IN THE SUPREME COURT, STATE OF FLORIDA

ITT INDUSTRIAL CREDIT COMPANY,

Petitioner,

vs. CASE NO. 66,416

EDWARD V. REGAN, COMPTROLLER OF THE STATE OF NEW YORK, AS TRUSTEE OF THE COMMON RETIREMENT FUND,

Respondent.

An Appeal from the
District Court of Appeal, First District,
of a Question of Great Public Importance

ANSWER BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES:

PAGE

CASES (cont.):

STATUTES AND LAWS:

PAGE

STATUTES AND LAWS (cont.):

OTHER AUTHORITIES:

ISSUES

I. WHETHER INTERNATIONAL HARVESTER AND ITS "DEBTOR'S EQUITY" CONCEPT HAVE SURVIVED THE ENACTMENT OF CHAPTER 78-222, LAWS OF FLORIDA

A. WHETHER CHAPTER 78-222, LAWS OF FLORIDA, IS UNAMBIGUOUS IN ITS OVERRULING OF INTERNATIONAL HARVESTER AND THE "DEBTOR'S EQUITY" CONCEPT, AND IT IS THIS COURT'S DUTY TO GIVE EFFECT TO THAT INTENT

B. WHETHER IF CHAPTER 78-22, LAWS OF FLORIDA, IS AMBIGUOUS, THE LEGISLATIVE INTENT AS EVIDENCED IN THE PREAMBLE SHOULD BE GIVEN EFFECT

C. WHETHER IF THIS COURT IS UNABLE TO DISCERN THE LEGISLATIVE INTENT FROM CHAPTER 78-222, THEN IT SHOULD RECEDE FROM INTERNATIONAL HARVESTER IN A RE- EXAMINATION OF THAT CASE ON THE MERITS

II. RESPONSE TO ARGUMENTS IN ITT'S INITIAL BRIEF

A. WHETHER CHAPTER 78-222, LAWS OF FLORIDA, IS UNCONSTITUTIONAL

B. WHETHER THE "PLACE OF FILING" ARGUMENT IS EXTRA-RECORD AND IMPROPERLY RAISED FOR THE FIRST TIME ON APPEAL

C. WHETHER THE FIRST DISTRICT DID NOT ERR BY THREE TIMES HOLDING THAT THE MORTGAGE AND SECURITY AGREEMENT DID NOT EXCLUDE A LIEN OR CLAIM SUCH AS THAT HELD BY ITT

INTRODUCTION

This litigation has a little bit of something for everyone. It involves an action to foreclose a mortgage on real and personal property at a Holiday Inn in Jacksonville. It initially was concerned with the meaning of certain paragraphs in a Mortgage and Security Agreement and whether it was the mortgage itself or only personal property or fixtures that was "subject to" any other lien. Argument was given on whether or not there was to be implied a "comma" in the Mortgage and Security Agreement or whether that contract was to be judicially construed to mean just what its plain and unambiguous language stated. The trial court ignored the clear and definite wording of the Mortgage and Security Agreement, inserted a phantom "comma," and granted a summary final judgment in favor of ITT, the petitioner herein, and against Regan, the respondent herein and mortgagee. On appeal to the First District, the case was argued in terms of "semi-colons" as well as the phantom "comma" in order to discern the intent of the Mortgage and Security Agreement. In an opinion, [Regan I], the First District agreed with Regan's position that it was not the mortgage but rather the property that was "subject to" other liens. The First District, however, as it is wont to do, nevertheless affirmed the lower court summary judgment by injecting into this litigation an issue [debtor's equity] not raised by the parties. The First District affirmed on authority of a Florida Supreme Court opinion [International Harvester] which it perceived at

the time to be controlling. On rehearing, the First District issued another opinion [Regan II] clarifying its previous opinion, again relying on the prior Supreme Court opinion and its "debtor's equity" concept enunciated therein. On motion for extraordinary relief -- in which the First District was apprised that the Florida Legislature had explicitly overruled both the International Harvester opinion as well as the "debtor's equity" concept and that for the court to continue to follow International Harvester would be to encroach upon the powers of a co-equal branch of government -- the First District withdrew its prior two opinions "in the interests of the proper administration of justice" and substituted therefor a new opinion [Regan III]. In its final opinion, the First District continued to agree with Regan that the trial court erred by its holding the Mortgage and Security Agreement "subject to" other liens rather than "property" being subject to other liens. The First District this time correctly reversed the trial court's summary judgment but remanded for further proceedings to determine on what date the debtor hotel received possession of the disputed computer equipment, calling the record "susceptible to differing interpretations" even though the record is, in fact, uncontradicted on this point.[1] Lastly,

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[1]The record is uncontradicted that the debtor hotel received possession of the computer equipment on March 21, 1980 as per the "Acceptance of Installation and Delivery Receipt" found at page 52 of the Record on Appeal (more than ten days before ITT filed its financing statement on May 27, 1980).

the First District certified to this Court a question of great public importance, asking the narrow question of whether International Harvester and its "debtor's equity" concept have survived their subsequent explicit repudiation by the legislature.

STATEMENT OF THE CASE AND FACTS

Due to the brevity of ITT's statements of the case and of the facts, wherein this Court is not provided with what Regan feels is sufficient information concerning the posture of this case, Regan provides the following statement:

This is an action to foreclose a mortgage on real and personal property in Duval County, Florida, commercially called the Holiday Inn City Center. An Amended Complaint [R:01-07] was filed by respondent, Edward V. Regan, Comptroller of the State of New York, as Trustee of the Common Retirement Fund [hereinafter "Regan"], to foreclose a Mortgage and Security Agreement. [R:13-30]. Petitioner, ITT Industrial Credit Company [hereinafter "ITT"], one of the defendants below, answered the Amended Complaint and alleged that it had a valid security agreement and financing statement relating to certain personal property within the subject hotel, said statement being recorded in O.R. Book 5518, beginning at Page 351 of the Public Records of Duval County, Florida. [R:35].

