liable in tort when it places an article on the market knowing that the article is to be used without inspection for defects, and it has a defect which causes injury to a foreseeable bystander when he comes within the range of danger. The contributory or comparative negligence of the victim can be a defense to the manufacturer if it arises other than by a failure of the user to discover the defect in the goods or a failure to guard against the existence of the defect. Thus, the consumer, user, or bystander is still required to exercise ordinary care. The court further held that the bystander-victim could use the theory of breach of an implied warranty of merchantability against the manufacturer even though there was not any privity of contract between them. In such a case, the manufacturer would have the same defenses of contributory negligence and comparative negligence as it would have under strict liability in tort principles. It is to noted that the court deliberately extended the range of 402(A) to include bystanders even though the drafters of the Restatement had taken no position on that issue.<sup>12</sup> The court also stated that a suit under *Restatement (Second) of Torts*, section

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9. FLA. STAT. § 672.201(3)(c) (1975).

10. FLA. STAT. § 672.106 (1975).

11. 336 So. 2d 80 (Fla. 1976).

12. RESTATEMENT (SECOND) OF TORTS § 402(A), Caveat(1) (1965).

402(A) eliminates the notice requirement found under the UCC (section 2-607(3)(a)),<sup>13</sup> restricts or eliminates the effectiveness of disclaimers, and abolishes the privity requirement. Inasmuch as causes of action under section 402(A) and breach of warranty were concurrent remedies under the *West* case, pre-*West* warranty cases will have a continuing viability.

A pre-*West* complaint alleged that a retailer sold fabric to a minor's mother which was used by her to make kitchen draperies which subsequently exploded and burst into flames when the minor was attempting to put some hot paraffin into the kitchen sink. The court held that, in alleging that the fabric was a dangerous instrumentality with dangerous and defective characteristics, the complaint stated a cause of action by the minor against the retailer despite a lack of privity.<sup>14</sup> Today, a count under section 402(A) would also seem appropriate. In another decision, however, the District Court of Appeal for the Second District, in the course of affirming a jury verdict in favor of a bottler in a "bug-in-the-bottle" case, discussed the liability of the retailer and bottler under negligence and implied warranty theories with a seeming unawareness of UCC sections 2-314 and 2-315.<sup>15</sup> One would hope that at least one of the clerks of the court would have had a nodding acquaintance with Florida Statutory law.<sup>16</sup>

The Supreme Court of Florida has affirmed the Third District decision in *Ford Motor Co. v. Evancho*,<sup>17</sup> holding that a manufacturer of automobiles must use reasonable care in the design and manufacture of its vehicles in order to prevent secondary impact injuries to passengers when the vehicle is involved in a primary collision with another vehicle or object. The manufacturer, however, is not to be held obligated to build a "crash-proof" or "fool-proof" car; hence, the liability of the manufacturer is not based on breach of an implied warranty or on strict liability in tort principles, but rather upon a breach of a duty of reasonable care.

A federal district court (in attempting to apply Florida law) has held that an importer of foreign cars cannot be held liable under an

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13. FLA. STAT. § 672.607(3)(a) (1975).

14. *Dudley v. Mae's Discount Fabrics*, 323 So. 2d 279 (Fla. 2d Dist. 1975).

15. FLA. STAT. § 672.314-315 (1975).

16. *Tarwacki v. Royal Crown Bottling Co.*, 330 So. 2d 253 (Fla. 2d Dist. 1976).

17. *Ford Motor Co. v. Evancho*, 327 So. 2d 201 (Fla. 1976), *aff'g* *Evancho v. Thiel*, 299 So. 2d 40 (Fla. 3d Dist. 1974).

implied warranty that the car was equipped with crashworthy seats.<sup>18</sup> The court noted that a Florida court in the *Evancho* case had imposed such a warranty upon the manufacturer of a car, but the court was of the view that the importer had no ability to control the design and manufacturing process and therefore should not be held to the same standard of care as a manufacturer. The force of the opinion is weakened by the fact that the court was obviously opposed to the whole notion of car crashworthiness, whether asserted against the manufacturer or importer.

An electrical utility company owes a nondelegable high degree of care to employees of an independent contractor who work with the company's facilities. On the other hand, a shopping center which has a central switchboard containing numerous electrical meters which are used to measure electricity consumed by lessees which is supplied by a city generating system is not to be equated with an electrical utility, and its required degree of care is simply ordinary care.<sup>19</sup>

It is reversible error for the trial court judge to charge the jury in a suit being tried against the principle manufacturer and component part manufacturers for negligent design, manufacture, and assembly of a crane that the jury could not find against the manufacturers "[i]f . . . there were no set safety standards, in 1966, and those safety devices recommended were not in use in the industry."<sup>20</sup> It is interesting to note that the quoted language was actually in a question written by the jury and sent to the judge, to which he had responded in the negative.

A buyer of defective goods sued his retailer who impleaded the manufacturer as a third-party defendant.<sup>21</sup> The buyer was granted judgment against the retailer who was granted judgment against the manufacturer. The buyer's subsequent attempt to refuse satisfaction of his judgment against the retailer in order to enable him to bring an action directly against the manufacturer was refused on appeal. The First District Court of Appeal reasoned that, because the first suit against the retailer and manufacturer involved essentially the same issues as the proposed second suit against the manu-

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18. *Smith v. Fiat-Roosevelt Motors, Inc.*, 402 F. Supp. 116 (M.D. Fla. 1975).

19. *Lake Parker Mall, Inc. v. Carson*, 327 So. 2d 121 (Fla. 2d Dist. 1976).

20. *Jones v. Bucyrus-Erie Co.*, 323 So. 2d 633, 634 (Fla. 3d Dist. 1976).

21. *Billman v. Nova Products, Inc.*, 328 So. 2d 244 (Fla. 1st Dist. 1976).

facturer and since a favorable final judgment had been obtained in the first suit, the plaintiff was collaterally estopped from relitigating the same issues.

Even though a plaintiff's complaint alleged that the defendant's truck driver was actively negligent in driving a truck which collided with the plaintiff's car, the defendant was not prevented from filing a third party complaint against the manufacturer of its truck alleging that the manufacturer was actively negligent in the manufacture and design of the truck's electrical system and that the manufacturer breached warranties (the nature of which were not revealed in the opinion).<sup>22</sup>

The District Court of Appeal, Third District, stated in a rather oblique manner that a car manufacturer may be liable in negligence and/or for breach of implied warranty to a person who is struck by a car as the result of a failure of the master brake cylinder in the car.<sup>23</sup> Inasmuch as the ruling arose in the appeal of an order granting a new trial, the statement is hardly binding.

Florida Statutes section 440.11(2) (1975) provides that an employer's workmen's compensation carrier, service agent, or safety consultant shall not be liable as a third party tortfeasor for assisting the employer in carrying out its duties of furnishing safety inspections, consultive services, or other safety services. This section does not preclude the estate of a deceased workman of a subsidiary corporation from suing the parent corporation for its alleged negligent manufacture of a dangerous machine supplied to the subsidiary corporation simply because the parent corporation also supplied inspections or instructions incidental to the supplying of the machine.<sup>24</sup>

In appropriate cases the doctrine of *res ipsa loquitur* may be used in products liability cases, but before the jury can infer negligence, it must be charged and must conclude that the "instrumentality causing an injury was in the exclusive control of the defendant at the time the negligent act or omission . . . occurred."<sup>25</sup> In addition, the court must instruct the jury that if it concludes, after it has taken into consideration all of the evidence in the case,

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22. *Central Truck Lines, Inc. v. White Motor Corp.*, 316 So. 2d 579 (Fla. 3d Dist. 1975).

23. *Ford Motor Co. v. Berger*, 321 So. 2d 614 (Fla. 3d Dist. 1975).

24. *Greene v. Ivaco Indus., Ltd.*, 334 So. 2d 347 (Fla. 1st Dist. 1976).

25. *Auto Specialties Mfg. Co. v. Boutwell*, 335 So. 2d 291, 292 (Fla. 1st Dist. 1976), quoting Florida Standard Jury Instruction 4.6.

that the occurrence was not due to any negligence upon the part of the manufacturer, it may not infer negligence upon the part of the manufacturer. Florida Standard Jury Instruction 4.6 should be followed closely, since any deviation therefrom may result in reversible error.

In a pair of exploding soft-drink bottle cases, the Third District held that the doctrine of *res ipsa loquitur* (which is predicated upon an object's being in the exclusive control of a defendant) may be used if the victim is able to produce sufficient evidence of careful handling of the bottle from the time it left the bottler's control until the time of the explosion. The victim was not obliged "to do the impossible by accounting for every moment of a bottle's existence from the time it leaves a defendant manufacturer's possession and control. . . ." <sup>26</sup> This possessory aspect of the *res ipsa* rule has been stretched to include a case where a truck tire blew out after having been driven 9,520 miles, when the buyer testified that the tire, which had been in his control for one month, had not been driven in an under-inflated condition or subjected to abuse. <sup>27</sup> Inasmuch as the buyer alleged that the personnel of the defendant tire company had made representations regarding the durability of the tire, it is strange that the suit was not based upon breach of express and implied warranties rather than on action in negligence. The use of the *res ipsa* doctrine would seem rather strained in this instance.

In a case of apparent first impression in Florida, it was held that when a manufacturer of an elevator also installs and maintains it in a building owned by another, and the elevator falls and injures a passenger, the victim may assert the doctrine of *res ipsa loquitur* in a suit against the manufacturer. <sup>28</sup> The court noted that such a cause of action would lie even though the maintenance contract between the owner of the building and the elevator manufacturer provided that the owner of the building was to be in control and possession of the elevator. "The crucial point is the actual control of the elevator system, rather than the contractual agreement." <sup>29</sup>

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26. *Steele v. Royal Crown Bottling Co.*, 335 So. 2d 586, 588 (Fla. 3d Dist. 1976); *Lauck v. Publix Mkt., Inc.*, 335 So. 2d 589 (Fla. 3d Dist. 1976). Compare *Coca-Cola Bottling Co. v. Clark*, 299 So. 2d 78 (Fla. 1st Dist.), *cert. dismissed*, 301 So. 2d 100 (Fla. 1974).

27. *Goodyear Tire & Rubber Co. v. Hughes Supply, Inc.*, 336 So. 2d 1221 (Fla. 4th Dist. 1976).

28. *Commercial Union Ins. Co. v. Street*, 327 So. 2d 113 (Fla. 2d Dist. 1976).

29. *Id.* at 114.

This case should be contrasted with *Radar v. Otis Elevator Co.*<sup>30</sup> in which a rider in an elevator sued the owner of the building in which the elevator was located and the company (Otis) which maintained the elevator. Before the trial, the building owner and the plaintiff settled, and the owner then went to trial against Otis. Otis was exonerated against the building owner and the plaintiff, then filed suit against Otis. The trial court held that if Otis had no liability toward the building owner, it had none against the plaintiff and dismissed her suit. On appeal, it was held that the trial court was in error because the alleged liability of Otis to the owner of the building was not an essential part of the plaintiff's case against Otis. Therefore, the decision in the prior case did not affect the plaintiff's action against Otis.

### E. *Defenses to Products Liability*

The manufacturer of a machine (a livestock drop feeder) in a defective condition rendering it unreasonably dangerous to a user may not be held liable to a user injured by the machine in either breach of implied warranty of fitness or in negligence when the defective condition was obviously dangerous to the user.<sup>31</sup> This defense holds true even though the defect could have been cured in the design and manufacturing process by the expenditure of a nominal sum of money.

A painter, who was injured by the inhalation of paint fumes, was held to have no cause of action based on the theory that a warning on the can of paint was inadequate where he had read the warning label prior to using the paint.<sup>32</sup> The label had stated that the user should avoid breathing the vapor or spray mist, avoid prolonged paint contact with the skin, and use the paint only with adequate ventilation. As an additional factor the painter was injured while wearing a mask.

A manufacturer of goods cannot be held liable either for negligence or for breach of warranty unless there was a defect in the product. Thus, when a golfer sued the manufacturer and servicer of a golf cart because it rolled backwards upon him after he set the brake, and the sole testimony in his favor demonstrated that the

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30. 327 So. 2d 857 (Fla. 1st Dist. 1976).

31. *Farmhand, Inc. v. Brandies*, 327 So. 2d 76 (Fla. 1st Dist. 1976).

