IN THE SUPREME COURT OF FLORIDA

CASE NO: SC18-278

PROGRESSIVE SELECT
INSURANCE COMPANY,

Petitioner,

v.

FLORIDA HOSPITAL MEDICAL CENTER,
a/a/o Jonathan Parent,

Respondent.
_____/

RESPONDENT'S NOTICE OF SUPPLEMENTAL AUTHORITY

Respondent, FLORIDA HOSPITAL MEDICAL CENTER, a/a/o Jonathan Parent, by and through its undersigned counsel, submits as supplemental authority the following decisions:

1. The following cases are significant to the Respondent's position that the legislature cannot "clarify" a statute that was adopted many years ago by a previous legislature:

> *State Farm Mut. Auto. Ins. Co. v. Laforet,* 658 So.2d 55, 62 (Fla. 1995) ("It would be absurd ... to consider legislation enacted more than ten years after the original act as a clarification of original intent; the membership of the 1992 Legislature substantially differed from that of the 1982 Legislature."). *Exhibit "A"*.
>
> *McKenzie Check Advance of Florida v. Betts*, 928 So.2d 1204, 1210 (Fla. 2006) (Seven-year gap between enactment of original statute and subsequent amendment is too long to view the amendment as merely a

clarification of legislative intent for purposes of statutory interpretation of original statute) *Exhibit "B"*.

U.S. v. Southwestern Cable Co., 392 U.S. 157, 170, 88 S.Ct. 1994, 2001, 20 L.Ed.2d 1001, 1012 (1968) (the views of one legislature as to the construction of a statute adopted many years before by another legislature have very little, if any, significance) *Exhibit "C"*.

2. The following cases are significant to the Respondent's position that patients can sue overcharging health care providers and recover prevailing party attorney's fees and costs award under the Florida Unfair and Deceptive Trade Practices Act:

Mack v. Bristol-Myers Squibb Co., 673 So. 2d 100, 104 (Fla. 1st DCA 1996), rev. dism., 689 So.2d 1068 (Fla. 1997) (plaintiff stated a cause of action for FDUTPA violation by alleging that pharmaceutical companies were fixing prices at artificially-inflated levels) *Exhibit "D"*.

Latman v. Costa Cruise Lines, N.V., 758 So.2d 699, 703 (Fla. 3d DCA 2000) (overcharging is a deceptive practice under FDUTPA) *Exhibit "E"*.

Inphynet Contracting Services, Inc. v. Matthews, 196 So.3d 449, 454–55 (Fla. 4th DCA), rev. den., 2016 WL 7240316 (Fla. 2016) (noting that plaintiffs alleged that defendant's excessive charges for copies of medical records violate FDUTPA) *Exhibit "F"*.

§501.2105(1), Fla. Stat. (authorizing an award of prevailing party attorneys' fees in a FDUTPA action) *Exhibit "G"*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of August 2018, a true and correct copy hereof was **electronically filed** with the Clerk of the Court, and was **electronically served** on:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Response conforms to the font requirements of Florida Rule of Appellate Procedure 9.100(j) in that it was computer generated utilizing Times New Roman 14 point-font type.

s/Chad A. Barr
CHAD A. BARR, ESQUIRE
Florida Bar No. 0055365

LAW OFFICE OF CHAD A. BARR, P.A.

EXHIBIT “A”

State Farm Mut. Auto. Ins. Co. v. Laforet

Supreme Court of Florida

April 20, 1995, Decided

No. 83,537

Reporter
658 So. 2d 55 *; 1995 Fla. LEXIS 569 **; 20 Fla. L. Weekly S 173

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Petitioner, v. VERONICA ANN LAFORET, et vir, Respondents.

Subsequent History: [1]** Rehearing Denied July 24, 1995. Released for Publication July 24, 1995.

Prior History: Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance. Fourth District - Case No. 92-2832 (Indian River County).

Disposition: The court remanded the judgment of the appellate court because although the legislature expressly stated that the statute applied retroactively, it must be applied prospectively only because in substance it imposed a penalty on petitioner for failing to settle in bad faith.

Core Terms

insurer, damages, bad faith, first-party, bad faith action, third-party, retroactively, excess judgment, Statutes, attorney's fees, district court, debatable, remedial, effective date, coverage, settle, legislative intent, cause of action, claimant's, recoverable damages, punitive damages, policy limit, motorist, policies, provides, retroactive application, insurance company, trial judge, common law, uninsured

Case Summary

Procedural Posture

Petitioner insurer challenged the judgment of the Fourth District Court of Appeal, Indian River County (Florida), which held that the trial court properly granted respondents' motion for additur because *Fla. Stat. Ann. § 627.727(10)* applied retroactively.

Overview

Respondents had brought suit against petitioner insurer under *Fla. Stat. Ann. § 624.155*, contending that petitioner had acted in bad faith in failing to settle an uninsured motorist insurance claim. After trial, the trial judge applied *Fla. Stat. Ann. § 627.727(10)* and granted respondents excess judgment as a matter of law. On appeal, the appellate court found that the trial court properly granted respondent's motion for additur because *§ 627.727(10)* was to have retroactive application. Petitioner contended that *§ 627.727(10)* could not be applied retroactively and that its motion for directed verdict was incorrectly denied because the basis upon which petitioner denied coverage was fairly debatable. The court held that *§ 627.727(10)* could not be applied retroactively because it was, in substance, a penalty. Even if the legislature had expressly stated that a statute was to have retroactive application, the court would refuse to apply a statute retroactively if the statute impaired vested rights, created new obligations or imposed a penalty. Because the statute exposed petitioners to punitive damages for refusing to settle in bad faith, the statute could not apply retroactively.

Outcome

The court remanded the judgment of the appellate court because although the legislature expressly stated that the statute applied retroactively, it must be applied prospectively only because in substance it imposed a penalty on petitioner for failing to settle in bad faith.

LexisNexis® Headnotes

Insurance Law > Remedies > Penalties

Insurance Law > Liability & Performance Standards > Bad Faith & Extracontractual Liability > General Overview

Insurance Law > Remedies > General Overview

Insurance Law > ... > Motor Vehicle Insurance > Obligations > Settlements

HN1[] **Remedies, Penalties**

Fla. Stat. Ann. § 627.727(10) provides that the damages recoverable from an uninsured motorist insurance carrier in a bad faith action brought under *Fla. Stat. Ann. § 624.155* and the 1990 amendment thereto shall include the total amount of a claimant's damages, including any amount in excess of the claimant's policy limits awarded by a judge or jury in the underlying claim. The chapter law under which *§ 627.727(10)* was enacted provides that it is to apply retroactively to 1982.

Insurance Law > Liability & Performance Standards > Bad Faith & Extracontractual Liability > General Overview

Insurance Law > Remedies > Penalties

Insurance Law > Liability & Performance Standards > Good Faith & Fair Dealing > Payments

Insurance Law > Liability & Performance Standards > Good Faith & Fair Dealing > Third Party Claimants

HN2[] **Liability & Performance Standards, Bad Faith & Extracontractual Liability**

Under the duty to exercise good faith, if an insurer was found to have acted in bad faith, the insurer would have to pay the entire judgment entered against the insured in favor of the injured third party, including any amount in excess of the insured's policy limits. This type of claim became known as a third-party bad faith action.

Insurance Law > Liability & Performance Standards > Settlements > General Overview

HN3[] **Liability & Performance Standards, Settlements**

See *Fla. Stat. Ann. § 624.155*.

Insurance Law > ... > Damages > Punitive Damages > General Overview

HN4[] **Damages, Punitive Damages**

See *Fla. Stat. Ann. § 627.727(10)*.

Governments > Legislation > Interpretation

Governments > Legislation > Effect & Operation > General Overview

Governments > Legislation > Effect & Operation > Prospective Operation

Governments > Legislation > Effect & Operation > Retrospective Operation

HN5[] **Legislation, Interpretation**

The general rule is that a substantive statute will not operate retrospectively absent clear legislative intent to the contrary, but that a procedural or remedial statute is to operate retrospectively. Even when the legislature does expressly state that a statute is to have retroactive application, the court has refused to apply a statute retroactively if the statute impairs vested rights, creates new obligations, or imposes new penalties.

Governments > Legislation > Effect & Operation > Prospective Operation

Insurance Law > Remedies > Penalties

HN6[] **Effect & Operation, Prospective Operation**

The court concludes that *Fla. Stat. Ann. § 627.727(10)* applies prospectively only.

Insurance Law > Liability & Performance Standards > Settlements > Good Faith & Fair Dealing

Insurance Law > Liability & Performance Standards > Settlements > General Overview

Insurance Law > Liability & Performance Standards > Settlements > Third Party Claims

HN7[] **Settlements, Good Faith & Fair Dealing**

Fla. Stat. Ann. § 624.155 provides remedies for both first- and third-party causes of actions. *Section 624.155* provides that an insurer has acted in bad faith if it has not attempted in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for the insured's interest.

Insurance Law > Liability & Performance Standards > Bad Faith & Extracontractual Liability > Elements of Bad Faith

Insurance Law > Liability & Performance Standards > Bad Faith & Extracontractual Liability > General Overview

Insurance Law > Liability & Performance Standards > Settlements > General Overview

Insurance Law > Claim, Contract & Practice Issues > Reservation of Rights > General Overview

HN8[] **Bad Faith & Extracontractual Liability, Elements of Bad Faith**

In evaluating third-party bad faith actions, these five factors should be taken into account: (1) whether the insurer was able to obtain a reservation of the right to deny coverage if a defense were provided; (2) efforts or measures taken by the insurer to resolve the coverage dispute promptly or in such a way as to limit any potential prejudice to the insureds; (3) the substance of the coverage dispute or the weight of legal authority on the coverage issue; (4) the insurer's diligence and thoroughness in investigating the facts specifically pertinent to coverage; and (5) efforts made by the insurer to settle the liability claim in the face of the coverage dispute.

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George H. Moss of Moss, Henderson, Van Gaasbeck, Blanton & Koval, P.A., Vero Beach, Florida; and Jane Kreusler-Walsh of Jane Kreusler-Walsh, P.A., West Palm Beach, Florida, for Respondents.

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James K. Clark of Clark, Sparkman, Robb & Nelson, Miami, Florida, Amicus Curiae for Government Employees Insurance Company.

Judges: OVERTON, J., GRIMES, C.J., and HARDING and ANSTEAD, JJ., concur. WELLS, J., concurs in part and dissents in part with an opinion, **[**2]** in which SHAW and KOGAN, JJ., concur.

Opinion by: OVERTON

Opinion

[*56] OVERTON, J.

We have for review *State Farm Mutual Automobile Insurance Co. v. Laforet, 632 So. 2d 608, 609 (Fla. 4th DCA 1993)*, in which the district court certified the following question as one of great public importance:

> WHETHER AMENDED *SECTION 627.727(10), FLORIDA STATUTES* (SUPP. 1992), IS A REMEDIAL STATUTE AND HAS RETROACTIVE APPLICATION.

We have jurisdiction under *article V, section 3(b)(4), of the Florida Constitution.* Because *section 627.727(10)* is not an "amended" statute but is a newly created subsection that alters *section 624.155*, a previously enacted statute, we reword the question as follows:

> WHETHER NEWLY CREATED *SECTION 627.727(10), FLORIDA STATUTES* (SUPP. 1992), WHICH ALTERS THE DAMAGES AVAILABLE IN A BAD FAITH ACTION BROUGHT UNDER *SECTION 624.155*, IS A REMEDIAL STATUTE THAT HAS RETROACTIVE APPLICATION.

This question concerns the validity of retroactively applying a penalty to insurance companies for bad faith conduct in failing to settle uninsured motorist claims. It involves a review of three separate legislative acts: (1) a 1982 statute (*section 624.155*); (2) a 1990 **[**3]** amendment to the 1982 statute; and (3) a 1992 statute (*section 627.727(10)*), which alters the damages recoverable under the 1982 statute. ***HN1***[↑] *Section 627.727(10)* provides that the damages recoverable from an uninsured motorist insurance carrier in a bad faith action brought under *section 624.155* and the 1990 amendment thereto shall include the total amount of a claimant's damages, **[*57]** including any amount in excess of the claimant's policy limits awarded by a judge or jury in the underlying claim. The chapter law under which *section 627.727(10)* was enacted provides that it is to apply retroactively to 1982. Ch. 92-318, § 80, Laws of Fla. For the reasons expressed, we find that *section 627.727(10)* must be applied prospectively rather than retroactively. Consequently, we answer the question in the negative and quash the decision of the district court.

The facts of this case are as follows. In 1986, Veronica Laforet was traveling as a passenger in a car driven by her husband when they were struck from the rear by another motorist (the tortfeasor). After the accident, Mrs. Laforet incurred more than $ 40,000 in medical expenses for the treatment of her injuries. The Laforets were insured through **[**4]** State Farm, which paid Mrs. Laforet's medical bills up to the policy limits of her personal injury protection and medical payments coverage ($ 20,000). In 1988, the Laforets sued the tortfeasor to recover the additional cost of Mrs. Laforet's medical treatment and other damages. The tortfeasor's insurer, Travelers Insurance Company, then tendered its policy limits of $ 10,000. Thereafter, the Laforets unsuccessfully sought to recover out of court the remainder of their damages from State Farm, with whom they carried uninsured motorist coverage in the amount of $ 200,000.

In 1989, the Laforets filed suit against State Farm.

Subsequently, State Farm made an offer to settle the case in the amount of $ 40,000. The Laforets refused the offer and the case proceeded to trial, at which a jury awarded the Laforets $ 400,000 in damages. The trial court reduced this verdict to $ 200,000 based on the available limits of uninsured motorist insurance afforded to the Laforets by State Farm. Although State Farm did eventually pay the $ 200,000 policy limits to the Laforets, it did so only after "duping appellees into signing a [satisfaction of judgment] altogether different from that reasonably **[**5]** anticipated to have been sent." *State Farm Mut. Auto. Ins. Co. v. Laforet, 586 So. 2d 479, 480 (Fla. 4th DCA 1991)*(*Laforet I*). The satisfaction precluded the Laforets from proceeding with a bad faith cause of action. The trial court, however, granted relief to the Laforets under *Florida Rule of Civil Procedure 1.540* by vacating the satisfaction, and the district court affirmed. *See Laforet I.*

In 1990, the Laforets initiated this bad faith action under *section 624.155*, asserting that State Farm had acted in bad faith in failing to settle the uninsured motorist insurance claim. During the course of the proceeding, two separate appeals were initiated and completed before trial. *See Laforet v. State Farm Mut. Auto. Ins. Co., 578 So. 2d 910 (Fla. 4th DCA 1991)* (*Laforet II*)(reversing dismissal of suit); *State Farm Mut. Auto. Ins. Co. v. Laforet, 591 So. 2d 1143 (Fla. 4th DCA 1992)* (*Laforet III*)(quashing discovery order). Eventually, however, the case proceeded to trial. At the trial, the jury returned a verdict in favor of the Laforets in the amount of $ 24,000. Punitive damages, which are permitted under *section 624.155(4)*, were not awarded. On that same date **[**6]** (July 7, 1992), *section 627.727(10)* became law. That statute provides that the damages recoverable from an uninsured motorist carrier in a bad faith action filed under *section 624.155*, such as the one at issue here, are to include the total amount of the claimant's damages, including any amount awarded in the underlying claim in excess of the claimant's policy limits. In the chapter law under which section 626.727(10) was enacted, the Legislature directed that the statute applied retrospectively to 1982, the effective date of *section 624.155*. Ch. 92-318, § 80, Laws of Fla. Thus, under the retroactive application of the new statute, State Farm was liable for the entire excess judgment awarded to the Laforets in their original case against State Farm. Based on *section 627.727(10)*, the Laforets filed a motion for additur, asking the trial judge to award them the entire amount of the excess judgment as a matter of law. The judge granted the motion and awarded the Laforets a total of $ 416,280, which included the excess judgment amount of $ 200,000, plus $ 65,753 in interest; $ 141,753 in attorney's fees; and $ 8,774 in costs.

On appeal, the Fourth District Court of Appeal affirmed in **[**7]** part and reversed in part. First, the district court reduced the judgment by $ 15,000 because that amount represented **[*58]** appellate attorney's fees in several of the previous appeals in which attorney's fees had not been requested. Second, the district court rejected State Farm's contention that the trial judge did not apply the appropriate standard for determining bad faith. Finally, the district court held that the trial judge properly granted the motion for additur, finding that *section 627.727(10)* is to have retroactive application. In so holding, the district court certified the question regarding whether *section 627.727(10)* was, in fact, to be applied retroactively to 1982.

In this appeal, State Farm raises four issues, contending that: (1) *section 627.727(10)* cannot be retroactively applied; (2) the trial court incorrectly denied State Farm's motion for directed verdict because the basis on which State Farm denied coverage was "fairly debatable"; (3) the trial judge improperly instructed the jury regarding State Farm's duty to investigate; and (4) the judgment for attorney's fees and costs should be reversed. To properly evaluate the certified question and the other issues before **[**8]** us, we find it appropriate to first review the law as it relates to bad faith insurance claims in general.

Until this century, actions for breaches of insurance contracts were treated the same as any other breach of contract action and damages were generally limited to those contemplated by the parties at the time they entered into the contract. Roger C. Henderson, *The Tort of Bad Faith in First-Party Insurance Transactions: Refining the Standard of Culpability and Reformulating the Remedies by Statute*, 26 U. Mich. J.L. Ref. 1 (Fall 1992). Eventually, however, insurance contracts began to be seen as distinguishable from other types of contracts because they came to "occupy a unique institutional role" in modern society and affected a large number of people whose rates were dependent upon the acts of not only themselves but also of other insureds. *Id*. at 8. This became especially true when liability policies began to replace traditional indemnity policies as the standard insurance policy form. Under indemnity policies, the insured defended the claim and the insurance company simply paid a claim against the insured after the claim was concluded. Under liability policies, however, **[**9]** insurance companies took on the obligation of defending the insured, which, in turn, made insureds dependent on the acts of the insurers; insurers had the power to settle and foreclose an insured's exposure or to refuse to settle and leave the insured exposed to liability in excess of policy limits. *Id*. at 19-22. This placed insurers in a fiduciary relationship with their insureds similar to that which exists between an attorney and client. *Baxter v. Royal Indem. Co., 285 So. 2d 652 (Fla. 1st DCA 1973), cert. discharged, 317 So. 2d 725 (Fla. 1975)*. Consequently, courts began to recognize that insurers "owed a duty to their insureds to refrain from acting solely on the basis of their own interests in settlement." Henderson, *supra*, 26 U. Mich. J.L. Ref. at 21. ***HN2***[↑] This duty became known as the "exercise of good faith" or the "avoidance of bad faith." *Id*. at 22. Under this new standard of culpability, if an insurer was found to have acted in bad faith, the insurer would have to pay the entire judgment entered against the insured in favor of the injured third party, including any amount in excess of the insured's policy limits. This type of claim became known as a third-party **[**10]** bad faith action. *Id*.

In Florida, third-party bad faith actions were recognized as early as 1938. *See Auto Mut. Indem. Co. v. Shaw, 134 Fla. 815, 184 So. 852 (1938)*. Moreover, even though the tort of bad faith occurred between an insurer and its insured, Florida courts allowed the injured third party to bring a bad faith action directly against the first party's insurer. *Thompson v. Commercial Union Ins. Co., 250 So. 2d 259 (Fla. 1971)*. This was permitted because the injured third-party, as the beneficiary to the bad faith claim, was the real party in interest in a position similar to that of a "judgment creditor." *Id. at 264*.

By the time the legislature enacted *section 624.155* in 1982, it was clearly established in Florida law that third-party bad faith actions existed at common law. *Thompson*; *Opperman v. Nationwide Mutual Fire Ins. Co., 515 So. 2d 263 (Fla. 5th DCA 1987), review denied, 523 So. 2d 578 (Fla. 1988)*. There was, however, no first-party action by an insured **[*59]** for bad faith in Florida at common law. *Baxter*. Unlike third-party bad faith actions, in first-party bad faith actions the insured, particularly in uninsured motorist claims, is **[**11]** also the injured party who is to receive the benefits under the policy. *McLeod v. Continental Ins. Co., 591 So. 2d 621 (Fla. 1992)*. Essentially, Florida courts had refused to recognize the tort of first-party bad faith because the type of fiduciary duty that exists in third-party actions is not present in first-party actions and the insurer is not exposing the insured to excess liability. As the court explained in *Baxter*, the relationship in a first-party bad faith action is the very antithesis of that established in third-party actions.

> It is singularly important to . . . note that regardless of the bad faith of the insurer in refusing to settle a claim against it by its insured under this provision of the policy, such action of the insurer can never result in a judgment against the uninsured motorist for any excess liability. . . . Because the interests of

> the insurer are wholly adverse to those of its insured as to every facet of a claim under the uninsured motorist provision of the policy, no basis for a fiduciary relationship between the parties exists.

285 So. 2d at 656.

In 1982, the Legislature enacted section ***HN3***[⬆] 624.155, which provided in pertinent part **[**12]** as follows:

> (1) Any person damaged . . .
>
> . . . .
>
> (b) By the commission of any of the following by an insurer:
>
> 1. Not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for his interests;
>
> . . . .
>
> may bring a civil action against such insurer. . . .
>
> . . . .
>
> (3) Upon adverse adjudication at trial or upon appeal, the insurer shall be liable for damages, together with court costs and reasonable attorney's fees incurred by the plaintiff.
>
> (4) No punitive damages shall be awarded under this section unless the acts giving rise to the violation occur with such frequency as to indicate a general business practice and these acts are:
>
> (a) Willful, wanton, and malicious; [or]
>
> (b) In reckless disregard for the rights of any insured.

§ 624.155, Fla. Stat. (Supp. 1982). Through this statute, the Legislature created a first-party bad faith cause of action by an insured against the insured's uninsured or underinsured motorist carrier, thus extending the duty of an insurer **[**13]** to act in good faith to those types of actions. *McLeod*; *Opperman v. Nationwide Mut. Fire Ins. Co., 515 So. 2d 263 (Fla. 5th DCA 1987), review denied, 523 So. 2d 578 (Fla. 1988)*. The statute provided for recovery of (1) damages proximately caused by the insurer's bad faith, together with court costs and reasonable attorney's fees, and (2) punitive damages when appropriate. *McLeod*. This statute, with minor modifications, was the statute in effect at the time the Laforets' policy with State Farm was issued (1986) and the asserted bad faith on State Farm's part occurred (1988-89).

In 1990, the Legislature amended *section 624.155*, adding the following pertinent subsection:

> (7) The civil remedy specified in this section does not preempt any other remedy or cause of action provided for pursuant to any other statute or pursuant to the common law of this state. Any person may obtain a judgment under either the common law remedy of bad faith or this statutory remedy, but shall not be entitled to a judgment under both remedies. This section shall not be construed to create a common law cause of action. *The damages recoverable pursuant to this section shall include those* **[**14]** *damages which are a reasonably foreseeable result of a specified violation of this section by the insurer and may include an award or judgment in an amount that exceeds the policy limits*.

§ 624.155, Fla. Stat. (Supp. 1990)(emphasis added). Chapter 90-119, the law under **[*60]** which *section 624.155* was amended, also provided as follows:

> Except as otherwise expressly provided in this act, this act *shall take effect October 1, 1990, and shall apply to policies or contracts issued or renewed on or after that date*.

Ch. 90-119, § 55, Laws of Fla. (emphasis added).

In *McLeod* we reviewed the types of damages available under the 1982 version of the statute as well as the 1990 amendment, noting that section 624.155 did not distinguish between firstand third-party actions. We determined, however, that given the differences between first-party and third-party bad faith actions, the type of damages available in a first-party action were different from those in a third-party action. Specifically, we stated:

> In a third-party action, damages . . . would include the amount of a judgment in excess of policy limits because the insured is exposed to additional liability **[**15]** for the excess amount. Such is not the case in a first-party action, because the insured is not injured by the excess judgment amount. To allow recovery of the excess judgment in first-party cases would be in direct conflict with the fundamental principle that one is not liable for damages that he or she did not cause.
>
> Even though the insurer's bad faith in refusing to settle a first-party action leads to an excess judgment in favor of the insured and against the third-party, causing the excess judgment to occur is not enough. *To be liable under the statute, [the insurer] must not only cause the excess judgment, but the excess judgment must also injure the insured. . . . In the uninsured motorist case, the excess judgment does not qualify as damages resulting from a violation of the statute*.

591 So. 2d at 624 (citations omitted)(emphasis added). We concluded that the damages allowed in a first-party action under the statute included only those damages that were the natural, proximate, probable, or direct consequence of the insurer's bad faith. We noted that such a determination was consistent with both the legislative history of section 624.155 and the 1990 **[**16]** amendment thereto. Additionally, we concluded that, to hold otherwise would amount to "arbitrarily setting the damages recoverable as the amount of the excess judgment"; would be "analogous to *imposing a penalty or punitive damages upon the insurer*"; and would be "inconsistent with the legislature's action in setting forth the specific requirements for an award of punitive damages under subsection 624.155(4)." *Id. at 625* (emphasis added).

After our decision in *McLeod*, the Legislature enacted ***HN4***[⬆] section 627.727(10), Florida Statutes (Supp. 1992), the statute at issue here. That statute provides:

> The damages recoverable from an uninsured motorist carrier in an action brought under s. 624.155 *shall include the total amount of the claimant's damages, including the amount in excess of the policy limits*, any interest on unpaid benefits, reasonable attorney's fees and costs, and any damages caused by a violation of a law of this state. *The total amount of the claimant's damages are recoverable whether caused by an insurer or by a third-party tortfeasor*.

(Emphasis added.) The implementing language of that section provides:

> The purpose of subsection **[**17]** (10) of section 627.727, Florida Statutes, relating to damages, is to *reaffirm existing legislative intent, and as such is remedial rather than substantive*. This section and section 627.727(10), Florida Statutes shall take effect upon this act becoming a law and, *as it serves only to reaffirm the original legislative intent, section 627.727(10), Florida Statutes, shall apply to all causes of action accruing after the effective date of section 624.155, Florida Statutes*.

Ch. 92-318, § 80, Laws of Fla. (emphasis

added). As indicated by the express language of the statute, the Legislature has now determined that damages in first-party bad faith actions are to include the total amount of a claimant's damages, including any amount in excess of the claimant's policy limits without regard to whether the damages were caused by the insurance company. The Legislature has also directed that section ***61*** 627.727(10) is remedial and is to apply to all causes of action accruing after the effective date of section 624.155. Because section 624.155 was originally enacted in 1982, the implementing language indicates that section 627.727(10) is to be applied retroactively to 1982.

We have **[**18]** expressly stated that the Legislature was within its authority to alter the damages allowable under the statute. McLeod, 591 So. 2d at 625 ("We recognize that the legislature has the right to modify the common law definition of damages and allow recovery for amounts not proximately caused by the insurer's bad faith."). [1] The question, then, as recognized by the district court and as posed by State Farm, is whether the Legislature can modify the definition of damages retroactively to 1982 through a purported clarification of its intent.

HN5[↑] The general rule is that a substantive statute will not operate retrospectively absent clear legislative intent to the contrary, but **[**19]** that a procedural or remedial statute is to operate retrospectively. Arrow Air, Inc. v. Walsh, 645 So. 2d 422 (Fla. 1994); Alamo Rent-A-Car, Inc. v. Mancusi, 632 So. 2d 1352 (Fla. 1994); City of Lakeland v. Catinella, 129 So. 2d 133 (Fla. 1961). Even when the Legislature does expressly state that a statute is to have retroactive application, this Court has refused to apply a statute retroactively if the statute impairs vested rights, creates new obligations, or imposes new penalties. *Alamo*; State v. Lavazzoli, 434 So. 2d 321 (Fla. 1983); Seaboard Sys. R.R. v. Clemente, 467 So. 2d 348 (Fla. 3d DCA 1985).

When we apply these standards to the instant case, we find that section 627.727(10) cannot be applied retroactively because it is, in substance, a penalty. Without question, the Legislature has expressly stated that section 627.727(10) is remedial and is to be applied retroactively. Ch. 92-318, § 80, Laws of Fla. Just because the Legislature labels something as being remedial, however, does not make it so. *See, e.g.*, State v. Smith, 547 So. 2d 613 (Fla. 1989); State, Dep't of Transp. v. Knowles, 402 So. 2d 1155 (Fla. 1981). In fact, in *McLeod* **[**20]** , we signified a contrary conclusion by finding that the imposition of the amount of the excess judgment as damages would be "analogous to imposing a penalty or punitive damages on the insurer." 591 So. 2d at 625. For example, although the Legislature has characterized section 627.727(10) as simply a remedial clarification of legislative intent, the damages incurred by State Farm under section 627.727(10) would be over $ 200,000 higher in this case than if the section did not apply to this action. Further, in addition to imposing a significant penalty on all insurers found guilty of bad faith, section 627.727(10) is an entirely new provision; it would apply to all actions brought under section 624.155 since its effective date in 1982 if it were to be applied retroactively; and it significantly alters the language used to determine damages. By implementing section 627.727(10), the Legislature is in essence subjecting insurance companies in first-party bad faith actions to two penalties because, not only are they subject to punitive damages for the willful or reckless refusal to pay a claim, they are also subject to a penalty for the wrongful failure to pay a claim.

[1] Amicus Florida Defense Lawyers Association claims that section 627.727(10) not only is unconstitutional when retroactively applied but also is unconstitutional as a whole. We reject this argument without discussion based on our acknowledgment in *McLeod* that such a provision would be appropriately within the province of the Legislature.

This means that an **[**21]** insurance company found to have acted in bad faith in a first-party action may now be liable for: (1) damages proximately caused by the bad faith including interest, attorney's fees, and costs; (2) a penalty consisting of the entire amount of the excess judgment without regard to proximate causation; and (3) the additional penalty of punitive damages when the bad faith is found to be willful or reckless. To say that, under these circumstances, section 627.727(10) is simply a remedial clarification that does not retroactively impose a new penalty is not a justifiable interpretation.

The Laforets argue that the greater damages imposed under section 627.727(10) are simply an increased sanction rather than a penalty. We reject this argument based on our specific finding to the contrary in **[*62]** *McLeod* and the above analysis. The Laforets, citing Lowry v. Parole and Probation Commission, 473 So. 2d 1248 (Fla. 1985), and other cases, also argue that the Legislature was perfectly within its rights to clarify its intent and to apply the statute retroactively. We did state in *Lowry* that a clarifying amendment to a statute that is enacted soon after controversies as to the interpretation **[**22]** of a statute arise may be considered as a legislative interpretation of the original law and not as a substantive change. It would be absurd, however, to consider legislation enacted more than ten years after the original act as a clarification of original intent; the membership of the 1992 legislature substantially differed from that of the 1982 legislature. *Compare* Kaisner v. Kolb, 543 So. 2d 732 (Fla. 1989)(subsequent legislatures, in the guise of "clarification" cannot nullify retroactively what a prior legislature clearly intended). Additionally, although the pre-1990 version of section 624.155 applies to this case, section 627.727(10) is equally inapplicable to the 1990 amended version of section 624.155 given that such an application would still constitute a retroactive penalty. Consequently, section 627.727(10) can apply only to actions accruing after the date of its enactment in 1992.

In summary, ***HN6***[⬆] we conclude that section 627.727(10) applies prospectively only. In reaching this conclusion, we note that two district courts have applied that provision retroactively without reaching the constitutionality of such a retroactive application. *See* Brookins v. Goodson, 640 **[**23]** So. 2d 110 (Fla. 4th DCA), *review denied, 648 So. 2d 724 (Fla. 1994)*; Clough v. Government Employees Ins. Co., 636 So. 2d 127 (Fla. 5th DCA), *review denied, 645 So. 2d 452 (Fla. 1994)*. Because of our decision here, we disapprove those cases to the extent they can be read as approving the retroactive application of section 627.727(10).

We next address State Farm's contention that the trial judge should have directed a verdict in its favor because, under the "fairly debatable" standard, there was no bad faith as a matter of law. Alternatively, State Farm argues that the jury's verdict was contrary to the manifest weight of the evidence. Under the "fairly debatable" standard, a claim for bad faith can succeed only if the plaintiff can show the absence of a reasonable basis for denying the claim. Anderson v. Continental Ins. Co., 85 Wis. 2d 675, 271 N.W.2d 368 (Wis. 1978). To date, no Florida court has specifically adopted the "fairly debatable" standard in bad faith actions. Robinson v. State Farm Fire & Casualty Co., 583 So. 2d 1063 (Fla. 5th DCA 1991). Moreover, the approach by Florida courts in bad faith actions has been described as "unsettled." Id. at 1067-68. One federal **[**24]** district court has expressly applied the "fairly debatable" standard to a Florida action but did so based on its use in other jurisdictions. *See* Reliance Ins. Co. v. Barile Excavating & Pipeline Co., 685 F. Supp. 839 (M.D. Fla. 1988). Florida differs, however, from most jurisdictions given that first-party bad faith actions are actionable only under

section 624.155 and not the common law. Henderson, *supra*, 26 U. Mich. J.L. Ref. at 27-30. Additionally, as previously discussed, HN7[↑] section 624.155 provides remedies for *both* first- and third-party causes of actions. Section 624.155 provides that an insurer has acted in bad faith if it has "not attempted in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for [the insured's] interest." § 624.155(1)(b)1. Because this specific standard is set forth in section 624.155, we find it unnecessary and inappropriate to apply the "fairly debatable" standard to bad faith actions in Florida.