ITT thereupon moved for summary judgment [R:36-37] and in June 1983 the trial court granted ITT's motion. [R:58-59]. The trial court's order stated in pertinent part:

> The court adjudicates that the MORTGAGE AND SECURITY AGREEMENT specifically excludes a lien or claim such as that held by ITT INDUSTRIAL CREDIT COMPANY and therefore such lien or claim is superior to that claim being asserted by the Plaintiff. Therefore, the Plaintiff has no legally superior position the right title and interest of ITT INDUSTRIAL CREDIT COMPANY. As regards the computer equipment financed by it.

Regan timely appealed that court order to the District Court of Appeal, First District. [R:68]. In their respective briefs to the First District, the parties reiterated their arguments that they had offered earlier to the trial court as to the meaning of the following language from the Mortgage and Security Agreement:

> all fixtures, machinery, equipment and personal property of every nature whatsoever now or hereafter owned by the Mortgagor and located in, on or used or intended to be used in connection with or with the operation of said Land, buildings, structures or other improvements, including all extensions, additions, improvements, betterments, renewals and replacements to any of the foregoing; and all of the right, title and interest of the Mortgagor in any such personal property or fixtures subject to a conditional sales contract, chattel Mortgage or similar lien or claim together with the benefit of any deposits or payments now or hereafter made by the Mortgagor or on its behalf.

The arguments were phrased in terms of phantom "commas" versus the meaning of a semi-colon, and were directed to the issue of the meaning of the mortgage language as a matter of law.

In June 1984, the First District issued an opinion [Regan v. ITT Industrial Credit Co., 9 F.L.W. 1361 (Fla. 1st DCA June 21, 1984)] ["Regan I"] rejecting ITT's and the trial court's analysis of the meaning of the disputed language of the Mortgage and Security Agreement but nevertheless affirming the trial court on the basis of the "debtor's equity" concept as

enunciated by the Florida Supreme Court in International Harvester Credit Corp. v. American National Bank of Jacksonville, 296 So.2d 32 (Fla. 1974).

After a timely motion for rehearing, the First District in October 1984 issued a second opinion [Regan v. ITT Industrial Credit Co., 9 F.L.W. 2242 (Fla. 1st DCA Oct. 26, 1984)] ["Regan II"] adhering to Regan I and further clarifying the "debtor's equity" concept as it related to this case.

Upon discovering a fundamental error of all parties as well as the First District, Regan then moved the First District for extraordinary relief and cited to that court the existence of Chapter 78-222, Laws of Florida. Said Chapter's preamble provided, in full:

> WHEREAS, in a situation where there are conflicting security interests in the same collateral and a purchase money security interest has not been perfected within 10 days after the debtor took possession of the collateral, the Florida Supreme Court, in International Harvester Credit Corporation v. American National Bank of Jacksonville, (296 So.2d 32), recognized "the earlier creditor's priority of security in after-acquired property," but limited such priority to "the debtor's equity in the after-acquired property," and
>
> WHEREAS, the Uniform Commercial Code, as adopted by the Florida Legislature, and as interpreted in other jurisdictions, contains no such "debtor's equity" concept, and in fact provides for a complete and logical system of priorities, and

> WHEREAS, it is the intent of the Legislature that the concept of "debtor's equity" should not be applicable in the State of Florida, and that the clear language in the Uniform Commercial Code should be adhered to. NOW, THEREFORE,
>
> Be it Enacted by the Legislature of the State of Florida.

Following the preamble was a re-enactment and amendment of specified parts of Florida's Uniform Commercial Code, all of which effectively overruled the "debtor's equity" concept enunciated in the International Harvester decision which had been relied upon by the First District in its Regan I and Regan II opinions. Thereupon, the First District, in December 1984, issued an opinion [Regan v. ITT Industrial Credit Co., 10 F.L.W. 64 (Fla. 1st DCA Dec. 19, 1984)] ["Regan III"] withdrawing Regan I and Regan II, reversing the trial court's summary judgment, and remanding on the issue of exactly when the debtor hotel received possession of the computer equipment. The First District also stated that it was persuaded that the Florida Supreme Court would agree with it that International Harvester is no longer viable and that Chapter 78-222, Laws of Florida, was controlling. It then certified the following question as one of great public importance:

> DOES THE PROTECTION AFFORDED PURCHASE MONEY CREDITORS UNDER THE "DEBTOR'S EQUITY" CONCEPT OF INTERNATIONAL HARVESTER SURVIVE THE ENACTMENT OF CHAPTER 78-222, LAWS OF FLORIDA?

ITT then timely appealed the Regan III opinion to this Court.

SUMMARY OF ARGUMENT

I. INTERNATIONAL HARVESTER AND ITS "DEBTOR'S EQUITY" CONCEPT HAVE NOT SURVIVED THE ENACTMENT OF CHAPTER 78-222, LAWS OF FLORIDA.

A. CHAPTER 78-222, LAWS OF FLORIDA, IS UNAMBIGUOUS IN ITS OVERRULING OF INTERNATIONAL HARVESTER AND THE "DEBTOR'S EQUITY" CONCEPT, AND IT IS THIS COURT'S DUTY TO GIVE EFFECT TO THAT INTENT.

