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Corporate Law And Securities Regulation

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CORPORATE LAW AND SECURITIES REGULATION*

JOHN P.A. BELL** AND CRAIG G. GOODMAN***

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* The Survey period includes legislation enacted during 1972 and 1973 Regular and Special Sessions of the Florida Legislature and judicial decisions reported from 250 So. 2d through 287 So. 2d, 430 F.2d through 487 F.2d and 325 F. Supp. through 367 F. Supp.

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I. CORPORATE LAW

A. *New Legislation*

The most significant legislation relating to corporations during the survey period concerns (a) fractional shares and scrip and (b) the myriad statutory changes necessary to conform Florida's Corporation Code with the recently enacted corporate income tax code.

1. FRACTIONAL SHARES AND SCRIP

Florida became one of a growing number of jurisdictions to enact a statutory provision¹ expressly authorizing the issuance of fractions of shares and scrip. "Scrip" is a certificate exchangeable for shares or cash, usually before a specified time. The issuance of fractional shares and scrip often creates bookkeeping and administrative problems for the issuing corporation. Where statutes were silent regarding such issuance, the Secretary of State would often refuse to file corporate documents authorizing fractional shares or scrip. Yet their issuance is often desirable regarding such matters as stock dividends, splits, reorganizations and mergers or consolidations. The Florida statute allows the issuance of fractional shares or scrip for such purposes, as well as the making of reasonable arrangements between the issuing corporation and its shareholders regarding the purchase, sale or conversion of fractional interests into full share interests.

Where fractional shares are issued, the rights of their holders respecting dividends, voting, preemptive rights and net assets on liquidation have not always been adequately defined. The Florida statute declares that the holder of a fractional share certificate is entitled to receive dividends, exercise voting rights and participate in any asset distribution upon liquidation, but makes no further specifications. In contrast, the holder of scrip does not have any such rights unless otherwise provided by the issuer.

This statute is a sound step forward in clarifying problems concerning fractional shares and scrip. Further delineations of fractional share and scrip holders' rights, as well as other clarifications, will hopefully be forthcoming after an analysis of the statute's effectiveness and fairness has been made.

1. Fla. Laws, 1972, ch. 72-95, § 1, *creating* FLA. STAT. § 608.151 (1973).

2. CONFORMANCE WITH THE FLORIDA INCOME TAX CODE

The legislature amended and repealed numerous sections² of Florida's Corporation Code to make it consistent with Florida's Corporate Income Tax Code.³ Neither the inoperability or repeal of those sections impairs or abates a corporation's liability for prior unpaid taxes.⁴

3. CORPORATE "RESTORATION"

Statutory amendments were enacted to allow a dissolved domestic corporation or a foreign corporation whose permit to do business in Florida had been cancelled to "restore" its corporate entity or its permit to do business in Florida.⁵ To do so, such corporation must file its current annual report and pay various fees in lieu of capital stock or corporate privilege taxes which would otherwise have been due. Moreover, the owners of a majority of the capital or interest in any such domestic or foreign corporation may effectuate the restoration of its good standing with the state by following the same procedures.

4. MISCELLANEOUS

Florida's corporation laws⁶ were among the many statutes amended to conform to the restructuring of Florida's court system in accordance with revised article V of the Florida Constitution. Language changes were also made to various corporate laws to create consistency with Florida's corporate annual report and filing fee requirements.⁷

B. Recent Decisions

Of the many judicial decisions relating to corporations, the most important dealt with (a) the circumstances under which courts will "pierce the corporate veil" to impose individual liability on the corporate shareholders and (b) the liabilities of corporations and their officers and directors.

1. CORPORATE TRADENAMES

Since corporate tradenames are proliferating, the problem of "tradename piracy" often arises. In *Shatterproof Glass Corporation v. Buckmaster*,⁸ a foreign corporation, not qualified to do business in Florida, sought to enjoin a domestic corporation from doing business in a certain

2. Fla. Laws, 1973, ch. 73-333, § 157-58. See also Fla. Laws, 1973, ch. 73-101.

3. FLA. STAT. ch. 220, formerly Fla. Laws, 1971, ch. 71-984.

4. Fla. Laws, 1973, ch. 73-333, §§ 157-58.

5. Fla. Laws, 1973, ch. 73-200, creating FLA. STAT. § 608.37 (1973), amending FLA. STAT. § 608.37(1)(2) (1971).

6. Fla. Laws, 1973, ch. 73-334.

7. Fla. Laws, 1972, ch. 72-218.

8. 256 So. 2d 531 (Fla. 2d Dist. 1972).

Florida county under the tradename, "National Glass Company," the same tradename which the plaintiff used in that county. The District Court of Appeal, Second District, held that the plaintiff's evidence, which showed only that the defendant may have had "subliminal" knowledge of the plaintiff's tradename, was insufficient to prove that the defendant used the tradename with either a fraudulent purpose or actual knowledge that the tradename was being used by the plaintiff. Most defendants probably will not fare as well under this standard as did the defendant in this case, particularly where the plaintiff has advertised substantially in the subject area, a fact which would tend to negate the defense of no actual knowledge.

2. JURISDICTION

The corporate decisions dealing with the jurisdictional reach of Florida's "long-arm" statutes over nonresident foreign corporations indicate that Florida's courts will usually sustain jurisdiction when they conclude it is fair or consistent with due process. Persons asserting such jurisdiction will rarely suffer dismissal except where they fail to produce some evidence supporting their naked allegations.

For example, in *Eder Instrument v. Allen*,⁹ the plaintiffs brought a personal injury suit against a foreign corporation which had made and sold an allegedly defective gastroscope to a Florida hospital. The plaintiffs obtained substituted service of process on the foreign corporation. The defendant moved to dismiss for lack of personal jurisdiction on the ground that it was not "doing business" in Florida. The District Court of Appeal, Third District, affirmed the trial court's denial of the motion on the ground that the record showed that the constitutionally required "minimum contacts" were present. The defendant had "systematically and regularly" sold its products for "pecuniary profit" to persons within Florida and the cause of action had arisen out of the use of the defendant's product in Florida. The court declared that public policy influenced its conclusion that a supplier of a medical instrument having intimate internal physical contact should be amenable to service of process.¹⁰

9. 253 So. 2d 902 (Fla. 3d Dist. 1971).

10. *Id.* at 906. That comment underscores the policy-rooted basis of most of these jurisdictional cases. An example is the court's conclusion that the defendant was "systematically and continuously" participating in sales of its products to Florida's citizens. The defendant corporation was not licensed to do business in Florida. It had not solicited sales or displayed its medical products in Florida, but had advertised them in various unspecified medical journals which the subject hospital administrators had read. The company did not have any agents, brokers, wholesalers, distributors or detail men in Florida; it did not maintain an office or mailing address in Florida. The company's usual method of business was to receive orders by mail and deliver the products by common carrier, F.O.B. Chicago. The company mailed price lists upon request. During the three years preceding the lawsuit, the defendant had sold about \$5,000 of its products annually to Florida doctors and hospitals. If the above acts constitute "systematic and regular" sale of products within Florida, as the appellate court found, then what commercial acts would not come within that con-

The District Court of Appeal, Third District, in *Richard Bertram & Co. v. American Marine, Ltd.*,¹¹ held that a foreign corporation is amenable to substituted service of process merely upon affidavits. The court stated that the concurrence of uncontroverted matters contained within otherwise conflicting affidavits showed that the defendant Hong Kong corporation was "doing business" in Florida. Among other things, the court declared that the affidavits showed that the subject dealership agreement was entered into in Florida, the defendant advertised in Florida that the plaintiff was its agent¹² and the defendant exercised control¹³ over the plaintiff by requiring periodic inventory reports.

However, as *Citizens & Southern Bank v. Popkin*¹⁴ illustrates, mere naked allegations of jurisdiction will not be upheld. In that case, the plaintiff sought jurisdiction over a foreign corporation by substituted service of process. The defendant moved to dismiss and supported its motion by an affidavit. In response, the plaintiff merely restated the allegations of his complaint but failed to substantiate his allegations by an affidavit containing factual statements or other proof. Although the trial court had denied the motion, the District Court of Appeal, Third District, reversed and remanded, holding that the plaintiff failed to show facts clearly justifying the use of substituted service of process.

Perhaps the decision in *Martin Blumenthal Associates, Inc. v. Dinsmore*¹⁵ reflects the outer limits of the extension of personal jurisdiction by the Florida courts. The plaintiff Florida corporation sued the defendants, all nonresidents of Florida, for a brokerage commission related to an acquisition of an interest in a Florida corporation. During the six months it took to negotiate the transaction, only one of the defendants briefly visited Florida to discuss the matter. All other negotiations transpired in South Dakota or via telephone and mail between South Dakota and Florida. The transaction was closed in Chicago.

The plaintiff obtained substituted service upon the defendants, who were granted a dismissal by the trial court on the ground that the plaintiff had not shown that the defendants had the constitutionally required minimum contacts with Florida. On appeal, the defendants argued that

cept? For a case where the systematic and regular contact is more apparent with Florida's citizens, see *Reader's Digest Ass'n v. State*, 251 So. 2d 552 (Fla. 1st Dist. 1971) (advertisements sent to at least 10,000 persons in Florida).

11. 258 So. 2d 335 (Fla. 3d Dist. 1972) [hereinafter cited as *Bertram*]. Compare *Compuguide Corp. v. Sachs*, 259 So. 2d 513 (Fla. 3d Dist. 1972) (distinguishing *Bertram*) with *Sonnenblick-Goldman Corp. v. Feldman*, 266 So. 2d 48 (Fla. 3d Dist. 1972) (affirming on the basis of *Bertram* without further comment).

12. The agency factor, in connection with other factors, was also utilized to uphold jurisdiction in *4th Dimension Interiors, Inc. v. Decorator Services, Ltd.*, 256 So. 2d 571 (Fla. 3d Dist. 1972).

