IN THE SUPREME COURT OF FLORIDA

APPEAL NO. 66,937

THE CELOTEX CORPORATION, ET AL,

Petitioners.

Versus

CARMELLA MEEHAN, as Personal Representative of the Estate of Charles Meehan, Deceased

Respondent.

PETITION FOR DISCRETIONARY REVIEW OF A DECISION CERTIFIED BY THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT AS A QUESTION OF GREAT PUBLIC IMPORTANCE

ANSWER BRIEF ON THE MERITS OF RESPONDENT CARMELLA MEEHAN

BARON & BUDD
A PROFESSIONAL CORPORATION
8333 Douglas Avenue, 10th Floor
Dallas, Texas 75225
214/369-3605

LOUIS S. ROBLES, ESQ.
ATTORNEY AT LAW
75 S.W. 8th Street, Suite 401
Miami, Florida 33130
305/371-5944

Attorneys for Respondent
Carmella Meehan

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STATEMENT OF THE CASE

This case is before this Court upon certification from the Third District Court of Appeals of the following question:

> May an action which could not be maintained by reason of limitations in the state in which the allegedly wrongful conduct occurred because that state does not recognize postponement of accrual until discovery, nonetheless be maintained in Florida because Florida law postpones accrual until discovery?

The Third District certified this question upon its holding that the cause of action in this case arose in Florida and that, for that reason, the Florida borrowing statute, §95.10 FLA.STAT. (1979) was inapplicable. In so holding, the Third District relied on the precedent established by this Supreme Court that a cause of action "arises" for purposes of the Florida borrowing statute "where the last act necessary to establish liability occurred." Colhoun v. Greyhound Lines, Inc., 265 So.2d 18 (Fla. 1972). The Third District concluded that a cause of action did not exist until Mr. Meehan discovered his asbestos-related injury:

> Because the record before us does not conclusively demonstrate that the cause of action arose in New York or, for that matter, arose anytime prior to 1977 when Meehan's disease was first diagnosed in Florida, we hold that the trial court erred in finding as a matter of law that Meehan's cause of action arose in New York rather than Florida.

Meehan 466 So.2d at 1103.

STATEMENT OF THE FACTS

For purposes of this appeal, Respondent adopts the Statement of Facts as set forth by the Third District Court of Appeals in Meehan v. The Celotex Corp, 466 So.2d 1100 (Fla.3d DCA 1985) - to wit:

> The [Respondent] Carmella Meehan, is the personal representative of the estate of Charles Meehan, her late husband. Reciting a now all too familiar scenario, Mrs. Meehan charged that the defendants caused her husband's death when products manufactured by them exposed him to the pernicious effects of asbestos dust.
>
> Between 1942 and 1945, Charles worked at the Brooklyn Navy Yard where, it is alleged, he was exposed to the defendants' asbestos products. He and Carmella moved to Florida in 1969. Eight years later, Charles' Florida physician first diagnosed Charles as having asbestosis and mesothelioma, diseases caused by the inhalation of asbestos. Charles died in 1978, and a year later this suit was filed in Florida.

Id. at 1101.

SUMMARY OF ARGUMENT

It is the position of the Respondent that the Florida borrowing statute has no application in the instant case because Mr. Meehan's cause of action arose in Florida. This position is directly supported by this Court's decision in Colhoun v. Greyhound Lines, Inc., 265 So.2d 18 (Fla. 1972). Under Colhoun, for purposes of the Florida borrowing statute, "a cause of action sounding in tort arises in the jurisdiction where the last act necessary to establish liability occurred." Colhoun, 265 So.2d at 21. In a tort case such as the present, the last act necessary to establish liability is the claimant's injury. Since Mr. Meehan was injured in Florida, where he developed cancer and died, his cause of action **arose** in Florida. This interpretation of the Florida borrowing statute is supported by both Florida case law and the laws of other jurisdictions grappling with the problem of determining where an interstate tort arises.

Borrowing statutes are designed to discourage forum shopping. No intent to forum shop can be evidenced in the instant case. Mr. and Mrs. Meehan were residents of the State of Florida for nine years before this claim was filed. Indeed, Mr. Meehan lived and worked in Florida for eight years before he ever suffered any symptoms of asbestos disease or developed cancer. His disease was diagnosed in Florida. Charles Meehan died in Florida. Under no contortion of the facts can Respondent be charged with forum shopping in this case.

Moreover, if this Court were to apply the "significant interest" analysis applicable to substantive issues of Florida law, it would conclude that Florida law, including its statute of limitations, is applicable in this case. In Bishop v. Florida Specialty Paint Co., 389 So.2d 999 (Fla. 1980) this Court adopted the "significant interest" analysis as set forth in the Restatement (Second) of Conflict of Laws §§145, 146. Under the Restatement approach, all contacts save the "happenstance" of Mr. Meehan's exposure in New York to asbestos products, are in Florida: (1) Mr. Meehan's injury occurred in Florida; (2) The conduct causing the injury in this case took place in Florida along with other jurisdictions; (3) Both the Respondent and Petitioner The Celotex Corporation are residents of the State of Florida, and all other Defendant manufacturers are doing business in Florida or maintain registered agents here. Because the majority of the significant contacts in this case are in the State of Florida, and because application of the Florida statute of limitations in this case would further the interests of this State in protecting its citizens by insuring them their day in court for cases involving latent disease, a Restatement analysis would compel the application of Florida law to this case.

Finally, application of the Florida borrowing statute under the circumstances of this case would unconstitutionally deny the Respondent access to Florida courts. As this Court set forth in Diamond v. E.R. Squibb & Sons, Inc., 397 So.2d 671 (Fla. 1981), it is unconstitutional to apply a Florida statute in a way that

bars recovery in a latent disease case before a compensable injury was ever suffered by the Plaintiff. If the Florida borrowing statute were applied to the case at bar, Mrs. Meehan would be barred from access to the Florida courts before a viable cause of action on her behalf ever existed. The borrowing statute would thus cut-off Respondent's common law tort action without providing any alternative remedy in violation of Art. I, §21 of the Florida Constitution.