Recently, several district courts have also rejected the fairly debatable standard in both first-party unfair insurance trade practices **[**25]** and third-party bad faith actions, applying instead a totality-of-the-circumstances standard somewhat similar to the standard set forth in the statute. John J. Jerue Truck Broker, Inc. v. Insurance Co. of N. Am., 646 So. 2d 780 (Fla. 2d DCA 1994); *Robinson*. In *Robinson*, the Fifth District Court of Appeal evaluated a number of Florida cases in concluding that a totality-of-the-circumstances approach should be used HN8[↑] in evaluating third-party bad faith actions. The court determined that at least five factors should be **[*63]** taken into account: (1) whether the insurer was able to obtain a reservation of the right to deny coverage if a defense were provided; (2) efforts or measures taken by the insurer to resolve the coverage dispute promptly or in such a way as to limit any potential prejudice to the insureds; (3) the substance of the coverage dispute or the weight of legal authority on the coverage issue; (4) the insurer's diligence and thoroughness in investigating the facts specifically pertinent to coverage; and (5) efforts made by the insurer to settle the liability claim in the face of the coverage dispute. 583 So. 2d at 1068. In *Jerue*, the Second District Court of Appeal **[**26]** adopted this same approach, finding that the second, third, and fourth factors promulgated in *Robinson* should likewise be considered in a first-party cause of action. We agree, finding that a determination of whether an insurer has acted "fairly and honestly toward its insured and with due regard for [the insured's] interests" includes a consideration of these factors. Consequently, we reject the fairly debatable standard of determining whether a reasonable basis exists for rejecting coverage.

State Farm contends that we recently adopted the fairly debatable standard in Imhof v. Nationwide Mutual Ins. Co., 643 So. 2d 617 (Fla. 1994). In *Imhof*, we addressed the issue of whether a complaint for bad faith must allege that there has been a prior determination of the extent of damages. In answering that question in the affirmative, we stated in dicta that "an insurer has been found to have acted in bad faith when the disputed claim is determined not to be 'fairly debatable.'" 643 So. 2d at 619 (citing to Reliance Ins. Co. v. Barile Excavating & Pipeline Co., 685 F. Supp. 839, 840 (M.D. Fla. 1988)). That statement was irrelevant to the claim at issue and the application **[**27]** of the standard was not otherwise discussed in the opinion. Nevertheless, to clarify that this Court has not adopted the "fairly debatable" standard in actions brought under section 624.155, we recede from *Imhof* to the extent it could be read as holding to the contrary.

Interestingly, in the 1990 amendment to section 624.155, the Legislature, in addition to other changes, provided that "any person may obtain a judgment under either the common law remedy of bad faith or this statutory remedy, but shall not be entitled to a judgment under both remedies." § 624.155(7), Fla. Stat. (Supp. 1990). Because the statute otherwise makes specific reference to third-party causes of action brought under the statute, *see, e.g.*,

624.155(2)(b)4., it is clear that a third-party action can now be brought under either section 624.155 or the common law. This is untrue for first-party actions because, as discussed previously, first-party actions do not exist at common law. For consistency, however, we find that the standard set forth in this opinion should apply equally to third-party actions brought at common law.

We turn now to State Farm's remaining claims. We reject as being without merit **[**28]** State Farm's contentions that the jury's verdict was contrary to the manifest weight of the evidence and that the jury was inappropriately instructed regarding State Farm's duty to investigate. As to the latter claim, a review of the jury instructions provided in this case reflects that the judge instructed the jury consistent with our findings in this opinion as well as with prior Florida case law. *See* Boston Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783 (Fla. 1980)(insurer must investigate the facts), *cert. denied, 450 U.S. 922, 101 S. Ct, 1372, 67 L. Ed. 2d 350 (1981)*; Hollar v. International Bankers Ins. Co., 572 So. 2d 937 (Fla. 3d DCA 1990)(same), *review dismissed, 582 So. 2d 624 (Fla. 1991)*.

Finally, State Farm argues that, if the trial judge's final judgment is reversed, the attorney fee award must be reconsidered. The record reflects that the trial judge awarded attorney's fees based on the lodestar formula criteria set forth in Standard Guaranty Insurance Co. v. Quanstrom, 555 So. 2d 828 (Fla. 1990), and Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985). One of the criteria contained therein for considering a reasonable attorney's **[**29]** fee is "the amount involved and the results obtained." Rowe, 472 So. 2d at 1150. *See also* Quanstrom, 555 So. 2d at 834 (factors in determining whether a multiplier is necessary include a consideration of "whether **[*64]** any of the factors set forth in *Rowe* are applicable, *especially, the amount involved, the results obtained, and the type of fee arrangement between the attorney and his client*") (emphasis added). As a result of our decision in this case, the damages awarded to the Laforets, not including attorney's fees and costs, are being reduced from $ 265,753 (the amount of the excess judgment plus interest) to $ 24,000 (the amount of the jury's verdict). Consequently, "the amount involved and the results obtained" have changed since the initial award of attorney's fees. Under these circumstances, we find that the award of attorney's fees must be reconsidered by the trial judge. In conclusion, we find that section 627.727(10) can apply prospectively only. Accordingly, we answer the certified question in the negative, and we quash the decision of the district court. We also reject the application of the "fairly debatable" standard to insurance bad faith actions, specifically **[**30]** adopting instead the standard set forth in section 624.155. We remand this case to the district court with directions that the final judgment entered in this action be reversed and that this cause be remanded for entry of a new final judgment consistent with the dictates of this opinion.

It is so ordered.

GRIMES, C.J., and HARDING and ANSTEAD, JJ., concur.

WELLS, J., concurs in part and dissents in part with an opinion, in which SHAW and KOGAN, JJ., concur.

Concur by: WELLS J. (In Part)

Dissent by: WELLS J. (In Part)

Dissent

WELLS J., concurring in part and dissenting in part.

I concur with the majority's decision that the "fairly debatable" standard should not be applied to bad-

faith actions brought pursuant to section 624.155, Florida Statutes (1985). I also concur that the 1990 amendment to section 624.155 and the 1992 amendment to that same section through the adoption of section 627.727(10), Florida Statutes (Supp. 1992), do not apply to the 1986 cause of action at issue in this case. The 1990 act amending section 624.155 provides that it was to "take effect October 1, 1990, and shall apply to policies of contracts issued or renewed on or after that date." Ch. 90-119, § 55, Laws **[**31]** of Fla. Consequently, I conclude that the legislature did not expressly mandate that the damages recoverable in this statutory cause of action, which accrued prior to October 1, 1990, included damages in excess of policy limits. I therefore concur in the result reached by the majority.

I dissent, however, as to the majority's conclusion that section 627.727(10) is only prospective in nature. I conclude that section 627.727(10) applies retroactively back to the date of the 1990 amendment to section 624.155 and, consequently, that section 627.727(10) applies to all insurance policies issued after October 1, 1990.

It is a fundamental rule of statutory construction that a statute should be construed so as to ascertain and give effect to the intention of the legislature. City of Boca Raton v. Gidman, 440 So. 2d 1277, 1281 (Fla. 1983); *see also* City of Tampa v. Thatcher Glass Corp., 445 So. 2d 578, 579 (Fla. 1984) (citing Deltona Corp. v. Florida Public Service Comm'n, 220 So. 2d 905, 907 (Fla. 1969)). The timing and stated legislative intent of section 627.727(10) indicate that the legislature in enacting this statute was reacting to this Court's interpretation of section ***[**32]*** 624.155 following its amendment in 1990. [2] In McLeod v. Continental Insurance Co., 591 So. 2d 621, 626 (Fla. 1992), this Court concluded that pursuant to section 624.155 and the amendment thereto, an insured bringing a first-party action against an insurer could only recover damages that were the natural, proximate, probable, or direct consequence of the insurer's bad faith. The Court rejected the conclusion that first-party bad-faith damages should be fixed at the amount of the excess judgment. *Id.*. In response, the legislature **[*65]** expressly provided that first-party damages are to encompass the "total amount of the claimant's damages, including the amount in excess of the policy limits." § 627.727(10), Fla. Stat. (Supp. 1992).

[33]** While the legislature in enacting section 627.727(10) further provided in a legislative note that this section "shall apply to all causes of action accruing after the effective date of section 624.155, Florida Statutes," [3] I conclude that it was referring to the effective date of section 624.155 as amended in 1990. The legislature's intent should be given effect regardless of whether such construction varies from the statute's literal meaning. State v. Webb, 398 So. 2d 820, 824 (Fla. 1981); Garner v. Ward, 251 So. 2d 252, 256 (Fla. 1971). The legislative note accompanying section 627.727(10) implies that the statute's effective date is 1982, but I believe the only interpretation of the note compatible with the legislative history of section 624.155 and the *McLeod* decision is one recognizing the effective date of section 624.155 as October 1, 1990, the effective date of the 1990 amendment. This interpretation gives reasonable effect to the legislative intent expressed in both the note accompanying the 1990 amendment and the note accompanying the enactment of section 627.727(10), whereas the majority's opinion interpreting section 627.727(10) as prospective totally disregards **[**34]** and nullifies the legislative intent expressed in these provisions.

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[2] The 1990 amendment to section 624.155 provided in pertinent part that:

The damages recoverable pursuant to this section shall include those damages which are a reasonably foreseeable result of a specified violation of this section by the insured and may include an award or judgment in an amount that exceeds the policy limits.

Ch. 90-119, § 30, Laws of Fla.

[3] Ch. 92-318, § 80, Laws of Fla.

Further, my interpretation is in accord with this Court's decision in *Lowry v. Parole and Probation Commission, 473 So. 2d 1248 (Fla. 1985)*, recognizing that when an amendment to a statute is enacted soon after a controversy regarding the statute's interpretation, a court may consider that amendment as a legislative interpretation of the law rather than a substantive change.

It is well-settled in this State that insurance contracts are to be construed so as to include the provisions of insurance statutes. *See Grant v. State Farm Fire & Casualty Co., 638 So. 2d 936 (Fla. 1994)*; *Southeast Title & Ins. Co. v. Austin, 202 So. 2d 179, 180 (Fla. 1967)*; *Standard Accident Ins. Co. v. Gavin, 184 So. 2d 229 (Fla. 1st DCA 1966)*, *cert. dismissed, 196 So. 2d 440 (Fla. 1967)*. This principle, in conjunction with my analysis above, leads to the conclusion that all policies issued after the effective date **[**35]** of the 1990 amendment to *section 624.155* should conform with that statute as well as its proper legislative construction as evidenced by *section 627.727(10)*.

SHAW and KOGAN, JJ., concur.

End of Document

EXHIBIT “B”

McKenzie Check Advance of Fla., L.L.C. v. Betts

Supreme Court of Florida

April 27, 2006, Decided

No. SC04-1825

Reporter
928 So. 2d 1204 *; 2006 Fla. LEXIS 666 **; 31 Fla. L. Weekly S 255

MCKENZIE CHECK ADVANCE OF FLORIDA, LLC., etc., et al., Petitioners, vs. WENDY BETTS, etc., Respondent.

Subsequent History: Petition denied by *McKenzie Check Advance v. Betts, 27 So. 3d 661, 2010 Fla. LEXIS 46 (Fla., 2010)*

Prior History: [1]** Application for Review of the Decision of the District Court of Appeal - Certified Direct Conflict of Decisions. Fourth District - Case No. 4D03-3268. (Palm Beach County).

Betts v. McKenzie Check Advance of Fla., LLC, 879 So. 2d 667, 2004 Fla. App. LEXIS 11754 (Fla. Dist. Ct. App. 4th Dist., 2004)

Disposition: Fourth district court of appeals decision is approved.

Core Terms

deferred, transactions, presentment, check cashing, casher, Transmitters', loans, customer, rollover, deposit, checks, Statutes, currency, provider, Department's, post dated check, instruments, additional fee, implementing, provisions, agency's interpretation, check-cashing, authorize, travelers, agency's, cashing, agrees, courts, modify, businesses

Case Summary

Procedural Posture
Before the court for review was the decision by the Fourth District Court of Appeals involving petitioner check cashing business and respondent customer, which certified conflict with a decision in the Fifth District Court of Appeals and involved the customer's dealings with the business in cashing several checks.

Overview

The issue before the instant court was whether Fla. Stat. ch. 560 (Supp. 1994), entitled the Money Transmitters' Code (Code), authorized certain financial transactions referred to as deferred presentment transactions. The instant court approved of the holding of the Fourth District, finding that the Florida Legislature did not approve or authorize such transactions when it created the Code, and that these transactions were, in effect, loans subject to Florida's usury laws. Thus, the court disapproved of the Fifth District's contrary holding in *Betts v. Ace Cash Express, Inc., 827 So. 2d 294 (Fla. 5th DCA 2002)*. When reading all of the statute's terms together, the legislature contemplated a check casher to be a person or entity who could be compensated to provide currency in exchange for a check. Second, deferred presentment transactions were not authorized until the passage of the Deferred Presentment Act, *Fla. Stat. § 560.401* (2001). This conclusion was based upon a plain reading of the language of the original version of the Code enacted in 1994 and a similar reading of the 2001 version of the Code, as well as the terms of Florida's usury laws.

Outcome
The Fourth District's decision was approved, but the Fifth District's contrary holding was not.

LexisNexis® Headnotes

Governments > Legislation > Interpretation

HN1[] **Legislation, Interpretation**

When construing the meaning of a statute, the Florida Supreme Court must first look at its plain language. Furthermore, when the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.

Banking Law > ... > National Banks > Interest & Usury > General Overview

Contracts Law > Defenses > Usury

HN2[] **National Banks, Interest & Usury**

All contracts for the payment of interest upon any loan, advance of money, line of credit, or forbearance to enforce the collection of any debt, or upon any obligation whatever, at a higher rate of interest than the equivalent of 18 percent per annum simple interest are hereby declared usurious. However, the Florida Legislature from time to time has carved out exceptions to the usury laws. Specifically, *Fla. Stat. §§ 687.02* and *687.03* shall not be construed to repeal, modify or limit any or either of the special provisions of existing statutory law creating exceptions to the general law governing interest and usury and specifying the interest rates and charges which may be made pursuant to such exceptions.

Banking Law > ... > Bank Accounts > Deposit Accounts > General Overview

HN3[] **Bank Accounts, Deposit Accounts**

See *Fla. Stat. § 560.404(14)*.

Banking Law > ... > Bank Accounts > Deposit Accounts > General Overview

HN4[] **Bank Accounts, Deposit Accounts**

See *Fla. Stat. § 560.404(18)*.

Banking Law > ... > Bank Accounts > Deposit Accounts > General Overview

HN5[] **Bank Accounts, Deposit Accounts**

See *Fla. Stat. § 560.404(19)*.

Governments > Legislation > Effect & Operation > Amendments

HN6[] **Effect & Operation, Amendments**

Sometimes it may be appropriate to consider a subsequent amendment to clarify original legislative intent of a statute if such amendment was enacted soon after a controversy regarding the statute's interpretation arose.

Banking Law > ... > National Banks > Interest & Usury > General Overview

Contracts Law > Defenses > Usury

HN7[] **National Banks, Interest & Usury**

The usury laws, which existed at the time the Money Transmitters' Code, Fla. Stat. ch. 560, was enacted, have a general application to all contracts for the payment of interest upon any loan, advance

of money, line of credit, or forbearance to enforce the collection of any debt. *Fla. Stat. § 687.02* (1997). As a result, deferred deposit transactions are not "check cashing" transactions and are not governed by the Money Transmitters' Code enacted in 1994. Instead, these transactions are contracts for the payment of interest upon any loan and subject to Florida's usury laws.

Counsel: Virginia B. Townes of Akerman, Senterfitt, Orlando, Florida and Mitchell Berger of Berger Singerman, Fort Lauderdale, Florida, for Petitioner.

Christopher C. Casper of James Hoyer, Newcomer and Smiljanich, P.A., Tampa, Florida, E. Clayton Yates of Yates and Mancini, LLC, Fort Pierce, Florida and Richard A. Fisher, Cleveland, Tennessee, for Respondent.

Warren H. Husband and James R. Daughton, Jr. of Meetz, Hauser, Husband and Daughton, P.A., on behalf of the Community Financial Services Association of America and the Financial Service Centers of Florida, Inc.; and Lynn Drysdale of Jacksonville Area Legal Aid, Inc., Jacksonville, Florida and Deborah Zuckerman of AARP Foundation, Washington, D.C., on behalf of AARP, National Association of Consumer Advocates and National Consumer Law Center, for Amici Curiae.

Judges: ANSTEAD, J. WELLS, LEWIS, QUINCE, **[**2]** and BELL, JJ., concur. CANTERO, J., concurs in part and dissents in part with an opinion. PARIENTE, C.J., recused.

Opinion by: ANSTEAD

Opinion

[*1205] ANSTEAD, J.

We have for review the decision in *Betts v. McKenzie Check Advance of Florida, LLC, 879 So. 2d 667 (Fla. 4th DCA 2004)*, which certified conflict with the decision in *Betts v. Ace Cash Express, Inc., 827 So. 2d 294 (Fla. 5th DCA 2002)*. We have jurisdiction. *See art. V, § 3(b)(4), Fla. Const.* The issue before this Court is whether chapter 560, Florida Statutes (Supp. 1994), which is titled the "Money Transmitters' Code" (herein referred to as "the Code"), authorized certain financial transactions referred to as deferred presentment transactions. We approve the holding of the Fourth District in *McKenzie* that the Legislature did not approve or authorize such transactions when it created the Code in 1994 and that these transactions are, in effect, loans subject to Florida's usury laws. [1] We disapprove of the Fifth District's contrary holding in *Ace Cash*.

FACTS AND PROCEDURAL HISTORY

The **[**3]** factual transactions that gave rise to the present dispute are summarized in the Fourth District's opinion:

> Betts's business relationship with NCA [National Cash Advance] began in August 1997 when she gave NCA two checks, each in the amount of $ 115. In return, she received $ 200 in cash and NCA's promise to defer presentment of the checks for a specified time. Approximately one week later, Betts redeemed the checks for cash. Less than one week later, Betts gave NCA three more checks, each for $ 115, in exchange for $ 300 and the same promise by NCA. Approximately two weeks later, Betts replaced the checks with three new checks, which she ultimately replaced with cash two weeks thereafter. A number of similar transactions subsequently took place, with Betts continuing to replace one check with another check, each time paying a fee, until December 1997 when she redeemed all checks with cash.

[1] We decline to address the issue of whether National Cash Advance (NCA) is entitled to the protection of the safe harbor provision, *section 560.107, Florida Statutes* (Supp. 1994).

McKenzie, 879 So. 2d at 668-69 (Fla. 4th DCA 2004) (footnote omitted). A similar, although not identical, set of circumstances was presented in *Ace Cash, 827 So. 2d at 294*. Following a trial court decision against Betts based on the Fifth District's earlier decision in *Ace Cash*, the Fourth District **[**4]** reversed and held that the deferred payment transactions between Betts and NCA were essentially loan transactions and were not authorized with the Legislature's enactment of the Money Transmitters' Code in 1994. *McKenzie, 879 So. 2d at 674-75*. The Fourth District decided that the short-term loan agreements entered into between Betts and NCA contrasted sharply with the check cashing transactions authorized by the Code:

> There is no question that what takes place is something more than simple **[*1206]** check cashing. In a deferred presentment transaction, the customer is advanced money in exchange for a check which the lender agrees not to immediately cash. In exchange for agreeing to defer presentment of the check, the lender exacts a fee. As Betts argues in this case, one might wonder why anyone would utilize the services of a "check casher" and pay for what he or she could otherwise obtain for free at a bank. Clearly, it is because the customer does not have the funds readily available to honor the check. Thus, there can be no question that what takes place is essentially an advance of money or a short-term loan.

McKenzie, 879 So. 2d at 672. The Fourth District certified that its holding was **[**5]** in conflict with the Fifth District's holding in *Ace Cash*, and this review follows.

BACKGROUND

As outlined in the Fourth District's opinion, the Florida Legislature enacted the Money Transmitters' Code in 1994. This Code sought to regulate the practices of the money transmitter industry, including check cashing. The Code's definition of "money transmitter" referred to "any person located in or doing business in this state who acts as a payment instrument seller, foreign currency exchanger, check casher, or funds transmitter." *§ 560.103(10), Fla. Stat* (Supp. 1994). The Code defined "check casher" as "a person who, for compensation, sells currency in exchange for payment instruments received, except travelers checks and foreign-drawn payment instruments." *§ 560.103(3)*. "Sell" was defined as "to sell, issue, provide, or deliver." *§ 560.103(19)*. A "payment instrument" meant "a check, draft, warrant, money order, travelers check or other instrument or payment of money, whether or not negotiable." *§ 560.103(14)*. Moreover, "cashing" was defined as "providing currency for payment instruments, except for travelers checks and foreign-drawn payment instruments." *§ 560.302(1)*. Finally, the Department **[**6]** of Banking and Finance was charged with interpreting and enforcing the Code. *§§ 560.102(1)*, *560.105*.

The following year, on February 24, 1995, the Florida Check Cashiers Association (FCCA), [2] a group representing the Florida check cashing industry, solicited and received an informal opinion letter from the Department of Banking and Finance concerning certain deferred check cashing practices. The Department's letter stated that "Chapter 560, Florida Statutes, does not explicitly prohibit the concept of deferred deposits" so long as the service would be offered and managed in accordance with the provisions and fee caps of the Code.

Subsequently, on September 24, 1997, the Department adopted rules regulating check cashing transactions. These rules permitted a check casher

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[2] The Florida Check Cashiers Association is now known as Financial Service Centers of Florida, Inc.

to accept a postdated check, [3] and capped the transaction fees for such transactions at ten percent and the verification fees at five dollars. Fla. Admin. Code R. 3C-560.801 (transferred to *R.69V-560.801*), *3C-560.803* (repealed 2001), and 3C-560.905 (transferred to R.*69V-560.905*).

[*1207] On May 5, 1998, the Department sent a letter to Advance America, Cash Advance Centers of Florida, Inc., regarding cashing checks, fees associated with deferred deposit checks, and rollover transactions of deferred deposit checks. This letter stated that customers cashing checks must receive currency, not another check or other type of payment instrument. In referencing deferred presentment transaction practices, the letter described the limitations on fees that can be charged by check cashers and explicitly referenced Florida's Usury Law in *section 687.02, Florida Statutes* (1997), stating that "it is illegal to charge a higher rate of interest than 18 percent per annum simple interest. Any 'rollover,' 'extension' or 'renewal' of a deferred deposit check for an additional fee may constitute interest." In the final paragraph of the letter, the Department **[**8]** put Advance America on notice that the Department would fully enforce chapter 560 and that Advance America should "refrain from issuing payment instruments [for which it is] not properly licensed."

On May 1, 2000, the Florida Attorney General's Office issued an advisory legal opinion to the Comptroller of Florida in response to the question: "Are so-called 'payday loans' or like transactions subject to the state laws prohibiting usurious rates of interest?" Op. Att'y Gen. Fla. 00-26 (2000). The opinion stated:

> "Payday loans" or like transactions are subject to the state laws prohibiting usurious rates of interest. A company registered under Chapter 560, Florida Statutes, may cash personal checks for the fees prescribed in that chapter without violating the usury laws only if such transactions are concluded and are not extended, renewed or continued in any manner with the imposition of additional fees.
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> . . . .
>
> Thus, to the extent that a transaction comports with the provisions of this act [chapter 560], it would not violate the usury provisions in Chapter 687, Florida Statutes. In the absence of statutory authorization for these types of transactions, cashing a check or exchanging currency **[**9]** for a fee outside the scope of Chapter 560, Florida Statutes, would constitute a loan, subject to the usury provisions of Chapter 687, Florida Statutes.

Op. Att'y Gen. Fla. 00-26 (2000).

In 2001, Betts filed an administrative challenge to Department rule *3C-560.803, Fla. Admin. Code*, claiming that the rule, in seeming to authorize the acceptance of postdated checks by a check casher, was an invalid exercise of delegated legislative authority; furthermore, the rule improperly enlarged, modified, or contravened specific provisions of the Code it was meant to implement. After a hearing, an Administrative Law Judge (ALJ) upheld the rule, finding it did not enlarge, modify, or contravene the Code and it was a proper exercise of delegated legislative authority. *Betts v. Dep't of Banking & Fin.*, No. 01-1445RX (Fla. DOAH order filed Sept. 7, 2001). However, the ALJ concluded that the Department's rule did not authorize deferred deposit transactions or the fees to be charged for such transactions. *Id.* The order stated that "the Department has no rule, order, or declaratory statement authorizing deferred deposit transactions or repeated, consecutive deferred deposit transactions by a registered **[**10]** check casher." *Id.* at 11. Moreover, the order stated that "the rule does not establish the fees nor does it authorize 'rollover transactions' or 'payday loans.' " *Id.* at 32.

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[3] *Florida Administrative Code Rule 3C-560.803* **[**7]** provided, "A check casher may accept a postdated check, subject to the fees established in *Section 560.309(4), F.S.*" This rule only permitted postdated checks in check cashing transactions. Because there were no postdated checks in this case, we need not address the issue of whether the Department had the authority to promulgate this rule.

In 2001, the Legislature amended the Code to expressly permit deferred presentment transactions subject to certain limitations and to prohibit rollover transactions. **[*1208]** *See* Deferred Presentment Act, ch. 2001-119, § 13, Laws of Fla. (codified at *§§ 560.401-.408, Fla. Stat.* (2001)). A "deferred presentment transaction" is defined in the amendment as "providing currency or a payment instrument in exchange for a person's check and agreeing to hold that person's check for a period of time prior to presentment, deposit, or redemption." *§ 560.402(6)*. In the amended version of the statute, the Legislature expressly authorized deferred presentment transactions subject to the lender's compliance with strict record-keeping, notice, and Truth-in-Lending disclosure requirements. *See § 560.404*. The statute limits the face amount of the check taken for deferred presentment to not more than $ 500 and caps the fee for such transactions at ten percent. *§ 560.404(5)-(6)*. The statute expressly prohibits the post-dating of checks and **[**11]** any rollover or extension of a deferred presentment agreement. *§ 560.404(12), (14), (18)*.

ANALYSIS

We must decide whether the Legislature intended to include the deferred presentment transactions challenged by Betts when it enacted the Code in 1994. Like the Fourth District in *McKenzie* and the dissent in *Ace Cash*, we conclude that it did not. When reading all of the statute's terms together, we conclude that the Legislature contemplated a check casher to be a person or entity who may be compensated to provide currency in exchange for a check. We further conclude that the Legislature did not authorize deferred presentment transactions such as those involved herein until the passage of the Deferred Presentment Act in 2001. Hence, the transactions involved herein are subject to Florida usury laws. Our conclusion is based upon a plain reading of the language of the original version of the Code enacted in 1994 and a similar reading of the 2001 version of the Code, as well as the terms of Florida's usury laws.

HN1[⬆] When construing the meaning of a statute, we must first look at its plain language. *Montgomery v. State, 897 So. 2d 1282, 1285 (Fla. 2005)*. Furthermore, "when the language of the statute **[**12]** is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Id.* (quoting *Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984)*).

Historically, transactions involving the lending of money for a fee or at a particular rate of interest have been governed by Florida's usury laws. *See § 687.02(1), Fla. Stat.* (1993) ***HN2***[⬆] ("All contracts for the payment of interest upon any loan, advance of money, line of credit, or forbearance to enforce the collection of any debt, or upon any obligation whatever, at a higher rate of interest than the equivalent of 18 percent per annum simple interest are hereby declared usurious."). However, the Legislature from time to time has carved out exceptions to the usury laws. *See, e.g., § 687.031, Fla. Stat.* (1993) ("*Sections 687.02* and *687.03* shall not be construed to repeal, modify or limit any or either of the special provisions of existing statutory law creating exceptions to the general law governing interest and usury and specifying the interest rates and charges which may be made pursuant to such exceptions . **[**13]** . . ."). We find no exception to these laws in the enactment of the Money Transmitters' Code in 1994.

When the Money Transmitters' Code was enacted in 1994, it defined a "money transmitter" as "any person located in or doing business in this state who acts as a payment instrument seller, foreign currency exchanger, *check casher*, or **[*1209]** funds transmitter." *§ 560.103(10), Fla. Stat.* (Supp. 1994) (emphasis added). The Code defined "check casher" as "a person who, for compensation, *sells* currency in exchange for *payment instruments* received, except travelers checks and foreign-drawn payment instruments." *§ 560.103(3)* (emphasis added). The term "sell" was defined as "to sell, issue, provide, or deliver." *§ 560.103(19)*. A

"payment instrument" meant "a *check*, draft, warrant, money order, travelers check or other instrument or payment of money, whether or not negotiable." *§ 560.103(14)* (emphasis added). Moreover, the term "cashing" was also defined in the Code as "providing currency for payment instruments, except for travelers checks and foreign-drawn payment instruments." *§ 560.302(1)*. The Code's language explicitly provides, by the use of "in exchange for" and "for," that the check for cash **[**14]** transaction would be a contemporaneous one. *See §§ 560.103(3)*, *560.302(1)*. For example, the statute contemplates that a person may have to pay a fee for an authorized entity to cash a check, and the entity would then give the person money in exchange for the check. Therefore, we conclude the check cashing transaction contemplated by the Code is a straightforward payment of money in exchange for a check and not an authorization to process loans outside Florida's usury laws.

As noted above, the Code was amended by the passage of the Deferred Presentment Act in 2001. *See § 560.401-.408, Fla. Stat.* (2001). In the Deferred Presentment Act, a "deferred presentment transaction" was defined as "providing currency or a payment instrument in exchange for a person's check and agreeing to hold that person's check for a period of time prior to presentment, deposit, or redemption." *§ 560.402(6)*. Moreover, "rollover" was defined as "the termination or extension of an existing deferred presentment agreement by the payment of any additional fee and the continued holding of the check, or the substitution of a new check drawn by the drawer pursuant to a new deferred presentment agreement." *§ 560.402(8)*. **[**15]** Additionally, "termination of an existing deferred presentment agreement" was defined as:

> The check that is the basis for an agreement is redeemed by the drawer by payment in full in cash, or is deposited and the deferred presentment provider has evidence that such check has cleared. A verification of sufficient funds in the drawer's account by the deferred presentment provider shall not be sufficient evidence to deem the existing deferred deposit transaction to be terminated.

§ 560.402(10).

Importantly, Part IV of chapter 560, as amended in 2001, imposes strict requirements for deferred presentment transactions. Most relevant to the instant case is *section 560.404(14)*, which states, *HN3*[↑] "No deferred presentment provider or its affiliate may accept or hold an undated check or a check dated on a date other than the date on which the deferred presentment provider agreed to hold the check and signed the deferred presentment transaction agreement." Additionally, *section 560.404(18)* states:

> *HN4*[↑] No deferred presentment provider or its affiliate may engage in the rollover of any deferred presentment agreement. A deferred presentment provider shall not redeem, extend, or otherwise consolidate a deferred **[**16]** presentment agreement with the proceeds of another deferred presentment transaction made by the same or an affiliated deferred presentment provider.

Furthermore, *section 560.404(19)* provides:

> *HN5*[↑] A deferred presentment provider may not enter into a deferred presentment **[*1210]** transaction with a person who has an outstanding deferred presentment transaction with that provider or with any other deferred presentment provider, or with a person whose previous deferred presentment transaction with that provider or with any other provider has been terminated for less than 24 hours.

Like the Fourth District in *McKenzie* and Judge Griffin's dissent in *Ace Cash*, we conclude that the Legislature did not intend for deferred presentment transactions to be covered under the Money Transmitters' Code until it expressly added the Deferred Presentment Act in 2001.

In fact, this reading of the plain language of the statute is well articulated in Judge Griffin's dissent in *Ace Cash*:

> The fact that Chapter 560, which regulates check cashing operations, does not expressly prohibit rollovers and deferred presentments, does not mean that the usury laws are not violated by such devices. The legislature is to be forgiven **[**17]** for not having the foresight to prohibit or regulate the "uncashing" of a cashed check. Nor am I persuaded that the passage of the "Deferred Presentment Act" in October 2001 was intended by the legislature to confirm the prior legality of the practice. Indeed, it appears the legislation undertook to regulate and limit these schemes. Further, the statute appears to recognize that these transactions are, in fact, loans.

Ace Cash, 827 So. 2d at 299 (Griffin, J., dissenting). We conclude that if the Legislature had intended to carve out such an important exception to the usury laws in 1994, it would have expressly done so, as it did with the 2001 amendment.