The "debtor's equity" concept of International Harvester does not survive the enactment of Chapter 78-222, Laws of Florida. An examination of section 671.201(37), Florida Statutes, and sections 679.312(4) and (5), Florida Statutes, as they appeared prior to International Harvester; an examination of the International Harvester opinion; and an examination of Chapter 78-222, Laws of Florida, all show that the legislature explicitly and clearly overruled any such "debtor's equity" concept. Specifically, the legislature's re-enactment of the definition of a security interest in section 671.201 reemphasized that it is the seller, not the debtor, who retains only a security interest in purchased goods. Furthermore, the addition of language to sections 679.312(4) and (5) by the legislature makes what was clear before even clearer, that priority among competing security interests is not to be determined by vague notions of unjust enrichment or windfalls

but by the interrelated provisions of the uniform commercial code.

B. IF CHAPTER 78-222, LAWS OF FLORIDA, IS AMBIGUOUS, THE LEGISLATIVE INTENT AS EVIDENCED IN THE PREAMBLE SHOULD BE GIVEN EFFECT.

Should this Court find Chapter 78-222, Laws of Florida, to be ambiguous, then it is bound to apply standard principles of statutory construction in order to determine the purpose and intent of the legislature. Doing this, the Court may look to the law's preamble as best evidence of legislative intent. The preamble is manifest in its statement that the "debtor's equity" concept does not survive the enactment of Chapter 78-222, Laws of Florida.

C. IF THIS COURT IS UNABLE TO DISCERN THE LEGISLATIVE INTENT FROM CHAPTER 78-222, THEN IT SHOULD RECEDE FROM INTERNATIONAL HARVESTER IN A RE-EXAMINATION OF THAT CASE ON THE MERITS.

If this Court is unable to discern the legislative intent, then it should re-examine the case that articulated the "debtor's equity" concept, International Harvester, and recede from that case. Said case violates the legislative purpose of the uniform commercial code, which is to simplify, clarify and modernize the law governing commercial transactions and make it uniform among the various jurisdictions.

II. RESPONSE TO ARGUMENTS IN ITT'S INITIAL BRIEF

A. CHAPTER 78-222, LAWS OF FLORIDA, IS NOT UNCONSTITUTIONAL

Chapter 78-222, Laws of Florida, is not unconstitutionally void nor violative of due process. All statutes are presumptively valid and doubts as to the constitutionality of a statute are resolved in favor of validity. ITT has offered no evidence beyond a reasonable doubt as to why this law should be stricken.

B. THE "PLACE OF FILING" ARGUMENT IS EXTRA-RECORD AND IMPROPERLY RAISED FOR THE FIRST TIME ON APPEAL.

ITT's "place of filing" argument is not properly in the record and furthermore, is being improperly raised for the first time on appeal.

C. THE FIRST DISTRICT DID NOT ERR BY THREE TIMES HOLDING THAT THE MORTGAGE AND SECURITY AGREEMENT DID NOT EXCLUDE A LIEN OR CLAIM SUCH AS THAT HELD BY ITT.

The First District properly reversed the trial court's granting of a summary judgment in favor of ITT because the Mortgage and Security Agreement does not exclude a lien or claim such as that held by ITT. An examination of the express words of the Mortgage and Security Agreement show that it is not the Mortgage but rather the personal property or fixtures that is "subject to" other liens or claims.

ARGUMENT

I. INTERNATIONAL HARVESTER AND ITS "DEBTOR'S EQUITY" CONCEPT HAVE NOT SURVIVED THE ENACTMENT OF CHAPTER 78-222, LAWS OF FLORIDA.

The narrow issue as certified by the First District is whether or not International Harvester and the "debtor's equity" concept have been overruled by the legislature pursuant to Chapter 78-222, Laws of Florida. In order to fully understand the situation that the First District has provided this Court and to appreciate that the legislature has, in fact, overruled International Harvester, a background history is necessary. Regan, therefore, begs this Court's indulgence in providing the following history:

Relevant parts of the UCC prior to International Harvester

Prior to the 1974 International Harvester opinion, there existed the following relevant sections of the Uniform Commercial Code as adopted in Florida. Section 671.201, Florida Statutes (1972), the general definitions section, provided in subpart (37) that

> (37) "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (§672.401) is limited in effect to a reservation of a "security interest" . . . .

Section 679.312, Florida Statutes (1972), concerned with priorities among conflicting security interests in the same collateral, provided in subparts (4) and (5) that

> (4) A purchase money security interest in collateral other than inventory has priority over a conflicting security interest in the same collateral if the purchase money security interest is perfected at the time the debtor receives possession of the collateral or within ten days thereafter.
>
> (5) In all cases not governed by other rules stated in this section (including cases of purchase money security interests which do not qualify for the special priorities set forth in subsections (3) and (4) of this section), priority between conflicting security interests in the same collateral shall be determined as follows:
>
> (a) In the order of filing if both are perfected by filing, regardless of which security interests attached first under §679.204(1) and whether it attached before or after filing;
>
> (b) In the order of perfection unless both are perfected by filing, regardless of which security interest attached first under §679.204(1) and, in the case of a filed security interest, whether it attached before or after filing; and
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> (c) In the order of attachment under §679.204(1) so long as neither is perfected.

