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EAG:gm
205.001

IN THE SUPREME COURT OF FLORIDA

CARMEN FELICITA ARRIETA GIMENEZ, ***et al.,*** Plaintiffs-Appellants, **v.** ALBERT0 ARRIETA NEGRON, *et al.,* Defendants-Appellees.	CASE NO. 73,222

ANSWER BRIEF OF DEFENDANTS-APPELLEES

On certification from the United States
Court of Appeals for the First Circuit

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ANSWER BRIEF OF DEFENDANTS-APPELLEES

TO THE HONORABLE COURT

STATEMENT OF THE CASE

Defendants-Appellees, pursuant to Rule 9.210(c) of the Florida Rules of Appellate Procedure, provide a statement of the case in this answer brief because the statement of the case in the initial brief of plaintiffs-appellants does not contain a complete procedural history of the proceedings below.

This appeal is a discretionary proceeding to review two questions certified from the United States Court of Appeals for the First Circuit. The genesis of these proceedings is a summary judgment entered by the United States District Court for the District of Puerto Rico dismissing an amended complaint on the grounds that it was time barred by

the passage of twenty-three years after a compromise settlement of an estate approved by a Florida probate court.

Plaintiff Carmen Felícita Arrieta Giménez (hereafter the "Giménez Child) commenced this action, on October 7, 1983, against defendants Alberto Arrieta Negrón, Roberto Arrieta Negrón, Rafael Arrieta Negrón, Carmen Margarita Arrieta Negrón (hereafter the "Negrón Children"), Annabelle de Antonis and the conjugal partnership comprised of Alberto Arrieta Negrón and his wife Annabelle de Antonis.' [Fla. App. p. **26,** 1st Cir. App. p. **1]**[2]**.** The complaint alleges that the Negrón Children fraudulently induced the Giménez Child into signing a Settlement Agreement, whereby she sold her interest in the estate of Rafael Arrieta Rios to the Negrón Children for less than its true value. The Giménez Child subsequently amended the complaint, adding the conjugal partnership comprised by her and her husband Orlando Vizcarrondo Narváez **as** a party **plaintiff.**[3] [Fla. App. p. 87, 1st Cir. App. p. 85].

Thereafter, defendant Rafael Arrieta Negrón was declared to be an incompetent, and Esther R. Arrieta was appointed his legal guardian. [1st Cir. App. p. 281].

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[1]References to the "Giménez Child, the "Negrón Children" and the "Widow" are used herein to avoid confusion with the settlement document underlying this action which utilizes these same terms.

[2]References herein to "Fla. App. p. ___" are to the appendix to the initial brief filed by plaintiffs-appellants in these proceedings. References to "1st Cir. App. p. ___" are to the appendix filed by plaintiffs-appellants in the United States Court of Appeals for the First Circuit, copy of which was sent to this Court by the court of appeals.

'Hereafter, the reference to "plaintiffs" shall be to the Giménez Child and the conjugal partnership comprised by her and her husband Orlando Vizcarrondo Narváez.

The district court allowed the action to be continued against the guardian.' [1st Cir. App. p. 107]. After the close of discovery, defendants moved for summary judgment. [Fla. App. p. 105, 1st Cir. App. pp. 134-3511. Plaintiffs opposed the motion for summary judgment. [Fla. App. p. 111, 1st Cir. App. pp. 352-4941. Defendants replied in support of their motion for summary judgment. [1st Cir. App. pp. 495-5361.

The district court dismissed the amended complaint in an opinion and order and a judgment dated September 30, 1987. [1st Cir. App. pp. 560 and 568, Fla. App. p. 133]. Plaintiffs moved for amended and additional findings of fact [1st Cir. App. p. 569] and to alter or amend judgment [1st Cir. App. p. 577]. Defendants opposed the motion for amended and additional findings of fact and the motion to alter or amend the judgment. [1st Cir. App. pp. 600,5901. Although the district court amended *nunc pro tunc* its opinion and order of September 30, 1987, it refused to reconsider its decision dismissing the amended complaint. [1st Cir. App. p. 632].

Plaintiffs then filed a joint notice of appeal to the United States Court of Appeals for the First Circuit. [1st Cir. App. p. 634]. The court of appeals held that Florida law applied to the instant case and certified two questions to this Court because it determined that final disposition of the action depended on unresolved questions of Florida law. [Fla. App. p. 23].

'Hereafter the reference to "defendants" shall be to the Negrón Children, Annabelle de Antonis, the conjugal partnership comprised of Alberto Arrieta Negrón and his wife Annabelle de Antonis, and Esther R. Arrieta, as guardian for Rafael Arrieta Negrón.

STATEMENT OF FACTS

Defendants provide the Court with a restated factual version of the case because the legal issues before the Court should be addressed taking into consideration the complete factual record developed below. The statement of facts in plaintiffs' initial brief ignores the facts which were in effect stipulated for purposes of the motion for summary judgment and contains statements of alleged facts which were neither stipulated nor found by the district court, as provided by the procedural rules governing the motion for summary judgment. Additionally, by omission of certain facts, plaintiffs' initial brief creates an inaccurate impression of the facts in this action?

Pursuant to Rule 311.12 of the Local Rules for the United States District Court for the District of Puerto Rico, defendants submitted a separate statement of facts in support of their motion for summary judgment. [1st Cir. App. pp. 136-47]. Local Rule 311.12 provides that "[a]ll material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party." Plaintiffs also presented a statement of facts in which they admitted that numerous facts set forth in defendants' statement of facts were uncontested for the purpose of the motion for summary judgment. [1st Cir. App.