HN6[⬆] Sometimes it may be appropriate to consider a subsequent amendment to clarify original legislative intent of a statute if such amendment was enacted soon after a controversy regarding the statute's interpretation arose. *Lowry v. Parole & Prob. Comm'n, 473 So. 2d 1248, 1250 (Fla. 1985)*. However, the Fourth District decided that it is inappropriate to use an amendment for this purpose when the amendment was enacted seven years after the original statute. *McKenzie, 879 So. 2d at 674*; *see also Parole Comm'n v. Cooper, 701 So. 2d 543, 544-45 (Fla. 1997)* **[**18]** (concluding that ten years is too long to be an affirmation of prior legislative intent). We agree.

In this case, the Legislature enacted the 2001 version of the Code seven years after the 1994 version. As with the ten-year gap in *Cooper*, we conclude that seven years is too long to view the amendment as merely a clarification of legislative intent. It is telling that nowhere within the original version of the Code did the Legislature mention these types of transactions. Moreover, ***HN7***[⬆] the usury laws, which existed at the time the Code was enacted, have a general application to "all contracts for the payment of interest upon any loan, advance of money, line of credit, or forbearance to enforce the collection of any debt." *§ 687.02, Fla. Stat.* (1997). As a result, like the Fourth District and Judge Griffin, we conclude that the deferred deposit transactions involved herein are not "check cashing" transactions and are not governed by the Money Transmitters' Code enacted in 1994. Instead, these transactions are "contracts for the payment of interest upon any loan" [4] and subject to Florida's usury laws.

[*1211] Finally, we find it persuasive that courts in other states have held that deferred presentment transactions are loans. *See, e.g., Hamilton v. York, 987 F. Supp. 953, 956 (E.D. Ky. 1997)* (deciding that the deferred-repayment transactions "were nothing more than interest bearing loans"); *Austin v. Alabama Check Cashers Ass'n, 936 So. 2d 1014, 2005 Ala. LEXIS 197, Nos. 1011907 & 1011930, 2005 WL 3082884, at *21 (Ala. Nov. 18, 2005)* (concluding that deferred presentment transactions were loans subject to the Alabama Small Loan Act); *White v. Check Holders, Inc., 996 S.W.2d 496, 500, 46 8 Ky. L. Summary 59 (Ky. 1999)* (holding that the legislature did not intend for deferred deposit businesses to come under the law when it passed *Kentucky Revised Statutes section*

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[4] At oral argument, McKenzie's counsel conceded that these transactions were "a species of **[**19]** loans" and "a form of a loan."

368.100(2) to allow check cashing businesses to charge fees without implicating usury laws).

[*1211] Finally, we find it persuasive that courts in other states have held that deferred presentment transactions are loans. *See, e.g.*, Hamilton v. York, 987 F. Supp. 953, 956 (E.D. Ky. 1997) (deciding that the deferred-repayment transactions "were nothing more than interest bearing loans"); Austin v. Alabama Check Cashers Ass'n, 936 So. 2d 1014, 2005 Ala. LEXIS 197, Nos. 1011907 & 1011930, 2005 WL 3082884, at *21 (Ala. Nov. 18, 2005) **[**20]** (concluding that deferred presentment transactions were loans subject to the Alabama Small Loan Act); White v. Check Holders, Inc., 996 S.W.2d 496, 500, 46 8 Ky. L. Summary 59 (Ky. 1999) (holding that the legislature did not intend for deferred deposit businesses to come under the law when it passed Kentucky Revised Statutes section 368.100(2) to allow check cashing businesses to charge fees without implicating usury laws).

The facts of the instant case are strikingly similar to those in *White*. In 1992, the Kentucky General Assembly enacted Kentucky Revised Statutes chapter 368, allowing check cashing businesses to charge a fee for cashing checks without implicating Kentucky's usury laws. White, 996 S.W.2d at 497. The transactions in that case involved the use of an order instrument "payable on demand and drawn on a bank" to evidence the promise of a debt due at a later time. *Id.* In *White*, the court addressed the following issue:

> When a check cashing company licensed under KRS 368 et seq. accepts and defers deposit on a check pursuant to an agreement with the maker of the check, is the service fee charged by the check cashing company a "service fee" and not "interest" under KRS 368.100(2), **[**21]** or is the fee "interest" which is subject to the usury laws and disclosure provisions in KRS Chapter 360

Id. The Kentucky Supreme Court held that the General Assembly did not intend for section 368.100(2) to encompass short-term loans based upon deferred deposit transactions as well as check cashing from current funds. Id. at 499. The Court decided that deferred deposit businesses did not come under the Code. *Id.* Furthermore, the Court noted that if the 1992 Act had applied to deferred deposit transactions, there would have been no need for the General Assembly to have amend the statute in 1998 to include these types of transactions. *Id.*

CONCLUSION

In conclusion, we hold that the original version of the Code did not include deferred presentment transactions. Therefore, at the time the transactions between Betts and NCA took place, the legality of such transactions was governed by Florida's usury laws. Accordingly, we approve the Fourth District's essential holding in *McKenzie* on this issue, and disapprove the Fifth's District decision in *Ace Cash*. We decline to consider other issues raised by the parties.

It is so ordered. WELLS, LEWIS, QUINCE, and BELL, JJ., concur.

CANTERO, J., concurs **[**22]** in part and dissents in part with an opinion.

PARIENTE, C.J., recused.

Concur by: CANTERO (In Part)

Dissent by: CANTERO (In Part)

Dissent

CANTERO, J., concurring in part and dissenting in part.

Although the majority does not distinguish between pure deferred presentment transactions and rollover

transactions, I see great differences between them. More importantly, so did the Department of Banking and Finance--the agency charged with implementing the statute we interpret. As I explain in more detail below, a deferred presentment transaction is one in which the check casher agrees not to **[*1212]** "present" the customer's check to the bank until a later date; a rollover transaction is one in which the customer returns--sometimes more than once--and pays another fee to extend the period of deferment, usually by exchanging the previously "cashed" check for a new one. I agree with the majority that rollover transactions are essentially loans, and therefore are subject to the usury statute (this, incidentally, was also the Department's conclusion). I disagree, however, to the extent the majority holds that pure deferred presentment transactions are loans as well. Consistent with our many precedents deferring to an implementing **[**23]** agency's reasonable interpretation of a statute, I would defer to the Department, which concluded that the term "check cashing" includes deferred presentment transactions unless they involve a rollover for an additional fee. This interpretation reasonably clarifies a statutory ambiguity and falls squarely within the Department's area of expertise.

I. The Statutory Ambiguity

The issue in this case is whether the term "check cashing" in the Money Transmitters' Code--chapter 560, Florida Statutes (1997)--encompasses deferred presentment transactions. In a normal check-cashing transaction, the customer presents the check-cashing company with a check (sometimes a paycheck received that day), and in exchange receives cash. The majority finds nothing wrong with such transactions. Deferred presentment transactions are check-cashing transactions with a twist: like normal transactions, the customer receives cash in exchange for a check, but instead of having authority to cash the check immediately, the company, for a fee, agrees not to present the check to the bank for a specified period of time. [5]

Some deferred presentment transactions present yet another wrinkle: the customer enters into a so-called "rollover" transaction. These come in three main types: (1) the customer pays an additional fee in cash, and the check casher agrees to defer presentment for an even longer period; (2) the customer pays an additional fee and replaces the first check with a new one, presentment of which is also deferred; or (3) the customer redeems the earlier check with cash and then promptly writes a new check for deferred presentment, in exchange for which the cash--minus an additional fee--is returned. As scholars have noted, all of these rollovers achieve the same result: "a continuous flow of interest-only payments at very short intervals that never reduces the principal." Lynn Drysdale & Kathleen E. Keest, *The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System and its Challenge to Current Thinking About the Role of Usury Laws in Today's Society*, *51 S.C. L. Rev. 589, 601 (2000)*. [6]

Before 2001, when the Legislature passed the Deferred Presentment Act specifically addressing deferred presentment transactions, *see* ch. 2001-119, § 13, Laws of Fla., the Money Transmitters' Code did not mention them. It merely discussed check cashing in general, which it defined as "providing currency for payment instruments, except for travelers checks and foreign-drawn payment instruments." *§ 560.302(1), Fla. Stat.* (1997). Thus, if deferred presentment transactions qualified **[*1213]** as check cashing, they were subject to the Code's fee structure. *See id. §§ 560.301-.310*. If not, then they were effectively loans subject to Florida's longstanding usury laws.

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[5] These deferred presentment transactions are sometimes called "payday loans," "cash advance loans," **[**24]** "delayed deposit transactions," or "postdated check loans," among other things.

[6] The petitioner in this case stopped engaging in rollover transactions (at least the first and second types) **[**25]** in 1998, when the Department expressly stated in a letter of advice that such transactions constituted usurious loans.

See id. § 687.02(1) ("All contracts for the payment of interest upon any loan, advance of money, line of credit, or forbearance to enforce the collection of any debt, or upon any obligation whatever, at a higher rate of interest than the equivalent of 18 percent per annum simple interest are hereby declared usurious."). [7]

The majority concludes from the plain language of the Code that all deferred presentment transactions--whether completed or rolled over--fall outside the definition of "check cashing." Majority op. at 12, 15. According to the majority, they are simply disguised loans that must comply with the usury laws. *Id.* at 15. I beg to differ. I do not agree that all deferred payment transactions are the same. To the contrary, as I explain below, the agency charged with implementing the Code has reasonably interpreted it as including pure deferred presentment transactions but excluding rollovers. I would defer to the agency's interpretation.

II. The Agency's Interpretation

The agency with "general regulatory powers" under the Money Transmitters' Code is the Department of Banking and Finance, which has express statutory authority "to issue and publish rules . . . to interpret **[**27]** and implement the provisions of the code," as well as the "discretion to effectuate the purposes, policies, and provisions of the code." § 560.105(3), Fla. Stat. (1997). This authority, however, is limited. The Department may exercise "only such rulemaking power and administrative discretion . . . as is necessary, in order that the supervision and regulation of money transmitters may be flexible and readily responsive to changes in economic conditions, in technology, and in money transmitter practices." *Id.* § 560.102(2)(h).

On many occasions, the Department exercised its authority by evaluating whether the Code authorized deferred presentment transactions. First, in February 1995, the Department wrote to Florida's check-cashing association stating that it saw "no reason to object" to deferred presentment transactions, provided that they adhered to the Code's fee limitations for check-cashing transactions. *See* Letter from Jeffrey D. Jones, Asst. Gen. Counsel, Office of Comptroller, to Larry F. Lang, President, Fla. Check Cashiers Ass'n, Inc., at 1 (Feb. 24, 1995). The letter cautioned, however, that it was "not a rule, declaratory statement or final order," but rather an informal opinion **[**28]** by which the Department would not consider itself bound. *Id.*

In September 1997, the Department promulgated a formal rule addressing deferred presentment transactions. The rule provided that "[a] check casher may accept a postdated check, subject to the fees established in Section 560.309(4), F.S." Fla. Admin. Code R. 3C-560.803 (1997). As a logical corollary, the rule also allowed the check casher to *wait* until the specified date to cash the check. This is because the customer has the ability, by notifying the bank in writing of the postdated check, to prevent it from being cashed early. § 655.86, Fla. Stat. (1997). Unless the Department intended for check cashers to **[*1214]** accept postdated checks without ever cashing them, which seems absurd, it must have intended to allow deferred presentment of postdated checks.

The majority dismisses the rule because none of the respondent's transactions involved a postdated check; all of her checks were presently dated. But that is too formalist a reading of the rule. No functional difference exists between a postdated check and a presently dated check whose presentment is deferred. In one case, the agreement to defer is noted on the check itself; in **[**29]** the other, it is contained in a separate document. The agreements are effectively the same. Thus, the most logical reading of the Department's rule is that check cashing encompasses transactions in which

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[7] As one district court has noted, "the usury statutes were in existence at the time Chapter 560 was **[**26]** created and the legislature must be presumed to have been aware of them when it enacted legislation allowing the transactions to take place." Fastfunding the Co. v. Betts, 852 So. 2d 353, 355 (Fla. 5th DCA 2003). Thus, a transaction that complies with the Code "should not be deemed to be in violation of Florida's usury laws." *Id.*

the check casher waits for an agreed-upon period before cashing the customer's check. *See* Betts v. McKenzie Check Advance of Fla., LLC, 879 So. 2d 667, 671 (Fla. 4th DCA 2004) (stating that the rule "expressly approved deferred presentment transactions subject to certain restrictions").

Even if the rule did leave some ambiguity, however, it was clarified a few months later. In a letter of advice to Florida check cashers in May 1998, the Department explained, as the rule implied, that deferred presentment transactions were subject to the Code's check-cashing fee structure. But the Department cautioned that when a deferred presentment transaction is rolled over, extended, or renewed for an additional fee, the additional fee may constitute excessive interest under the usury laws. *See* Letter from Wm. Douglas Johnson, Asst. Dir., Div. of Banking, Dep't of Banking and Fin., to Billy Webster, President/CEO, Advance Am. Cash Advance Ctrs. of Fla., Inc., at 1 (May 5, 1998). In other words, a **[**30]** deferred presentment transaction only counts as check cashing when it is consummated by the actual cashing of the check or cash redemption.

Two years later, the Department asked the Attorney General for his opinion on the matter. We have long recognized that "although an opinion of the Attorney General is not binding on a court, it is entitled to careful consideration and generally should be regarded as highly persuasive." State v. Family Bank of Hallandale, 623 So. 2d 474, 478 (Fla. 1993). Reaching the same conclusion as the Department, the Attorney General opined that a check casher registered under the Code "may cash personal checks for the fees prescribed in [the Code] without violating the usury laws only if such transactions are concluded and are not extended, renewed or continued in any manner with the imposition of additional fees." Op. Atty. Gen. Fla. 00-26 (2000).

Finally, in April 2001, the respondent challenged the Department's rule in an administrative proceeding. The administrative law judge dismissed her petition, explaining that nothing in the Code "prohibits the check casher from holding the customer's check for an agreed-upon period of time." *Betts v. Dep't of Banking* ***[**31]*** *& Fin.*, No. 01-1445RX at 27 (Fla. Div. Admin. Hearings Sept. 7, 2001). While acknowledging that the Department's rule "provides more details than the statute," the judge concluded that it "does not enlarge, modify or contravene the language it seeks to interpret." *Id.* at 30. Accordingly, the judge upheld the rule as a reasonable implementation of the statute. The respondent did not appeal. Shortly thereafter, in light of the 2001 amendments to the Code, the rule was repealed. [8]

[*1215] In summary, the Department has consistently interpreted the Code's term "check cashing" as including deferred presentment transactions unless they involve a rollover, extension, **[**32]** or renewal for an additional fee. This policy was stated informally in 1995 (one year after the Code's enactment), was formalized into a rule in 1997, was further explained in a formal letter in 1998, was embraced by the Attorney General in 2000, and finally was upheld by an administrative law judge in 2001, just before the Code was amended. The interpretations were consistent. Some of the transactions in this case occurred in 1997, the year before the Department made its position absolutely clear in the formal letter. But the letter did not represent a change in Department policy. It merely confirmed the Department's consistent position, as already expressed (less clearly) in the informal opinion and the formal rule.

We have not required that, to be entitled to deference, an agency's statutory interpretation be

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[8] Before the statutory amendment, the Department was considering a proposed rule that would have expressly stated that "any agreement to extend, renew or continue a check cashing transaction in any manner, including the substitution of a new check drawn by the drawer, if coupled with the imposition of any fees, compensation, or any other benefit, is outside the scope of [the Code]." 27 Fla. Admin. Weekly 651-52 (Feb. 16, 2001). In light of the statutory amendments, the proposal was withdrawn. 27 Fla. Admin. Weekly 2841 (June 15, 2001).

exhaustively articulated in a formal rule. To the contrary, we have deferred to a rule supported by an affidavit from an agency official who attested after the fact that the Department of Revenue had "consistently maintained [a] policy" since the inception of a given tax. *Dep't of Revenue v. First Union Nat'l Bank of Fla., 513 So. 2d 114, 119 (Fla. 1987).* Thus, when we have **[**33]** reliable evidence that the implementing agency maintained a consistent interpretation of its statute during the time the statute was in effect--as is the case here--that interpretation should be followed if it meets the requirements for administrative deference. I now address that issue.

III. The Doctrine of Administrative Deference

We have long recognized that "the contemporaneous administrative construction of the enactment by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized." *Gay v. Canada Dry Bottling Co. of Fla., 59 So. 2d 788, 790 (Fla. 1952)* (quoting *Coca-Cola Co. v. State Bd. of Equalization, 25 Cal. 2d 918, 156 P.2d 1, 2 (Cal. 1945)*). Stated positively, this doctrine means that "a reviewing court must defer to an agency's interpretation of an operable statute as long as that interpretation is consistent with legislative intent and is supported by substantial, competent evidence." *Pub. Employees Relations Comm'n v. Dade County Police Benevolent Ass'n, 467 So. 2d 987, 989 (Fla. 1985).*

Courts defer to the implementing agency out of respect **[**34]** for the institutional competence and expertise of agencies charged with implementing legislation. Agencies have more expertise about matters within their jurisdiction than courts, which consider a wide variety of issues. While the courts always remain the final authority on the interpretation of statutes--an authority that, under the separation of powers in the Florida Constitution, no Legislature may remove--we certainly can benefit from an agency's unique combination of technical knowledge and practical experience. The Legislature, by authorizing an agency to implement a statute, encourages us to "accord[] considerable persuasive force" to the agency's judgments. *State ex **[*1216]** rel. Szabo Food Servs., Inc. of N.C. v. Dickinson, 286 So. 2d 529, 531 (Fla. 1973)*. We have done just that. Under our precedents, "deference usually will be accorded an administrative agency's interpretation of matters entrusted by statute to its discretion or expertise." *Palm Harbor Special Fire Control Dist. v. Kelly, 516 So. 2d 249, 250 (Fla. 1987)* (citing *Pub. Employees, 467 So. 2d at 987*, and *Daniel v. Fla. State Tpk. Auth., 213 So. 2d 585 (Fla. 1968)).* [9]

Although we occasionally depart from agency interpretations, it is only "for the most cogent reasons." *Fidelity Constr. Co. v. Arthur J. Collins & Son, Inc., 130 So. 2d 612, 613 (Fla. 1961)* (citing *Gay, 59 So. 2d at 790*). We do not defer to an agency's interpretation that attempts "to enlarge, modify, or contravene a statute." *Campus Commc'ns, Inc. v. Dep't of Revenue, 473 So. 2d 1290, 1296 (Fla. 1985)* (internal quotation marks omitted). The Administrative Procedure Act, not to mention the separation of powers, prohibits such actions. *See § 120.52(8)(c), Fla. Stat.* (2005) (stating that a rule is invalid if it "enlarges, modifies, or contravenes the **[**36]** specific provisions of law implemented"). We also do not defer to an agency when it "exceeds its authority" by "acting outside the scope of its powers and jurisdiction." *Level 3 Commc'ns, LLC v. Jacobs, 841 So. 2d 447, 450 (Fla. 2003)*. Only the agency charged with implementing the statute is entitled to our deference, and only when acting as the

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[9] Florida is by no means unique in deferring to agency **[**35]** interpretations of a statute the agency is charged with implementing. Both the federal courts, *see Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984)*, and the vast majority of states share these principles. *See, e.g., Manchester Sch. Dist. v. Crisman, 306 F.3d 1, 9 (1st Cir. 2002)* (noting that "most states . . . give[] some deference to the reasonable interpretation of a state statute by the state administrative agency charged with the responsibility of enforcing that statute").

Legislature authorized it to act.

But for these narrow exceptions, however, we defer to the implementing agency's interpretation of the statute. The majority gives no hint that these exceptional circumstances are present in this case. As I explain below, they are not.

IV. Deferring to the Agency in this Case

As I mentioned, the Department of Banking and Finance is the agency charged with enforcing and interpreting the Money Transmitters' Code. The Department interpreted the Code's term "check cashing" to include some, but not all, deferred presentment transactions. Under the doctrine of administrative deference, we must defer to this interpretation as long as it is within the scope of the Department's authority and is consistent with the statute. I address each requirement separately.

The Department's interpretation falls within its scope of authority **[**37]** to implement the Code. The statute provides that the Department may exercise "only such rulemaking power and administrative discretion . . . as is necessary, in order that the supervision and regulation of money transmitters may be flexible and readily responsive to changes in economic conditions, in technology, and in money transmitter practices." *§ 560.102(2)(h), Fla. Stat.* (1997). Here, the Department's interpretation surely meets that test of necessity. After the Code was enacted, the check-cashing industry asked the Department to explain whether check cashing included deferred presentment transactions. These transactions were very similar to ordinary check cashing, but involved the additional element of delay in cashing the check. For the regulation of money **[*1217]** transmitters to remain "flexible and readily responsive to changes . . . in money transmitter practices," *id.*, the Department absolutely needed to determine whether deferred presentment transactions qualified as check cashing. These were precisely the circumstances in which the Legislature intended for the Department to exercise its authority.

The other factor in deciding whether to defer to the Department is whether its interpretation **[**38]** enlarged, modified, or contravened the statute. It did none of those things. Rather, it reasonably clarified a statutory ambiguity. The Code contained only general references to check cashing, which it defined as "providing currency for payment instruments." *Id. § 560.302(1)*. At the time, the Code did not mention deferred presentment transactions. Such transactions, however, possess all the attributes of check cashing mentioned in the Code: the customer receives currency in exchange for a payment instrument (albeit one that will not be presented until a later date). The Department, faced with this ambiguity, interpreted check cashing to include deferred presentment transactions, except if they result in a rollover for an additional fee.

Where a statute is silent, we have traditionally allowed agencies to determine how a general statutory directive should be applied to specific circumstances. As we explained in *General Telephone Co. of Florida v. Marks, 500 So. 2d 142 (Fla. 1986)*: "The legislature cannot be expected to foresee and make provision for every possible type of [situation]. . . . Some discretion must be given to regulatory bodies to promulgate the detailed rules that expand **[**39]** upon and implement legislative directives." *Id. at 145*. In *Marks*, the Legislature had stated in general terms that the agency could make a certain calculation. We explained that "unless there is something else directly contrary in the statute itself, we must assume the legislature intended to grant the commission the discretion to determine what factors should be used in calculating [the figure]." *Id.* We have continued to apply this logic in more recent cases. *See, e.g., Level 3 Commc'ns, 841 So. 2d at 453-54* (quoting *Marks*). We should apply it in this case as well, where the Department applied a general statutory provision to specific facts.

While not the only plausible reading of the Code, the Department's interpretation is the most natural one. Check cashing is designed to place currency

in the customer's hands faster than otherwise feasible, in exchange for a fee that compensates the check casher for its efforts and assumption of risk. *See* Michael S. Barr, *Banking the Poor*, *21 Yale J. on Reg. 121, 142, 145 (2004)* (explaining that check cashers mostly accept "low-risk payroll or government benefit checks" from customers who lack a bank account or who "find that they lack sufficient **[**40]** liquidity to wait the two-to-three days for their bank to clear access to funds from a deposited check"). In an ordinary check-cashing transaction, the check casher may present the check as soon as possible. But nothing in the statute dictates when the check must be cashed or prohibits the parties from negotiating on that point. A deferred presentment transaction merely lengthens the time between the customer's receipt of currency and the company's cashing of the check. As long as the check casher ultimately presents the check to a bank at the end of the deferral period, or at least receives full payment in cash from the customer, the transaction remains so similar to ordinary check cashing that the most sensible reading of the statute is to treat them the same.

When a customer instead returns to the check casher and rolls over the initial **[*1218]** transaction, paying another fee to extend the period for actual payment, the transaction looks less like check cashing and more like a traditional loan. The Department sensibly concluded that rollover transactions--however styled or disguised--go beyond mere check cashing and cannot be squeezed within the Code. Instead, they must adhere to the interest **[**41]** restrictions established by the usury statute. This distinction between completed transactions and rollovers is so persuasive that I would adopt it even on de novo review. That it comes directly from the statute's implementing agency clinches the matter. At the very least, the Department's interpretation deserves our deference. To the extent the majority refuses to defer, I respectfully dissent.

EXHIBIT “C”

United States v. Southwestern Cable Co.

Supreme Court of the United States

March 12-13, 1968, Argued ; June 10, 1968, Decided [*]

No. 363

[*] Together with No. 428, Midwest Television, Inc., et al. v. Southwestern Cable Co. et al., also on certiorari to the same court.

Reporter
392 U.S. 157 *; 88 S. Ct. 1994 **; 20 L. Ed. 2d 1001 ***; 1968 U.S. LEXIS 3148 ****; 1 Media L. Rep. 2247; 13 Rad. Reg. 2d (P & F) 2045

UNITED STATES ET AL. v. SOUTHWESTERN CABLE CO. ET AL.

Prior History: [**1]** CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Disposition: *378 F.2d 118*, reversed and remanded.

Core Terms

broadcasting, stations, television, signals, Communications, radio, wire, regulation, interstate, provisions, transmission, subscribers, respondents', programming, responsibilities, microwave, purposes, cable, broadcasting station, Commerce, Services, audience, television broadcasting, circumstances, hearings, antenna, orders, regulatory authority, public interest, common carrier

Case Summary

Procedural Posture

Petitioner Federal Communication Commission sought review of a decision of the United States Court of Appeals for the Ninth Circuit, holding that petitioner had no authority under the Communications Act of 1934, *47 U.S.C.S. § 151*, to issue interim orders prohibiting respondent broadcasting company from expanding its television service.

Overview

The United States Supreme Court reversed a decision of the court of appeals, which held that petitioner was without authority under the Communications Act of 1934, *47 U.S.C.S. § 151*, to issue an order that restricted the expansion of respondent's television service in areas in which it had previously not operated, pending hearings on the merits with regard to a grievance filed by an adversely affected television station. The issues were whether petitioner had authority to regulate community antenna television systems, and, if it did, whether it had, in addition, authority to issue the prohibitory order in question. The Court answered both issues in the affirmative. 47 C.F.R. § 74.1107(a) provided the regulatory authority to prevent extension of signals of a television broadcast station beyond certain contours, and 47 C.F.R. § 74.1109 created the requisite procedures for the petition to handle existing violations.

Outcome

The decision of the court of appeals holding that petitioner had no authority to issue interim orders to respondent with regard to its expansion of television services was reversed and remanded. Petitioner did have authority under the Communication Act of 1934 to implement regulations associated with contour violations.

LexisNexis® Headnotes

Communications Law > ... > Regulated Practices > Introducing Competition > Signal Carriage

HN1[] **Introducing Competition, Signal Carriage**

See 47 C.F.R. § 74.1107(a).

Communications Law > ... > Regulated Entities > Broadcasting > Rate Regulation

HN2[] **Broadcasting, Rate Regulation**

See 47 C.F.R. § 74.1109 creates procedures applicable to petitions for waiver of the rules, additional or different requirements and rulings on complaints or disputes. It provides that petitions for special relief may be submitted informally, by letter, but shall be accompanied by an affidavit of service on any cable television system, station licensee, permittee, applicant, or other interested person who may be directly affected if the relief requested in the petition should be granted. Provisions are made for comments or opposition to the petition, and for rejoinders by the petitioner. Finally, the Federal Communication Commission may specify other procedures, such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, as it deems appropriate.

Communications Law > Federal Acts > General Overview

Transportation Law > Interstate Commerce > Federal Powers

Communications Law > ... > Regulated Entities > Broadcasting > General Overview

Communications Law > Federal Acts > Federal Communications Act > General Overview

Communications Law > Regulators > US Federal Communications Commission > General Overview

HN3 **Communications Law, Federal Acts**

The Federal Communication Commission's authority to regulate broadcasting and other communications is derived from the Communications Act of 1934, as amended, *47 U.S.C.S. § 151*. The Act's provisions are explicitly applicable to all interstate and foreign communication by wire or radio. The Commission's responsibilities are no more narrow: it is required to endeavor to make available to all the people of the United States a rapid, efficient, nation-wide, and world-wide wire and radio communication service.

Governments > Legislation > Interpretation

Governments > Federal Government > US Congress

HN4 **Legislation, Interpretation**

The views of one Congress as to the construction of a statute adopted many years before by another Congress have very little, if any, significance.

Communications Law > Federal Acts > Federal Communications Act > General Overview

HN5 **Federal Acts, Federal Communications Act**

See *47 U.S.C.S. § 152(a)*.

Communications Law > ... > Regulated Entities > Broadcasting > Rate Regulation

HN6 **Broadcasting, Rate Regulation**

Congress has imposed upon the Federal Communication Commission the obligation of providing a widely dispersed radio and television service, with a fair, efficient, and equitable distribution of service among the several States and communities. The Commission has been granted authority to allocate broadcasting zones or areas, and to provide regulations as it may deem necessary to prevent interference among the various stations.

Administrative Law > Judicial Review > Standards of Review > General Overview

HN7 **Judicial Review, Standards of Review**

Courts may not, in the absence of compelling evidence that such was Congress's intention, prohibit administrative action imperative for the achievement of an agency's ultimate purposes.

Lawyers' Edition Display

Summary

This case presented the issues (1) whether the Federal Communications Commission has authority under the Federal Communications Act to regulate community antenna television (CATV) systems, and (2) if it has, whether it has, in addition, authority to issue an order limiting further expansion of such systems in a certain area in a state pending hearings to be conducted on the merits of complaints against such expansion by a local television broadcaster operating in such area. On petitions for review the United States Court of Appeals for the Ninth Circuit held that the Commission lacked authority to issue such an order. (*378 F2d 118*.)

On certiorari, the United States Supreme Court reversed. In an opinion by Harlan, J., representing the views of six members of the court, it was held that (1) the Commission's authority under 152(a) of the Communications Act over "all interstate communication by wire or radio" permits the regulation of CATV systems, and that (2) the prohibitory order in question did not exceed or abuse the Commission's authority under the Act.

White, J., concurred in the result, expressing the view that the Commission's authority to prevent a CATV system from interfering with a local television broadcaster must be found in provisions of the Communications Act other than 152(a) and that such authority is found in 301 and 303 of the Act, giving the Commission broad authority over broadcasting and conferring authority to make regulations to prevent interference between stations and also authority to establish areas or zones to be served by any station.

Douglas and Marshall, JJ., did not participate.

Headnotes

COMMUNICATIONS §15 > Federal Communications Act -- CATV systems -- > Headnote:
LEdHN[1] [1]

The terms "the transmission of … signals, pictures, and sounds of all kinds," whether by radio or cable, "including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding and delivery of communications) incidental to such transmission," as used in the provisions of the Federal Communications Act of 1934 (*47 USC 153(a)*, *(b)*) defining the term "communication by wire or radio" as used in the Act to encompass such activities, amply suffice to reach community antenna television (CATV) systems which transmit the signals of broadcasting stations in one area of a state into another area of the same state.

COMMERCE §55 > CATV systems -- > Headnote:
LEdHN[2] [2]

Community antenna television (CATV) systems are engaged in interstate communication so as to be subject to regulation by the Federal Communications Commission under the Federal Communications Act of 1934 (*47 USC 151 et seq.*) even though intercepted signals emanate from stations located within the same state in which a CATV system operates, where, in view of the fact that television broadcasting consists in very large part of programming devised for, and distributed to, national audiences, companies which so operate CATV systems within the same state are ordinarily employed in the simultaneous retransmission of communications that have very often originated in other states; to categorize the activities of such

companies as intrastate would disregard the character of the television industry, and serve merely to prevent the national regulation that is not only appropriate but essential to the efficient use of radio facilities.

COMMUNICATIONS §15 > Federal Communications Act -- CATV systems -- > Headnote:
LEdHN[3][] [3]

Community antenna television (CATV) systems in which the intercepted signals emanate from stations located within the same state in which such systems operate, but which are ordinarily employed in the simultaneous retransmission of communications that have very often originated in other states, are not common carriers within the meaning of 152(b) of the Federal Communications Act of 1934 (*47 USC 152(b)*), which provides that nothing in the Act shall give the Federal Communications Commission jurisdiction over "carriers" that are engaged in interstate communication through physical connection, or connection by wire or radio, with the facilities of another carrier, if they are not directly or indirectly controlled by such other carrier.

COMMUNICATIONS §15 > STATUTES §157.3 > Federal Communications Act -- CATV systems -- > Headnote:
LEdHN[4][] [4]

The fact that the Federal Communications Commission in previous years unsuccessfully sought legislation that would have explicitly authorized regulation of community antenna television (CATV) systems, cannot be dispositive of the question whether the Commission has authority under 152(a) of the Federal Communications Act of 1934 (*47 USC 152(a)*), giving the Commission authority over "all interstate communications by wire or radio," where such requests by the Commission for legislation evidently merely reflected both its uncertainty as to the proper width of its authority and its understandable preference for more detailed guidance than the Act now provides.