I. THE FLORIDA BORROWING STATUTE IS NOT APPLICABLE TO THE PRESENT CASE BECAUSE RESPONDENT'S CAUSE OF ACTION AROSE WITHIN THE STATE OF FLORIDA

A. Under Florida Law, A Cause of Action Does Not Arise Until A Compensable Injury Has Been Suffered.

As a general proposition, Florida courts have traditionally treated statutes of limitation as procedural matters and thus, in choice of law questions, have routinely employed the applicable Florida statute. Colhoun v. Greyhound Lines, Inc., 265 So.2d 18 (Fla. 1972). The Florida borrowing statute provides an exception to this general rule:

> When the cause of action has arisen in another state or territory of the United States, or in a foreign country, and by the laws thereof an action thereon cannot be maintained against a person by reason of the lapse of time, no action thereon shall be maintained against him in this state.

FLA.STAT. §95.10 (1979).

Where a cause of action arises in another state, then, Florida courts will apply the foreign state's statute of limitations, rather than that of the forum. The primary purpose of the borrowing statute is to prevent forum shopping; one who has slept on his rights in the state where the cause of action arose should not be permitted to revive a stale claim by shopping for a forum with a more favorable statute of limitations. See Cope v. Anderson, 331 U.S. 461 (1947); Stafford v. International Harvester Co., 668 F.2d 142, (2d Cir. 1981); Allen v. Greyhound Lines, Inc., 583 P.2d 613, 615 (Utah 1978).

Petitioners contend that Mr. Meehan's cause of action arose in New York and that the New York statute of limitations there-

fore governs this case. Under the applicable New York statute, Respondent's claim is concededly time-barred. Indeed, under New York law, every victim of asbestos disease is effectively barred from bringing suit in New York. For, under New York law, the statute of limitations is deemed to run in an action for asbestos-related disease from the date of the plaintiff's last exposure to asbestos regardless of when a disease process manifests. See Steinhardt v. Johns-Manville Corp., 432 N.Y.S.2d 422, 424 (N.Y.App.Div. 1980), aff'd, 446 N.Y.S.2d 244, (N.Y. 1981) cert. denied 456 U.S. 967 (1982). Moreover, a successful statute of limitations defense in a personal injury claim will also serve to bar a later wrongful death action premised on the same wrongful conduct under New York law. See Kelliher v. New York Cent. & H.R.R. Co., 212 N.Y. 207, 105 N.E. 824, 825 (Ct.App. 1914). Therefore, since Mr. Meehan was last exposed to asbestos in 1945, the New York statute of limitations governing the decedent's personal injury claim expired in 1948. Under New York law, Mrs. Meehan's wrongful death claim was concommmitantly barred at the same time, thirty years prior to Mr. Meehan's death from asbestos-induced cancer.

Such a discussion of New York's anachronistic law regarding statutes of limitation is academic to the instant case; however, since neither Respondent's wrongful death action, nor the decedent's right to recover for personal injuries, arose in New York. Both rights of action arose instead in this State. Thus, the

Florida borrowing statute has no application to this case. Colhoun, supra.

At the outset, Respondent would note that the issue of where a cause of action arises in a latent disease case for purposes of the Florida borrowing statute must be resolved in accordance with Florida law. It is undisputed that Florida laws are to be afforded their clear and unequivocal meaning as determined by this State's judiciary. Heredia v. Allstate Insurance Company, 358 So.2d 1353 (Fla. 1978). Thus in Colhoun v. Greyhound Lines, Inc., supra, this Court looked to Florida law to answer the question of where the cause of action arose under the Florida borrowing statute in a traditional tort case involving a Florida resident injured in Tennessee in a typical moving vehicle collision. 265 So.2d at 21.[1]

In Colhoun, this Court held that, for purposes of the borrowing statute, "a cause of action sounding in tort arises in the jurisdiction where the last act necessary to establish liability occurred." Colhoun, 265 So.2d at 21. In the present case, this "last act" is injury. It is a fundamental and long accepted principle of law in Florida that a tort has not been committed

[1]Interestingly, the courts of New York also look to their own state law to determine where a cause of action arises for purposes of the New York borrowing statute. See, e.g., Martin v. Julius Dierck Equip. Co., 43 N.Y.2d 583, 374 N.E.2d 97, 403 N.Y.S.2d 185 (1978); and Prefabco, Inc. v. Olin Corp., 418 N.Y.S.2d 432 (N.Y.App.Div. 1979) (applying New York law to determine that under the New York borrowing statute, a cause of action for fraudulent representation arose in Pennsylvania, where the loss resulting from the representations was sustained, Id. at 433).

and a cause of action has not arisen unless and until an injury has been suffered by the plaintiff. City of Miami v. Brooks, 70 So.2d 306 (Fla. 1954); McIntyre v. McCloud, 334 So.2d 171 (Fla.3d DCA 1976). See also, e.g. Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129 (5th Cir. 1985). See generally, Prosser and Keeton on Torts, §30 at 165 (5th ed. 1984); Restatement (Second) on Torts, §907 comment a (1979). Thus, when a tort can be described as having its origin in one state and its resulting injury in another state, the tort is deemed to "arise" in the state where the injury - the last event necessary for liability - occurs. See Patch v. Stanley Works (Stanley Chemical Co. Division), 448 F.2d 483, 492 (2d Cir. 1971); Hester v. New Amsterdam Casualty Co., 287 F.Supp. 957, 972 (D.S.C. 1968), aff'd in part and dismissed in part, 412 F.2d 505 (4th Cir. 1969); Swearngin v. Sears Roebuck & Co., 376 F.2d 637, 639 (10th Cir. 1967); K-Mart Co. v. Midcon Realty Group of Conn., 489 F.Supp. 813, 815 (D.Conn. 1980); Todd Shipyards Corp. v. Turbine Serv., Inc., 467 F.Supp. 1257, 1285 (E.D. La. 1978); McCall v. Susquehanna Electric Co., 278 F.Supp. 209 (D. Md. 1968); St. Clair v. Righter, 250 F.Supp. 148, 155 (W.D. Va. 1966). See also, Restatement of Conflicts of Laws §377 (1934).

Under Florida's "last act" analysis, Petitioner's cause of action could not possibly have arisen until Mr. Meehan received an injury due to his asbestos exposure. Since Mr. Meehan did not develop cancer - and thus suffered no compensable injury - until eight years after his move to Florida, the law of this State dic-

tates that both the decedent's right of action for personal injuries and Respondent's wrongful death action arose in Florida.

Petitioners each argue that Mr. Meehan was injured in New York. Petitioner GAF Corporation bases its argument on Plaintiff's answer to the following interrogatory propounded by Defendant The Celotex Corporation:

> For the purposes of this action, on what date do you contend the decedent was injured as a result of [the Defendant's] conduct.
>
> Answer: 1942 through 1944.