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[5]For example, plaintiffs' statement of facts states that the Giménez Child sold in 1960 her equal share of her father's estate in Puerto Rico for $18,000.00, that the machinery of a sugar mill in Puerto Rico was sold in 1963 for over two million dollars, and that the father's will left his estate to his five children in equal shares. The impression created is that the share of the Giménez Child in the machinery of the sugar mill alone was worth over $400,000.00. Not mentioned are facts such as that the father at his death owned only 65 of the 1284 shares of the sugar mill, that both the sugar mill and the estate of the father had substantial liabilities, and that under the law of Puerto Rico the Giménez Child is only entitled to one-sixth of her father's estate because a sixth child established paternity.

pp. 383-84]. The facts relevant to this proceeding, which all parties agreed were uncontested for the purpose of defendants' motion for summary judgment, are as follows.

Rafael Arrieta Rios married Margarita Negrón Bustamante on May 24,1913 in Toa Baja, Puerto Rico and they had four children together, the Negrón Children. [Fla. App. p. 87, 1st Cir. App. pp. 85, 183]. Margarita Negrón Bustamante died on February 19, 1958. [1st Cir. App. p. 184].

The Giménez Child was born on January 30, 1937, and is the daughter of Rafael Arrieta Rios and Felicita Giménez Alvarez-Torres. [1st Cir. App. p. 186].

Two weeks after the death of his wife Margarita, Rafael Arrieta Rios married Felicita Giménez Alvarez-Torres (hereafter the "Widow"). [1st Cir. App. p. 208]. Eight months after his second marriage, Rafael Arrieta Ríos died on November 8, 1958, in San Juan, Puerto Rico, and was a resident of and domiciled in Puerto Rico. [Fla. App. p. 88, 1st Cir. App. p. 86]. At the time of death of Rafael Arrieta Rios, his estate consisted of personal and real property in the Commonwealth of Puerto Rico and the State of Florida. [Fla. App. p. 88, 1st Cir. App. p. 86].

This Court may take judicial notice of the fact that, after the death of Rafael Arrieta Rios, the Supreme Court of Puerto Rico ruled that a sixth child was entitled to share equally in Mr. Arrieta's estate. *Ocasio v. Díaz*, 88 P.R.R. 658, 735 (1963)("Esther Camacho Torres is the legitimate heiress of Rafael Arrieta Rios, her predecessor and father, together with the other heirs of the deceased....").[6]

[6]The existence of this sixth child voids the provision in the will dividing the estate among the five named heirs. P.R. Laws Ann. tit. 31, § 2368 (1930). The six heirs inherit equal shares. P.R. Laws Ann. tit. 31, § 2643 (1930).

Probate of the estate of Rafael Arrieta Rios was had in Dade County Judges' Court, Case No. 45176-A, and the Widow was appointed by Judge W. F. Blanton, and served as administratrix cum testamento annexo. [Fla. App. p. 88, 1st Cir. App. pp. 86, 209]. The Widow elected to take dower in the estate of Rafael Arrieta Rios. [1st Cir. App. p. 210]. Various claims and objections thereto were made in the probate proceeding. [1st Cir. App. pp. 198-99].

On July 27, 1960, the Giménez Child and the Widow signed in Miami, Florida at the offices of their attorney, M. Lewis Hall, Esquire, a document titled "Settlement Agreement". [Fla. App. p. 66, 1st Cir. App. pp. 197, 227]. An order approving and confirming the Settlement Agreement was entered by Judge W. F. Blanton on that same date. [Fla. App. p. 74, 1st Cir. App. p. 236]. At the time of the signing of the Settlement Agreement, the Giménez Child and the Widow were residents of and domiciled in Florida. [Fla. App. p. 52, 1st Cir. App. p. 213].

The Giménez Child was represented in the settlement of the estate of Rafael Arrieta Rios by M. Lewis Hall, Esquire. [1st Cir. App. p. 191]. M. Lewis Hall, Esquire, as attorney for the Giménez Child and the Widow, signed the Settlement Agreement. [Fla. App. p. 66, 1st Cir. App. pp. 201, 227]. M. Lewis Hall, Esquire, died on March 24, 1979. [1st Cir. App. p. 252].[7]

Paragraph 14 of the Settlement Agreement reads as follows:

> 14. The Widow and Gimenez Child are represented by Hall & Hedrick, attorneys at law, Miami, Florida, and Celestino Iriarte and F. Fernandez Cuyar, attorneys of Puerto Rico, attorneys of their own choosing, and have

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[7]Subsequent to filing the motion for summary judgment, defendants learned that George W. Whitehurst, Jr., an attorney from the office of M. Lewis Hall who assisted the Giménez Child and the Widow during probate of the estate of Rafael Arrieta Rios in Florida, died on April 6, 1974. [1st Cir. App. p. 543].

been advised and counseled by said counsel as to their rights in and to the subject matter of this Agreement, both as to the Laws of Florida and Puerto Rico, and the Negron Children are represented by the Law Office of Marshall O. Mitchell, Vero Beach, Florida, and Claude Pepper Law Offices, Miami Beach, Florida, and have been counseled and advised of their rights in and to the subject matter of this Agreement.

