IN THE
SUPREME COURT OF FLORIDA

CASE NO. 66,938

THE CELOTEX CORPORATION, et al.,
Petitioners

vs.

JEAN NANCE,
as personal representative of
the Estate of E. S. Nance,
Respondent

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

AMICUS CURIAE BRIEF OF THE NATIONAL GYPSUM COMPANY

Donald M. Middlebrooks
Thomas R. Julin
Norman Davis

STEEL HECTOR & DAVIS
Attorneys for National Gypsum Company
4000 Southeast Financial Center
Miami, Florida 33131-2398
(305) 577-2810

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

CASES (Cont.)

CASES (Cont.)

CASES (Cont.)

CASES (Cont.)

CASES (Cont.)

STATUTES

STATUTES (Cont.)

OTHER AUTHORITIES

OTHER AUTHORITIES (Cont.)

IN THE
SUPREME COURT OF FLORIDA

CASE NO. 66,938

THE CELOTEX CORPORATION, et al.
Petitioners

vs.

JEAN NANCE,
as personal representative
of the Estate of E. S. Nance
Respondent

INTRODUCTION

The amicus, National Gypsum Company, will demonstrate that the plaintiff's claims in this case are barred because the defendants were amenable to process throughout the limitations period of one or more foreign states. The Florida borrowing statute, section 95.10, Florida Statutes, requires the application in this action of those time bars.[1]

This argument attacks the conclusion of Colhoun v. Greyhound Lines, Inc., 265 So.2d 18 (Fla. 1972), that in tort actions the borrowing statute requires application of the

---

1. The certified question in this case and in The Celotex Corp. v. Meehan, Case No. 66,937, reads:

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

The arguments advanced in this brief are fully applicable to the issues raised in the Meehan case.

statute of limitations of a foreign state only if the last act necessary to establish liability occurred in that state. This holding is inconsistent with the history of the borrowing statute and the decisions of other states interpreting their borrowing statutes. The "last act" doctrine is a mechanical rule which causes adverse consequences when applied to a variety of different types of actions and if applied in this action, as the plaintiffs construe the rule, would wholly defeat the public policy -- encouragement of economic growth -- which led to enactment of the statute.

INTEREST OF THE AMICUS CURIAE

The amicus curiae is a large manufacturer in the United States. It is engaged in defending litigation throughout the country similar to the litigation giving rise to this appeal.

The Florida borrowing statute, like other borrowing statutes in effect throughout the country, was intended to allow defendants to rely on the expiration of a statute of limitations of any state in which the defendant was amenable to process throughout the prescribed limitation period. Under the interpretation of the borrowing statute announced by the Third District Court of Appeal and previously announced by this Court in Colhoun, the amicus and other similar companies are not permitted to raise such a defense and the purpose of the borrowing statute is defeated.

STATEMENT OF THE CASE AND THE FACTS

The amicus curiae will accept the statements of the case and the facts relied upon by both the petitioners and respondent to the extent that these separate statements are not in conflict. The amicus believes there is no dispute regarding the two facts of this case which are essential to the legal issue briefed by the amicus:

1. The plaintiff could have commenced and maintained this action against the defendants in Virginia if it had been commenced within the period imposed by the Virginia statute of limitations.

2. The plaintiff's action would have been barred by the Virginia statute of limitations at the time it was commenced in Florida.

No other facts are necessary to the argument advanced in this brief by the National Gypsum Company.[2]

SUMMARY OF ARGUMENT

This brief advances the following arguments in support of the petitioners.

Point I: Purpose of the Borrowing Statute. When it enacted the borrowing statute in 1872, the Florida Legislature recognized that economic growth in the state could be encouraged by assuring persons who came here that the state's statute of limitations would not resuscitate claims which had expired in

---

2. If the record does not clearly reflect either of the facts required for the argument advanced by the amicus, this case should be remanded for a determination of these facts.

other states. Today, the borrowing statute should be construed in a fashion which is consistent with the original purpose of the enactment. The Court should hold defendants may rely upon the expiration of the statute of limitations of any state which could have exercised jurisdiction over them.

Point II: Colhoun Should be Overruled. In Colhoun v. Greyhound Lines, Inc., 265 So.2d 18 (Fla. 1972), this Court erred in holding that the borrowing statute permits defendants to rely upon only the statute of limitations of the state in which the last act necessary to eastablish liability occurs. This rule is inconsistent with the original purpose of the borrowing statute and inequitable in its application to contemporary problems such as that which the Court faces in this case.

Point III: Most Significant Relationships is the Wrong Rule. The choice of laws test adopted by this Court for determining which state's substantive law is applicable to a cause of action is not an appropriate test for determining where a cause of action arises for borrowing statute purposes because that test is not sensitive to the policies behind the borrowing statute.

Point IV: Plaintiff's Action is Barred. The plaintiff's claims in this case are barred by the Florida borrowing statute because the defendants were subject to the jurisdiction of the Virginia courts throughout the limitations period applicable in that state and this action was not commenced until after that period expired.

ARGUMENT

I.

The Florida Borrowing Statute was Enacted to Allow a Defendant to Raise the Statute of Limitations of Any State Which Could Have Exercised Jurisdiction over the Defendant

The history of the Florida borrowing statute shows that the Legislature intended to permit defendants to rely on the expiration of the statute of limitations of any state which could have exercised jurisdiction over the defendant. Other states with similar borrowing statutes have interpreted their statutes in this fashion. This Court overlooked the history of the statute and erroneously interpreted the actions of other state courts when it held in Colhoun v. Greyhound Lines, Inc., supra, that in tort actions Florida borrows the statute of limitations of the state where the last act necessary to incur liability occurs.

A. Florida's Original Statute Borrowed the Statute of Limitations from the State where the Last Act Occurred

Before examining the modern form of the borrowing statute, it is important to understand that the Florida Legislature first enacted a "borrowing statute" in 1833. That statute was substantially different than the statute which is in effect today. It provided:

> In all suits now pending, or that may be hereafter instituted in the Courts of this State upon any cause of action, originating in any foreign state or place, any law or

> statute of limitation of such foreign state or place may be pleaded: Provided, however, that such plea shall in no case be adjudged sufficient, unless it shall be made to appear before the Court wherein it is pleaded, that such law or statute of limitations, had completely run upon and barred the action in such foreign state or place, before the defendant had ceased to be a resident thereof, and had removed therefrom.
>
> Act Feb. 17, 1833, Sec. 1, Duval, 157.

In this form, the statute permitted defendants to raise a foreign statute of limitations only if the cause of action had "originated" in that jurisdiction.

1. Florida Cases Did Not Determine Where a Cause of Action Originates for Borrowing Statute Purposes

The only decision to mention the 1833 version of the borrowing statute is Perry v. Lewis, 6 Fla. 555 (1856). The case involved an action for trover seeking the value of a slave who had been stolen from the plaintiff in Alabama, sold several times in Alabama, and ultimately resold to the defendant in Florida.

The Court concluded that the 1833 statute was not applicable because both the plaintiff and the defendant were residents of Florida and the defendant's liability to the plaintiff had originated in Florida. The Court did comment, however, that the borrowing statute had been enacted "in the view of the Legislature . . . [to] secur[e] the right to defendants to plead the statute of limitations of other States in all cases where it would prove a bar in those States . . .

providing a remedy for the further protection of our citizens from stale foreign demands originating without our jurisdiction." 6 Fla. at 560 (emphasis added).

No Florida decision has been found which interpreted how courts should decide where a claim "originates" for purposes of applying the 1833 statute.

2. Missouri Cases Held a Cause of Action Originates Where the Last Act Necessary to Establish Liability Occurs

One other state in the country enacted and still uses a borrowing statute which is similar to Florida's 1833 version. The decisions from that state make clear that under such a statute actions were considered to originate in the state where the last act necessary for the cause of action took place. The Missouri Statute of Limitations, section 516.190, Mo. Rev. Stat., worded almost identically to Florida's original borrowing statute, provides:

> Whenever a cause of action has been fully barred by the laws of the state, territory or country in which it originated, said bar shall be a complete defense to any action thereon, brought in any of the courts of this state.

Numerous Missouri decisions have held that under this statute Missouri borrows the statute of limitations of another state when the last act necessary for the cause of action or the

injury occurred outside Missouri.[3] Therefore, it is clear that had Florida kept its 1833 borrowing statute, a statute worded closely to the Missouri borrowing statute, it would have allowed a defendant to borrow the statute of limitations from only the state where the last act necessary to the cause of action occurred.

