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Corporate Law and Securities Regulation

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CORPORATE LAW AND SECURITIES REGULATION*

TONY M. EDWARDS**

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I. CORPORATE LAW

A. *New Legislation*

The 1975 session of the Florida legislature produced a completely revised General Corporation Act.¹ The new act, which is based on the Model Business Corporation Act,² takes effect on

* The survey period includes legislation during the 1974 and 1975 sessions of the Florida legislature and judicial decisions reported from 288 So. 2d through 310 So. 2d, 488 F.2d through 511 F.2d and 368 F. Supp. through 390 F. Supp.

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1. Fla. Laws 1975, ch. 75-250, creating FLA. STAT. ch. 607 (1975).

2. Not only did the drafters of the new act rely to a large extent on the model act, but in many instances they adopted its provisions verbatim. This should be of substantial benefit to Florida practitioners since many questions which will arise under the new act have been decided in other jurisdictions. See generally AMERICAN BAR FOUNDATION, MODEL BUSINESS CORPORATION ACT ANNOTATED (2d ed. 1971).

January 1, 1976. Under the new act, the special provisions under the prior law dealing with closely-held corporations³ and foreign corporations⁴ have been integrated into the general act. While the new act provides a complete, logically organized, modern corporation act, there have been few substantive changes from prior Florida law.⁵

B. *Recent Decisions*

1. SALE OF ASSETS

Unless there exists a statute providing otherwise, a bona fide purchaser of corporate assets does not assume the debts of the selling corporation in the absence of fraud or an agreement to assume those debts.⁶ This principle of law was the focal point of litigation in *Sens v. Slavia, Inc.*,⁷ when both the successor in interest of the corporation and that corporation's unsecured creditors claimed a substantial amount of money. In *Sens*, a corporation, owning property in Miami Beach on which a hotel was located, defaulted on its mortgage payments and the holders of the first, second and third mortgages brought a foreclosure action. Prior to the entry of the foreclosure decree, Sens purchased the property from the corporation. Then to protect his title, he made the highest bid at the court-ordered foreclosure sale. Sens' bid was approximately \$66,000 higher than the actual mortgages, so that a surplus fund was created. This surplus fund was claimed by both Sens, as the holder of the equity of redemption, and by the tenants of the hotel who desired a refund of advance rents given to the original corporation. Although the District Court of Appeal, Third District, affirmed the trial court's refusal to refund the surplus funds to Sens on equitable grounds,⁸ the Supreme Court of Florida reversed, holding that the mere acquisition of property from a corporation generally does not make the buyer liable for the corporation's debts to unsecured creditors.

The court weighed the conflicting claims of the purchaser of

3. FLA. STAT. ch. 608, pt. II (1973).

4. FLA. STAT. ch. 613 (1973).

5. For a comparison of the old and new acts, see THE FLORIDA BAR CONTINUING LEGAL EDUCATION, BASIC PRACTICE UNDER THE NEW FLORIDA CORPORATION LAW (1975). See also THE FLORIDA BAR CONTINUING LEGAL EDUCATION, BASIC CORPORATE PRACTICE (to be published in 1976).

6. *East Coast Stores v. Cuthbert*, 101 Fla. 25, 133 So. 863 (1931); 7 FLA. JUR. *Corporations* § 343 (1956); cf. *Casements, Inc. v. Ruscoe*, 85 So. 2d 736 (Fla. 1956).

7. 304 So. 2d 438 (Fla. 1974).

8. *Sens v. Slavia, Inc.*, 292 So. 2d 627 (Fla. 3d Dist. 1974).

assets from a virtually defunct corporation against those of unsecured creditors and reached the most equitable result. The court, noting that Sens acquired title subject to the claims of vested creditors, nevertheless refused to extend his liability to the tenants, who were unsecured creditors. The court's determination is consistent with past decisions⁹ and properly protects bona fide purchasers of corporate assets from claims of unsecured creditors.

It is a well-settled principle of law that a corporation has both express and implied powers to transfer its property and assets, subject to limitations imposed by various statutory provisions and public policy considerations.¹⁰ As a result of these powers, there is a presumption that a sale of corporate property or assets is made in good faith and in the best interests of the stockholders.¹¹

These rules of law were applied by the District Court of Appeal, Third District, in *De La Rosa v. Tropical Sandwiches, Inc.*¹² After concluding that the sale of a restaurant is not subject to the Florida Bulk Transfer Act,¹³ the court found that a purchaser of corporate assets who did not assume the obligation attached to the stock of the vendor was a bona fide purchaser under Florida Statutes section 672.403 (1973) and therefore obtained good title to the property. Although the court in *De La Rosa* did not expressly so state, it seems that the determinative issue was whether the purchaser acted in good faith so as to come within the protection of Florida Statutes section 679.307 (1973). Since a corporation in Florida is empowered to sell all of its assets, and since a purchaser who does not expressly assume any indebtedness attached to a corporate asset is not liable thereon, the purchaser in *De La Rosa* was entitled to believe that his vendor had the legal authority to sell the assets in question and therefore acted in good faith.

9. *Meyer v. Bricklayers Local 7*, 144 Fla. 401, 198 So. 78 (1940); *Rosen v. Dorn-Kothe*, 126 Fla. 717, 171 So. 646 (1936). See also *Lamb v. Leroy Corp.*, 85 Nev. 276, 454 P.2d 24 (1969).

10. 6A W. FLETCHER, PRIVATE CORPORATIONS § 2925 (perm. ed. rev. 1968); H. HENN, LAW OF CORPORATIONS § 341 (2d ed. 1970); FLA. STAT. § 608.19(1) (1973); Fla. Laws 1975, ch. 75-250, § 80, creating FLA. STAT. § 607.241 (1975).

11. *De La Rosa v. Tropical Sandwiches, Inc.*, 298 So. 2d 471, 472 (Fla. 3d Dist. 1974), citing *Baron v. Pressed Metals*, 35 Del. Ch. 325, 117 A.2d 357 (1955).

12. 298 So. 2d 471 (Fla. 3d Dist. 1974), noted in 29 U. MIAMI L. REV. 597 (1975).

13. FLA. STAT. ch. 676 (1973). However, after the *De La Rosa* decision was handed down, the Florida legislature amended the Bulk Sales Act to include specifically the sale of restaurant assets. See Fla. Laws 1975, ch. 75-216, amending FLA. STAT. § 676.102(3) (1973).

2. RIGHTS OF SHAREHOLDERS

The basic scheme for dividend distribution is that all shareholders participate ratably except as otherwise provided in the articles of incorporation. The usual practice where dividends are not to be shared ratably is to give to one or more classes of shares designated "preferred shares," a dividend preference over another class or classes.¹⁴ Florida statutory law expressly allows a corporation to use this preferential distributive scheme as long as it is so provided in the articles of incorporation.¹⁵ Whether, absent such a provision, shareholders of a corporation could contract among themselves to agree upon a preferential distributive scheme was not clear, and thereby created a case of first impression when that issue was raised in *Little v. Caswell-Doyle-Jones Corp.*¹⁶ In this case, a Subchapter S corporation¹⁷ was established by ten shareholders in order to construct and sell a large condominium project. Eight of these shareholders lent substantial amounts of money to the corporation, which served as the major source of equity financing for the project, and the individual defendants signed each note as personal guarantors of the corporation. The shareholders voluntarily signed a stockholders agreement in which the undivided profits of the corporation, after the payment of construction costs, would be distributed on a proportionate basis, except that the shareholder-lenders would be entitled to advance distributions roughly equal to half of the amount of their loans.¹⁸

The assignee of two of these loans brought suit against the corporation and the individual guarantors after the condominium project failed. The defendants attempted to avoid payment of the principal and interest on these loans by asserting that the loans were usurious and hence unenforceable. It was claimed by the defendants that the shareholders' agreement was a device calculated to give an incentive to the shareholders to lend money to the corporation while obtaining a preferential claim to dividends without losing the corpo-

14. H. HENN, *supra* note 10, § 324.

15. FLA. STAT. § 608.14 (1973). See also Fla. Laws 1975, ch. 75-250, § 15, creating FLA. STAT. § 607.044 (1975).

16. 305 So. 2d 842 (Fla. 1st Dist. 1975).