(R. 336) See Brief of Petitioner GAF Corporation, at pp.5,10. Petitioner The Celotex Corporation, on the other hand, argues that injury occurred in New York because "[n]umerous medical texts and cases recognize that tissue injuries from asbestos begin to occur almost immediately upon inhalation." Brief of Petitioner The Celotex Corporation at p.10. Neither of the Petitioner's arguments are persuasive.

Certainly, this Court should not convert the Plaintiff's good faith effort to comply with a discovery request pursuant to Florida Rule of Civil Procedure 1.340 into a statement of law as to where her cause of action arose for purposes of the Florida borrowing statute. As is clear from answers to further interrogatories, Mr. Meehan suffered no injury until 1977:

> Please state when any symptom [of mesothelioma] manifested itself to you, regardless of your realizing the significance of such symptom.
>
> Answer: Sometime in the year 1977.

(R. 210)

The facts of this case clearly indicate that Mr. Meehan first suffered ill effects caused by his exposure to asbestos no earlier than 1977, eight years after he moved to Florida. Respondent should not now be estopped from asserting that the legal injury in this case occurred in Florida by an interrogatory answer submitted in the very early stages of discovery. Rather, the legal question before this Court must be answered in light of all the evidence in the record as to Mr. Meehan's medical history.

Nor should this Court accept the argument proffered by The Celotex Corporation that Mr. Meehan's injury occurred in New York upon his exposure to asbestos products. While Petitioner The Celotex Corporation fails to reveal the medical texts on which it relies, Respondent would not dispute that there may be initial effects of asbestos in a worker's lungs upon exposure to asbestos-containing products. Respondent would note, however, that such initial effects are not injurious. As Dr. Irving Selikoff, the most noted physician in the field of asbestos disease has long recognized:

> As is common with environmentally-induced disease, and for that matter with infectious disease, a given degree of exposure does not produce the same degree of response in everyone. We are constantly struck by the fact that only some of those working under comparable conditions show pathogenic effects.

I. Selikoff & Douglas H.K. Lee, Asbestos and Disease 436 (1978). Dr. Selikoff explains that "the presence of asbestos bodies, or even of asbestos fibers alone is not sufficient evidence of asbestosis." Selikoff, at 230. Drs. Hamilton and Hardy concur

that the mere presence of asbestos fibers in the lungs is not injurious, and that "[t]he finding of asbestos bodies in sputum or lung biopsy proves exposure only." A. Hamilton & H. Hardy, Industrial Toxicology, 428 (1974).

Indeed, not everyone who inhales asbestos fibers develops an asbestos-related disease. While one may experience an undetected initial lesion to the lung, only a portion of those exposed will eventually develop asbestosis or mesothelioma. Without such an injury, no cause of action can arise in Florida. McIntyre v. McCloud, supra. This medical fact becomes even more significant in a case such as the present one based on the development of the asbestos-induced cancer, mesothelioma. Unlike the "creeping" disease of asbestosis, mesothelioma does not follow a slow, progressive course of development, but may be characterized by its rapid and fatal, albeit latent, onset. H. Corwin Hinshaw & John F. Murry, Disease of the Chest, 731 (1980).

Thus, this case differs substantially from one in which a plaintiff was exposed to asbestos and subsequently became ill from the exposure in a foreign state before moving to Florida. E.g. Marano v. The Celotex Corporation, 433 So.2d 592 (Fla.3d DCA

1983) rev. denied, 438 So.2d 833 (Fla. 1983)[2] Under those facts, it may be properly reasoned that the Plaintiff was injured in a foreign state and that therefore his cause of action "arose" in a foreign state for purposes of the Florida borrowing statute. In the instant case, however, there is no evidence that Mr. Meehan had cancer in New York prior to moving to Florida. Indeed, he lived in this state for seven years before he developed cancer or any other asbestos disease. He died in this state less than a year after the onset of mesothelioma. Thus, under Florida law, there can be little confusion as to where the resulting personal injury or wrongful death claim arose. Both claims arose in Florida.

Such a conclusion follows directly from the analysis of Florida case law concerning when a cause of action accrues for statute of limitation purposes. The unequivocal law in Florida is that a cause of action accrues "only when there has been notice of an invasion of the legal right of the plaintiff or he has been put on notice of his right to a cause of action." City of Miami v. Brooks, 70 So.2d 306, 309 (1954). See also, e.g.

[2]While the precedential value of the Marano decision may be doubtful, see Meehan v. Celotex Corporation , 466 So.2d at 1103-1105, it is the Respondent's position that the Marano decision can be meaningfully distinguished on its facts and is therefore of no force in this case. In Marano, there was some evidence that the Plaintiff, who suffered from asbestosis, developed a disease process and was injured in New York. Such are not the facts in the present case. Mr. Meehan developed mesothelioma in Florida and died here as a result. The record indicates no evidence whatsoever of a disease process that developed in New York.

The Celotex Corp. v. Copeland, (Nos. 65,124; 65,154 & 65,394) ____ So.2d ____ (Fla. 1985) (opinion issued June 13, 1985); Universal Engineering Corp. v. Perez, 451 So.2d 463, (Fla. 1984); Foley v. Morris, 339 So.2d 215 (Fla. 1976); Seaboard Air Line Railroad Co. v. Ford, 92 So.2d 160 (Fla. 1956). Petitioners argue, however, that such "accural" cases are irrelevant to a determination of where a cause of action arises. Discovery, they assert, is not an element of plaintiff's cause of action. Therefore, they conclude, it is not definitive of plaintiff's cause of action.

Neither precedent, policy, nor plain logic suggests that this Court should apply the discovery rule to determine **when** a cause of action accrues, and then follow a completely different standard to ascertain **where** the action arose. The two issues are one in the same. There is no tort until there is damage. There is no damage until there is a disease process caused by asbestos exposure - in this case cancer. Mr. Meehan became ill with cancer in 1978. He died the next year. His cause of action arose and accrued in Florida "when the Plaintiff knew or should have known of the existence of the cause of action or the invasion of his legal rights." Meehan v. Celotex Corp., 466 So.2d 1100, 1102 (Fla. 3d DCA 1985).