B. In 1872, the Florida Legislature Amended the Borrowing Statute to Allow a Defendant to Raise the Statute of Limitations of any State With Jurisdiction Over the Defendant

In 1872, Florida amended its borrowing statute. Section 18, Chapter 1869, Laws of Florida 1872. Under the new

---

3. See, e.g., Burns v. Union P. R.R., 564 F.2d 20 (8th Cir. 1977); McIndoo v. Burnett, 494 F.2d 1311 (8th Cir. 1974); Sterling Drug, Inc. v. Cornish, 370 F.2d 82 (8th Cir. 1966); Young v. Hicks, 250 F.2d 80 (8th Cir. 1957); Burgert v. Union P. R.R., 240 F.2d 207 (8th Cir. 1957); Trezecki v. Gruenewald, 532 S.W.2d 209 (Mo. 1976); Lindsey v. Colgate-Palmolive Co., 491 S.W.2d 269 (Mo. 1973); Bowling v. S.S. Kresge Co., 431 S.W.2d 191 (Mo. 1968); Christner v. Chicago, R.I. & P. R.R., 228 Mo. App. 220, 64 S.W.2d 752 (1933). When presented with the problem of determining where an action involving a claim based on exposure to asbestos products originated, Missouri adhered to its "last act" doctrine. In Elmore v. Owens-Illinois, Inc., 673 S.W.2d 434, 436 (Mo. 1984)(en banc), the court held, without any real explanation that "A cause of action accrues when and originates where damages are sustained and are capable of ascertainment." Thus, Missouri has concluded that the "last act" necessary to establish liability is diagnosis rather than exposure. But as will be seen from the discussion infra, the significance of the Missouri case is not its determination of what constitutes the last act, but that under its borrowing statute an action originates where the last act occurs. Cf. Patch v. Playboy Enterprises, Inc., 652 F.2d 754, 755 (8th Cir. 1981)(recognizing the last act rule is applicable in Missouri, but refusing to apply it under the facts of the case). Patch is discussed infra at 33-35.

statute any claim was considered barred in the forum state if it was barred in the state in which it "has arisen." Because the new statute no longer made reference to the State in which the claim "originated," it thereby abandoned the "last act" rule.

1. Florida Decisions Prior to 1972 held that Under the 1872 Statute a Cause of Action "Arises" Wherever Jurisdiction Exists

It was not until Courtlandt Corporation v. Whitmer, 121 So.2d 57 (Fla. 2d DCA 1960), that a Florida court directly[4] faced the issue of how to determine where a cause of action arises under the borrowing statute of 1872. The plaintiff in the case was a Swiss corporation. The defendant, a resident of Florida, pleaded the statute of limitations of France, the place where the contract in dispute was made, should be borrowed and that it would bar the action. The trial judge agreed with the defendant and entered a judgment on the pleadings for him.

---

4. The first case which interpreted Florida's new borrowing statute was Brown v. Case, 80 Fla. 703 (1920). The plaintiff claimed that the defendant should be precluded from pleading the Florida statute of limitations which had expired because the cause of action had arisen in New York, a jurisdiction which had a longer statute of limitations which had not expired. Without saying why, the Court agreed that the action had arisen in New York, but that the borrowing statute did not prohibit a defendant from using Florida's statute of limitations. The Court explained, "It is clear that the Legislature intended to give a debtor against whom a cause of action accrued in [an]other State or Territory, or in a foreign country, the benefit of statutes of limitations of those jurisdictions if they were shorter than that of this state." 80 Fla. at 708. Notwithstanding the ambiguity of some of the language in this opinion, the case has been interpreted by the Fifth Circuit as expressly adopting the view that a defendant can rely on the expiration of the statute of limitations of any state which could have exercised jurisdiction over the plaintiff's claim and the defendant. Beasley v. Fairchild Hiller Corporation, 401 F.2d 593 (5th Cir. 1968)(discussed infra).

Judge Milledge, for the Second District, reversed the trial court's order holding that the plaintiff should have been permitted to prove that the cause of action did not in fact arise in France and that therefore Florida would not borrow that statute of limitations. The court then wrote at some length about how the trial court should determine where a cause of action arises for borrowing statute purposes. The court first noted that a split of authority had come to exist in the United States, some states finding that a cause of action arises in any state or country which could exercise jurisdiction over the action and other states concluding that the other factors than jurisdiction are determinative.

Judge Milledge concluded that the former states had adopted the better view, explaining:

> It seems unrealistic to say that a cause of action "arises" at a place where the action cannot be maintained. The running of time is not the bar to an action which there was no way to institute at the very moment of the breach. His failure to pursue a remedy within a given period is meaningless to a creditor who at the place of the breach has no remedy. If the creditor has no means of enforcement where the breach occurs it is plain that he does have a remedy wherever the debtor is amenable to process, usually his place of residence. To say that undue delay in pursuing the remedy bars the action makes sense. This must be why the limitation of [that] forum should apply.
>
> 121 So.2d at 59.

The court then commented that the action may well have arisen in France if jurisdiction over the Florida defendant existed in France. "Perhaps there, personal jurisdiction may be obtained over a non-resident defendant by means we would call contructive service. That remains to be ascertained . . .," the court stated.

In DeVane v. United States, 259 F. Supp. 18 (D. P.R. 1966), a federal judge in Puerto Rico placed a similar construction on the Florida borrowing statute, holding that Florida would borrow Puerto Rico's statute of limitations "when the action is brought in a court within the jurisdiction of Puerto Rico."

The Fifth Circuit Court of Appeals followed this same line of analysis in Beasley v. Fairchild Hiller Corporation, 401 F.2d 593 (5th Cir. 1968), a case involving an action by a helicopter pilot against a manufacturer for damages he sustained in a crash of the helicopter in Louisiana. The plaintiff was a resident of Florida and the defendant was a California corporation. The defendant argued under the Florida borrowing statute it was entitled to raise the Louisiana statute of limitations as a defense because the Louisiana courts could have exercised jurisdiction over the action and the Louisiana statute of limitations had expired.

The Fifth Circuit agreed with the defendant, holding, "The test, as Brown v. Case, supra, states it, is: Whether or not an action arising in a particular jurisdiction could have

been maintained there at the time suit was commenced in Florida." 401 F.2d at 596.

2. Other Jurisdictions Have Interpreted Identical Statutes as Meaning that a Cause of Action "Arises" Wherever Jurisdiction Exists

Florida's borrowing statute of 1872 is substantively identical to the borrowing statutes in several other jurisdictions. A brief review of how those jurisdictions have interpreted their borrowing statutes confirms that the interpretations of the Florida borrowing statute in Courtlandt, DeVane, and Beasley were correct.

Illinois is one jurisdiction whose experience with borrowing statutes is particularly enlightening. The Florida and Illinois statutes, both enacted in the year 1872, are nearly identical in their wording as can be seen by this side-by-side comparison:

Florida	Illinois
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 there be maintained against a person by reason of the lapse of time, no action thereon shall be maintained against him in this State.	[W]hen a cause of action has arisen in a State or territory out of this State, or in a foreign country, and by the laws thereof, an action thereon can not be maintained by reason of lapse of time, an action shall not be maintained in this State.
Sec. 18, ch. 1869 Laws of Fla. (1872)	Sec. 20, ch. 83, Ill. Stats. (1872)

The first decision to interpret the Illinois statute, Hyman v. Bayne, 83 Ill. 256, 261 (1876), did not directly

address the issue of how to determine where a cause of action arises, but it did explain that the borrowing statute served the purpose of encouraging interstate trade. The Illinois Supreme Court rejected arguments that a limiting construction of the statute should be imposed, and allowed the defendant to assert the Maryland statute of limitations to bar an action on a note which had been made in Maryland.

Two years after Bayne, the Illinois Supreme Court was again presented with a borrowing statute issue in Hyman v. McVeigh, 10 Chicago Leg. News 157, 1 Ill. Cir. Ct. Rpts. 577 (1878)(unreported decisions), and it took the opportunity to clarify its earlier decision. "The words 'when a cause of action has arisen,' as they occur in the statute pleaded, should be construed as meaning, when jurisdiction exists in the courts of a state to adjudicate between the parties upon the particular cause of action, if properly invoked -- or in other words, when the plaintiff has the right to sue the defendant in the courts of the state upon the particular cause of action without regard to the place where the cause of action had its origin. This was the view taken in Hyman v. Bayne, supra, although not discussed at length in the opinion, and we do not conceive that the question need be discussed now." Id. at 578.