32. *Wickham v. Baltimore Copper Paint Co.*, 327 So. 2d 826 (Fla. 3d Dist. 1976).

brake released only once in several tests and then only when it was depressed one third of the way, the golfer was unable to show any defect in the cart.<sup>33</sup>

Section 371.60 of the Florida Statutes (1975) requires that a plate be attached to boats stating the recommended number of persons or the maximum weight load for safe operation. A violation of this statute may constitute negligence per se. If the operator of a boat were told that it was overloaded, however, and in spite of this warning and apparent bad weather, the operator still increased the speed of the boat after water came in over the bow, the cause of the operator's drowning would not be attributed to the absence of the plate but to the operator's negligence.<sup>34</sup>

A supplier's bid forms which provide that the supplier will not be liable for delay in furnishing structural steel to a building site and that "acceptance of materials on delivery shall constitute a waiver of any claims for damages on account of delay" precludes liability for delayed delivery, but not for damages for defective and non-conforming goods.<sup>35</sup>

A contract for the supplying of fabricated pipe which provided that the buyer was to make an inspection of the pipe within thirty days after delivery and that the seller agreed to repair or replace defective pipe provided claim was made within one year, has been construed to mean that if the inspection were not made within the thirty-day period, the buyer could not reject the pipe under UCC section 2-606<sup>36</sup> or, under UCC section 2-608,<sup>37</sup> revoke his acceptance.<sup>38</sup> On the other hand, under UCC section 2-607<sup>39</sup> the buyer is required to notify the seller within a reasonable time of a breach or he will be barred from any remedy. Since the contract in question had a one year warranty period, this was a determination by the parties as to the reasonable length of time for the buyer to notify the seller of the breach under UCC section 1-204.<sup>40</sup> Thus, the buyer

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33. *Lash v. Noland*, 321 So. 2d 104 (Fla. 4th Dist. 1975), *cert. denied*, 333 So. 2d 463 (Fla. 1976).

34. *Duncan v. Monark Boat Co.*, 330 So. 2d 843 (Fla. 1st Dist. 1976).

35. *Southeastern Builders, Inc. v. Joe Brashears Steel, Inc.*, 336 So. 2d 1228, 1229 (Fla. 1st Dist. 1976).

36. FLA. STAT. § 672.606 (1975).

37. FLA. STAT. § 672.608 (1975).

38. *United States Fidelity & Guar. Co. v. North Am. Steel Corp.*, 335 So. 2d 18 (Fla. 2d Dist. 1976).

39. FLA. STAT. § 672.607 (1975).

40. FLA. STAT. § 671.204 (1975).

could recover for any breach since he did notify the seller within the specified period.

#### F. *Statute of Limitations*

When a guest in a restaurant is hit on the head by a chandelier, the statute of limitations for actions based on negligence and implied warranty counts (assuming that he has a cause of action in warranty) against the general contractor who constructed the restaurant begins to run from the date of the injury and not from the completion of work by the contractor. Further, under the 1973 version of the Florida statute of limitations, the limitation would be under the four-year period provided by former Florida Statutes section 95.11(4)(1973) for a tort action rather than section 95.11(5)(e) for a breach of contract action.<sup>41</sup>

In another case of first impression in Florida, the District Court of Appeal for the Third District held that a cause of action for wrongful death accrued under former Florida Statutes section 95.11(6)(1973)<sup>42</sup> upon the death of the victim in an aircraft crash rather than upon the date when it was discovered that his death was allegedly caused by a design error in the manufacture of the aircraft.<sup>43</sup>

In an extraordinary opinion, the Supreme Court of Florida has held that "[a]ssuming only for the purpose of this opinion that an implied warranty was associated with the washing machine manufactured by petitioner in Sweden,"<sup>44</sup> the cause of action for the breach of warranty arose at the time tender of delivery was made in accordance with former section 672.725(2) of the Florida Statutes (1973) (UCC section 2-725(2))<sup>45</sup> and not at the time when the breach

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41. *Smith v. Continental Ins. Co.*, 326 So. 2d 189 (Fla. 2d Dist. 1976). 1974 Fla. Laws ch. 74-382 § 7 substantially rewrote section 95.11; the current version now provides a four year limit for actions based on breach of contract.

42. The current version, FLA. STAT. § 95.11(4)(d) (1975) provides the same two year limit for wrongful death.

43. *Walker v. Beech Aircraft Corp.*, 320 So. 2d 418 (Fla. 3d Dist. 1975). This case was also decided under the former version of the statute of limitations.

44. *AB CTC v. Morejon*, 324 So. 2d 625, 628 (Fla. 1975). This decision's effect on the statute of limitations is unclear in view of the overriding jurisdictional issues which were the basis of the appeal.

45. Law of June 3, 1965, ch. 65-254 § 1, Fla. Laws 684 (repealed 1974). This act which extended the statute of limitations to four years for breach of contract was repealed by section 26 of the act which extended the general contract limitation to four years.

of warranty was discovered, as had been held in a prior case.<sup>46</sup>

A contract for compiling, editing, and publishing of pamphlets has been construed to refer to a sale of goods, and hence subject to the four-year statute of limitations rather than the three-year statute governing oral contracts.<sup>47</sup>

### G. Indemnity Agreements

The use of indemnity agreements in products liability cases was well illustrated in *Joseph L. Rozier Machinery Co. v. Nilo Barge Line, Inc.*<sup>48</sup> An employee of Nilo Barge Line was instructed to rent a portable generator from Rozier and to attach it to a truck and bring it back to Nilo. The employee signed a lease form which contained the following indemnity provision:

INDEMNITY — NON-VEHICLE — Customer shall defend, indemnify and hold forever harmless Lessor, its subsidiary and affiliated companies, their officers, agents and employees, against all loss, liability and expense, including reasonable attorneys' fees, by reason of bodily injury including death, and property damage, sustained by any person or persons including but not limited to employees of Customer, as a result of the maintenance, use, operation, storage, erection, dismantling, servicing or transportation of Equipment other than Vehicles, whether such bodily injury, death, or property damage are due or claimed to be due to any negligence of Lessor, employees or agents of Lessor or any other person.<sup>49</sup>

As the employee was driving the truck, a wheel fell from the generator, seriously injuring him. The employee sued the lessor of the generator claiming negligent maintenance, and the lessor filed a third-party action against the lessee for indemnity. The court held

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46. *Creviston v. General Motors Corp.*, 225 So. 2d 331 (Fla. 1969); see *Golconda Corp. v. Newton*, 336 So. 2d 433 (Fla. 1st Dist. 1976), which deals with the statute of limitations and the question of its applicability to a successor corporation to the one which manufactured an allegedly defective product. The exact holding is difficult to ascertain.

47. *Lake Wales Publishing Co., v. Florida Visitor, Inc.*, 335 So. 2d 335 (Fla. 2d Dist. 1976), applying section 672.2-725 of the FLA. STAT. (1975) which was transferred (in effect) to section 95.11(3)(k) (1975).

48. 318 So. 2d 557 (Fla. 2d Dist. 1975), *cert. denied*, 328 So. 2d 843 (Fla. 1976). There was no contention raised in the case that the employee was not authorized to sign the lease agreement on behalf of his employer.

49. *Id.* at 557-58. See also Murray, *Indemnifying Suppliers Against Their Own Wrongs - Risk Allocation of Products Liability*, 9 UNIF. COM. CODE L.J. 203 (1977).

that it was clear that the lessee was to indemnify the lessor against "any negligence" of the lessor, and this would include any negligence of the lessor prior to the execution of the lease. Under this type of indemnity agreement, the employer's exposure for liability to his employee will extend far beyond the limits of workmen's compensation.

Under the general rule of indemnification, in order for a contract to be construed as requiring indemnification, it should clearly and expressly provide for indemnification of the indemnitee for injuries arising from the indemnitee's own negligence.<sup>50</sup>

#### H. *Revocation of Acceptance*

UCC section 2-608 provides that a buyer may revoke his acceptance of goods "whose nonconformity substantially impairs its value to him if he has accepted it."<sup>51</sup> This substantial impairment must be subjectively measured from the viewpoint of the buyer; however, it is reversible error for a trial court to use the test of the financial ability of the buyer to remedy the nonconformity as the standard for substantial impairment.<sup>52</sup>

In an apparent case of first impression in Florida, the Court of Appeal for the First District held that a complaint which incorporated by reference an attached letter that revoked the plaintiff's acceptance because of defects in the car purchased from the defendant stated a cause of action, even though the complaint itself did not state the facts alleged in the letter of revocation.<sup>53</sup>

#### I. *Performance of Warranties*

Sections 320.696 and 320.697 of the Florida Statutes (1975) provide that a motor vehicle licensee (such as a distributor) shall compensate any authorized motor vehicle dealer who performs work to rectify the licensee's products or warranty defects. These provisions have been interpreted to mean that when a consumer sues an authorized car dealer who has refused to repair defects arising out of a breach of implied warranty "also termed as 'advertised war-

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50. *United Gas Pipeline Co. v. Gulf Power Co.*, 334 So. 2d 310 (Fla. 1st Dist. 1976).

51. FLA. STAT. § 672.608 (1975).

52. *Barrington Homes, Inc. v. Kelley*, 320 So. 2d 841 (Fla. 2d Dist. 1975).

53. *McClurkin v. Parrish Volvo, Inc.*, 317 So. 2d 85 (Fla. 1st Dist. 1975).

ranty”<sup>54</sup> and also sues the licensee under the statute, the consumer cannot recover from the licensee because it was the legislative intent to cover only written warranties and not those “judicially inspired.”<sup>55</sup> The court overlooked, unfortunately, the fact that the UCC has legislatively created warranties of merchantability and fitness for a particular purpose.<sup>56</sup>

### J. *Collateral Source Rule*

The collateral source rule received an unusual application in *Walker v. Hilliard*.<sup>57</sup> The buyer of a farm tractor incurred flood damage to the tractor. The buyer’s insurance company paid for the damage, and he returned the tractor to the seller for repair. While it was in the hands of the seller, it was discovered that the tractor was a stolen tractor, and the true owner claimed it. The buyer sued the seller for breach of warranty of title. The appellate court held that the seller was liable for full damages, undiminished by the amount paid to the buyer by his insurance company. “If there must be a windfall, it is more just that the injured party profit, rather than the wrongdoer be relieved of full responsibility for his wrongdoing.”<sup>58</sup>

### K. *Damages for Breach*

A court, in awarding damages for lost profits, including overhead, to a seller when the buyer breaches under UCC section 2-708,<sup>59</sup> must be careful to avoid including more than one award for overhead.<sup>60</sup>

### L. *Insurance Proceeds*

A wholesale seller of jewelry on consignment to a retail jeweler has the right to intervene in the retailer’s suit against its fire insurance company for loss which occurred in a fire in order to claim any of the proceeds which might be owing to the intervenor.<sup>61</sup>

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54. *Jagodnik v. Renault, Inc.*, 328 So. 2d 211, 212 (Fla. 1st Dist. 1976).

55. *Id.* at 213.

56. FLA. STAT. §§ 672.314-15 (1975).

57. 329 So. 2d 44 (Fla. 1st Dist. 1976).

58. *Id.* at 45.

59. FLA. STAT. § 672.708 (1975).

60. See *Tech Corp. v. Permutit Co.*, 321 So. 2d 562 (Fla. 4th Dist. 1975).

61. *W. Klang & Son, Inc. v. Milar Galleries, Inc.*, 328 So. 2d 510 (Fla. 3d Dist. 1976).

### M. *Title to Goods*

A used car dealer who sells an encumbered automobile without the consent of the security interest holder and who fails to deliver a certificate of title to the buyer of the car, may be held liable under section 818.01 of the Florida Statutes (1975) for the criminal offense of selling personal property under a lien and for the criminal offense of transferring a motor vehicle without delivery of a certificate of title.<sup>62</sup> Absence of any proof that he had the criminal intent to commit these offenses was not a defense. This approach may be one way to help curb the habit of some used car dealers of selling "out of trust."<sup>63</sup>

### N. *Florida's Deceptive and Unfair Trade Practices Law*

The Florida Deceptive and Unfair Trade Practices Act (known as the little FTC Act)<sup>64</sup> which prohibits the use of unfair or deceptive acts or practices in the conduct of any trade or commerce has been upheld as constitutional by the Supreme Court of Florida.<sup>65</sup> The Act does not define what is an "unfair trade practice," and it was contended that those words were so vague and indefinite that they denied substantive due process. The court rejected this facet of the attack on the grounds that these phrases were also found in the Federal Trade Commission Act and in the Model Unfair Trade Practices and Consumer Protection Act, and that thirty years of case law had given these words a meaning well settled in trade regulation law. The Act was further attacked on the grounds that there was an unconstitutional delegation of rulemaking authority to the Department of Legal Affairs (the executive branch) which was to be exercised in accordance with the rules, regulations, and decisions of the Federal Trade Commission and the federal courts in interpreting the Federal Trade Commission Act. The court, after concluding that there was a delegation of authority, upheld it as being within constitutional limits. Finally, the Act provides that "due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relat-

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62. FLA. STAT. § 319.34 (1975).