13. The control factor was utilized to negate jurisdiction in *Compuguide Corp. v. Sachs*, 259 So. 2d 513 (Fla. 3d Dist. 1972), but was essential to upholding jurisdiction in *Martin Blumenthal Assoc., Inc. v. Dinsmore*, 289 So. 2d 481 (Fla. 3d Dist. 1974).

14. 281 So. 2d 522 (Fla. 3d Dist. 1973).

15. 289 So. 2d 481 (Fla. 3d Dist. 1974) [hereinafter referred to as *Blumenthal*].

although they acquired stock in a Florida corporation and realized a pecuniary benefit, their activity constituted a business venture carried on outside of Florida. The District Court of Appeal, Third District, reversed on the basis that a single sale of corporate stock owned by non-residents to a Florida purchaser through a Florida broker made the nonresidents subject to substituted service where the nonresidents had "some degree of control" over the personal property involved—their own stock—and over the broker.¹⁶

3. VENUE

Two venue cases decided during the survey period reflect how legal doctrines are utilized to effectuate different results in cases with slightly varying factual patterns. In *Al Stone Plumbing, Inc. v. Colonial Leasing Co.*,¹⁷ a foreign corporation sued the defendant in Dade County, Florida. The defendant, which maintained its place of business in Pinellas County, Florida, moved for a change of venue to Pinellas County, but its motion was denied. The District Court of Appeal, Third District, reversed, holding that a defendant corporation may choose to be tried in the county of its residence when neither the plaintiff nor the defendant was a resident of or had its customary place of business in the county where the action was filed, and when the claim for relief had not accrued in that county.

In contrast, in *Merrill Stevens Yachts, Inc. v. Irwin Yacht & Marine Corp.*,¹⁸ two domestic corporations with their principal places of business in Dade County sued the defendant in Dade County. The defendant was granted a transfer of venue to Pinellas County on the basis that it did not have nor did it usually maintain an office in Dade County for its customary business and because the claim for relief did not arise in Dade County. The District Court of Appeal, Third District, again reversed the trial court and disallowed the transfer of venue, holding that a claim for money owed, for which no place of payment was agreed upon, could be brought in the county of the payee's residence since the claim accrued there.

4. PIERCING THE CORPORATE VEIL

Under what circumstances may a court pierce the fictional "corporate veil" and hold the corporation's principals liable for its acts? This

16. For an example of a case where the plaintiffs lost the jurisdictional issue at the trial court level because, among other reasons, they made the jurisdictional issue confusing to the court, see *Youngblood v. Citrus Assoc. of the N.Y. Cotton Exch., Inc.*, 276 So. 2d 505 (Fla. 4th Dist. 1973). In any event, the court in that case should have allowed jurisdiction since it could have taken judicial notice that the defendant exchange did business in Florida, as evidenced by its literature in most national brokerage houses in Florida. For that reason among others, the validity of the decision is questionable. *Martin Blumenthal Assoc. Inc. v. Dinsmore*, 289 So. 2d 481 (Fla. 3d Dist. 1974), provides an instructive counterpoint.

17. 254 So. 2d 557 (Fla. 3d Dist. 1971).

18. 276 So. 2d 230 (Fla. 3d Dist. 1973).

issue has always been hotly contested since the result is usually of considerable economic significance to the litigants. There have been a number of recent cases involving this issue culminating in the Supreme Court of Florida's decision in *Levenstein v. Sapiro*¹⁹ (more commonly known as the "Loans, Inc." case), to be analyzed below.

The time-honored legal rhetoric in Florida is that the courts are reluctant to pierce a corporate veil unless it is necessary to prevent injustice.²⁰ In *Aztec Motel, Inc. v. State*,²¹ the Supreme Court of Florida declared that it would look through the screen of a corporate entity to the individuals who compose it in cases in which the corporation is (a) a mere device or sham to accomplish some ulterior purpose, (b) a mere instrumentality or agent of another corporation or individual owning all or most of its stock, or (c) where the purpose is to evade some statute or to accomplish some fraud or illegal purpose.²²

The supreme court apparently applied the agency or instrumentality standard to the fascinating factual scenario of *Levenstein*. A corporation with the decidedly Dickensian appellation of Loans, Inc., which was wholly owned and controlled by one Sapiro, its president, sold some land. Sapiro then assiduously dissolved Loans, Inc. Subsequently, the plaintiff sued, among others, Sapiro and the defunct Loans, Inc. for breach of contract. The supreme court framed the dispositive issue as "whether the wholly owned and controlled corporation in this case should have its corporate veil pierced so as to hold its president and owner liable for breach of contract."²³ The court answered the issue affirmatively, holding that where the relationship between an individual and a corporation is "personalized," actual fraud does not have to be shown to pierce the corporate veil and the individual may be found liable for a contractual obligation made in the name of the corporation.

Although the *Levenstein* decision involved a wholly-owned close corporation which was dissolved under inequitable circumstances leaving the plaintiff without meaningful recourse against it, the court's language does not appear restricted to that context since a "personalized" relationship could also exist in a larger or publicly-owned corporation.

In *House of Koscot Development Corp. v. American Line Cosmetics, Inc.*,²⁴ the plaintiff sued a parent corporation, its subsidiary and the principal allegedly controlling them for breach of contract. In the trial court, the plaintiff successfully argued that the subsidiary was merely the alter-ego of the parent and the principal, and that the jury should pierce the corporate veil and hold them jointly liable.

On appeal, the United States Court of Appeals, Fifth Circuit, framed

19. 279 So. 2d 858 (Fla. 1973) [hereinafter referred to as *Levenstein*].

20. E.g., *Robert's Fish Farm v. Spencer*, 153 So. 2d 718, 721 (Fla. 1963).

21. 251 So. 2d 849 (Fla. 1971) [hereinafter referred to as *Aztec Motel*].

22. *Id.* at 852.

23. *Levenstein v. Sapiro*, 279 So. 2d 858, 860 (Fla. 1973).

24. 468 F.2d 64 (5th Cir. 1972).

the issue as whether under Florida law there was sufficient evidence of the "abuse" of the subsidiary's corporate entity to hold the controlling person and/or the parent liable. Citing the supreme court's decision in *Aztec Motel*²⁵ as enunciating alternative rationales for establishing the liability of an individual for the acts of a corporation, the court affirmed. It stated that the evidence supported an inference that the principal controlled the parent and subsidiary, used them as his personal "conduits" or "instrumentalities" and caused the subject contract to be cancelled to protect his own interests to the detriment of the subsidiary's welfare.²⁶

The implication of these decisions seems to be that the corporate shield can no longer be used where inequitable or unconscionable actions are shown, regardless of what legal labels are ultimately placed upon the rationale used to affix liability. The theories of (a) personalization, (b) agency, conduit or instrumentality or (c) identity may be no more than divergent linguistic formulations of the concept of unconscionability. In any case, the parameters of these theories remain to be developed.²⁷

5. CORPORATE CIVIL LIABILITY FOR THE ACTS OF AGENTS

As noted in the previous section, the mere legal form of a transaction may be disregarded in certain circumstances, particularly those which appear to be unconscionable. The case of *McCabe v. Howard*²⁸ illustrates this rationale. In *McCabe*, through the efforts of the plaintiff broker, a corporation leased property with an option to purchase, but never exercised the option. The property was thereafter acquired by the corporation's president in his own name and the prior lease payments were credited to his purchase payment. The broker sued, contending that, in substance if not in form, the corporation had purchased the property. The trial court directed a verdict against the plaintiff, but the District Court of Appeal, Second District, reversed and remanded. The court held that it was a jury question whether the corporation purchased the property through its president. It declared that the jury was entitled to infer the existence of an agency relationship even where both the alleged principal and agent denied the existence of such an agency.

Can a corporation's agents create a contract which is not formalized which binds the corporation? The District Court of Appeal, First District, has ruled that the "intent" of the parties will govern. In *Gateway Cable T.V. v. Vikoa Construction Corp.*,²⁹ the defendant's finance direc-

25. The Supreme Court of Florida set forth several rationales including the instrumentality or agency theory. Neither the supreme court nor the Fifth Circuit Court of Appeals articulated any precise standards for these alternative theories.

26. *House of Koscot Devel. Corp. v. American Line Cosmetics, Inc.*, 468 F.2d 64, 66-7 (5th Cir. 1972).

27. It is clear, however, that increasing analysis must be made of the ethics, as well as the present legality and form, of corporate action. See, e.g., *Stiffer Rules for Business Ethics*, Bus. Wk. 87-90 (March 30, 1974).

28. 281 So. 2d 362 (Fla. 2d Dist. 1973) [hereinafter referred to as *McCabe*].

29. 253 So. 2d 461 (Fla. 1st Dist. 1971).

tor, after detailed negotiations, told the plaintiff's president that "we have a deal." The plaintiff sent its executed contract to the defendant and the plaintiff began performing its duties under the contract. Subsequently, the defendant attempted to get out of the contract on the ground that the contract had not been consummated since it had not been signed by two of its officials as required by the terms of the contract document. The court held that evidence of the parties' conduct could be presented to show whether there was a contractual agreement.³⁰

However the decision in *H.S.A., Inc. v. Harris-In-Hollywood, Inc.*,³¹ illustrates that corporations cannot be held responsible for the acts of its principals in their individual capacities who are not acting as corporate agents or who are not known to be corporate agents. In *H.S.A.*, a broker sought to hold a corporation liable for alleged breach of an oral real estate sales contract. The plaintiff had dealt with a non-party individual whom the plaintiff apparently assumed to be the sole owner and principal of the subject property. Actually, such individual was only one of the officers of the defendant corporation which owned the property. The District Court of Appeal, Fourth District, held that the plaintiff failed to show the elements of the doctrine of "apparent authority" or "agency by estoppel" since the record failed to show that (a) the plaintiff knew of the existence of the principal or that (b) the plaintiff had any reason to believe the individual with whom he dealt was the principal's agent.