Following the McVeigh rule, the federal court in Osgood v. Artt, 10 F. 365 (N.D. Ill. 1882), explained that "In Hyman v. McVeigh, 10 Leg. News, 157, the supreme court of this state held that the words 'when a cause of action has arisen,' as used in the twentieth section, 'should be construed as meaning when

jurisdiction exists in the courts of a state to adjudicate between the parties upon the particular cause of action, if invoked; or, in other words, when the plaintiff has the right to sue the defendant in the courts of the state upon the particular cause of action, without regard to the place where the cause of action had its origin.'" 10 F. at 367 (emphasis added). Numerous Illinois decisions have adhered to the rule announced in McVeigh[5] and other jurisdictions have interpreted their borrowing statutes in a similar manner.[6]

---

5. See, e.g., Delta Bag Company v. Frederick Leyland & Co., 173 Ill. App. 38 (1912); O'Donnell v. Lewis, 104 Ill. App. 198 (1902); National Bank of Denison v. Danahy, 89 Ill. App. 92 (1899); McGuigan v. Rolfe, 80 Ill. App. 256 (1899). But see Mitchell v. United Asbestos Corporation, 100 Ill. App. 3d 485, Ill. Dec. 375, 426 N.E.2d 350 (1981)(concluding that a cause of action based on exposure to asbestos products arises only in the state which has the most significant relationship to the tort). The Mitchell decision, discussed at length infra at 39, is inconsistent with all prior Illinois decisions and is not based upon any sound reasoning.

6. E.g., Green v. Kensinger, 429 P.2d 95 (Kan. 1967) (for purposes of the Kansas borrowing statute, an action arises when defendant is subject to suit in another state's courts); Hornick v. First Catholic Slovak Union, 115 Kan. 597, 224 P. 486 (1924) (holding causes of action "arise" under the borrowing statute at the defendant's place of residence); Bruner v. Martin, 76 Kan. 862, 93 P. 165, 14 L.R.A., N.S., 775 ("The place where it arises is the place where some court has jurisdiction of the subject matter and the parties against whom the cause of action has arisen"); Partridge v. Palmer, 277 N.W. 18, 19 (Minn. 1937) (action arose simultaneously in Minnesota, the place of breach of contract, and California, because "defendant could have been sued instantly and successfully" in California); Drake v. Bigelow, 93 Minn. 112, 100 N.W. 664 (1904)("action did not accrue until the culmination of those circumstances which resulted in a right of action, coupled with an opportunity to maintain it"); Powers Mercantile Co. v. Blethen, 91 Minn. 339, 97 N.W. 1056 (1904) (existence of cause of action not sufficient to give rise to action for borrowing statute purposes); Luce v. Clarke, 49 Minn. 356, 361, 51 N.W. 1162, 1103 (1892)(action

(Footnote continued on next page)

C. Florida's Amended Statute was Intended to Permit Defendants to Rely on the Expiration of an Identifiable Statute of Limitations

Florida's borrowing statute of 1872 served the important public policy of assuring defendants that they could rely upon the expiration of the statute of limitations of the state in which they were subject to jurisdiction. A defendant who enters Florida, either physically or even by way of establishing minimum contacts sufficient to allow Florida to exercise jurisdiction over him, thus need not worry that stale claims would be resuscitated by that entry or that future claims would be subject to Florida's statute of limitations. Before the 1872 amendment, as shown by the Missouri statutes interpreting a statute similar to Florida's 1833 statute, a defendant could not rely on this result. The early borrowing statute would give effect to a foreign statute of limitations only if the cause of action originated in the foreign jurisdiction.

(Footnote continued from previous page)

arises in a state only if defendant is subject to jurisdiction in that state); Hamilton v. North Pac. S.S. Co., 164 P. 579 (Or. 1917)(Oregon borrows statute of limitations of California because California had jurisdiction over action); Freundt v. Hahn, 24 Wash. 8 (1901)(following the Illinois decisions). See also Folda Real Estate Co. v. Jacobsen, 75 Colo. 16, 223 P. 748 (1924); Wyatt v. United Airlines, Inc., 638 P.2d 812 (Colo. App. 1981). The Colorado decisions, applying a Florida-type borrowing statute which was in effect from 1921 through 1984, indicate that borrowing is required when an action arises "in the courts" of another state, 223 P. at 748, "and the only reason that the cause of action is not cognizable in the foreign state is plaintiff's failure to comply with that state's statute of limitations." 638 P.2d at 813.

When it amended the borrowing statute in 1872, the Florida Legislature may have been attempting to encourage interstate commerce. Other courts recognized that the "has arisen" rule would permit a nonresident defendant to leave his home state and enter the forum jurisdiction without fear that claims dead in his home state would be resuscitated by his migration. In a leading Indiana decision, VanDorn v. Bodley, 38 Ind. 402 (1871), Justice Buskirk, dissenting, explained:

> The evil of the common law rule . . . was that it would prevent emigration to this State from states having a shorter limitation. And when we remember that at the time this statute was enacted, every sister state had a shorter limitation than Indiana, and that the policy of Indiana, in common with other western states, was to increase her population as rapidly as possible, the necessity and propriety of the enactment under consideration fully appear.
>
> The statute remedies the evil by saying to the citizens of other states, "you shall be in no worse condition by becoming a citizen of Indiana than you now are; and if you have a perfect defense now, under the limitation laws of your place of residence, you shall not lose it if you remove to this State.
>
> 38 Ind. at 413.

Other decisions from many states have also concluded that borrowing statutes enacted in the mid or late 1800s served similar purposes.[7]

---

7. See, e.g., Hyman v. Bayne, supra; Robinson v. Moore, 76 Miss. 89, 103, 23 So. 631, 633 (1898); Copus v. California, 158 Tex. 196, 301 S.W.2d 217 (1957); Continental Supply Co. v. Hutchings, 267 S.W.2d 914 (Tex. Civ. App. 1954).

Given that the purpose of the borrowing statute of 1872 was to allow defendants to raise the statute of limitations of a state which had jurisdiction over the defendant throughout the limitations period of that state, the Court is left with the issue of how the borrowing statute should be construed today.

Resolution of this issue is made difficult because concepts of long-arm jurisdiction and due process minimum contacts necessary to exercise long-arm jurisdiction have been radically changed since 1872.[8] Today, corporate defendants frequently are subject to the jurisdiction of more than one state.[9] Thus, if such a corporate defendant can utilize the

---

8. At the time when Florida enacted its borrowing statute of 1872, a person could not be subject to a court's jurisdiction unless he was actually served with process within the court's territory. 4 C. Wright and A. Miller, Federal Practice and Procedure §1064 (1969). This territorial concept of personal jurisdiction became firmly rooted in the United States with the Supreme Court's landmark decision in Pennoyer v. Neff, 95 U.S. 714 (1877). Pennoyer established the principle that, absent a waiver, the defendant's presence within the state was a necessary prerequisite to the court's exertion of personal jurisdiction over him. Id. As Justice Holmes noted some 40 years later in summarizing Pennoyer, "the foundation of jurisdiction is physical power." McDonald v. Mabee, 243 U.S. 90, 91 (1917).

9. E.g., Keeton v. Hustler Magazine, Inc., ___ U.S. ___, 79 L.Ed.2d 790 (1984)(non-resident publisher subject to jurisdiction in state where small number of magazines distributed). See also McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Perkins v. Benguet Consolidated Mining Company, 342 U.S. 437 (1952); International Shoe Co. v. Washington, 326 U.S. 310 (1945); Kurland, The Supreme Court, The Due Process Clause and The In Personam Jurisdiction of State Courts, 25 U. Chi. L. Rev. 569 (1958); 4 Wright and Miller, supra at §1065. The development of long-arm statutes followed quickly upon the heels of International Shoe. See generally, 4 Wright and Miller, supra at §1068; D. Currie, The Growth of the Long Arm:

(Footnote continued on next page)

statute of limitations of any state with jurisdiction over it and the action, the defendant would be entitled to rely on the shortest statute of limitations from among several states. This may not have been the result that the legislature intended when it enacted the borrowing statute in 1872.[10] However, it is the

---

(Footnote continued from previous page)

Eight Years of Extended Jurisdiction in Illinois, 1963 U. Ill. L. F. 533 (1963); Foster, Long-Arm Jurisdiction in Federal Courts, 1969 Wis. L. Rev. (1969). There are, however, still significant constitutional restraints on the power of the states to exercise jurisdiction over defendants. See, e.g., Helicopteros Nacionales de Colombia, S.A. v. Hall, 80 L.Ed.2d 404 (1984)(Colombian corporation for an accident that took place in Peru); Kulko v. Superior Court, 436 U.S. 84 (1978)(non-resident parent seeking support for a child living in state); Rush v. Savchuk, 444 U.S. 320 (1980)(non-resident motorist seeking damages for an accident that occurred outside the state); World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980) (non-resident automobile dealer who had joined with the manufacturer in a products liability action brought far from the state where the car was sold); Hanson v. Deckla, 357 U.S. 235 (1958)(holding "it is a mistake to assume . . . the eventual demise of all restrictions on the personal jurisdiction of state courts). See generally Seidelson, Recasting World-Wide Volkswagen as a Source of Longer Jurisdictional Reach, 19 Tulsa L.J. 1 (1983); 4 Wright and Miller, supra at §1067. J. Hazard, Civil Procedure 83 (3rd ed. 1985).