Significantly, each Petitioner asks this Court to disregard the case of Colhoun v. Greyhound Lines, Inc., supra, the only Supreme Court decision directly relevant to the issue under consideration. In Colhoun, this Court was compelled to determine

where a cause of action for contract and tort arose for purposes of the Florida borrowing statute. In that case the plaintiff purchased a bus ticket in Florida and was later injured when the bus was involved in an accident in Tennessee. This Court determined that the plaintiff's cause of action in contract arose in Florida, where the ticket was purchased. It was therefore concluded that the Florida borrowing statute was not applicable to the contract action and that the Florida statute of limitations applied. Id. at 21. In order to determine where the contract action **arose** for purposes of the Florida borrowing statute, this Court relied on **Florida** law concerning the **accrual** of a claim in contract.

> The count sounding in contract, however, is not barred; the lower courts improperly applied the Tennessee statute of limitations to it. This Court, in Peters v. E.O. Painter Fertilizer Co., 1917, 73 Fla. 1001, 75 So. 749, determined where a cause of action sounding in contract arises. In that case we said:
>
> > ". . .[W]here the last act necessary to complete the contract is performed, that is the place of the contract; and **the place where the contract is completed, there the cause of action accrues.** Peters v. E.O. Painter Fertilizer Co., supra, at 750. (Emphasis supplied).
>
> The contract in the instant case was completed in Florida with the purchase of the bus ticket. It is in this State, therefore, that the cause of action sounding in contract arose. Because it arose in Florida [the Florida borrowing statute] is not applicable; [the Florida statute of limitations] is controlling.

Colhoun, 265 at 21.

In determining that the tort action in Colhoun arose in Tennessee, the place of the accident and injury, this Court relied on the seminal law review article, Ester, Borrowing

Statutes of Limitations and Conflict of Laws, 15 U.FLA.L.REV. 33, 47 (1962), and concluded that "a cause of action sounding in tort arises in the jurisdiction where the last act necessary to establish liability occurred." Colhoun at 21. Interestingly, that law review article went on to explain:

> In both cases the court held that the cause of action arose in the state where injury was received - not in the state where the product was manufactured and where the defendant's negligence presumably occurred. Therefore, the question - where does a tort cause of action 'arise,' 'accrue,' or 'originate'? - is answered without complication or dissent where the last act necessary to establish liability occurred.

Ester, 15 U.FLA.L.REV. at 48 (Emphasis added).

The decision of this Court in Colhoun effectively underscores the force of the panel's opinion in the case below that "Florida case law discloses that no such distinction [between the use of 'arise' and 'accrue'] has ever been made and that, to the contrary, the terms 'arise' and 'arose' have consistently been used interchangeably with the terms 'accrue' and 'accrued'". (Footnote and citations omitted.) Meehan v. The Celotex Corp., 466 So.2d at 1102. Petitioner's strenuous attempt to distinguish the meaning of the two terms only further reveals their synonymous use. See Meehan v. The Celotex Corp., 466 So.2d at 1103 n.4 (discussing the interchangeable use of "arose" and "accrue"); Downing v. Vaine, 228 So.2d 622, 625 (Fla.1st DCA 1969) (quoting Florida Jurisprudence for the proposition that "the cause of action does not arise except on the ascertainment or knowledge of a particular fact.").

The Florida borrowing statute has consistently been applied only in those cases where the injury in tort occurred outside of the State of Florida. Colhoun, supra; Griffin v. Seaboard Coastline RR Co., 307 F.Supp. 741 (Fla. 1969); Beasley v. Fairwell, 401 F.2d 593 (5th Cir. 1968); Lecard v. Keel, 211 So.2d 868 (Fla.2d DCA 1968). This longstanding precedent is persuasive and well-reasoned and should be adhered to in the case at bar.

B. Respondent's Interpretation of the Florida Borrowing Statute is Supported by the Law in Other Jurisdictions.

Florida is not the first jurisdiction to grapple with the problematic issues accompanying the typical borrowing statute. Other states also have confronted the task of determining where a cause of action arises for purposes of the forum's borrowing statute. Elmore v. Owens-Illinois, Inc., 673 S.W.2d 434 (Mo. banc 1984); Parish v. B.F. Goodrich Co., 395 Mich. 271, 235 N.W.2d 570 (Mich. 1975); Mack Trucks, Inc. v. Bendix-Westinghouse Automobile Air Brake Co., 372 F.2d 18 (3d Cir. 1966), cert. denied, 387 U.S. 930 (1967). Those courts have ruled as did the Third District Court of Appeals below - a cause of action arises at the same point in time and in place.

In a case similar to the one at bar, the Supreme Court of Missouri held that for purposes of the Missouri borrowing statute, a cause of action accrues where the final element necessary to a claim occurs. Elmore v. Owens-Illinois, Inc., 673 S.W.2d at 436. In that asbestosis case, the Missouri Supreme Court reasoned that the Missouri borrowing statute had no application

since the plaintiff's cause of action did not arise until he received a doctor's diagnosis of his condition while in Missouri. Id. The Elmore court applied Missouri law to interpret the application of the Missouri borrowing statute. Id. Relying on Renfroe v. Eli Lilly & Co., 686 F.2d 642 (8th Cir. 1982), it concluded that "a cause of action **accrues when and originates where** damages are sustained and are capable of ascertainment." Elmore, 673 S.W.2d at 436 (emphasis supplied). The Renfroe court had similarly concluded in a claim alleging cancer as a result of DES exposure that "when the cancer developed and became capable of ascertainment, the final element of the cause of action occurred, and [the] cause of action accrued under Missouri law." Renfroe, 686 F.2d at 647.

The Supreme Court of Michigan has likewise considered this issue and determined that a "claim accrues when and where injury and damage are suffered." Parish v. B.F. Goodrich Co., 235 N.W.2d at 571. Parish was a product liability suit against a tire manufacturer brought by Michigan residents for injuries received in Ohio in an automobile accident caused by the blowout of a defective tire. Under the Michigan borrowing statute, Ohio's statute of limitations was applicable and thus, the plaintiffs' claims were time-barred. The plaintiffs sought to avoid this result by urging the court that their personal injury claims based on breach of warranty accrued in Michigan at the time of sale, rather than in Ohio at the time of the accident. In rejecting this argument, the Michigan court looked to Michigan law to

resolve what that court termed an issue of "statutory construction." Id. at 572. The court noted that the construction advanced by the plaintiffs in Parish was at odds with Michigan's policy that "a claim for personal injury does not accrue for statute of limitations purposes until all elements of the claim, including the element of damage, are present." Id. at 574. Thus, the Supreme Court of Michigan held that for purposes of statute of limitations and for the Michigan borrowing statute, a cause of action does not accrue "until all elements of the cause of action are present." Id. at 576.