63. See *Helmig v. State*, 330 So. 2d 246 (Fla. 1st Dist. 1976).

64. FLA. STAT. §§ 501.201-213 (1975).

65. *Department of Legal Affairs v. Rogers*, 329 So. 2d 237 (Fla. 1976). This case upheld the 1973 version of the act which is essentially identical to its 1975 counterpart.

ing to . . . the Federal Trade Commission Act . . . *as from time to time amended.*"<sup>66</sup> It would appear that the legislature was attempting to delegate authority to the Commission, the federal courts and the Congress of the United States in the future, which would be impermissible. The Supreme Court of Florida, however, neatly side-stepped the issue by stating: "To preserve the constitutional validity of the act, we would like to say that the legislative enactment intended only decisions made prior to its enactment."<sup>67</sup>

### III. BULK SALES

In a case of apparent first impression in the United States, it was held that a secured creditor had standing to attack a bulk sale of a business conducted in violation of the bulk sale provisions (Article 6) of the UCC.<sup>68</sup> The secured creditor was not given notice of the sale, although the seller and buyers of the business knew of the secured party's security interest in a major item of the business's equipment. The secured party repossessed the equipment upon default by the buyer and claimed a deficiency amount from the buyers. The lower court ruled in favor of the buyers. The appellate court reversed, stating that the secured creditor would be able to recover the deficiency from the buyers because of the failure to comply with the notification requirements of Article 6.

### IV. WAREHOUSING AND TRANSPORTATION OF GOODS

A district court has held that the enforceability of a limitation of liability provision is dependent on the shipper's knowledge of the existence of that provision in the bill of lading.<sup>69</sup> The shipper admitted at trial that she understood that she was signing a contract when she signed the bill, but asserted that she knew nothing of the limitation provision. The goods were subsequently lost while in the carrier's possession. This case was incorrectly decided since the limitation of liability clause (if it correctly follows the approved tariff) should have been binding on the shipper regardless of her state of knowledge.<sup>70</sup>

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66. FLA. STAT. § 501.204(2) (1975) (emphasis added).

67. 329 So. 2d at 267.

68. *Automated Truck & Trailer Wash Ctrs., Inc. v. Eastamp, Inc.*, 320 So. 2d 7 (Fla. 2d Dist. 1975). See FLA. STAT. §§ 676.101-10 (1975).

69. *Allied Van Lines, Inc. v. Bratton*, 330 So. 2d 521 (Fla. 4th Dist. 1976).

70. J. MILLER, *LAW OF FREIGHT LOSS AND DAMAGE CLAIMS* 350-62 (3d ed. 1967).

Testimony by a plaintiff owner of household goods, destroyed in a warehouse fire, that the goods were worth more at the time of their loss than at their purchase twenty years before, was "not competent, substantial evidence which accords with logic and reason."<sup>71</sup> The proper test of damages should have been market value at the date of the loss.

A recent case illustrates the difficulties of proving at which point a loss of goods in transit occurred when the goods were handled by more than one carrier. A consignor-consignee delivered goods to a shipline in the far east, and bills of lading (and other shipping documents) were delivered to the consignor-consignee. The shipment arrived at a port and was unloaded by a stevedoring company. The goods were then placed in the hands of a land carrier which delivered only a portion of the goods to the consignor-consignee. The consignor-consignee sued the shipline, and the trial court entered judgment against the shipline. On appeal, the decision was reversed on the ground that the consignor-consignee did not prove that the goods were lost by theft while in the hands of the shipline. Furthermore, the court held that the consignor-consignee might hold all carriers liable for the loss, and the land carrier as the last carrier would then be liable unless it could show that it received the goods in a pilfered or damaged state.<sup>72</sup>

## V. NEGOTIABLE INSTRUMENTS

### A. *Jurisdiction*

Service of process under section 48.193(1)(g) of the Florida Statutes (1975) may be effectuated against a nonresident who previously indorsed a corporate note (as a guarantor) and executed a separate guaranty agreement in the State of Florida, when he fails to pay the note in accordance with the terms of his guaranty.<sup>73</sup>

### B. *Venue*

In accordance with section 47.061 of the Florida Statutes, (1975) a suit on an unsecured promissory note shall be brought in the county in which the note was signed by the maker or in which

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71. *Allied Van Lines, Inc. v. McKnab*, 331 So. 2d 319-20 (Fla. 2d Dist. 1976).

72. *Swedish East Asia Co. v. Topp Electronics, Inc.*, 334 So. 2d 653 (Fla. 3d Dist. 1976).

73. *Feldman v. Southeast Bank of Dadeland*, 323 So. 2d 628 (Fla. 3d Dist. 1976).

the maker resides, but not in the county in which payment was to be made.<sup>74</sup> Section 47.061 has no application to a suit filed against a maker who resides in a foreign state and who signed the notes in the foreign state. As a result, if notes were payable in Escambia County, Florida, and the foreign maker was authorized to do business in said county, then venue would be proper in Escambia County.<sup>75</sup> The proper venue for suit against the drawer of a dishonored check is the county in which the drawee bank is located and not the county in which a depository bank of the payee is located.<sup>76</sup> This view is based on the theory that the contract of the drawer is to be performed in the drawee bank, and the cause of action arises there upon dishonor.

When a promissory note was executed and delivered to the payee in Dade County, Florida, and the note provided for payment by the makers or guarantors to be made in Dade County, an action based on a default in payment on the note could not be transferred to Broward County, Florida, over the protests of the plaintiff-payee.<sup>77</sup> The obligors had sought the transferral based on the filing of a separate suit in Broward County which involved different parties though the same issues.

### C. *The Partial Demise of the Holder in Due Course*

The Federal Trade Commission has promulgated a rule which requires any purchase-money lender, vendor, or lessor to include the following legend in ten point boldface type in any consumer credit contract:

**ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT  
IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH  
THE DEBTOR COULD ASSERT AGAINST THE SELLER OF  
GOODS OR SERVICES OBTAINED PURSUANT HERETO**

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74. *Foster v. Greco*, 320 So. 2d 43 (Fla. 4th Dist. 1975). *But see Atwood v. Florida Equity & Mortgage Investors*, 325 So. 2d 24 (Fla. 4th Dist. 1975), where the same court held in an overly terse opinion that venue for suit is proper in the county in which payment is to be made to the plaintiff-payee rather than in the county of the debtor. The second case, if it deals with an unsecured promissory note, is wrong in light of section 47.061.

75. *Cousins Mortgage & Equity Inv. v. Florida First Nat'l. Bank*, 324 So. 2d 139 (Fla. 1st Dist. 1975).

76. *Shindler v. State Wide Recovery & Research Corp.*, 330 So. 2d 807 (Fla. 3d Dist. 1976).

77. *Central Bank of North Dade v. Prime Land Dev. Corp.*, 335 So. 2d 581 (Fla. 3d Dist. 1976).

OR WITH THE PROCEEDS HEREOF; RECOVERY HERE-  
UNDER BY THE DEBTOR SHALL NOT EXCEED  
AMOUNTS PAID BY THE DEBTOR HEREUNDER.<sup>78</sup>

This legend will, of course, destroy the negotiability of any consumer credit contract which contains the usual negotiable promissory note.<sup>79</sup> Furthermore, this legend will also destroy the waiver of defenses rule contained in UCC section 9-206.<sup>80</sup> It is still too early to determine this ruling's impact on consumer credit regarding limiting its availability, restraining improper credit practices on the part of ghetto merchants, or changing current interest rates etc.

The decision in *Dynamic Homes, Inc. v. Rogers*,<sup>81</sup> is illustrative of the uncanny luck of Florida appellate courts to arrive at the right result for the wrong reasons. A promissory note was signed:<sup>82</sup>

by /s/ Arthur J. Maas ..... (SEAL)  
by /s/ Janet H. Maas ..... (SEAL)  
/s/ Arthur J. Maas ..... (SEAL)  
ARTHUR MASS—Individually  
/s/ Janet H. Maas ..... (SEAL)  
JANET MAAS—Individually

The note did not contain the name of any corporation, but the payees sued Dynamic Homes, Inc. the alleged corporate principal. The district court of appeal cited UCC section 3-403 (and the comments thereto)<sup>83</sup> for the proposition that parol testimony could be introduced between the immediate parties to show that Arthur J. Maas and Janet H. Maas signed in a representative capacity, but held that the testimony introduced at the trial did not show that they did sign in such a capacity. Although this view is correct, it is irrelevant to the question of the liability of the unnamed corporation because UCC section 3-403 states that "no person is liable on an instrument unless his signature appears thereon." Even if parol testimony had shown that the signers were signing in behalf of the unnamed corporation, the corporation would not have been liable. The parol testimony would have released the individual signers from liability with the result that no one would have been liable on

78. 16 C.F.R. § 433.2 (1976).

79. FLA. STAT. §§ 673.104(1)(h), 673.105 (1975) (UCC §§ 3-104(1)(b), 3-105).

80. FLA. STAT. § 679.206 (1975).

81. 331 So. 2d 326 (Fla. 4th Dist. 1976).

82. *Id.* at 327.

83. FLA. STAT. § 673.403 (1975).

the note. Apparently, the court was confused as to the use of parol testimony.

Although UCC section 3-403(2) permits the introduction of parol evidence between the immediate parties to a negotiable instrument to show that an agent signed in his representative capacity (rather than personally), this same rule does not hold true when a corporate president signs, as the corporate president, a guaranty of a lease executed by his corporation as lessee. As a result, parol testimony may not be introduced to prevent his personal liability as a guarantor.<sup>84</sup>

#### D. *Accord and Satisfaction*

An unusual aspect of an accord and satisfaction agreement was present in *Sound City, Inc. v. Kessler*.<sup>85</sup> In settlement of a disputed account, a debtor gave his check to the creditor. The check stated on its reverse side:

This check is accepted in full settlement of transactions represented by invoices listed in other side. By endorsing this check and obtaining payment hereof, the endorsers agree that they will not in the future refuse to sell deal with [sic] Sound City Inc. on a COD basis (this agreement requires the extension of no credit whatsoever). It is agreed by the parties hereto that this agreement shall be specifically enforceable [sic]; & if it is violated by any endorser that endorser agrees to pay damages and reasonable attorney's fee to enforce this agreement. The parties to this agreement are Sound City Inc and the undersigned endorsers.<sup>86</sup>

The endorsers of the check stopped selling records to the drawer of the check who then brought suit for specific performance. The endorsers defended on the ground that the contract did not have a termination date and was, therefore, not specifically enforceable. It was held, however, that when a contract fails to provide for an expiration date, the duration of the contract is to be determined from the surrounding circumstances. If the parties did not contemplate a termination date or if their intention cannot be ascertained,

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84. *Manufacturers' Leasing, Ltd. v. Florida Dev. & Attractions, Inc.*, 330 So. 2d 171 (Fla. 4th Dist. 1976).

85. 316 So. 2d 315 (Fla. 1st Dist. 1975).

86. *Id.* at 316.

“the contract will be terminable within a reasonable time depending upon the circumstances and . . . it may not be terminated by either party without first giving reasonable notice.”<sup>87</sup>

### E. *Summary Judgment*

It is reversible error to enter a summary judgment in favor of an alleged holder in due course when the maker has raised in his answer allegations that the note was obtained by fraud of the payee, that there was a lack of consideration for the note, that the note was issued subject to a condition which the holder knew about, and that the holder took the demand note an unreasonable length of time (three months) after its issuance.<sup>88</sup>

### F. *Parol Evidence*

The District Court of Appeal for the Fourth District has held that parol evidence may be introduced to show that it was the understanding of the makers and payee of a promissory note that the individual liability of the makers would be released upon the incorporation of a corporation whose name appeared on the note as a maker.<sup>89</sup> It is submitted that the court confused the rule allowing parol evidence to show a condition precedent to liability, with the rule forbidding parol evidence to show a condition subsequent.<sup>90</sup>

### G. *Discharge*

When an unsecured creditor sues a debtor, the debtor may normally introduce an order of discharge in bankruptcy as prima facie proof of the discharge of the claim. If the bankruptcy, however, were a chapter XI proceeding, a discharge may be effectuated only upon the debt being part of the arrangement which was confirmed by the bankruptcy court. Thus, proof of both the arrangement and confirmation must be introduced in the state court in order to defeat the claim.<sup>91</sup>

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87. *Id.* at 318. See also FLA. STAT. § 672.309 (1975).

88. *A.B.G. Inv., Inc. v. Seldon*, 336 So. 2d 444 (Fla. 4th Dist. 1976).

89. *Menke v. Cournoyer*, 330 So. 2d 491 (Fla. 4th Dist. 1976).