10. The National Conference of Commissioners on Uniform State Laws, and in turn several states, Michigan (Mich. Comp. Laws Ann. §600.5861), Pennsylvania (42 Pa. Cons. Stat. Ann. §5521 (1981)), Oklahoma (Okla. Stat. Ann. tit. 12 §§104-08), and West Virginia (W. Va. Code §§55-2A-1 to 55-2A-6), have endorsed, however, the simple and predictable rule that when numerous statutes of limitations are potentially applicable the earliest statute should be given effect. "The period of limitation applicable to a claim accruing outside of this state shall be either that prescribed by the place where the claim accrued or by the law of this state, whichever first bars the claim." Uniform Statute of Limitations on Foreign Claims Act §2, 14 U.L.A. 507 (1980). The National Conference , and the American Bar Association, adopted this uniform act in 1957. 14

(Footnote continued on next page)

Legislature's failure to to amend the borrowing statute since 1872 to bring it into conformity with modern concepts of long-arm jurisdiction which have created this hypothetical problem and it is not an appropriate role for the Court to do what the Legislature perhaps should have done.[11]

The rule advocated by the amicus is the same as the rule which Professor Vernon advocated after completing his comprehensive review of problems arising under borrowing statutes. Statutes of Limitation in the Conflict of Laws: Borrowing

---

(Footnote continued from previous page)

U.L.A. at 507. Note that the act also asks where a claim "accrues" as opposed to where it "originates." In 1982, the National Conference offered a new borrowing statute, Uniform Conflict of Law - Limitations Act, 12 U.L.A. 51 (Supp. 1985). The new act allows substantive conflict of laws to govern some choice of law problems involving statutes of limitations. The existence of the new uniform act does not weaken the amicus's point: This Court can find significant support in the old uniform act, and in the states which continue to adhere to it, for the policy that the earliest applicable limitation action should bar an action.

11. Recognizing this problem, one state, Nevada, has construed its borrowing statute, Nev. Rev. Stat. §11.020, which is worded similarly to Florida's statute, as requiring application of the foreign time bar of the defendant's "residence." Alberding v. Brunzell, 601 F.2d 474 (9th Cir. 1979)("The reasoning behind the rule was that a cause of action arises in the place where the defendant can be sued, and at the time those cases were decided, personal jurisdiction could only be obtained in the state of residence"). See also Wing v. Wiltsee, 47 Neb. 350, 223 P. 334 (1924); Lewis v. Hyams, 26 Nev. 68, 63 P. 126 (1900). Other states have enacted statutes which expressly require application of the statute of limitations of the defendant's residence and have interpreted the term "residence," as being used in the same sense as the diversity statutes defining the jurisdiction of the federal courts. E.g., Hamilton v. North Pac. S.S. Co., 164 P. 578 (1917). Such an interpretation of the Florida borrowing statute, although not fully supported by the history of the law, might come close to effectuating the purpose of the statute and would accommodate the interests of both plaintiffs and defendants.

Statutes, 32 Rocky Mt. L. Rev. 287 (1960). He described his view in terms of how an ideal statute would operate on a debtor-creditor problem:

> I suggest that amenability to process should be made the basis for the choice of the application of foreign statutes of limitation. For the purpose of choosing the applicable time period, the claim, in essence, would be deemed to have arisen wherever the defendant is amenable to process, i.e., wherever the suit might have been brought. . . . With modern transportation and communication facilities, it is not overly burdensome to require the claimant to bring his suit where the debtor is subject to service of process. Of course, a debtor may be subject to process in more than one jurisdiction at the same time. Under the proposed legislation, if the claim is barred in any jurisdiction, it will be barred everywhere. The proposal contemplates a multiple place of arising. In conjunction with the amenability-to-process provision, a uniform act should operate to suspend local time periods during a debtor's non-amenability to process. This would permit all states to apply the same standard to the claim presented, i.e., whether or not the claim is barred by the laws of any place where the debtor has been amenable to process from the time the claim arises to the time suit is brought. Perfect Conflicts (sic) uniformity would be achieved. And the law of the place having the closest contact with the specific problem presented would be applied. Before any claim is barred, the debtor will have to satisfy the judgment of at least one jurisdiction that the claimant has had a reasonable opportunity to bring his action. If the debtor fails in this, the claim will be heard everywhere. If he succeeds, no jurisdiction will grant relief.
>
> 32 Rocky Mt. L. Rev. at 326-27 (footnotes omitted).

Florida's existing statute fortunately is capable of being interpreted as operating precisely in the manner that

Professor Vernon described his "perfect" statute as operating. Indeed, it appears from the history of the Florida borrowing statute, when compared with the history of other borrowing statutes, that the Florida Legislature intended just such a result.

Today, the Florida borrowing statute, if interpreted as the amicus suggests is appropriate, would serve its original purpose of assuring defendants that they would be no worse off here than in foreign jurisdictions in which they could be sued. A corporation can engage in business activities in any jurisdiction which has enacted such a borrowing statute with confidence that the limitations period applicable to claims arising from that activity would be no longer than the limitations period of its state of incorporation or principal place of business, or other states where the claim might have been brought.

II.

The Colhoun Decision Should be Overruled Because it Interprets the Borrowing Statute in a Fashion Which is Inconsistent with the Legislative Purpose of the Statute

Until the Colhoun decision, Florida clearly had followed the decisions of the Illinois courts to apply a rule which permitted a defendant to raise as a bar any statute of limitation which had expired in a state which could have exercised jurisdiction over the claim. When faced with Colhoun, however, this Court departed, without basis, from that rule.

A. The Authority Cited by the Colhoun Case for the "Last Act" Rule is Inapposite

This Court has defined the crucial phrase in Florida's borrowing statute -- "when the cause of action arose" -- only once, and its reasoning is flawed. In Colhoun v. Greyhound Lines, Inc., 265 So.2d 18 (Fla. 1972), the plaintiff had sued in tort and contract to recover for injuries sustained in Tennessee on a bus she had boarded in Florida, where the ticket was purchased. Applying the "has arisen" language in the borrowing statute as then written, the Court held that because the physical injury occurred in Tennessee -- arose there -- the defendant could borrow the shorter Tennessee limitation which barred the action in Florida. Because the contract -- the bus ticket -- was held to have arisen in Florida, the Tennessee limitation could not be borrowed and Florida's longer statute of limitations kept the contract action alive. The Court announced a rule for application of the Florida borrowing statute as follows:

> That the action arose in Tennessee for purposes of determining whose limitation of action law is applicable to the tort counts is clear for "a cause of action sounding in tort arises in the jurisdiction where the last act necessary to establish liability occurred." Ester, Borrowing Statutes of Limitation and Conflict of Laws, 16 U.Fla.L.Rev. 33, 47 (1962).
>
> Id. at 21 (emphasis supplied).

The Court's sole citation to authority for such a

rule was a law review article.[12] At the indicated page of the article, the author makes a sweeping pronouncement: "The courts unanimously hold that a cause of action sounding in tort arises in the jurisdiction where the last act necessary to establish liability occurred." Ester, supra at 47. A footnote directs the reader to four cases which allegedly prove the point. Even a cursory review of those cases, however, shows they do not do so.