Finally in Mack Trucks, Inc. v. Bendix-Westinghouse, supra, a Pennsylvania federal court faced the question of where a cause of action for indemnification for loss arose under that state's borrowing statute. In its interpretation of the statute, the Third Circuit noted that under Pennsylvania law, the statute of limitations begins to run at "the occurrence of the final significant event necessary to make the claim suable." Mack Trucks, 372 F.2d at 20. The court then reasoned that since the cause of action for indemnity arose upon satisfaction of a judgment in Florida, the cause of action necessarily arose in Florida:

> We think the concept of when a cause arises and the concept of where a cause arises, both used to aid in the application of statutes of limitations, are in pari materia. In other words, the cause arises where as well as when the final significant event that is essential to a suable claim occurs.

Id.[3]

Thus, it is clear that a forum must apply its own law to interpret its borrowing statute. Moreover, a cause of action generally arises for purposes of the forum's borrowing statute at the same point in time and in place that the action accrues under the forum statute of limitations. Under Florida law, a cause of action accrues for statute of limitations purposes when the plaintiff knew or should have known of his right to a cause of action. Celotex v. Copeland, supra; City of Miami v. Brooks, supra. Therefore, since Charles Meehan first developed cancer and became injured in 1977 in the State of Florida, his cause of action for purposes of the Florida borrowing statute necessarily arose in Florida at that time. Accordingly, Florida's borrowing statute has no application to this case.

[3]The Third Circuit again considered Pennsylvania's borrowing statute in McKenna v. Ortho Pharmaceutical Corp., 622 F.2d 657 (3d Cir. 1980) cert. denied 449 U.S. 976 (1981). There, the Third Circuit attempted to distinguish Mack Trucks. The distinction made in McKenna, however, is not relevant to the analysis of the case at hand. In McKenna it was reasoned that once it is determined that a cause of action arose in a foreign jurisdiction under the borrowing statute, the court must then look to that foreign jurisdiction's case law to determine when the statute begins to run. McKenna at 660. McKenna has no application in a case where the issue to be determined is where a cause of action arises. That issue was resolved in Mack Trucks.

II. RESPONDENT'S INTERPRETATION OF THE FLORIDA BORROWING STATUTE IS CONSISTENT WITH THE PUBLIC POLICY OF THIS STATE.

A. Respondent's Interpretation of the Florida Borrowing Statute Will Not Deter the Intended Purpose of the Statute.

Borrowing statutes are designed to discourage forum shopping. Ester, Borrowing Statutes of Limitation and Conflict of Law, 15 U.FLA.L.REV. 33, 40 (1962). Of course, forum shopping is rarely a problem when the plaintiff is a resident of the forum. Indeed, a borrowing statute may impose a substantial hardship to an innocent resident who simply seeks to enforce his claim in the courts of his residence, but who suffered the misfortune to become injured while away from home. In response to this injustice, several states include in the borrowing statute itself an exception for forum resident-plaintiffs. New York, for example, makes such an exception. The New York borrowing statute provides:

> An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, **except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply.**

N.Y.CIV.PRAC.LAW §202 (McKinney 1972) (emphasis added). See also United States Fidelity and Guaranty Co. v. Smith, 46 N.Y.2d 498, 387 N.E.2d 604, 414 N.Y.S.2d 672 (N.Y. 1979) (applying §202); Allen v. Greyhound Lines, Inc., 583 P.2d 613, 615 (Utah 1978) (interpreting Utah Code Ann. §78-12-45 (1953) which likewise contains an exception for Utah resident-plaintiffs);

and Idaho Code §5-239 (1979). For a list of borrowing statutes containing similar exceptions, see Ester, 15 U.FLA.L.REV. at 80-81. In addition, at least one state's judiciary has carved such an exception into its borrowing statute. The court in Coan v. Cessna Aircraft, 53 Ill.2d 526, 293 N.E.2d 588 (Ill. 1973), ruled that the Illinois borrowing statute "was intended to apply only to cases involving nonresident parties." 293 N.E.2d at 590. In this way, the Illinois Supreme Court has acted to guarantee residents of that state who choose simply to file their claims in the courts of the state in which they reside the full protection of the laws of Illinois, both substantive and procedural.

Admittedly, the Florida borrowing statute is silent as to an exception for resident-plaintiffs. Still, this Court will ensure that resident-plaintiffs availing themselves of the Florida courts receive the full protection of the laws of this State by refusing to adhere to the Florida borrowing statute in this case where it clearly has no application. Respondent was a resident of this state for nine years before filing this claim. Indeed, Mr. Meehan lived and worked in Florida for eight years before he ever suffered any symptoms of asbestos disease. His disease was diagnosed in Florida. Charles Meehan died in Florida. Under no contortion of facts can Respondent be charged with forum shopping. Application of the borrowing statute under these circumstances would not serve the statute's intended purpose, but instead, would violate the policies and interests of the State of Florida and would, in effect, deny a long-time Florida resident

total access to the courts.

B. Respondent's Assertion That a Cause of Action Arises for Purposes of the Florida Borrowing Statute Where the Plaintiff Knew or Should Have Known of the Facts Giving Rise to the Underlying Cause of Action is Consistent with Florida's Well-Established Policy in Regard to Latent Disease Cases.

Florida courts have long adhered to the rule that they are under no compulsion to enforce foreign laws which are grossly at odds with the laws and policies of Florida. Wilkinson v. Manpower, Inc., 531 F.2d 712 (5th Cir. 1976). Yet the application of New York's statute of limitations to the present case would be repugnant to Florida's well established policy that a cause of action involving a latent injury does not arise until the plaintiff knew or should have known of the facts giving rise to the underlying cause of action. This policy, reflected both in Florida's case law, see, e.g., Celotex v. Copeland, supra; City of Miami v. Brooks, supra; Diamond v. E.R. Squibb and Sons, Inc., 397 So.2d 671 (Fla. 1981), and its statutory law, FLA.STAT. §95.031(2) (1977) (statutory adoption of the discovery rule), should not be abandoned in the instant case. Respondent's interpretation of the Florida borrowing statute is in harmony with this essential principle of Florida law.

III. RESPONDENT'S INTERPRETATION OF THE FLORIDA BORROWING STATUTE IS CONSISTENT WITH FLORIDA'S "SIGNIFICANT INTEREST" ANALYSIS IN CHOICE OF LAW QUESTIONS.