International Harvester

International Harvester was decided by this Court in 1974. There were two questions certified by the lower court in that case, only the second of which is of relevance to the instant appeal. The lower court asked whether or not under sections 679.312(4) and (5), a party with a security interest in after-acquired property took priority over a party with a purchase money security interest which was not perfected within ten days after the debtor took possession of the collateral. The lower appellate court, in an opinion reported as American National Bank of Jacksonville v. International Harvester Credit Corporation, 269 So.2d 726 (Fla. 1st DCA 1972), had itself answered the above question in the affirmative. It noted that courts in other jurisdictions had decided the precise question under review and all had held that the failure to perfect within the required period of time removed any priority the Uniform Commercial Code gave to the subsequent purchase money security interest holder. Accordingly, it held, when the purchase money security interest was not perfected within the ten day period, the priority between the two competing security interests was determined according to the rules set forth in subsection (5) of section 679.312. Under the facts of the specific case before it, the holder of the security interest in after-acquired property had priority over the security interest of the purchase money creditor.

In dissent, Acting Chief Judge Rawls proffered the view that the holding of the majority's panel opinion constituted "legal larceny." He was of the view that the creditor's interest in the debtor's after-acquired property was limited to the "debtor's equity" in same.

The Florida Supreme Court modified the lower appellate opinion when it got its turn at bat. International Harvester Credit Corp. v. American National Bank of Jacksonville, 296 So.2d 32 (Fla. 1974). It said it agreed with the district court's position that the earlier creditor with the after-acquired property clause had priority if the subsequent purchase money security interest was not timely perfected. It then adopted the Rawls dissent and that judge's view that the earlier creditor's security interest "must be limited to the debtor's equity in the after acquired property." 296 So.2d at 34. It did this for the stated reason of "contractual constitutional requirements and equitable principles." 296 So.2d at 34. In the belief that it was acting equitably, so as not to give the after-acquired creditor a "windfall" and to avoid "unjust enrichment," the Court ignored the express wording of sections 679.312(4) and 679.312(5) quoted above and judicially injected the "debtors equity" concept into the Uniform Commercial Code, a multi-chapter statute that had been a creation solely of the legislature up until that point.

The legislature reacts with Chapter 78-222, Laws of Florida

The Florida Legislature specifically and explicitly reacted to the International Harvester decision in Chapter 78-222, Laws of Florida. The preamble to that Chapter stated in full:

> WHEREAS, in a situation where there are conflicting security interests in the same collateral and a purchase money security interest has not been perfected within 10 days after the debtor took possession of the collateral, the Florida Supreme Court, in International Harvester Credit Corporation v. American National Bank of Jacksonville, (296 So.2d 32), recognized "the earlier creditor's priority of security in after-acquired property," but limited such priority to "the debtor's equity in the after-acquired property," and
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> WHEREAS, the Uniform Commercial Code, as adopted by the Florida Legislature, and as interpreted in other jurisdictions, contains no such "debtor's equity" concept, and in fact provides for a complete and logical system of priorities, and
>
> WHEREAS, it is the intent of the Legislature that the concept of "debtor's equity" should not be applicable in the State of Florida, and that the clear language in the Uniform Commercial Code should be adhered to. NOW, THEREFORE,
>
> Be it Enacted by the Legislature of the State of Florida.

The Legislature then re-enacted section 671.201(37), Florida Statutes, which had provided in pertinent part that the retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer was limited

to a reservation of a security interest. The legislature also amended subsection (3), relating to conflict between a purchase money security interest and a security interest in inventory collateral, by adding language that if the holder of the purchase money security interest fails to meet the requirement of that subsection, the priority of the competing interests will be determined under subsection (5). And, of importance to this history, the legislature amended subsection (4) by adding a sentence to the effect that should the purchase money security interest not be perfected at the time the debtor receives possession of the collateral or within 10 days thereafter,

> Failure to so perfect shall cause the priority of said purchase money security interest to be determined under subsection (5).

A. CHAPTER 78-222, LAWS OF FLORIDA, IS UNAMBIGUOUS IN ITS OVERRULING OF INTERNATIONAL HARVESTER AND THE "DEBTOR'S EQUITY" CONCEPT, AND IT IS THIS COURT'S DUTY TO GIVE EFFECT TO THAT INTENT.

The protection afforded purchase money creditors under the "debtor's equity" concept of International Harvester does not survive the enactment of Chapter 78-222, Laws of Florida. Chapter 78-222 is patent that the holding of International

Harvester and the "debtor's equity" concept enunciated therein are overruled.[2]

There can be no argument that it is within the province of the legislature to provide for a uniform commercial code to simplify, clarify and modernize the law governing commercial transactions in Florida. See section 671.102, Florida Statutes (1983). Nor can there be argument that it is within the province of the legislature to provide for the creation of liens against property and for the establishment of priorities among lienors. Therefore, the only issue is whether or not the passage of Chapter 78-222 in fact accomplished what is so strongly stated in its preamble, i.e., that the concept of "debtor's equity" not be applicable in the State of Florida.

Regan is in agreement with the First District below in Regan III where that court states that

> we cannot in good conscience reasonably question the meaning and intended effect of the amended statute.

10 F.L.W. at 66. Nor do we believe that this Court can in good conscience reasonably question the meaning and intended effect of the statute as amended.

It is hornbook law that if the intent of the legislature is clear and unmistakeable from the language used,

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[2]The First District stated in Regan III: "We are persuaded that the Florida Supreme Court will agree that International Harvester is no longer viable, and that the amended statute controls . . . ."

it is a court's duty to give effect to that intent. Englewood Water District v. Tate, 334 So.2d 626 (Fla. 2d DCA 1976). The reason, of course, is that the legislature is assumed to know the meaning of words and to have expressed its intent by the use of the words found in the statute. S.R.G. Corp. v. Dept. of Revenue, 365 So.2d 687 (Fla. 1978). There is thus no room for judicial construction and no necessity for interpretation if the language of a statute is clear and admits of only one meaning. A court, therefore, is without power to construe an unambiguous statute, and certainly may not extend, modify, or limit a statute's express terms or its reasonable and obvious implications. American Bankers Life Assurance Co. v. Williams, 212 So.2d 777 (Fla. 1st DCA 1968).