In the first case cited by Professor Ester's law review article, Sylvania Electric Products v. Barker, 228 F.2d 842 (1st Cir. 1955), the court was interpreting the Massachusetts borrowing statute which barred any cause of action which was barred by the state of the plaintiff's residence. The plaintiff in the case was a resident of Nebraska, therefore the court applied the Nebraska statute of limitations. The court did not even consider where the action "arose," nor did it mention where the last act necessary to liability occurred.

The next case which Professor Ester relied on for his conclusion regarding the "unanimous" endorsement of the "last act" rule, was Wilt v. Smack, 147 F. Supp. 700 (E.D.Pa. 1957). The plaintiff, a Maryland citizen, was injured in Delaware in an

---

12. The Court seemingly also relied, in selecting language for its rule, on a much older contract case where the Court had said: "[W]here the last act necessary to complete the contract is performed, that is the place of the contract; and the place where a contract is completed, there the cause of action accrues." Peters v. E.O. Painter Fertilizer Co., 73 Fla. 1001, 75 So. 749, 750 (Fla.1917). The issue there, however, was not the borrowing statute but where venue should be fixed. A "last act" rule is appropriate for venue determination but it cannot be transplanted for borrowing statute purposes.

automobile accident and sued a Pennsylvanian in a federal court in Pennsylvania. The court invoked Pennsylvania's borrowing statute which said that an action would be barred in Pennsylvania if fully barred by the laws of the state where it arose.

In this case, the court noted the existence of the Pennsylvania borrowing statute and then determined that irrespective of whether the Pennsylvania or the Delaware statute of limitations should be applied to the action, it had been timely filed because it was commenced within the limitations periods of both states. The court therefore had no need to decide how to determine where a cause of action arises for borrowing statute purposes, and, contrary to Professor Ester's conclusion, did not do so.

In Drummy v. Oxman, 280 App. Div. 800, 113 N.Y.S.2d 224 (1952), the third case cited as part of the "unanimous" authority supporting the last act rule in tort cases, the plaintiff was injured in an automobile accident in Connecticut by a Connecticut resident. The New York court, in a two-paragraph memorandum opinion, held that under applicable borrowing legislation, the "integral" parts of the Connecticut statute of limitations would be borrowed. The opinion, however, contains no discussion of whether borrowing was required because the defendant would have been subject to the jurisdiction of the Connecticut courts or because the last act necessary to establish liability, the accident, occurred in Connecticut. The borrowing could have been for either reason, but the opinion of the court gives no clue as to which reason controlled its decision.

The last case cited by Professor Ester as authority for concluding that an action "arises," for borrowing statute purposes, where the "last act" occurs is McLenden v. Kissick, 250 S.W.2d 489 (Mo. 1952). This is erroneous for two reasons. First, the Missouri borrowing statute, as discussed above, does not borrow the statute of limitations of the state where a cause of action "arises." Cases interpreting the Missouri borrowing statute do not shed light on how statutes, such as Florida's statute, which use the "arising" terminology, should be interpreted. In addition, although other Missouri cases do adopt a last act rule, the McLendon case, ironically considering Professor Ester's use of it, is not one of them. The plaintiff was injured on the job in Kansas and was barred from bringing a tort action against the defendants by the Kansas Workmen's Compensation Law. The Missouri Court held the limitations period imposed by the Kansas Workmen's Compensation Law would be applied in Missouri not because the "last act" had occurred in Kansas, but because "the plaintiffs chose to collect compensation under the Kansas law . . . [and] submitted their controversy to the Workmen's Compensation Commission." 250 S.W.2d at 493. The fact that the injury occurred in Kansas appears to be wholly incidental to the court's conclusion that the Kansas statute of limitations would be applied and there is no mention at all of Professor Ester's "last act" doctrine.

Thus, none of the four cases which form the basis of Professor Ester's conclusion that "courts unanimously hold that a cause of action sounding in tort arises in the jurisdiction

where the last act necessary to establish liability occurred" in fact ever reach such a holding. Therefore, the Colhoun Court erred in relying on Professor Ester's superficial analysis as the sole basis for adopting the last act rule in Florida.[13]

B. The "Last Act" Rule is Inconsistent With the Policies Which Florida's Amended Borrowing Statute was Intended to Serve

The borrowing statute was amended in 1872 so that a defendant could assert the statute of limitations which had

---

13. In 1974, the Florida Legislature amended the borrowing statute again, modernizing the language of the statute, but not altering it substantively. The statute as revised in 1974 provides: "When the cause of action arose in another state or territory of the United States, or in a foreign country, and its laws forbid the maintenance of the action because of lapse of time, no action shall be maintained in this state." Laws of Florida, Chapter 74-382. Because this amendment came after the Colhoun decision, some doubt is created regarding whether the Legislature has implicitly "enacted" the Colhoun interpretation of the statute into the statute. The standard rule in interpreting legislative enactments subsequent to judicial interpretation is a presumption that the legislature approved the interpretation given the earlier statute by the courts. Davies v. Bossert, 449 So.2d 418 (Fla. 3d DCA 1984); Peninsular Supply Co. v. C.B. Day Realty of Florida, Inc., 423 So.2d 500 (Fla. 3d DCA 1982). However, there are exceptions to this rule. One judicial decision construing an act does not approach the dignity of a well-settled interpretation. United States v. Raynor, 302 U.S. 540, 552, 82 L.Ed. 413, 420 (1938). Expanding upon this tenet, in White v. Winchester Country Club, 315 U.S. 32, 40 (1942), the United States Supreme Court refused to accept the argument that a re-enactment of a statute adopted the holding of one case and called that case "patently incomplete as an exposition of doctrine." The Supreme Court again rejected the standard doctrine in Federal Communications Commission v. Columbia Broadcasting System, Inc., 311 U.S. 132, 85 L.Ed. 87 (1940). The Court held, "We are not . . . willing to rest decision on any doctrine concerning the implied enactment of a judicial construction upon re-enactment of a statute. The persuasion that lies behind that doctrine is merely one factor in the total effort to give fair meaning to the language." 311 U.S. at 137. Thus, this Court can and should overrule Colhoun if it determines that Colhoun in fact was wrongly decided.

expired in any state where the plaintiff could have obtained jurisdiction over the defendant. The "last act" rule is inconsistent with this legislative intention and effectively undoes what the Legislature intended to do.

1. The "Last Act" Rule will Discourage Interstate Commerce

Factual and legal variables create an environment of randomness and uncertainty for an enterprise which operates in several, many or all states. As has been shown, borrowing statutes were created to provide some degree of predictability which would encourage multi-state commerce. Today, however, a multi-state business must assume the worst when operating under various statutes of limitations which may range from one year to six or more for the same liability. The "last act" rule thus encourages courts to be wooden and to overlook the policy which prompted the legislature to write a borrowing statute.[14]

---

14. The Third District, in reviewing the asbestos cases which prompted the present review in this Court, were required to interpret "last act," and did so in an arbitrary manner by reaching into other policy tracks and importing a "time of discovery" test. That test was most elaborately stated in Meehan v. The Celotex Corp., 10 Fla. L. W. 333 (3d DCA Feb. 5, 1985), where the court cited as authority for the discovery test Creviston v. General Motors Corp., 225 So.2d 331 (Fla. 1969). Creviston is entirely inapposite, however, since its holding "is limited solely to the matter of the commencement of the running of the three years statute of limitation...and is not otherwise extended." Id. at 334. That opinion had nothing to do with the borrowing statute. The Third DCA also cited City of Miami v. Brooks, 70 So.2d 306 (Fla. 1954) for the same principle, yet that opinion also had nothing to do with the borrowing statute. The issue there was when a statute of limitations should begin to run; since no state other than Florida was involved in the tort complaint, there was no need to address the question of which statute to apply.

2. The Policies Which Once Warranted Application of the Rule to Choice of Substantive Law Problems are not the Same as the Policies Served by Borrowing Statutes

The roots of the "last act" rule can be traced to ancient rules for choice of substantive law and herein lies many of its problems. Rights to redress were said to "vest" in the plaintiff where and when the last event necessary for defendant's liability occurred. The particular rights which vested were those granted by the "last act" jurisdiction. So as not to enlarge or diminish such vested rights, courts would follow the substantive law of that jurisdiction.[15]

The purpose of borrowing statutes, however, is divorced from the substantive "rights" of the parties. Statutes of limitations were not passed to vest any rights in the plaintiff; on the contrary, they were passed to compel plaintiffs to file within a reasonable time and to shield defendants from state claims.[16] Courts should thus look to policies behind the limitation of actions and not rules for determining the place where rights vest (e.g. the "last act" rule) when interpreting borrowing statutes.