17. See INT. REV. CODE OF 1954, §§ 1371-79.

18. It is not clear from the opinion whether all the shareholders signed the shareholders' agreement. The court's holding expressly does not "consider or comment as to the propriety of those not bound by the agreement challenging the financial structure" of the corporation. 305 So. 2d at 845.

ration's Subchapter S status.¹⁹ The defendants maintained that any monies derived as dividends as a result of the agreement would, in effect, be additional interest on the loans and would therefore push the effective interest rate above the legal limit.

The District Court of Appeal, First District, rejected the defendants' contentions and found that stockholders of a corporation may unanimously agree to preferential distribution of corporate profits. The court based its decision on the freedom given to citizens to contract with other citizens of full age and competent understanding.²⁰ It reasoned that the agreement was voluntarily entered into between the individual stockholders, so that there was no fixed duty on either the corporation as an entity or the guarantors to pay an interest over the 6 percent stated in the loans being litigated. The court downplayed the shareholders' attempt to evade the spirit, if not the letter, of provisions in Subchapter S, stating that "[t]he law of this jurisdiction as to corporate structure is not amended or engrafted upon by the intricacies of tax advantages or disadvantages of the Federal Internal Revenue Code."²¹

The decision in *Little* does not seem justified in letting stand an agreement which undercuts much of the spirit, if not the letter, of Florida statutory law. Florida Statutes section 608.14 (1973) expressly states that "[e]very corporation may issue the shares of stock authorized by its certificate of incorporation and none other."²² *Little* permitted the members of a corporation to create a new class of stock, *i.e.*, preferred, without seeking an amendment of the corporation's articles of incorporation. Although not bound by the Internal Revenue Code when considering Florida corporate law, the court should have realized that its decision permitted the avoidance of Florida, not federal, law.

3. PIERCING THE CORPORATE VEIL

One of the haziest areas of corporate law is the determination of whether a corporation acts as an entity, *i.e.*, a separate person,

19. A corporation can only qualify for Subchapter S treatment if, among other requirements, it has only one class of stock. INT. REV. CODE OF 1954, § 1371(a)(4).

20. See, *e.g.*, *Palm Beach Mobile Homes, Inc. v. Strong*, 300 So. 2d 881 (Fla. 1974); *State v. Tobasso Homes, Inc.*, 3 Terry 110, 28 A.2d 248 (Del. 1942).

21. 305 So. 2d at 844.

22. Emphasis added. *But see* Fla. Laws 1975, ch. 75-250, § 15, *creating* FLA. STAT. § 607.044 (1975), which does not contain this express limitation.

or as an aggregate of its individual shareholders.²³ If the corporation is found to act as an entity unto itself, its shareholders are not personally liable for its actions. However, if the fictional corporate veil is pierced by a finding that the organization is a sham, the individual stockholders will be personally liable.²⁴ The pertinent decisions in the survey period dealt with questions of loans to corporations and the parent/subsidiary relationship.

a. Loans to Corporations

Florida's usury law permits a lender to charge 10 percent interest on loans to individuals and 15 percent interest on loans to corporations.²⁵ An extremely crucial legal question is therefore whether a loan to a corporation, established for the purposes of charging more than a 10 percent interest rate, guaranteed by individuals who receive an economic benefit therefrom, is a loan to the corporate entity or to the individual guarantors. The interest charged on loans which have an interest rate in excess of 10 percent will be forfeited if the corporate veil is pierced by a court holding that the loan was, in reality, made to a group of individuals.²⁶ The United States Court of Appeals for the Fifth Circuit restated several settled principles of Florida law and approved a set of jury instructions concerning the above issue in *Securities Investment Co. v. Indian Waters Development Corp.*²⁷ The facts in *Indian Waters* were the same as those posed above, with an effective interest rate charged on the loan of 10.85 percent. Although the court pointed out that Florida does not permit its usury law to be evaded by the creation of a sham corporation to disguise a loan to an individual,²⁸ it did cite a prior case²⁹ which held that a corporation formed for the sole purpose of borrowing money at an interest rate higher than 10 percent is not, without more, grounds for holding the loan usurious. *Indian Waters* makes clear that whether such a loan is a sham is a factual question to be

23. For a general discussion of the federal income tax implications of the entity/aggregate approach, see J. CHOMMIE, *FEDERAL INCOME TAXATION* § 217 (2d ed. 1973); H. HENN, *supra* note 10, § 16.

24. 9 W. FLETCHER, *PRIVATE CORPORATIONS* § 4231 (perm. ed. rev. 1964); H. HENN, *supra* note 10, § 146.

25. FLA. STAT. § 687.02 (1973).

26. See FLA. STAT. § 687.04 (1973).

27. 501 F.2d 662 (5th Cir. 1974).

28. *Gilbert v. Doris R. Corp.*, 111 So. 2d 682 (Fla. 3d Dist. 1959).

29. *Holland v. Gross*, 89 So. 2d 255 (Fla. 1956).

resolved by the trier of fact guided by appropriate court instruction.³⁰

b. Parent/Subsidiary Relationship

Florida courts have repeatedly held that the corporate veil will not be penetrated either at law or in equity unless it is shown that the corporation was organized or employed to mislead creditors or to work a fraud on them. Moreover, the fact that a parent corporation owns all of the stock of a subsidiary does not, in and of itself, constitute abuse of the corporate entity privilege.³¹ The Supreme Court of Florida has found such abuse of the entity privilege in cases where the purpose is to evade some statute or to accomplish some fraud or illegal purpose,³² and in cases where the corporation is either a mere device to accomplish some ulterior purpose or a mere instrumentality or agent of another corporation or individual owning all or most of its stock.³³

The issue of whether a subsidiary corporation was a mere instrumentality of its parent was raised in *Gladding Corp. v. Register*.³⁴ In *Gladding*, the parent corporation ("Gladding") created a subsidiary for the exclusive purpose of purchasing Register's wholly owned corporation, Outdoor Sporting Goods Co. ("Outdoor"). The sales contract referred to Outdoor as the seller, Register as the shareholder, and the subsidiary as the buyer. The contract also recited that "Gladding desires to so acquire said assets" and that "Gladding agrees . . . to cause the Buyer to purchase and to accept transfer"³⁵ After Register presented a statement of previously undisclosed debts, it was "Gladding . . . [which]

30. The court in *Indian Waters* approved instructions to the jury which allowed consideration of the following factors: (1) whether there had been active stockholder and/or director meetings; (2) whether the corporation had ever engaged in any form of business prior to the time the loan in issue was made; (3) whether the corporation engaged in any form of business after the loan was made; (4) whether the corporation has any employees; (5) whether the corporation had an active checking account; (6) whether the proceeds of the loan were used for the corporation's business or that of the individual defendants; (7) whether the corporation paid any real estate taxes; and (8) whether the corporation filed any income tax returns. 501 F.2d at 666 n.5. Since the jury was properly instructed in *Indian Waters*, its findings that the corporation was not a sham and that the loan was not usurious were affirmed.