[Fla. App. pp. 64-65, 1st Cir. App. pp. 225-226].[8]

The Giménez Child produced on March 20, 1987 at her deposition, what purports to be a letter dated July 25, 1960 from M. Lewis Hall, Esquire, addressed to Celestino Iriarte, Esquire and F. Fernández Cuyar, Esquire, which reads in part:

Inasmuch as the [final draft of the settlement] agreement involves Puerto Rican law to some extent, I am sending you the enclosed copy for your opinion as to whether or not it contains any provisions of which you do not approve.

[1st Cir. App. pp. 206-207, 253].[9]

Celestino Iriarte, Esquire, was the godfather of the Giménez Child. [1st Cir. App. p. 192]. The Giménez Child denies that Celestino Iriarte, Esquire, represented her in the settlement of the estate of Rafael Arrieta Rios. [1st Cir. App. p. 192]. Celestino Iriarte, Esquire, died on January 9, 1967. [1st Cir. App. p. 255].

The Giménez Child also denies that Francisco Fernández Cuyar, Esquire, represented her in the settlement of the estate of Rafael Arrieta Rios. [1st App. p. 193]. Francisco Fernández Cuyar, Esquire, died on August 12, 1966. [1st Cir. App. p. 256].

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[8]Plaintiffs in their statement of facts below admitted that paragraph 14 of the Settlement Agreement reads as herein stated, but denied the veracity of the contents thereof with respect to attorneys Celestino Iriarte and F. Fernández Cuyar. [1st Cir. App. pp. 384-385].

[9]Plaintiffs in their statement of facts below admitted that the Giménez Child produced a carbon copy of said purported letter at her deposition, but did not admit that the original letter existed or was sent. [1st Cir. App. p. 385].

Marshall O. Mitchell, Esquire, as attorney for the Negrón Children, signed the Settlement Agreement. [Fla. App. p. 66, 1st Cir. App. p. 227]. Marshall O. Mitchell, Esquire, died on August 19, 1968. [1st Cir. App. p. 257].

After having served as administratrix for over 20 months, the resignation of the Widow was accepted by the Dade County Judges' Court on August 9, 1960. [1st Cir. App. p. 258]. The Widow died on July 14, 1978. [1st Cir. App. pp. 189-1901. Judge W. F. Blanton died on January 20, 1969. [1st Cir. App. p. 260].

The Giménez Child alleges that the Arrieta Ranch in Florida belonged to the estate of Rafael Arrieta Ríos. [Fla. App. p. 97, 1st Cir. App. p. 95]. Attached to defendants' statement of facts below is an appraisal of the Arrieta Ranch in Florida, dated August 27, 1960, signed by Frank W. Williamson, Sr., Appraiser, and stamped "Filed August 24, 1960 W. F. Blanton, County Judge". [1st Cir. App. p. 261]. Frank W. Williamson, Sr., died on October 9, 1982. [1st Cir. App. p. 262].

Defendant Rafael Arrieta Negrón was adjudged to be an incompetent because of dementia of the Alzheimer's type and arteriosclerosis by the Circuit Court for Dade County, Florida on May 13, 1986, and his wife, defendant Esther R. Arrieta, was appointed his guardian. [1st Cir. App. p. 281].

Paragraph 13 of the Settlement Agreement reads as follows:

> 13. All parties hereto agree that it is their purpose and intention in entering into this Settlement Agreement to irrevocably terminate and settle any and all differences and claims which the Negron Children may have against the Widow and the Gimenez Child and which the Widow and the Gimenez Child may have against the Negron Children and their properties and the estate and properties of Mrs. Margarita Negron de Arrieta and the

estate and properties of Rafael Arrieta-Rios, deceased, excepting such as are afforded by this Agreement.

[Fla. App. p. 64, 1st Cir. App. p. 225].[10]

The Giménez Child alleges that by means of the Settlement Agreement the Negrón Children bought her share in the estate of Rafael Arrieta Ríos in Florida and Puerto Rico. [Fla. App. p. 91, 1st Cir. App. p. 89]. The Giménez Child admits that she and the Widow received payments due under the Settlement Agreement for the sale of their interest in the estate of Rafael Arrieta Rios at or about the signing of the Settlement Agreement, and that the remainder due was received in 1962. [1st Cir. App. p. 194]. On July 26, 1962, the Giménez Child and the Widow signed a Satisfaction of Mortgage whereby they acknowledged having received full payment of the remaining $275,000.00 due to them under the Settlement Agreement. [1st Cir. App. p. 282].

The Giménez Child was 23 years old at the time of the signing of the Settlement Agreement. Prior to the signing of the Settlement Agreement, the Giménez Child received an undergraduate degree from the University of Florida at Gainesville, Florida and completed her first semester of law studies at the law school of said university. [1st Cir. App. pp. 187-188]. On October 7, 1983, over twenty-three years after having signed the Settlement Agreement, the Giménez Child instituted the present action. [Fla. App. p. 26, 1st Cir. App. p. 1].

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[10] "Although plaintiffs admitted in their statement of facts below that paragraph 13 of the Settlement Agreement reads as stated herein, they denied "that the purpose and intent of the execution of the said document was as stated therein." [1st Cir. App. pp. 386-387].

SUMMARY OF ARGUMENT

The court of appeals certified two questions to this Court. The first question concerns the validity of section 95.031(2) of the Florida Statutes under article I, section 21 of the Florida constitution. The second question concerns the claim preclusive effect of a Florida consent decree. The claim preclusion issue should be resolved first because it allows this Court to dispose of the instant action without the necessity of reaching the constitutional issue certified.