Because statutes of limitations exist to afford defendants a measure of predictability and to encourage the

---

15. It is an accepted rule that borrowing statutes do not permit the plaintiff to borrow a foreign limitations period which is longer than the domestic period. Am. Jur. 2d, Limitation of Actions §67 at 647. This could not be the case if the "right" to use the foreign period had been "vested" in the plaintiff.

16. Restatement of Conflicts of Law §377-378.

filing of timely claims, it would appear absurd to have courts decide which statutes can be borrowed in a manner (i.e. the "last act" rule) that would thwart both of those goals. Use of the "last act" rule detracts from predictability since defendants never know which state's statute will apply to a given action until the "last act" is determined by a court. Use of the "jurisdiction" rule on the other hand would foster predictability since the defendant would know in advance exactly which states' statutes he will be able to borrow.

The instant case and the companion Meehan case dramatically illustrate the difficulty of applying the "last act" rule with any certainty or uniformity in latent disease cases, because states sharply disagree over what constitutes the "last act."

In addition, the "last act" rule has been rejected by this Court as even a logical rule for determining which state's substantive law should apply. In Bishop v. Florida Specialty Paint Co., 389 So.2d 999, 1001 (1980), the Court labeled the last act rule "inflexible" and "mechanical," noting that frequently "the state where the injury occurred may have little actual significance for the cause of action."[17]

The Restatement (Second) of Conflicts was equally critical of the last act rule as a means of choosing substantive

---

17. See also Olsen v. Piccolo, 453 So.2d 12 (Fla. 1984); State Farm Mutual Automobile Insurance Co. v. Olsen, 406 So.2d 1109 (Fla. 1981). See generally H. Southerland & J. Waxman, Florida's Approach to Choice-of-Law Problems in Tort, 12 F.S.U. L. Rev. 447 (1984).

law. The reporter wrote in an introductory note:

> Experience has shown that the last event rule does not always work well. Situations arise where the state of the last event (place of injury) bears only a slight relationship to the occurrence and the parties with respect to the particular issue. Also, in the case of such torts as fraud, defamation, invasion of the right of privacy, unfair competition and interference with a marital relationship, there is often no one clearly demonstrable place of injury and at times injury will have occurred in two or more states.
>
> Introductory Note at 413.

For the same reasons that the last act rule does not work for choosing which state's substantive laws should govern a cause of action, the rule also does not work for choosing which state's statute of limitations applies.[18]

C. The "Last Act" Rule is an Arbitrary Rule which Does Not Serve Any Logical Policy

A "last act" rule is ill-suited to the operation of a borrowing statute because it vitiates against the kind of predictability which such statutes are designed to promote. In fact, the rule serves no coherent policy. Rather, it is awkward and inconsistent in practice, and it is unfair to both plaintiffs and defendants in different types of actions.

---

18. Amicus does not advocate that the same rules which govern choice of substantive law should be applied to choice of limitations questions. This point is discussed infra at 36-41.

Several different scenarios illuminate the difficulties posed by application of the last act rule to the borrowing statute.

1. The "Last Act" May Occur in a State Where Jurisdiction Does Not Exist

Arbitrariness in applying a borrowing statute is vividly illustrated in Templeman v. Baudhuin Yacht Harbor, Inc., 608 F.2d 916 (1st Cir. 1979), where a yacht purchaser brought a tort action against a seller. The buyer resided in Illinois, the seller in Michigan. The yacht was built and delivered in Michigan and later repaired by the defendant in Wisconsin and in Florida. After a fire in the open sea, the yacht sank. The action was commenced in Illinois and transferred to Puerto Rico. Errroneously interpreting the Illinois borrowing statute as a "last act" statute, the trial court applied the limitations action of Puerto Rico to bar the action. The First Circuit reversed, concluding that the Illinois statute would not tolerate application of a foreign borrowing statute from a place where the defendant's contact was "too minimal even to confer in personam jurisdiction." 608 F.2d at 918.

2. The "Last Act" May Occur in Multiple States

Actions commonly faced by corporations who are engaged in broadcasting television and radio programs to all 50 states, demonstrate one of the weaknesses of the last act rule. In a defamation action, for example, the last act necessary to give rise to liability is generally recognized as the date of first

publication.[19] In a nationwide broadcast, of any state the last act therefore would be regarded as having occurred in all 50 states simultaneously when the broadcast was received on radios or televisions across the country.

The United States Supreme Court recently held in Keeton v. Hustler Magazine, Inc., ___ U.S.___, 79 L.Ed.2d 790 (1984), that a nationwide publisher can be subjected to a jurisdiction in which it has even a very small circulation.[20] The Court

---

19. See Restatement (Second) of Torts §577A (1977); Ariz. Rev. Stat. Ann. §12-651 (1982); Cal. Civ. Code §§3425.1-.5; Idaho Code §§6-702 to -750 (1979); Ill. Ann. Stat. ch. 126, §§11-15 (Smith-Hurd 1967); N.M. Stat. Ann. §§41-7-1 to 41-7-5 (1981 Cum. Supp.); N.D. Cent. Code §14-02-10 (1981); 42 Pa. Cons. Stat. Ann. §§8341-8345 (Purdon 1982). Florida also follows this rule. Section 770.07, Florida Statutes (1983), provides, "The cause of action for damages founded upon a single publication or utterance, as described in s. 770.05, shall be deemed to have accrued at the time of the first publication or exhibition or utterance thereof in this state." A federal court noted, "This rule was adopted in recognition of the vast multiplicity of suits which could arise from mass publications which transcend a variety of medias and state lines, and the attendant problems of choice of law, indefinite liability, and endless tolling of the statute of limitations."

20. Hustler circulated some 10 to 15,000 copies of its magazine in New Hampshire each month. 79 L.Ed.2d at 796. See also Calder v. Jones, ___ U.S. ___, 79 L.Ed.2d 804 (1984) (holding California court could exercise personal jurisdiction over Florida newspaper editor and reporter in libel action by California resident). The conclusions of the Supreme Court in Keeton and Calder is consistent with a large number of lower court decisions from the 1960s and 1970s. See, e.g., Anselmi v. Denver Post, Inc., 552 F.2d 316 (10th Cir.), cert. denied, 432 U.S. 911 (1977)(Los Angeles Times caused tortious injury by an act or omission in Wyoming, even though paper was first published outside the state); Rebozo v. Washington Post Co., 515 F.2d 1208 (5th Cir. 1975)(Washington Post is subject to the

(Footnote continued on next page)

rejected arguments that due process considerations required the Court to hold that media interests should not be held accountable in every jurisdiction.[21]

The Eight Circuit confronted this problem with applying the last act rule in Patch v.Playboy Enterprises, Inc., 652 F.2d 754 (8th Cir. 1981). The plaintiff, a resident of Missouri, sued Playboy, a magazine written, edited, and prepared for distribution in Illinois, for defamation in a Missouri federal district court. Missouri has interpreted its borrowing statute as permitting defendants to raise the statute of limitations of the state where the last act necessary to liability occurs. In a defamation action, the last act has been recognized to be

---

(Footnote continued from previous page)

jurisdiction of Florida court by virtue of sending a libel into Florida); Edwards v. Associated Press, 512 F.2d 258 (5th Cir. 1975)(Associated Press committed tort in Mississippi by sending report to Mississippi from New Orleans); Buckley v. New York Post Corp., 373 F.2d 175 (2d Cir. 1967)(Connecticut long-arm statute gives court jurisdiction over nonresident publisher).

21. The defendant in that case also argued that due process was abridged by subjecting it to the New Hampshire six-year statute of limitations on defamation actions -- the only statute in the nation which had not expired at the time the action was commenced. In footnote, the Court rejected this argument observing that the sole issue before the Court was whether jurisdiction could be exercised by the New Hampshire courts and not whether the New Hampshire courts could apply the lengthy New Hampshire statute of limitations to the defendant. Thus, the Court left open the possibility that due process or first amendment principles require a state to borrow another state's statute of limitations. Cf. Holderness v. Hamilton Fire Insurance Company of New York, 54 F. Supp. 145 (S.D. Fla. 1944) (holding that due process would be violated if Florida refused to recognize a limitations period created by a contract which was made in Florida notwithstanding that Florida treats contractual limitations periods as contrary to public policy and void).

publication. Thus, the difficulty with applying the last act rule in that case was that publication had occurred throughout the nation. The court found the last act rule unhelpful and inappropriate in this type of case, only complicating the problem. The court commented:

> This rule works well for injuries caused by a single act or for injuries occurring at a single location, but does not determine where a libel action originates because the injury occurs, potentially, in many places at the same time. The place of injury rule does not answer whether the place of first injury, most injury, or any injury governs, and, for that reason, does not tell us where a cause of action for libel originates.
>
> 652 F.2d at 756.