When one examines Chapter 78-222, it is readily seen that it is neither uncertain nor unambiguous. The language, rather, is clear and patent. Two points bear emphasis. First, it is significant that the legislature re-enacted subsection 671.201(37), Florida Statutes. That subsection is part of the general definitions overarching all of the various chapters comprising the Uniform Commercial Code. Why the legislature re-enacted that particular section does not beg an answer. The reason, quite simply, is that that section succinctly and explicitly sets forth why there is no such concept as "debtor's equity" anymore in Florida since the adoption of the Uniform Commercial Code. While the Supreme Court in International Harvester, for "equitable" reasons, believed that the debtor

only acquired an interest in the property while the seller retained title, the legislature in section 671.201(37) reconfirmed that

> The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer . . . is limited in effect to a reservation of a security interest.

Thus, the concept as stated in International Harvester that the debtor only receives an equity interest while the seller retains all else is inconsistent with this legislative pronouncement that it is the seller that retains only a security interest. As stated elsewhere in the Code and cited to by the legislature in Chapter 78-222, section 672.401, Florida Statutes, states that the provisions of the Uniform Commercial Code apply irrespective of title to goods. Furthermore, section 672.401(1), Florida Statutes (1983), reiterates that "[a]ny retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest." (emphasis supplied). Therefore, it is seen that the legislature's re-enactment of section 671.201(37) is a direct rebuff to any statement by the International Harvester court that the debtor receives only an equity interest in property. Pursuant to section 671.201(37), the debtor receives both title as well as possession. Accordingly, there can be no such thing as "debtor's equity" under the Uniform Commercial

Code. By its re-enactment of section 671.201(37), the legislature has effectively said just that.

Second, the legislature not only re-enacted section 671.201(37) but it also added language to sections 679.312(3) and 679.312(4). The almost identical language in those two subsections made it explicit that if the holder of a purchase money security interest failed to abide by the simple rules set forth in those two subsections, then priority of conflicting security interests would be determined by subsection (5). And, under that subsection, in contradistinction to the International Harvester court's fear of "unjust enrichment" and "windfalls," priority is determined by the expedience of order of filing or order of perfection or order of attachment. There is no provision in the legislative scheme of a uniform commercial code [see section 671.102(2)(c), Florida Statutes (1983)] for fear of unjust enrichment or windfalls. Furthermore, as noted by Chief Justice Carlton in a lengthy, scholarly and eminently-correct dissent to International Harvester, the priorities to be given competing security interests in the same property is a legislative determination. Thus, even though the court may feel a different system would be "more equitable," that determination is not for the court to make. 296 So.2d at 39.

It is seen, therefore, that Chapter 78-222, Laws of Florida -- in its re-enactment of section 671.201(37) to exclude the "debtor's equity" concept from the Uniform

Commercial Code, and in its amendment of sections 679.312(3) and (4) to provide a clear and concise system to determine priority of competing security interests when the holder of the purchase money security interest fails to perfect that interest within the requisite time period -- has effectively and concisely overruled this Court's prior decision in International Harvester and the "debtor's equity" concept enunciated therein. Accordingly, since this Court (along with Regan and the First District) "cannot in good conscience reasonably question the meaning and intended effect of the amended statute," this Court should answer the certified question in the negative and recede from International Harvester.

B. IF CHAPTER 78-222, LAWS OF FLORIDA, IS AMBIGUOUS, THE LEGISLATIVE INTENT AS EVIDENCED IN THE PREAMBLE SHOULD BE GIVEN EFFECT.

If this Court somehow believes that Chapter 78-222, Laws of Florida, is ambiguous in its overruling of International Harvester and the "debtor's equity" concept, then it is bound to use standard principles of statutory construction in order to determine the purpose of the legislature. Doing this, this Court will find that the legislative intent is express in its overruling of International Harvester and "debtor's equity."

The primary rule for statutory interpretation is to determine the purpose of the legislature. Tyson v. Lanier, 156 So.2d 833 (Fla. 1963). All rules of construction of statutes are designed to subserve the overall object of ascertaining the legislative will and carrying that intent into effect to the fullest degree. Gracie v. Deming, 213 So.2d 294 (Fla. 2d DCA 1968). This intent, furthermore, must be given effect even though it may appear to contradict the strict letter of the statute. State v. Webb, 398 So.2d 820 (Fla. 1981).

If this Court finds the re-enactment of section 671.201(37) and the amendment to sections 679.312(3) and (4) to be ambiguous vis-a-vis International Harvester and the "debtor's equity" concept, then it may look beyond the words of the statute to ascertain what was in the legislative mind. One valuable tool a court may look at is the preamble to the law. While it is certainly true that a preamble is only an introductory or prefatory clause, is not an effective part of an act and cannot enlarge or confer powers, a preamble is a rich source, if not the best source, of legislative intent. Sunshine State News Co. v. State, 121 So.2d 705 (Fla. 3d DCA 1960). An examination of the preamble of Chapter 78-222, Laws of Florida, discloses beyond peradventure the mind of the legislature vis-a-vis International Harvester.