EVIDENCE §167 > legislative intent -- > Headnote:
LEdHN[5][] [5]

The views of one Congress as to the construction of a statute adopted many years before by another Congress has very little, if any, significance.

EVIDENCE §167 > STATUTES §157.3 > Federal Communications Act -- legislative intent -- CATV systems -- > Headnote:
LEdHN[6][] [6]

The United States Supreme Court, in deciding whether the Federal Communications Commission has authority under the Federal Communications Act of 1934 (*47 USC 151 et seq.*) to regulate community antenna television (CATV) systems, cannot obtain significant assistance from the various expressions of congressional opinion that followed the Commission's unsuccessful request in prior years for legislation which would have explicitly authorized regulation of CATV systems, not only in view of the general proposition that the views of one Congress as to the construction of a statute adopted many years before by another Congress has very little, if any, significance, but also where it is far from clear that Congress believed, as it considered such request for legislation, that the Commission did not already possess regulatory authority over CATV.

COMMUNICATIONS §15 > Federal Communications Act -- CATV systems -- > Headnote:
LEdHN[7][⬇] [7]

The United States Supreme Court cannot construe the Federal Communications Act of 1934 (*47 USC 151 et seq.*) so restrictively as to conclude that 152(a) of the Act, making it explicitly applicable to all interstate and foreign communications by wire or radio, does not independently confer regulatory authority upon the Federal Communications Commission but instead merely prescribes the forms of communication to which the Act's other provisions may separately be made applicable, and that therefore, where the Commission does not contend either that community antenna television (CATV) systems are common carriers and thus within Subtitle II of the Act or that they are broadcasters and thus within Subtitle III, CATV, with certain of the characteristics both of broadcasting and of common carriers, but with all of the characteristics of neither, eludes altogether the Act's grasp.

COMMUNICATIONS §12 > Federal Communications Act -- authority of FCC -- > Headnote:
LEdHN[8][⬇] [8]

Nothing in the language of 152(a) of the Federal Communications Act of 1934 (*47 USC 152(a)*), making the Act explicitly applicable to all interstate and foreign communication by wire or radio, in the surrounding language, or in the Act's history or purposes, limits the Federal Communications Commission's authority to those activities and forms of communication that are specifically described by the Act's other provisions.

COMMUNICATIONS §12 > Federal Communications Act -- authority of FCC -- > Headnote:
LEdHN[9][⬇] [9]

The Federal Communications Commission under the Federal Communications Act of 1934 (*47 USC 151 et seq.*) is given a comprehensive mandate, with not niggardly but expansive powers.

COMMUNICATIONS §15 > regulation of CATV systems -- > Headnote:
LEdHN[10][⬇] [10]

The Federal Communications Commission reasonably concludes that regulatory authority over community antenna television (CATV) is imperative if the Commission is to perform with appropriate effectiveness certain of its other responsibilities, including its obligation under the Federal Communications Act of 1934 to provide a widely dispersed radio and television service with a fair, efficient, and equitable distribution of service among the several states and communities (*47 USC 307 (b)*), with respect to which purpose and other purposes, the Commission has been granted authority to allocate broadcasting zones or areas and to provide regulations "as it may deem necessary" to prevent interference among the various stations (*47 USC 303(f)*, *(h)*).

COMMUNICATIONS §15 > authority of FCC -- CATV -- > Headnote:
LEdHN[11][⬇] [11]

While the consequences of unregulated community antenna television (CATV) have been variously estimated, there is substantial evidence that the Federal Communications Commission cannot discharge its overall responsibilities without authority over this important aspect of television service.

COMMUNICATIONS §15 > regulation of CATV systems -- > Headnote:
LEdHN[12] [12]

The Federal Communications Commission reasonably finds that the successful performance of its duties with respect to the orderly development of an appropriate system of local television broadcasting demands prompt and efficient regulation of community antenna television (CATV) systems.

ADMINISTRATIVE LAW §236 > Scope of judicial review -- > Headnote:
LEdHN[13] [13]

In the absence of compelling evidence that such was Congress' intention, the Supreme Court of the United States is unwilling to prohibit federal administrative action imperative for the achievement of an agency's ultimate purpose.

COMMUNICATIONS §15 > authority of FCC to regulate CATV systems -- > Headnote:
LEdHN[14] [14]

In the absence of compelling evidence that it was Congress' intention to prohibit the Federal Communications Commission from regulating community antenna television (CATV) systems, the Commission's authority under 152(a) of the Federal Communications Act of 1954 (47 USC 152 (a)) over all interstate communications by wire or radio permits the regulation of CATV systems, although such authority to regulate CATV is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting.

COMMUNICATIONS §15 > rules and regulations -- CATV -- > Headnote:
LEdHN[15] [15]

The Federal Communications Commission, for purposes of exercising its authority to regulate community antenna television (CATV), as restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting, may issue such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as public convenience, interest, or necessity requires (47 USC 303(r)).

COMMUNICATIONS §21 > order of FCC -- restriction of CATV systems -- > Headnote:
LEdHN[16] [16]

Sections 312(b), (c), of the Federal Communications Act of 1934 (47 USC 312(b), (c)), providing that a cease and desist order may issue only if the respondent has violated or failed to observe a provision of the Act or a rule or regulation promulgated by the Federal Communications Commission under the Act's authority, and that cease and desist orders are proper only after hearing or waiver of the right to hearing, are inapplicable to an order of the Commission that respondent operators of community antenna television (CATV) systems generally restrict their carriage of signals in a certain area in the state to areas served by them on a certain prior date, pending hearings to determine whether the carriage of such signals into another area of the state contravenes the public interest, where the respondents were not found to have violated or to have failed to observe any provision of the Act or a rule or regulation promulgated thereunder, and where the question before the Commission was only whether an existing situation should be preserved pending a determination whether the respondents' present or planned CATV

operation is consistent with the public interest and what, if any, action should be taken by the Commission.

COMMUNICATIONS §21 > orders of FCC -- > Headnote:
LEdHN[17][] [17]

Nothing in the history of 312 (b) of the Federal Communications Act of 1934 (*47 USC 312(b)*) providing that a cease and desist order may issue only if the respondent has violated or failed to observe a provision of the Act or a rule or regulation promulgated by the Federal Communications Commission under the Act's authority, suggests that the Commission was deprived of its authority, granted elsewhere in the Act (*47 USC 154(i)*), to issue orders necessary in the execution of its functions.

COMMUNICATIONS §15 > FCC -- limiting expansion of CATV systems -- > Headnote:
LEdHN[18][] [18]

The Federal Communications Commission's order limiting further expansion of community antenna television (CATV) systems pending appropriate hearings to determine whether further expansion would contravene the public interest, does not exceed or abuse the Commission's authority under the Federal Communications Act of 1934 to issue such orders, not inconsistent with the Act, as may be necessary in the execution of its functions (*47 USC 154(i)*).

Syllabus

Community antenna television (CATV) systems receive television broadcast signals, amplify them, transmit them by cable or microwave, and distribute them by wire to their subscribers' receivers. In 1959 the Federal Communications Commission (FCC), although it found CATV "related to interstate transmission," stated that it "did not intend to regulate CATV," and that it preferred to recommend legislation which would impose specified requirements upon CATV systems. Such legislation was proposed but not enacted. The CATV industry has had an explosive growth, has increased substantially the signal transmission range, and has been bringing signals from selected broadcasting areas into metropolitan centers. Since 1960 the FCC has gradually asserted jurisdiction over CATV, and in 1965, following hearings, the FCC issued revised rules, applicable to cable and microwave CATV systems, to govern the carriage of local signals and the nonduplication **[****2]** of local programming. The FCC banned CATV transmission of distant signals into the 100 largest television markets (except for such service as existed on February 15, 1966, or unless the FCC found the service would "be consistent with the public interest"), and created summary procedures for applications for separate or additional relief. Petitioner Midwest Television applied for special relief, alleging that respondents' CATV systems transmitted signals from Los Angeles into the San Diego area, adversely affecting Midwest's San Diego station. The FCC, after considering the petition and responsive pleadings, restricted the expansion of respondents' service in areas in which they had not operated on February 15, 1966, pending hearings on the merits of Midwest's complaint. The Court of Appeals held that the FCC lacked authority under the Communications Act of 1934 to issue such order. *Held*:

1. The FCC has authority under the Act to regulate CATV systems. Pp. 167-178.

(a) The FCC has broad authority over "all interstate and foreign communication by wire or radio," which includes CATV systems as they are encompassed within the term "communication by wire or radio," and there is **[****3]** no doubt they

are engaged in interstate communication. Pp. 167-169.

(b) The FCC's requests for legislation have no significant bearing on the resolution of this issue. Pp. 169-171.

(c) The FCC has reasonably found that the successful performance of its responsibilities for the orderly development of local television broadcasting demands prompt and efficacious regulation of CATV, and in the absence of compelling evidence that Congress intended otherwise, administrative action imperative for an agency's ultimate purposes should not be prohibited. *Permian Basin Area Rate Cases, 390 U.S. 747, 780*. Pp. 172-178.

(d) The FCC's authority recognized here is restricted to that reasonably ancillary to the effective performance of its responsibilities for the regulation of television broadcasting. P. 178.

2. The FCC had authority to issue the prohibitory order in this case. Pp. 178-181.

(a) The order was designed merely to preserve the situation as of the time of issuance, and it was not, in form or function, a cease-and-desist order that must issue under *§ 312* of the Act, and which requires a hearing or a waiver of the right thereto. Pp. 179-180.

(b) The FCC has **[****4]** authority to issue "such orders . . . as may be necessary in the execution of its functions," and this order for interim relief pending hearings to determine appropriate action, did not exceed or abuse its authority under the Act. Pp. 180-181.

Counsel: Henry Geller argued the cause for the United States et al. With him on the briefs were Solicitor General Griswold, Assistant Attorney General Turner, Francis X. Beytagh, Jr., Howard E. Shapiro, and Daniel R. Ohlbaum.

Ernest W. Jennes argued the cause for petitioners in No. 428. With him on the briefs was Charles A. Miller.

Arthur Scheiner argued the cause for respondent Southwestern Cable Co. in both cases. With him on the brief were Morton H. Wilner and Harold F. Reis. Robert L. Heald argued the cause for respondents Mission Cable TV, Inc., et al. in both cases. With him on the brief were Frank U. Fletcher, Edward F. Kenehan, and James P. Riley.

Michael Finkelstein filed a brief for the All-Channel Television Society, as amicus curiae, urging reversal.

Briefs of amici curiae, urging affirmance, were filed by Robert A. Marmet, Thomas W. Wilson, John D. Matthews, and Robert H. Young for the Alice Cable Television Corp. et al. **[****5]** , and by Wayne W. Owen, Harry M. Plotkin, and George H. Shapiro for the Black Hills Video Corp. et al.

Judges: Warren, Black, Harlan, Brennan, Stewart, White, Fortas, Douglas; Marshall took no part in the consideration or decision of these cases.

Opinion by: HARLAN

Opinion

[*159] [*1006] [**1995]** MR. JUSTICE HARLAN delivered the opinion of the Court.

These cases stem from proceedings conducted by the Federal Communications Commission after requests by Midwest **[**1996]** Television [1] for relief under §§ 74.1107 [2] **[****7]** and **[*160]**

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[1] Midwest's petition was premised upon its status as licensee of KFMB-TV, San Diego, California. It is evidently also the licensee of various other broadcasting stations. See *Second Report and Order, 2 F. C. C. 2d 725, 739*.

[2] 47 CFR § 74.1107 (a) provides that *HN1*[↑] "no CATV system operating in a community within the predicted Grade A contour of a television broadcast station in the 100 largest television markets shall extend the signal of a television broadcast station beyond the Grade B contour of that station, except upon a showing approved by the Commission that such extension would be consistent with the public interest, and specifically the establishment and healthy maintenance

74.1109 [3] of the rules promulgated by the Commission for the regulation of community antenna television (CATV) systems. Midwest averred that respondents' CATV systems transmitted the signals of Los Angeles broadcasting stations into the San Diego area, and thereby had, inconsistently with the public interest, adversely affected Midwest's San Diego station. [4] **[****8]** Midwest sought an appropriate order limiting the carriage of such signals by respondents' systems. After consideration of the petition and of various responsive pleadings, the Commission restricted the expansion of respondents' service **[***1007]** in areas in which they had not operated **[****6]** on February 15, 1966, pending hearings to be conducted on the merits of Midwest's complaints. [5] *4 F. C. C. 2d 612*. **[*161]** On petitions for review, the Court of Appeals for the Ninth Circuit held that the Commission lacks authority under the Communications Act of 1934, 48 Stat. 1064, *47 U. S. C. § 151*, to issue such an order. [6] *378 F.2d 118*. **[**1997]** We granted certiorari to consider this important question of regulatory authority. [7] *389 U.S. 911*. For reasons that follow, we reverse.

[**9]** I.

CATV systems receive the signals of television broadcasting stations, amplify them, transmit them by cable or microwave, and ultimately distribute them by wire to the receivers of their subscribers. [8] **[****10]** CATV systems **[*162]** characteristically do not produce their own programming, [9] and do not recompense producers or broadcasters for use of the programming which they receive and redistribute. [10] Unlike ordinary broadcasting stations, CATV systems commonly charge their subscribers installation and other fees. [11]

The CATV industry has grown rapidly since the establishment of the first commercial system in 1950. [12] In the late 1950's, some 50 new systems were established each year; by 1959, there were

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of television broadcast service in the area. Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. The market size shall be determined by the rating of the American Research Bureau, on the basis of the net weekly circulation for the most recent year." San Diego is the Nation's 54th largest television market. *Midwest Television, Inc.*, 11 Pike & Fischer Radio Reg. 2d 273, 276.

[3] 47 CFR § 74.1109 *HN2*[↑] creates "procedures applicable to petitions for waiver of the rules, additional or different requirements and rulings on complaints or disputes." It provides that petitions for special relief "may be submitted informally, by letter, but shall be accompanied by an affidavit of service on any CATV system, station licensee, permittee, applicant, or other interested person who may be directly affected if the relief requested in the petition should be granted." 47 CFR § 74.1109 (b). Provisions are made for comments or opposition to the petition, and for rejoinders by the petitioner. 47 CFR §§ 74.1109 (d), (e). Finally, the Commission "may specify other procedures, such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, as it deems appropriate." 47 CFR § 74.1109 (f).

[4] Midwest asserted that respondents' importation of Los Angeles signals had fragmented the San Diego audience, that this would reduce the advertising revenues of local stations, and that the ultimate consequence would be to terminate or to curtail the services provided in the San Diego area by local broadcasting stations. Respondents' CATV systems now carry the signals of San Diego stations, but Midwest alleged that the quality of the signals, as they are carried by respondents, is materially degraded, and that this serves only to accentuate the fragmentation of the local audience.

[5] February 15, 1966, is the date on which grandfather rights accrued under 47 CFR § 74.1107 (d). The initial decision of the hearing examiner, issued October 3, 1967, concluded that permanent restrictions on the expansion of respondents' services were unwarranted. *Midwest Television, Inc., 11 Pike & Fischer Radio Reg. 2d 273*. The Commission has declined to terminate its interim restrictions pending consideration by the Commission of the examiner's decision. *Midwest Television, Inc., id.*, at 721.

[6] The opinion of the Court of Appeals could be understood to hold either that the Commission may not, under the Communications Act, regulate CATV, or, more narrowly, that it may not issue the prohibitory order involved here. We take the court's opinion, in fact, to have encompassed both positions.

[7] We note that the Court of Appeals for the District of Columbia Circuit has concluded that the Communications Act permits the regulation of CATV systems. See *Buckeye Cablevision, Inc. v. F. C. C., 128 U. S. App. D. C. 262, 387 F.2d 220*.

[8] CATV systems are defined by the Commission for purposes of its rules as "any facility which . . . receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes

550 "nationally **[****11]** known and identified" systems serving a total audience **[***1008]** of 1,500,000 to 2,000,000 persons. [13] It has been more recently estimated that "new systems are being founded at the rate of more than one per day, and . . . subscribers . . . signed on at the rate of 15,000 per month." [14] By late 1965, it was reported that there were 1,847 operating CATV systems, that 758 others were franchised but not yet in operation, and that there were 938 applications **[*163]** for additional franchises. [15] The statistical evidence is incomplete, but, as the Commission has observed, "whatever the estimate, **[**1998]** CATV growth is clearly explosive in nature." *Second Report and Order, 2 F. C. C. 2d 725, 738, n. 15*.

[**12]** CATV systems perform either or both of two functions. First, they may supplement broadcasting by facilitating satisfactory reception of local stations in adjacent areas in which such reception would not otherwise be possible; and second, they may transmit to subscribers the signals of distant stations entirely beyond the range of local antennae. As the number and size of CATV systems have increased, their principal function has more frequently become the importation of distant signals. [16] In 1959, only 50 systems employed microwave relays, and the maximum distance over which signals were transmitted was 300 miles; by 1964, 250 systems used microwave, and the transmission distances sometimes exceeded 665 miles. First Report and Order, 38 F. C. C. 683, 709. There are evidently now plans "to carry the programing of New York City independent stations by cable to . . . upstate New York, to Philadelphia, and even as far as Dayton." [17] And see *Channel **[*164]** 9 Syracuse, Inc. v. F. C. C., 128 U. S. App. D. C. 187, 385 F.2d 969*; *Hubbard Broadcasting, Inc. v. F. C. C., 128 U. S. App. D. C. 197, 385 F.2d 979*. Thus, "while **[****13]** the CATV industry originated in sparsely settled areas and areas of adverse terrain . . . it is now spreading to metropolitan centers . . . ." First Report and Order, *supra*, at 709. CATV systems, formerly no more than local auxiliaries to broadcasting, promise for the future to provide a national communications system, in which signals from selected broadcasting centers would be transmitted to metropolitan areas throughout the country. [18]

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such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house." 47 CFR § 74.1101 (a).

[9] There is, however, no technical reason why they may not. See Note, The Wire Mire: The FCC and CATV, 79 Harv. L. Rev. 366, 367. Indeed, the examiner was informed in this case that respondent Mission Cable TV "intends to commence program origination in the near future." *Midwest Television, Inc., supra, at 283*.

[10] The question whether a CATV system infringes the copyright of a broadcasting station by its reception and retransmission of the station's signals is presented in *Fortnightly Corp. v. United Artists TV, Inc., 392 U.S. 390, 88 S. Ct. 2084, 20 L. Ed. 2d 1176*.]

[11] The installation costs for CATV systems in 16 Connecticut communities were, for example, found to range from $ 31 to $ 147 per home. M. Seiden, An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry 24 (1965).

[12] CATV systems were evidently first established on a noncommercial basis in 1949. H. R. Rep. No. 1635, 89th Cong., 2d Sess., 5.

[13] CATV and TV Repeater Services, 26 F. C. C. 403, 408; Note, The Wire Mire: The FCC and CATV, *supra*, at 368.

[14] Note, The Wire Mire: The FCC and CATV, *supra*, at 368.

[15] *Second Report and Order, 2 F. C. C. 2d 725, 738*. The franchises are granted by state or local regulatory agencies. It was reported in 1965 that two States, Connecticut and Nevada, regulate CATV systems, and that some 86% of the systems are subject at least to some local regulation. Seiden, *supra*, at 44-47. See Conn. Gen. Stat. Rev., Tit. 16, c. 289 (1958); Nev. Stat. 1967, c. 458.

[16] The term "distant signal" has been given a specialized definition by the Commission, as a signal "which is extended or received beyond the Grade B contour of that station." 47 CFR § 74.1101 (i). The Grade B contour is a line along which good reception may be expected 90% of the time at 50% of the locations. See *47 CFR § 73.683 (a)*.

[17] Note, The Wire Mire: The FCC and CATV, *supra*, at 368 (notes omitted).

[18] It has thus been suggested that "a nationwide grid of wired CATV systems, interconnected by microwave frequencies and financed by

[**14]** The Commission has on various occasions attempted to assess the relationship between community antenna television systems and its conceded regulatory functions. In 1959, **[***1009]** it completed an extended investigation of several auxiliary broadcasting services, including CATV. CATV and TV Repeater Services, 26 F. C. C. 403. Although it found that CATV is "related to interstate transmission," the Commission reasoned that CATV systems are neither common carriers nor broadcasters, and therefore are within neither of the principal regulatory categories created by the Communications Act. *Id.*, at 427-428. The Commission declared that it had not been given plenary authority over "any and all enterprises which happen to be connected with one of the many aspects of communications." *Id.*, at 429. It refused to premise regulation of CATV upon assertedly adverse consequences for broadcasting, because it could not "determine where the impact takes effect, although we recognize that it may well exist." *Id.*, at 431.

The Commission instead declared that it would forthwith seek appropriate legislation "to clarify the situation. **[****15]** " **[*165]** *Id.*, at 438. Such legislation was introduced in the Senate in 1959, [19] favorably reported, [20] and debated on the Senate **[**1999]** floor. [21] The bill was, however, ultimately returned to committee. [22]

Despite its inability to obtain amendatory legislation, the Commission has, since 1960, gradually asserted jurisdiction over CATV. It first placed restrictions upon the activities of common carrier microwave facilities that serve CATV systems. See *Carter Mountain Transmission Corp., 32 F. C. C. 459*, aff'd, *321 F.2d 359*. Finally, the Commission in 1962 conducted a rule-making proceeding in which it re-evaluated the significance of CATV for its regulatory **[****16]** responsibilities. First Order and Report, *supra*. The proceeding was explicitly restricted to those systems that are served by microwave, but the Commission's conclusions plainly were more widely relevant. The Commission found that "the likelihood or probability of [CATV's] adverse impact upon potential and existing service has become too substantial to be dismissed." *Id.*, at 713-714. It reasoned that the importation of distant signals into the service areas of local stations necessarily creates "substantial competition" for local broadcasting. *Id.*, at 707. The Commission acknowledged that it could not "measure precisely the degree of . . . impact," but found that "CATV competition can have a substantial negative effect upon station audience and revenues . . . ." *Id.*, at 710-711.

The Commission attempted to "accommodat[e]" the **[*166]** interests of CATV and of local broadcasting by the imposition of two rules. *Id.*, at 713. First, CATV systems were required to transmit to their subscribers the signals of any station into whose service area they have brought competing signals. [23] Second, **[***1010]** CATV systems were forbidden to duplicate the programming **[****17]** of such local stations for periods of 15 days before and after a local broadcast. See generally First Report and Order, *supra*, at 719-730. These carriage and nonduplication rules were expected to "insur[e]

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subscriber fees, may one day offer a viable economic alternative to the advertiser-supported broadcast service." Levin, New Technology and the Old Regulation in Radio Spectrum Management, 56 Am. Econ. Rev. 339, 341 (Proceedings, May 1966).

[19] See S. 2653, 86th Cong., 1st Sess.

[20] S. Rep. No. 923, 86th Cong., 1st Sess.

[21] See 106 Cong. Rec. 10416-10436, 10520-10548.

[22] *Id.*, at 10547. The Commission in 1966 made additional efforts to obtain suitable modifications in the Communications Act. See n. 30, *infra*.

[23] See generally First Report and Order, *supra*, at 716-719. The Commission held that a CATV system must, within the limits of its channel capacity, carry the signals of stations that place signals over the community served by the system. The stations are to be given priority according to the strength of the signal available in the community, with the strongest signals given first priority. Exceptions are made for situations in which there would be substantial duplication or in which an independent or noncommercial station would be excluded. *Id.*, at 717.

many stations' ability to maintain themselves as their areas' outlets for highly popular network and other programs . . . ." *Id.*, at 715.

The Commission in 1965 issued additional notices of inquiry and proposed rule-making, by which **[****18]** it sought to determine whether all forms of CATV, including those served only by cable, could properly be regulated under the *Communications Act. 1 F. C. C. 2d 453*. After further hearings, the Commission held that the Act confers adequate regulatory authority over all CATV systems. Second Report and Order, *supra*, at 728-734. It promulgated revised rules, applicable both to cable and to microwave CATV systems, to govern the carriage of local signals and the nonduplication of local programming. Further, the Commission forbade the importation by CATV of distant signals into the 100 largest television markets, except insofar as such service was offered on February 15, 1966, unless the Commission has previously **[*167]** found that it "would be consistent with the public interest," *id.*, at 782; see generally *id.*, at 781-785, "particularly the establishment and healthy maintenance of television broadcast service in the area," 47 CFR § 74.1107 (c). Finally, **[**2000]** the Commission created "summary, nonhearing procedures" for the disposition of applications for separate or additional relief. 2 F. C. C. 2d, at 764; **[****19]** 47 CFR § 74.1109. Thirteen days after the Commission's adoption of the Second Report, Midwest initiated these proceedings by the submission of its petition for special relief.

II.

We must first emphasize that questions as to the validity of the specific rules promulgated by the Commission for the regulation of CATV are not now before the Court. The issues in these cases are only two: whether the Commission has authority under the Communications Act to regulate CATV systems, and, if it has, whether it has, in addition, authority to issue the prohibitory order here in question. [24]

HN3[↑] The Commission's authority to regulate broadcasting and **[****20]** other communications is derived from the Communications Act of 1934, as amended. The Act's provisions are explicitly applicable to "all interstate and foreign communication by wire or radio . . . ." *47 U. S. C. § 152 (a)*. The Commission's responsibilities are no more narrow: it is required to endeavor to "make available . . . to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service . . . ." *47 U. S. C. § 151*. The **[*168]** Commission was expected to serve as the "single Government agency" [25] **[****21]** with "unified jurisdiction" [26] **[***1011]** and "regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio." [27] It was for this purpose given "broad authority." [28] As this Court emphasized in an earlier case, the Act's terms, purposes, and history all indicate that Congress "formulated a unified and comprehensive regulatory system for the [broadcasting] industry." *F. C. C. v. Pottsville Broadcasting Co., 309 U.S. 134, 137*.

LEdHN[1][↑] [1]Respondents do not suggest that CATV systems are not within the term

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[24] It must also be noted that the CATV systems involved in these cases evidently do not employ microwave. We intimate no views on what differences, if any, there might be in the scope of the Commission's authority over microwave and nonmicrowave systems.

[25] The phrase is taken from the message to Congress from President Roosevelt, dated February 26, 1934, in which he recommended the Commission's creation. See H. R. Rep. No. 1850, 73d Cong., 2d Sess., 1.

[26] S. Rep. No. 781, 73d Cong., 2d Sess., 1.

[27] *Ibid.* The Committee also indicated that there was a "vital need" for such a commission, with jurisdiction "over all of these methods of communication." *Ibid.*

[28] The phrase is taken from President Roosevelt's message to Congress. H. R. Rep. No. 1850, *supra*, at 1. The House Committee added that "the primary purpose of this bill [is] to create such a commission armed with adequate statutory powers to regulate all forms of communication . . . ." *Id.*, at 3.

"communication by wire or radio." Indeed, such communications are defined by the Act so as to encompass "the transmission of . . . signals, pictures, and sounds of all kinds," whether by radio or cable, "including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." *47 U. S. C. §§ 153* **[****22]** *(a)*, *(b)*. These very general terms amply suffice to reach respondents' activities.

LEdHN[2][] [2] *LEdHN[3]*[] [3]Nor can we doubt that CATV systems are engaged in interstate communication, even where, as here, the intercepted **[*169]** signals emanate from stations located within the same State in which the CATV system operates. [29] We may take notice that television broadcasting **[**2001]** consists in very large part of programming devised for, and distributed to, national audiences; respondents thus are ordinarily employed in the simultaneous retransmission of communications that have very often originated in other States. The stream of communication is essentially uninterrupted and properly indivisible. To categorize respondents' activities as intrastate would disregard the character of the television industry, and serve merely to prevent the national regulation that "is not only appropriate but essential to the efficient use of radio facilities." *Federal Radio Comm'n v. Nelson Bros. Co., 289 U.S. 266, 279*.

[**23]**

[*1012]** *LEdHN[4]*[] [4]Nonetheless, respondents urge that the Communications Act, properly understood, does not permit the regulation of CATV systems. First, they emphasize that the **[*170]** Commission in 1959 and again in 1966 [30] **[****24]** sought legislation that would have explicitly authorized such regulation, and that its efforts were unsuccessful. In the circumstances here, however, this cannot be dispositive. The Commission's requests for legislation evidently reflected in each instance both its uncertainty as to the proper width of its authority and its understandable preference for more detailed policy guidance than the Communications Act now provides. [31] We have recognized that administrative agencies should, in such situations, be encouraged to seek from Congress clarification of the pertinent statutory provisions. *Wong Yang Sung v. McGrath, 339 U.S. 33, 47*.

LEdHN[5][] [5]*LEdHN[6]*[] [6]Nor can we obtain significant assistance from the various expressions of congressional opinion that followed the Commission's requests. In the first place, *HN4*[] the views of one Congress as to the construction of a statute adopted many years before by another Congress have "very little, if any, significance."

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[29] Respondents assert only that this "is subject to considerable question." Brief for Respondent Southwestern Cable Co. 24, n. 25. They rely chiefly upon the language of *§ 152 (b)*, which provides that nothing in the Act shall give the Commission jurisdiction over "carriers" that are engaged in interstate communication solely through physical connection, or connection by wire or radio, with the facilities of another carrier, if they are not directly or indirectly controlled by such other carrier. The terms and history of this provision, however, indicate that it was "merely a perfecting amendment" intended to "obviate any possible technical argument that the Commission may attempt to assert common-carrier jurisdiction over point-to-point communication by radio between two points within a single State . . . ." S. Rep. No. 1090, 83d Cong., 2d Sess., 1. See also H. R. Rep. No. 910, 83d Cong., 1st Sess. The Commission and the respondents are agreed, we think properly, that these CATV systems are not common carriers within the meaning of the Act. See *47 U. S. C. § 153 (h)*; *Frontier Broadcasting Co.* v. *Collier*, 24 F. C. C. 251; *Philadelphia Television Broadcasting Co. v. F. C. C., 123 U. S. App. D. C. 298, 359 F.2d 282*; CATV and TV Repeater Services, *supra*, at 427-428.

[30] See H. R. 13286, 89th Cong., 2d Sess. The bill was favorably reported by the House Committee on Interstate and Foreign Commerce, H. R. Rep. No. 1635, 89th Cong., 2d Sess., but failed to reach the floor for debate.

[31] See, for the legislation proposed in 1959, CATV and TV Repeater Services, *supra*, at 427-431, 438-439. The Commission in 1966 explicitly stated in its explanation of its proposed amendments to the Act that "we believe it highly desirable that Congress . . . confirm [the Commission's] jurisdiction and . . . establish such basic national policy as it deems appropriate." H. R. Rep. No. 1635, *supra*, at 16.

Rainwater v. United States, 356 U.S. 590, 593; *United States v. Price, 361 U.S. 304, 313*; **[****25]** *Haynes v. United States, 390 U.S. 85, 87, n. 4*. Further, it is far from clear that Congress believed, as it considered these requests for legislation, that the Commission did not already possess regulatory authority over CATV. **[**2002]** In 1959, the proposed legislation was preceded by the Commission's declarations that it "did not intend to regulate CATV," and that it preferred to recommend **[*171]** the adoption of legislation that would impose specified requirements upon CATV systems. [32] Congress may well have been more troubled by the Commission's unwillingness to regulate than by any fears that it was unable to regulate. [33] In 1966, the Commission informed Congress that it desired legislation in order to "confirm [its] jurisdiction and to establish such basic national policy as [Congress] deems appropriate." H. R. Rep. No. 1635, 89th Cong., 2d Sess., 16. In response, the House Committee on Interstate and Foreign Commerce said merely that it did not "either agree or disagree" with the jurisdictional conclusions of the Second Report, and that "the question of whether or not . . . **[***1013]** the Commission has authority under present law to regulate **[****26]** CATV systems is for the courts to decide . . . ." *Id.*, at 9. In these circumstances, we cannot derive from the Commission's requests for legislation anything of significant bearing on the construction question now before us.

Second, respondents urge that *§ 152 (a)* [34] does not **[*172]** independently confer regulatory authority upon the Commission, but instead merely prescribes the forms **[****27]** of communication to which the Act's other provisions may separately be made applicable. Respondents emphasize that the Commission does not contend either that CATV systems are common carriers, and thus within Title II of the Act, or that they are broadcasters, and thus within Title III. They conclude that CATV, with certain of the characteristics both of broadcasting and of common carriers, but with all of the characteristics of neither, eludes altogether the Act's grasp.