31. Sowards, *Corporations*, 22 U. MIAMI L. REV. 339, 342-43 (1967).

32. *Aztec Motel, Inc. v. State*, 251 So. 2d 849 (Fla. 1971). See Bell & Goodman, *Corporate Law and Securities Regulation*, 28 U. MIAMI L. REV. 922, 928 (1974).

33. *Levenstein v. Sapiro*, 279 So. 2d 858 (Fla. 1973).

34. 293 So. 2d 729 (Fla. 3d Dist. 1974).

35. *Id.* at 731 (court's emphasis).

manage[d] to negotiate a reduced price"³⁶ Subsequent to the sale of Outdoor to Gladding's subsidiary, the parties became entangled in a dispute and Register brought an action against both Gladding and its wholly owned subsidiary, claiming a breach of the above-mentioned sales contract.

The court in *Gladding* reversed the lower court's ruling that Gladding was liable under the sales contract. The court conceded that the subsidiary was established for the sole purpose of consummating the sale, acquiring the assets of Outdoor and insulating Gladding from personal liability, and that the negotiations culminating in the acquisition were conducted solely by Gladding. Nevertheless, the District Court of Appeal, Third District, decided that the subsidiary was not the alter ego of Gladding and that the wording of the sales contract was not sufficient to consider Gladding to be a guarantor of the subsidiary.

The decision in *Gladding* seems to contradict completely a prior decision of the Supreme Court of Florida. Although it is not disputed that a parent corporation which is not the alter ego of its subsidiary cannot be held liable for the contracts of its subsidiary,³⁷ the District Court of Appeal ignored the principle established in *Levenstein v. Sapiro*³⁸ that the determination of the entity privilege is primarily a factual one to be decided by the trier of fact. The Supreme Court of Florida in that case stated:

We do not believe the rule of limited individual liability is so pervasive and absolute as to preclude a trial judge from . . . having a factual determination made in a proper case as to whether an individual rather than his wholly owned corporation is liable.³⁹

That the *Gladding* case is a proper one for such a factual determination is evident from the terms in the sales contract which specify that Gladding, not its subsidiary, was to acquire the assets of Outdoor, and by Gladding's negotiation of the terms of sale. Although a trier of fact might agree with the Third District's findings, it was not the function of the appellate court to so decide.

36. *Id.*

37. *J.P. Stevens & Co. v. Harrell Int'l, Inc.*, 299 So. 2d 69 (Fla. 1st Dist. 1974).

38. 279 So. 2d 858 (Fla. 1973).

39. *Id.* at 860.

4. JURISDICTION

The landmark case of *International Shoe Co. v. Washington*⁴⁰ established that states could obtain in personam jurisdiction over nonresident corporations and individuals as long as there existed certain minimum contacts with the state "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."⁴¹

Florida Statutes section 48.181 (1973), Florida's principal long-arm statute, provides for substituted service upon the Secretary of State for all nonresidents doing business in the state.⁴² Disputes in this area of the law principally center around the meaning of "doing business" in Florida. The cases involving construction of this statute during the survey period illustrate that each case must be resolved on the basis of its particular facts.

The court concluded in *Babson Brothers Co. v. Allison*⁴³ that the defendant corporation fell within the jurisdictional reach of section 48.181 because one of its sales representatives had spent three months in a Florida office taking orders and selling its products, other of its sales representatives had actively sold its products to Florida customers, and the plaintiff had been required by the defendant to keep books and records on dealership sales. Similarly, a nonresident corporate manufacturer was found to have established the requisite minimum contacts with Florida in *Dublin Co. v. Peninsular Supply Co.*⁴⁴ since it sold its products to distributors in Florida for at least five years and thereby grossed at least \$13,000 per year.

Jurisdiction over foreign corporations pursuant to section 48.181 was found lacking in two cases during the survey period. In *Crown Colony Club, Ltd. v. Honecker*,⁴⁵ the defendant resort operator, although not qualified to do business in Florida, had contracted with a Miami concern to provide numerous services for the defendant.⁴⁶ The plaintiff in *Crown Colony* brought an action based upon

40. 326 U.S. 310 (1945).

41. *Id.* at 316. See also *Hanson v. Denckla*, 357 U.S. 235 (1958); *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *Perkins v. Benquet Consol. Mining Co.*, 342 U.S. 437 (1952).

42. For a discussion of this statute, see Note, *In Personam Jurisdiction—Due Process and Florida's Short "Long-Arm"*, 23 U. FLA. L. REV. 336 (1971).

43. 298 So. 2d 450 (Fla. 1st Dist. 1974).

44. 309 So. 2d 207 (Fla. 4th Dist. 1975).

45. 307 So. 2d 889 (Fla. 3d Dist. 1974).

46. The Miami concern, among other things, (1) made reservations; (2) handled corre-

defendant's negligent maintenance of an airstrip located in the Bahamas. The court denied jurisdiction under section 48.181 on the basis of the established rule that to invoke this section, it must be shown that the cause of action arose out of a transaction or operation connected with or incidental to the activities of the foreign corporation in Florida.⁴⁷ Jurisdiction over the defendant was obtained, however, under another long-arm statute, which provides for service upon a foreign corporation's business agent within Florida.⁴⁸

The rule that section 48.181 may be utilized only when the suit arises out of the defendant's activities or business in Florida was also applied in *American Baseball Cap, Inc. v. Duzinski*⁴⁹ when it was determined that the corporate defendant was not doing business in Florida at the time of the incident giving rise to the cause of action, even though it had thereafter commenced doing business in the state, before the suit was filed.⁵⁰

5. VENUE

Florida's venue statute⁵¹ governing actions against corporations provides a plaintiff with multiple venue choices. A plaintiff suing a foreign corporation under this statute can bring an action in the county where such corporation has an agent, where the cause of action accrued or where the property in litigation is located. When the plaintiff in *Mann v. Goodyear Fire & Rubber Co.*⁵² was struck

spondence; (3) coordinated the placing of orders with suppliers; (4) contacted workmen and arranged for their transportation to defendant's place of business in the Bahamas; and (5) had fastened to the outside wall of the office a sign which read "Crown Colony Club." Defendant also listed the address of the Miami concern as one of its two Miami mailing addresses.

47. *Lyster v. Round*, 276 So. 2d 186 (Fla. 1st Dist. 1973). In addition, the burden of proof to sustain the validity of service of process is upon the person who seeks to invoke the jurisdiction of the court. Failure to meet this burden will render service on an agent invalid and ineffective. *Pan Americana Television Los Angeles, Inc. v. Latin Media Consultants Corp.*, 300 So. 2d 730 (Fla. 3d Dist. 1974).

48. FLA. STAT. § 48.081(5) (1973). After examining the services detailed in note 46 *supra*, one can understand the court's determination that the Miami concern acted as defendant corporation's business agent.

49. 308 So. 2d 639 (Fla. 1st Dist. 1975). This opinion is expertly written and researched and provides an excellent source of material for research into the jurisdictional aspects of Florida corporate law.

50. In addition, the court in *American Baseball* held that defendant corporation was not susceptible to service under FLA. STAT. § 48.182 (1971), *repealed by* Fla. Laws 1973, ch. 73-179, § 2, because, among other reasons, the cause of action accrued before the effective date of that statute.