90. W. E. BRITTON, *BILLS AND NOTES* §§ 54-55 (2d ed. 1961).

91. *Wellington-Hall, Ltd. v. Comprehensive Communities Corp.*, 321 So. 2d 124 (Fla. 4th Dist. 1975).

### H. Contribution

Under former section 733.703 of the Florida Statutes (1975), one court held that if a husband were to die, the wife could bring a declaratory judgment action against his estate to determine her rights of contribution from the estate. The widow would have to have filed her claim under the former non-claim statute within four months from the time of the first publication of the notice to creditors or would be barred from any relief if she were subsequently forced to pay the entire amount of the note to the payee.<sup>92</sup> The fact that the widow had not made any of the payments was held to be irrelevant because the non-claim statute required the filing of all claims "whether due or not, direct or contingent."<sup>93</sup> Inasmuch as this statute has been repealed, it is not clear what the widow would have to do to preserve her rights under the new probate code.

### I. Restrictive Indorsements

A clever embezzlement scheme and UCC section 3-419<sup>94</sup> came into play in *Siegel Trading Co., Inc. v. Coral Ridge National Bank*.<sup>95</sup> Siegel Trading opened an account in the defendant bank in the name of "The Siegel Trading Company, Inc., Customers' Segregated Account"<sup>96</sup> for the deposit of customer's margin funds. The manager of Siegel's Fort Lauderdale, Florida office subsequently opened an account with the defendant bank in the name of "Samstein, Inc., d/b/a/ Siegel Trading Co. of Fort Lauderdale."<sup>97</sup> The manager then deposited a number of checks belonging to the plaintiff in this account. The checks were collected by the defendant, and the manager withdrew the funds. The plaintiff sued for the conversion of its checks, and the appellate court held that the defendant bank could not be held innocent of conversion in the absence of findings of fact that it operated "in accordance with the reasonable commercial standards applicable to the business of such" bank (under UCC section 3-419(3)<sup>98</sup>) in its handling of the

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92. *Simpson v. First Nat'l Bank & Trust Co.*, 318 So. 2d 209 (Fla. 4th Dist. 1975).

93. FLA. STAT. § 733.702(1) (1975).

94. FLA. STAT. § 673.719 (1975).

95. 328 So. 2d 476, 477 (Fla. 4th Dist. 1976).

96. *Id.* at 477.

97. *Id.*

98. FLA. STAT. § 673.419(3) (1975).

checks. The trial court had held that the bank did not fail to comply reasonably with its own commercial standards, but, as the appellate court noted, a bank must operate in good faith and in accordance with the reasonable commercial standards applicable to the banking business.

#### J. *Massachusetts Business Trusts*

The trustees of a Massachusetts business trust which is the holder of a promissory note and mortgage have standing to maintain a foreclosure action in the trusts' behalf.<sup>99</sup> Furthermore, a Massachusetts business trust which has fully complied with chapter 609 of the Florida Statutes (1975) (empowering it to do business in Florida) has the power to foreclose mortgages in this state without its trustees being plaintiffs in the action.<sup>100</sup>

#### K. *Usury*

An attorney who lent \$25,000 for a period of thirty days under an agreement which he drafted, providing that the borrowers were to pay the loan along with a gold doubloon worth not less than \$1,000, knew or should have known that the transaction was usurious on its face because it provided for interest of 48 percent per annum.<sup>101</sup> Thus he was denied recovery of the principal sum even though the gold doubloon was allegedly a fake.

The parties to a loan agreement which is usurious may abandon it and substitute another loan agreement which is not usurious, and the borrower will then be deemed to have waived his claim to usury under the original agreement.<sup>102</sup>

#### L. *Title*

An unusual defense to a suit on a promissory note was presented in a recent case.<sup>103</sup> The maker of a promissory note borrowed

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99. *Brickell Constr. Co. v. Pujol*, 329 So. 2d 340 (Fla. 3d Dist. 1976). In regard to Massachusetts business trusts, see *Your Constr. Center, Inc. v. Gross*, 316 So. 2d 596 (Fla. 4th Dist. 1975); *Boyd v. Boulevard Nat'l Bank*, 306 So. 2d 551 (Fla. 3d Dist. 1975).

100. *Tampa Properties, Inc. v. Great Am. Mortgage Inv.*, 333 So. 2d 480 (Fla. 2d Dist. 1976).

101. *Atwood v. Fisher*, 330 So. 2d 62 (Fla. 3d Dist. 1976). For an analysis of a note regarding the issue of usury, see *Gulf Life Ins. Co. v. Penland*, 335 So. 2d 293 (Fla. 1st Dist. 1976).

102. *Munilla v. Perez-Cobo*, 335 So. 2d 584 (Fla. 3d Dist. 1976).

103. *Smith v. Ocean State Bank*, 335 So. 2d 641 (Fla. 1st Dist. 1976).

money from a bank and attempted to use the proceeds of the loan to purchase silver from a company. The purchase did not involve the bank. Subsequently, an officer of the bank allegedly telephoned the seller of the silver and on two occasions stated that the purchaser-borrower had no right to use the loan to purchase silver and that the bank was entitled to any proceeds which resulted from the purchase. These alleged statements were untrue, and the seller of the silver refused to complete the transaction causing damage to the purchaser. The payee-bank sued the maker who counterclaimed for intentional and unjustified interference with a business relationship. The trial court dismissed the counterclaim, but the appellate court reversed holding that the counterclaim was sufficient to show the existence of a business relationship (though not necessarily evidenced by an enforceable contract), knowledge of the relationship by the bank's officer, an intentional and unjustified interference with this relationship, and damages resulting to the borrower as a result of the breach of the relationship.

In a case of first impression in Florida, it was held that under section 440.22 of the Florida Statutes (1975) an employer's estate may not offset any workmen's compensation benefits owed to a deceased employee's estate because of a promissory note signed by the deceased workman and his wife where the employer was the obligee under the note.<sup>104</sup>

#### M. *Attorney's Fees*

In an overly succinct opinion, it has been held that when a surety company has issued its bond to secure payment of a promissory note and the company brings a declaratory decree action to determine its liabilities under the bond, it is error to award attorney's fees on the bond when the bond does not provide for them, even though the promissory note does provide for attorney's fees.<sup>105</sup> The force of the opinion is attenuated by the fact that the surety company dismissed its case prior to any final determination of its liabilities.

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104. *Kennedy v. Estate of Beasley*, 318 So. 2d 496 (Fla. 2d Dist. 1975).

105. *Banker's Fire & Cas. Ins. Co. v. Newman*, 330 So. 2d 760 (Fla. 4th Dist. 1976).

## VI. MORTGAGES

A. *Jurisdiction*

Even though personal services of process upon nonresident mortgagors may be available under section 48.193 of the Florida Statutes (1975), a foreclosing mortgagee may elect to use service of process by publication under section 49.021 of the Florida Statutes (1975). In this latter event, the plaintiff will, of course, not be entitled to an in personam judgment against the mortgagors for any deficiency between the unpaid balance of the mortgage and the sales price at foreclosure.<sup>106</sup>

B. *Construction Loans*

A contractor who has completed the construction of a building is entitled to an equitable lien against the undisbursed balance of construction loan funds under a construction loan agreement. A contractor (or other lienor) is not entitled to this equitable lien, however, when the work has not been completed because of the default of the owner and the construction lender has not misled the contractor (or other subcontractor or supplier) into continuing to work or supply materials after the owner has defaulted.<sup>107</sup>

A general contractor who completes the construction of a hotel is entitled to an equitable lien on undisbursed construction loan funds which the construction mortgage lender refuses to disburse because the owner of the hotel defaulted on the mortgage by never applying for a permanent construction mortgage.<sup>108</sup> The foreclosure of the construction loan by the mortgagee was held by the trial court as superior to the contractor's mechanic's lien on the real property. Consequently, the court imposed the lien even though there was a "kickback" which the contractor gave to the owner, since, as the court noted, no prejudice inured to the construction lender as a result of this "kickback" and most of the "kickback" was actually used in the construction project and thus returned to the property.

A foreclosure judgment must not be based upon the face amount of a note and mortgage when the facts show that the mort-

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106. *Risman v. Whittaker*, 336 So. 2d 213 (Fla. 4th Dist. 1976).

107. *J.G. Plumbing Ser., Inc. v. Coastal Mortgage Co.*, 329 So. 2d 393 (Fla. 2d Dist. 1976).

108. *Morgen-Oswood & Assoc., Inc. v. Continental Mortgage Inv.*, 323 So. 2d 684 (Fla. 4th Dist. 1976).

gagee as the lender under the construction loan has not in fact advanced the full face amount of the note and mortgage.<sup>109</sup>

A loan application wherein the lender reserves the right prior to final disbursement to withdraw its approval of the loan for any reason prevents the application from being a binding contract. When the lender accepts a signed note and mortgage, however, the prior loan application "contract" is merged into the note and mortgage, and it becomes binding upon the lender. If the lender should still refuse to make the loan, the damages consist of the additional cost of the substitute loan reduced to its present value.<sup>110</sup>

In the absence of any contrary clause in a construction loan agreement, the mortgagors may not introduce parol testimony to the effect that the mortgagee was to make inspections as work progressed to assure that the house would be constructed in a workman-like manner as a defense to a mortgage foreclosure action.<sup>111</sup>

### C. *Balloon Mortgages*

In an apparent case of first impression, it has been held that section 697.05 of the Florida Statutes (1975), which regulates "balloon mortgages," has no application to a promissory note (and mortgage) which provides for an initial payment and a final payment.<sup>112</sup> The statute was held designed to cover balloon mortgages for regular monthly or regular periodic payments and not one which merely has two payments, even if its final payment were over twice as large as the first.

### D. *Instruments Treated as Mortgages*

In another apparent case of first impression in Florida, a district court has decided that a vendee in possession under a recorded agreement for deed after he has defaulted, but before he has given up possession of the land, has an equity of redemption which is subject to levy by his judgment lien creditors.<sup>113</sup> The court reasoned that the agreement for deed must be treated as if it were a mortgage.

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109. *Hemmerle v. First Fed. Sav. & Loan Ass'n*, 338 So. 2d 82 (Fla. 2d Dist. 1976).

110. *Financial Fed. Sav. & Loan Ass'n v. Continental Enterprises, Inc.*, 338 So. 2d 907 (Fla. 3d Dist. 1976).

111. *O'Neal v. First Fed. Sav. & Loan Ass'n*, 328 So. 2d 470 (Fla. 4th Dist. 1976).

112. *Vlock v. Capodilupo*, 327 So. 2d 787 (Fla. 3d Dist. 1976).

113. *Hoffman v. Semet*, 316 So. 2d 649 (Fla. 4th Dist. 1975).

Further, if a lien creditor should purchase the vendee's interest at the sheriff's sale he would have the right to satisfy the total outstanding indebtedness to the vendor and to receive a deed for the property. Moreover, the lien creditor-purchaser might also bring suit for specific performance against the vendor to secure a deed.

### E. *Priorities*

A mortgage which is filed prior to the filing of a mechanic's lien will have priority over it. If the amount of the mortgage is increased (by a modification agreement) after the filing of the mechanic's lien, however, then the amount of the increase will be subservient to the mechanic's lien.<sup>114</sup> The mortgagee then will have first priority for the original amount and third priority for the increased amount.

When a mortgage recites that it encumbers "all the land located in the County of Orange, State of Florida . . . described in Exhibit 'A' attached hereto and made a part hereof,"<sup>115</sup> but Exhibit "A" is not attached, recording of the mortgage is constructive notice to no one. If a notice of commencement were filed on the same day as this void mortgage, any mechanic's liens which were subsequently filed would relate back to the date of filing of the notice of commencement. Therefore, if this mortgage were re-recorded along with the omitted Exhibit "A," the lien claimants would have priority over the mortgagee whose original filing was defective.

A purchase money first mortgage which is properly recorded prior to a judgment lien being entered against the mortgagor has priority over the judgment lien. Thus, if the lien creditor attempts to levy his lien upon the property after a *lis pendens* has been filed in the mortgage foreclosure action, it arises too late, and the foreclosure of the mortgage extinguishes the lien creditor's interest.<sup>116</sup>

A mortgagee under a purchase money mortgage has priority over a prior judgment lien entered against the mortgagor.<sup>117</sup>

### F. *Equitable Liens*

Although a mortgage given by a mortgagor who did not own the land is invalid, an equitable lien may be imposed when the mortga-

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114. *Bowen v. American Arlington Bank*, 325 So. 2d 31 (Fla. 1st Dist. 1976).

115. *Air Flow Heating & Air Conditioning, Inc. v. Baker*, 326 So. 2d 449, 450 (Fla. 4th Dist. 1976).