[**28]** *LEdHN[7]*[↑] [7] *LEdHN[8]*[↑] [8] *LEdHN[9]*[↑] [9]We cannot construe the Act so restrictively. Nothing in the language of *§ 152 (a)*, in the surrounding language, or in the Act's history or purposes limits the Commission's authority to those activities and forms of communication that are specifically described by the Act's other provisions. The section itself states merely that the "provisions of [the Act] shall apply to all interstate and foreign communication by wire or radio . . . ." Similarly, the legislative history indicates that the Commission was given "regulatory power over all forms of electrical communication . . . ." S. Rep. No. 781, 73d Cong., 2d Sess., 1. Certainly Congress could not in 1934 have foreseen the development of community antenna television systems, but it seems to us that it was precisely because Congress wished "to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission," *F. C. C. v. Pottsville Broadcasting Co., supra, at 138*, **[****29]** that it conferred **[**2003]** upon the Commission a "unified jurisdiction" [35] and "broad

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[32] See S. Rep. No. 923, 86th Cong., 1st Sess., 5-6.

[33] Thus, the Senate Committee on Interstate and Foreign Commerce observed in its 1959 Report that although the Commission's staff had recommended that authority be asserted over CATV, the Commission had "long hesitated," and had only recently made clear "that it did not intend to regulate CATV systems in any way whatsoever." S. Rep. No. 923, *supra*, at 5. Nonetheless, it must be acknowledged that the debate on the Senate floor centered on the broad question whether the Commission should have authority to regulate CATV. See, *e. g.*, 106 Cong. Rec. 10426.

[34] *47 U. S. C. § 152 (a)* provides that *HN5*[↑] "the provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone."

[35] S. Rep. No. 781, *supra*, at 1.

authority." [36] Thus, "underlying the whole [Communications Act] is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting **[*173]** and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors." *F. C. C. v. Pottsville Broadcasting Co., supra, at 138*. Congress in 1934 acted in a field that was demonstrably "both new and dynamic," and it therefore gave the Commission "a comprehensive mandate," with "not niggardly but expansive powers." *National Broadcasting Co. v. United States, 319 U.S. 190, 219*. We have found no reason to believe that *§ 152* does not, as its terms suggest, confer regulatory authority over "all interstate . . . communication by wire or radio." [37]

[**30]**

[*1014]** ***LEdHN[10]***[⬆] [10]Moreover, the Commission has reasonably concluded that regulatory authority over CATV is imperative if it is to perform with appropriate effectiveness certain of its other responsibilities. ***HN6***[⬆] Congress has imposed upon the Commission the "obligation of providing a widely dispersed radio and television service," [38] with a "fair, efficient, and equitable distribution" of service among the **[*174]** "several States and communities." *47 U. S. C. § 307 (b)*. The Commission has, for this and other purposes, been granted authority to allocate broadcasting zones or areas, and to provide regulations "as it may deem necessary" to prevent interference among the various stations. *47 U. S. C. §§ 303 (f), (h)*. The Commission has concluded, and Congress has agreed, that these obligations require for their satisfaction the creation of a system of local broadcasting stations, such that "all communities of appreciable size [will] have at least one television station **[****31]** as an outlet for local self-expression." [39] **[****32]** In turn, the Commission has held that an appropriate system of local broadcasting may be created only if two subsidiary goals are realized. First, significantly wider use must be made of the available ultra-high-frequency channels. [40] Second, communities **[**2004]** must be encouraged "to launch sound and **[*175]** adequate programs to utilize the television channels now reserved for educational purposes." [41] **[****33]** These subsidiary goals **[***1015]**

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[36] H. R. Rep. No. 1850, *supra*, at 1.

[37] Respondents argue, and the Court of Appeals evidently concluded, that the opinion of the Court in *Regents v. Carroll, 338 U.S. 586*, supports the inference that the Commission's authority is limited to licensees, carriers, and others specifically reached by the Act's other provisions. We find this unpersuasive. The Court in *Carroll* considered the very general contention that the Commission had been given authority "to determine the validity of contracts between licensees and others." *Id., at 602*. It was concerned, not with the limits of the Commission's authority over a form of communication by wire or radio, but with efforts to enforce a contract that had been repudiated upon the demand of the Commission. The Court's discussion of the Commission's authority under *§ 303 (r)*, see *id., at 600*, must be read in that context, and as thus read it cannot be controlling here.

[38] S. Rep. No. 923, *supra*, at 7. The Committee added that "Congress and the people" have no particular interest in the success of any given broadcaster, but if the failure of a station "leaves a community with inferior service," this becomes "a matter of real and immediate public concern." *Ibid*.

[39] H. R. Rep. No. 1559, 87th Cong., 2d Sess., 3; Sixth Report and Order, ***17 Fed. Reg. 3905***. And see Staff of the Senate Comm. on Interstate and Foreign Commerce, 85th Cong., 2d Sess., The Television Inquiry: The Problem of Television Service for Smaller Communities 3-4 (Comm. Print 1959). The Senate Committee has elsewhere stated that "there should be no weakening of the Commission's announced goal of local service." S. Rep. No. 923, *supra*, at 7.

[40] The Commission has allocated 82 channels for television broadcasting, of which 70 are in the UHF portion of the radio spectrum. This permits a total of 681 VHF stations and 1,544 UHF stations. H. R. Rep. No. 1559, *supra*, at 2. In December 1964, 454 VHF stations were on the air, 25 permittees were not operating, and 11 applications were awaiting Commission action, leaving 63 unreserved VHF allocations available. Seiden, *supra*, 162, n. 11, at 10. At the same time, 90 UHF stations were operating, 66 were assigned but not operating, 52 applications were pending before the Commission, and 1,108 allocations were still available. *Ibid*. The Commission has concluded that, in these circumstances, "an adequate national television system can be achieved" only if more of the available UHF channels are utilized. H. R. Rep. No. 1559, *supra*, at 4.

[41] S. Rep. No. 67, 87th Cong., 1st Sess., 8-9. The Committee indicated that it was "of utmost importance to the Nation that a reasonable opportunity be afforded educational institutions to use

have received the endorsement of Congress. [42]

LEdHN[11][↑] [11]The Commission has reasonably found that the achievement of each of these purposes is "placed in jeopardy by the unregulated explosive growth of CATV." H. R. Rep. No. 1635, 89th Cong., 2d Sess., 7. Although CATV may in some circumstances make possible "the realization of some of the [Commission's] most important goals," First Report and Order, *supra*, at 699, its importation of distant signals into the service areas of local stations may also "destroy or seriously degrade the service **[****34]** offered by a television broadcaster," *id.*, at 700, and thus ultimately deprive the public of the various benefits of a system of local broadcasting stations. [43] **[****35]** In particular, **[*176]** the Commission feared that CATV might, by dividing the available audiences and revenues, significantly magnify the characteristically serious financial difficulties of UHF and educational television broadcasters. [44] **[****36]** The Commission acknowledged **[***1016]** **[**2005]** that it could not predict with **[*177]** certainty the consequences of unregulated CATV, but reasoned that its statutory responsibilities demand that it "plan in advance of foreseeable events, instead of waiting to react to them." *Id.*, at 701. We are aware that these consequences have been variously estimated, [45] but must conclude that there is substantial evidence that the Commission cannot "discharge its overall responsibilities without authority over this

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television as a noncommercial educational medium." *Id.*, at 3. Similarly, the House Committee on Interstate and Foreign Commerce has concluded that educational television will "provide a much needed source of cultural and informational programing for all audiences . . . ." H. R. Rep. No. 1559, *supra*, at 3. It is thus an essential element of "an adequate national television system." *Id.*, at 4. See also H. R. Rep. No. 572, 90th Cong., 1st Sess.; S. Rep. No. 222, 90th Cong., 1st Sess.

[42] Legislation was adopted in 1962 to amend the Communications Act in order to require that all television receivers thereafter shipped in interstate commerce for sale or resale to the public be capable of receiving both UHF and VHF frequencies. 76 Stat. 150. The legislation was plainly intended to assist the growth of UHF broadcasting. See H. R. Rep. No. 1559, *supra*. Moreover, legislation has been adopted to provide construction grants and other assistance to educational television systems. 76 Stat. 68, 81 Stat. 365.

[43] See generally Second Report and Order, *supra*, at 736-745. It is pertinent that the Senate Committee on Interstate and Foreign Commerce feared even in 1959 that the unrestricted growth of CATV would eliminate local broadcasting, and that, in turn, this would have four undesirable consequences: (1) the local community "would be left without the local service which is necessary if the public is to receive the maximum benefits from the television medium"; (2) the "suburban and rural areas surrounding the central community may be deprived not only of local service but of any service at all"; (3) even "the resident of the central community may be deprived of all service if he cannot afford the connection charge and monthly service fees of the CATV system"; (4) "unrestrained CATV, booster, or translator operation might eventually result in large regions, or even entire States, being deprived of all local television service -- or being left, at best, with nothing more than a highly limited satellite service." S. Rep. No. 923, *supra*, at 7-8. The Committee concluded that CATV competition "does have an effect on the orderly development of television." *Id.*, at 8.

[44] The Commission has found that "we are in a critical period with respect to UHF development. Most of the new UHF stations will face considerable financial obstacles." First Report and Order, *supra*, at 712. It concluded that "one general factor giving cause for serious concern," *ibid.*, was that there is "likely" to be a "severe" impact between new local stations, particularly UHF stations, and CATV systems. *Id.*, at 713. Further, the Commission believed that there was danger that CATV systems would "siphon off sufficient local financial support" for educational television, with the result that such stations would fail or not be established at all. It feared that "the loss would be keenly felt by the public." Second Report and Order, *supra*, at 761. The Commission concluded that the hazards to educational television were "sufficiently strong to warrant some special protection . . . ." *Id.*, at 762. Similarly, a recent study has found that CATV systems may have a substantial impact upon station revenues, that many stations, particularly in small markets, cannot readily afford such competition, and that in consequence a "substantial percentage of potential new station entrants, particularly UHF, are likely to be discouraged . . . ." Fisher & Ferrall, Community Antenna Television Systems and Local Television Station Audience, 80 Q. J. Econ. 227, 250.

[45] Compare the following. Seiden, *supra*, at 64-90; Note, The Federal Communications Commission and Regulation of CATV, 43 N. Y. U. L. Rev. 117, 133-139; Note, The Wire Mire: The FCC and CATV, *supra*, at 376-383; Fisher & Ferrall, *supra*. We note, in addition, that the dispute here is in part whether local, advertiser-supported stations are an appropriate foundation for a national system of television broadcasting. See generally Coase, The Economics of Broadcasting and Government Policy, 56 Am. Econ. Rev. 440 (May 1966); Greenberg, Wire Television and the FCC's Second Report and Order on CATV Systems, 10 J. Law & Econ. 181.

important aspect of television service." Staff of Senate Comm. on Interstate and Foreign Commerce, 85th Cong., 2d Sess., The Television Inquiry: The Problem of Television Service for Smaller Communities 19 (Comm. Print 1959).

LEdHN[12][⬆] [12] *LEdHN[13]*[⬆] [13] *LEdHN[14]*[⬆] [14]The Commission has been charged with broad responsibilities for the orderly development of an appropriate system of local television broadcasting. The significance of its efforts can **[****37]** scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population. The Commission has reasonably found that the successful performance of these duties demands prompt and efficacious regulation of community antenna television systems. *HN7*[⬆] We have elsewhere held that we may not, "in the absence of compelling evidence that such was Congress' intention . . . prohibit administrative action imperative for the achievement of an agency's ultimate purposes." *Permian Basin Area Rate Cases, 390 U.S. 747, 780*. **[*178]** Compare *National Broadcasting Co. v. United States, supra, at 219-220*; *American Trucking Assns. v. United States, 344 U.S. 298, 311*. There is no such evidence here, and we therefore hold that the Commission's authority over "all interstate . . . communication by wire or radio" permits the regulation of CATV systems.

LEdHN[15][⬆] [15]There is no need here to determine in detail **[****38]** the limits of the Commission's authority to regulate CATV. It is enough to emphasize that the authority which we recognize today under *§ 152 (a)* is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting. The Commission may, for these purposes, issue "such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law," as "public convenience, interest, or necessity requires." **[**2006]** *47 U. S. C. § 303 (r)*. We express no views as to the Commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes.

III.

We must next determine whether the Commission has authority under the Communications Act to issue the particular prohibitory order in question in these proceedings. In its Second Report and Order, *supra*, the Commission concluded that it should **[***1017]** provide summary procedures for the disposition both of requests for special relief and of "complaints or disputes." *Id., at 764*. It feared that if evidentiary hearings were in every situation mandatory they would **[****39]** prove "time consuming and burdensome" to the CATV systems and broadcasting stations involved. *Ibid*. The Commission considered that appropriate notice and opportunities for comment or objection must be given, and it declared that "additional procedures, such as oral argument, evidentiary **[*179]** hearing, or further written submissions" would be permitted "if they appear necessary or appropriate . . . ." *Ibid*. See 47 CFR § 74.1109 (f). It was under the authority of these provisions that Midwest sought, and the Commission granted, temporary relief.

The Commission, after examination of various responsive pleadings but without prior hearings, ordered that respondents generally restrict their carriage of Los Angeles signals to areas served by them on February 15, 1966, pending hearings to determine whether the carriage of such signals into San Diego contravenes the public interest. The order does not prohibit the addition of new subscribers within areas served by respondents on February 15, 1966; it does not prevent service to other subscribers who began receiving service or who submitted an "accepted subscription request" between February 15, 1966, and **[****40]** the date of the Commission's order; and it does not preclude the carriage of San Diego and Tijuana, Mexico, signals to subscribers in new areas of service. *4 F. C. C. 2d 612, 624-625*. The order is thus designed simply to preserve the situation as it existed at the moment of its issuance.

LEdHN[16][↑] [16]*LEdHN[17]*[↑] [17]Respondents urge that the Commission may issue prohibitory orders only under the authority of *§ 312 (b)*, by which the Commission is empowered to issue cease-and-desist orders. We shall assume that, consistent with the requirements of *§ 312 (c)*, cease-and-desist orders are proper only after hearing or waiver of the right to hearing. Nonetheless, the requirement does not invalidate the order issued in this case, for we have concluded that the provisions of *§§ 312 (b)*, *(c)* are inapplicable here. *Section 312 (b)* provides that a cease-and-desist order may issue only if the respondent "has violated or failed to observe" a provision of the Communications Act or a rule or regulation promulgated by the Commission under the Act's **[****41]** authority. Respondents here were not found **[*180]** to have violated or to have failed to observe any such restriction; the question before the Commission was instead only whether an existing situation should be preserved pending a determination "whether respondents' present or planned CATV operations are consistent with the public interest and what, if any, action should be taken by the Commission." 4 F. C. C. 2d, at 626. The Commission's order was thus not, in form or function, a cease-and-desist order that must issue under *§§ 312 (b)*, *(c)*. [46]

[**42]** *LEdHN[18]*[↑] [18]The **[**2007]** Commission has acknowledged that, in this area of **[***1018]** rapid and significant change, there may be situations in which its generalized regulations are inadequate, and special or additional forms of relief are imperative. It has found that the present case may prove to be such a situation, and that the public interest demands "interim relief . . . limiting further expansion," pending hearings to determine appropriate Commission action. Such orders do not exceed the Commission's authority. This Court has recognized that "the administrative process [must] possess sufficient flexibility to adjust itself" to the "dynamic aspects of radio transmission," *F. C. C. v. Pottsville Broadcasting Co., supra, at 138*, and that it was precisely for that reason that Congress declined to "stereotyp[e] the powers of the Commission to specific details . . . ." *National Broadcasting Co. v. United States, supra, at 219*. And compare *American Trucking Assns. v. United States, 344 U.S. 298, 311*; *R. A. Holman & Co. v. S. E. C., 112 U. S. App. D. C. 43, 47-48, 299 F.2d 127, 131-132*. **[****43]** **[*181]** Thus, the Commission has been explicitly authorized to issue "such orders, not inconsistent with this [Act], as may be necessary in the execution of its functions." *47 U. S. C. § 154 (i)*. See also *47 U. S. C. § 303 (r)*. In these circumstances, we hold that the Commission's order limiting further expansion of respondents' service pending appropriate hearings did not exceed or abuse its authority under the Communications Act. And there is no claim that its procedure in this respect is in any way constitutionally infirm.

The judgments of the Court of Appeals are reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases.

Concur by: WHITE

Concur

MR. JUSTICE WHITE, concurring in the result.

My route to reversal of the Court of Appeals is somewhat different from the Court's. Section 2 (a) of the Communications Act, *47 U. S. C. § 152 (a)*, says that "*the provisions of this chapter* shall apply to all interstate and foreign communication

[46] Respondents urge that the legislative history of *§ 312 (b)* indicates that the Commission may issue prohibitory orders only under, and in conformity with, that section. We find this unpersuasive. Nothing in that history suggests that the Commission was deprived of its authority, granted elsewhere in the Act, to issue orders "necessary in the execution of its functions." *47 U. S. C. § 154 (i)*. See also *47 U. S. C. § 303 (r)*.

by **[****44]** wire or radio . . . ." (Emphasis added.) I am inclined to believe that this section means that the Commission must generally base jurisdiction on other provisions of the Act. This position would not, however, require invalidation of the assertion of jurisdiction before us today. *Section 301*, *47 U. S. C. § 301*, gives the Commission broad authority over broadcasting, and *§ 303*, *47 U. S. C. § 303*, confers authority to "make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter" and also the authority to establish areas or zones to be served by any station. The Commission has ample **[*182]** power under these provisions to prevent a Los Angeles television broadcaster from interfering with broadcasting in San Diego. For example, the Commission could stop a Los Angeles television station from owning and operating a wire CATV system which carried the station's signals into San Diego. The Commission should also be able to prevent a third **[***1019]** party from disrupting Commission-licensed broadcasting in the San Diego market.

Even **[****45]** if *§§ 301* and *303* in themselves furnish insufficient basis for the Commission to enjoin extraneous interference with the San Diego broadcasting scheme it has authorized, § 2 (a), *supra*, makes the provisions of the Act, including *§§ 301* and *303*, applicable to all wire and radio communication. Hence the **[**2008]** Commission is authorized to regulate wire communications to implement the ends of *§§ 301* and *303*, and authorized as well to use its express authority over broadcasting to enforce its specific powers over common carriers by wire.

References

15 Am Jur 2d, Commerce 62; Am Jur, Radio and Television (1st ed 4)

16 Am Jur Pl & Pr Forms, Radio and Television, Forms 16:1081-16:1084

11 Am Jur Legal Forms, Radio and Television, Forms 11:651-11:654.4

US L Ed Digest, Commerce 55; Communications 15-21

ALR Digests, Commerce 12; Radio and Television 3 et seq.

L Ed Index to Anno, Federal Communications Commission; Radio or Television

ALR Quick Index, Commerce; Radio and Television

Annotation References:

Licensing and control of telecast facilities. *95 L Ed 1075*.

[**46]** Administrative Procedure Act as applied to action of *Federal Communications Commission. 94 L Ed 645, 97 L Ed 900*.

Contracts of broadcast licensee as affecting, or affected by, application of Communications Act of 1934 or action by the *Communications Commission. 94 L Ed 376*.

Legal aspects of television. *15 ALR2d 785*.

Legal aspects of radio communication and broadcasting. 40 ALR 1513, 66 ALR 1361, 76 ALR 1272, 82 ALR 1106, 89 ALR 420, 104 ALR 872, 124 ALR 982, 171 ALR 765.

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EXHIBIT “D”

Mack v. Bristol-Myers Squibb Co.

Court of Appeal of Florida, First District

May 7, 1996, Filed

CASE NO: 95-653

Reporter
673 So. 2d 100 *; 1996 Fla. App. LEXIS 4598 **; 1996-1 Trade Cas. (CCH) P71,401; 21 Fla. L. Weekly D 1110

PATRICIA MACK, on behalf of herself and all others similarly situated, Appellant, v. BRISTOL-MYERS SQUIBB CO. and MEAD JOHNSON & CO. Appellees.

Subsequent History: [1]** Released for Publication May 23, 1996. Petition for Review Dismissed January 31, 1997, Reported at: *1997 Fla. LEXIS 177*.

Prior History: An appeal from an order of the Circuit Court for Okaloosa County. Jere Tolton, Judge.

Disposition: REVERSED and REMANDED

Core Terms

purchasers, Antitrust, indirect, Brick, consumers, statutes, Shoe, anti trust law, price-fixing, unfair methods of competition, damages, federal law, overcharges, antitrust violation, deceptive, cause of action, remedies, treble damages, unfair, infant formula, manufacturer, violations, Appeals, pass-on, lack standing, passing-on, appellees, provides, suits, cumulative remedy

Case Summary

Procedural Posture

Appellant challenged an order of the Circuit Court for Okaloosa County (Florida) dismissing with prejudice her class action suit against appellees on the grounds that she and the class lacked standing to file suit under the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. ch. 501, part II (1993).

Overview

Appellant indirect purchaser of infant formula filed a class action suit against appellee formula manufacturers, alleging that appellees engaged in unfair methods of competition by fixing formula prices at artificially inflated levels in violation of the Florida Deceptive and Unfair Trade Practices Act (Florida DTPA), Fla. Stat. ch. 501, part II (1993). The trial court dismissed appellant's suit with prejudice for lack of standing. The court reversed, holding that the plain language of the Florida DTPA permitted consumers, indirect purchasers, to bring suit for price fixing conduct and that federal antitrust laws limiting federal antitrust standing to direct purchasers did not preempt the Florida DTPA from authorizing suit by indirect purchasers. Further, the legislature never indicated in the subsequently enacted Florida Antitrust Act, precluding suit by indirect purchasers, that it intended to take away a consumer's right to sue under the Florida DTPA where conduct also violated the Florida Antitrust Act.

Outcome

The court reversed because the plain language of the Florida DTPA permitted consumers to bring suit for price fixing conduct; federal antitrust laws limiting standing to direct purchasers did not preempt the Florida DTPA; and the Florida Antitrust Act did not impair consumer remedies under the Florida DTPA.

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Governments > Legislation > Interpretation

HN1[] **Regulated Practices, Price Fixing & Restraints of Trade**

The Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. ch. 501, part II (1993), must be construed liberally to promote its policies.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN2[] **Regulated Practices, Price Fixing & Restraints of Trade**

Under the Florida Deceptive and Unfair Trade Practices Act (the Florida DTPA), *Fla. Stat. ch. 501.203(7)* (1993), a "consumer" is defined to include an individual. A consumer who has suffered a loss as a result of a "violation of this part," meaning a violation of the Florida DTPA, may bring an action for damages.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN3[] **Regulated Practices, Price Fixing & Restraints of Trade**

See *Fla. Stat. ch. 501.203(3)* (1993).

Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > General Overview

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Antitrust & Trade Law > Federal Trade Commission Act > Scope

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN4[] **Public Enforcement, US Federal Trade Commission Actions**

The acts proscribed by the Florida Deceptive and Unfair Trade Practices Act, *Fla. Stat. ch. 501.204(1)* (1993), include antitrust violations.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN5[] **Regulated Practices, Price Fixing & Restraints of Trade**

See *Fla. Stat. ch. 501.204(1)* (1993).

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN6[] **Regulated Practices, Price Fixing & Restraints of Trade**

An act does not have to be violative of a specific rule or regulation in order to violate the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. ch. 501, part II (1993).

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Banking Law > Federal Acts > Federal Trade Commission Act > Unfair Competition & Practices

Antitrust & Trade Law > Consumer Protection > General Overview

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Antitrust & Trade Law > Federal Trade Commission Act > Scope

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

HN7[] **Regulated Practices, Price Fixing & Restraints of Trade**

In determining whether particular conduct violates the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. ch. 501, part II (1993), a court should consider whether the Federal Trade Commission and the federal courts deem such conduct to be an unfair method of competition or an unconscionable, unfair or deceptive act or practice under section 5(a)(1) of the Federal Trade Commission Act, *15 U.S.C.S. § 45(a)(1)*.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN8[] **Regulated Practices, Price Fixing & Restraints of Trade**

Subsection 501.211 of the Florida Deceptive and Unfair Trade Practices Act (the Florida DTPA), Fla. Stat. ch. 501, part II (1993), controls the individuals who may sue under the Florida DTPA.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Private Actions > Purchasers > General Overview

HN9[] **Regulated Practices, Price Fixing & Restraints of Trade**

Federal antitrust laws limiting federal antitrust standing to direct purchasers do not preempt state laws allowing antitrust suits by indirect purchasers.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

Governments > Legislation > Enactment

Antitrust & Trade Law > ... > Private Actions > Purchasers > General Overview

Governments > Legislation > Interpretation

HN10[] **Purchasers, Direct Purchasers**

When the legislative branch of the government exercises a legislative power in the form of a duly enacted statute it is not the function of a court to explore the wisdom or advisability of the enactment in order to bring its enforceability into question.

Governments > Legislation > Enactment

Governments > Legislation > Interpretation

HN11[] **Legislation, Enactment**

A law should be construed in harmony with any other statute having the same purpose. On the other hand, where statutes operate on the same subject without plain inconsistency or repugnancy, if possible courts should construe them so as to preserve the force of both without destroying their evident intent. Importantly, a later enacted statute

should not, if possible, be construed as impliedly repealing the earlier enacted statute.

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Robert A. Butterworth, Attorney General; Patricia A. Conners, Assistant Attorney General; Mark S. Fistos, Assistant Attorney General, Tallahassee, for Amicus Curiae.

Harry R. Detwiler of Alford & Detwiler, Tallahassee; Douglas D. Broadwater and Max R. Shulman of Cravath, Swaine & Moore, New York, NY; Bill L. Bryant, Jr. and Donna Blanton of Katz, Kutter, Haigler, Alderman, Marks, Bryant & Yon, Tallahassee; Frank Cicero, Jr., J. Andrew Langan and Wendy L. Bloom, Chicago, IL, for Appellees.

Judges: VAN NORTWICK, J., MINER AND WOLF, JJ., CONCUR.

Opinion by: VAN NORTWICK

Opinion

[*101] VAN **[**2]** NORTWICK, J.

Patricia Mack appeals an order dismissing with prejudice her class action suit against appellees, Abbott Laboratories, Inc., [1] Bristol-Myers Squibb Co., and Mead Johnson & Co., pharmaceutical companies that manufacture and sell infant formula, on the grounds that she, and the others in her class, are indirect purchasers who lack standing to bring a suit under the Florida Deceptive and Unfair Trade Practices Act (the Florida DTPA), Chapter 501, Part II, Florida Statutes (1993). She contends, and we agree, that the circuit court erred in dismissing her claim because standing for the instant action is expressly provided by subsections 501.211(2) and 501.204(1) of the Florida DTPA. Accordingly, we reverse and remand for further proceedings. We also certify to **[*102]** the Florida Supreme Court a question of great public importance.

[1] Mack's claims against Abbott were settled during pendency of this appeal.

Factual and Procedural Background

Mack, a resident of Okaloosa County, purchased for her **[**3]** child infant formula manufactured and distributed by one or more of the appellees. In her class action suit, Mack claims that the appellees, by conspiring to cause retail prices of infant formula to be raised, fixed, maintained and stabilized at artificially high and non-competitive levels, have overcharged Florida consumers for infant formula. She filed a two-count action seeking to recover damages under the Florida Antitrust Act, Chapter 542, Florida Statutes (1993), and under the Florida DTPA. Regarding her Florida DTPA claim, Mack alleges that she and the class members acquired infant formula for family and household purposes and are consumers within the meaning of *section 501.211, Florida Statutes* (1993) and that:

For over twelve years, defendants have engaged in, and have conspired amongst themselves to engage in, unfair methods of competition and unfair acts or practices in violation of *section 501.204* of DTPA in the sale and marketing of infant formula to thousands of Florida consumers at excessively high prices.

She claims that, as a result of these acts, she and the other members of the class have suffered damages.

The trial court's order dismissing her complaint **[**4]** with prejudice states, in pertinent part, as follows:

1. Because the Complaint alleges that Plaintiff and the rest of the putative class are indirect purchasers

of infant formula, it fails to state a cause of action under the Florida Antitrust Act, Chapter 542, Florida Statutes (1993). The intent of the Florida legislature in enacting the Antitrust Act was that "due consideration and great weight be given to the interpretations of the federal courts relating to comparable federal antitrust statutes." *§ 542.32, Fla. Stat.* (1993). . . .

The United States Supreme Court has held that indirect purchasers lack standing under Section 4 of the Clayton Act, *15 U.S.C. § 15*, to recover damages for violations of the federal antitrust laws. *Illinois Brick Co. v. Illinois, 431 U.S. 720, 728-729, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977)*; *Kansas and Missouri v. Utilicorp United, Inc., 497 U.S. 199, 111 L. Ed. 2d 169, 110 S. Ct. 2807 (1990)*. Consistent with the above stated intent of the Florida legislature, the standing requirements for a private cause of action under the Florida Antitrust Act parallel the standing requirements of Section 4 of the Clayton Act. Accordingly, Florida adheres to the "direct purchaser" rule enunciated in Illinois Brick **[**5]** , and Plaintiff and the putative class lack standing under Chapter 542.

2. The complaint also fails to state a cause of action under the Florida Deceptive and Unfair Trade Practices Act ("DTPA"), Chapter 501, Part II, Florida Statutes (1993). Plaintiff's DTPA claim is based on the same price-fixing conspiracy alleged in her Florida Antitrust Act claim. Since under the Florida Antitrust Act indirect purchasers do not suffer cognizable injury as a result of alleged price-fixing conspiracies, they are barred from asserting claims under the DTPA based upon such conspiracies. The Florida legislature could not have intended that indirect purchasers could seek relief under the DTPA for alleged violations of Chapter 542 when Chapter 542 itself does not allow such relief.

It is not that indirect purchasers can never sue under the DTPA but where a DTPA claim is based on an alleged antitrust violation -- as it is here -- the direct purchaser rule does apply. Other standing rules apply to DTPA claims derived from other statutes. However, those standing rules are not implicated in this case. Only the direct purchaser rule is involved here.

Granting indirect purchasers standing under **[**6]** the DTPA to assert price-fixing claims that they lack standing to assert under the Florida Antitrust Act would create an irreconcilable conflict between the two statutes. Indirect purchasers would be able to avoid the standing requirements of the Antitrust Act simply by relabeling their claims as DTPA claims.

[*103] The Florida Supreme Court has declared that "courts should avoid a construction which places in conflict statutes which cover the same general field"; rather, where two statutes "relate to the same purpose" they should be construed in harmony. *City of Boca Raton v. Gidman, 440 So. 2d 1277, 1282 (Fla. 1983)*; see also, *Scates v. State, 603 So. 2d 504, 506 (Fla. 1992)*("In general, statutes relating to the same subject and having the same purpose should be construed consistently"). The Florida Antitrust Act and the DTPA relate to the same purpose -- i.e., they both are meant to protect the marketplace and to proscribe unfair methods of competition. The DTPA should, therefore, be construed harmoniously and consistently with the Florida legislature's clear intent to allow only direct purchasers to sue for alleged price-fixing conspiracies. Any other result would eviscerate **[**7]** the direct purchaser rule of the Florida Antitrust Act.

Accordingly, Plaintiff and the putative class have no standing to sue under the DTPA. [2]

Mack does not challenge the trial court's conclusion that under *Illinois Brick Company v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*,

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[2] Although the trial court's order could be read as an adjudication of whether the complaint stated a cause of action under the Florida DTPA, we were assured by counsel at oral argument that, in fact, the complaint was not tested to determine if it stated a cause of action, but the issue before the trial court was whether plaintiffs had standing to bring a Florida DTPA claim.

she and the others in her class, all of whom are indirect purchasers, cannot bring a Florida antitrust claim. However, she does contend that, as consumers, the class members have standing to bring a claim for redress from the complained-of conduct under the plain language of DTPA.

While this case may ultimately involve complex litigation, **[**8]** the issue before us is relatively straightforward. We view our consideration here as essentially determining whether a consumer-purchaser's standing to sue for price-fixing under the Florida DTPA is governed (i) by the language of the Florida DTPA, which expressly authorizes a consumer to bring an action for damages for violation of DTPA, or (ii) by a policy adopted from Illinois Brick that would bar an indirect purchaser from bringing an action under the Florida DTPA based upon a claim which is in substance an antitrust action to encourage efficient private antitrust enforcement by direct purchasers and to avoid conflict between the Florida DTPA and the Florida Antitrust Act. The Illinois Brick policy reasons persuaded the trial court to deny standing to Mack and the class. For the reasons that follow, we believe that the plain language of our consumer protection statute, in which the legislature has expressly permitted a consumer to recover for price-fixing, must control. Therefore, we hold that the instant cause of action under the Florida DTPA is not barred on the grounds that Mack and the class lack standing to sue.

The Florida DTPA

The Florida DTPA expresses a primary **[**9]** policy "to protect the consuming public . . . from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce," *section 501.202(2), Florida Statutes* (1993), and, as a rule of construction, provides that ***HN1***[⬆] the act "shall be construed liberally to promote [such] policies. . . ." *§ 501.202, Fla. Stat.* (1993).