51. FLA. STAT. § 47.051 (1973).

52. 300 So. 2d 666 (Fla. 1974).

by a vehicle owned and operated by defendant corporation in Hillsborough County, he chose to bring suit in Dade County. The defendant made a motion to transfer the action to Hillsborough County under the Florida forum non conveniens statute, Florida Statutes section 47.122 (1973), claiming that it resided there and that all of the witnesses and participants also resided there. Plaintiff, in turn, invoked Florida Statutes section 47.163 (1973), which provides that no change of venue shall be made to any county where either of the parties resides without their consent. The trial court's denial of the defendant's motion was reversed by the District Court of Appeal, Third District, on the grounds that the forum non conveniens statute, having been enacted by the legislature at a later date, took precedence over the earlier statute.⁵³

The Supreme Court of Florida, however, reversed the Third District's decision on the basis of the well-settled rule that where two statutes operate on the same subject without positive inconsistency or repugnancy, courts must construe them so as to preserve the force of both without destroying their evident intent, if possible.⁵⁴ The court stated that

absent the necessary clear intention to repeal, the later discretionary general statute [section 47.122] is presumed to have made an exception to the prior specific, mandatory statute [section 47.163] which prohibits transfer of a case to the residence of either of the parties without their consent.⁵⁵

A literal interpretation of this sentence indicates that section 47.163 can be defeated whenever a trial court, in its discretion, decides to apply the forum non conveniens statute. The Supreme Court of Florida concluded, however:

When suing a foreign corporation, one has the right to bring one's action anywhere business is transacted in Florida subject to the forum non conveniens statute and further limited by the provisions of Section 47.163, Florida Statutes, requiring the consent of the parties.⁵⁶

53. *Mann v. Goodyear Tire & Rubber Co.*, 285 So. 2d 681 (Fla. 3d Dist. 1973), *rev'd*, 300 So. 2d 666 (Fla. 1974). The District Court, in effect, nullified FLA. STAT. § 47.163 (1973).

54. *E.g.*, *Florida Jai Alai, Inc. v. Lake Howell Water & Reclamation Dist.*, 274 So. 2d 522 (Fla. 1973); *Ellis v. City of Winter Haven*, 60 So. 2d 620 (Fla. 1952); *cf. Howarth v. City of DeLand*, 117 Fla. 692, 158 So. 294 (1934).

55. 300 So. 2d at 668.

56. *Id.* (footnotes omitted).

The court's decision to uphold the trial court's denial of defendant's motion to change venue finds additional support as a result of an amendment⁵⁷ to section 47.163 in 1973, which makes that section controlling as the last expression of the legislative will. Thus, defendants in actions against foreign corporations in Florida cannot obtain a change of venue to the county where either of the parties resides without the consent of the plaintiff.

6. ABILITY TO SUE OR BE SUED

During the survey period, there were two cases which construed different statutes governing a corporation's ability to bring or defend an action.

When a corporation required by law to pay a tax on its net income fails to file its annual report with the Department of State and to pay the annual filing fee by July 1 of each year, the corporation will not be permitted to maintain or defend an action in any Florida court until such reports are filed and all back taxes are paid.⁵⁸ If a domestic corporation fails to pay the tax for a period of 1 year, the corporation is subject to dissolution.⁵⁹ In *Gilman v. Altman*,⁶⁰ a corporation which was legally dissolved by the state for nonpayment of taxes was not allowed to file a counterclaim because it failed to reinstate itself. The court's imposition of this burden on a dissolved corporation is clearly justified by the prior case law in this area.⁶¹

A foreign nonprofit corporation which does not obtain a permit from the Department of State to carry out the objects and purposes of its incorporation in Florida is not permitted to bring or maintain suit before any court in the state.⁶² Therefore, when a foreign nonprofit corporation did not obtain such a permit in *City of Sunrise v. Plastics Pipe Institute*,⁶³ the court correctly found that the corporation did not have the capacity to seek an injunction.

57. Fla. Laws 1973, ch. 73-334, § 11.

58. FLA. STAT. § 608.351 (1973). See also Fla. Laws 1975, ch. 75-250, § 120, creating FLA. STAT. § 607.357(6) (1975).

59. FLA. STAT. § 608.36(1) (1973). See also Fla. Laws 1975, ch. 75-250, § 90, creating FLA. STAT. § 607.271(2)(a) (1975).

60. 300 So. 2d 703 (Fla. 3d Dist. 1974).

61. See *Marienelli v. Weaver*, 208 So. 2d 489 (Fla. 2d Dist. 1968).

62. FLA. STAT. § 617.11 (1973).

63. 299 So. 2d 112 (Fla. 4th Dist. 1974).

7. OFFICERS AND DIRECTORS

Officers and directors have traditionally owed fiduciary duties to their corporation and its shareholders.⁶⁴ Florida courts have long sustained this fiduciary duty in view of the fact that the responsibilities of directors and officers towards a corporation are analogous to those of a trustee toward the beneficiary of a trust. The obligation is therefore imposed on them to act with fidelity and good faith, subordinating their personal interests to those of the corporation.⁶⁵ The cases involving fiduciary duties in the survey period revolve around the issues of usurping corporate opportunity, oppression of minority shareholders and the so-called business judgment rule.

a. Usurping Corporate Opportunity

It is a cardinal principle that officers and directors of a corporation may not divert to themselves the opportunities which in equity and fairness belong to the corporation.⁶⁶ While it is true that corporate officers and directors are not precluded from entering into another similar enterprise separate from the corporation, they must refrain from interfering with the business of the corporation and must act in good faith.⁶⁷ The central question is thus whether the opportunity is a corporate one or one within the legitimate scope of the individual interests of the officer or director.

In *Independent Optical Co. v. Elmore*,⁶⁸ it was alleged by a corporation and its majority shareholder that defendants, former employees who were directors of the corporation at all times pertinent to the complaint, induced all of the corporation's employees to leave and to work for defendants, unlawfully transferred the corporation's property to themselves, worked under plaintiff's trade name while billing under defendant's name and, finally, used assets, equipment, facilities and goodwill of plaintiff corporation in promoting the business of defendant. Finding that the allegations in

64. 11 W. FLETCHER, PRIVATE CORPORATIONS § 5135.1 (perm. ed. rev. 1971); H. HENN *supra* note 10, § 235.

65. *Gould v. Brick*, 358 F.2d 437 (5th Cir. 1966); *Garner v. Pearson*, 374 F. Supp. 580 (M.D. Fla. 1973); *Flight Equip. & Eng'r Corp. v. Shelton*, 103 So. 2d 615 (Fla. 1958); *Etheredge v. Barrow*, 102 So. 2d 660 (Fla. 2d Dist. 1958).

66. H. HENN, *supra* note 10, § 237. However, a shareholder's claim of lost corporate opportunity will be denied when the corporation lacks the financial ability to take advantage of it. *Hardwicke Cos. v. Freed*, 299 So. 2d 116 (Fla. 2d Dist. 1974).

67. *Renpack, Inc. v. Oppenheimer*, 104 So. 2d 642 (Fla. 2d Dist. 1958).