116. *Baron v. Aiello*, 319 So. 2d 198 (Fla. 3d Dist. 1975).

117. *Associates Discount Corp. v. Gomes*, 338 So. 2d 552 (Fla. 3d Dist. 1976).

gee's funds were used to improve the property with the knowledge and consent of the real owner of the property.<sup>118</sup>

When a warranty deed to land is obtained by the fraud of the grantee in misrepresenting the nature of the instrument to the grantor, the deed is void.<sup>119</sup> If the fraudulent grantee then mortgages the property, the mortgage is also void. Although the mortgage is void, if the mortgagee advances funds to pay other liens and encumbrances on the property, he is entitled to reimbursement from the defrauded true owner of the property.

### G. *Moratorium Clauses*

A mortgage clause has been judicially upheld where the clause provided that if a building moratorium were imposed by governmental authority or if water and sewerage were unavailable, a moratorium would result as to payment of principal and interest during said period.<sup>120</sup> The moratorium was invoked by the Dade County Director of Pollution Control prohibiting sewerage hookups on the subject property. It is suggested that in light of ever increasing environmental controls, this use of similar (or expanded) moratorium clauses will increase. Judge Barkdull, in specially concurring with the result, suggested that if the sewerage moratorium might be of sufficient duration so as to make this mortgage clause oppressive or unconscionable, it might justify a court in relieving parties from the agreement.<sup>121</sup>

### H. *Insurance Proceeds*

When mortgaged insured real estate has been destroyed by fire and the mortgagee sues the insurer, the rights of the mortgagee under a loss-payable clause in the insurance policy are determined based on the amount owing on the mortgage at the time of the fire and not at the time of the trial.<sup>122</sup>

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118. *Wagner v. Roberts*, 320 So. 2d 408 (Fla. 2d Dist. 1975).

119. *Houston v. Mentelos*, 318 So. 2d 427 (Fla. 3d Dist. 1975).

120. *Kessler v. Hilsenroth*, 325 So. 2d 72 (Fla. 3d Dist. 1975).

121. *Id.* at 74.

122. *Norfolk & Dedham Mut. Fire Ins. Co. v. Schlehuber*, 327 So. 2d 891 (Fla. 3d Dist. 1976).

### I. Acceleration

A trial court may be justified in refusing to allow the acceleration of the total mortgage indebtedness and foreclosure of a mortgage on the grounds of unconscionability, when the mortgagor has made a technical default in one month's payment.<sup>123</sup> The default was alleged to have occurred because of an excusable misunderstanding by the serviceman-mortgagor (who was in the Phillipines) and the Florida mortgagee and the communication difficulties between the two countries.

Accelerating clauses in promissory notes are to be construed strictly against the lender because of their harsh nature. When an acceleration clause in a promissory note secured by a mortgage provides that the holders have the right to accelerate "in the event that this property is sold by the maker(s)"<sup>124</sup> and the makers have entered into an agreement for deed with third parties, this does not constitute a present sale of the property but merely a contract to sell. As a result, the accelerating event has not occurred, and the note and mortgage may not be accelerated. The validity of this kind of acceleration clause has been implicitly upheld, however.

In another recent case,<sup>125</sup> a subordinated mortgage provided that default in the first mortgage would "constitute an automatic default in this [the subordinated] mortgage." A default occurred in the first mortgage with the result that the mortgagee of the subordinated mortgage declared a default in his mortgage, accelerated the entire balance and filed suit for foreclosure. Although the first mortgagee subsequently extended the time of payment on his mortgage, it was held that this act had no effect on the acceleration of the subordinated mortgage foreclosure.

A mortgage note which contains clauses waiving demand for payment and providing for acceleration of the entire balance in the event of a default in the payment of any installment, may be accelerated upon the makers' failure to make an installment payment.<sup>126</sup> In such a case the holder has no duty to seek the makers and give them an opportunity to cure the default.

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123. Federal Home Loan Mortgage Corp. v. Taylor, 318 So. 2d 203 (Fla. 1st Dist. 1976).

124. Chopan v. Klinkman, 330 So. 2d 154, 155 (Fla. 4th Dist. 1976); *cf.*, Uwanawich v. Gaudini, 334 So. 2d 116 (Fla. 3d Dist. 1976).

125. Crescent Beach Co. v. Conzelnam, 321 So. 2d 437 (Fla. 2d Dist. 1975).

126. Motel Management Co. v. Winger, 335 So. 2d 9 (Fla. 4th Dist. 1976).

When a contract for deed (treated as a mortgage by the court) provides that "failure to pay any installments herein promptly when due shall cause the entire indebtedness to become immediately due and payable,"<sup>127</sup> the provision is to be deemed an automatic acceleration clause (not an optional one). Hence, the failure to make a payment results in the self-executing acceleration of the balance of the indebtedness without any demand by the payee.

### J. Foreclosure Defenses

When there is substantial evidence that a mortgagor (now deceased) executed a note and mortgage on his property in order to defeat a possible income tax lien against the property and the mortgagee gave no consideration for the mortgage, the heirs of the mortgagor may assert this lack of consideration in a mortgage foreclosure suit.<sup>128</sup> The mortgagee, the deceased mortgagor, and the heirs of the mortgagor are in *pari delicto*; however, since the mortgagee was seeking the foreclosure of the mortgage, the court was correct in refusing to assist him in the attempted foreclosure and eviction of the heirs in possession.

An affirmative defense in a mortgage foreclosure action that the mortgagee "had ample funds of the defendant's to apply to the note"<sup>129</sup> does not meet the required degree of certainty so as to inform the mortgagee of what is proposed to be proved in order that it might have a fair opportunity to prepare its evidence. A trial court would, therefore, be correct in ordering the defendant-mortgagor to file an amended defense.

A mortgagor in a foreclosure action may introduce parol testimony of an oral agreement which allegedly provided for the mortgagee to release mineral rights in the encumbered land upon certain payments being made by the mortgagor, and which was entered into simultaneously with the execution of the written mortgage, provided "that the oral agreement is shown by clear, precise and indubitable evidence."<sup>130</sup>

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127. *Cook v. Merrifield*, 335 So. 2d 297, 298 (Fla. 1st Dist. 1976).

128. *Chaykin v. Kant*, 327 So. 2d 793 (Fla. 3d Dist. 1976).

129. *Zito v. Washington Fed. Sav. & Loan Ass'n*, 318 So. 2d 175, 176 (Fla. 3d Dist. 1975).

130. *Furlong v. First Nat'l Bank*, 329 So. 2d 406, 408 (Fla. 3d Dist. 1976). A first mortgagee may be granted a summary judgment for foreclosure as against a second mortgagee who has raised defenses when the court believes that the defenses are merely "paper issues" and without substance in fact. *Reflex, N.V. v. UMET Trust*, 336 So. 2d 473 (Fla. 3d Dist. 1976).

In order to prove usury it is necessary for the borrower to prove that the lender knowingly and willfully charged and received an unlawful rate of interest. A corrupt purpose by the lender must be proved, and thus the lender may be permitted to testify that he did not have this corrupt intent.<sup>131</sup> Hence, the entry of a summary judgment in favor of a debtor in a usury case is improper when there remain issues as to whether payments were in fact usurious and whether the lender had the requisite corrupt intent to exact more than the legal rate of interest.<sup>132</sup>

A writ of certiorari was discharged in the case of *Financial Federal Savings and Loan Association v. Burleigh House, Inc.*,<sup>133</sup> leaving intact the district court's decision that a foreign savings and loan association is not exempt from the Florida usury laws under section 665.161 of the Florida Statutes (1967)<sup>134</sup> as are domestic savings and loan associations.

The mortgagor does not have a cause of action for reformation of a mortgage where the mortgagee lowered a thirty day default clause to fifteen days.<sup>135</sup> The mortgagee had previously insisted in good faith on the mortgagor's wife's signature on the purchase agreement to which he had no right. When some doubt was cast on the identity of the mortgagor's wife, the mortgagee dropped his demand for her signature in return for the lowering of the default time limit. The court held there was sufficient consideration for the modification based on the mortgagee's forbearance to demand her signature. Since all prior agreements were merged into the new contract, mortgage reformation could not be granted.

#### K. Procedure

In an apparent case of first impression, it has been held that a final judgment of foreclosure of a mortgage is a final decision and not an interlocutory one; thus any appeal from the judgment would not be within rule 4.2 of the Florida Appellate Rules as an appeal from an interlocutory order or judgment.<sup>136</sup>

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131. *Sumner v. Inv. Mortgage Co.*, 332 So. 2d 103 (Fla. 1st Dist. 1976).

132. *I.R.E. Fin. Corp. v. Cassel*, 335 So. 2d 598 (Fla. 3d Dist. 1976).

133. 336 So. 2d 1145 (Fla. 1976), *discharging cert. on*, 305 So. 2d 59 (Fla. 3d Dist. 1975).

134. The court cited the statute erroneously as it had been renumbered. FLA. STAT. § 665.395 (1975).

135. *Uwanawich v. Gaudini*, 334 So. 2d 116 (Fla. 3d Dist. 1976).

136. *Symon-Ryals Group, Inc. v. Citizens & Southern Mortgage Co.*, 334 So. 2d 144 (Fla. 1st Dist. 1976).

In an emergency situation it is permissible for a court to appoint a receiver in mortgage foreclosure proceedings prior to service of process upon the defendant.<sup>137</sup> In addition, it is reversible error for a trial court to dismiss the petition for an appointment of a receiver in a mortgage foreclosure case when the mortgage provides for the appointment, the mortgagee has established a prima facie case, and the court has not received contrary evidence from the mortgagor.<sup>138</sup>

Under rule 1.440 of the Florida Rules of Civil Procedure a case is at issue thirty days after service of the last pleading. If one party in a mortgage foreclosure action notices the other for a trial date within the thirty day period, however, the receiving party may be deemed to have waived this period when he is tardy in making his objections.<sup>139</sup>

A mortgage foreclosure sale conducted by the clerk of the court may not be set aside on the ground that the clerk failed to delay the sale beyond the notice hour until the imminent arrival of a prospective bidder invited by the mortgagor, in the absence of any proof that the clerk agreed to delay the sale.<sup>140</sup>

A final judgment of mortgage foreclosure which provided that the clerk of the court was to sell the property "to the highest bidder or bidders for cash"<sup>141</sup> has been construed to mean that the clerk had the discretion to accept one-third of the amount bid (apparently in cash) to permit the bidder to pay the remaining two-thirds on the following day and then to extend the time an additional day when the bidder was caught in a traffic jam and could not reach the courthouse before it closed on the day following the sale. The court noted that there was no fraud or trickery involved, and the only person who complained was the disappointed second highest bidder who alleged that he was willing to pay the entire price on the day of the sale.

The mortgagor in a foreclosure action does not have a constitutional right of trial by jury in the determination of the amount of the deficiency which has resulted from the foreclosure sale of the encumbered property.<sup>142</sup> On the other hand, a deficiency judgment

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137. *Overseas Dev., Inc. v. Krause*, 323 So. 2d 679 (Fla. 3d Dist. 1975).

138. *Howley v. Sage Shopping Plaza Corp.*, 336 So. 2d 691 (Fla. 4th Dist. 1976).

139. *Davis v. Hagin*, 330 So. 2d 42 (Fla. 1st Dist. 1976).

140. *Jonton, Inc. v. Fidelity Mortgage Investors*, 329 So. 2d 45 (Fla. 1st Dist. 1976).

141. *Smith v. First Nat'l Bank*, 336 So. 2d 448, 449 (Fla. 4th Dist. 1976).

142. *Bradberry v. Atlantic Bank*, 336 So. 2d 1248 (Fla. 1st Dist. 1976).

in a mortgage foreclosure action may be denied when the court finds that the value of the property bid in by the mortgagee greatly exceeds the amount owing on the mortgage as established by the foreclosure judgment. Further, if there were no deficiency judgment, then unconditional guarantors would not be liable on their guaranty to the mortgagee.<sup>143</sup>

#### L. *Miscellaneous*

If a mortgage is assigned by the mortgagee for a loan to the mortgagee and the loan agreement provides that if the mortgagee fails to pay principal and interest by a certain date, the assignee-lender may exercise a remedy of foreclosure of the mortgage, the assignee was given all of the rights of ownership when the mortgagee defaulted in making its payments.<sup>144</sup>

A final judgment which finds that the mortgagee is the owner and holder of a note and that the mortgage is binding on the mortgagor, may not be defeated by the mortgagor's assertion that third persons (not parties to the suit) have some interest in the note and mortgage.<sup>145</sup> The right of third parties to the note and mortgage should be tried in an action between them and the mortgagee.