6. CORPORATE CRIMINAL LIABILITY FOR THE ACTS OF AGENTS

In *West Valley Estates, Inc. v. State*,³² a Florida corporation was found criminally liable for the illegal acts of its agent. The uncontroverted facts showed that the corporation's vice president, a "mere salaried employee," was authorized to effectuate the subject dredging and that neither the corporation's directors nor its president authorized illegal dredging or knew that it occurred. Nevertheless, the District Court of Appeal, Second District, held that the evidence presented was sufficient to sustain the criminal conviction of the corporation where it was shown that the corporation's agent was in charge of the dredging operation, knew the limits of the dredging permit and instructed the dredging contractor to exceed those limits.

7. LIABILITY OF CORPORATE AGENTS

In *CIC Leasing Corp. v. Dade Linen Furniture Co.*,³³ the plaintiff alleged conversion against a potpourri of defendants, including the cor-

30. The court quoted the declaration of Lord Chancellor Sugden: "Tell me what you have done under such a deed and I will tell you what the deed means." *Id.* at 464.

31. 285 So. 2d 690 (Fla. 4th Dist. 1973) [hereinafter referred to as *H.S.A.*].

32. 286 So. 2d 208 (Fla. 2d Dist. 1973).

33. 279 So. 2d 73 (Fla. 3d Dist. 1973).

poration, the secretary of the corporation and the president of the bank where the corporation dealt. The District Court of Appeal, Third District, affirmed the liability of the defendants on the ground that they had acted as the defendant corporation's agents in connection with the conversion. The court declared that the officers and agents of a corporation are personally liable to any third person they injure as a consequence of their tortious acts even if such acts are performed within the scope of their employment as corporate officers or agents.

Unfortunately, the decision does not explain the factual basis for holding the banker liable other than noting that he endorsed and deposited a check for the defendant corporation.

8. DERIVATIVE ACTIONS

a. Standing

Who should have the legal right to institute a derivative action on behalf of a wholly-owned subsidiary when the directors of both the parent and the subsidiary decline to address themselves to an alleged wrong? In *Crow v. Context Industries, Inc.*,³⁴ shareholders of the parent corporation brought a derivative action on behalf of the parent charging the parent's directors with corporate "waste" for failing to take legal action to recover part of the alleged purchase price, paid under the guise of an employment contract to the president of the wholly-owned subsidiary, to purchase the assets of the subsidiary. The District Court of Appeal, Third District, held that the plaintiffs lacked "standing" to sue on behalf of the subsidiary, which the court declared was the only entity for which a derivative action could be brought. The court's conclusion is questionable in light of the fact that a federal court in Florida reached the opposite conclusion on basically similar facts.³⁵ As a matter of sound policy, it would seem that the shareholders of a parent corporation should be accorded the legal right to ensure that the parent's wholly-owned subsidiaries and its controlled affiliates are run in accordance with applicable laws. Otherwise, there would be an open invitation for the very kinds of wrongs alleged in *Crow*.

b. Security for Costs

In *Industrial Electronics Associates, Inc. v. Poteat*,³⁶ the defendant corporation argued that the trial court order requiring the plaintiffs to post a \$2500 bond was inadequate in light of the defendant's affidavits

34. 260 So. 2d 865 (Fla. 3d Dist. 1972).

35. *Gadd v. Pearson*, 351 F. Supp. 895 (M.D. Fla. 1972). The federal court termed an action wherein a stockholder of a parent corporation sues to redress a wrong allegedly done to a subsidiary as a "double" derivative action. *Id.* at 900-01.

36. 251 So. 2d 135 (Fla. 4th Dist. 1971). *See also* *Sargent v. Genesco, Inc.*, 337 F. Supp. 1244, 1247 (M.D. Fla. 1972), where the court ruled that it would consider certain claims as derivative "at least" for cost security purposes. This curious statement was not explained.

estimating litigation costs in excess of \$12,000. The District Court of Appeal, Fourth District, held that no showing had been made that the trial court had abused its broad discretion since the statute gave the defendant corporation the right to seek additional security whenever it could show the security ordered was inadequate. This decision appears sound since a fair application of the statute depends upon the trial court's evaluation of the probable validity and good faith of the plaintiff's claims as opposed to their harassment or "strike-suit" utilization.

9. RIGHTS OF SHAREHOLDERS

In *Davidson v. Ecological Science Corp.*³⁷ the plaintiff sought a writ of mandamus for production of the defendant corporation's shareholder lists. The defendant argued that the plaintiff was prohibited from obtaining the list because he intended to use the information "otherwise than to protect his interest in the corporation." The trial court denied production of the lists on the basis that the plaintiff's primary purpose for seeking the list was to influence another lawsuit between himself and the corporation. The District Court of Appeal, Third District, reversed, holding that a pending suit by or against the corporation or its employee was irrelevant and not per se sufficient to support the affirmative defense required by law. The court reasoned that if it allowed such a defense, a corporation could always defeat a shareholder's right to inspect the shareholder lists by filing a law suit against him.

10. CORPORATE DISSOLUTIONS

In *Herbert v. Royal Enterprises, Inc.*,³⁸ the plaintiffs, who apparently held 49% of the stock in the defendant corporation, sued to dissolve it. The District Court of Appeal, First District, held that the Florida dissolution statute under which the plaintiffs sued was inapplicable because the total voting power of the corporation was not evenly divided into two independent interests. Assuming that the subject corporation was a close corporation, there is no discussion why the plaintiffs failed to avail themselves of the involuntary dissolution remedy provided by statute.³⁹

In *Chapman v. L&N Grove, Inc.*,⁴⁰ the court analyzed problems relating to the determination of the effective date of a dissolution and of post-dissolution judgments. On July 1, 1970, the defendant corporation's stockholders approved a resolution of dissolution calling for liquidation within the month of July, 1970. On July 24 and 30, respectively, the Secretary of State issued and published a preliminary certificate of corporate dissolution. On August 14, 1970, a law suit was filed against the

37. 266 So. 2d 71 (Fla. 3d Dist. 1972).

38. 259 So. 2d 750 (Fla. 1st Dist. 1972).

39. FLA. STAT. § 608.77 (1973).

40. 265 So. 2d 725 (Fla. 2d Dist. 1972).

corporation. And, on August 20, 1970, a final certificate of dissolution was issued.

The District Court of Appeal, Second District, held that the suit was filed before the effective date of dissolution since the defendant's resolution failed to specify a date of dissolution and, in any case, dissolution was not effective until the final certificate of dissolution was issued six days after the law suit was filed. Moreover, the court declared that liquidation and dissolution are not synonymous. The court also stated that even though the judgment was rendered against the defendant after its dissolution, the judgment was valid since it was rendered as a result of a suit begun before the dissolution and was based upon a prior liability.

II. SECURITIES REGULATION

A. *New Legislation*

The most important legislation related to securities regulation of recent date concerns (a) amendments narrowing the availability of several transactions exempted from Florida's registration laws and (b) legislation designed to expand the jurisdictional reach of Florida's securities laws. Pursuant to its statutory authority, the Division of Securities effected a massive overhauling of its rules governing the registration of securities, the regulation of securities brokers and salesmen and various significant general concepts.

1. JURISDICTION

Historically, the jurisdictional reach of Florida's securities laws has encompassed securities dealers (including investment advisors) and salesmen selling securities in Florida. Because of increasing problems associated with persons operating from outside of Florida, but selling securities to Florida residents, the legislature enacted amendments⁴¹ extending the jurisdiction of Florida's securities laws to specifically embrace brokers and salesmen selling securities to Florida residents from offices outside of Florida, by mail or otherwise, such as via long-distance or WATS telephonic communications. The Division of Securities can thus assert jurisdiction over any such persons so long as such assertion can be rationalized as complying with due process.⁴² It is probable that the term "office" will be liberally construed to effectuate the investor protection policies underlying Florida's securities laws.

41. Fla. Laws, 1973, ch. 73-68, *amending* FLA. STAT. §§ 517.02(4), .02(4)(d), .02(6) and .12(1) (1971).

42. *See* section I,B,2 *supra* for decisions reflecting the extent to which long-arm jurisdictional statutes have been stretched. Even though a transaction may be exempt from registration, it is never exempt from the anti-fraud prohibitions under Florida law. FLA. STAT. § 517.301 (1971). The same is true under the federal securities laws. 15 U.S.C. § 77q (1970) (section 17 of the Securities Act of 1933, as amended).

2. DISTRIBUTIONS AND REORGANIZATIONS

Formerly, only distributions and reorganizations by corporations were exempted from registration under Florida's securities laws; now such activities by trusts and partnerships are also exempted.⁴³ When the corporate exemption was originally enacted, entities other than corporations were not widely utilized. However, mushrooming tax laws have caused the popularity of vehicles offering tax advantages, such as real estate trusts and limited partnerships, to increase geometrically in number in relation to their social benefits. By broadening the exemption's scope to include trusts and partnerships, the legislature acknowledged the present fashionableness and social impact of such entities. The terms of the statute do not make it clear, however, whether the term "partnerships" also includes limited partnerships, but it would seem that they would be included since there is no persuasive policy reason why they should not.

3. BONDS OR NOTES SECURED BY MORTGAGES

The exemption encompassing the sale of a mortgage, together with all of the bonds or notes secured by it, was tightened by adding two new conditions, one of which must be met by the person claiming the exemption.⁴⁴ These conditions limit the total amount of indebtedness which may be incurred against the property hypothecated as security for the bonds or notes. These debt ceilings help protect investors by preventing the overloading of debts against the property utilized as security.