68. 289 So. 2d 24 (Fla. 2d Dist. 1974).

the complaint of the defendants' intentional efforts to destroy the plaintiff's business sufficiently stated a cause of action for breach of a director's fiduciary duty,⁶⁹ the District Court of Appeal, Second District, reversed the trial court's dismissal of the complaint for failure to state a cause of action.

b. Oppression of Minority Shareholders

It is a generally accepted principle, codified by the Florida legislature,⁷⁰ that when a corporation issues additional capital stock, shareholders at the time of issuance should have the right, in preference to any other persons, to purchase the new stock in proportion to the number of shares of the original stock held by them.⁷¹ This privilege is called the shareholder's preemptive right, and the preservation, unimpaired and undiluted, of the old shareholder's relative and proportionate voting strength and control is the foundation of that right.

In issuing additional shares, corporate management is, as in the case of any corporate activity, under a fiduciary duty to take corporate action according to the best interests of the corporation and not for personal advantage.⁷² Therefore, if directors offer additional shares to freeze out the current shareholders, regardless of the application (and even technical observance) of preemptive rights, the directors have breached their fiduciary duties.⁷³

A breach of directors' fiduciary duties was thus found to have occurred in *Biltmore Motor Corp. v. Rogue*⁷⁴ even though the minority shareholders' preemptive rights were technically observed. In *Biltmore*, the majority shareholders, acting in their capacity as

69. In an interesting concurring opinion, Judge Boardman stated that the complaint should have been upheld in that it alleged a proper case of interference with existing contractual relationships. 289 So. 2d at 25.

70. FLA. STAT. § 608.42(2) (1973). Under this section, a shareholder is presumed to have this right unless expressly denied by the certificate of incorporation. The corresponding section in the new general corporation act changes this presumption; a shareholder has no such right unless expressly provided for in the articles of incorporation. See Fla. Laws 1975, ch. 75-250, § 26, creating FLA. STAT. § 607.077(1) (1975).

71. 11 W. FLETCHER, PRIVATE CORPORATIONS § 5135 (perm. ed. rev. 1971); H. HENN, *supra* note 10, § 173.

72. *Rowland v. Times Pub. Co.*, 35 So. 2d 399 (Fla. 1948); Note, *Freezing Out Minority Shareholders*, 74 HARV. L. REV. 1630 (1961).

73. *Rowland v. Times Pub. Co.*, 35 So. 2d 399 (Fla. 1948); 11 W. FLETCHER, PRIVATE CORPORATIONS § 5135.1 (perm ed. rev. 1971); H. HENN, *supra* note 10, § 240.

74. 291 So. 2d 114 (Fla. 3d Dist.), *cert. denied*, 303 So. 2d 639 (Fla. 1974).

directors, authorized a new issue of capital stock after they had pressured the plaintiff minority shareholder to resign from the corporation.⁷⁵ Plaintiff was given the opportunity to exercise his preemptive rights but refused to do so. Although the defendants claimed that this recapitalization was needed to repay loans to plaintiff's family, the court held that the only apparent purpose for the new issue of stock was to dilute the plaintiff's interest, and therefore, the defendants' action constituted an abuse of discretion and a violation of their fiduciary duties. The *Biltmore* decision is eminently justified when it is observed that the defendants used the recapitalization funds, among other things, to issue dividends and to excessively increase their salaries. The mere fact that the plaintiff was afforded an opportunity to acquire additional stock cannot excuse the defendants' breach of faith because "the individual defendants knew that the plaintiff, having been ousted from the corporate family, would not invest any more money in the company."⁷⁶ Such an empty gesture cannot be allowed to relieve directors of the duty owed to their shareholders.

c. Business Judgment Rule

Although it is undisputed that officers and directors must act in the best interests of the corporation, were they not immunized from liability arising from poor business decisions which were made in good faith, they would be afraid to take any risk even if it was in the best interests of the corporation. The business judgment rule was therefore created so that if in the course of management, directors in good faith arrive at a decision within the corporation's powers and their authority, for which there is a reasonable basis, a court will not interfere with internal management and substitute its judgment for that of the directors to enjoin or set aside the transaction or to surcharge the directors for any resulting loss.⁷⁷ Florida has given wide discretion in the exercise of directors' business judgment in the performance of their duties.⁷⁸

75. The plaintiff had served as an employee, vice-president and director of the company for 11 years before his employment was terminated. Thereafter, the defendants attempted to purchase plaintiff's stock for considerably less than its fair market value. When the plaintiff refused to accede to defendant's demands, he was pressured to resign from both his officer and director posts in the corporation.

76. 291 So. 2d at 115.

77. H. HENN, *supra* note 10, § 242.

78. *Yarnall Warehouse & Transfer, Inc. v. Three Ivory Bros. Moving Co.*, 226 So. 2d 887 (Fla. 2d Dist. 1969).

The United States Court of Appeals for the Fifth Circuit was called upon to review the exercise of managerial discretion in *Schein v. Caesar's World, Inc.*⁷⁹ In this case, plaintiffs alleged in a derivative action a diminution of corporate assets as a result of the directors' and officers' failure to exercise a clause in an equipment lease executed with Centronics Data Computer Corporation.⁸⁰ Simultaneously with the execution of this lease, Centronics assigned to Caesar's World an option to purchase a large block of the former's stock, subject to a right in Centronics to recapture 50 percent of the stock if the above-mentioned equipment lease were terminated by either party. As a result of a dramatic rise in the price of Centronics stock, Caesar's World exercised its option. Unforeseen difficulties arose, however, so that the equipment in question was never placed into operation, and Centronics thus exercised its right to recapture one-half of the stock obtained by Caesar's World through the exercise of its option. The plaintiffs alleged that the failure of defendants to fix a rent with Centronics so that its right of recapture would be eliminated constituted a breach of their fiduciary duty.

The court correctly concluded that the defendants fulfilled their corporate duties. It was noted that it was incumbent upon the corporate directors to evaluate the relative risks of alternate courses of action and that their decision "was undisputedly a sound exercise of their business judgment which, absent any allegations or showing of bad faith or fraud, is not judicially reviewable."⁸¹ The correctness of the decision is bolstered by the fact that the directors arranged a compromise as to both corporations' rights under the lease and option agreements, which resulted in an immediate profit of roughly \$6.7 million on a \$1.7 million investment. *Caesar's World* thus presented a perfect case for a court to abstain from interfering with the day-to-day operations of a corporation.

8. DERIVATIVE ACTIONS

The shareholder derivative action involves the assertion by a shareholder of a corporate cause of action against persons who have

79. 491 F.2d 17 (5th Cir.), *cert. denied*, 419 U.S. 838 (1974). It is to be noted that the appellate court merely affirmed *per curiam*, attaching a copy of the lower court's memorandum opinion to its opinion.

80. Under the lease, either party had the right to terminate the agreement prior to the end of a six-month's rent-free period commencing when sufficient equipment and accessories were installed and operating. *Id.* at 18.