In 1960, Judge Blanton entered an order approving and confirming a settlement agreement. Judge Blanton's order was a consent decree. The court of appeals was unsure of the claim preclusive effect of consent decrees under Florida law. It thus certified the issue to this Court. Although Judge Blanton's order was a consent decree, recent Florida cases hold that judicially approved settlement agreements may not be set aside in collateral proceedings. Defendants argue that these recent cases bar plaintiffs' collateral action to set aside Judge Blanton's decree.

Defendants also argue that as a matter of public policy this Court should accord consent decrees the same status as other decrees or judgments. Litigants settle disputes because they want a litigation to end. The public policy favors the termination of litigation. If consent decrees are not accorded claim preclusive effect, an important incentive to end litigation by compromise would be lost. This would subvert the public policy which favors the termination of litigation.

The court of appeals concluded that plaintiffs did not allege extrinsic fraud. A decree may be attacked in collateral action only if it was procured by extrinsic fraud. Plaintiffs argue that they have alleged extrinsic fraud. A careful examination of the record

shows that plaintiffs alleged only intrinsic fraud, and thus are not entitled to have Judge Blanton's order set aside.

The constitutional question certified was framed in terms of "fraud that was not discovered or discoverable". The very term of section 95.031(2) makes this issue irrelevant. Although defendants contend the issue is likewise irrelevant to the constitutional analysis of section 95.031(2), they address the issue should this Court conclude otherwise.

Plaintiffs had the burden of proving the invalidity of section 95.031(2). An examination of the record shows that plaintiffs have not met that burden on the discoverability issue. The only correct finding, under long-established principles of constitutional adjudication, is that facts allegedly concealed or misrepresented were discoverable during the twelve-year limitation period of section 95.031(2). An examination of the record shows that this legal conclusion is also factually correct.

Section 95.031(2) does not violate article I, section 21 of the Florida constitution. This Court has so stated in two recent decisions. These two decisions were in product liability cases. However, the determination by this Court that perpetual liability places an undue burden on manufacturers is equally applicable to all potential defendants.

Plaintiffs' action was not abolished by section 95.031(2). Rather, the statute required plaintiffs to initiate their action within a reasonable time. A legislature may constitutionally shorten a limitations period.

Assuming as plaintiffs argue, that section 95.031(2) did abolish their action, it would still be constitutional. There was an overpowering public necessity justifying the

legislative enactment. Access to the courts is not denied when an action is abolished because of such a necessity.

Finally, plaintiffs' argument that the statute of repose did not commence to run until 1981 because there was a continuing fraud, is without merit. This issue was not raised by plaintiffs in the summary judgment proceedings, as required by the rules governing those proceedings. It is not properly before this Court. Additionally, the finding by the court of appeals that plaintiffs failed to allege a continuing fraud is correct.

ARGUMENT

1. The order approving the Settlement Agreement is an absolute defense to the present action.

The second question certified to this Court by the court of appeals concerns the res judicata effect of an order approving and confirming a property settlement agreement. An action should be disposed of on non-constitutional grounds if the Court may do so without reaching the constitutional issue raised. ***Singletary v. State,*** 322 ***So.*** 2d 551, 552 (Fla. 1975). Defendants respectfully urge that the Court should first decide that the Florida probate order bars plaintiffs' action, because so holding would dispose of the instant case without the necessity of reaching the constitutional question certified.

Judge W. F. Blanton of the County Judges' Court in and for Dade County, Florida, entered an order which "approved and confirmed the Settlement Agreement on July 27, 1960. [Fla. App. p. 74, 1st Cir. App. p. 236]. The Settlement Agreement states that its purpose is "to irrevocably terminate and settle any and all differences and claims ... which the Widow and Gimenez Child may have against the Negron Children and their

properties ... and the estate and properties of Rafael Arrieta-Rios..." [Ha. App. p. 64, 1st Cir. App. p. 225]. It also provides that the "validity and binding effect of this agreement shall not be raised or questioned in the Courts of Puerto Rico or elsewhere." [Fla. App. p. 65, 1st Cir. App. p. 226]. The order approving the Settlement Agreement specifically "directed [the Giménez Child] to perform said agreement and comply therewith in all respects." [Ha. App. p. 74, 1st Cir. App. p. 236]. The instant action was commenced in direct violation of Judge Blanton's order.

The full faith and credit statute, section 1738 of title 28 of the United States Code, "obliges federal courts to give the same preclusive effect to a state-court judgment as would the courts of the State rendering the judgment." ***McDonald v. City of West Branch, Mich.***, 466 U.S. 284,287, 104 S. Ct. 1799, 1801, 80 L. Ed. 2d 302 (1984); ***cf. State v. Pitner,*** 42 N.J. 251; 200 A.2d 104,107 (1964) ("[A] judgment by a court of competent jurisdiction approving the compromise ... is binding upon the courts of New Jersey to the same extent as it would bind subsequent litigation in Pennsylvania."). Judge Blanton's order should be accorded preclusive effect because the public policy, evidenced by Rule 1.540(b) of the Florida Rules of Civil Procedure, favors the termination of litigation. ***Declaire v. Yohanan,*** 453 So. 2d 375, 380 (Fla. 1984).

Rule 1.540(b) of the Florida Rules of Civil Procedure reads in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, decree, order or proceedings for ... (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party.... The motion shall be made within a reasonable time, and for reason[] ... (3) not more than one year after the judgment, decree, order or proceeding was entered or taken.... This rule does not limit the power of a court to

> entertain an independent action to relieve a party from a judgment, decree, order or proceeding or to set aside a judgment or decree for fraud upon the court.
> ....