4. LIMITED OFFERINGS

Florida's securities laws exempt from its registration requirements "limited offerings." These were previously defined as sales of securities by a corporation, trust or partnership during any 12 consecutive months to not more than 20 persons. Sales to certain institutions were excluded from the computation, but any sales made by a corporation pursuant to the pre-incorporation subscription exemption were included within the computation. Now included within the 20 person computation under the amended limited offering exemption are sales made in connection with "any" of the 17 "other" transactions exempted by Florida Statutes, section 517.06 (1973).⁴⁵ Thus, the limited offering exemption, which has

43. Fla. Laws, 1973, ch. 73-68, *amending* FLA. STAT. § 517.06(4) (1971).

44. Fla. Laws, 1973, ch. 73-68, *amending* FLA. STAT. §§ 517.06(7), (8) (1971).

45. Fla. Laws, 1973, ch. 73-68, *amending* FLA. STAT. § 517.06(11) (1971). Much relied upon, this section exempts "sales" to 20 persons under certain conditions. Revised sections 517.06(7), (8), and (18) also refer to "sales" of securities. These subsections, among others, reflect a curious and confusing lack of differentiation which seemingly exists under Florida's securities statutes between an "offer" and a "sale." Section 517.02(3) defines a "sale" as including "every disposition or attempt to dispose of a security or interest in a security for value." *All* of the exempted transactions under FLA. STAT. § 517.06 (1973) refer to the "sale" of any security involved in transactions described therein. Does "sale" there connote a con-

been widely relied upon, may be unavailable if any of the other transactional exemptions have been claimed within 12 months of the date when a person wishes to avail himself of the limited offering exemption.

The narrowing of the limited offering exemption reinforces the fact that business entities must emphasize long-range financial planning. Even then, anomalous results may occur. Suppose, for example, that a corporation sells its securities to 20 of its executives under a qualified stock option plan exempted by Florida Statutes section 517.06(18) (1973), then six months later is approached by a limited group of sophisticated and monied investors who wish to take an investment position in the company through their limited partnership. Must the corporation refuse to sell them any unregistered securities for the next half year? It is difficult to see what purposes such a statutory construction would accomplish in terms of protecting these potential investors or in terms of any other positive social or economic values. But, apparently the corporation could not sell its securities in this context unless it could avail itself of another exemption or unless it registered its securities, which would probably be uneconomical.

There may be no meaningful solution to this kind of dilemma under the present legislation since it may preclude administrative rules dealing with the kind of problem described above. The most meaningful solution seems to be a reassessment of the present system, particularly in terms of the economic realities of small business financing, and the eventual transition from the registration of securities to less economically crippling forms for registration of business enterprises. The focus should be to maintain a continuous flow of material facts to investors.

5. ESCROWED SECURITIES

Through legislation, the Division of Securities now has substantially absolute discretion over the form, content and duration of escrow documents made in connection with securities issued for such matters as patent rights, copyrights and trademarks, organizational or promotional fees and good will or going concern value.⁴⁶ The Division may require the escrow-

summed sale? If "sale" there means a "sale" as defined under section 517.06(2), does the latter include offers as well as consummated sales? Assuming such, does the language of an exemptive provision like section 517.06(11), which refers to the "consummation of the sale," make sense? At the least, this confusion detracts from meaningful analysis and advice.

The authors were unable to find sources explicating the reasoning underlying the original enactment of section 517.02(3) but analogous statutes clearly distinguish offers from sales. Section 401(i)(1)-(2) of the Uniform Securities Act differentiated them. And section 2(3) of the Securities Act of 1933 made that distinction even sharper. See 15 U.S.C. § 77b(3) (1970). Without this distinction, the language of chapter 517 tends to be confusing and misleading. Florida's securities laws, especially section 517.02(3), should be amended to reflect this distinction. The Florida Division of Securities has supported this distinction regarding the exemptive provisions of section 517.06. This approach is sound since a contrary approach could lead to anomalous and unjust results.

46. Fla. Laws, 1972, ch. 72-151, § 1, amending FLA. STAT. § 517.18 (1971). "Department" refers to the Department of Banking and Finance. The Department's Division of Securities

ing of the subject securities for as long as it deems in the "best interests" of the entity's other shareholders. The Division will allow the escrowed securities to be released upon such conditions as it deems "just and equitable." The escrowed securities include any cash or stock dividends and any securities issued via a stock split or exchange, recapitalization or business combination. The presumed intent of a statute such as this is to protect investors. Whether such a laudable goal is attained by methods such as this is not clear and is being questioned.⁴⁷

6. MISCELLANEOUS

Several other amendments were made to Florida's securities laws. As with the corporation laws, amendments were made conforming various securities statutes with other laws effectuating Florida's restructured court system.⁴⁸ Annual appropriations were authorized to help administer Florida's securities laws more effectively.⁴⁹

B. *Rules of the Department of Banking and Finance, Division of Securities*

Almost all of the Division's former rules were revised and almost all of them, other than those in chapter 3B-3, were renumbered. The more significant changes are described herein.

1. CONTENT OF A PROSPECTUS

Whereas comparative illustrations, charts and pictures in prospectuses were formerly prohibited, under the substantially revised rule,⁵⁰ they are now allowed, but only when necessary for full and fair disclosure of the material facts related to the issuer. Projections are also allowed under the same standard which, despite its negativism, has important implications since it will finally allow investors to obtain some of the disclosures long demanded and relied upon by professional and institutional inves-

(the "Division") makes rules implementing the securities laws. See also Fla. Div. Sec. R. 3B-1.08 regarding escrows.

47. Professor James S. Mofsky argues that state "merit" regulations are often detrimental to small business financing. J. MOFSKY, *BLUE SKY RESTRICTIONS ON NEW BUSINESS PROMOTIONS* (1971). See also the review of Professor Mofsky's book by Bell & Arky in 27 BUS. LAW. 361 (1971); *Symposium: The Operation and Effectiveness of Blue Sky Legislation*, 15 WAYNE ST. L. REV. 1401 (1969). Professor Mofsky also advocates a sweeping reform of Florida's securities laws focusing upon the elimination of "merit" standards, the elimination of a requirement to register with the state, securities registered under the federal securities laws, the partial elimination of broker-dealer regulations and the retention of strong anti-fraud laws coupled with the staff and resources to enforce them. Mofsky, *Reform of the Florida Securities Laws*, 2 FLA. ST. U.L. REV. 1 (1974).

48. Fla. Laws, 1973, ch. 73-334, § 1, amending FLA. STAT. § 517.20(2) (1971).

49. Fla. Laws, 1973, ch. 73-305, § 1, amending FLA. STAT. § 517.04(3) (1971). This change was made to conform the statutory language to FLA. CONST. art. III, § 3(b), relating to annual legislative sessions.

50. Fla. Div. Sec. R. 3B-1.02.

tors.⁵¹ Drawings by artists, engineers or architects are prohibited on the premise that they may be inaccurate since there is no assurance of completion of a given structure. However, accurate maps or surveys, as well as "established" corporate symbols or trademarks, are permissible.

The same rule requires that the issuer disclose in its prospectus whether it intends to furnish annual reports and whether such reports will contain certified audited or unaudited financial statements. The issuer must also disclose the nature and frequency of other reports it may issue and whether such reports contain certified audited or unaudited financials.⁵² This amendment is significant because the issuer must commit itself to quality and accuracy regarding periodic reports it intends to distribute to its investors. Failure to live up to its commitments without persuasive reasons for such failure could subject an issuer to allegations of fraud.

2. PROMOTERS' EQUITY INVESTMENT RATIO: LIMITED PARTNERSHIPS

The sale of real estate packaged as securities has greatly increased. A popular vehicle for the sale of real estate securities is the limited partnership, which also offers potential tax shelter benefits. The Division has attempted to deal with this phenomenon by establishing standards for the computation of the permissible promoters' equity investment ratio in limited partnership offerings.⁵³

3. REAL ESTATE INVESTMENT TRUSTS

Another popular vehicle for public real estate offerings is the real estate investment trust (REIT). The substantially revised standards governing REITs⁵⁴ provide that a REIT required to register its securities by qualification must make provisions in its organizational documents satisfying eight detailed sets of conditions covering such matters as net assets, annual expenses and transactions with related or affiliated persons.

4. INVESTMENT COMPANIES

One of the major problems with "investment companies"⁵⁵ has been the fact that money managers are rewarded only in relation to the increase

51. The soundness (and fairness) of restrictions against projections are being increasingly questioned. See, e.g., Kripke, *The Myth of the Informed Layman*, 28 BUS. LAW. 631 (1973), where the author, one of the foremost experts on securities accounting, argues that projections are the "absolute key piece of information to any prospective securities investor. . . ." *Id.* at 634. See SEC Securities Act Release No. 5362 (Feb. 2, 1973) (statement by the SEC on disclosure of projections of future economic performance).

52. Fla. Div. Sec. R. 3B-1.02.

53. Fla. Div. Sec. R. 3B-1.04.

54. Fla. Div. Sec. R. 3B-1.13. These conditions apply unless "directly contradictory" to the intent of sections 856-58 of the Internal Revenue Code of 1954, and applicable rules of the Treasury Department.

55. The term "investment company" is defined by reference to the Investment Company

of the assets of the companies they manage. In the past, particularly in the conglomerate era of the 1960's, this stimulus caused too many money managers to engage in unhealthy practices to stimulate their company's earnings without regard to long-range performance.

The new rule⁵⁶ addresses itself to incentive fees by requiring that the economic penalty for a manager's poor performance shall be as great as his reward for superior performance. The issue, though, is whether this type of rule, even though logically consistent, simply reinforces the stimulus to perform regardless of the costs. Would it not be sounder if the rule directed itself to specific standards of prudence rather than allowing itself to be swept up in the performance syndrome?

In any case, the rule also requires that investment companies disseminate certified financial statements disclosing a net worth of at least \$100,000 and imposes limits upon the company's operating and management expenses. These standards preclude excessive business expenditures and help protect investors by requiring the companies to maintain stable economic bases.