The Eighth Circuit then focused on what it perceived to be the purpose of the borrowing statute: the prevention of plaintiff forum shopping for statutes of limitations. After reviewing various proposed interpretations of the borrowing statute,[22] the court concluded, "it is only by holding that Patch's claim originated in Illinois that the anti-forum shopping purpose of the Missouri borrowing statute can be consistently applied to residents and non-residents." 652 F.2d at 758.

---

22. The plaintiff argued that the court should apply the statute of limitations of the state with the most significant contacts with the tort. 652 F.2d at 757. The court rejected that suggestion finding it to be "without support in Missouri law." Id. Playboy argued that the court should hold the action originated either where venue was appropriate or where the first publication occurred. Id. at 758. The court rejected these suggestions because "[v]enue statute and borrowing statutes serve . . . different policies" and the place of first publication (or single publication) rule is limited to "determining when a cause of action accrued." Id.

The decision is significant because Missouri is the one state in the nation which has throughout its history consistently interpreted its borrowing statute as adhering to the "last act" rule. Now even this state, assuming the Missouri courts agree with the Eighth Circuit's interpretation of their law, has realized what the Florida Legislature realized when it amended its borrowing statute in 1872: permitting a defendant to rely only upon the statute of limitations of the place where the cause of action originated (that is, the place where the last act necessary to establish liability occurred) is not a workable rule. In some cases it will not give defendants the protection that it was intended to afford them; in others, it will not have a logical application; and in others, it simply will not work.

Fortunately, this Court need not go through all the contortions of the Patch decision to achieve what that court did. Florida's statute has not recognized the last act rule since it was amended in 1872. By so holding and returning to a "jurisdictional" approach, this Court can reestablish a rational application of the borrowing statute which is consistent with the intention of the 1872 legislature.

3. The "Last Act" is Subject to Manipulation by Plaintiffs

The defendants have argued persuasively that if the Court determines that discovery is the last act necessary to incur liability and that the place of the last act is the place whose statute of limitations applies, then plaintiffs will be able to forum shop. Individuals who know that they were exposed

to asbestos logically should come to Florida to be diagnosed to take advantage of the "discovery/last act" rule.

The defendants argue that because of this problem the Court should reject the plaintiff's argument that the last act is discovery and instead should adhere to the view that exposure is the last act. Assuming arguendo that the plaintiff's interpretation of the last act rule is correct, the Court should abandon the last act rule, as a matter of policy.

III.

No Legislative History or Policy Suggests an Action Arises, for Borrowing Statute Purposes, in the State with the "Most Significant Relationship"

It is important to discuss one other interpretation of borrowing statutes which has been adopted by some courts but which should not be adopted by this Court. In determining which state's substantive laws applies, a number of states, including Florida, have adopted the Restatement (Second) of Conflicts view that the substantive law of the state with the most significant relationship to the action should apply. Some states have assumed on that basis alone that the statute of limitations of the state with the most significant relationship to the action should apply. This approach , however, is ill-founded. Although the principles underlying those choices are intended to achieve separate policy objectives, the courts which take this approach have blurred those differing principles and have lost sight of the purpose of a borrowing statute. The reasons which warrant

choice of a state's substantive law will not always justify choosing that same state's statute of limitations.

One Florida appellate court and courts from other jurisdictions already have recognized the amicus's view that different rules should apply to choice of substantive law and choice of statute of limitations. The Fourth District Court of Appeal held in Pledger v. Burnup & Sims, Inc., 432 So.2d 1323 (1983), that notwithstanding this Court's adoption of the most significant relationship test for choosing substantive law in Bishop v. Florida Specialty Paint Co., 389 So.2d 999 (1980), no basis existed for concluding this choice of law rule should be used for resolving statute of limitations conflict problems under the Florida borrowing statute. Pledger involved a suit filed in Florida for a libel published in New York. The Fourth District held:

> The language of Section 95.10 is as clear today as it was in 1968 or in 1872. We have no indication that the legislative intent has changed. The language of [the Restatement Second], as adopted in Bishop, clearly refers to rights and liabilities, not to remedies. That is, Bishop determines which state's substantive law will apply, notwithstanding where the cause of action accrued. We decline to "give a strained construction to evade the effect" of the [borrowing] statute in the absence of a statement of legislative will or a ruling by our Supreme Court.
>
> 432 So.2d at 1331 (quoting McCluny v. Silliman, 28 U.S. (3 Pet.) 270, 7 L.Ed. 676 (1830)).

Constrained by the Colhoun decision, the Fourth District adhered to the rule that a tort cause of action arises for

borrowing statute purposes in the state where the last act necessary to establish liability occurs.

Courts from other jurisdictions also have rejected application of judicially-created substantive choice of law rules to borrowing statute problems. In Wyatt v. United Airlines, Inc., 638 P.2d 812 (Colo. App. 1981), a Colorado court noted that the Restatement (Second) of Conflicts §6 itself provides that choice of law rules should not be applied when a "statutory directive" exists on a choice of law issue. Accordingly, the court concluded that the substantive choice of law rules set forth in Restatement (Second) of Conflicts §145 (the most significant relationship test) would not be used to interpret its borrowing statute.[23]

In the choice of substantive law, "the identity of the state of most significant relationship is said to depend upon the nature of the tort and upon the particular issue." Id. For policy reasons, different states give different emphasis, to

---

23. In Wyatt, the court interpreted a borrowing statute similar to that of Florida. Colo. Rev. Stat. §13-80-118 (1973). Recently, the Colorado Legislature replaced that borrowing statute with a provision that in some cases uses substantive choice of law rules to resolve statute of limitations conflicts. 1984 Colo. Sess. Laws 477. The new borrowing statute has not yet been interpreted, however, and since Wyatt created a specific exception to Colorado's usual application of the most significant relationship test for conflicts problems, cf. First National Bank of Rostek, 182 Colo. 437, 514 P.2d 314 (Colo. 1973), Wyatt may still have vitality. Regardless, Wyatt supports the proposition that a court, faced with the sort of borrowing statute that exists in Florida, should not apply either substantive choice of law rules or the "most significant relationship test" to a conflict involving statutes of limitation.

such things as the deterrence of other wrongdoers, the compensation of injured parties, the protection of defendants against harassment, or the easing of burdens on the state's courts. Therefore, in order to recognize the state's legitimate interest in these policies, applying a "significant relationship" test is a flexible and less arbitrary way of selecting the law which defines rights and liabilities. It does not follow, however, that such a test should also be employed to determine which state's statute of limitations is to apply.

As has been shown above, legislatures in the vast majority of states, including Florida, enacted borrowing statutes to install a wholly separate principle. Such statutes encourage interstate activity while placing reasonable limits on exposure to any legal liability which may result from such activity. The significant relationships test is founded on wholly different policies and is therefore inappropriate in the context of borrowing statutes.

Illustrative of how courts blur the crucial distinction between the policies and reach the wrong result is Mitchell v. United Asbestos Corp., 426 N.E.2d 350 (Ill.App. 1981), which involved a wrongful death complaint filed in Illinois on behalf of a decedent who allegedly contracted asbestosis as a consequence of work performed in Illinois and in Missouri. The defendants were manufacturers and distributors -- foreign corporations which did business in the two states. The trial court denied the defendants' motions to dismiss on two counts, and they appealed.

The appellate court agreed with the trial court that Illinois should not borrow the Missouri statute of limitations, and thus departed from strong Illinois precedent regarding its borrowing statute, as described above. The court first acknowledged that Illinois, like Florida, had adopted a "significant relationships" test to determine the choice of substantive law. Using the Second Restatement criteria, the court then engaged in a lengthy analysis of contacts between the two states and the parties, and the policies of the two jurisdictions regarding wrongful death actions. Its conclusion, as to substantive law, was that Illinois had the most significant relationships.

The appellate court then erroneously applied the same test -- significant relationships -- to the Illinois borrowing statute and found that "[s]ince the cause of action arose in terms of interest analysis in Illinois, the 'borrowing' statute does not apply," Id. at 360, and that Illinois' statute of limitations should be used. It was the wrong test for the borrowing statute, and it produced the wrong result because it resuscitated a claim which had been long barred in Missouri. The Illinois court cited only one case, Hamilton v. General Motors Corp., 490 F.2d 223 (7th Cir. 1973), as a basis for utilizing the significant relationships test.