81. *Id.* at 20.

damaged the corporation in situations where, for some reason, the corporation has failed to enforce the claim directly.⁸² It differs from the individual and class actions which may be brought by shareholders in that the purpose of the derivative action is to obtain a judgment in the corporation's favor, whereas individual and class actions seek to redress damages done to the shareholders as individuals.⁸³

In *Fried v. Easton*⁸⁴ the chief executive officer of a corporation filed a suit as a private individual against one of the corporation's shareholders. The defendant counterclaimed, alleging a breach of plaintiff-counterdefendant's fiduciary duty to the corporation by his intention to convert certain corporate assets to his own use and benefit. As plaintiff's alleged breach of fiduciary duty constituted an injury to the corporation and not to the defendant individually, the appellate court upheld the trial court's dismissal of the counterclaim. Since a suit to recover damages for breach of a director's duty to his corporation is generally treated as a wrong to the corporation,⁸⁵ a proper result was reached in *Fried*, especially in light of the procedural rule that a counterclaim must exist in favor of a defendant in the same right in which he is sued.⁸⁶

The threshold question which must be answered in any suit is whether the plaintiff has standing to sue, for unless this requirement is satisfied, no action can be maintained. The court in *Belcher v. Schilling*⁸⁷ was faced with the issue of whether shareholders who had not given proxies to the defendants would have standing to sue on their own behalf for misleading statements made by the defendants in obtaining proxies from other shareholders. The court in *Belcher* answered affirmatively because

“it is not important whether or not the complaining stockholders were deceived—they could suffer equally damaging injury to their corporate interests merely because other shareholders were deceived”⁸⁸

82. H. HENN, *supra* note 10, § 360.

83. Sowards, *Corporations*, 22 U. MIAMI L. REV. 339, 346 (1967).

84. 293 So. 2d 87 (Fla. 3d Dist. 1974).

85. H. HENN, *supra* note 10, § 360, at 758-59.

86. *Lucas v. Wade*, 43 Fla. 419, 31 So. 231 (1901); *Fidelity-Philadelphia Trust Co. v. Ball*, 208 So. 2d 282 (Fla. 3d Dist. 1968).

87. 309 So. 2d 32 (Fla. 3d Dist. 1975).

88. *Id.* at 34, quoting *Dann v. Studebaker-Packard Corp.*, 288 F.2d 201, 209 (6th Cir. 1961).

The court clearly arrived at the correct conclusion since the directors' alleged improper and illegal obtaining of proxies in order to gain control of the company certainly had an adverse effect on the plaintiffs' right to vote.⁸⁹

The court in *Belcher* also considered whether the corporation had allegedly suffered sufficient injury from the director's conduct to warrant a derivative action. It noted that each count of the complaint specifically alleged harm to the corporate entity due to the defendants' fraud, bad faith, and gross abuse of discretion. The court then discussed the statutory requirement⁹⁰ that an allegation of a corporation's refusal to seek redress for the acts complained of be included in the complaint. As demand on directors need not be made if it would be useless,⁹¹ the court held that the statutory requirement was met and that a derivative action was proper, since plaintiffs alleged that a demand upon the corporation to remove defendants from their position of corporate control would have been futile because those same defendants were in control of the corporation.

The final case in the survey period dealing with derivative actions concerns a shareholder's right to maintain such a suit more than three years after the corporation has been dissolved. Florida's dissolution statute⁹² permits a dissolved corporation to sue and be sued in its corporate name during the 3-year period following its dissolution. Thereafter, the corporation is barred from maintaining an action.⁹³ Since the plaintiff in a derivative action steps into the shoes of the corporation of which he is a shareholder,⁹⁴ the District Court of Appeal, Third District, properly concluded in *Carothers v. Patton*⁹⁵ that a shareholder cannot bring a derivative action where his corporation is unable to sue in its own stead.

89. The *Belcher* court refused to follow *Abbey Properties Co. v. Presidential Ins. Co.*, 119 So. 2d 74 (Fla. 2d Dist. 1960), where it was implied that if proxies which were properly obtained were improperly voted or voted in excess of their authority, the only parties who could complain were the shareholders who had given their proxies.

90. FLA. STAT. § 608.131(2) (1973). *But see* Fla. Laws 1975, ch. 75-250, § 50, creating FLA. STAT. § 607.147 (1975), which no longer requires such an allegation.

91. *Orlando Orange Groves Co. v. Hale*, 107 Fla. 304, 144 So. 674 (1932).

92. FLA. STAT. § 608.30 (1973). *See also* Fla. Laws 1975, ch. 75-250, §§ 86, 99, creating FLA. STAT. §§ 607.261, .297 (1975). *But note* that under section 608.30, the liquidation of corporate assets occurs during the three years following dissolution, while under section 607.261, corporate assets must be liquidated before the corporation is dissolved.

93. *Fleischer v. A.A.P., Inc.*, 222 F. Supp. 40 (S.D.N.Y. 1963), *aff'd*, 329 F.2d 424 (2d Cir.), *cert. denied*, 379 U.S. 835 (1964).

94. *See* note 83 *supra* and accompanying text.

95. 288 So. 2d 293 (Fla. 3d Dist. 1973).

9. STOCK CERTIFICATES

The stock certificate is the instrument which evidences the shareholder's interest in the corporation. Such interest may exist even though no stock certificate is issued.⁹⁶ The stock certificate merely serves to identify the shareholder and to facilitate the transfer of his interest.

In *Baywood Furniture Mart, Inc. v. Kennedy*⁹⁷ the plaintiff agreed to sell all of the outstanding stock of his closely-held corporation to the defendant. Even though the defendant took possession and control of the company after the closing of the deal, "[f]or reasons not entirely clear, the stock certificates were not turned over"⁹⁸ to the new owner. When the plaintiff, approximately three years after the sale took place, foreclosed on the mortgage that he had obtained as security for the defendant's promissory note, the defendant claimed that it should be exonerated from its obligations arising from the transaction because of the failure of the plaintiff promptly to turn over the stock certificates. The court used a quasi-estoppel analysis to deny defendant's claim, reasoning that defendant was not hampered or prejudiced by reason of not having the certificates. The decision in *Baywood* indicates that the court will not permit a party to take advantage of a merely technical violation of the law when he is not actually injured.

10. DEPARTMENT OF CITRUS

The Department of Citrus was created by the Florida legislature to carry out the provisions and requirements of the Florida Citrus Code, Florida Statutes chapter 601.⁹⁹ The Department is empowered to act as a body corporate for all purposes necessary to its statutory role.¹⁰⁰

96. H. HENN, *supra* note 10, § 134. Although FLA. STAT. § 608.41 (1973) states that every shareholder shall be entitled to a stock certificate, it does not require that a corporation issue such certificates unless a shareholder makes the appropriate request. *See also* Fla. Laws 1975, ch. 75-250, § 23, *creating* FLA. STAT. § 607.067 (1975).

97. 295 So. 2d 350 (Fla. 2d Dist. 1974).

98. *Id.* at 351.

99. FLA. STAT. § 20.29 (1973). Prior to the Governmental Reorganization Act of 1969 (Fla. Laws 1969, ch. 69-106), the major portion of the duties of the Department of Citrus was carried out by the Florida Citrus Commission.

100. FLA. STAT. § 601.05 (1973). The legislature has authorized the creation of other corporations for limited purposes. *See, e.g.*, FLA. STAT. § 374.011 (1973) (Florida Canal Authority).

The extent to which the Department is to be treated as a body corporate was tested in *State Department of Citrus v. Huff*.¹⁰¹ The plaintiff, a former chairman of the Florida Citrus Commission which exists within the Department of Citrus and which heads up the Department, had incurred expenses in defending himself in a criminal proceeding arising from certain acts that were allegedly performed in his capacity as chairman. Plaintiff sued the Department to recover these expenses under the statutory section¹⁰² which provides that a corporate director shall be entitled to indemnification of litigation expenses, including attorneys' fees, incurred by him in the successful defense of a criminal action which arises out of the director's corporate duties. Plaintiff's claim for relief was denied by the District Court of Appeal, Second District. The court failed to grant plaintiff's claim as a result of its twin findings that the Department of Citrus did not have full corporate powers and that the plaintiff's claim under the indemnification statute did not fall within the very narrowly defined purposes of the Department.