5. INDEPENDENT TRANSFER AGENTS AND REGISTRARS

A significant step forward was taken to alleviate problems involving transfer agents and/or registrars who are negligent or who perpetrate fraud upon others. In general, this new rule⁵⁷ requires every issuer of registered securities, having over 100 shareholders of record after the distribution of its securities, to appoint and maintain an independent transfer agent and/or registrar for its securities. There must also be an agency agreement requiring that specified records, including records reflecting offers and sales of unregistered securities, be maintained for at least six years from their origination date.

6. FINANCIAL STATEMENTS

Current, complete and accurate financial statements are crucial to a fair presentation of any company's financial status. Under its rule,⁵⁸ the

Act, 15 U.S.C. § 80(a)(3) (1971). See Garrett, *When Is An Investment Company?* 37 U. DEB. L.J. 355 (1960).

56. Fla. Div. Sec. R. 3B-1.17.

57. Fla. Div. Sec. R. 3B-1.20. Regarding the necessity for legislative and administrative controls similar to this rule, see Bell & Arky, *Public Investor Protection and the Need for Regulations of Transfer Agents*, 26 BUS. LAW. 1649 (1971).

58. Fla. Div. Sec. R. 3B-2.02. The Division's rules regarding financial statements are basically patterned after the federal requirements. The form and content of financial statements filed with the SEC under the Securities Act of 1933 and the Securities Exchange Act of 1934 are governed by regulation S-X, 17 C.F.R. § 210 (1970). These rules are being revised constantly. See, e.g., SEC Securities Act Release No. 5427 (Oct. 4, 1973) (notice of proposed amendments to regulation S-X providing for disclosure of significant accounting policies); SEC Securities Act Release No. 5449 (Jan. 3, 1974) (disclosure of inventory profits reflected in income in periods of rising prices). The federal regulations control financial statements in periodic reports as well as in registration statements.

Division accepts any financial statements prepared in accordance with the strict federal laws. However, the financials must be audited by independent certified public accountants and prepared in accordance with generally accepted accounting principles on a consolidated basis. Normally, a registrant must file (a) its certified balance sheet as of a date within 90 days of the date it files its registration statement and (b) certified statements of profit and loss, changes in its financial position and changes in its capital accounts.

The registrant must file the required financials for each of its last two fiscal years (or such time as it has been in business) preceding the date of its latest balance sheet filed, as well as for any period between the close of the latest of such fiscal years and the date of its latest certified balance sheet.

A company in the "development" stage, including one which has not begun operations, must file an audited balance sheet notwithstanding the date of filing its registration statement. Such a company may file an audited statement of cash receipts and disbursements in lieu of statements of profit and loss.

In connection with contemplated acquisitions, if the registrant intends to use any of the proceeds of the offering to purchase, directly or indirectly, any business or portion thereof, financial statements of that business or portion thereof must be filed as if such business were the registrant.

7. DEFINITIONS

Eight new definitions⁵⁹ crucial to understanding and complying with Florida's securities laws were promulgated during the survey period. "Division" refers to the "Division of Securities." Other terms defined are "executive officer," "home office or principal office," "main Florida office," "branch office," "applicant" and "registrant."

The concept of "material information or adequate information," which is central to the disclosure requirements, was defined to encompass:

that information required to provide full disclosure of financial and other information about the company and/or its securities which would enable a prudent individual to make an informed and realistic evaluation of the worth of the company and/or of the securities offered.⁶⁰

This definition of "material information" may, but does not seem to, differ significantly from the concept of materiality enunciated by the United States Supreme Court in *Affiliated Ute Citizens v. United States*.⁶¹

59. Fla. Div. Sec. R. 3B-2.04.

60. Fla. Div. Sec. R. 3B-2.04(8).

61. 406 U.S. 128, 153 (1972). The United States Supreme Court declared that in a case involving primarily a failure of disclosure, a material fact is one a "reasonable investor might have considered . . . important in the making of [his] decision." *Id.* at 153-54. See

8. CONTROLLING PERSONS

The Division defines a "controlling person" as:

Any person, corporation, trust, partnership, officer or director owning directly, or indirectly, equitabl[y] or beneficially, individually or cumulatively with members of his immediate family who owns or votes 10% or more of any class of the issued and outstanding securities of any issuer. . . .⁶²

This definition of a controlling person differs materially from the concept utilized under federal law, which defines "control" in the following manner:

[T]he possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.⁶³

Thus, a person could avoid being a control person under the Division's 10% rule yet be deemed a control person under the broad federal power standard. Adherence only to the Division's concept of control could inadvertently cause liability to be imposed upon a person not cognizant of the inconsistent concepts. At the least, the Division should make it clear whether it intends for its rule to control in issues involving Florida's securities laws. This same sort of confusion exists regarding the definition of "churning," which is discussed in section II, B, 11 *infra*.

9. ADVERTISING AND SALES LITERATURE

The deceptive or misleading use of sales material contravening the legal purposes of a statutory prospectus are forbidden.⁶⁴ Prohibited devices include the distribution of non-factual data based on conjectural, unfounded or extravagant claims or assertions. While this declaration may be viewed as a more specific reassertion of the general anti-fraud prohibitions of section 517.301 of the Florida Statutes (1971), it is important because it is an explicit prohibition of various types of deception which still are being defended against as mere non-material opinions. Such non-material "opinions" are outside the ambit of the anti-fraud prohibitions against misrepresentations of material facts.⁶⁵

also SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968), *cert. denied sub nom.* Coates v. SEC, 394 U.S. 976 (1969), which was cited by the United States Supreme Court in *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972).

62. Fla. Div. Sec. R. 3B-2.06.

63. 17 C.F.R. § 230.405(f) (1970). Under the federal securities laws, controlling persons are subject to a number of restrictions and potential liabilities. See Sommer, *Who's "In Control"?*—S.E.C., 21 BUS. LAW. 559 (1966). (Mr. Sommer was subsequently confirmed as a SEC Commissioner). See also *Pennaluna & Co., Inc. v. SEC*, 410 F.2d 861, 865-66 (9th Cir. 1969), *cert. denied*, 396 U.S. 1007 (1969); Annot., 9 A.L.R. Fed. 639 (1971).

64. Fla. Div. Sec. R. 3B-2.07.

65. See, e.g., *Sparks v. State*, 256 So. 2d 537 (Fla. 4th Dist. 1972).

10. STATEMENTS OF FINANCIAL CONDITION, FINANCIAL
RESPONSIBILITY AND THE DUTY OF
REASONABLE SUPERVISION

Generally, brokers registered in Florida must file certified financial statements disclosing their financial condition.⁶⁶ The Division's standards—generally patterned after analogous federal rules—specify the records which dealers and investment advisors must have and maintain regarding their operations and employees for a minimum of three years.⁶⁷ These records must be maintained in Florida or made available upon the Division's request for inspection. Dealers and investment advisors must also have and continuously maintain a specified "net worth";⁶⁸ the failure to comply with the net worth requirements will cause suspension of the entity's business. Also, the rules now explicitly articulate the non-delegable duty of reasonable supervision by declaring that a securities dealer is responsible for the acts of his salesmen and executive officers during their employment until actual notice of their termination is received by the Division.⁶⁹

11. CHURNING OR TWISTING

The Division's revised conceptualization of "churning" is totally different from the concept generally utilized under federal law and adopted by a Florida court. The Division defines twisting or churning thusly:

No dealer, executive officer, or salesman shall disturb any insurance or securities portfolio of a prospective investor, otherwise known as "twisting" or "churning" which is defined as making any false or misleading representations pertaining to or any incomplete or fraudulent comparison with respect to any life insurance policies, insurers, securities, mutual funds, or issuers for the purpose of inducing or tending to induce any person to cash in or convert any security or to lapse, forfeit, surrender or terminate any life insurance policy for the purpose of sale or purchase of securities, mutual funds or insurance.⁷⁰

In contrast, churning is defined under federal law to include:

66. Fla. Div. Sec. R. 3B-3.01.

67. Fla. Div. Sec. R. 3B-3.15 & 3.16.

68. Fla. Div. Sec. R. 3B-1.17.

69. Fla. Div. Sec. R. 3B-3.05(4)(a). In 1964, Congress enacted section 15(b)(5)(E) of the Securities Exchange Act of 1934, 15 U.S.C. § 780(b)(5)(E) (1974), which codified the "duty of reasonable supervision" concept, and made inadequate supervision an independent ground for sanctioning broker-dealers and associated persons. The SEC has repeatedly declared that the "maintenance of adequate supervisory controls over salesmen's activities is a basic and vital responsibility of the broker-dealer." *L.B. Securities Corp.*, 42 S.E.C. 885, 888 (1966) (a case involving a Florida broker-dealer); *Reynolds & Co.*, 39 S.E.C. 902, 916-17 (1960).

70. Fla. Div. Sec. R. 3B-3.08.

[A]ny act of any broker or dealer designed to effect with or for any customer's account, in respect to which such broker or dealer or his agent or employer is vested with any discretionary power any transactions of purchase or sale which are excessive in size or frequency in view of the financial resources and character of such account.⁷¹

And in *Hayden, Stone, Inc. v. Brown*,⁷² the District Court of Appeal, Fourth District, adopted the generally accepted definition, treating churning as engaging an account in transactions which are "excessive in size and frequency in view of the financial resources and character of the account."⁷³

The Division's conceptualization of churning, which prohibits fraudulently tending to induce a person to convert his securities or insurance portfolio for the purpose of generating commissions upon subsequent securities or insurance transactions, is a specific prohibition which does not seem dependent upon the criteria historically utilized to determine churning. Thus, potential liability exists under dual concepts of churning.

C. Recent Decisions

Florida's state and federal courts grappled with difficult issues in the securities area. The most noteworthy decisions dealt with (a) the issue of what constitutes a security, (b) the scope of the reorganization transactional exemption, (c) what statutes of limitations should apply to securities claims and (d) the perennial problem of differentiating facts from opinions.