Fla. R. Civ. P. 1.540(b).

The court of appeals concluded that "[i]n most instances, misrepresentation of the sort that is alleged in this case would not be considered 'fraud on the court.'" [Fla. App. p. 16]. Plaintiffs' action would thus be barred under Rule 1.540(b) because it was not commenced within one year of entry of the order approving and confirming the Settlement Agreement. Fla. R. Civ. **P.** 1.540(b). However, the court of appeals was unsure of the preclusive effect of consent judgments under this Court's decision in ***Declaire,*** and certified the matter to this Court. [Fla. App. p. 17].

The fact that the order approving and confirming the Settlement Agreement **was** entered pursuant to the consent of the parties should not defeat its preclusive effect. This Court, in ***Mims v. Reid,*** 98 ***So.*** 2d 498 (Fla. 1957), affirmed a summary judgment holding that a consent judgment in a case involving personal injuries prevented maintenance of a separate action for property damages. ***Mims*** recognizes "the necessity of bringing litigation to a close." ***Mims,*** 98 ***So.*** 2d at 501. The modern view, followed by the majority of jurisdictions, is that a consent judgment is entitled to res judicata effect. ***See, Modem View*** of ***State Courts*** as ***to whether Consent Judgment Is Entitled to Res Judicata or Collateral Estoppel Effect,*** 91 A.L.R.3d 1170, 1176, § 3[a] (1979) and cases cited therein.

Recent Florida cases have refused, pursuant to Rule 1.540(b) of the Florida Rules of Civil Procedure, to set aside settlement agreements approved in final judgments. For example, in ***Declaire*** this Court refused to allow a property settlement agreement approved in a final judgment of dissolution of marriage to be set aside on grounds that it was

procured by fraudulent misrepresentation. ***DeClaire,*** 453 So. 2d at 376. Other Florida cases similarly holding include: *Susskind v. Susskind*, 475 So. 2d 1276 (Fla. 3d DCA 1985), ***review denied,*** 488 ***So.*** 2d 832 (Ha. 1986); ***Langer v. Langer,*** 463 ***So.*** 2d 429 (Fla. 3d DCA 1985); Daugharty ***v. Daugharty,*** 456 ***So.*** 2d 1271 (Ha. 1st DCA 1984), ***petition for review denied,*** 464 ***So.*** 2d 554 (Fla. 1985); ***August v. August, 350 So.*** 2d 794 (Fla. 3d DCA 1977).

Plaintiffs' position that the order approving and confirming the Settlement Agreement should not be accorded any preclusive effect would in effect render such orders meaningless. This in turn would make it more difficult to settle legal actions and would subvert the public policy which favors the termination of litigation. ***Declaire,*** 453 So. 2d at 380.

Additionally, Rule 1.010 of the Florida Rules of Civil Procedure states that "[t]hese rules shall be construed to secure the just, speedy and inexpensive determination of every action." Fla. R. Civ. P. 1.010. A holding that a consent order such as that of Judge Blanton bars plaintiffs' action under Rule 1.540(b) would promote that objective.

The record shows that Judge Blanton's order put an end to a heated, drawn-out and expensive probate battle. Probate of the estate of Rafael Arrieta Ríos was initiated in Dade County by the Widow on November 28, 1958. [1st Cir. App. p. 209]. Defendant Alberto Arrieta Negrón had previously initiated probate proceedings in Indian River County, but the Giménez Child and Widow contested the jurisdiction of the Indian River County probate court. [1st Cir. App. p. 606]. The Negrón Children filed in the Dade County probate proceedings numerous and substantial claims against the estate, all of which were objected to by the Giménez Child. [1st Cir. App. pp. 616, 618, 621-24]. The Settlement Agreement indicates that the Giménez Child made claims against the Negrón

Children and the estate of Rafael Arrieta Rios and that the Negrón Children disputed both the jurisdiction of Dade County probate court and the right of the Giménez Child to inherit from Rafael Arrieta **Rios.** [1st Cir. App. pp. **213-14].** The probate battle in Dade County with the Widow **as** administratrix lasted for twenty months, and the record shows that fees for the attorneys of the Giménez Child and Widow alone amounted to over $50,000.00--a very substantial amount in **1960** dollars. [1st Cir. App. pp. **336, 338].**

Judge Blanton's order terminated all the controversies between the parties and avoided what surely would have otherwise continued to be an acrimonious and very expensive probate contest. If the "just, speedy and inexpensive determination" by compromise of such legal battles is to be encouraged, this Court should hold that the order approving and confirming the Settlement Agreement bars the instant action.

Plaintiffs, in apparent disagreement with the conclusion of the court of appeals that they have alleged only intrinsic fraud, reargue the extrinsic fraud issue at pages **25** to **30** of their initial brief. The conclusion of the court of appeals is in accord with Florida case law which holds that conduct such **as** intentional misrepresentation and fraudulent concealment of assets does not constitute extrinsic fraud or fraud upon the court. ***DeClaire*, 453 *So.*** 2d at **380; *August*, 350 *So.*** 2d at 795.