A lawyer who was simultaneously acting as agent and officer of a bank and as an issuing agent for a title insurance company issued a title insurance policy insuring the bank as the mortgagee of a loan issued by it, knowing (because of his own dishonest conduct) that the mortgage was not a first lien.<sup>146</sup> The bank was held able to recover on the policy over the contention that the lawyer's knowledge should be imputed to the bank. The court reasoned that because the agent was acting adversely to his principal, the bank, his knowledge could not be imputed to the bank.

Section 201.021(1) of the Florida Statutes (1975) provides that a surtax shall be paid on the amount of consideration paid and that "the consideration . . . shall not include amounts of existing mortgages on the real estate sold." In a case of first impression, this statute has been construed to mean that if there is an existing

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143. *Spencer v. American Advisory Corp.*, 338 So. 2d 62 (Fla. 3d Dist. 1976).

144. *Tamiami Abstract & Title Co. v. Berman*, 324 So. 2d 137 (Fla. 3d Dist. 1975).

145. *Willark House, S.A. v. Espinosa*, 328 So. 2d 514 (Fla. 3d Dist. 1976).

146. *Peoples Downtown Nat'l Bank v. Lawyers Title Guar. Fund*, 334 So. 2d 105 (Fla. 3d Dist. 1976).

mortgage on the property sold and the new buyer assumes and agrees to pay it and the mortgagee releases the seller (the original mortgagor) from liability as a result of this assumption agreement, then the surtax is not to be based on the total sales price but only on the price over and above the existing mortgage.<sup>147</sup> It is interesting to note that the court expressly refused to follow an attorney general's opinion<sup>148</sup> and a Department of Revenue Rule to the contrary.<sup>149</sup>

The Supreme Court of Florida has held that when a corporation conveys real property to its president and sole stockholder by a quitclaim deed which shows that the property is subject to a purchase money mortgage held by another, the transfer shows a shifting of economic burden in the paying of the mortgage from the corporation to the grantee. As a result, the transaction is subject to the tax prescribed by section 201.02 of the Florida Statutes (1975) even though the grantee does not assume and agree to pay the mortgage.<sup>150</sup>

Inasmuch as there is no Florida statute requiring the attestation of a mortgage, the District Court of Appeal, Second District, has held that at least in the case of nonhomestead property the signatures of two witnesses are not necessary to validate a mortgage.<sup>151</sup> The court noted that prior to the 1972 amendments to the Florida Constitution, case law required two witnesses on a mortgage encumbering homestead property, but the court, in dictum, advanced the thought that since the present Constitution has omitted the former words "duly executed,"<sup>152</sup> it would seem to indicate that a nonwitnessed mortgage on homestead property would be valid. The court also held that when the mortgagors sign various forms submitted to them under the "truth in lending laws," they cannot later claim that they were not adequately advised of their rights on the basis that they did not read the papers, unless they can show that they were prevented from reading the papers.

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147. *Leadership Housing, Inc. v. Department of Revenue*, 336 So. 2d 1239 (Fla. 4th Dist. 1976).

148. (1973) FLA. ATT'Y GEN. ANNUAL REP. 114.

149. FLA. ADMIN. CODE § 12A-4.13(25) (1973).

150. *Florida Dep't of Revenue v. De Maria*, 338 So. 2d 838 (Fla. 1976).

151. *Reliable Fin. Co. v. Axon*, 336 So. 2d 1271 (Fla. 2d Dist. 1976).

152. FLA. CONST. art X, § 4(c) (amended 1972).

### M. *Legislation*

Mortgagees who collect money from mortgagors for deposit in escrow accounts for the payments of taxes are now required to pay the taxes promptly in order to take advantage of the maximum tax discount. If the escrow account is not sufficient to pay the taxes, the mortgagee must notify the mortgagor of the deficit within fifteen days after the mortgagee receives notification of the taxes from the tax collector.<sup>153</sup>

## VII. SURETIES AND GUARANTORS

Normally, if a person orally promises to pay the debt of another, the promise is unenforceable under the Statute of Frauds, section 725.01 of the Florida Statutes (1975). A guaranty is not within the statute when the guarantor of a construction loan to a corporation makes his guaranty in return for the lender's oral promise to pay the guarantor a mortgage owed to the guarantor by the borrowing corporation from the construction draws to be disbursed to the lender.<sup>154</sup> This oral promise of the lender is supported by the consideration of the guarantor's guaranty. Furthermore, it would appear that if the promisor were to make his oral promise in return for a promise of the creditor to forebear in suing the principal debtor, the oral promise might be enforceable.<sup>155</sup> On the other hand, if the oral promise were to pay the debt in installments which would take approximately eight years to pay, the promise would not be one to be performed within one year, and it would be barred under another provision of the statute.

Under UCC section 3-415<sup>156</sup> when co-makers of a promissory note are sued by the payee, the co-makers may use parol evidence to show that they were accommodation makers for the benefit of the payee and, therefore, not liable to him.<sup>157</sup>

Parol evidence is not admissible to prove the meaning of a guaranty agreement when it is free from any ambiguity.<sup>158</sup> Further, when the corporate debtor delivers possession of the mortgaged real

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153. 1976 Fla. Laws ch. 76-12.

154. *Johnson v. Barnett Bank*, 320 So. 2d 851 (Fla. 4th Dist. 1975).

155. *Goldstein v. ABCO Constr. Co.*, 334 So. 2d 281 (Fla. 3d Dist. 1976).

156. FLA. STAT. § 673.415 (1975).

157. *Gehrig v. Ray*, 332 So. 2d 703 (Fla. 1st Dist. 1976).

158. *MacCulley v. Fidelity Fed. Sav. & Loan Ass'n*, 335 So. 2d 327 (Fla. 1st Dist. 1976).

property to the lender, this does not prevent the lender from filing foreclosure proceedings or from obtaining a deficiency judgment against the guarantors who were officers and owners of the corporate debtor.

An attorney's fee of \$8,000 awarded on a \$22,356.46 judgment based on a guaranty agreement is a reasonable one rather than a fee of \$15,000 awarded by the trial court. "The cases are clear that while the opinion of an expert witness testifying on attorney's fees is persuasive, it is not binding on the court in determination of a reasonable fee."<sup>159</sup>

A creditor must not deal with a debtor or a guarantor in such a manner as to harm the interest of the guarantor. Therefore, when the creditor sues the guarantor, the guarantor may file a counterclaim which alleges that the creditor took control of the debtor corporation and caused its financial failure and, further, that the creditor took possession of all of the assets of the debtor corporation and improperly conducted a sale of these assets which resulted in insufficient funds to pay the debt.<sup>160</sup>

A grantee under a quitclaim deed from a corporation is not liable for the payment of the usual amount of documentary stamp taxes when the grantee was the absolute guarantor of payment of a note and mortgage given by the corporation to a lender and the conveyance was not made for any consideration.<sup>161</sup>

If a husband should use duress to force his wife to sign an instrument to guarantee the payments of goods sold to a corporate purchaser, this duress may be a good defense against the seller if he had knowledge of it.<sup>162</sup> In addition, if the seller could have recovered the goods (building materials) from the buyer under section 713.15 of the Florida Statutes (1975) but did not do so, this also would be a valid defense for the guarantor on the basis that the seller failed to mitigate damages.

#### VIII. BANKS AND SAVINGS AND LOAN ASSOCIATIONS

In order for an alleged novation contract to be valid, it must be supported by consideration. In a recent case, a bank's accounts were

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159. *Ruwitch v. First Nat'l Bank*, 327 So. 2d 833 (Fla. 3d Dist. 1976).

160. *Dorsy v. Maryland Nat'l Bank*, 334 So. 2d 273 (Fla. 3d Dist. 1976).

161. *Straughn v. Story*, 334 So. 2d 337 (Fla. 1st Dist. 1976).

162. *Associated Housing Corp. v. Keller Bldg. Prods. Inc.*, 335 So. 2d 362 (Fla. 1st Dist. 1976).

in a confused state since the bank was in liquidation. Thus, when it entered into a letter agreement with a debtor which recited the amount of principal which was to become due on a certain date but failed to mention interest for this date (although it contained a gratuitous agreement on the part of the liquidators to defer certain itemized interest payments for the tax advantage of the debtor), this letter agreement was not supported by consideration. Hence, the debtor remained liable for the amount of the unpaid interest.<sup>163</sup>

Federal banking law provides that no national bank may "be the purchaser or holder of any such shares" of its own capital stock.<sup>164</sup> This provision does not invalidate the will of a testator who bequeaths capital stock to a national bank to enable it to sell the shares to qualify directors to serve the bank.<sup>165</sup>

#### A. *Bank Accounts*

The Supreme Court of the United States has held that a customer of a bank does not possess any fourth amendment rights in his bank records.<sup>166</sup> Therefore, he cannot challenge subpoenas duces tecum which were defectively issued and which resulted in the bank turning over information dealing with his accounts to the government. The Court was of the view that the customer has no legitimate "expectation of privacy"<sup>167</sup> because his checks were not confidential communications but negotiable instruments used in business, and because the customer had voluntarily conveyed all of the information to the bank employees.

A bank which mistakenly permits a husband who is a joint tenant in a savings account with his wife, to withdraw the alleged balance when the wife previously withdrew most of the money, may recover from the husband the amount of withdrawal. This fact holds true even though the wife accomplished the withdrawal without a passbook since she had complied with the rules of the bank providing that withdrawals could be made without a passbook if approval were obtained from a bank officer.<sup>168</sup>

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163. *Garner v. Thompson*, 335 So. 2d 302 (Fla. 2d Dist. 1976).

164. 12 U.S.C. § 83 (1970).

165. *First Nat'l Bank v. Young*, 338 So. 2d 67 (Fla. 1st Dist. 1976).

166. *United States v. Miller*, 96 S. Ct. 1619 (1976).

167. *Id.* at 1623-24.

168. *Miranda v. Fidelity Nat'l Bank*, 334 So. 2d 74 (Fla. 3d Dist. 1976).

### B. *Safety Deposit Boxes and Gifts*

In a case of first impression in Florida, it has been held that the mere leasing of a safety deposit box in a bank in the names of a husband and wife, when the wife has never opened the box prior to the death of her husband, is not enough to establish an estate by the entireties in bearer bonds which were found in the box.<sup>169</sup> It has additionally been held that the fact that a husband and wife take title to a certificate of deposit as "husband or wife" is not determinative that they took other than as tenants by the entireties.<sup>170</sup> Hence, testimony must be introduced to show the intent of the parties.

### C. *Letters of Credit*

A bank which has dishonored payment upon a letter of credit is not liable for attorney's fees (taxed as costs) incurred by the beneficiary when he successfully sues the bank. UCC sections 5-115, 2-710, 1-103, and 1-106(1)<sup>171</sup> when construed together do not permit an award of attorney's fees either as costs or as "commercially reasonable charges, expenses or commissions."<sup>172</sup>

### D. *Garnishment*

When A is a creditor of B and B has obtained a judgment against C, A may not garnish this judgment by having a writ of garnishment served on C when the judgment is based on an unliquidated claim and the judgment is being appealed under supersedeas. The trial court should not dissolve such a writ, but rather should stay its proceedings until the appeal is decided.<sup>173</sup>

In another recent case, an in personam action was brought against an alleged debtor by constructive service of process and garnishment of an alleged debtor of the defendant.<sup>174</sup> Subsequently,

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169. *Bechtel v. Bechtel*, 330 So. 2d 217 (Fla. 2d Dist. 1976).

170. *Norman v. Bank of Hawthorne*, 321 So. 2d 112 (Fla. 1st Dist. 1975).

171. FLA. STAT. §§ 675.115, 672.2-710, 671.101, 671.106(1) (1975).

172. *Florida Nat'l Bank v. Alfred & Ann Goldstein Foundation, Inc.*, 327 So. 2d 110, 111 (Fla. 1st Dist. 1976). A stand-by letter of credit for \$60,000 was used as a commitment fee for the procuring of a construction loan in *Levenson v. Barnett Bank*, 330 So. 2d 192 (Fla. 3d Dist. 1976). See Murray, *Letters of Credit in Non Sale of Goods Transactions*, 30 BUS. LAW. 1103 (1975).

173. *Florida Steel Corp. v. A.G. Spanos Enterprises, Inc.*, 332 So. 2d 663 (Fla. 2d Dist. 1976).

174. *Shannon v. Great S. Equip. Co.*, 326 So.2d 19 (Fla. 2d Dist. 1976).

default judgments were entered against both the defendant and the garnishee. On appeal, the garnishee was held capable of setting aside the garnishment on the grounds that the in personam judgment against the defendant was void because of a lack of due process. Therefore, no valid judgment in garnishment could be entered against the garnishee.