1. DEFINITION OF A "SECURITY"

What constitutes a "security" under Florida's securities statutes? This remains a difficult issue to answer at its outer parameters since courts may utilize different standards to construe the statutory language. And, as always, ingenious minds continuously seek to fashion new business forms to circumvent the strict registration and anti-fraud provisions of Florida's securities laws. Recent decisions have begun to explore the applicability of Florida's securities laws to some of these new business forms.

In *Frye v. Taylor*,⁷⁴ the issue was whether the offer and sale of a "supervisorship" position in a pyramid franchising enterprise constituted the species of security defined as an "interest in or under a profit

71. 17 C.F.R. § 240.15c1-7a. See also *Hecht v. Harris, Upham & Co.*, 283 F. Supp. 417 (N.D. Cal. 1968), *aff'd and modified*, 430 F.2d 1202 (9th Cir. 1970); *Powers v. Francis I. DuPont & Co.*, 344 F. Supp. 429 (E.D. Pa. 1972).

72. 218 So. 2d 230 (Fla. 4th Dist.), *cert. denied*, 225 So. 2d 539 (Fla. 1969); Annot., 32 A.L.R.3d 623, 635 (1969) (stockbroker's liability for allegedly "churning" or engaging customer's account in excessive activity).

73. *Hayden, Stone, Inc. v. Brown*, 218 So. 2d 230, 235 (Fla. 4th Dist. 1969).

74. 263 So. 2d 835 (Fla. 4th Dist. 1972) [hereinafter cited as *Frye*].

sharing or participation agreement or scheme."⁷⁵ Without discussion, but with express reliance upon the broad policy-based decisions in *Florida Discount Centers, Inc. v. Antinori*⁷⁶ and *State ex rel. Healy v. Consumer Business System, Inc.*,⁷⁷ the District Court of Appeal, Fourth District, held that the transaction encompassing the plaintiff's sale of the supervisorship position in the subject enterprise came within this definition.

The unanswered question is whether the Florida courts have adopted the "risk capital" rationale for defining a security. The "risk capital" definition of a security may be generalized as encompassing those factual contexts wherein persons subject their capital or assets to the risks of a business enterprise over which they have no meaningful control.⁷⁸ The Florida Court's language implies that it may have adopted the "risk capital" standard since it relied upon both the *Consumer Business* decision, which expressly followed such rationale, and upon the *Florida Discount* decision in which the Supreme Court of Florida declared that the "statutory policy of affording broad protection to investors is not to be thwarted by unrealistic and irrelevant formulae."⁷⁹

Subsequently, in *Bond v. Koscot Interplanetary, Inc.*⁸⁰ the District Court of Appeal, Fourth District, held that the subject company's "directorship" agreements also constituted securities under Florida law. The Court declared that *Frye* controlled, but again failed to articulate the basis for its decision.

75. The term "security" is defined in FLA. STAT. § 517.02(1) (1971). See Mofsky, *Some Comments on the Expanding Definition of "Security,"* 27 U. MIAMI L. REV. 395 (1973).

76. 226 So. 2d 693 (Fla. 2d Dist. 1969). *aff'd*, 232 So. 2d 17 (Fla. 1970) [hereinafter cited as *Florida Discount*].

77. 482 P.2d 549, 5 Ore. App. 19 (1971) [hereinafter referred to as *Consumer Business*], in which the court relied upon the now famous decision by Judge Roger Traynor in *Silver Hills Country Club v. Sobieski*, 55 Cal. 2d 811, 361 P.2d 906, 13 Cal. Rptr. 186 (1961), wherein he enunciated the so-called "risk capital" rationale for defining a security.

78. For an analysis of the *Frye* and related decisions, see Bell, *Evolution of Florida Securities Law*, 47 FLA. BAR J. 48 (1973). See also the discussion of various concepts of what constitutes a security in Mofsky, *The Expanding Definition of "Security" Under the Blue Sky Laws*, 1 SEC. REG. L.J. 217 (1973).

79. *Florida Discount Centers, Inc. v. Antinori*, 226 So. 2d 693, 695 (Fla. 2d Dist. 1969), quoting Mr. Justice Murphy in *SEC v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946), one of the first landmark United States Supreme Court decisions concerning the definition of a security. Ironically, the *W.J. Howey* case originated in Florida. See Tew & Freedman, *In Support of SEC v. W.J. Howey Co.: A Critical Analysis of the Parameters of the Economic Relationship Between an Issuer of Securities and the Securities Purchaser*, 27 U. MIAMI L. REV. 407 (1973).

80. 276 So. 2d 198 (Fla. 4th Dist. 1973). See also *Bond v. Koscot Interplanetary, Inc.*, 246 So. 2d 631 (Fla. 4th Dist. 1971), wherein the court held that the plaintiffs alleged a claim for relief under the Florida securities laws.

Of particular interest to Florida practitioners, the SEC has issued its guidelines concerning the applicability of the federal securities laws to the offer and sale of condominiums or units in real estate developments, SEC Securities Act Release No. 5347 (Jan. 4, 1973), and, regarding advertising and sales practices related thereto, SEC Securities Act Release No. 5382 (April 9, 1973). See also Note, *Florida Condominiums—Developer Abuses and Securities Law Implications Create a Need for a State Regulatory Agency*, 25 U. FLA. L. REV. 350 (1973); Note, *Application of the Securities Doctrine of Integration to Real Estate Syndicates*, 46 S. CAL. L. REV. 428 (1973).

The implications of the *Frye* and *Bond* decisions may be far-reaching since the risk capital standard would bring within the penumbra of the securities laws many franchises, distributorships, syndications and analogous investment-based relationships which often would not otherwise come within the scope of more conservative conceptualizations of a security.

2. EXEMPTIONS FROM REGISTRATION

The Supreme Court of Florida's decision in *Data Lease Financial Corp. v. Barad*⁸¹ has significant implications. Briefly, the facts were that Data Lease acquired Discount Drugs by issuing its voting stock for the stock of Discount, which underwent a tax-free reorganization as part of the transaction. Both entities were apparently Florida close corporations. Subsequently, shareholders of Discount sought to void the acquisition on the ground that Data Lease failed to register its stock. Data Lease claimed the transaction was exempt and that the plaintiffs were estopped by their acceptance of contractual benefits.

The Supreme Court of Florida held that the record did not support a finding of estoppel against the plaintiffs. The court declared:

The instant action was not an equitable suit for rescision [*sic*], but was brought to void the transaction under a statute specifically requiring registration and making sales of unregistered stock voidable where statutory requirements are not met. In such a situation, estoppel is applicable only where the purchaser himself is in *pari delicto*, participates in the management of the issuing corporation, or where some unusual circumstances exist justifying application of the doctrine of estoppel.⁸²

Thus, the supreme court recognized the *sui generis* nature of section 517.21 of the Florida Statutes (1971) as a statutory remedy distinct from an equitable claim for rescission.⁸³ It appears that the court has repudiated the defense of estoppel in the securities context except in unusual circumstances.⁸⁴

Secondly, the court held that a corporate "B" reorganization qualifying for tax-free treatment as an acquisition of stock for voting stock is not necessarily exempt from registration as a bona fide reorganization since the purposes of tax reorganizations are different from the reasons

81. 291 So. 2d 608 (Fla. 1974).

82. *Id.* at 612.

83. Compare *Davis v. McGahee*, 257 So. 2d 62 (Fla. 1st Dist. 1972), and *Henderson v. Hayden, Stone, Inc.*, 461 F.2d 1069 (5th Cir. 1972).

84. The conflicting public policies regarding the appropriateness of equitable defenses such as in *pari delicto* and laches in the context of the securities laws are analyzed in Bell, *How to Bar an Uninnocent Investor—the Validity of Common Law Defenses to Private Actions Under the Securities Exchange Act of 1934*, 23 U. FLA. L. REV. 1 (1970). Compare *Murrell v. Jupiter Corp.*, 274 So. 2d 550 (Fla. 3d Dist. 1973), wherein the court held that the plaintiff should be barred by laches after sporadically pursuing a claim for 20 years.

underlying reorganizations under the securities laws.⁸⁵ The court did not explain its conclusion but, in any case, it is true that the tax laws are not concerned with the timely disclosure of material facts to investors, which is the basic thrust of the securities laws.

Third, the *Data Lease* court held that a transaction wherein a corporation issues its unregistered securities to the stockholders of a second corporation undergoing a bona fide reorganization is not exempt from registration.⁸⁶ The exemption applies only to a corporation undergoing a bona fide reorganization which issues its stock to its own existing shareholders.

Finally, the court rejected the defendant's claim that its acquisition was exempted since it was in connection with a merger, consolidation or sale of assets.⁸⁷ There was no sale of assets since the defendant purchased only the stock, not the assets, of the acquired company. And there was not a merger or consolidation since both corporations continued their existence after the acquisition.

The *Data Lease* decision is important in that the court applied Florida's securities laws to void a transaction apparently involving two closely held corporations. The dissenting judge believed that this application had not been "traditionally" made under Florida law.⁸⁸ Even if that were so, the effectiveness of the securities laws would be severely undermined unless all securities transactions, including those termed "private," were required to comply with the terms of any exemption claimed. If such were not the law, the exemptions could be easily flaunted.⁸⁹ The

85. *Data Lease Fin. Corp. v. Barad*, 291 So. 2d 608, 612 (Fla. 1974). The court was construing the terms of the corporate reorganization exemption, FLA. STAT. § 517.06(4) (1971).

86. *Id.* at 612. Again, the court was construing the language and purpose of FLA. STAT. § 517.06(4) (1971).

87. *Id.* at 613. Here the court was addressing itself to the business combination exception of FLA. STAT. § 517.06(6) (1971). For the federal registration requirements regarding business combinations, see note 89 *infra*.