In ***Declaire***, this Court discussed at length the distinction between extrinsic and intrinsic fraud. After surveying numerous cases on the subject, this Court concluded that the cases defining extrinsic versus intrinsic fraud "distinguish between false and misleading information being presented on an issue to be tried and conduct which prevents a party from trying the issue." ***Declaire*, 453 *So.* 2d** at 380. Under this standard, it is plain that plaintiffs have not alleged conduct of the type which prevents a party **from** trying an issue.

Plaintiffs argue, at page 28 of the initial brief, that through misrepresentation and concealment defendants induced the Giménez Child into signing the Settlement Agreement and thus kept her out of court and prevented her "from discovering the true extent and value of her father's estate."[11] In a sense a judicially approved settlement will always keep a party out of court, for that is precisely its purpose. But being kept out of court by settlement is not the equivalent of being ***prevented*** from trying an issue, for it would then be difficult to reconcile the ruling in ***Declaire*** with the reasoning supporting that ruling.

In ***Declaire,*** the parties settled their differences concerning marital property by an agreement which was approved by a judgment. The respondent-wife in ***Declaire*** **was,** in the same sense **as** plaintiffs argue here, kept out of court on the facts concerning that settlement and her petitioner-husband's worth. However, this Court still held that that settlement agreement could not be set aside under Rule 1.540(b). ***Declaire,*** 453 So. 2d at 376. The deciding factor appears not to be whether a matter was actually resolved by a court, but whether "a matter [is] before the court for resolution and could have been tried." ***Declaire,*** **453** So. 2d at 380.

Defendants take exception to plaintiffs' contention that "[h]ow much the estate was worth, or, even further, how much the share of any one of the five children under the will was worth, was not in any way, form or manner before the [Dade County probate] court." [Initial brief at p. 23]. Judge Blanton plainly had before him the Settlement Agreement, which **was** "approved and confirmed by his July 27, 1960 order. The Settlement

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[11]This is an admission that the Giménez Child could have discovered the alleged "true extent and value of her father's estate" in the Dade County probate proceedings.

Agreement states the Arrieta Ranch "shall be valued at $900,000.00" and that all the Florida lands shall be valued at $975,000.00. [Fla. App. pp. 57, 63; 1st Cir. App. pp. 218, 224]. It also values the interest of the Giménez Child in the Florida estate at $175,000.00 and her interest in the Puerto Rican estate at $18,000.00 (approximately the mortgage indebtedness on the Cupey residence). [Fla. App. p. 57; 1st Cir. App. p. 218].

The Giménez Child testified at her deposition:

> Q. What I am trying to get at, Mrs. Vizcarrondo [ie, the Giménez Child], you contend that the Settlement Agreement in and of itself is a misrepresentation, is that correct?
>
> A. Yes.
>
> Q. Now, in addition to that settlement agreement, did anyone of the defendants say to you, 'The Arrieta Ranch is worth X dollars"?
>
> A. No.
>
> Q. Did anyone of the defendants give you a dollar valuation of any asset included in the estate?
>
> A. No.

[1st Cir. App. p. 202].

Plaintiffs' contention that the extent and value of the estate of Rafael Arrieta Ríos was not before the probate court is also absurd. "Both the county judge and the personal representative of an estate have the duty to protect the interests of all parties with either vested or contingent interests in an estate." In ***re Anders' Estate,*** 209 ***So.*** 2d 269, 270 (Fla. 2d DCA), ***appeal dismissed sub nom. Whebyv. Florida Nat. Bank*** of ***Jacksonville,*** 212 ***So.*** 2d 874 (Fla. 1968). The collection, valuation and distribution of an estate's assets is

the very essence of a probate proceeding. §§ 733.602-733.608, Fla. Stat. (1987); *Williams v. Howard Cole & Co.*, 159 Fla. 151, 31 So. 2d 914,920 (1947); *Glidden v. Gutelius*, 96 Fla. 834, 119 So. 140, 142 (1928).

Defendants also take exception to plaintiffs' contention that the Giménez Child did not have the benefit of discovery mechanisms through which any fact allegedly concealed or misrepresented could have been ascertained. [Initial brief at pp. 26-27]. The Giménez Child and her able counsel could have taken the depositions of the Negrón Children under Rules 1.21, 1.24 and 1.25 of Florida's 1954 Rules of Civil Procedure.[12] They likewise could have served interrogatories and requests for production of documents under Rules 1.27 and 1.28 of the 1954 rules. Finally, the Giménez Child and her counsel under Rule 1.28 could also have inspected, measured, surveyed or photographed real property of the estate, including the Arrieta Ranch. The simple fact is that the Giménez Child and her counsel did have available to them ample discovery mechanisms to uncover any fact allegedly concealed or verify any fact allegedly misrepresented.

Defendants rely on *Columbus Hotel Corporation v. Hotel Management Co.*, 116 Fla. 464, 156 So. 893 (1934) for the proposition that a consent decree entered pursuant to a fraudulently induced settlement agreement may be set aside in an equitable action. [Initial brief at pp. 28-29]. Language in the *Columbus Hotel* case, quoted by plaintiffs, suggests that fraud employed in procuring a party's consent to a consent decree constitutes extrinsic fraud which may be attacked in an equitable action. However, the distinction between extrinsic fraud and intrinsic fraud is not analyzed in the *Columbus Hotel* opinion.

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[12] Rule A of the 1954 Rules of Civil Procedure states that "[t]hese rules are applicable to all suits of a civil nature and all special statutory proceedings in the ... County Judge's Courts ... whether recognizable as cases at law or equity...." Fla. R. Civ. P. A (1954).