### E. *Legislation*

The Florida Banking Code was amended to provide that: (a) applications to operate a branch bank or branch trust company must be accompanied by a fee of \$1,000; (b) a fee of \$2,500 for investigating and processing each application for a merger, consolidation, or purchase of assets is required; (c) directors of a bank need no longer be owners of shares of stock in the bank; (d) the department no longer need furnish a list of approved securities; and (e) it is unlawful for bank or trust company officers and directors to violate willfully any of the provisions of the Banking Code and to provide false information to the Department of Banking and Finance.<sup>175</sup> Further, another enactment includes: (a) a provision that with the approval of the Department, state banks can make the same kind of loans as national banks; (b) another provision that department approval is now required for the acquisition of a controlling interest in a bank or trust company; (c) provisions articulating the procedures for cease and desist orders by the Department; and (d) provisions setting the procedures for the removal of officers and directors, said procedures to be in accordance with chapter 120 of the Florida Statutes (1975).<sup>176</sup>

Industrial savings banks may now with the approval of the Department (based upon a satisfactory showing that the public convenience and necessity will be served thereby) establish up to two branches per calendar year within the limits of the county in which the parent bank is located.<sup>177</sup>

Banks and trust companies may now invest up to five percent of their unimpaired capital and surplus to purchase bonds or other evidences of indebtedness of the State of Israel.<sup>178</sup> Savings associa-

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175. 1976 Fla. Laws ch. 76-177, amending FLA. STAT. §§ 658.08, 659.11, 659.141, 659.17, 659.53 (1975).

176. 1976 Fla. Laws ch. 76-178, amending FLA. STAT. § 659.14 (1975).

177. FLA. STAT. § 656.071 (Supp. 1976).

178. FLA. STAT. §§ 659.20, 665.361 (Supp. 1976).

tions may likewise invest up to five percent of their net worth in bonds of Israel.

When a trust service office is established by a trust company at a bank which has trust powers, it may now retain these powers and continue to exercise them.<sup>179</sup> In addition, a trust company which is acting in a fiduciary capacity may now employ another trust company as its agent to advise or assist it in the performance of its duties as a principal and to render investment advice. Further, a trust company acting in a fiduciary capacity may agree with another trust company for the transfer of fiduciary relationships between them, provided the approval of a circuit court is obtained after notice to beneficiaries and after a hearing if the beneficiaries expressed any objections.<sup>180</sup> The court is directed to approve the substitution unless it determines that it would be a material detriment to the estate, trust or other fiduciary relationship, or to the beneficiaries thereof.

Section 659.18 of the Florida Statutes (1975) was amended to increase from \$5,000 to \$15,000 the maximum amount available for loan by banks at the present six percent per annum discount or add-on rate.<sup>181</sup> In addition, section 687.03 of the Florida Statutes (1975), which pertains to usury, was amended to provide that it would not apply to loans or commitments to insure, made by the Federal Housing Administration, the Veterans' Administration, Federal National Mortgage Association, Government National Mortgage Association, Federal Home Loan Mortgage Corporation and any department, agency or instrumentality of the federal government, or any of their successors.<sup>182</sup>

Section 657.06(3)(b) of the Florida Statutes (1975), relating to credit unions, was amended to provide that all fees collected by the state under part I of chapter 657 shall be deposited in the state treasury in a special bank and trust company trust fund under the Department of Banking and Finance.<sup>183</sup> Also, section 657.161(12) of the Florida Statutes (1975) was amended to permit credit unions to invest in the Southeast Corporate Federal Credit Union.<sup>184</sup>

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179. FLA. STAT. § 659.061 (Supp. 1976).

180. FLA. STAT. §§ 660.011, 660.012 (Supp. 1976).

181. 1976 Fla. Laws ch 76-125, *amending* FLA. STAT. § 659.18 (1975).

182. FLA. STAT. § 687.03 (Supp. 1976).

183. FLA. STAT. § 657.06 (Supp. 1976).

184. FLA. STAT. § 657.161 (Supp. 1976).

## IX. CONSUMER FINANCE

A seller of goods who attempts to collect a portion of the purchase price of the goods from the buyer when the seller knows that the account has been paid (by repossession and sale of the goods for more than the balance of the account), may be held liable to the buyer under sections 559.55-.78 of the Florida Statutes (1975) for actual damages incurred as the result of this wrongful collection practice, or for \$500, whichever is greater, together with court costs and reasonable attorney's fees. These sections of the Florida Statutes, although primarily directed toward collection agencies, apply to any person engaging in unlawful collection of consumer claims.<sup>185</sup>

In a consistent vein, a small loan company comes within the meaning of the word "person," and can be held liable for damages for prohibited activities in the collection of an unpaid loan.<sup>186</sup>

A professional medical association which attempts to collect its allegedly unpaid bills by sending simulated judicial complaints to former patients may also be held liable for the sum of \$500 together with attorney's fees and court costs under sections 559.72(10) and 559.77(1) of the Florida Statutes (1975).<sup>187</sup> If the recipients of these "complaints" can prove that the association's conduct was wanton, malicious, or gross and outrageous, punitive damages might be awarded. In the instant case, the plaintiff was unable to prove such a course of conduct and was denied punitive damages by the appellate court, although the trial court had awarded \$12,000 punitive damages.

A bank which on one occasion refused to inform a credit bureau of the true amount (some \$500) owed to it rather than the represented amount of \$1,700 and then later corrected the quoted amount to \$585 may be held liable for slander of credit as libel per se.<sup>188</sup> In order to award punitive damages it would not be necessary to prove actual malice. Since it was libel per se, punitive damages could be awarded without an award of compensatory damages.

Section 559.72(4) of the Florida Statutes (1975), which forbids a creditor from communicating with the debtor's employer prior to obtaining a final judgment against the debtor unless the debtor

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185. *Williams v. Streeps Music Co.*, 333 So. 2d 65 (Fla. 4th Dist. 1976).

186. *Cook v. Blazer Fin. Serv., Inc.*, 332 So. 2d 677 (Fla. 1st Dist. 1976).

187. *Steiner & Munach, P.A. v. Williams*, 334 So. 2d 39 (Fla. 3d Dist. 1976).

188. *Matthews v. Deland State Bank*, 334 So. 2d 164 (Fla. 1st Dist. 1976).

gives his written permission to communicate with the employer or acknowledges in writing the existence of the debt after it has been placed for collection, has been upheld as constitutional by the Supreme Court of Florida.<sup>189</sup> It was argued that the statute infringed on the creditor's right of free speech. The court held that the public interest in preventing harassment of a debtor through communication with his employer transcends a creditor's interest in using his speech to the employer as a means of collection. Further, the court held that the Act's minimum damage provision is not a taking of the creditor's property without due process. The damage provision is sustainable both because it provides for liquidated damages in a situation in which it is most difficult to ascertain actual damages and constitutes a form of punitive damages designed to dissuade consumer collection agencies from engaging in forbidden conduct.

The Florida Consumer Finance Act has been amended to provide that the lender may now charge a maximum of thirty percent per annum interest on the first \$500 (rather than the first \$300); twenty-four percent per annum on that amount exceeding \$500 and not exceeding \$1,000 (rather than \$300 and \$600), and sixteen percent per annum on that amount exceeding \$1,000 (rather than \$600).<sup>190</sup>

The Federal Consumer Leasing Act of 1976, effective March 23, 1976,<sup>191</sup> and the regulations thereunder (Federal Reserve Board Regulation Z),<sup>192</sup> require the lessors of personal property for lessees' personal, family, or household uses for periods in excess of four months to make disclosures in the following matters before the lessee enters into the lease:

- (a) the identification of the property leased (car, boat, etc.);
- (b) the down payment amount, security deposit, etc. charged at the beginning of the lease;
- (c) the amounts of incidental fees charged, if any; and
- (d) the number, amount and dates of the lease payments together with the total sum charged for lease payments.

The lease form is also required to disclose the insurance involved,

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189. *Harris v. Beneficial Fin. Co.*, 338 So. 2d 196 (Fla. 1976).

190. Ch. 76-180, S.B. No. 785, *amending* FLA. STAT. § 516.031 (1975).

191. Consumer Leasing Act of 1976, Pub. L. No. 94-240, 90 Stat. 257 (1976), *amending* 15 U.S.C. § 1601 (1970).

192. Fed. Res. Board Reg. Z, Fed. Reg. 45537 (Oct. 15, 1976).

as well as any express warranties made by the lessor or a manufacturer of the leased product.

In addition to the Consumer Leasing Act, Congress also enacted the Equal Credit Opportunity Act<sup>193</sup> as amended<sup>194</sup> which was supplemented by Federal Reserve Board Regulation B.<sup>195</sup> The purpose of this act is to prevent discrimination in any credit transaction on the basis of sex, marital status, age, race, color, religion, or national origin of any applicant for credit. The act can be enforced by a victim, who may recover actual as well as punitive damages, or by the Attorney General. The Truth in Lending Act was also amended to provide for the Fair Credit Billing Act<sup>196</sup> designed to allow the consumer an opportunity to correct billing errors in open-end credit under credit cards and revolving charge accounts. Under the Act the onus is placed on creditors to disclose the procedure required to correct billing errors.

It is suggested that if experience under the Truth in Lending Act is any indication, the economic costs of these acts will far outweigh any benefits. Of course, these economic costs will be passed on to the consumer.

## X. SECURED TRANSACTIONS

### A. Venue

When the defendant's only place of business is in Escambia County, Florida, and it signs a security agreement providing for payments in said county, the proper venue is in Escambia County and not in Broward County when the plaintiff sues upon the common count for money had and received, rather than upon the security agreement itself.<sup>197</sup>

Federal law provides that suits against national banks may be brought within the district in which the bank is established or located.<sup>198</sup> If a foreign national bank repossesses a car (in which it

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193. Equal Credit Opportunity Act, Pub. L. No. 93-495, 88 Stat. 1521 *et seq.* (1974).

194. Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239, 90 Stat. 251 (1976).

195. Fed. Res. Board Reg. B, 12 C.F.R. § 202 (1976).

196. Fair Credit Billing Act, Pub. L. No. 93-495, 88 Stat. 1500 (1974), *amending* 15 U.S.C. § 1601 (1970).

197. Pensacola Restaurant Supply Co. v. Byrn Mawr Camp Resorts, Inc., 320 So. 2d 35 (Fla. 4th Dist. 1975).

198. 12 U.S.C. § 94 (1970).

holds a security interest) by employing a repossessing company, suit may be brought against the bank in the county in which the repossession occurs.<sup>199</sup> The transaction of business (repossession) and commission of a tortious act through a Florida agent (repossessor) constitutes a waiver of the bank's right to assert the statute.

### B. *Perfection and Priorities*

In a case of first impression in Florida,<sup>200</sup> it has been held that the issuance of a promissory note and the subsequent proper execution and filing of the "Notice of Lien" form supplied by the State of Florida Department of Highway Safety and Motor Vehicles, Division of Motor Vehicles, perfects a security interest in motor vehicles without the filing of a financing statement under UCC section 9-102(1)(a) and 9-302(3)(d)<sup>201</sup> and section 319.27(2) of the Florida Statutes (1975).

A security interest in a car perfected under Florida law by recordation on the title certificate remains valid under UCC section 9-103(4)<sup>202</sup> in Connecticut where the car was operated for a period of nine months before the owner went bankrupt.<sup>203</sup> The interest was held perfected even though the creditor knew that the car was in Connecticut, had accepted payments from the debtor while she was in Connecticut, and even though the creditor had constructive notice that Connecticut law requires registration of the car in the state within sixty days of coming within the state.

Under the 1962 version of the UCC a creditor who has properly perfected his security interest in property of the debtor is not required to file an amended financing statement when the debtor changes his name. Under a proposed change (1972 draft of the UCC) to UCC section 9-402,<sup>204</sup> a creditor would have to file a new financing statement in the new name of the debtor if the original filing would become seriously misleading because of the change.<sup>205</sup>

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199. *Vann v. First Nat'l Bank*, 324 So. 2d 94 (Fla. 3d Dist. 1975).

200. *Georgia-Pacific Corp. v. Consolidated Suppliers, Inc.*, 332 So. 2d 368 (Fla. 1st Dist. 1976).

201. FLA. STAT. §§ 679.102(1)(a), 679.302(3)(b) (1975).

202. FLA. STAT. § 679.103(4) (1975).

203. *Ford Motor Credit Co. v. Ossen (In re Maxwell)*, Bank No. H-75-225 (D. Conn. 1975) reported in 18 U.C.C. Rptr. 504.

204. FLA. STAT. § 679.312(5)(b) (1975).

205. *Avdoyan v. Sunbank (In re Sofa Centre, Inc.)*, No. 74-377-ORL-P (M.D. Fla. 1975) reported in 18 U.C.C. Rptr. 536.