It has been clearly demonstrated that the Florida borrowing statute has no application to this case under Florida's traditional place of injury rule. That this is true becomes even more apparent when the issue is examined in light of this Court's adoption of the "significant interest" analysis for choice of law questions. In Bishop v. Florida Specialty Paint Company, 389 So.2d 999 (Fla. 1980), this Court rejected the traditional lex loci delicti rule for resolution of choice of law problems in tort actions in favor of the "significant relationships" tests advocated by the Restatement (Second) of Conflict of Laws. Section 146 of the Restatement (Second) provides:

> In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in §6 to the occurrence and the parties, in which event the local law of the other state will be applied.

Restatement (Second) of Conflict of Laws §146 (1971).

Another Restatement provision enumerates the relevant contacts to consider in a choice of law question involving personal injury:

> (a) the place where the injury occurred,
>
> (b) the place where the conduct causing the injury occurred;
>
> (c) the domicile, residence, nationality, place of incorporation and place of business of the parties; and
>
> (e) the place where the relationship, if any, between the parties is centered.

Restatement (Second) of Conflict of Laws §145 (1971).

In Bishop, this Court noted that the place of injury would remain as the decisive factor in most cases and reaffirmed this State's interest in "certainty, predictability and uniformity of result." Still, this Court characterized the traditional place of injury rule as "inflexible" and rejected its application to a case where the "happenstance" of the accident is the only connection with the State whose law is to be applied.

The Bishop case involved a choice of substantive law, while the issue at bar concerns statutes of limitation, generally considered a procedural matter and not subject to choice of law analysis. See Pledger v. Burnup & Sims, Inc., 432 So.2d 1323 (Fla.4th DCA 1983). There is a decided trend in the law, however, to recognize that statutes of limitation are often outcome determinative and to treat such statutes as substantive, and therefore as subject to a full choice of law analysis.[4] R. Weintraub, Commentary on the Conflict of Laws 62 (2d ed. 1980). See also, Morley, Applying the Significant Relationship Test to Florida's Borrowing Statute, Florida Bar Journal, July/August (1985).

[4]Both Judge Peason in footnote one of his revised opinion in Meehan, and Judge Schwartz in his dissenting opinion recognize the potentially substantive nature of the statute of limitations issue in the choice of law context. Neither, however, conducts a full "significant relationships" analysis upon the facts of this case. Judge Schwartz erroneously assumes, without analysis, that New York substantive law would apply in this case. Meehan 466 So.2d at 1106. Such is not the case, as is set forth in this section of Respondent's brief.

If the "significant relationship" test is applied to the case at hand, it becomes clear that the law of Florida, not that of New York, is controlling here. For, the only connection with the State of New York in this case is the "happenstance" of Mr. Meehan's exposure to asbestos products. All other contacts are with the State of Florida or a third state. The considerations set forth in §145 of the Restatement are discussed in turn:

(a) The place where the injury occurred. [5]

As discussed in Section I, above, the injury in this case occurred in Florida. There is no evidence that Mr. Meehan had cancer in New York prior to moving to Florida. He lived in Florida for seven years before he developed mesothelioma and died in this State within a year of its onset.

(b) The place where the conduct causing the injury occurred.

This case was brought under theories of strict liability, failure to warn, implied warranty and negligence. Thus, the wrongful conduct giving rise to this action took place in the states where the manufacturing and marketing of the asbestos-containing products was carried forth. Such conduct occurred in a number of states including Pennsylvania (Pittsburgh Corning Corporation), Ohio (Philip Carey Corporation and Owens-Illinois, Inc.), Missouri (Eagle-Picher Industries, Inc.) and Florida (The Celotex Corporation).

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[5] Under Bishop, the place of injury will most often be decisive, in determining where a cause of action arose, as this Court admonished:

> The conflicts theory set out in the Restatement does not reject the "place of the injury" rule completely. The state where the injury occurred would, under most circumstances, be the decisive consideration in determining the applicable choice of law.

Bishop 389 So.2d at 1001.

(c) The domicile, residence, nationality, place of incorporation and place of business of the parties.

Mrs. Meehan is presently a resident of Florida and she and her husband were residents of Florida for nine years prior to the filing of this lawsuit. Petitioner The Celotex Corporation is also a Florida resident. All of the other asbestos manufacturers that were party to this suit are either "doing business" in Florida under FLA.STAT. §607.304 (1977) or maintain registered agents in this state.

(d) The place where the relationship, if any, between the parties is centered.

Mr. Meehan was exposed to the Petitioner's asbestos products in New York from 1942 to 1945.

The happenstance of Mr. Meehan's exposure to asbestos products in New York is effectively underscored when it is understood that in most cases involving latent disease as a result of asbestos exposure, the plaintiff will have been exposed to asbestos in more than one state. If it is determined that a cause of action for asbestos disease arises upon exposure to asbestos, how can a court determine in which of several states the cause of action arose? A "significant contacts" analysis eliminates confusion in this regard and thereby provides the predictability and uniformity or result that concerned this Court in Bishop. Problems arising when the significant contacts rule is not applied is exemplified by the Wyoming case of Duke v. Housen, 589 P.2d 334 (Wyo. 1979). Duke was a negligence action against a Wyoming citizen who had knowingly infected a woman with gonorrhea which later developed into a severe injury. The Wyoming Supreme Court was faced with the issue of where the cause of action arose under the traditional place of injury rule for purposes of the

Wyoming borrowing statute. The couple had engaged in intercourse in several states and the doctor's diagnosis of gonorrhea was made in yet another. Members of the court agreed that under the laws of Wyoming, the cause of action did not arise in the forum state (the plaintiff was not a Wyoming resident and had not visited the state), but disagreed as to the place where the action did arise. Although the majority concluded that under the laws of New York, the action arose in New York where the last "exposure" took place, Id. at 345-47, the concurring justice argued that under the laws of Wyoming and of Washington, D.C., the action arose in Washington, D.C. where the plaintiff received a doctor's diagnosis of her condition. Id. at 353-54. (The dissent argued for yet another location, Id. at 354.) Had the Duke court approached the issue from an interest analysis standpoint, it would have been clear that the law of Washington, D.C. applied. Although no exposure occurred there, the plaintiff lived there and received a doctor's diagnosis of her condition in that jurisdiction. Neither party had any affiliation with the State of New York other than two fortuitous "meetings" in that state. Only the District of Columbia had a real interest in the case. Interest analysis would have avoided this confusion.