88. 291 So. 2d at 613-14.

89. See note 42 *supra*. Any statutory "person," as defined by FLA. STAT. § 517.02(2) (1971), claiming an exemption under the Florida securities statutes in connection with exempted securities, FLA. STAT. § 517.05 (1973), or exempted transactions, FLA. STAT. § 517.06 (1973), conceptually has the burden of proving his right to such exemption under Florida law and under any other applicable state securities laws and federal law.

Two exemptions frequently claimed under Florida law are the so-called "pre-incorporation" exemption, FLA. STAT. § 517.06(10) (1973), and the "limited offering" exemption, FLA. STAT. § 517.06(11) (1973). Federal analogies often claimed are the "private offering" exemption under section 4(2) of the Securities Act of 1933, 15 U.S.C. § 77d(2) (1970), and the "intrastate offering" exemption of section 3(a)(11) of the Securities Act, 15 U.S.C. § 77c(a)(11) (1970). The SEC has issued important interpretative releases attempting to clarify private offerings under federal law, SEC Securities Act Release No. 5487 (April 23, 1974) (notice of adoption of rule 146), and attempted to clarify intrastate offerings thereunder, SEC Securities Act Release No. 5450 (Jan. 7, 1974) (adoption of rule 147). See also SEC Securities Act Release No. 5223 (Jan. 11, 1972) (adoption of rule 144 regarding the resale of restricted or unrestricted securities); SEC Securities Act Release No. 5226 (Jan. 10, 1972) (applicability of the federal anti-fraud provisions to private offerings); and SEC Securities Act Release No. 5306 (Sept. 26, 1972) (the Division of Corporation Finance's interpretations of rule 144).

Data Lease decision apparently applies to all "private" or "closed" transactions in existence and being formed in Florida.

3. STATUTES OF LIMITATION

A recurring issue involving the Florida securities laws concerns the choice of the "most applicable" Florida statute of limitation where violations of the Florida securities laws are alleged.⁹⁰ This issue surfaces frequently when claims are brought under the Florida and/or federal securities laws.

In a case brought under the federal securities laws, *Josef's of Palm Beach, Inc. v. Southern Investment Co.*,⁹¹ the issue was which statute of limitation, Florida Statutes section 517.21 (1971) (two years) or section 95.11(5)(d) (1971) (three years), was the "most applicable" statute governing the case. Despite the court's acknowledgment that it should choose the statute which would best effectuate the underlying federal policies enunciated in *Azalea Meats Inc. v. Muscat*,⁹² the court held that

It should be noted that a correlation of rule 146 to Florida's securities laws poses difficult issues. Rule 146 is broader than Florida's limited offering exemption, FLA. STAT. § 517.06(11) (1973) which allows only up to 20 "sales," a term of art which itself is unclear under Florida's securities laws; see note 45 *supra*. Rule 146 has been criticized as confusing and complex. Wander & Shevitz, "Rule 146 Adopted," 7 REV. SEC. REG. 911 (1974).

The SEC has also issued proposed rule 240, which would allow an exemption from registration for limited individual transactions—as opposed to offerings—of securities by *closely-held* issuers. The aggregate sales price for all securities sold during any 12 consecutive month period would be limited to \$100,000. Only 25 purchasers would be allowed. Moreover, the issuer could have only a maximum of 50 beneficial owners of its securities. SEC Securities Act Release No. 5499 (June 3, 1974). This proposed rule has not yet been adopted. Thus, it may undergo substantial revision before its possible finalization.

Regarding the applicability of the federal registration requirements to business combinations, see SEC Securities Act Release No. 5316 (Oct. 6, 1972) (adoption of rules 145 & 153A regarding "business combinations" and the prospective rescission of rule 133—the "no-sale" rule—which formerly applied to such business combinations); SEC Securities Act Release No. 5243 (Apr. 12, 1972) (applicability of rule 144 to rule 133 business combinations and to stock bonus or similar plans).

Florida practitioners should also scrutinize two important decisions by the Court of Appeals for the Fifth Circuit construing the federal private offering exemption: *Hill York Corp. v. American Int'l Fran., Inc.*, 448 F.2d 680 (5th Cir. 1971), and *SEC v. Continental Tobacco Co.*, 463 F.2d 137 (5th Cir. 1972). The *Continental Tobacco* decision has been viewed by many experts as unrealistic. See, e.g., Garrett, *Private Placements*, 5 REV. SEC. REG. 859 (1972).

90. FLA. STAT. § 517.21 (1971), declares, *inter alia*, that "no action shall be brought for the recovery of the purchase price after two years from the date of such sale." Neither FLA. STAT. § 517.301 (1971), Florida's general anti-fraud prohibition, nor its federal counterpart, section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1970), and rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5 (1970), contain a statute of limitations.

91. 349 F. Supp. 1057 (S.D. Fla. 1972) [hereinafter referred to as *Josef's of Palm Beach*].

92. 386 F.2d 5 (5th Cir. 1967) [hereinafter referred to as *Azalea Meats*]. The court adopted the three year limitation as best implementing the holding of the United States Supreme Court in *SEC v. Capital Gains Bureau*, 375 U.S. 180 (1963), that a fundamental purpose of the federal securities laws is to substitute the philosophy of "full disclosure" for the archaic concept of caveat emptor ("let the buyer beware") and thus to promote a high standard of business ethics in the securities industry. *Id.* at 186.

the shorter two year statute was the most appropriate. The court apparently ignored both *Azalea Meats* and *Beefy Trail, Inc. v. Beefy King International, Inc.*⁹³ In *Beefy Trail* the Court held that *Azalea Meats* required that it look to the longer state statute of limitations in actions for securities fraud.

The question of which Florida statute of limitation applies was also litigated in another federal case, *Sargent v. Genesco*.⁹⁴ The defendants in that case argued that (a) the two year limit should control absolutely and that (b) the two year period should commence at the time of the alleged violation regardless of when the plaintiffs became aware of the securities violations.⁹⁵ The United States District Court for the Middle District of Florida rejected these contentions, holding that the longer three year statute of limitations applied and, by implication, that the broader "discovery" standard determined when the three year period began to run.

Thus, both the *Sargent* and *Josef's of Palm Beach* decisions followed the *Azalea Meats* standard, holding that the statute of limitations began to run upon discovery of the alleged violation by the plaintiff, which occurs when he has acquired either (a) actual knowledge of the alleged violation or (b) notice of facts which, in the exercise of due diligence, would have led the plaintiff to actual knowledge of the alleged violation.⁹⁶ Although the federal courts follow federal law regarding the discovery issue, the same test should control in cases brought under Florida law to effectuate fully the legislative purposes and policies underlying the liberally construed Florida securities laws and rules of civil procedure.

4. PENDENT JURISDICTION

An increasing number of claims have been filed in federal courts alleging primary jurisdiction under the federal securities laws and "pendent" jurisdiction over the Florida claims, thus seeking a determination of the pendent claims in the federal forum. In *Ratner v. Scientific Resources Corp.*,⁹⁷ the defendants argued, *inter alia*, that even though the court may have had jurisdiction over the federal claims, it lacked subject

93. 348 F. Supp. 799 (M.D. Fla. 1972). *Cf. Wolf v. Frank*, 477 F.2d 467 (5th Cir. 1973), in which the court found that the plaintiff commenced the action within either the two or three year period.

94. 352 F. Supp. 66 (M.D. Fla. 1972) [hereinafter referred to as *Sargent*].

95. The defendants relied upon *Fowler v. Matheny*, 184 So. 2d 676 (Fla. 4th Dist. 1966), wherein the District Court of Appeal, Fourth District, held that the right to bring a claim under FLA. STAT. § 517.21 (1971) "terminated" when the two year period after the sale ran despite the plaintiffs' claim that the fraud had been concealed and that they had discovered it within two years of filing their action. The court did not analyze the statute in terms of the underlying legislative purposes and policies.

96. *Josef's of Palm Beach, Inc. v. Southern Inv. Co.*, 349 F. Supp. 1057, 1061. *See also Aboussie v. Aboussie*, 441 F.2d 150, 156 (5th Cir. 1971). It appears that if a limitations period were deemed to run mechanically, regardless of when the plaintiff discovered the violation, there would be a mockery of justice in many cases.

97. 53 F.R.D. 325 (S.D. Fla. 1971), *appeal dismissed*, 462 F.2d 616 (5th Cir. 1972).

matter jurisdiction over the claims arising under Florida's securities laws. The United States District Court for the Southern District of Florida held that it had jurisdiction over the pendent claims. Subsequently, in other cases, the Fifth Circuit Court of Appeals upheld pendent jurisdiction over claims arising under Florida's securities acts and under Florida common-law.⁹⁸

The issue of the permissible methods of service of process in pendent jurisdiction cases based upon a common nucleus of facts has also been raised. In *Ratner*, it was argued that although the federal securities statute involved⁹⁹ allowed out-of-state service of process for federal claims, it did not allow the same scope of service of process for pendent claims under Florida's securities laws or under common law. Following what "seemed" to be the rule applied in the majority of cases, the court held that the federal service of process provision was inapplicable to the pendent claims. However, other courts have ruled differently on the same issue. Thus, Judge Lord, after articulating the policies of economy, convenience and fairness underlying the concept of pendent jurisdiction, held in *In re Penn Central Securities Litigation*,¹⁰⁰ that the federal securities laws impliedly extended their jurisdictional provisions to interrelated state claims giving rise to pendent subject matter jurisdiction.

5. CRIMINAL PROSECUTIONS

Criminal decisions under Florida's securities laws have been rather infrequent and as *Sparks v. State*¹⁰¹ demonstrates, have usually been of limited social significance. Most prosecutions have apparently been brought against an individual defendant for one or a few violations. Assuming a limitation of manpower and resources, this type of enforcement may be defensible. On the other hand, since the rationale of selective enforcement necessarily includes some notion of maximizing the social impact of cases pursued, the validity of bringing relatively insignificant cases like *Sparks* is dubious unless justifiable on some other basis.