In a case of first impression in Florida (and perhaps of first impression in the United States) it has been held that the holder of a subsequently perfected security interest in motel furnishings, fixtures and other goods used in the motel has priority over a previously recorded property mortgage which covered the same goods. The court so held even though the real property mortgage holder filed suit to foreclose and filed a *lis pendens* against the subject motel prior to the filing of the financing statement of the perfected security interest holder. The court chose to follow the view that UCC section 9-312(5)(b)<sup>206</sup> sets out the rules of priority, and it is not to be affected by the pre-Code *lis pendens* rules.<sup>207</sup>

In Florida and in approximately eleven other states a writ of execution becomes a lien on personal property from the time the writ is delivered to the sheriff and not from the time the sheriff actually physically attaches the debtor's goods. For example, *A* delivers a writ of execution to the sheriff on March 18. On April 7, *B* executes and mails a notice of lien to the Division of Motor Vehicles for notation on the certificate of title to a car owned by the debtor of *A* and *B*. On April 10, the certificate of title is issued showing the lien filed on April 7. On April 8, *C* delivers its writ of execution against the same debtor to the sheriff. What is the priority between *A*, *B* and *C*? Since the notice of lien becomes a lien on a car when it is filed on April 10, as a result of the general execution rule, the parties have priority in the order of *A*, *C* and *B*.<sup>208</sup> Under this non-sensical rule, a non-purchase money security interest lender who innocently perfects one minute after a writ of execution has been placed in the hands of the sheriff will take subject to this writ. In more modern states, the priority of the judgment creditor would date from the time that the sheriff made his levy of execution, not the earlier time when the sheriff received the writ.

A judicially appointed receiver of a motel (in a motel foreclosure action) is a "lien creditor" under UCC section 9-301.<sup>209</sup> Thus, he has priority over open-account unsecured creditors who furnished goods to the motel prior to his appointment.<sup>210</sup>

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206. FLA. STAT. § 679.312(5)(b) (1975).

207. *National Bank of Sarasota v. Dugger*, 335 So. 2d 859 (Fla. 2d Dist. 1976). The court reasoned that to give the mortgage priority based on the filing of a *lis pendens* would result in a method of perfection un contemplated and unintended by the drafters of the UCC.

208. *Bank of Hawthorne v. Shepherd*, 330 So. 2d 75 (Fla. 1st Dist. 1976).

209. FLA. STAT. § 679.301 (1975).

210. *Zirot v. Gilmer*, 336 So. 2d 680 (Fla. 4th Dist. 1976).

A paid surety which completes a construction contract has an equitable right of subrogation to the rights of the owner to withhold payments from the contractor upon its default and to receive payments from the owner which would otherwise be paid to the defaulting contractor. This equitable right of subrogation is not a security interest under Article 9 of the UCC,<sup>211</sup> and, therefore, need not be perfected by the filing of a financing statement in order to be protected even as against the trustee in bankruptcy of the contractor.<sup>212</sup>

Under UCC section 9-310<sup>213</sup> a mechanic in Florida who performs work on a boat which is subject to a prior security interest has a possessory lien which has priority over the security interest. The lien statute provides, however, that the possessory lien of the mechanic continues "so long as the possession continues, not to exceed three months after performance of the labor or furnishing the materials."<sup>214</sup> The quoted language inexplicably has been interpreted to mean that if the owner of the boat leaves it in the possession of the mechanic lienor, then the lien continues as against the security interest holder. Further, if the lienor files suit to foreclose five months after the work has been completed, he may enforce his lien against the owner and the security interest holder.<sup>215</sup>

### C. Defenses

UCC section 9-206<sup>216</sup> has made its maiden voyage in Florida, and, from the standpoint of the financing community, it was a successful trip. A purchaser purchased an open road motor home to be used for business purposes. The installment-purchase contract (security agreement) which was executed by the buyer and assigned to a bank provided that the buyer was to perform all of his covenants without regard to any claims which he might have against the seller and that the buyer would look only to the seller for performance of warranties, etc. The buyer paid for about a year and then defaulted. The bank brought a replevin suit after accelerating the balance due on the security agreement. The buyer claimed that the

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211. FLA. STAT. §§ 679 *et seq.* (1975).

212. *McAtee v. United States Fid. & Guar. Co.*, 401 F. Supp. 11 (N.D. Fla. 1975).

213. FLA. STAT. § 679.310 (1975).

214. FLA. STAT. § 713.74 (1975).

215. *Eastern Airlines Employees Fed. Credit Union v. Lauderdale Yacht Basin, Inc.*, 334 So. 2d 175 (Fla. 4th Dist. 1976).

216. FLA. STAT. § 679.206 (1975).

motor home was sold to him as a new one when in fact it was used and that it had to be returned to the seller for numerous defects which had never been corrected. The court held that under 9-206 the buyer's waiver of defenses was valid and effective because the bank did not have a close connection with the seller-dealer, that the bank took the assignment from the dealer in good faith for value and without knowledge of any claims or defenses, and that the buyer made payments for a year without notifying the bank of any of the alleged defects. As a result, the bank was entitled to replevy the motor home.<sup>217</sup> As previously discussed,<sup>218</sup> the Federal Trade Commission's rule which provides that the holder of a consumer credit contract is subject to all claims and defenses which the consumer could assert against the seller of the goods will eliminate the effect of 9-206 in consumer cases. Cases such as the instant case will not be affected by the rule, however, because the motor home was bought for business purposes.

The fact that borrowers were forced to sign a renewal promissory note, a security agreement and a real property mortgage as the result of "duress" involving the lender's threats to enforce rights through court proceedings on the original obligation, does not constitute legal duress sufficient to raise a defense to the enforcement of these instruments.<sup>219</sup> Further, any verbal abuse exercised by the lender to induce the borrowers to sign these instruments would not constitute a defense. In addition, the court implied that if the amended pledge agreement purportedly gave the pledgee the right to sell pledged paintings at any price unilaterally decided upon by the pledgee, this clause would not be in violation of UCC section 9-501<sup>220</sup> because the amended pledge agreement authorized this action, and the borrowers "destroyed any previous defense they may have had on this point by the execution of the amended pledge agreement."<sup>221</sup> It is submitted that the court was attempting to state that a debtor may waive his rights after default in accordance with UCC sections 9-501, 9-504, 9-505, 9-506.<sup>222</sup>

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217. *Are v. Barnett Bank*, 330 So. 2d 250 (Fla. 3d Dist. 1976).

218. See text accompanying note 64 *supra*.

219. *Spillers v. Five Points Guar. Bank*, 335 So. 2d 851 (Fla. 1st Dist. 1976).

220. FLA. STAT. § 679.501 (1975).

221. 335 So. 2d at 853.

222. FLA. STAT. §§ 679.501, 679.504-506 (1975).

#### D. *Repossessions and Collections*

A repossessing security interest holder who fails to file notice of sale under UCC section 9-504(3)<sup>223</sup> may not recover a deficiency from the co-signer (apparently an accommodation co-signer) of the security agreement.<sup>224</sup> Similarly, guarantors of a secured promissory note who guarantee payment by means of a separate agreement (rather than an indorsement on the note) are to be considered debtors within the meaning of UCC sections 9-105(1)(d) and 9-504(5)<sup>225</sup> and are entitled to reasonable notice prior to the sale of the collateral. If notice is not given, the secured party may not secure a deficiency judgment against the guarantors.<sup>226</sup>

In a rather convoluted opinion, the Supreme Court of Florida has apparently recognized that the UCC has done away with the old election of remedies doctrine. Thus, a creditor now may sue for the balance of unpaid installments on a security agreement and also seek replevin of the encumbered goods.<sup>227</sup>

It is reversible error to enjoin the sale under UCC section 9-504<sup>228</sup> of a promissory note given as collateral in the absence of (a) verified pleadings, affidavits or sworn testimony; (b) a bond; and (c) any showing that irreparable injury would occur if the injunction were not granted.<sup>229</sup>

If a security agreement authorizes the creditor to enter the premises where a motor vehicle is located and take possession of it, entry by an agent of the creditor who did not enter into any building (only the hood of the car was in a car port) and who quietly removed the car (the keys were left in the ignition) did not constitute an unlawful trespass or breach of the peace. Nevertheless, because the debtor had a history of late payments which were accepted by the creditor without repossession, there may have been a duty for the creditor to notify the debtor before carrying out the repossession.<sup>230</sup>

Summary judgment may be entered in favor of a secured party

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223. FLA. STAT. § 679.504(3) (1975).

224. *Washington v. First Nat'l Bank*, 332 So. 2d 644 (Fla. 3d Dist. 1976).

225. FLA. STAT. §§ 679.105(1)(d), 679.504(5) (1975).

226. *Hepworth v. Orlando Bank & Trust Co.*, 323 So. 2d 41 (Fla. 4th Dist. 1975).

227. *Encore, Inc. v. Olivetti Corp. of America*, 326 So. 2d 161 (Fla. 1976), *aff'g*, 291 So. 2d 27 (Fla. 3d Dist. 1974).

228. FLA. STAT. § 679.504 (1975).

229. *City Nat'l Bank v. Somerset Dev. Corp.*, 330 So. 2d 501 (Fla. 4th Dist. 1976).

230. *Raffa v. Dania Bank*, 321 So. 2d 83 (Fla. 4th Dist. 1975).

who seeks a deficiency judgment when the facts show that he exerted an honest effort to secure the highest price that the market would bear for the collateral, a used construction machine.<sup>231</sup>

When a buyer of inventory goods asserts as a defense to an action for replevin brought by the person who claims a security interest in the inventory in the hands of the seller, that it is a buyer in the ordinary course of business under UCC sections 9-307(1) and 1-201(9)<sup>232</sup> and this defense is not controverted, the security interest holder is not entitled to a summary judgment.<sup>233</sup>

### E. Legislation

Statutory replevin has been substantially changed by the elimination of temporary restraining orders under former sections 78.055(6),<sup>234</sup> 78.069,<sup>235</sup> and 78.073<sup>236</sup> of the Florida Statutes. In lieu of the restraining order approach, a petitioner may now secure a prejudgment issue of a writ of replevin and obtain a seizure of the goods when the nature of the claim, the amount thereof and the grounds clearly appear from specific facts in the verified petition or by a separate affidavit of the petitioner. The prejudgment writ of replevin may issue if the court finds from the verified petition or affidavit that the defendant "is engaging in, or is about to engage in conduct that may place the claimed property in danger of destruction, concealment, waste, removal from the state, removal from the jurisdiction of the court, or transfer to an innocent purchaser, during the pendency of the action, or that the defendant has failed to make payment as agreed."<sup>237</sup> The emphasized words are of particular importance in the ordinary security interest repossession case. The petitioner must post bond in the amount of twice the value of the goods or twice the balance of the amount remaining due and owing (whichever is less) as security for the payment of damages if the writ is obtained wrongfully. The defendant may obtain release of the goods by posting within five days of the serving of the writ a bond in the amount of one and one-fourth times the amount

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231. *Schatten v. C.I.T. Corp.*, 335 So. 2d 572 (Fla. 3d Dist. 1976).

232. FLA. STAT. §§ 679.307(1), 671.201(9) (1975).

233. *Johnson & Kirby, Inc. v. Citizens Nat'l Bank*, 338 So. 2d 905 (Fla. 3d Dist. 1976).

234. FLA. STAT. § 78.055(6) (1973) (amended 1976).

235. Repealed 1976.

236. Repealed 1976.

237. 1975 Fla. Sess. Law Serv., Ch. 76-19, § 78.068(2) (emphasis added).

due on the agreement. The prejudgment writ can issue only upon the signed order of a judge of the circuit or county court. If the defendant does not choose to post a bond, he can file a "contradictory motion"<sup>238</sup> within ten days after service of the writ and obtain the dissolution of the writ unless the petitioner proves the grounds upon which the writ was issued. Such a motion is to be set down for an immediate hearing.

Section 78.02 of the Florida Statutes (1975)<sup>239</sup> has been amended to provide that when the goods have been retained by or redelivered to the defendant on his forthcoming bond, he may recover attorney's fees as well as costs and damages, if any, from the petitioner in replevin.

For purposes of the homestead exemption from forced sale, the head of the family status, required to qualify, shall inure to the benefit of the surviving tenant by the entirety or spouse of the owner. This status "shall inure to the surviving spouse irrespective of the fact that there are not two persons living together as one family under the direction of one of them who is recognized as the head of the family."<sup>240</sup>

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238. *Id.*

239. 1975 Fla. Sess. Law Serv., Ch. 76-19, § 78.20.

240. 1976 Fla. Sess. Law Serv., Ch. 76-36, § 222.19(2).