Another difficult problem arises in latent disease cases when the plaintiff lives in one jurisdiction but receives a doctor's diagnosis in another. Unlike New York, many states hold that a plaintiff's cause of action accrues at the date of a doctor's diagnosis. Fusco v. Johns-Manville Products Corp., 643

F.2d 1181 (5th Cir. 1981); Karjala v. Johns-Manville Products Corp., 523 F.2d 155 (8th Cir. 1975); Nolan v. Johns-Manville Asbestos & Magnesia Materials Co., 74 Ill.App.3d 778, 392 N.E.2d 1352 (1979), aff'd, 85 Ill.2d 161 (1981). Where the traditional place of injury rule is applied in such a case, it may lead to the anomalous result that the statute of limitations of the state in which the physician resides is applied to a cause of action which has no other significant ties to that jurisdiction. In this instance, the place of injury rule could actually become an invitation to forum shopping. A potential plaintiff suffering from latent disease could extend the limitations period applicable to his cause of action by traveling to a particular state with a favorable statute to receive his doctor's diagnosis. Interest analysis, on the other hand, would also consider the plaintiff's residence in a determination of which state's statute to apply and would thereby reduce the potential for abuse.

In fact, since this Court's adoption of the significant contacts test in Bishop Florida courts have regularly emphasized the residence of the parties in deciding choice of laws issues in tort cases. See, e.g., Krasnosky v. Meredith, 447 So.2d 232 (Fla.1st DCA 1983) (applying Florida law where Florida residents were involved in an accident in Georgia); Proprietors Insurance Co. v. Valsecchi, 435 So.2d 290 (Fla.3d DCA 1983) (applying Florida law where temporary residents of Florida were involved in an accident in North Carolina); Harris v. Berkowitz, 433 So.2d 613 (Fla.3d DCA 1983) (applying Florida law where Florida resi-

dents were involved in an accident in Maine); See also, Watts v. National Insurance Underwriters, 540 F.Supp. 488 (S.D. Fla. 1982) (applying Florida law where Florida citizens were involved in an accident in Louisiana). In each of these cases, of central importance was the interest of this State in protecting its citizens according to Florida law. As the Third Circuit wrote in the Harris case:

> In a situation such as the one under consideration where decedent's beneficiaries and litigants are from a particular state, the law of that state determines the measure of wrongful death damages.

Harris, 433 So.2d at 614.

Moreover, application of Florida law to the issue of statute of limitations will promote the policies of this state. Professor Weintraub has devised the following test for application in tort cases where a "true conflict" exists:

> 2. "True Conflict" cases: If two or more states having contacts with the parties or the transaction will have the policies underlying their different tort rules advanced, apply the law that will favor the plaintiff unless one or both of the following facts is present:
> a. That law is anachronistic or aberrational.
> b. The state with that law does not have sufficient contact with the defendant or the defendants actual or intended course of conduct to make application of its law reasonable.

R. Weintraub, Commentary on the Conflict of Laws 346 (2d ed. 1980).

Under this approach, Florida's law controls in this case. First, Florida's law will favor the plaintiff. Further, it is New York's law rather than Florida's which is anachronistic. Finally, Florida has sufficient contact with all the defendants that the application of Florida law to the instant case is

completely reasonable. (Indeed, the Celotex Corporation is itself a resident of this State). As Professor Weintraub explains, a choice of law rule must operate in accordance with the prevailing trend in tort law. Id. at 270. That trend is toward "distribution rather than concentration of losses, through the device of liability insurance." Id. Further, a manufacturer selling its products for national distribution can easily foresee that its activities in one state may give courts in another state reasonable interest in applying their own state law to the manufacturer in a case involving a resident-plaintiff. No element of unfair surprise is raised in the instant case. Id. at 339. Moreover, as discussed above, Florida has expressly decided policy that its citizens should not be denied a day in court on the basis of statute of limitations before the facts giving rise to their cause of action were known or should have been known. Celotex v. Copeland, supra.

Abandonment of the place of injury rule in choice of law questions involving statutes of limitations was urged as early as 1966 by Judge Freedman dissenting in Mack Trucks, 372 F.2d at 21-26. Judge Freedman refused to be bound in his analysis by the traditional classification of statutes of limitation as procedural; instead, he reasoned: "Indeed, while limitations of action may fall under the heading of procedure, to the litigant a determination that his suit is completely barred by the statute of limitations is substantively far more drastic and important than a ruling on the extent of his right to [damages]." Id. at

24. "[T]he decision as to when [a] claim should be barred," argued Judge Freedman, should "be governed by the policy of the jurisdiction with the most significant interest in the claim, - the jurisdiction in which the 'cause of action' 'arose'." Id. at 25. See also Wyatt v. United Airlines, Inc., 638 P.2d 812, 814 (Colo.Ct.App. 1981) (in which the dissent argued that for purposes of the Colorado borrowing statute, "the first determination that must be made is where the most significant relationships do lie" and then, that the state found to have the most significant relationship to the litigation should be deemed the one in which the claim arose).

Although Judge Freedman's approach has been considered and rejected by some courts, e.g. Elmore v. Owens-Illinois, Inc., 673 S.W.2d 434 (Mo. banc 1984); Wyatt, 638 P.2d 812; Parish v. B.F. Goodrich Co., 235 N.W.2d 570, 575 (Mich. 1975), other courts have adopted the "significant interest" analysis to resolve statutory interpretation questions under a state's borrowing statute.[6] E.g. Ellis v. Great Southwestern Corp., 646 F.2d 1099 (5th Cir. 1981); Mitchell v. United Asbestos Corp., 100 Ill.App.3d 485, 426 N.E.2d 350 (Ill.App.Ct. 1981); Icelandic Airlines, Inc. v. Canadair, Ltd., 104 Misc.2d 239, 428 N.Y.S.2d 393 (N.Y.Sup.Ct. 1980); Myers v. Cessna Aircraft Corp., 275 Or. 501, 553 P.2d 355

[6]Although New Jersey has no borrowing statute, courts in that state nonetheless follow an interest analysis approach to determine which statute of limitations applies in interstate tort actions. See Heavner v. Uniroyal, Inc., 63 N.J. 130, 305 A.2d 412 (N.J. 1973).