HN2[⬆] Under the Florida DTPA a "consumer" is defined to include "an individual," like Mack and her class members. *§ 501.203(7), Fla. Stat.* (1993). A consumer, like Mack, who has suffered a loss as a result of a "violation of this part," may bring an action for damages. *§ 501.211(2), Fla. Stat.* (1993). The Florida DTPA defines "violation of this part" in subsection 501.203(3), as follows:

HN3[⬆] (3) "Violation of this part" means any violation of this act and may be based upon any of the following:

(a) Any rules promulgated pursuant to the Federal Trade Commission Act, 15 U.S.C. s. 41 et seq. or this act;

(b) The standards of unfairness and deception set forth and interpreted by the Federal Trade Commission or the federal courts;

[*104] (c) Any law, statute, rule, regulation or ordinance **[**10]** which proscribes unfair methods of competition, or unfair, deceptive, or unconscionable acts or practices. (Emphasis supplied).

Since "violation of this part" means "any violation of this act," and subsection 501.204(1) [3] proscribes unfair methods of competition as illegal, Mack's claim that she and others were damaged by unfair methods of competition engaged in by appellees gives her standing to bring this suit under the plain language of the Florida DTPA. Further, *section 501.204(2)* provides that in determining what constitutes an "unfair method of competition" under subsection 501.204(1), "due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to s. 5(a)(1) of the Federal Trade Commission Act, *15 U.S.C. 45(a)(1)*." Section 5(a)(1) of the FTC Act encompasses violations of

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[3] *Section 501.204(1)* provides:

HN5[⬆] Unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

the antitrust laws. See *FTC v. Indiana Federation of Dentists, 476 U.S. 447, 454-55, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)*(finding that antitrust violations are unfair methods of competition under the FTC Act). Thus, ***HN4***[⬆] the acts proscribed by subsection 501.204(1) include antitrust violations.

[11]** While subparagraphs (a) through (c) of subsection 501.203(3) set forth possible violations which would permit recovery under the Florida DTPA, it is clear that the legislature did not intend this list to be exclusive. See, *Department of Legal Affairs v. Father and Son Moving & Storage, 643 So. 2d 22 (Fla. 4th DCA 1994)*, rev. denied, ***HN6***[⬆] *651 So. 2d 1193 (Fla. 1995)*(an act does not have to be violative of a specific rule or regulation in order to violate the Florida DTPA). But, even if one of these express violations were required to permit recovery, Mack would nevertheless have standing under DTPA because it is well established that collusive price-fixing constitutes a violation of section 5(a)(1) of the Federal Trade Commission Act. See, *Federal Trade Com'n v. National Lead Co., 352 U.S. 419, 77 S. Ct. 502, 1 L. Ed. 2d 438 (1957)*; *Keasbey & Mattison Co. v. Federal Trade Com'n, 159 F.2d 940 (CA 6 1947)*; In the *Matter of Binney & Smith, Inc., 96 F.T.C. 625 (1980)*; accord, In the *Matter of Milton Bradley Co., 96 F.T.C. 638 (1980)*. Thus, Mack's cause of action, which in essence claims that the pharmaceutical companies have engaged in unfair methods of competition **[**12]** by fixing prices at artificially-inflated levels to the detriment of Florida consumers, has stated a violation of the Florida DTPA.

Although the plain language of the Florida DTPA permits Mack, a consumer, to bring this suit for price-fixing, appellees argue that she lacks standing to bring the instant action because Mack, as an indirect purchaser, would lack standing to bring a similar action under the FTC Act. Appellees reason that, because subsection 501.204(2) of the Florida DTPA requires due consideration and great weight should be given to federal precedent relating to claims arising under the FTC Act, Mack's standing to bring an action for unfair methods of competition under the Florida DTPA, and which are derived from antitrust law, are governed by federal antitrust precedent. Thus, according to appellees, the federal standing rules established by Illinois Brick and *Hanover Shoe, Inc. v. United Shoe Manufacturing Corp., 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*, preclude Florida consumers who are indirect purchasers from having standing to pursue antitrust claims under the Florida DTPA.

We do not construe subsection 501.204(2) as grafting the federal **[**13]** standing rules onto the Florida DTPA. We agree with Mack that subsection 501.204(2) should be interpreted to mean that, ***HN7***[⬆] in determining whether particular conduct violates the Florida DTPA, a court should consider whether the FTC and federal courts deem such conduct to be an unfair method of competition or an unconscionable, unfair or deceptive act or practice under section 5(a)(1) of the FTC Act. The reference in subsection 501.204(2) to section 5(a)(1) of the FTC Act, *15 U.S.C. § 45(a)(1)*, the parallel provision in the federal **[*105]** act declaring unfair methods of competition and commerce to be unlawful, makes it evident that subsection (2) of *section 501.204* is concerned with unlawful conduct not who may sue. *Section 501.211*, ***HN8***[⬆] not *section 501.204*, controls the individuals who may sue. A fair reading of *section 501.211* reveals no intention by the legislature to limit suits for price-fixing to direct purchasers only.

Further, while the trial court's order recites that "other standing rules apply to the Florida DTPA claims derived from other statutes," we have not been directed to, nor have we uncovered, any Florida case importing standing rules from another statute into the Florida **[**14]** DTPA.

The *ARC America* Limits on *Illinois Brick*

In Hanover Shoe, a shoe machinery manufacturer was sued by one of its customers, a manufacturer

and wholesaler of shoes, for treble damages under section 4 of the Clayton Act, *15 U.S.C. § 15*, for an antitrust violation under *section 2* of the Sherman Act, *15 U.S.C. § 2*. The manufacturer sought to defend by alleging that the wholesaler passed the overcharge along to its customers and had suffered no injury. The Supreme Court rejected this so-called "passing-on" defense, finding that recognition of the passing-on defense in treble-damage actions "would often require additional long and complicated proceedings involving massive evidence and complicated theories," *392 U.S. at 493*, and would dilute the incentive of direct purchasers to bring treble damages suits. The availability of a passing-on defense, the Court concluded, could potentially shield the wrongdoer from liability to all potential plaintiffs except ultimate consumers who, in many cases, would have only a "tiny stake in a lawsuit and little interest in attempting a class action." *Id. at 494*. This threat to the efficiency of the treble damages remedy, **[**15]** the Court said, counseled against recognition of a broad passing-on defense. Id.

In Illinois Brick, the State of Illinois brought a treble damages action under section 4 of the Clayton Act against Illinois Brick and other concrete block manufacturers for conspiring to fix the prices of concrete blocks contrary to *section 1* of the Sherman Act, *15 U.S.C. § 1*. Because the state had purchased the brick not directly from Illinois Brick, but from middlemen, the Court ruled that the State of Illinois, as an indirect purchaser, could not use the pass-on theory offensively to recover damages for antitrust violations. *431 U.S. at 735, 97 S. Ct. at 2069*. As in Hanover Shoe, in Illinois Brick the court advanced a number of policy reasons for its decision. First, the court explained that restricting Hanover Shoe to the defensive use of the pass-on theory would create an "unwarranted" risk of multiple liability for defendants. *431 U.S. at 730*. Because Hanover Shoe effectively creates a presumption that direct purchasers are entitled to recover from the defendant, if defendants could not use that presumption against indirect purchasers, the Court reasoned that defendants **[**16]** could be subject to overlapping damage claims. Second, the Court concluded that proving damages resulting from the pass-on of overcharges would be virtually impossible. As it had in Hanover Shoe, the court expressed skepticism that "price and output decisions in the real economic world rather than an economist's hypothetical model," *id. at 731-32*, could be adequately and efficiently reconstructed in the courtroom. In fact, the Court found that the offensive use of the pass-on theory would be even more unwieldy than the defensive use, because overcharges would have to be traced through each level in the distribution chain until the overpriced good reached the plaintiffs. *Id. at 732-33*. Third, the Court feared that allowing indirect purchasers to sue for damages under section 4 of the Clayton Act would dilute the effectiveness of the treble damages remedy because indirect purchasers would often have only a small stake in the total potential damages and direct purchasers would have less incentive to enforce the antitrust laws if subsequent purchasers would be able to intervene in their suits and claim a portion, if not all, of the alleged overcharge. Id. Finally, the Court **[**17]** also noted a host of procedural problems that would beset the judiciary should the pass-on theory be permitted in any antitrust suit. The Court expressed an unwillingness to **[*106]** transform treble damage actions into "massive multiparty litigations involving many levels of distribution and including large classes of ultimate consumers remote from the defendant." *Id. at 740*.

The Hanover Shoe and Illinois Brick bar to the use of the pass-on theory, however, does not preempt state statutes that provide antitrust remedies for indirect purchasers. *California v. ARC America Corp., 490 U.S. 93, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989)*. In ARC America, the states of Alabama, Arizona, California and Minnesota brought class actions in federal court against various cement producers alleging a nationwide conspiracy to fix cement prices, seeking damages both under the federal antitrust laws and under state antitrust laws that allowed indirect purchasers to recover

overcharges passed on to them. Both the federal and state claims were settled against several major defendants. *In re Cement and Concrete Antitrust Litigation, 437 F. Supp. 750 (Jud. Pan. Mult. Lit. 1977)*. The district **[**18]** court refused to allow payment of the states' indirect purchaser claims out of the settlement funds, however, on the ground that the state indirect purchaser statutes had been preempted by federal law. The states appealed and the Court of Appeals for the Ninth Circuit affirmed. *In re Cement and Concrete Antitrust Litigation, 817 F.2d 1435 (9th Cir. 1987)*. The United States Supreme Court reversed, holding that the state indirect purchaser laws were not preempted by federal law, notwithstanding the Illinois Brick rule limiting federal antitrust standing to direct purchasers. As the ARC America Court said:

Neither [Hanover Shoe or Illinois Brick] addressed the pre-emptive force of the federal antitrust laws. Neither case contains any discussion of state law or of the relevant standards for pre-emption of state law. As we made clear in Illinois Brick, the issue before the court in both that case and in Hanover Shoe was strictly a question of statutory interpretation -- what was the proper construction of § 4 of the Clayton Act. See, e.g., 431 U.S. at 736, 96 S. Ct. at 2069.

It is one thing to consider the congressional policies identified **[**19]** in Illinois Brick and Hanover Shoe in defining what sort of recovery federal antitrust law authorizes; it is something altogether different, and in our view inappropriate, to consider them as defining what federal law allows States to do under their own antitrust law. As construed in Illinois Brick, § 4 of the Clayton Act authorizes only direct purchasers to recover monopoly overcharges under federal law. We construed § 4 as not authorizing indirect purchasers to recover under federal law because that would be contrary to the purposes of Congress. But nothing in Illinois Brick suggests that it would be contrary to congressional purposes for States to allow indirect purchasers to recover under their own antitrust laws. When viewed properly, Illinois Brick was a decision construing the federal antitrust law, not a decision defining the interrelationship between the federal and state antitrust laws. The congressional purposes on which Illinois Brick was based provide no support for a finding that state indirect purchaser statutes are pre-empted by federal law.

109. S. Ct. at 1666, 1667.

In concluding that the ***HN9***[⬆] federal antitrust laws, as interpreted **[**20]** by Illinois Brick, did not preempt state laws allowing antitrust suits by indirect purchasers, the ARC America court determined that the Ninth Circuit had misinterpreted Hanover Shoe and Illinois Brick when the Court of Appeals had ruled that state laws permitting indirect purchaser recoveries were inconsistent with and stood as an obstacle to effectuating the congressional purposes and policies with respect to the enforcement of the antitrust laws identified in those two cases. *109 S. Ct. at 1666*. Said the ARC America court:

The Court of Appeals also erred in concluding that state indirect purchaser statutes interfere with accomplishing the purposes of the federal law that we identified in Illinois Brick. First, the Court of Appeals **[*107]** concluded that state indirect purchaser statutes interfere with the congressional purpose of avoiding unnecessarily complicated proceedings on federal antitrust claims. But these state statutes cannot and do not purport to affect remedies available under federal law.

Second, the Court of Appeals reasoned that allowing state indirect purchaser claims could reduce the incentives of direct purchasers to bring antitrust actions **[**21]** by reducing their potential recoveries. The presence of indirect purchaser claims would reduce settlement offers to direct purchasers, the Court of Appeals believed, and if the total liability were to exhaust a defendant's assets, the direct purchasers would have to share the defendant's estate in bankruptcy with indirect purchasers. But the Court in Illinois Brick was not

concerned with the risk that a plaintiff might not be able to recover its entire damages award or might be offered less to settle . . . Illinois Brick was concerned that requiring direct and indirect purchasers to apportion the recovery under a single statute -- § 4 of the Clayton Act -- would result in no one plaintiff having a sufficient incentive to sue under that statute. State indirect purchaser statutes pose no similar risk to the enforcement of the federal law.

Third, the Court of Appeals concluded that state indirect purchaser claims might subject antitrust defendants to multiple liability, in contravention of the "express federal policy" condemning multiple liability. *817 F.2d at 1446* (citing Illinois Brick; *Associated General Contractors of California, Inc. v. Carpenters, 459 U.S. 519, 544, **[**22]** 103 S. Ct. 897, 911, 74 L. Ed. 2d 723 (1983)*; and *Blue Shield of Virginia v. McCready, 457 U.S. 465, 474-475, 102 S. Ct. 2540, 2545-46, 73 L. Ed. 2d 149 (1982))*. But Illinois Brick, as well as Associated General Contractors and Blue Shield, all were cases construing § 4 of the Clayton Act; in none of those cases did the Court identify a federal policy against States imposing liability in addition to that imposed by federal law. Ordinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law, see Silkwood v. Kerr-McGee Corp., 464 U.S. at 257-258, 104 S. Ct. at 626-27; *California v. Zook, 336 U.S. 725, 736, 69 S. Ct. 841, 847, 93 L. Ed. 1005 (1949)*, and no clear purpose of Congress indicates that we should decide otherwise in this case.

109 S. Ct. at 1666-1667.

As the supreme court recognized in ARC America, permitting an indirect purchaser suit under state law would not undermine federal enforcement of the antitrust laws. After the ARC America decision, then, it is clear that the principles of Illinois Brick and Hanover Shoe apply only to antitrust actions **[**23]** under federal law and do not restrict state remedies for antitrust violations. If Hanover Shoe and Illinois Brick do not preclude a state antitrust remedy for price-fixing, they surely cannot preclude a state deceptive trade practices remedy for price-fixing.

This is not to say that the concerns raised in Hanover Shoe and Illinois Brick - the difficulties of tracing overcharges through a distribution chain, [4] **[**25]** the possibility of multiple liability for defendants, and the prospects of inconsistent or duplicate federal and state judgments [5] - are not valid policy considerations under state antitrust or deceptive **[*108]** trade practice statutes. ARC America simply declines to impose on each state the federal legislative antitrust policy of deterring violations by simplifying antitrust litigation. States, such as Florida here, are free to adapt a different legislative policy, such as a policy of compensating individual consumers who are injured, even at the expense of permitting more complex litigation. Following ARC America, issues such as whether deterrence, compensation, or efficient judicial administration should be promoted by antitrust laws and whether and to what **[**24]** extent these goals can or should be harmonized [6] are fundamental policy decisions for the legislature of each state. Recognizing that, under ARC America, it is left to the Florida legislature to make the policy decisions concerning whether to authorize damage actions by consumers for antitrust violations under Florida

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[4] Economists continue their substantial debate concerning whether the entire overcharge is passed on to the ultimate consumer or whether some or all of the overcharge is absorbed by the direct purchaser and other intermediate purchasers in the distribution chain. Compare, Harris & Sullivan, Passing-On the Monopoly Overcharge: A Comprehensive Policy Analysis, 128 U. Pa. L. Rev. 269, 276 (1979) ("In a multiple-level chain of distribution, passing-on monopoly overcharges is not the exception; it is the rule") with Landes & Posner, The Economics of Passing-On: A Reply to Harris and Sullivan, 128 U. Pa. L. Rev. 1274 (1980) (complete pass-on should not be assumed, even if supply elasticity is infinite and there is no demand elasticity).

[5] See, Report of the American Bar Association Section of Antitrust Law Task Force to Review the Supreme Court's Decision in California v. ARC America Corp., *59 Antitrust L.J. 273, 278 (1990)*.

[6] Id. 59 Antitrust L.J. at 284-287.

law, [7] we read subsections 501.202(2), 501.211(2) and 501.204(1) of the Florida DTPA as a clear statement of legislative policy to protect consumers through the authorization of such indirect purchaser actions.

[26]** We have not overlooked the argument of the pharmaceutical companies that this ruling in effect will create an Illinois Brick repealer to the Florida Antitrust Act, which the Florida Legislature has declined to adopt. However, we disagree that the ruling in the instant case is a repealer in disguise or that it will eviscerate Florida's antitrust law. Florida's antitrust law, permitting treble damage recovery by direct purchasers injured by price-fixing, remains intact and undisturbed by this ruling. More importantly, we are unconvinced that the legislative history of Florida's Antitrust Act is persuasive in defining the legislative intent for the Florida DTPA. We find the legislative intent of the Florida DTPA evident from the plain and unambiguous words of that statute. Kirby **[*109]** *Center of Spring Hill v. State Dept. of Labor and Employment Sec., Div. of Unemployment Compensation, 650 So. 2d 1060, 1062 (Fla. 1st DCA 1995).*

We are also not unmindful of the recent opinion of the Texas Supreme Court in *Abbott Laboratories, Inc. (Ross Laboratories Div.) v. Segura, 907 S.W.2d 503 (Tex. 1995)*, wherein the Texas Supreme Court held that consumers, as indirect purchasers, had no standing **[**27]** to bring an action alleging antitrust violations under the Texas Deceptive Trade Act (the Texas DTPA). Although Segura, as the instant case, involved an action under a state deceptive trade practices act and state antitrust act against infant formula manufacturers, because of material differences in the applicable Florida and Texas statutes, we do not find Segura persuasive. The majority opinion in Segura did not premise its decision on an analysis of the Texas consumer statute. Instead, the Texas court was persuaded that the policy reasons precluding

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[7] The ARC America Task Force Report of the American Bar Association, supra, note 5, discusses the different premises underlying the federal and state antitrust enforcement approaches. The report observes that a statute authorizing suits by indirect purchasers:

> rests on the premise that federal law does not target its damage awards to the actual victims of anticompetitive conduct. Implicit in the state approach is the view that the treble damages remedy is designed primarily to compensate those actually injured by antitrust violations and that courts can efficiently trace overcharges and recreate pricing decisions.
>
> Adherents of the state view also believe the Supreme Court's concern that indirect purchaser suits dilute the treble damages remedy is exaggerated. Hanover Shoe and Illinois Brick rest on the notion that direct purchasers will sue antitrust violators when given a treble damages remedy unfettered by a pass-on defense. A number of commentators, however, have argued that the Illinois Brick rule creates artificial incentives for direct purchaser suits that do not reflect business reality. They note that direct purchasers are usually middlemen who stand in a customer-supplier relationship with the wrongdoer, a relationship that is often vital to the continued viability of the direct purchaser's business. According to these commentators, few direct purchasers will jeopardize this relationship by filing an antitrust claim against the supplier. State indirect purchaser laws seem to follow this reasoning.
>
> By contrast, the federal enforcement scheme, embodied in Hanover Shoe and Illinois Brick, puts primary emphasis on deterring antitrust violations rather than compensating victims. Implicit in the federal view is that antitrust law cannot provide full compensation for the economic dislocation caused by anticompetitive conduct. Even if the victims are fully reimbursed, the economic inefficiencies wrought by the violations persist. Effective deterrence, however, obviates the need for compensation and, absent some other market failure, avoids economic inefficiencies that can never be fully redressed. Hanover Shoe and Illinois Brick serve the policy of deterrence by insuring recovery and reducing the costs of litigation for direct purchasers -- those who are most likely to have information about antitrust violations. Those cases also concentrate potential recovery among a few purchasers rather than dividing it among a vast number of plaintiffs whose individual damages are so small that they destroy any incentive to sue. They remove the need for antitrust plaintiffs to engage in the complex tracing of overcharges to prove liability. Finally, they keep litigation relatively manageable by avoiding multiparty lawsuits with hundreds or perhaps thousands of plaintiffs making different claims against the same defendant for the same wrong.

Id. 59 Antitrust L.J. at 290-291 (footnotes omitted). In addition, some commentators urge that "effective private enforcement" may require that "one or more classes of private litigants be motivated and capable of challenging antitrust violations" depending upon "the type of antitrust violation and the remedy sought." Joseph F. Brodley, Antitrust Standing in Merger Cases: Reconciling Private Incentives and Public Enforcement Goals, *94 Mich. L. Rev. 1, 21, 22 (1995)*.

indirect purchaser recovery under the federal antitrust law announced in Hanover Shoe and Illinois Brick Co. applied with equal force to preclude a consumer claim under the Texas DTPA. 907 S.W.2d at 507. The Segura court concluded that to rule otherwise would undermine administration of the Texas Antitrust Act. 907 S.W.2d at 505-06. [8]

[28]** It is apparent, however, that the Florida DTPA is distinguishable from the Texas DTPA in many important respects. For example, the cumulative remedy provision of Florida's DTPA, *section 501.213, Florida Statutes* (1993), as well as the cumulative remedy provision of the Florida Antitrust Act, [9] **[**29]** are very different from the cumulative remedy provisions in the similar Texas statutes. [10] Most importantly, though, there is no real question that the plain language of the Florida DTPA does expressly permit a cause of action by consumers for unfair methods of competition, including price-fixing. On the other hand, as exemplified by the concurring opinions in *Segura, 907 S.W.2d 503, 507-513*, the provisions of the Texas DTPA do not so plainly allow a cause of action against these defendants.

[30]** Unlike the Texas DTPA, the Florida DTPA clearly expresses the legislative policy to authorize consumers (that is, indirect purchasers) to bring actions under the Florida DTPA for price-fixing conduct. In the face of such a clear expression of state policy in the statute, it is not for a court to deny a statutory right of action based on the court's preference for a conflicting policy. *State ex rel. Eichenbaum v. Cochran, 114 So. 2d 797, 800 (Fla. 1959)* ***HN10***[⬆] ("When the legislative **[*110]** branch of the government exercises a legislative power in the form of a duly enacted statute . . . it is not the function of a court to explore the wisdom or advisability of the enactment in order to bring its enforceability into question.").

The Florida DTPA and Antitrust Act in Harmony

Finally, we will briefly address the conclusion of the trial court that the Florida DTPA and Florida Antitrust Act have the same purpose and must be construed harmoniously to allow only direct purchasers to sue for alleged price-fixing conspiracies.

It has been consistently recognized that the federal consumer and antitrust statutes were enacted to deal

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[8] The Tennessee Court of Appeal has ruled that indirect purchasers have standing to maintain an action against infant formula manufacturers for alleged price-fixing under the Tennessee Consumer Protection Act, *T.C.A. §§ 47-18-101 et seq.*, a statute similar to the Florida DTPA. Blake v. Abbott Laboratories, Inc., 1996 WL 134947, C.A. No. 03A01-9509-CV-00307 (Tn. App., Mar. 27, 1996).

[9] The Florida DTPA, *section 501.213, Fla. Stat.* (1993), provides in pertinent part:

(1) The remedies of this pact are in addition to remedies otherwise available for the same conduct under state or local law.

The Antitrust Act, *section 542.35, Fla. Stat.* (1993) provides:

The remedies provided by this Act are cumulative of each other and of existing powers and remedies inherent in the courts.

[10] The Texas DTPA cumulative remedy provision provides:

The provisions of this subchapter are not exclusive. The remedies provided in this subchapter are in addition to any other procedures or remedies provided for in any other law . . . An act or practice that is a violation of law other than this subchapter may be made the basis of an action under this subchapter if the act or practice is proscribed by a provision of this subchapter or is declared by such other law to be actionable under this subchapter.

Tex. Bus. & Com. Code § 17.43 (emphasis added). Justice Gonzales, in his concurring opinion in Segura, states that, in Texas under *section 17.43*, either the Texas DTPA must expressly make conduct illegal or another statute must, and refer to the Texas DTPA as the source for a cause of action to remedy it. Thus, Justice Gonzales concluded, Texas consumers could not maintain a price-fixing cause of action under the Texas DTPA because the Texas DTPA did not expressly make the alleged conduct unlawful and the Texas Antitrust Act did not expressly declare the conduct that it proscribes was actionable under the Texas DTPA. *Segura, 907 S.W.2d at 513* [Gonzales, J., concurring].

The Texas Antitrust Act cumulative remedy provides: "The provisions of this Act are cumulative of each other and of any other provision of law of this state in effect relating to the same subject." *Tex. Bus. & Com. Code § 15.02(a)*.

with closely related aspects of the same problem - the protection **[**31]** of free and fair competition. *U.S. v. American Bldg. Maintenance Industries, 422 U.S. 271, 279, 95 S. Ct. 2150, 2155, 45 L. Ed. 2d 177 (1975)*; *FTC v. Raladam Co., 283 U.S. 643, 647-648, 51 S. Ct. 587, 590, 75 L. Ed. 1324 (1931)*. Since both the Florida DTPA and the Florida Antitrust Act are patterned after their federal counterparts, we may assume that they too, in part, relate to the same purposes - the protection of free, fair and effective competition. [11]

We accept without question the maxim of statutory construction that **[**32]** ***HN11***[⬆] a law should be construed in harmony with any other statute having the same purpose. *Scates v. State, 603 So. 2d 504, 506 (Fla. 1992)*; *Wakulla County v. Davis, 395 So. 2d 540, 542 (Fla. 1981)*; *Mann v. Goodyear Tire & Rubber Co., 300 So. 2d 666, 668 (Fla. 1974)*. On the other hand, where statutes operate on the same subject without plain inconsistency or repugnancy, if possible courts should construe them so as to preserve the force of both without destroying their evident intent. *Mann, 300 So. 2d at 668*; *Davis, 395 So. 2d at 542*. Importantly, a later enacted statute should not, if possible, be construed as impliedly repealing the earlier enacted statute. *Mann, 300 So. 2d at 668*.

Applying these maxims to this case, we find that there is no plain inconsistency or repugnancy between the Florida DTPA and Antitrust Act which must be harmonized. We believe that ARC America establishes that two statutes, both of which prohibit anticompetitive conduct, are not inconsistent merely because one allows indirect purchasers to sue for damages and the other does not. Permitting indirect purchasers to sue under the Florida DTPA effectuates the consumer protection policies **[**33]** of the Florida DTPA, but is not adverse to the purposes of the Antitrust Act. Moreover, to accept the argument of defendants, which would eliminate a remedy provided to an entire class of consumers - indirect purchasers who have been damaged by alleged illegal price-fixing - would be wholly contrary to the legislature's intent in enacting the Florida DTPA.

We note that when the Florida DTPA was enacted in 1973 it permitted, as it does today, a consumer to sue a defendant for engaging in unfair methods of competition. [12] When the Antitrust Act was enacted seven years later in 1980, its cumulative remedy provision, quoted supra in footnote 9, provided that its remedies were cumulative to existing remedies. If the legislature intended the Antitrust Act to take away the right of a consumer to sue for unfair competition under the Florida DTPA where the defendants' conduct also violated the Antitrust Act, the legislature would have expressly said so. Under the circumstances presented here, we will not imply a repeal of a consumer's cause of action expressly established by the legislature in the Florida DTPA.

[34]** Because of the statewide significance of this litigation and the issues presented here under the Florida DTPA, pursuant to *Article **[*111]** V, section 3(b)(4) of the Florida Constitution*, we certify to the Florida Supreme Court the following question of great public importance:

DOES A CONSUMER HAVE STANDING TO BRING AN ACTION FOR DAMAGES UNDER THE FLORIDA DECEPTIVE TRADE PRACTICES ACT, CHAPTER 501, FLORIDA STATUTES (1993), FOR ALLEGED PRICE-FIXING?

REVERSED and REMANDED for further

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[11] (5) The purpose of Florida's Antitrust Act is:

to complement the body of federal law prohibiting restraints of trade or commerce in order to foster effective competition.

§ 542.16, Fla. Stat. (1993).

The purpose of DTPA, in part, is:

(2) To protect the consuming public from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce.

§ 501.202(2), Fla. Stat. (1993).

[12] *Sections 501.203(5)*, *501.204(1)*, and *501.211(2), Fla. Stat.* (1973).

proceedings consistent with this opinion, and question certified.

MINER AND WOLF, JJ., CONCUR.

EXHIBIT “E”

Latman v. Costa Cruise Lines, N.V.

Court of Appeal of Florida, Third District

February 2, 2000, Opinion Filed

CASE NOS. 3D99-852, 3D 99-853, 3D 99-854

Reporter
758 So. 2d 699 *; 2000 Fla. App. LEXIS 915 **; 25 Fla. L. Weekly D 309

TRUDY LATMAN, NATHAN LATMAN, ROSEMARIE TEITLER, PATRICIA ESPINET, RHONDA KATZ, LARRY KATZ, JOYCE KAPLAN, CAROL DAILEY, and WILLIAM DAILEY, individually and on behalf of all others similarly situated, Appellants, vs. COSTA CRUISE LINES, N.V., KLOSTER CRUISE LINES, and CARNIVAL CRUISE LINES, Appellees.

Subsequent History: [1]** Petition for Review Dismissed October 22, 2001, Reported at: *2001 Fla. LEXIS 2153*. Rehearing Denied May 31, 2000. Released for Publication May 31, 2000. Writ of certiorari denied: *Kloster Cruise Lines N.V. v. Espinet, 2002 U.S. LEXIS 6517 (U.S. Oct. 7, 2002)*.

Prior History: An appeal from a non-final order from the Circuit Court for Dade County, Stuart M. Simons, Judge. LOWER TRIBUNAL NOS. 96-3450. 96-8076. 96-8078. 96-18139.

Disposition: Reversed and remanded.

Core Terms

cruise line, port, charges, cruise, consumer, ticket, passenger, class action, class certification, deceptive, maritime law, unfair, trade practice, sales tax, damages

Case Summary

Procedural Posture

Plaintiffs appealed the order of the Circuit Court for Dade County (Florida) denying class certification in their action against defendant cruise lines in a deceptive trade practice action.

Overview

Plaintiffs contended that defendants should repay to the passengers the amounts which were collected as port charges, but which the cruise lines kept for themselves and that they should have been certified as a class. The court found that Florida had a substantial interest in preventing deceptive and unfair trade practices, and the enforcement of state law against such practices would not work material prejudice to the characteristic features of the general maritime law, or interfere with its proper harmony and uniformity. For purposes of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA), *Fla. Stat. ch. 501.201-213* (1991), the court found the inquiry to be how a reasonable consumer would interpret the term "port charges" and concluded that there was a deceptive practice under the FDUTPA. Reliance and damages were sufficiently shown, and each member of the class did not have to individually prove reliance on the alleged misrepresentations.

Outcome

The judgment was reversed and remanded; defendant cruise lines performed deceptive and unfair trade practices pursuant to the statute; each class member did not have to individually prove their reliance on the alleged misrepresentations.

LexisNexis® Headnotes

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

HN1[] Federal & State Interrelationships, Choice of Law

It is true that state law must yield to the needs of a uniform federal maritime law when the Court finds inroads on a harmonious system, but this limitation still leaves the States a wide scope. A state remedy is permissible unless it works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

HN2[] Consumer Protection, Deceptive & Unfair Trade Practices

Florida has a substantial interest in preventing deceptive and unfair trade practices. That is especially so where these cruise lines have their respective national headquarters within the State of Florida, and the passenger tickets specify Florida as the forum for litigation.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

HN3[] Consumer Protection, Deceptive & Unfair Trade Practices

The enforcement of state law against deceptive and unfair trade practices would not work material prejudice to the characteristic features of the general maritime law, or interfere with its proper harmony and uniformity.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > General Overview

HN4[] Class Actions, Prerequisites for Class Action

Fla. R. Civ. P. 1.220 itself requires the court to consider the claims or defenses of the representative parties and whether they raise questions of law or fact common to the class, whether class claims or defenses predominate over questions of law or fact affecting only individual members of the class, and all relevant facts and circumstances.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

HN5[] Consumer Protection, Deceptive & Unfair Trade Practices

The Florida Deceptive and Unfair Trade Practices Act (FDUTPA) is a consumer protection statute, *Fla. Stat. ch. 501.202(2)*(1991), which states in part that unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful. The statute creates a private cause of action for consumers: In any individual action brought by a consumer who has suffered a loss as a result of a violation of this part, such consumer may recover actual damage, plus attorney's fees and court costs. *Fla. Stat. ch. 501.211(2)*.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

HN6[] **Consumer Protection, Deceptive & Unfair Trade Practices**

Where the cruise line bills the passenger for port charges but keeps part of the money for itself, that is a deceptive practice under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA).

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Governments > Legislation > Statute of Limitations > General Overview

HN7[] **Class Actions, Prerequisites for Class Action**

Assuming that the contractual limitation period is valid and applicable, it is sufficient if the contract provision is satisfied, or compliance is excused, as to the class plaintiffs.

Counsel: Robert C. Gilbert; Burt & Pucillo, LLP.; Zwerling, Schachter & Zwerling, LLP, and Joseph Lipofsky and Robert S. Schachter, for appellants.