Hamilton was very weak precedent. The issue on appeal was when the statute of limitations had commenced to run in an action for contract damages, and the court first had to determine whether Illinois' statute would operate or whether a foreign

statute would be borrowed. The Seventh Circuit devoted only a few lines in a footnote to the question, concluding the proper statute of limitations would emerge after use of a significant relationships test. Id. at 226 n.1. Citing only a law review article as the basis for such a conclusion, the Seventh Circuit also ignored strong Illinois precedent to the contrary.[24]

IV.

The Plaintiff's Action is Barred Because the Defendants were Amenable to Process in Virginia Throughout the Limitations Period Prescribed by Virginia

The Florida borrowing statute, as interpreted by the amicus, can be easily applied to the instant case. The plaintiff alleged her decedent was exposed to asbestos in Virginia. Under the allegations of the complaint, Virginia could have exercised jurisdiction over the defendants.[25] At the time the plaintiff commenced her action in Florida, it would have been barred by

---

24. Several years later, a federal district court had occasion to apply Illinois' borrowing statute in a medical malpractice action where Illinois and Missouri again were competing jurisdictions. Nutty v. Universal Engineering Corp., 564 F. Supp. 1459 (S.D. Ill. 1983). That court seemed to recognize that Illinois' historic purpose for its borrowing statute had been to apply the statute of limitations from the state where jurisdiction appeared -- in that case, Illinois. But the court went on to say that recent Illinois decisions had changed the traditional rule, citing Hamilton and Mitchell. Error thus succeeded to error, and Illinois' long-time legislative policy was judicially abandoned in a few short years.

25. The commission of tortious conduct in Virginia is a sufficient basis for obtaining jurisdiction over a defendant. Section 8-81.2(a)(1), Va. Code. See Willis v. Semmes, Bowen & Semmes, 441 F. Supp. 1235 (E.D. Va. 1977)(applying statute).

the Virginia statute of limitations.[26] Therefore Florida borrows the Virginia statute and bars the plaintiffs claims.[27]

---

26. The Virginia statute of limitations, section 8.01-243(A), Virginia Code, provides, "every action for personal; injuries, whatever the theory of recovery . . . shall be brought within two years next after the cause of action shall have accrued." The issue of when a cause of action accrues in a foreign state in which the defendant was amenable to process -- in the sense that the statute of limitations begins to run -- must be determined by reference to the law of the foreign state. Holderness v. Hamilton Fire Insurance Co. of New York, 54 F. Supp. 145 (S.D. Fla. 1944)(interpreting Florida law). All state courts, except Ohio, have concluded that when a statute of limitations is borrowed "it is not wrenched bodily out of its own setting, but taken along with it are the court decisions of its own state which interpret and apply it, and the companion statutes which limit and restrict its operation. This we think is the general law." Devine v. Rook, 314 S.W.2d 932, 935 (Mo. App. 1958). The Wyoming Supreme Court held, "in applying a 'borrowed' statute, we must consider not only the borrowed limitation of action statute itself, but also any applicable tolling statutes as well as pertinent court cases. In effect, plaintiff's cause of action must be viewed as if filed in the state where under the laws of that state a cause of action accrued." Duke v. Housen, 589 P.2d 334 (Wyo. 1979). See also Graham v. Freguson, 593 F.2d 764 (6th Cir. 1979); In re "Agent Orange" Product Liability Litigation, 597 F. Supp. 740, 801 (S.D.N.Y. 1984); Plumb v. Cottle, 492 F. Supp. 1330 (D. Del. 1980). Judge Schwartz, dissenting from the en banc decision in Meehan, supra, correctly concluded it is essential to look to the law of the foreign jurisdiction to determine when the action accrues "to vindicate the very basis of section 95.10." 10 Fla. L. W. 336. Cf. Pledger v. Burnup & Sims, Inc., 432 So.2d 1323 (Fla. 4th DCA 1983), pet. for rev. denied, 446 So.2d 99 (Fla. 1984)(applying borrowed statute of limitations). In 1981, the Virginia Supreme Court construed this section as meaning that an action based on an asbestos claim begins to run after diagnosis or manifestation of symptoms. Locke v. Johns-Manville Corp., 221 Va. 951, 275 S.E.2d 900 (1981). The plaintiff in this case did not commence her action within the two years of the date of diagnosis or manifestation and therefore is barred.

27. If the Florida borrowing statute is interpreted as permitting defendants to raise only those statutes of limitations of their states of residence, see footnote 11 supra, it may be necessary to remand this case for a determination of the residences of the defendants and whether the statutes of limitations of those states would bar the plaintiff's claims.

CONCLUSION

The decision below should be quashed and the Third District Court of Appeal should be directed to affirm the summary judgment for the defendants entered by the trial court because the plaintiff's claims are barred by section 95.10, Florida Statutes.

Respectfully submitted,

STEEL HECTOR & DAVIS
Attorneys for National Gypsum Company

By 

Donald M. Middlebrooks
Thomas R. Julin
Norman Davis
4000 Southeast Financial Center
Miami, Florida 33131-2398
(305) 577-2810

ACKNOWLEDGMENT

This brief was prepared with the assistance of Jason Meyer, an associate at Steel Hector & Davis, and Jeff Davis, Brenda Greenberg, Kathleen Paisley, and Andrew Rosenblatt, summer associates at Steel Hector & Davis, who have not yet been admitted to the Bar.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this brief was mailed June 7, 1985, to:

C. Bryant Boydstun, Jr.
Lyle & Skipper, P.A.
Fortune Federal Building
2600 Ninth Street North
St. Petersburg, Florida 33704

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

Philip Freidin
Suite 2500
44 West Flagler Street
Miami, Florida 33130

Gilbert Haddad
Haddad, Josephs & Jack
P.O. Box 345118
Coral Gables, Florida 33114

Kermit Kindred
1010 Concord Building
66 West Flagler Street
Miami, Florida 33130

Harold C. Knecht
2600 Douglas Road
Suite 810
Coral Gables, Florida 33134

John Liebman
P.O. Box 1171
Orlando, Florida 32802

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

James C. Rinaman
Marks, Gray, Conray & Gibbs
P.O. Box 447
Jacksonville, Florida 32201

Karl Santone, P.A.
545 Ingraham Building
25 Southeast Second Avenue
Miami, Florida 33131

Charles P. Schropp
Raymond T. Elligett, Jr.
Shackleford, Farrior, Stallings
& Evans, P.A.
P.O. Box 3324
Tampa, Florida 33601

Thomas J. Schulte
Lee, Schulte, Murphy & Coe
800 Peninsula Federal BUilding
200 Southeast First Street
Miami, Florida 33131

Kenneth J. Smith
Locco, Klein & Touby, P.A.
901 N.E. 125 Street, Suite C
North Miami, Florida 33161

M. Stephen Smith, III
Rumberger, Wechsler & Kirk
1200 AmeriFirst Building
One Southeast Third Avenue
Miami, Florida 33131

Caron E. Speas
Stephen, Lynn, Chernay & Klein, P.A.
One Biscayne Tower, Suite 2400
Miami, Florida 33131

Thomas Spencer
Spencer, Taylor & Homer, P.A.
1107 Biscayne Building
19 West Flagler Street
Miami, Florida 33130

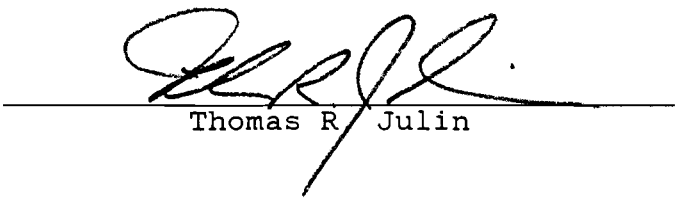
James E. Tribble
Blackwell Walker Gray Powers
Flick & Hoehl
2400 AmeriFirst Building
One Southeast Third Avenue
Miami, Florida 33131

Sharon L. Wolfe
500 Roberts Building
28 West Flagler Street
Miami, Florida 33130

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

Joseph T. Woodward
250 Bird Road
Suite 104
Coral Gables, Florida 33146

Jon W. Zeder
Gary Held
4900 Southeast Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2363



Thomas R. Julin