The decision in *Huff* seems overly restrictive, even though it is supported by a prior Attorney General Opinion.¹⁰³ The Department of Citrus possesses "all the powers of a body corporate for all purposes necessary for fully carrying out the provisions and requirements of this chapter."¹⁰⁴ The Florida Citrus Commission is composed of twelve people appointed by the governor and confirmed by the senate, and they are required to faithfully carry out their mandated function.¹⁰⁵ It would seem that the Florida citrus industry would be benefited and protected if the members of the Florida Citrus Commission knew that they would be indemnified for any legal expenses incurred in the successful defense of a criminal proceeding arising from the member's official actions. For this reason, the court in *Huff* should have found that the Department of Citrus, although a limited body corporate, was required to indemnify plaintiff for his expenses.

101. 290 So. 2d 130 (Fla. 2d Dist.), *cert. denied*, 295 So. 2d 632 (Fla. 1974).

102. FLA. STAT. § 608.13(14)(c) (1973). *See also* Fla. Laws 1975, ch. 75-250, § 5, *creating* FLA. STAT. § 607.014(3) (1975).

103. Fla. Att'y Gen. Op. 068-44, [1967-68] FLA. ATT'Y GEN. BIENNIAL REP. 234.

104. FLA. STAT. § 601.05 (1973).

105. FLA. STAT. § 601.04 (1973).

II. SECURITIES REGULATION

A. *New Legislation*

The 1974 and 1975 sessions of the Florida legislature produced two modifications to the Florida blue sky laws.¹⁰⁶ First, the clause within Florida Statutes section 517.21(1) (1973), which limited the time in which an action could be brought for the recovery of the purchase price of an unlawfully sold security to 2 years from the date of such sale, was deleted.¹⁰⁷ The limitation period for actions arising under the Florida blue sky laws is thus now governed by the general statute of limitations.¹⁰⁸ The effect of the legislature's action was to double the time in which an action can be brought under Florida Statutes chapter 517, from 2 to 4 years.¹⁰⁹

Second, statutory bond requirements for dealers registered to sell securities in Florida were increased from \$5,000 to \$50,000, unless the dealer is a member of the Securities Investor Protection Corporation, in which case no bond is required.¹¹⁰

B. *Recent Decisions*¹¹¹

1. PERSONS LIABLE FOR ILLEGAL SALE OF SECURITIES

Pursuant to Florida Statutes section 517.21(1) (Supp. 1974), a purchaser of illegal securities in Florida may recover the purchase price of such securities in an action against the officer of the unlawfully created corporation if the officer has "personally participated or aided in *any way* in making the sale"¹¹² Although it is clear that the quoted language refers to some activity by the officer in inducing the purchaser to invest,¹¹³ the limits of the activities which

106. FLA. STAT. ch. 517 (1973).

107. Fla. Laws 1974, ch. 74-382, § 28.

108. FLA. STAT. § 95.11 (Supp. 1974).

109. FLA. STAT. § 95.11(3) (Supp. 1974) provides for a 4-year statute of limitations for an action founded on a statutory liability or any action not specifically provided for.

110. The change was made pursuant to Fla. Laws 1974, ch. 74-278. The title of the law indicates that FLA. STAT. §§ 517.12, 517.13, 517.14 and 517.15 are to be changed to reflect the increased amount. Unfortunately, the text of FLA. STAT. § 517.12 (Supp. 1974) still reflects the prior amount of \$5,000.

111. The highly significant case of *Data Lease Financial Corp. v. Barad*, 291 So. 2d 608 (Fla. 1974), in which the Supreme Court of Florida applied the blue sky laws to void a transaction involving two closely held corporations, was reported and analyzed in Bell & Goodman, *Corporate Law and Securities Regulation*, 28 U. MIAMI L. REV. 922, 944-46 (1974).

112. Emphasis added.

113. *Nichols v. Yandre*, 151 Fla. 87, 9 So. 2d 157 (1942).

fall within the statutory scope have not been precisely drawn by the courts.

The District Court of Appeal, Third District, was presented with an opportunity to further clarify these limits in *Ruden v. Medalie*.¹¹⁴ Defendant, who was an attorney, was the secretary of a corporation he had formed.¹¹⁵ Defendant's signature appeared on many of the corporation's debentures as an attesting witness to the signature of the corporation's president. The plaintiff, an unsophisticated investor, complained that the corporation's president had exchanged with him some of the debentures, which were nonexempt and unregistered,¹¹⁶ for \$60,000-worth of blue chip securities; the president was never seen again. Plaintiff, who had known the defendant socially before the incident, instituted this action to rescind her capital investment, alleging that she had relied upon defendant's signature as an indication that the sale was in full compliance with the law. The court in *Ruden*, placing heavy emphasis on the fact that defendant neither knew of nor discussed plaintiff's interest in investing in the corporation, held that

the defendant's mere act of signing nine debentures in blank as an attesting witness and corporate secretary was [not] a legally sufficient inducement to the plaintiff to hold defendant personally liable.¹¹⁷

It was further stated that the plaintiff's

claim that she was persuaded to purchase the debentures by the appearance of defendant's signature on nine of them should be weighed against her own corresponding duty to exercise precaution in safeguarding her own interest.¹¹⁸

The court's analysis appears to be faulty. First, in determining

114. 294 So. 2d 403 (Fla. 3d Dist. 1974).

115. The defendant, who was inactive in the operation of the corporation, claimed that he was initially listed as the secretary (and a director) of the corporation only to fulfill the required number of positions for the company. In this regard, it might be noted that an attorney cannot be held liable under FLA. STAT. § 517.21(1) (Supp. 1974) based upon his mere filing of the necessary documents with the Secretary of State to form a corporation. *Hughes v. Bie*, 183 So. 2d 281 (Fla. 2d Dist. 1966).

116. Defendant testified that he had cautioned the corporation's president as to the registration requirements of Florida's blue sky laws, but was unaware that the debentures were not registered. Defendant stated that the corporation's president had informed him that he had another attorney in Boston who could handle his affairs. 294 So. 2d at 405.

117. 294 So. 2d at 406.

118. *Id.* The plaintiff admitted that, being an inexperienced investor, she did not investigate the books and records of the corporation nor the value of the debentures before investing.

that an officer's signature on an illegal security does not constitute "some activity" under section 517.21(1), the court not only went against authority from other jurisdictions decided under similar statutes,¹¹⁹ but also ignored the public policy consideration that an officer of a corporation should be responsible for the documents he signs.¹²⁰ If officers of a corporation are under a duty to exercise due diligence attesting to debentures, there would arguably exist tighter controls on the possibilities of fraud. Second, the court, in effect, used an estoppel analysis when it determined that plaintiff should not be able to rely on defendant's signature as a result of her failure to investigate fully the corporation's track record. It seems that the plaintiff was held to an excessive duty in light of the fact that

[e]stoppel under Florida law requires that the stock purchaser directly participate in the management of the issuing corporation or otherwise exercise some control over the corporation.¹²¹

Interpretation of section 517.21 was also involved in *Frye v. Platinum Coast Aviation, Inc.*¹²² Plaintiff brought an action against a salesman, a dealer, and a surety¹²³ under the above statute, presenting the question of whether a dealer and a surety are liable to a purchaser of nonexempt, unregistered securities which were sold by one of the dealer's salesmen without knowledge and without authorization of the dealer. The court in *Frye* responded in the negative, apparently relying on the common law rule of agency that principals are not liable for the actions of their agents outside the scope of employment.¹²⁴

The District Court of Appeal, Fourth District, arrived at a conclusion which is arguably wrong as to both the bondsman and the dealer. First, any person having a right of action against a dealer or salesman under section 517.21(1) also has a right of action¹²⁵ under the bond which is posted pursuant to Florida Statutes section 517.12

119. See Annot., 44 A.L.R.3d 588, 605-07 (1972).

120. Cf. *Escott v. BarChris Constr. Corp.*, 283 F.Supp. 643 (S.D.N.Y. 1968).

121. *Henderson v. Hayden, Stone, Inc.*, 461 F.2d 1069, 1073 (5th Cir. 1972). In this case, a sophisticated investor who entered into a contract for the purchase of unregistered stock, knowing that the stock was unregistered, was not estopped from obtaining rescission under FLA. STAT. § 517.21(1) (1971). *Contra*, *Sorenson v. Elrod*, 286 F.2d 72 (5th Cir. 1960).