Additionally, the facts in the ***Columbus Hotel*** case are very different from those in the case at bar. Thus, the ***Hotel Columbus*** language quoted by plaintiffs should not determine the result in the instant case.

In ***Columbus Hotel,*** G. .L. Miller & Co., Inc. ("Miller") underwrote **$1,600,000.00** in bonds issued by East Coast Enterprises, Inc. ("East Coast") and guaranteed by Miami Holding Company ("Miami Holding"). ***Columbus Hotel,*** **156** ***So.*** at **894-95.** Proceeds of the bonds were to be used to finance a hotel. ***Id.***

Miller became an involuntary bankrupt in the United States District Court for the Southern District of New York, the Hon. Julian W. Mack presiding. ***Columbus Hotel,*** 156 ***So.*** at **895.** A bondholders' committee was established to protect the interests of the holders of bonds. ***Id.***

East Coast defaulted on the bonds, and foreclosure proceedings were begun in the circuit court of Dade County against East Coast, Miami Holding and others. ***Id.*** A contract was executed in which the bondholders' committee settled the pending litigation to collect on the bonds and a 25% interest in the hotel was acquired by Hotel Management Co., a corporation owned by a Mr. S. L. Lynch. ***Hotel Columbus,*** **156** ***So.*** at **895-96.**

Judge Mack approved the settlement contract. ***Hotel Columbus,*** **156** ***So.*** at **896.** Apparently, the bondholders' committee had no power to act without the approval of Judge Mack. ***Columbus Hotel,*** **156** ***So.*** at **899.** A consent foreclosure decree was entered by the circuit court of Dade County pursuant to the settlement contract approved by Judge Mack. ***Columbus Hotel,*** **156** ***So.*** at **894.**

The bondholders' committee subsequently sued in the circuit court of Dade County to rescind the settlement contract which had been approved by Judge Mack in New York and to set aside the foreclosure decree which had been entered pursuant to that contract. ***Id.*** It was alleged that Mr. Lynch procured the settlement contract by fraudulently representing that Miami Holding, the guarantor of the bonds, had no assets and was insolvent. ***Hotel Columbus,* 156 *So.*** at **895.**

In the ***Columbus Hotel*** case, Judge Mack was presiding in New York over the bankruptcy of Miller, not of Miami Holding. The **only** misrepresentations alleged concerned the value of Miami Holding, not of Miller. Judge Mack was at best only tangentially concerned with the worth of Miami Holding. The settlement contract approved by Judge Mack in New York settled pending litigation in the Dade County foreclosure proceedings in which the bondholders' committee was participating. ***Hotel Columbus,* 156 *So.*** at **895.** The contract did not settle a dispute in the bankruptcy proceeding over which Judge Mack was presiding. Furthermore, Judge Mack testified that, at the hearing held to consider the settlement, counsel for Mr. Lynch made clear that "no representations whatsoever" concerning the settlement were being made to the court. ***Hotel Columbus,* 156 *So.*** at **900.** The very agreement itself had a clause disclaiming any representations. ***Id.*** In fact, this Court in ***Columbus Hotel*** concluded that not even the bondholders' committee relied on any misrepresentation made by Mr. Lynch, and thus the contract approved by Judge Mack could not **be** rescinded. ***Hotel Columbus,* 156 *So.*** at **901.**

Additionally, claimants in ***Columbus Hotel*** sought to set aside a consent decree in the circuit court of Dade County--the same court that had entered that decree. ***Hotel***

Columbus, **156 So.** at **894.** There is no evidence in the Columbus ***Hotel*** opinion that the settlement contract which lead to the consent foreclosure decree was submitted to the circuit court of Dade County for its review and approval. The only judicial approval of the settlement contract mentioned in the ***Columbus Hotel*** opinion is that of Judge Mack in the New York bankruptcy proceeding. ***Hotel Columbus,* 156 *So.*** at **896.**

In contrast to ***Hotel Columbus,*** the extent and value of the estate of Rafael Arrieta Ríos was a primary concern of Judge Blanton's probate court. The Settlement Agreement was approved and confirmed by Judge Blanton, not by a foreign court. The Settlement Agreement contained specific representations as to values and did not contain a disclaimer of representations. Additionally, there is no evidence that any disclaimer was orally made to Judge Blanton at the hearing approving the Settlement Agreement. Judge Blanton's order terminated controversies pending in his court, not controversies pending in a different court in a foreign jurisdiction. Finally, plaintiffs in the instant action seek to set aside a Florida consent decree in a collateral proceeding in a foreign court.

The facts underlying this appeal more closely resemble the facts underlying the ***Declaire*** case than those of the ***Hotel Columbus*** case. Unlike the ***Hotel Columbus*** opinion, the ***Declaire*** opinion analyzes the distinction between extrinsic and intrinsic fraud at length. The issues raised in this appeal should thus be resolved in accordance with the legal and equitable principles found in ***Declaire*** and its progeny, the latest pronouncement of this Court on the subject. ***Declaire*** accords a judicially approved settlement res judicata protection unless a party alleges and proves extrinsic fraud which prevents it from having an opportunity to present its case in court. ***Declaire,* 453** So. 2d at **379.**

Even California case law, discussed by plaintiffs at pages 29 to 30 of their initial brief, is in accord with the position adopted by this Court in *Declaire* and defendants in this answer brief. ***In re Marriage of Park,*** 27 Cal. 3d 337, 342, 165 Cal. Rptr. 792, 796, 612 P.2d 882 (Cal. 1980) holds that a final judgment may be set aside by establishing that extrinsic factors prevented one party to the litigation from presenting its case.