Hicks & Anderson, P.A., and Mark Hicks and Gary A. Magnarini; Mase & Gassenheimer, P.A.; Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., and Joel Perwin; Paul, Weiss, Rifkind, Wharton & Garrison and Lewis R. Clayton and Steven C. Herzog; Rodriguez & Aronson, for appellees.

Judges: Before COPE, GREEN and FLETCHER, JJ.

Opinion by: COPE

Opinion

[*700] COPE, J.

In these three consolidated appeals, class action plaintiffs appeal an order denying **[*701]** class certification. We conclude that class certification should have been granted, and reverse the order under review.

I.

The plaintiffs are cruise passengers who traveled on Carnival Cruise Lines, Costa Cruise Lines, N.V., and Kloster Cruise Lines. For the time period at issue here, the passengers' ticket price was calculated as **[**2]** follows: (a) cruise price + (b) port charges = (c) total ticket price. The term "port charges" was not defined.

Plaintiffs contend that the term "port charges" necessarily informs the consumer that these are "pass-through" charges paid by the cruise line to the relevant port authorities. Plaintiffs allege, and for present purposes it is accepted as true, that in fact the cruise lines passed through only a portion of the port charges to third parties, and kept the remainder for themselves. Plaintiffs alleged that this practice--collecting port charges but keeping a part of the port charges for their own account--amounted to an unfair and deceptive trade practice for purposes of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"). *See §§ 501.201-.213, Fla. Stat.* (1991). [1]

[3]** In 1996, plaintiffs filed class action complaints against the defendant-appellee cruise lines, contending that the cruise lines should repay to the passengers those amounts which were collected as "port charges" but which the cruise lines kept for themselves. The trial court denied the motion for class certification. The plaintiffs have appealed.

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[1] Because the plaintiffs' earliest claims are for cruises purchased in 1992, we refer to the 1991 version of FDUTPA. The statute has been subsequently amended from time to time, but not in ways material to the present analysis.

II.

Although not the basis of the trial court's ruling, the cruise lines' threshold argument is that the FDUTPA is completely displaced by maritime law and can have no application to a passenger cruise ticket. They point out that a passenger cruise ticket is a maritime contract, *see* 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 5-5, at 168 (2d ed. 1994), and say that maritime law necessarily governs to the exclusion of state law. We disagree.

The United States Supreme Court has said, "'It ***HN1***[⬆] is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system[,] but this limitation still leaves the States a wide scope.'" *American Dredging Co. v. Miller, 510 U.S. 443, 452, 127 L. Ed. 2d 285, 114 S. Ct. 981 (1994)* (citation omitted). A state **[**4]** remedy is permissible unless it "'works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations.'" *Id. at 447* (citations omitted).

HN2[⬆] Florida has a substantial interest in preventing deceptive and unfair trade practices, as thoroughly explained by the Fourth District in *Renaissance Cruises, Inc. v. Glassman, 738 So. 2d 436, 438-40 (Fla. 4th DCA 1999)*. That is especially so where, as here, these cruise lines have their respective national headquarters within the State of Florida, and the passenger tickets specify Florida as the forum for litigation. *See id. at 439*. We are unable to see how ***HN3***[⬆] the enforcement of state law against deceptive and unfair trade practices would work material prejudice to the characteristic features of the general maritime law, or interfere with its proper harmony and uniformity. *See American Dredging, 510 U.S. at 447*; *Renaissance Cruises, 738 So. 2d at 439-40*; *see also Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 206-07, 133 L. Ed. 2d 578, 116 S. Ct. 619 (1996)*; **[**5]** *Kossick v. United Fruit Co., 365 U.S. 731, 741, 6 L. Ed. 2d 56, 81 S. Ct. 886 (1961)*; *In the Matter of Nautilus* **[*702]** *Motor Tanker Co., 900 F. Supp. 697, 702-05 (D.N.J. 1995)*; *F/V Robins Nest, Inc. v. Atlantic Marine Diesel, Inc., 1994 U.S. Dist. LEXIS 15403*, Civ. A. No. 92-3900 (JEI), 1994 WL 594592, at *2-3 (D.N.J. Oct. 24, 1994); *Hoddevik v. Arctic Alaska Fisheries Corp., 94 Wn. App. 268, 970 P.2d 828, 834-35 (Wash. Ct. App. 1999)*. We conclude that FDUTPA is applicable here and reject the cruise lines' argument to the contrary. [2]

[6]** III.

We now turn to the merits of the order denying class certification. We glean from the trial court's order that the court concluded plaintiffs had not correctly analyzed their cause of action under FDUTPA. As we interpret the order, the court reasoned that once FDUTPA was properly interpreted, individual issues of reliance and damages on the part of the class members would outweigh any issues common to the class. The court thus denied class certification.

Plaintiffs argue that it was inappropriate for the trial court to conduct any inquiry into the elements of plaintiffs' claims in deciding a motion for class certification. We disagree. ***HN4***[⬆] *Florida Rule of Civil Procedure 1.220* itself requires the court to consider the claims or defenses of the representative parties and whether they raise questions of law or fact common to the class, *id.* R. 1.220(a)(2); whether class claims or defenses predominate over questions of law or fact affecting only individual members of the class, *id.* R.

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[2] The Florida Attorney General has asserted jurisdiction under FDUTPA, in an inquiry regarding the cruise lines' port charges.

In 1997 Carnival and Kloster entered into an "Assurance of Voluntary Compliance" with the Florida Attorney General which effectively limited port charges to those imposed by a governmental or quasi-governmental authority. The agreement was made without any admission that there had been any violation of law, and without prejudice to the cruise lines' position in any pending or future litigation.

1.220(b)(3); and "*all* relevant facts and circumstances." *Id.* (emphasis added); *see* *Dept. of Agriculture v. Varela, 732 So. 2d 1146* (Fla. 3d DCA), *review denied,* **[**7]** *744 So. 2d 459 (Fla. 1999)*. In performing the required analysis under *Rule 1.220*, the court necessarily had to consider the law applicable to plaintiffs' claims in order to decide whether those claims were maintainable as a class action.

HN5[⬆] FDUTPA is a consumer protection statute, *see* *§ 501.202(2), Fla. Stat.* (1991), which states in part that "unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." *Id.* *§ 501.204(1)*. The statute creates a private cause of action for consumers: "In any individual action brought by a consumer who has suffered a loss as a result of a violation of this part, such consumer may recover actual damage, plus attorney's fees and court costs . . . ." *Id.* *§ 501.211(2)*.

The cruise lines argue that FDUTPA requires the plaintiffs to demonstrate reliance and damages, and that this will necessarily entail case-by-case adjudication which is inappropriate for class consideration. The cruise lines contend that reliance and damages in most cases cannot be shown, because the ticket states (a) the cruise price, (b) the port charges, and (c) the total price. The port charges **[**8]** are not a later "add on," but are instead a flat amount stated in advance. Thus, the consumer knows at the outset the total price for the cruise, and can make a decision whether that total price is acceptable or not.

In these cases the named plaintiffs testified they were willing to pay, and did pay, the quoted fare for the cruises and were happy with the cruises they took. At the time they purchased their tickets, some of the cruise passengers were given the separate breakdown for the cruise charge and the port charges, while others were only given the total cruise price. The cruise lines argue that absent some indication that the consumers were influenced in **[*703]** some way by the port charges, there is neither reliance nor resulting damage under FDUTPA. More to the point, the cruise lines argue that to determine whether there was individual reliance and resulting damage in any individual case, there must necessarily be a case-by-case inquiry, which is not suitable for a class action.

We conclude that the cruise lines read FDUTPA too narrowly and would illustrate with the following example. Suppose that a company systematically overcharges its customers on sales tax. The hypothetical **[**9]** company pays the state the sales tax that it owes, and then keeps the overcharge for itself.

We would not hesitate to say that an intentional overcharge of sales tax, which is kept by the company itself, is an unfair and deceptive trade practice and that the consumer must be repaid. That is so even though the consumers clearly were willing to pay the price charged--in the hypothetical example, they actually paid the sales tax overcharges--nor would it make a difference that the consumers paid no attention to the sales tax amount. We think such a claim would be actionable under FDUTPA. *See* *W.S. Badcock Corp. v. Myers, 696 So. 2d 776, 778-79 (Fla. 1st DCA 1996)* (class certified under FDUTPA for claim that Badcock impermissibly charged consumers a seven dollar non-filing fee in connection with purchases of consumer goods it sold and financed); *see also* *Execu-Tech Business Systems Inc. v. New Oji Paper Co., Ltd., 752 So. 2d 582, 2000 Fla. LEXIS 65, 25 Fla. Law W. S 40 (Fla. 2000)*(class action under FDUTPA to recover damages for price fixing).

The same logic applies here. For purposes of FDUTPA, we think the inquiry is how a reasonable consumer would interpret the term "port charges." The **[**10]** term necessarily constitutes a representation to a reasonable consumer that these are "pass-through" charges which the cruise line will pay to the relevant port authorities (and

possibly others [3]).

As the Michigan Supreme Court said in a comparable context, "We hold that members of a class **[**11]** proceeding under the Consumer Protection Act need not individually prove reliance on the alleged misrepresentations. It is sufficient if the class can establish that a reasonable person would have relied on the representations." *Dix v. American Bankers Life Assurance Co., 429 Mich. 410, 415 N.W.2d 206, 209 (Mich. 1987)* (footnote omitted); *see Weitzel v. Barnes, 691 S.W.2d 598, 600 (Tex. 1985)*; *see also Orkin Exterminating Co. v. Federal Trade Commission, 849 F.2d 1354, 1368 (11th Cir. 1988)*; *Trans World Accounts, Inc. v. Federal Trade Commission, 594 F.2d 212, 214 (9th Cir. 1979)*; *§ 501.204(2), Fla. Stat.* (1991).

We therefore conclude that ***HN6***[⬆] where the cruise line bills the passenger for port charges but keeps part of the money for itself, that is a deceptive practice under FDUTPA. Reliance and damages are sufficiently shown by the fact that the passenger parted with money for what should have been a "pass-through" port charge, but the cruise line kept the money. We note that the Fourth and Fifth District Courts of Appeal have already allowed comparable class actions to proceed in their respective **[**12]** jurisdictions. *See Renaissance Cruises, Inc. v. Glassman, 738 So. 2d at 437*; *Premier Cruise Lines, LTD., v. Picaut, 746 So. 2d 1132, 1999 Fla. App. LEXIS 13969*, *5-6, 24 Fla. Law W. at D 2423.

[*704] The cruise lines argue that they have no liability under FDUTPA because in numerous instances they sold their tickets through travel agents, and never communicated directly with the consumers. That makes no difference. Whether the travel agent is viewed as being an agent of the passenger, or the cruise line, the cruise line elected to itemize an amount on the ticket for port charges, and determined the disposition of funds. Whether the ticket was purchased through a travel agent is irrelevant to the underlying analysis.

We see no merit to the cruise lines' other objections to class certification. The orders under review must therefore be reversed and the cause remanded with directions to certify the class actions.

IV.

The cruise lines next argue that the passenger ticket contains a limitation requiring a written notice of claim to be submitted to the cruise line within 185 days, and suit to be brought within one year, after the injury complained of. They point out that only a handful of written claims were submitted **[**13]** complaining about the port charges. Their position is that as a prerequisite to maintaining a class action, every member of the class must submit a written claim in accordance with the limitation period contained on the ticket.

We reject this argument. ***HN7***[⬆] Assuming that the contractual limitation period is valid and applicable, it is sufficient if the contract provision is satisfied, or compliance is excused, as to the class plaintiffs. *See Kornberg v. Carnival Cruise Lines, Inc., 741 F.2d 1332, 1336-37 (11th Cir. 1984)* (citing, inter alia, *American Pipe & Construction Co. v. Utah, 414 U.S. 538, 551, 38 L. Ed. 2d 713, 94 S. Ct. 756 (1974)*).

Because the trial court did not rule on any issue regarding the validity or applicability of the contractual limitation periods contained in these tickets, we decline to reach those issues here. They should be considered in the first instance by the trial court on remand.

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[3] We need not now decide whether we agree with the Fifth District's definition of port charges contained in *Premier Cruise Lines, Ltd. v. Picaut, 746 So. 2d 1132, 1999 Fla. App. LEXIS 13969, 24 Fla. Law W. D 2422 (5th DCA 1999)*, which includes port-side expenses associated with the port stay (regardless of whether paid to public or private third parties), while the plaintiffs contend that the term "port charges" means only those charges that are paid to a governmental or quasi-governmental port authority.

We do not need to resolve that issue at this time because under either definition, the term "port charges" indicates to a reasonable consumer that they are payments to third persons, not payments which are to be kept by the cruise lines themselves.

For the reasons stated, the order under review is reversed and the cause remanded for further proceedings consistent herewith.

Reversed and remanded. **[**14]**

End of Document

EXHIBIT “F”

InPhyNet Contr. Servs. v. Matthews

Court of Appeal of Florida, Fourth District

June 22, 2016, Decided

Nos. 4D14-3382, 4D14-3387, 4D14-3391 and 4D14-3392

Reporter
196 So. 3d 449 *; 2016 Fla. App. LEXIS 9594 **; 41 Fla. L. Weekly D 1464

INPHYNET CONTRACTING SERVICES, INC., d/b/a Emergency Physicians of Delray, a Florida corporation; MD NOW MEDICAL CENTERS, INC., a Florida corporation; SELECT PHYSICAL THERAPY HOLDINGS, INC., d/b/a Select Physical Therapy, a foreign corporation authorized to do business in Florida; PREMIER FAMILY HEALTH, P.A., a Florida Professional Association; WELLINGTON MEDICAL CARE ASSOCIATES, LLC, a Florida limited liability company; HEALTHPORT TECHNOLOGIES, LLC; and all other persons and entities similarly situated, Appellants, v. R.V. MATTHEWS III, PATRICIA MAHER, RON DEPAOLO, and LAUREN MCKELVEY, as Personal Representative of the Estate of Scott M. McKelvey, individually and on behalf of all persons similarly situated, Appellees.

Subsequent History: Review denied by *Inphynet Contr. Servs. v. Matthews, 2016 Fla. LEXIS 2684 (Fla., Dec. 15, 2016)*

Prior History: [1]** Consolidated appeals of a non-final order from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Lucy Chernow Brown, Judge; L.T. Case No. 50-2013-CA-009428-MB (AH).

Core Terms

juridical, class action, trial court, class certification, issues, parties, certifying, cases, bilateral, class representative, courts, proceedings, providers, requirements, records, copies, medical records, class member, typicality, adequacy, subclass, overlap, identity of parties, member of the class, issue of standing, irreparable harm, cause of action, legal representative, named plaintiff, certification

Case Summary

Overview

HOLDINGS: [1]-In a class action suit brought by plaintiffs challenging the fees for health care records charged by defendants, the court reversed the trial court order certifying a defendant class and a defendant subclass because the trial court erred in determining that the plaintiff class had standing to bring a class action against the defendant class as there was nothing in the record to support a finding that members of the defendant class were private actors who were connected by a common agreement or uniform practice, thus, the juridical link was improperly applied in the case to establish standing as to the defendant class.

Outcome

Judgment affirmed in part, reversed in part; certiorari granted in part; case remanded to trial court for further proceedings.

LexisNexis® Headnotes

Business & Corporate
Compliance > ... > Medical Treatment > Patient

Confidentiality > Medical Records Under HIPAA

HN1[] Patient Confidentiality, Medical Records Under HIPAA

See § 456.057(6), Fla. Stat. (2013).

Business & Corporate Compliance > ... > Medical Treatment > Patient Confidentiality > Medical Records Under HIPAA

HN2[] Patient Confidentiality, Medical Records Under HIPAA

See § 456.057(17), Fla. Stat. (2013).

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Special Proceedings > Class Actions > Appellate Review

HN3[] Standards of Review, Abuse of Discretion

Orders granting or denying class certification are reviewed for an abuse of discretion. A trial court's decision as to whether a party has satisfied the standing requirement is reviewed de novo. Because Florida's class action rule is based on *Fed. R. Civ. P. 23*, Florida courts may generally look to federal cases as persuasive authority in their interpretation of Fla. R. Civ. P. 1.220.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > Allocation

HN4[] Class Actions, Certification of Classes

The movant for class certification bears the burden of establishing all the requirements of Fla. R. Civ. P. 1.220. The trial court must conduct a rigorous analysis to determine whether class certification is warranted. Compliance with Rule 1.220 requires a rigorous analysis because the granting of class certification considerably expands the dimensions of the lawsuit, and commits the court and the parties to much additional labor over and above that entailed in an ordinary private lawsuit.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN5[] Class Actions, Certification of Classes

A movant for class certification must demonstrate the following four prerequisites required by Fla. R. Civ. P. 1.220(a): (1) the members of the class are so numerous that separate joinder of each member is impracticable, (2) the claim or defense of the representative party raises questions of law or fact common to the questions of law or fact raised by the claim or defense of each member of the class, (3) the claim or defense of the representative party is typical of the claim or defense of each member of the class, and (4) the representative party can fairly and adequately protect and represent the interests of each member of the class. Fla. R. Civ. P. 1.220(a). Courts refer to those elements as the numerosity, commonality, typicality, and adequacy of representation elements of class certification. In addition to satisfying Rule 1.220(a), the movant must also satisfy one of the three subdivisions of Rule 1.220(b).

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN6 **Class Actions, Certification of Classes**

See *Fla. R. Civ. P. 1.220(b)*.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Class Members > Defendants as Class

HN7 **Class Actions, Certification of Classes**

As a general proposition, a motion to certify a defendant class raises heightened due process concerns, as compared to a motion to certify a plaintiff class. As the federal district court in Marchwinski v. Oliver Tyrone Corp., observes: A defendant class differs in vital respects from a plaintiff class, and the very notion of a defendant class raises immediate due process concerns. When one is an unnamed member of a plaintiff class one generally stands to gain from the litigation. The most one can lose in cases where res judicata operates is the right to later bring the same cause of action. However, when one is an unnamed member of a defendant class, one may be required to pay a judgment without having had the opportunity to personally defend the suit. Although the court believes that *Fed. R. Civ. P. 23* pertaining to class actions requirements of adequacy of representation and notice to class members were designed to safeguard due process rights, the court notes the inherent difference in the nature of plaintiffs and defendants in most suits and suggest that a defendant class should be certified and such an action tried only after careful attention to these safeguards.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Class Members > Defendants as Class

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN8 **Class Actions, Certification of Classes**

The due process concerns regarding defendant class certification are even more pronounced in bilateral class actions. Bilateral class actions raise unique and overlapping issues of standing, commonality, typicality, and adequacy of representation. The overlap of issues regarding bilateral class actions makes appellate analysis sometimes difficult because different appellate opinions focus on different aspects of the problem. For example, the Eleventh Circuit Court of Appeals has observed that in many ways, the commonality and typicality requirements of class certification overlap. Both requirements focus on whether a sufficient nexus exists between the legal claims of the named class representatives and those of individual class members to warrant class certification. Another example of the overlap of issues is demonstrated in Sosa, where the Florida supreme court has stated that the issues of typicality and adequacy of representation require an analysis of whether the claims and interests of a class representative and class members are antagonistic.

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

Civil Procedure > Special Proceedings > Class

Actions > Certification of Classes

HN9[] **Standing, Burdens of Proof**

Typicality is satisfied when the claims of the class representative and class members are not antagonistic to one another and the second prong of the adequacy requirement pertains to whether the class representative's interests are antagonistic to the interests of the class members. There is arguably some overlap between issues of standing and typicality. As asserted by the Eleventh Circuit, without individual standing to raise a legal claim, a named representative does not have the requisite typicality to raise the same claim on behalf of a class. Thus, the Eleventh Circuit has opined that any analysis of class certification must begin with the issue of standing. The difficulty presented by the overlap of issues is perhaps best illustrated by the doctrine of juridical link. Likewise, the Florida supreme court considers standing to be a threshold issue to be considered before class certification.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Class Members > Defendants as Class

HN10[] **Class Actions, Certification of Classes**

The issues and problems unique to defendant class certification have led courts to conclude that certification of defendant classes are, and should be, sparingly granted. The federal district court in Thillens, Inc. v. Community Currency Exchange Ass'n. of Illinois, Inc., asserts that defendant classes seldom are certified.

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Class Members > Defendants as Class

HN11[] **Standing, Burdens of Proof**

The In re Gap opinion also provides a thoughtful framework for understanding why certification of defendant classes often is denied. There is great judicial reluctance to certify a defendant class when the action is brought by a plaintiff class. The primary concern with bilateral actions, antitrust or other types, is a fear that each plaintiff member has not been injured by each defendant member. Several rules, useful in unilateral as well as bilateral defendant class actions, emerge from In re Gap and similar cases: (1) A defendant class will not be certified unless each named plaintiff has a colorable claim against each defendant class member; (2) A defendant class will not be certified under *Fed. R. Civ. P. 23(b)(3)* without a clear showing that common questions do in fact predominate over individual issues; (3) The requirement that each named plaintiff must have a claim against each defendant may be waived where the defendant members are related by a conspiracy or juridical link. A juridical link is some legal relationship which relates all defendants in a way such that single resolution of the dispute is preferred to a multiplicity of similar actions. Absent such juridical link, a defendant class fails the U.S. Const. art. III test requiring a case or controversy to support the assertion of jurisdiction.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Class Members > Defendants as Class

HN12[] **Prerequisites for Class Action,**

Adequacy of Representation

Regarding standing for certification of a plaintiff class, Florida law is clear. To satisfy the standing requirement for a class action claim, the class representative must illustrate that a case or controversy exists between him or her and the defendant, and that this case or controversy will continue throughout the existence of the litigation. However, no Florida court has addressed the issue of standing with regards to certifying a defendant class, except for the Second District in Addison. In other words, no Florida case has squarely addressed the standing requirement where a plaintiff class representative was not injured by a significant portion of the defendant class. Although the Second District seemingly discusses the juridical link exception to the standing issue in Addison, the discussion of the issue of standing is intertwined with the issue of adequacy of representation. Generally speaking, issues relating to standing and adequacy of representation arise where the plaintiffs seek to certify a bilateral class action, but the defendant class includes parties against whom the nominal plaintiffs have no claim.

Civil Procedure > ... > Class Actions > Class Members > Defendants as Class

HN13[] **Class Members, Defendants as Class**

As a matter of standing, the Court of Appeal of Florida agrees with those federal courts which have determined that a class of defendants alleged to be violating a law do not display juridical links merely because its members are subject to a common regulatory scheme. Regulation under a common statute, or similar actions in violation of statutory or regulatory provisions, does not establish a juridical link.

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

Civil Procedure > ... > Stays of Judgments > Appellate Stays > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

HN14[] **Appellate Jurisdiction, Final Judgment Rule**

An order denying the motion to stay the entire proceeding is a non-final, non-appealable order. Thus, the appellate court does not have jurisdiction as to that order on direct appeal. Nonetheless, the Florida Court of Appeal can treat the appeal as a petition for writ of certiorari. *Fla. R. App. P. 9.040(c)* states that if a party seeks an improper appellate remedy, the cause shall be treated as if the proper remedy had been sought. *Fla. R. App. P. 9.030(b)(2)(A)* provides that the certiorari jurisdiction of district courts of appeal may be sought to review non-final orders of lower tribunals other than as prescribed by Fla. R. Civ. P. 9.130.

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

Evidence > Burdens of Proof > Allocation

HN15[] **Appellate Jurisdiction, State Court Review**

For an appellate court to review a nonfinal order by petition for certiorari, the petitioner must demonstrate that the trial court departed from the essential requirements of the law, thereby causing irreparable injury which cannot be adequately remedied on appeal following final judgment.

Civil Procedure > Appeals > Standards of Review > Prejudicial Errors

Civil Procedure > Appeals > Standards of Review > Reversible Errors

HN16[] Standards of Review, Prejudicial Errors

As to irreparable harm, the Court of Appeal of Florida has previously said that exposure to a potential inconsistent ruling on the same issue by another court constitutes irreparable harm.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Torts > Business Torts > Unfair Business Practices > Elements

Torts > Business Torts > Unfair Business Practices > Remedies

HN17[] Deceptive & Unfair Trade Practices, State Regulation

The Florida Deceptive and Unfair Trade Practices Act, *§ 86.061, Fla. Stat.*, allows for injunctive relief, and injunctive relief is also appropriate under *§ 86.061*.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Governments > Courts > Judicial Comity

Civil Procedure > ... > Stays of Judgments > Appellate Stays > General Overview

HN18[] Standards of Review, Abuse of Discretion

The trial court's limited stay order, denying the request for a blanket stay of the entire action, is reviewed for abuse of discretion. The principle of priority applies to the analysis of whether a stay of the entire proceeding should have been granted by the trial court below. Absent extraordinary circumstances, a trial court abuses its discretion when it fails to respect the principle of priority. The principle of priority, as a matter of comity, applies to the motion to stay the entire proceeding. In a class action case, the Third District described the principle of priority as follows: Principles of comity between sovereigns suggest that a court of one state should stay a proceeding pending before it on grounds that a prior-filed case involving substantially the same subject matter and parties is pending in another state's courts.

Governments > Courts > Judicial Comity

HN19[] Courts, Judicial Comity

The rationale for the application of the principle of priority, as a matter of comity, is the avoidance of wasting judicial resources in duplicative and unnecessary proceedings and the risk of inconsistent judgments regarding the application of law to the same factual dispute. The purpose of applying the principle of priority as a matter of comity is to prevent unnecessary and duplicitous lawsuits that would be oppressive to both parties. It would be a waste of judicial resources for both actions, involving the same set of facts and requesting virtually identical relief, to proceed side-by-side.

Civil Procedure > ... > Stays of Judgments > Appellate Stays > General Overview

Governments > Courts > Judicial Comity

HN20[] Stays of Judgments, Appellate Stays

In applying the principle of priority, the pivotal question is whether the second-filed action is sufficiently similar in parties and issues as to be unnecessarily duplicative of the prior-filed proceeding. Florida law is clear that the causes of action do not have to be identical to require a stay of the second-filed action. It is sufficient that the

two actions involve a single set of facts and that resolution of the one case will resolve many of the issues involved in the subsequently filed case. Nor does the principle of priority require an absolute identity of parties between the two actions, with regards to the propriety of a stay. Complete identity of the parties and claims is not required in applying the principle of priority to a motion to stay.

Civil Procedure > ... > Stays of Judgments > Appellate Stays > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Waiver & Preservation of Defenses

HN21[] **Stays of Judgments, Appellate Stays**

Case law more stringently requires identity of parties with regard to abatement of an action. Abatement would not have been available where there was not a complete identity of parties. While abatement requires complete identity of parties and causes of action, a stay should require substantial similarity of parties and actions. Although the principle of priority is generally applied to cases pending concurrently in a federal court and a state court or currently in courts of two different states, the principle is also applicable when two cases are pending in different circuits within Florida.

Civil Procedure > Special Proceedings > Class Actions > Appellate Review

Civil Procedure > ... > Stays of Judgments > Appellate Stays > General Overview

HN22[] **Class Actions, Appellate Review**

In the context of class actions, the Court of Appeal of Florida has said that where federal and state courts have concurrent jurisdiction over the parties and identical causes of action, the latter court to obtain jurisdiction should stay all proceedings in deference to the first court. Likewise, the Third District has stated that when there is a previously-filed class action case which involves substantially similar parties and issues, the subsequently-filed action should be stayed.

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

HN23[] **Appellate Jurisdiction, State Court Review**

On certiorari an appellate court can only deny the writ or quash the order under review. It has no authority to take any action resulting in the entry of a judgment or orders on the merits or to direct that any particular judgment or order be entered.

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Judges: CONNER, J. GERBER and FORST, JJ., concur.

Opinion

[*454] CONNER, J.

This is a consolidated appeal of a trial court order granting bilateral class certification, certifying both a plaintiff and a defendant class, in an action challenging fees charged for copies of health care records. **[**2]** This portion of the order is appealable as a non-final order pursuant to *Florida Rule of Appellate Procedure 9.130(a)(3)(C)(vi)*. For the reasons set forth below, we reverse the order insofar as it certified a defendant class and a defendant subclass. We affirm, without discussion, the order certifying a plaintiff class. The other aspect of the order which denied stay is reviewable by certiorari, as discussed below. We grant certiorari relief and quash the order denying stay of the entire action pending resolution of two other prior-filed class actions currently pending in the Circuit Court of Hillsborough County. Additionally, we quash that portion of the trial court order that applied a limited stay to the plaintiff subclass, and reverse the imposition of that subclass.

Factual Background and Trial Court Proceedings

The four named plaintiffs in this case are existing or past patients of health care providers who received treatment and requested copies of their medical records, bills generated from such treatment, or both, through attorneys as their legal representatives. The plaintiffs filed a class action asserting claims that charges assessed to their legal representatives for these records exceeded the limits of *section 456.057, Florida Statutes* (2013), and the administrative **[**3]** regulations governing the various providers. The plaintiffs contend that their legal representatives paid the excessive charges and passed the charges on to them. Additionally, the **[*455]** plaintiffs allege the excessive charges violate the Florida Deceptive and Unfair Trade Practices Act (FDUTPA). The amended complaint ("the Complaint") asserts a bilateral class action, asking the trial court to certify both a plaintiff class, consisting of:

> For the period from June 1, 2009 through the date of entry of judgment herein (the "Class Period"), any person or any person's legal representative who, in violation of Florida law, was charged an excessive amount to obtain copies of health care records from *any Florida Record Owner*,

(emphasis added) and a defendant class, consisting of:

> *All Record Owners located in the State of Florida* who, during the Class Period, violated Florida law by charging any person or any person's legal representative an excessive amount to obtain copies of requested health care records.

(emphasis added). The Complaint seeks declaratory relief, damages, supplemental relief, and attorney's fees.

The Complaint specifically cites statutory and rule authority for the alleged violations **[**4]** of law. First, the Complaint references *section 456.057(6), Florida Statutes* (2013), which provides:

> ***HN1***[↑] Any health care practitioner[1] licensed by the department or a board within the department who makes a physical or mental examination of, or administers treatment or dispenses legend drugs to, any person shall, upon request of such person or the person's legal representative, furnish, in a timely manner, without delays for legal review, copies of all reports and records relating to such examination or treatment, including X rays and

[1] The term "health care practitioner" or "record owner" excludes certain professionals such as certified nursing assistants, pharmacists, dental hygienists, respiratory therapists and others specified in *section 456.057(2), Florida Statutes* (2013). However, terms include health care professionals who are not covered by the four administrative rules alleged in the Complaint. Thus, by defining the classes with reference to "all record owners," both the purported plaintiff and defendant classes contained members for whom none of the four administrative rules are applicable.

insurance information.

Id. Next, the Complaint references *section 456.057(17), Florida Statutes* (2013), which provides:

> ***HN2***[↑] A health care practitioner or records owner furnishing copies of reports or records or making the reports or records available for digital scanning pursuant to this section shall charge no more than the actual cost of copying, including reasonable staff time, or the amount specified in administrative rule by the appropriate board, or the department when there is no board.

Id. Finally, the Complaint references four administrative rules governing fees for medical records: *Florida Administrative Code Section 64B8-10.003* (applicable to medical doctors); *Section 64B15-15.003* (applicable to osteopaths); *Section 64B2-17.0055* (applicable to chiropractors); and *Section 64B17-6.005* (applicable to physical therapists). All four **[**5]** administrative codes provide that the reasonable cost of reproducing copies of written or typed documents shall be no more than $1.00 per page for the first twenty-five pages, and no more than $0.25 for each additional page in excess of twenty-five pages. *Fla. Admin. Code R. 64B8-10.003(2)*, *64B15-15.003(2)*, *64B2-17.0055(2)*, *64B17-6.005(2)*.

The Complaint alleges that the defendants, Premier Family Health, P.A. ("Premier"), Wellington Medical Care Associates, LLC ("Wellington"), and InPhyNet Contracting Services, Inc. ("Inphynet"), **[*456]** are either corporate entities or professional associations providing health care services. In the trial court and on appeal, Inphynet contends that it is not a health care provider, a medical record owner, **[**6]** or a record custodian. Because we reverse the defendant class certification for other reasons, we do not address this argument.

With respect to Premier, the plaintiffs alleged that Premier violated the statutes and administrative rule by contracting services through another entity, BACTES Imaging Solutions, Inc. BACTES is considered a "ROI" (Release of Information) provider of medical records.[2] Significant to the proceedings below and to this appeal is the fact that BACTES is named as a defendant in a prior-filed class action suit that was pending at all times material to this case in the Circuit Court of Hillsborough County ("the *Webber* Case").