As succinct and explicit as it is, the preamble bears but simple quoting and needs no explanation:

> WHEREAS, . . . the Florida Supreme Court, in International Harvester Credit Corporation v. American National Bank of Jacksonville, (296 So.2d 32), . . . limited . . . priority to "the debtor's equity in the after-acquired property," and
>
> WHEREAS, the Uniform Commercial Code, as adopted by the Florida Legislature, and as interpreted in other jurisdictions, contains no such "debtor's equity" concept, . . . , and
>
> WHEREAS, it is the intent of the Legislature that the concept of "debtor's equity" should not be applicable in the State of Florida, and that the clear language in the Uniform Commercial Code should be adhered to.

Accordingly, if it is somehow believed that sections 671.201(37), 679.312(3) and 679.312(4) are ambiguous in relation to International Harvester, then this Court should follow the express intent of the legislature as set forth in the preamble to Chapter 78-222, Laws of Florida, answer the certified question in the negative, and recede from International Harvester.

C. IF THIS COURT IS UNABLE TO DISCERN THE LEGISLATIVE INTENT FROM CHAPTER 78-222, THEN IT SHOULD RECEDE FROM INTERNATIONAL HARVESTER IN A RE-EXAMINATION OF THAT CASE ON THE MERITS.

Assuming, arguendo, that the statutes as amended are ambiguous and that the intent of the legislature is somehow not discernable through an examination of policy statements, then

this Court should recede from International Harvester in a re-examination of that case on the merits.

International Harvester has been universally condemned by all commentators and other courts.[3] The reason, basically, is that the opinion stands alone against the unanimous opinion of other courts in the country when construing the meaning of sections 679.312(4) and (5) in a situation of competing security interests where the purchase money security interest was not perfected within ten days of the debtor receiving possession of the property. See General Electric Corporation v. Tidwell Industries, 565 P.2d 868 (Ariz. 1977); Ranier National Bank v. Inland Machinery Co., 631 P.2d 389 (Wash. App. 1981); In re Samuels & Co., 526 F.2d 1238 (5th Cir. 1976); Talcott v. Franklin National Bank, 194 N.W.2d 775 (Minn. 1972). While ordinarily argument may legitimately be made that how other states interpret their own statutes may only be interesting but not even persuasive in Florida, the context of this discussion is the uniform commercial code. The Florida Legislature adopted the Model Act basically in toto and

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[3] International Harvester has been called "absolute nonsense" and "rationally inexplicable" by one writer, [see Murray, "Commercial Law," 30 U. of Miami Law Review 63, 99 (1975); Murray, "Commercial Law," 33 U. of Miami Law Review 853, 908 (1979)], "incorrect" by another [see "Purchase Money Security Interest Priority Under §9-312(4) of the U.C.C.: Florida Supreme Court Rewrites the Code," 29 U. of Miami Law Review 384, 386 (1975)], and likely to cause "confusion and uncertainty" by yet another commentator [see "Note," 3 Florida State University Law Review 150, 160 (1975).

clearly enunciated the purposes of chapters 671 through 679 of the state's law:

> (a) To simplify, clarify and modernize the law governing commercial transactions;
>
> * * *
>
> (c) To make uniform the law among the various jurisdictions.

Sections 671.102(2)(a) and (c), Florida Statutes (1983). Thus, how other states view the same statute as Florida's section 679.312 is persuasive on our courts pursuant to the express legislative goal of making the law uniform among all jurisdictions. No state has followed Florida in its International Harvester derogation of the Uniform Commercial Code.

This Court should re-examine International Harvester and correct the errors of that opinion. Several are glaring. First, the Court erred in basing its decision on unnamed "equitable principles." Such judicial concept has no place in the legislatively-passed set of interrelated chapters that make up the Uniform Commercial Code. It is the legislature's prerogative to decide how priorities among conflicting security interests are to be determined. Whether the legislature gives priority to the first to file, the first to perfect, or the first to attach -- is uniquely a legislative decision. So long as the legislative scheme is rational and offends no constitutional prohibition, this Court should accede to that

determination by a co-equal branch of government. As noted in the International Harvester dissent,

> where there are competing security interests in the same property and the property is insufficient to satisfy both debts, any priority to either creditor is, in a sense, inequitable.

296 So.2d at 40.

Second, the International Harvester court erred by reading into the U.C.C. the alien concept of "debtor's equity." Regan hopes that this has been explained well-enough above and will not burden this Court with reiteration of that argument.

Third, the error of the International Harvester court becomes most manifest if the owner of the purchase money security interest is someone other than the seller of the goods, as provided for in section 679.107(2), Florida Statutes (1983). A third party who advances money to purchase property from the seller has a "security interest" in that property. That third party certainly has no "title" in the property. Yet under the International Harvester reasoning, the third party's interest would be something more [precisely what is unfathomable] than a "mere" security interest but presumably less than "title." By the International Harvester reasoning, this situation is unprovided for. By the express wording of the code, however, the answer is clear and in contradiction to International Harvester. The third party provider, of course,

has a "security interest." No resorting to "debtor's equity" is necessary.

Fourth, and of some significance, the International Harvester holding derogates one of the most important policies underlying the Uniform Commercial Code. The Court's opinion gives the holder of a purchase money security interest no incentive to file a financing statement promptly, since even if the holder of the purchase money security interest neglects the ten day rule, he still has absolute priority over the prior after-acquired interest holder pursuant to International Harvester. This is so because according to the "debtor's equity" concept, the determination of the debtor's equity depends on the purchase money interests' being paid first. Accordingly, the International Harvester rule rewards a person who has failed to provide prior creditors with notice of his security interest [Tidwell, 565 P.2d at 872] and renders meaningless the strict notice and filing requirements of the Code that operate to protect both parties.