The *Sparks* case is instructive because it demonstrates the invalidity of ancient doctrines in light of actual selling practices in the securities context. In *Sparks*, the state filed a criminal information alleging that the defendant (1) was not a registered securities dealer, (2) sold unregistered securities and (3) fraudulently misrepresented a material fact in connection with a sale of securities. Sparks was found guilty on all counts and given concurrent sentences upon each of them. The District Court of Appeal, Fourth District, held that although counts (1) and (2) alleged violations of separate statutes and Sparks was convicted on each

98. *Kasner v. Hentz & Co.*, 475 F.2d 119 (5th Cir. 1973). Compare *McCurin v. Kohlmeier & Co.*, 477 F.2d 113 (5th Cir. 1972).

99. Securities Act of 1933 § 22(a), 15 U.S.C. § 77v(a) (1970).

100. 338 F. Supp. 436, 438 (E.D. Pa. 1972).

101. 256 So. 2d 537 (Fla. 4th Dist. 1972) [hereinafter referred to as *Sparks*].

count, he should have been subjected to only one sentence since his offenses, even though separate, were part of a "single transaction."¹⁰² The court thus affirmed the convictions but remanded the case for imposition of a single sentence.

Sparks was also convicted for misrepresenting a material fact. A purchaser of the subject stock testified that he bought it primarily because Sparks declared that the stock "would triple in value in six months time. . . ."¹⁰³ The appellate court reversed Sparks' fraud conviction, holding that the statement was merely an "expression of opinion relating to a future event"¹⁰⁴ and thus was not a statement of fact. This holding, although not inconsistent with common-law doctrine, appears inappropriate in view of both the public interest policies underlying Florida's securities laws and the realities of securities sales techniques.¹⁰⁵

When do criminal sanctions outstrip their purposes and become cruel and unusual? In *Godfrey v. State*,¹⁰⁶ the defendant was convicted

102. The court relied upon *Easton v. State*, 250 So. 2d 294 (Fla. 2d Dist. 1971), in which that court reiterated the "single transaction" concept.

103. *Sparks v. State*, 256 So. 2d 537, 538 (Fla. 4th Dist. 1972).

104. *Id.* at 538.

105. The ancient "fact-opinion" dichotomy derives from a common law postulate which assumed that parties dealt at arm's length and that each person was "competent" to look after his own interests. This fiction has never had much validity when measured against reality and is inappropriate in the securities context where substance is supposed to govern. As Dean Prosser stated, it is not the "form" of a statement or representation that is significant—it is rather the "sense in which it is reasonably understood." W. PROSSER, *LAW OF TORTS* 720 (4th ed. 1971). Prosser also noted the tendency of courts to treat statements of value or predictions as covering something more than mere opinion, thus affording relief to aggrieved persons within the framework of evolving common law standards. *Id.* at 723-24.

In broker-dealer administrative proceedings, the SEC long ago sliced apart the defense that predictions or promises of future value are mere opinions and not facts. The SEC has long held that representations, whether couched in terms of opinion or fact, which are made without a reasonable basis in fact and designed to induce securities transactions, are contrary to the fundamental duty of fair dealing imposed upon persons selling securities. *F.S. Johns & Co., Inc.*, 43 S.E.C. 124, 129 (1966); *Mac Robbins & Co., Inc.*, 41 S.E.C. 116, 119 (1962), *aff'd sub nom. Berko v. SEC*, 316 F.2d 137 (2d Cir. 1963). Moreover, the prediction of a specific and substantial price increase of a promotional and speculative security within a relatively short time period is deemed unjustifiable and thus inherently fraudulent. *Underhill Securities Corp.*, 42 S.E.C. 689, 693 (1965); *Mac Robbins & Co., Inc.*, 41 S.E.C. 116, 131 (1962).

Although the SEC decisions were not in a criminal context, the basic duty of "fair dealing" should not be altered because of the nature of the charges. Only the quantum of proof should change. Requiring a reasonable factual basis for representations would merely reflect the reality that the heart of many, perhaps most, securities transactions is the "sales pitch" made to potential investors, whether through personal communications or through press releases and the media.

In any case, the standard of "fair dealing" would be merely a carry-over of the "reasonableness" doctrines pervasive throughout common law. Florida courts are becoming more reluctant to allow the "opinion" defense; thus, in *Vokes v. Arthur Murray, Inc.*, 212 So. 2d 906 (Fla. 2d Dist. 1968), the court declared that misrepresentations, even of opinions, are actionable where there is shown (a) a fiduciary relationship, (b) an "artifice or trick employed by the representor," (c) a context in which the parties did "not in general deal at arm's length," or (d) a context in which the "representee does not have equal opportunity to become apprised of the truth or falsity of the fact represented." *Id.* at 908-09.

106. 278 So. 2d 325 (Fla. 3d Dist. 1973) [hereinafter cited as *Godfrey*].

on five counts alleging unlawful sales of securities and ultimately sentenced to imprisonment for five concurrent terms of five years each. On appeal, the defendant argued that these sentences constituted cruel and unusual punishment. Without analysis of the defendant's contention, the District Court of Appeal, Third District, held that a "[s]entence of imprisonment for a period which it is provided by law may be imposed upon conviction for an offense is not cruel and unusual punishment."¹⁰⁷ Can it be rationally contended that any term of prison imposed by law is constitutional? Suppose the legislature had decreed a 100 year term of imprisonment for selling unregistered securities. Would such a sentence be sustainable under *Godfrey* simply because the law allowed it? Hopefully, no court would blithely impose such a sentence.¹⁰⁸

One aspect of evolving societal demands has been the insistence upon speedy and public criminal trials. That right applies with equal force under Florida's securities laws. In *Turner v. Olliff*,¹⁰⁹ the defendants sought a writ of prohibition forbidding a judge from asserting jurisdiction over them on the basis that their motions for a speedy trial in accordance with the Florida Rules of Criminal Procedure and the sixth amendment to the United States Constitution had been ignored. The District Court of Appeal, First District, held that the judge failed to show cause why the writ of prohibition should not be issued against him and ordered it so issued.

Is the existence of a "security" a question of law or of fact? The defendant in *Miller v. State*¹¹⁰ was charged with criminal securities violations. Before the jury trial began, the court ruled that the state's evidence, which consisted of stock certificates and promissory notes, constituted securities as a matter of law. Based upon such ruling, the defendant pleaded nolo contendere, reserving the right to appeal. The court sentenced the defendant to prison, and he appealed on the evidentiary issue. The District Court of Appeal, Second District, reversed, holding that in a criminal proceeding, evidence of the transactions involved should have been presented to the jury for its determination whether such transactions constituted securities within the purview of Florida's securities laws.¹¹¹

Other courts, however, have reasoned that a sounder approach, even

107. *Id.* at 326.

108. Regarding the circumstances under which sentences may constitute cruel and unusual punishment, see Annot., 33 A.L.R.3d 335, 363-65 (1970). Moreover, the *Godfrey* decision does not reflect whether the convictions were for offenses arising from a single transaction; if so, only one sentence should have been imposed under the *Sparks* rationale discussed in the text following note 102 *supra*.

109. 281 So. 2d 384 (Fla. 3d Dist. 1973).

110. 285 So. 2d 41 (Fla. 3d Dist. 1973).

111. The court relied upon *Roe v. United States*, 287 F.2d 435, 440 (5th Cir.), *cert. denied*, 368 U.S. 824 (1961), a criminal case in which the Court of Appeals for the Fifth Circuit declared that since it is the "peculiar facts of the setting" which transform "an offer from a mere sale of property into a sale of a security," the trier of fact must determine the issue. The *Roe* decision represents the so-called stricter view of the province of a court in a criminal securities case.

in a criminal case, is to determine the existence of a security as a matter of law.¹¹² The question of what constitutes a security under Florida's securities statutes depends upon varying statutory constructions of complex legal definitions. It is sufficiently difficult for a lay jury to attempt to determine the facts of a controversy. Asking a jury to also determine if the evidence fits within technical legal abstractions goes beyond the jury's abilities and would likely produce inconsistent and unjust results. Such undesirable results would only buttress the claim made by some that our system of justice is inherently inequitable.

6. SECURITIES AND THE FLORIDA UNIFORM COMMERCIAL CODE

Although this article does not encompass developments under Florida's adoption of the Uniform Commercial Code, developments under it should be noted, particularly those related to article 8, dealing with investment securities, and to article 9, dealing with secured transactions.¹¹³

112. Other courts, such as those of California, take an opposing view and hold that, even in a criminal case, whether a security is present is a question solely for the court to determine; *see, e.g.*, *People v. Marvin*, 48 Cal. App. 2d 160, 119 P.2d 359 (1941). In a civil context, courts usually treat the issue of what constitutes a security as a question of law for the court to determine, particularly where most or all of the material facts are undisputed; *see, e.g.*, *SEC v. W.J. Howey Co.*, 328 U.S. 293, 294 (1946) (most of the facts stipulated); *Frye v. Taylor*, 263 So. 2d 835 (Fla. 4th Dist. 1972).

113. Regarding the transfer of investment securities under FLA. STAT. ch. 678 (1971) *see, e.g.*, *Phillips v. Zimring*, 284 So. 2d 233 (Fla. 2d Dist. 1973). The interaction of the securities law and the Uniform Commercial Code is analyzed in Bell & Arky, *Public Investor Protection and the Need for Regulation of Transfer Agents*, 26 BUS. LAW. 1649 (1971); *see also* note 57 *supra* and accompanying text.

Regarding transactions wherein securities are used as collateral, as governed by FLA. STAT. ch. 679 (1971), *see, e.g.*, *Tallahassee Bank & Trust Co. v. Bryant*, 271 So. 2d 190 (Fla. 1st Dist. 1972).