Another ROI provider, HealthPort Technologies, LLC ("HealthPort"), was involved in providing medical records to one of the named plaintiffs and successfully moved to intervene in this case. Although not granted full party status, HealthPort was able to participate in the proceedings below, and has appeared in this appeal. Like BACTES, HealthPort asserts an interest in this case because it is a named defendant in another prior-filed class action **[**7]** proceeding, also pending in the Circuit Court of Hillsborough County ("the *Allen* Case"). All three defendants in this case, as well as HealthPort, contend that the *Webber* Case and the *Allen* Case assert the same claims and legal theories the plaintiffs are pursuing in this case. The named plaintiffs in this case contend that the class actions filed in the *Webber* Case and the *Allen* Case are not similar to this case because, in both of those cases, a ROI is a defendant, whereas in this case, no ROI has been directly sued and the defendant class is composed of medical record owners.

The trial court found that the plaintiffs adequately demonstrated the requirements of *Florida Rule of Civil Procedure 1.220(a)* and *(b)* to justify bilateral class certification. As to the defendant class, the trial court found that each named defendant and the defendant class are subject to the limitations on copying costs imposed by either a statute or the respective regulatory boards under which the medical record owner was licensed, and that a class representative could fairly and adequately protect the interests of the defendant class. The trial court determined that "[t]here are no substantial or

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[2] ROIs service medical records for record owners to assure compliance with state and federal privacy laws.

fundamental conflicts between the Defendants that go to the **[**8]** specific issue in controversy in this litigation." It also found that "multiple lawsuits would create a substantial risk of inconsistent rulings which would impose incompatible standards of conduct on Defendants." To address the possibility that there may be some overlap between the named and class defendants in this case and the defendants or defendant classes in the *Webber* Case and the *Allen* Case, the trial court created a plaintiff and defendant subclass to include the class parties in this case who may have their claims resolved by either of those cases. The trial court entered a stay as to the proceedings involving the subclasses.

The three defendants and HealthPort gave notice of appeal of the order certifying bilateral classes in this case.

Appellate Analysis

Certification of Defendant Class

Class Certification

HN3[↑] Orders granting or denying class certification are reviewed for an abuse of **[*457]** discretion. *Freedom Life Ins. Co. of Am. v. Wallant, 891 So. 2d 1109, 1113-14 (Fla. 4th DCA 2004)* (citing *Renaissance Cruises, Inc. v. Glassman, 738 So. 2d 436, 438 (Fla. 4th DCA 1999)*). "A trial court's decision as to whether a party has satisfied the standing requirement is reviewed de novo." *Sosa v. Safeway Premium Fin. Co., 73 So. 3d 91, 116 (Fla. 2011)*. "Because Florida's class action rule is based on *Federal Rule of Civil Procedure 23*, Florida courts may generally look to federal cases as persuasive authority in their interpretation of *rule 1.220*." *InPhyNet Contracting Servs., Inc. v. Soria, 33 So. 3d 766, 770-71 (Fla. 4th DCA 2010)* (citing **[**9]** *Seven Hills, Inc. v. Bentley, 848 So. 2d 345, 352-53 (Fla. 1st DCA 2003)*.

HN4[↑] "The movant for class certification bears the burden of establishing all the requirements of *Florida Rule of Civil Procedure 1.220*." *Id. at 771* (citing *Chase Manhattan Mortg. Corp. v. Porcher, 898 So. 2d 153, 156 (Fla. 4th DCA 2005))*. "The trial court must conduct a 'rigorous analysis' to determine whether class certification is warranted." *Id.*; *Execu-Tech Bus. Sys., Inc. v. Appleton Papers, Inc., 743 So. 2d 19, 21-22 (Fla. 4th DCA 1999)*. Compliance with *rule 1.220* requires a rigorous analysis "because the granting of class certification considerably expands the dimensions of the lawsuit, and commits the court and the parties to much additional labor over and above that entailed in an ordinary private lawsuit." *Baptist Hosp. of Miami, Inc. v. Demario, 661 So. 2d 319, 321 (Fla. 3d DCA 1995)*.

HN5[↑] A movant for class certification must demonstrate the following four prerequisites required by *rule 1.220(a)*:

> (1) the members of the class are so numerous that separate joinder of each member is impracticable, (2) the claim or defense of the representative party raises questions of law or fact common to the questions of law or fact raised by the claim or defense of each member of the class, (3) the claim or defense of the representative party is typical of the claim or defense of each member of the class, and (4) the representative party can fairly and adequately protect and represent the interests of each member of the class.

Soria, 33 So. 3d at 771; *see also Fla. R. Civ. P. 1.220(a)*. Courts refer to these elements as "the numerosity, commonality, typicality, **[**10]** and adequacy of representation elements of class certification." *Soria, 33 So. 3d at 771* (internal quotation mark omitted) (quoting *Marco Island Civic Ass'n v. Mazzini, 805 So. 2d 928, 930 (Fla. 2d DCA 2001))*. In addition to satisfying *rule 1.220(a)*, the movant must also satisfy one of the three subdivisions of *rule 1.220(b)*. *Fla. R. Civ. P. 1.220(b)*; *Sosa, 73 So. 3d at 106*.

The trial court granted class certification pursuant to *subsections (b)(1)* and *(b)(2)*; thus *subsection (b)(3)* of the rule is not at issue in this case. *Rule 1.220(b)* provides in part:

> ***HN6*[↑] (b) Claims and Defenses Maintainable**. A claim or defense may be maintained on behalf of a class if the court concludes that the prerequisites of subdivision (a) are satisfied, and that:
>
> (1) the prosecution of separate claims or defenses by or against individual members of the class would create a risk of either:
>
> (A) inconsistent or varying adjudications concerning individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or
>
> (B) adjudications concerning individual members of the class which would, as a practical matter, be dispositive of the interests of other members of the **[*458]** class who are not parties to the adjudications, or substantially impair or impede the ability of other members of the class who are not parties to the adjudications to protect their interests; or
>
> (2) the party opposing the class has **[**11]** acted or refused to act on grounds generally applicable to all the members of the class, thereby making final injunctive relief or declaratory relief concerning the class as a whole appropriate[.]

Defendant Class Certification

***HN7*[↑]** As a general proposition, a motion to certify a *defendant* class raises heightened due process concerns, as compared to a motion to certify a *plaintiff* class. *See City of Tampa v. Addison, 979 So. 2d 246, 254 (Fla. 2d DCA 2007)*. As the federal district court in *Marchwinski v. Oliver Tyrone Corp., 81 F.R.D. 487 (W.D. Pa. 1979)*, observed:

> [A] defendant class differs in vital respects from a plaintiff class, and ... the very notion of a defendant class raises immediate due process concerns. When one is an unnamed member of a plaintiff class one generally stands to gain from the litigation. The most one can lose in cases where res judicata operates is the right to later bring the same cause of action. However, when one is an unnamed member of a defendant class, one may be required to pay a judgment without having had the opportunity to personally defend the suit. Although we believe that the *Rule 23* [the federal rule pertaining to class actions] requirements of adequacy of representation and notice to class members were designed to safeguard due process rights, we note the inherent difference in the **[**12]** nature of plaintiffs and defendants in most suits and suggest that a defendant class should be certified and such an action tried only after careful attention to these safeguards.

Id. at 489.

Because the trial court's certification of the defendant class in this case creates a mandatory class without an "opt out" provision, due process rights of the putative defendants are at greater risk. To the extent the plaintiffs are seeking monetary damages, courts have recognized the risk of diverging interests among the putative defendants. *Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 804-05, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985)*. Although the named plaintiffs assert with emphasis that the primary objective of the class action litigation is to obtain declaratory and injunctive relief, a proper analysis as to the propriety of certifying a defendant class action nonetheless requires a rigorous assessment due to the risk of diverging interests among the putative defendants. The declaratory judgment will establish entitlement to an award of damages and attorney's fees.

***HN8*[↑]** The due process concerns regarding

defendant class certification are even more pronounced in *bilateral* class actions. Bilateral class actions raise unique and overlapping issues of standing, commonality, typicality, and adequacy of **[**13]** representation. The overlap of issues regarding bilateral class actions makes appellate analysis sometimes difficult because different appellate opinions focus on different aspects of the problem.[3] For **[*459]** example, the Eleventh Circuit Court of Appeals has observed that "[i]n many ways, the commonality and typicality requirements of [class certification] overlap. Both requirements focus on whether a sufficient nexus exists between the legal claims of the named class representatives and those of individual class members to warrant class certification." *Prado-Steiman ex rel. Prado v. Bush, 221 F.3d 1266, 1278 (11th Cir. 2000)*. Another example of the overlap of issues is demonstrated in *Sosa*, where our supreme court stated that the issues of typicality and adequacy of representation require an analysis of whether the claims and interests of a class representative and class members are antagonistic. *Sosa, 73 So. 3d at 114-15* (explaining that ***HN9***[⬆] typicality is satisfied "when the claims of the class representative and class members are not antagonistic to one another" and "[t]he second prong [of the adequacy requirement] pertains to whether the class representative's interests are antagonistic to the interests of the class members"). Finally, as discussed more fully below, there is arguably some overlap **[**14]** between issues of standing and typicality. As asserted by the Eleventh Circuit, "[w]ithout individual standing to raise a legal claim, a named representative does not have the requisite typicality to raise the same claim on behalf of a class." *Prado-Steiman, 221 F.3d at 1279*. Thus, the Eleventh Circuit has opined that "[a]ny analysis of class certification must begin with the issue of standing."[4] *Id. at 1280* (internal quotation marks omitted) (quoting *Griffin v. Dugger, 823 F.2d 1476, 1482 (11th Cir. 1987)*). The difficulty presented by the overlap of issues is perhaps best illustrated by the doctrine of "juridical link" discussed below.

HN10[⬆] The issues and problems unique to defendant class certification have led courts to conclude that certification of defendant classes **[**15]** are, and should be, sparingly granted. The federal district court in *Thillens, Inc. v. Community Currency Exchange Ass'n. of Illinois, Inc., 97 F.R.D. 668, 674-76 (N.D. Ill. 1983)*, asserted that defendant classes seldom are certified. In discussing *In re Gap Stores Securities Litigation, 79 F.R.D. 283 (N.D. Cal. 1978)*, as a case which explores the due process issues surrounding defendant class certification in bilateral actions, the Illinois Federal District Court said:

> ***HN11***[⬆] The *In re Gap* opinion also provides a thoughtful framework for understanding why certification of defendant classes often is denied. There is great judicial reluctance to certify a defendant class when the action is brought by a plaintiff class. The primary concern with bilateral actions, antitrust or other types, is a fear that each plaintiff member has not been injured by each defendant member....
>
> Several rules, useful in unilateral as well as bilateral defendant class actions, emerge from *In re Gap* and similar cases: (1) A defendant class will not be certified unless each named plaintiff has a colorable claim against each defendant class member; (2) A defendant class will not be certified under *Fed. R. Civ. P. 23(b)(3)* without a clear showing that common questions do in fact predominate over individual issues; (3) The requirement that each named plaintiff must have a claim against each

[3] The lack of a cohesive approach in analysis is undoubtedly due to different approaches taken by advocates in opposing class treatment. For example, the four appellants in this case argued different issues in different ways when asserting trial court error. Although there are many issues we could have addressed in this opinion, we have focused on those which we have considered primary to a proper resolution of the case.

[4] Likewise, our supreme court considers standing to be a threshold issue to be considered before class certification. *Sosa, 73 So. 3d at 116*.

> defendant may be waived where **[**16]** the defendant members are related by a conspiracy or "juridical link."
>
> A "juridical link" is some legal relationship which relates all defendants in a **[*460]** way such that single resolution of the dispute is preferred to a multiplicity of similar actions. Absent such juridical link, a defendant class fails the Article III test requiring a case or controversy to support the assertion of jurisdiction.

Thillens, Inc., 97 F.R.D. at 676 (internal citations and footnote omitted).

Standing and Juridical Link

The trial court in this case properly addressed the issue of standing before analyzing the other requirements for defendant class certification. The trial court was satisfied that a proper showing of standing was made based on a juridical link between the plaintiff class representatives, the plaintiff class, and all of the members of the defendant class. Regarding standing, the order on appeal states:

> While typically a class representative must be able to maintain a cause of action against each and every named defendant, courts have recognized certain exceptions, such as where defendants are "juridically" related so that a single resolution of the particular dispute would be expeditious. A plaintiff class has standing to pursue **[**17]** its claims against multiple defendants if the actions forming the basis for the lawsuit provide the requisite "juridical link" that authorizes defendants' inclusion in the law suit. *See, e.g.*, *Moore v. Comfed Savings Bank, 908 F.2d 834, 838 (11th Cir. 1990)*. Recognizing case law holding that where there was either a contractual obligation among all defendants or a ***state or local statute*** requiring common action by the defendants, it is appropriate to join as a defendant a party with whom the named class representative, did not have a direct contract. *See*, *City of Tampa v. Addison, 979 So. 2d 246, 253 (Fla. 2d DCA 2007)*.

While it is true that the juridical link exception has been applied by one of our colleague district courts to the issue of standing in certifying a defendant class in a bilateral class action, *see* *Addison, 979 So. 2d at 253*, the exception is limited, and we are not inclined to interpret the exception broadly enough to apply it in this case.[5]

Although it has evolved over time, the juridical link exception first found **[**18]** expression in *LaMar v. H & B Novelty & Loan Co., 489 F.2d 461 (9th Cir. 1973)*. The *LaMar* opinion was issued after the 1966 amendment to the federal rules of procedure which allowed for an expanded use of class actions. *Id. at 465*. The Ninth Circuit at that time was concerned that class actions could become rampant. *Id.* In an attempt to limit a flood of class action cases, the *LaMar* court held that a plaintiff class representative "cannot represent those having causes of action against other defendants against whom the plaintiff [class representative] has no cause of action and from whose hands he suffered no injury." *Id. at 462*. However, the court went on to say:

> Obviously this position does not embrace situations in which all injuries are the result of a conspiracy or concerted schemes between the defendants at whose hands the class suffered injury. *Nor is it intended to apply in instances in which all defendants are juridically related in a manner that suggests a single resolution of the dispute would be expeditious*.

[*461] *Id. at 466* (emphasis added and footnotes

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[5] Another example of the difficulty of analysis regarding defendant class certification due to the overlap of issues is demonstrated by case law which contends that the juridical link exception has nothing to do with standing; instead, the exception applies to issues of typicality and adequacy of representation. ***Matte v. Sunshine Mobile Homes, Inc., 270 F. Supp. 2d 805, 822 (W.D. La. 2003)***.

omitted).

Initially, the juridical link exception was applied to government defendants. *Leer v. Washington Educ. Ass'n., 172 F.R.D. 439, 448 (W.D. Wash. 1997)* ("*La Mar* only briefly discussed what types of relationships might qualify as 'juridical links,' and cited a few prior cases where a **[**19]** juridical link was present. Such cases generally involved class actions brought against state officials applying a common rule."). Eventually, the exception was extended to private actors as defendants who were connected by a common agreement or uniform practice. *Id.* As the *Thillens* court noted, defendant class "certification most commonly occurs (1) in patent infringement cases, (2) in suits against local public officials challenging the validity of state laws, or (3) in securities litigation." *Thillens, 97 F.R.D. at 674* (citations omitted). Courts have been reluctant to expand the exception to private sector cases, unless the common agreement or uniform practice truly standardizes the questions involved. *See Angel Music, Inc. v. ABC Sports, Inc., 112 F.R.D. 70, 75 (S.D.N.Y. 1986)* (explaining that the "juridical link" exception is limited to cases where the defendants' conduct "is standardized by a common link to an agreement, contract or enforced system which acts to standardize the factual underpinnings of the claims and to insure the assertion of defenses common to the class"); *Leer, 172 F.R.D. at 449* (discussing private sector cases but finding no juridical link where defendant class members had delegated authority to class representative to mail uniform notices); *Clark v. McDonald's Corp., 213 F.R.D. 198, 223 n.21 (D.N.J. 2003)* (holding that defendant class **[**20]** of franchisees did not satisfy juridical link doctrine because there was no "common link to an agreement, contract or enforced system which acts to standardize the factual underpinnings of the claims and to insure the assertion of defenses common to the class" (citation omitted)).

HN12[↑] Regarding standing for certification of a *plaintiff* class, Florida law is clear. "To satisfy the standing requirement for a class action claim, the class representative must illustrate that a case or controversy exists between him or her and *the defendant*, and that this case or controversy will continue throughout the existence of the litigation." *Sosa, 73 So. 3d at 116* (emphasis added). However, no Florida court has addressed the issue of standing with regards to certifying a *defendant* class, except for the Second District in *Addison. 979 So. 2d at 253*. In other words, no Florida case has squarely addressed the standing requirement where a plaintiff class representative was not injured by a significant portion of the defendant class. Although the Second District seemingly discusses the juridical link exception to the standing issue in *Addison*, the discussion of the issue of standing is intertwined with the issue of adequacy of representation. *Id.* ("Generally **[**21]** speaking, issues relating to standing and adequacy of representation arise where, as in this case, the plaintiffs seek to certify a bilateral class action, but the defendant class includes parties against whom the nominal plaintiffs have no claim.").

HN13[↑] As a matter of standing, we agree with those federal courts which have determined that a class of defendants alleged to be violating a law do not display juridical links merely because its members are subject to a common regulatory scheme. *See Matte, 270 F. Supp. 2d at 827-28* (holding that "regulation under a common statute, or similar actions in violation of statutory or regulatory provisions," does not establish a juridical link); *Monaco v. Stone, 2002 U.S. Dist. LEXIS 28646, 2002 WL 32984617, *45 (E.D.N.Y. 2002)* **[*462]** (finding juridical link doctrine inapplicable where defendant hospital director class members were not alleged to be following a statute or uniform policy but rather alleged to be making autonomous decisions in violation of state law); *Turpeau v. Fidelity Fin. Servs., Inc., 936 F. Supp. 975, 978-79 (N.D. Ga. 1996)* (finding no juridical link among defendant lenders and life insurance companies although each allegedly violated same state statute in same manner; defendants were not state officials charged with enforcing state statute or common rule or practice).

In applying the juridical link doctrine to establish the standing **[**22]** of the plaintiff class to maintain an action against the defendant class, the trial court in this case relied upon the only Florida state case granting defense class certification in a bilateral class action, *Addison*. However, reliance on *Addison* is not persuasive because it involved certifying a defendant class consisting of *governmental entities* which had enacted various occupational license tax ordinances under the authority of the same enabling legislation. Thus, *Addison* involved the application of the juridical exception in the context of the original discussion of the exception in *LaMar*. Moreover, there is nothing in the record before us to support a finding that members of the defendant class are private actors who are connected by a common agreement or uniform practice. Thus, the juridical link was improperly applied in this case to establish standing as to the defendant class.

Having determined that the trial court erred in determining that the plaintiff class had standing to bring a class action against the defendant class, we reverse and remand for further proceedings to decertify the defendant class and the defendant subclass.

Denial of Stay of Entire Case

Premier and HealthPort **[**23]** seek review of the trial court order denying the motion to stay, asserting the trial court erred in denying a stay of the entire action because of the pending litigation in both the *Webber* Case and the *Allen* Case. Premier contends the parties and issues are similar enough in all three cases to require a stay of the entire case to avoid unnecessary and duplicitous litigation and possibly inconsistent judgments. In opposition, the plaintiffs contend that the plaintiff classes in the *Webber* Case and the *Allen* Case are substantively different from the plaintiff class in this case because the *Webber* Case and the *Allen* Case involve ROI providers, whereas this case involves the medical record owners.

Although it is not argued in the briefs, we initially observe that ***HN14***[↑] the order denying the motion to stay the entire proceeding is a non-final, non-appealable order. Thus, we do not have jurisdiction as to that order on direct appeal. Nonetheless, we treat the appeal as a petition for writ of certiorari. *See* *Fla. R. App. P. 9.040(c)* (stating that if a party seeks an improper appellate remedy, "the cause shall be treated as if the proper remedy had been sought"); *Fla. R. App. P. 9.030(b)(2)(A)* ("The certiorari jurisdiction of district courts of appeal **[**24]** may be sought to review ... non-final orders of lower tribunals other than as prescribed by *rule 9.130*."); *Marchetti v. School Bd. of Broward Cty., 117 So. 3d 811, 812-13 (Fla. 4th DCA 2013)*.

HN15[↑] "For an appellate court to review a nonfinal order by petition for certiorari, the petitioner must demonstrate that the trial court departed from the essential requirements of the law, thereby causing irreparable injury which cannot be adequately remedied on appeal following final judgment." *Belair v. Drew, 770 So. 2d 1164, 1166 **[*463]** (Fla. 2000)*. Premier has argued on appeal that the trial court abused its discretion in denying a stay of the entire action, and that the class defendants are significantly exposed to the risk of inconsistent rulings on the same issues by other courts. We agree with Premier that the trial court abused its discretion in denying a stay of the entire action, and determine that the abuse of discretion constitutes a departure from the essential requirements of law. We also determine the denial of a stay of the entire proceeding creates the risk of irreparable harm that cannot be remedied on appeal.

Irreparable Harm

HN16[↑] As to irreparable harm, we have previously said that exposure to a potential inconsistent ruling on the same issue by another court constitutes irreparable harm. *Cole v. Cole, 937 So. 2d 261, 262 (Fla. 4th DCA 2006)* (determining there would be irreparable

harm **[**25]** due to the potential of an inconsistent ruling in a separate proceeding which could affect the ability of the family court to equitably divide marital assets); *REWJB Gas Investments v. Land O'Sun Realty, Ltd., 645 So. 2d 1055, 1056 (Fla. 4th DCA 1994)* (quashing denial of stay of the entire proceedings regarding the eviction of multiple defendants until a declaratory action filed in another circuit as to the validity of the underlying lease was resolved, after concluding irreparable harm from risk of conflicting decisions).

In this case, the plaintiff class is seeking damages and "any other relief the Court deems proper and just" for violation of FDUTPA, as well as, "supplemental relief that may be appropriate under *Section 86.061, Fla. Stat.*" FDUTPA ***HN17***[⬆] allows for injunctive relief, and injunctive relief is also appropriate under *section 86.061*. To the extent that the plaintiff class is seeking declaratory relief which will determine the amount of damages awarded, we are satisfied there is a potential that declaratory relief entered by the trial court in the proceeding below could be inconsistent with declaratory relief entered in the *Allen* Case, currently on appeal in the Second District.[6] Thus, Premier has established the potential for irreparable harm that justifies certiorari review of the order denying a stay of **[**26]** the entire proceeding.

Departure from the Essential Requirements of Law

HN18[⬆] The trial court's limited stay order, denying the request for a blanket stay of the entire action, is reviewed for abuse of discretion. *REWJB Gas Invs., 645 So. 2d at 1055*. As discussed below, the principle of priority applies to the analysis of whether a stay of the entire proceeding should have been granted by the trial court below. "'Absent extraordinary circumstances ... a trial court abuses its discretion when it fails to respect the principle of priority.'" *Parker v. Estate of Bealer, 890 So. 2d 508, 512 (Fla. 4th DCA 2005)* (quoting *Hirsch v. DiGaetano, 732 So. 2d 1177, 1177-78 (Fla. 5th DCA 1999))*.

We determine that the principle of priority, as a matter of comity, applies to the motion to stay the entire proceeding in this case. In a class action case, the Third **[*464]** District described the principle of priority as follows: **[**27]**

> Principles of comity between sovereigns suggest that a court of one state should stay a proceeding pending before it on grounds that a prior-filed case involving substantially the same subject matter and parties is pending in another state's courts.

Polaris Pub. Income Funds v. Einhorn, 625 So. 2d 128, 129 (Fla. 3d DCA 1993) (citation omitted).

HN19[⬆] The rationale for the application of the principle of priority, as a matter of comity, is the avoidance of wasting judicial resources in duplicative and unnecessary proceedings and the risk of inconsistent judgments regarding the application of law to the same factual dispute. *Robeson v. Melton, 52 So. 3d 676, 679 (Fla. 4th DCA 2009)* (holding that the trial court abused its discretion in not granting a stay where two duplicative proceedings could result in the possibility of inconsistent results); *In re Guardianship of Morrison, 972 So. 2d 905, 908 (Fla. 2d DCA 2007)* ("The purpose of applying the principle of priority as a matter of comity is to prevent 'unnecessary and duplicitous lawsuits' that 'would be oppressive to both parties.'" (quoting *Siegel v. Siegel, 575 So. 2d 1267, 1272 (Fla. 1991))*; *Edgar v. Cape Coral Med. Ctr., Inc., 712 So. 2d 1209, 1211 (Fla. 2d DCA 1998)* (upholding a stay order where "[i]t would be a waste of judicial resources for both actions, involving the same set

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[6] We note that on March 2, 2016, the Second District *per curiam* affirmed the trial court decision certifying a plaintiff class in the *Allen* Case; however, a ruling on motions for rehearing, rehearing en banc, clarification and for written opinion remains pending. *HealthPort Technologies, LLC v. Allen, 2016 Fla. App. LEXIS 3032, 2016 WL 802065 (Fla. 2d DCA Mar. 2, 2016)*. We also note that our review of online records does not indicate that any appeal of the trial court decision certifying a plaintiff class in the *Webber* Case has been filed as of the date this opinion.

of facts and requesting virtually identical relief, to proceed side-by-side"); *REWJB Gas Invs., 645 So. 2d at 1056*.

HN20[↑] In applying the principle of priority, the pivotal question is whether the second-filed action is sufficiently **[**28]** similar in parties and issues as to be unnecessarily duplicative of the prior-filed proceeding. *Pilevsky v. Morgans Hotel Grp. Mgmt., LLC, 961 So. 2d 1032, 1035 (Fla. 3d DCA 2007)*. Florida law is clear that "the causes of action do not have to be identical" to require a stay of the second-filed action. *Id.* (quotation marks omitted) (quoting *Florida Crushed Stone Co. v. Travelers Indem. Co., 632 So. 2d 217, 220 (Fla. 5th DCA 1994))*. "'It is sufficient that the two actions involve a single set of facts and that resolution of the one case will resolve many of the issues involved in the subsequently filed case.'" *Id.* (quoting *Travelers, 632 So. 2d at 220*). Nor does the principle of priority require an absolute identity of parties between the two actions, with regards to the propriety of a stay.[7] *Sorena v. Gerald J. Tobin, P.A., 47 So. 3d 875, 878 (Fla. 3d DCA 2010)* ("Complete identity of the parties and claims is not required [in applying the principle of priority to a motion to stay]." (citing *In re Guardianship of Morrison, 972 So. 2d at 910*)); *see also Ricigliano v. Peat, Marwick, Main & Co., 585 So. 2d 387, 387 (Fla. 4th DCA 1991)* (holding that it is within a trial court's discretion to grant stay in subsequently filed state action where the allegations in previously filed federal action are the same, notwithstanding a disparity in the parties to the two actions); *REWJB Gas Invests., 645 So. 2d at 1056* (reversing the denial of a stay despite the fact there was not a "complete identity of parties," where there was a "common contract interpretation issue" that would be **[*465]** dispositive of both related actions and "it would **[**29]** not be in the interest of judicial economy to have more than one court make the same decision"); *Edgar, 712 So. 2d at 1211* (affirming a stay of the state action in favor of the previously filed federal action, without requiring a complete identity of parties and noting "many of the issues in the state action would be made moot by a final determination of the federal action").

Although the principle of priority is generally applied to cases pending concurrently in a federal court and a state court or currently in courts of two different states, the principle is also applicable when two cases are pending in different circuits within this state. *See REWJB Gas Invests., 645 So. 2d at 1056* (holding it error to deny stay in later-filed Palm Beach County eviction proceeding where a prior declaratory action was filed in Dade County); *Ewing Indus., Inc. v. Miami Wall Sys't, Inc., 583 So. 2d 713, 714 (Fla. 3d DCA 1991)* (analyzing a case where parties brought similar actions **[**30]** in the Fifth and the Eleventh Judicial Circuits; pendency of the prior action was grounds to abate later-filed action); *Lightsey v. Williams, 526 So. 2d 764, 765-66 (Fla. 5th DCA 1988)* (failure to stay trespass proceedings pending earlier-filed declaratory judgment action in another county which involved the same parties and the same, or substantially the same, causes of action constitutes an abuse of discretion and a departure from the essential requirements of the law).

HN22[↑] In the context of class actions, we have said that where federal and state courts have concurrent jurisdiction over the parties and identical causes of action, the latter court to obtain jurisdiction should stay all proceedings in deference to the first court. *Black v. Rouse, 587 So. 2d 1359, 1363 (Fla. 4th DCA 1991)*. Likewise, the Third District has stated that when there is a previously-filed class action case which involves substantially similar parties and issues, the subsequently-filed action should be stayed. *See Beckford v. GMC, 919 So. 2d 612, 613 (Fla. 3d DCA 2006)*; *J.M. Smucker Co. v. Rudge, 877 So. 2d 820, 822 (Fla. 3d DCA*

[7] We note that the ***HN21***[↑] case law more stringently requires identity of parties with regard to abatement of an action. *See REWJB Gas Invests., 645 So. 2d at 1057* (noting that abatement would not have been available where there was not a complete identity of parties); *Sauder v. Rayman, 800 So. 2d 355, 358 (Fla. 4th DCA 2001)* ("While abatement requires complete identity of parties and causes of action, ... a stay should require substantial similarity of parties and actions.").

2004); *Einhorn, 625 So. 2d at 129-30*.

The record in this case does not reveal a valid reason to depart from the principle of priority. Because, as discussed above, the failure to observe the principle of priority is an abuse of discretion, and because the class action suit below exposes the named defendants to the potential of inconsistent rulings by **[**31]** different courts considering the sufficiently similar issues, we hold that the failure to stay the entire proceedings is a departure from the essential requirements of law. A stay of the entire case was warranted, and we quash the trial court's denial of the motion to stay the entire case. If a stay of the entire proceeding had been granted, then there would have been no need to carve out a plaintiff subclass. Thus, we also reverse the portion of the order creating a plaintiff subclass.

Insofar as we have granted certiorari and quashed the trial court's order denying stay of the entire cause, the matter of stay will return to the trial court for further consideration. This Court has no jurisdiction to compel the trial court to institute a complete stay since this issue arose under principles of certiorari. *See Broward Cty. v. G.B.V. Int'l Ltd., 787 So. 2d 838, 844 n.18 (Fla. 2001)* ***HN23***[⬆] ("[O]n certiorari an appellate court can only deny the writ or quash the order under review. It has no authority to take any action resulting in the entry of a judgment or orders on the merits or to direct that any particular judgment or order be entered." (alteration in original) (quoting *Snyder v. Douglas, **[*466]** 647 So.2d 275, 279 (Fla. 2d DCA 1994)))*. However, on remand, the parties may once more seek a stay pending final resolution of the **[**32]** *Allen* Case, and the trial court may determine whether the issues in the pending appeal remain and are sufficiently similar given the nature of the record providers in this cause and that pending in the *Allen* case.[8]

Affirmed in part, reversed in part, certiorari granted in part, and cause remanded.

GERBER and FORST, JJ., concur.

[8] We assume an appellate determination in the *Allen* Case will resolve issues raised in the *Webber* Case, since no appeal of the plaintiff class certification was filed in the *Webber* Case.

End of Document

EXHIBIT “G”

Fla. Stat. § 501.2105

The Florida code and constitution are updated through all legislation signed and in effect as of the 2018 Regular Session.

LexisNexis® Florida Annotated Statutes > Title XXXIII. Regulation of Trade, Commerce, Investments, and Solicitations. (Chs. 494 — 560) > Chapter 501. Consumer Protection. (Pts. I — VII) > Part II. Deceptive and Unfair Trade Practices. (§§ 501.201 — 501.213)

§ *501.2105*. Attorney's fees.

(1) In any civil litigation resulting from an act or practice involving a violation of this part, except as provided in subsection (5), the prevailing party, after judgment in the trial court and exhaustion of all appeals, if any, may receive his or her reasonable attorney's fees and costs from the nonprevailing party.

(2) The attorney for the prevailing party shall submit a sworn affidavit of his or her time spent on the case and his or her costs incurred for all the motions, hearings, and appeals to the trial judge who presided over the civil case.

(3) The trial judge may award the prevailing party the sum of reasonable costs incurred in the action plus a reasonable legal fee for the hours actually spent on the case as sworn to in an affidavit.

(4) Any award of attorney's fees or costs shall become a part of the judgment and subject to execution as the law allows.

(5) In any civil litigation initiated by the enforcing authority, the court may award to the prevailing party reasonable attorney's fees and costs if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party or if the court finds bad faith on the part of the losing party.

(6) In any administrative proceeding or other nonjudicial action initiated by an enforcing authority, the attorney for the enforcing authority may certify by sworn affidavit the number of hours and the cost thereof to the enforcing authority for the time spent in the investigation and litigation of the case plus costs reasonably incurred in the action. Payment to the enforcing authority of the sum of such costs may be made by stipulation of the parties a part of the final order or decree disposing of the matter. The affidavit shall be attached to and become a part of such order or decree.

History

S. 1, ch. 73-124; s. 5, ch. 79-386; s. 11, *ch. 93-38*; s. 4, *ch. 94-298*; s. 632, *ch. 97-103*.

Annotations

LexisNexis® Notes