This litany of International Harvester errors can certainly continue for a not insignificant number of pages but the point hopefully has been made. Should this Court desire further statements of the error of the International Harvester decision, it need only consult any law review or any other non-Florida court decision. It is hoped that if this Court has to take a fresh look at International Harvester because it disagrees with Regan's first two issues above, that it in fact

do so and see that International Harvester has created confusion and uncertainty in Florida commercial transactions. This Court should recede from that prior opinion.

II. RESPONSE TO ARGUMENTS IN ITT'S INITIAL BRIEF.

A. CHAPTER 78-222, LAWS OF FLORIDA, IS NOT UNCONSTITUTIONAL

ITT has apparently decided to pursuade this Court that the answer to the certified question is in the affirmative by ignoring all discussion of the clear language of Chapter 78-222 and by ignoring the legislative intent as evidenced by the prefatory words of Chapter 78-222 and instead attacking the legislation head-on by proposing that said chapter is unconstitutional. ITT, however, has not met its burden.

ITT proposes as its first argument on page 7, in wholly conclusory fashion with no example and authority, that said chapter is unconstitutionally void since reasonable and competent citizens cannot refer to the law and with reasonable clarity and certainty ascertain their rights. ITT proposes as its second argument on page 8, again in conclusory fashion and barren of example or authority, that said chapter violates due process since persons are not put on notice of the laws that control aspects of their life and livelihood.

Without belaboring this point, Regan respectfully reminds the Court that all statutes are presumptively valid and constitutional. Biscayne Kennel Club, Inc. v. Florida State Racing Commission, 165 So.2d 762 (Fla. 1964). Further, it is

presumed that the legislature considered the constitutionality of all enactments passed by it and that the legislature intended to enact a valid and constitutional statute. McConville v. Ft. Pierce Bank & Trust Co., 135 So. 392 (Fla. 1931); Marsh v. Garwood, 65 So.2d 15 (Fla. 1953). Moreover, it is the duty of the courts to so construe legislation to save it from constitutional infirmities and to effect a constitutional result if it is possible to do so. Chatlos v. Overstreet, 124 So.2d 1 (Fla. 1960). Doubts as to the constitutionality of a statute are resolved in favor of validity. Department of Legal Affairs v. Rogers, 329 So.2d 257 (Fla. 1976). Lastly, no law can be declared unconstitutional unless it clearly appears beyond all reasonable doubt that there is a conflict with the Constitution. Bonvento v. Board of Public Instruction, 194 So.2d 605 (Fla. 1967).

With these weighty principles in mind, an examination of ITT's first two statements of unconstitutionality do not bear up under the light of scrutiny. Any further discussion of this point would strain the patience of the Court.

B. THE "PLACE OF FILING" ARGUMENT IS EXTRA-RECORD AND IMPROPERLY RAISED FOR THE FIRST TIME ON APPEAL.

ITT argues on page 9 of its Initial Brief that, all of a sudden, there really is no conflict of security interests since Regan "filed in the wrong place and there is only one good and sufficient filing and that is ITT's." Regan answers

this allegation not by resort to something that is apparently extra-record and not passed on by the trial court below, but rather by citation to the record. Regan alleged in the First Amended Complaint that his Mortgage and Security Agreement and financing statement were filed in the public records of Duval County beginning on page 190 of volume 4998 [R:01] and later refiled beginning on page 556 of volume 5116 of those records. [R:03]. Regan further alleged that ITT had a financing statement that was filed beginning on page 351 of volume 5518 of those records [R:04]. In its Answer, ITT admitted only that its financing statement was recorded "in O.R. Book 5518, beginning at Page 351 of the Public Records of Duval County, Florida." [R:35].

ITT argues in its brief that this Court could simply "dispose" of this case by acknowledging that proper filing is with the Secretary of State and apparently thus not even have to answer the certified question. Regan responds that even if ITT's argument were valid, sections 679.312(4) and (5), as applied to this case, would still require the certified question's answer in any event, since priorities of conflicting security interests are not determined only by time of perfection or attachment but by filing, even if in a wrong place.

Furthermore, ITT is raising this issue of "place of filing" for the first time on appeal, and this it cannot

properly do.[4] ITT apparently wishes this Court to sit as a trier of fact in the first instance and rule in ITT's favor based on a record that does not comport with its own admitted statements. This Court should not be party to such actions.

C. THE FIRST DISTRICT DID NOT ERR BY THREE TIMES HOLDING THAT THE MORTGAGE AND SECURITY AGREEMENT DID NOT EXCLUDE A LIEN OR CLAIM SUCH AS THAT HELD BY ITT.

In its last two arguments, ITT is apparently re-arguing the position it successfully took in front of the trial court by its emphasis on the specific wording of the Mortgage and Security Agreement. Such argument brings us full circle to the beginnings of this case, and provide a sense of closure.

In its Order granting ITT's summary judgment, the trial court held:

> The court adjudicates that the MORTGAGE AND SECURITY AGREEMENT specifically excludes a lien or claim such as that held by ITT INDUSTRIAL CREDIT COMPANY and therefore such lien or claim is superior to that claim being asserted by the Plaintiff. Therefore, the Plaintiff has no legally superior position the right title and interest of ITT INDUSTRIAL CREDIT COMPANY. As regards the computer equipment financed by it.

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[4]This issue was first raised by ITT in its own Motion for Extraordinary Relief directed to the First District almost a month after the release of the Regan III opinion. ITT's Motion was summarily denied by the First District.