(Or. 1976). These courts all followed the Restatement approach to statutes of limitation in choice of law questions reasoning that "an action will be barred by the statute of limitations of a non-forum jurisdiction only if that jurisdiction is the state of the otherwise applicable law and the statute in that state bars the right as well as the remedy." Myers, 553 P.2d at 355 citing Restatement (Second) of Conflict of Laws §§142-143 (1972).

Thus, a "significant contacts" approach to the statute of limitations issue raised by the borrowing statute in this case would provide a fair and reasonable method for determining where a cause of action "arose" for purposes of the statute. In most cases, such as the present one, the "significant contacts" test would yield the same result as the place of the injury rule. However, in those cases where a severe injustice would result, the Restatement approach provides this Court with the flexibility needed to ensure that the policies of this State are properly guarded.

IV. THE APPLICATION OF THE FLORIDA BORROWING STATUTE IN THIS CASE UNCONSTITUTIONALLY DENIES RESPONDENT ACCESS TO THE FLORIDA COURTS

Article I, Section 21 of the Florida Constitution guarantees Florida residents a right of access to the courts of the state. The section provides:

> The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

Art. I, §21 FLA.CONST.

In Kluger v. White, 281 So.2d 1 (Fla. 1973), the Supreme Court of Florida set forth a test for the proper interpretation of this constitutional provision:

> [W]here a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla.Stat. §2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

281 So.2d at 4.

In applying this test, the court found that a statute which had the effect of denying the plaintiff her traditional right of action in tort for damages arising from an automobile accident violated the constitutional guarantee of access to the courts and could not be applied to bar the plaintiff's claim for damages. Id.

More recently, in the case of Diamond v. E.R. Squibb and Sons, Inc., 397 So.2d 671 (Fla. 1981), this Court declared unconstitutional a Florida statute that proposed to bar recovery in a latent disease case before a compensable injury was ever suffered by the plaintiff. In Diamond an action was brought in negligence and product liability against the manufacturers of DES on the grounds that the drug caused cancerous and precancerous conditions in the plaintiff. The drug was administered in 1955 and 1956, but the injury from the drug was not discovered until 1976. The trial court held that the action was barred by

the Florida Statute of Repose, §95.031(2) FLA.STAT. (1977), requiring that all product liability actions must be filed within twelve years after the date of delivery of the product. The District Court of Appeal affirmed, but this Court reversed. In reserving, this Supreme Court explained that the Statute of Repose was unconstitutional as applied in that case where plaintiff's right of action was barred before it ever existed so that no judicial forum was available to the aggrieved party. Accord, Overland Construction Co. v. Sirmons, 369 So.2d 572 (Fla. 1979); Vilardebo v. Keene Corporation, 431 So.2d 620 (Fla.3d DCA 1983).

If the application of the Florida borrowing statute is allowed in the case at bar, Mrs. Meehan would similarly be barred from access to the courts before a viable cause of action ever existed. It cannot be disputed that the actions asserted by Respondent - actions for personal injury based on negligence, strict liability and product liability - are rights of action guaranteed by Article I, Section 21 of the Florida Constitution. These actions are recognized in Florida and are an integral part of its common law. Hence, the Legislature is without power to abolish Respondent's cause of action without providing her with a reasonable alternative to protect her rights. Kluger v. White, 281 So.2d 1 (Fla. 1973).

As applied in the case at bar, the borrowing statute would cut off the Respondent's common law tort actions without providing any alternative remedy. By application of this statute, the law of New York is "borrowed" by Florida and adopted as the

controlling law of this case. New York law, which prohibits its citizens from filing claims for asbestos-related personal injuries before any physical damage is manifest,[7] is in direct conflict with the laws of Florida and in violation of the Florida Constitution as determined by the Supreme Court in the Kluger, Overland Construction, Diamond and Vilardebo cases. Hence, it is unconstitutional for the Florida courts to apply New York law under the factual circumstances of this proceeding.

CONCLUSION

Wherefore, based upon the arguments and citations of authority contained herein, Respondent respectfully prays that this Court affirm the decision of the court below and remand the case for trial.

Respectfully submitted,

BARON & BUDD
A PROFESSIONAL CORPORATION
8333 Douglas Avenue, 10th Floor
Dallas, Texas 75225
214/369-3605

BY: _____
JANE N. SAGINAW

[7]New York's statute of limitations attaches in an occupational disease case when the plaintiff was last exposed to defendants' products. Thornton v. Roosevelt Hospital, 47 N.Y.2d 780, 391 N.E.2d 1002, 417 N.Y.S.2d 920 (1979). New York is the only state that does not recognize such latent disease cases. As a result of this law, residents of New York who bring toxic chemical and asbestos-related disease claims to court in that state are left remediless. See e.g., Barbanel, New York Laws Curb Suits on Toxic Damage, N.Y. Times, March 7, 1982, §1 at 22, col.4.

AND

LOUIS S. ROBLES, ESQ.
ATTORNEY AT LAW
75 S.W. 8th Street, Suite 401
Miami, Florida 33130
305/371-5944

BY: Louis S. Robles /gs
LOUIS S. ROBLES

CERTIFICATE OF SERVICE

I hereby certify that an exact copy of Respondent's Answer Brief has been mailed to all counsel of record herein for the Petitioners on this the 29 day of July, 1985, per the attached list.

JANE N. SAGINAW

SERVICE LIST OF MEEHAN

Louis S. Robles
Attorney at Law
75 S.W. 8th Street, Suite 401
Miami, Florida 33130

Thomas C. MacDonald, Jr.
Charles P. Schropp
Raymond T. Elligett, Jr.
Shackleford, Farrior, Stallings
and Evans
A Professional Association
Post Office Box 3324
Tampa, Florida 33601

Susan J. Cole
Blaire & Cole
2801 Ponce de Leon Boulevard, Suite 550
Coral Gables, Florida 33134

Michael K. McLemore
Kimbrell, Hammon, Jennings,
Womack, Carlson & Kniskern
Suite 900, 799 Brickell Plaza
Miami, Florida 33131

James C. Rinaman
Marks, Gray, Conray & Gibbs
Post Office Box 447
Jacksonville, Florida 32201

Joel R. Wolpe
Wolpe & Leibowitz
Suite 607 - Biscayne Building
19 West Flagler Street
Miami, Florida 33130

Parker D. Thomson
Jon W. Zeder
Gary M. Held
Thomson, Zeder, Bohrer, Werth,
Adorno & Razook
4900 Southweast Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2363