122. 298 So. 2d 522 (Fla. 4th Dist. 1974). This case was handed down without a majority opinion but with an excellent dissenting opinion.

123. A statutory bond requirement is set out in FLA. STAT. § 517.12(4) (1973).

124. W. SEAVEY, LAW OF AGENCY § 87 (1964).

125. Pursuant to FLA. STAT. § 517.21(2) (Supp. 1974).

(Supp. 1974). Since the trial court agreed that the plaintiff had a right of action against the salesman, it is impossible to comprehend why, under section 517.21(2), the plaintiff did not have a right of action under the bond against the surety.¹²⁶

Second, the facts of the case seemingly support an application of the well-established rule of agency law that a principal is liable for misrepresentations made by an agent during the course of transactions apparently authorized if the agent's position made the deceit possible.¹²⁷

Third, one must agree with the dissenting judge in *Frye* who, concluding that the paramount concern of the blue sky laws is the protection of purchasers and the condemnation of illegal sales of securities, believed that the legislature intended to place the burden and responsibility for all illegal sales upon those registered under its laws as dealers. Protection of the investor will be eroded if he cannot be confident that his purchase of securities from a registered salesman is in full compliance with the law. The court's decision in *Frye* thus appears to violate both the letter and the spirit of Florida's blue sky laws.

2. STATUTE OF LIMITATIONS

The federal securities laws contain no limitation period that is expressly applicable to claims arising under rule 10b-5,¹²⁸ nor does federal law provide any general statute of limitations for civil actions. Consequently, the limitation period applied by a federal court is that which the forum state applies to the state remedy which bears the closest substantive resemblance to rule 10b-5 and which best effectuates its purpose.¹²⁹

There are two causes of action in Florida which bear a resemblance to rule 10b-5—common law fraud and Florida Statutes section 517.301(1) (1973), which deals with fraudulent securities transactions. In *Hudak v. Economic Research Analysts, Inc.*¹³⁰ the United States Court of Appeals for the Fifth Circuit therefore had to choose

126. 298 So. 2d at 523 n.6 (Walden, J., dissenting).

127. W. SEAVEY, *supra* note 124, § 92.

128. 17 C.F.R. § 240.10b-5 (1975).

129. *Sargent v. Genesco, Inc.*, 492 F.2d 750 (5th Cir. 1974).

130. 499 F.2d 996 (5th Cir. 1974), *cert denied*, 419 U.S. 1122 (1975). The same question was presented in the companion case of *O'Connell v. Economic Research Analyst, Inc.*, 499 F.2d 994 (5th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975).

between the then existing 3-year limitation period for common law fraud¹³¹ and a 2-year limitation for an action under section 517.301(1).¹³² The court examined both alternatives and concluded that the policies underlying rule 10b-5 are more nearly embodied in section 517.301(1) and therefore applied the shorter limitation period.

The court's decision seems to be based upon a sound analysis of the federal and state rules applying to the fraudulent sale of securities. Not only is the language of rule 10b-5 strikingly similar to that of section 517.301(1), but the interpretation of the Florida blue sky provision has paralleled the development of rule 10b-5.¹³³ Indeed, section 517.301(1) has been referred to as "the mirror image" of rule 10b-5.¹³⁴

3. CRIMINAL PROSECUTIONS

Two minor criminal prosecution cases under Florida's blue sky laws occurred during the survey period. In the first case,¹³⁵ the defendant claimed that it was not illegal for him to sell securities without being registered as a broker or dealer as required under Florida Statutes section 517.12(1) (1973) because the sales were to nonresidents of the State of Florida. The court quickly dismissed this argument, as the applicable statute prohibits all sales of securities within Florida without regard to the residence of the purchaser.

In the companion case,¹³⁶ the defendant was prosecuted for the delivery of securities to a bank without being registered as a broker or dealer. The court rejected the state's contention that in order to qualify for an exempt transaction under Florida Statutes section 517.06(5) (1973), one must sell securities to a bank, in the bank's

131. FLA. STAT. § 95.11(5)(d) (1973). A 4-year limitation period for common law fraud actions is now provided for by FLA. STAT. § 95.11(3)(j) (Supp. 1974).

132. Since the time of the *Hudak* and *O'Connell* cases, the statute of limitation for actions arising out of blue sky laws violations has been changed to 4 years. See notes 107-09 *supra* and accompanying text.

133. Whereas the common law action for fraud requires a false statement of fact known by the defendant to be false at the time it was made, *Poliakoff v. National Emblem Ins. Co.*, 249 So. 2d 477 (Fla. 3d Dist. 1971), the Florida courts have relaxed such traditional notions of scienter and evil purpose in actions brought under its blue sky laws. *State v. Houghtaling*, 181 So. 2d 636 (Fla. 1965).

134. Comment, *Opening a Pandora's Box — Disclosure Under the Florida Securities Act*, 23 U. MIAMI L. REV. 593, 594 (1973).

135. *State v. Hayes*, 305 So. 2d 819 (Fla. 1st Dist. 1975).

136. *State v. Hayes*, 305 So. 2d 822 (Fla. 1st Dist. 1975).

name and for the bank's use. Since the statute expressly exempts "the . . . transfer or delivery of securities to a bank . . .,"¹³⁷ the court correctly sustained the lower court's dismissal of the information against the defendant.

4. DEPARTMENT OF BANKING AND FINANCE

The Department of Banking and Finance administers and provides for the enforcement of all the provisions of Florida's blue sky laws¹³⁸ and is empowered to enjoin the unlawful sale of securities.¹³⁹ In *Wee Mac Corp. v. State*¹⁴⁰ the Department attempted to seek recovery of the purchase price of illegally sold securities on behalf of the private purchasers. The court refused to grant the Department such power, finding that nothing in Florida Statutes chapter 517 authorizes it to do so. It was pointed out that

[t]he wisdom of this decision of the legislature is evident since the private purchasers are not parties to this suit and therefore have not been heard upon the business decision involved.¹⁴¹

The court was certainly justified in not permitting the Department of Banking and Finance to utilize section 517.21 to recover the purchase price of securities sold in violation of the Act since it is clear from even a cursory reading of the statute that this right of recovery belongs solely to the purchaser.

137. FLA. STAT. § 517.06(5) (1973).

138. FLA. STAT. § 517.03 (1973).

139. FLA. STAT. § 517.19 (1973).

140. 301 So. 2d 101 (Fla. 3d Dist. 1974).

141. *Id.* at 102.