Regan urged the First District to hold the above finding and ruling to be in error. This the First District did, in all three of its opinions. The reasoning of the First District is clear, and the holding of the First District that disputed the trial court's summary judgment finding is correct.

It is hornbook law that a contract shall receive a reasonable construction and that isolated sentences should not be construed alone but in connection with the remainder of the contract. James v. Gulf Life Insurance Co., 66 So.2d 62 (Fla. 1953); Bay Management, Inc. v. Beau Monde, Inc., 366 So.2d 788 (Fla. 2d DCA 1978). Similarly, when the meaning of a contract is well-settled, a court is not at liberty to modify it by its own interpretation. Pafford v. Standard Life Insurance Co., 52 So.2d 910 (Fla. 1951). Where the contract is clear and unambiguous, a court cannot give it any meaning beyond that expressed. Bay Management. The language of the contract itself must be held to control in the absence of ambiguity or uncertainty. D'Amato v. D'Amato, 176 So.2d 907 (Fla. 3d DCA 1965). Plain and unambiguous language must be construed to mean just what the language used implies. Camichos v. Diana Stores Corp., 157 Fla. 349, 25 So.2d 864 (1946). Lastly, whenever the words are clear and definite, they must be understood according to their grammatical construction, and in their ordinary meaning. Wilcox v. Atkins, 213 So.2d 879 (Fla. 2d DCA 1968). Faithful interpretation implies that words, or assemblages of words, be taken in that sense which one honestly

believes that the utterer attached to them. Fry v. Hawley, 4 Fla. 258 (1851).

The key to this argument before the trial court was the Mortgage and Security Agreement. The issue was resolved by the First District by looking at the clear and unambiguous language of that document; the matter, therefore, was purely a question of law.

The Mortgage and Security Agreement states that the mortgaged property includes

> all of the following described land, real estate, buildings, improvements, fixtures, furniture, and other personal property (which together with any additional such property hereafter acquired by the Mortgagor and subject to the lien of this Mortgage or intended to be so, as the same may from time to time constitute, is hereinafter sometimes referred to as the Mortgaged Property); to-wit:

[R: 13] (emphasis supplied). The Mortgage and Security Agreement then explicitly specifies what the above language refers to, in the paragraphs lettered (A) and (B). Of relevance to this proceeding is Paragraph (B), wherein it is stated that mortgaged property is:

> all fixtures, machinery, equipment and personal property of every nature whatsoever now or hereafter owned by the Mortgagor and located in, on or used or intended to be used in connection with or with the operation of said Land, buildings, structures or other improvements, including all extensions, additions, improvements, betterments, renewals and replacements

> to any of the foregoing; and all of the right, title and interest of the Mortgagor in any such personal property or fixtures subject to a conditional sales contract, chattel Mortgage or similar lien or claim together with the benefit of any deposits or payments now or hereafter made by the Mortgagor or on its behalf.

[R: 13] (emphasis supplied). That language is patent that it is not the mortgage that is subject to a conditional sales contract, chattel mortgage or similar lien. Rather, the language is explicit that it is the personal property or fixtures that is subject to a conditional sales contract or other lien. Read that way, the language manifestly means and the First District held that the mortgaged property includes and intends to include presently and in the future "all of the right, title and interest of the Mortgagor in any such personal property or fixtures [that are, can be or may be] subject to a conditional sales contract, chattel mortgage or similar lien or claim together with the benefit of any deposits or payments now or hereafter made by the Mortgagor or on its behalf." Read that way, the document stands for the proposition that the instant Mortage and Security Agreement would cover any personalty or fixtures that are or may be subject to another lien.

It is of significance that there is no "comma" in Paragraph (B) between the words "fixtures" and "subject" in the fourth line from the bottom of the first full paragraph of Paragraph (B) [R: 13]. Had there been such a comma, then the

trial court would have been correct in its assumption that it is the mortgage that is subject to the conditional sales contract or other lien and thus there would be a valid exclusion. But there is no such comma, and thus the trial court was in error in reading the relevant language as stating that the mortgage covered "personal property or fixtures," comma, [the mortgage being] subject to [and excluded by] "a conditional sales contract, chattel mortgage or similar lien or claim." The only interpretation that does not do damage to the literal words and plain meaning of the Mortgage and Security Agreement is that mortgage property includes "any such personal property or fixtures" that are or could be subject to any other lien. Again, it is the property or fixtures that is subject to the lien, not the mortgage. The First District thus came up with the only legally-defensible position when it agreed with Regan that the trial court was in error in granting summary judgment in favor of ITT with its strained contract interpretation. This Court should agree with the First District on this issue.

CONCLUSION

Regan respectfully requests this Court to agree with the First District and to answer the question certified to it by that court in the negative, i.e., to hold that International Harvester and the "debtor's equity" concept do not survive the enactment of Chapter 78-222, Laws of Florida. The legislature has clearly spoken in its overruling of International Harvester

and "debtor's equity" and this Court should give proper deference to that co-equal branch of government's express wishes. This Court should approve the opinion of the First District below [Regan III].

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to Christine R. Milton, Atty., and Frank Surface, Esq., P.O. Box 4099, Jacksonville, Florida 32201, Harry Katz, Jr., Esq., 337 E. Forsyth Street, Jacksonville, Florida 32202, Linda Lettera, Ass't. Atty. Gen'l., Department of Legal Affairs, The Capitol LL04, Tallahassee, FL 32301, and Roger J. McDonald, Esq., 1218 E. Robinson St., Orlando, FL 32801, by U.S. Mail this 1st day of March, 1985.

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