In *Marriage of Park,* a judgment of dissolution of marriage was entered against Mrs. Park, dividing community property and awarding custody of the children to Mr. Park. *Marriage of Park,* 27 Cal. 3d at 341, 165 Cal. Rptr. at 796. The court which entered the dissolution judgment was not informed that Mrs. Park's absence at the proceedings was due to her involuntary deportation to Korea and that counsel appearing for Mrs. Park had not been authorized to so appear. ***Marriage of Park,*** 27 Cal. 3d at 340-41, 165 Cal. Rptr. at 795. Not even Mrs. Park's unauthorized counsel was aware of the deportation. ***Marriage of Park,*** 27 Cal. 3d at 344, 165 Cal. Rptr. at 797.

Mr. Park knew the reason for his wife's absence at the dissolution proceedings. ***Marriage of Park,*** 27 Cal. 3d at 340, 165 Cal. Rptr. at 795. However, Mr. Park failed to inform the court of the involuntary deportation, and even created the impression that Mrs. Park had voluntarily left for Korea. ***Marriage of Park,*** 27 Cal. 3d at 341, 165 Cal. Rptr. at 795.

The Supreme Court of California found that "Mr. Park had a duty of inform the court of the extrinsic facts that prevented his wife's attendance." *Marriage of Park,* 27 Cal. 3d at 343, 165 Cal. Rptr. at 796. By concealing those facts, Mr. Park perpetuated a fraud upon the court. Id. The dissolution judgment was vacated. *Marriage of Park,* 27 Cal. 3d at 347, 165 Cal. Rptr. at 799.

The *Marriage* of *Park* case is a classic example of extrinsic fraud which prevents a party from presenting its case in court. Plainly, the extrinsic fraud found in *Marriage of Park* is precisely the type of misconduct which would allow a court to set aside a judgment under the *Declaire* decision. In contrast, plaintiffs in the instant action do not allege any conduct which prevented a party from presenting its case in court, and thus are not entitled to have Judge Blanton's order set aside under *Declaire*.

Plaintiffs close the section of their initial brief concerning the res judicata issue with an argument which is raised for the first time here before this Court. They argue that, regardless of the preclusive effect of the order approving and confirming the Settlement Agreement with respect to the Florida estate of Rafael Arrieta Ríos, Judge Blanton's order is of no effect with respect to the Puerto Rican estate. [Initial brief at pp. 30-32]. This new argument is without merit.

A reading of Judge Blanton's order shows that its purpose and effect was to terminate all controversies between the parties--in Florida, as well as in Puerto Rico. The order approving the Settlement Agreement "directed [the Giménez Child] to perform said agreement and comply therewith in all respects." [Fla. App. p. 74, 1st Cir. App. p. 236]. It does not read--"comply therewith in respect to the Florida estate"--as plaintiffs in effect so argue. Paragraph 13 of the Settlement Agreement states that the purpose and intention is "to irrevocably terminate and settle any and all differences and claims" which the Giménez Child may have against the Negrón Children and their properties and the estate of Rafael Arrieta Ríos. [Fla. App. p. 64, 1st Cir. App. p. 225]. Paragraph 17 of the

Settlement Agreement states that "the validity and binding effect of this agreement shall not be raised or questioned in the courts of Puerto Rico or elsewhere." [Fla. App. p. 65, 1st Cir. App. p. 226].

Plaintiffs cannot at the same time comply with Settlement Agreement "in all respects" as ordered by Judge Blanton and prosecute the instant action in Puerto Rico.

A stipulation requesting approval of the Settlement Agreement was submitted to Judge Blanton. [Fla. App. p. 72, 1st Cir. p. 233]. Plaintiffs, at page 30 of their initial brief, quote language in the stipulation which suggests that Judge Blanton's approval of the Settlement Agreement was being sought only with respect to provisions therein concerning estate assets administrable in Florida. But, that limiting language does not appear in Judge Blanton's order. Plaintiffs' attempt to limit the preclusive effect of Judge Blanton's order to the Florida estate is directly contradicted by language in the order specifically directing the Giménez Child to comply with the Settlement Agreement "in all respects". [Fla. App. p. 74, 1st Cir. p. 236].

Even assuming that Judge Blanton's order fails to conform to the stipulation, the proper procedure to correct such a defect in the order is by motion to the court which entered the order. Fla. R. Civ. P. 1.540. Alleged defects in Judge Blanton's order may not be corrected in a collateral civil action brought 23 years later in the United States District Court for the District of Puerto Rico.

Questions concerning the extent and the value of the estate of Rafael Arrieta Rios were before the Dade County probate court for resolution. The Giménez Child and her able counsel had ample discovery mechanisms available to uncover any fact allegedly concealed or verify any fact allegedly misrepresented concerning the extent and value of

the estate in those proceedings. Under this Court's decision in *Declaire*, plaintiffs' action is barred by the order approving and confirming the Settlement Agreement.

2. The facts allegedly concealed or misrepresented were discoverable in 1960.

The court of appeals certified to this Court a question concerning the constitutionality of 95.031(2) of the Florida Statutes in fraud actions under the "access to the courts" provision of the Florida constitution. [Fla. App. pp. 23-24]. Before proceeding to address the constitutional question certified, defendants wish to clarify a collateral issue. The question certified was framed in the context of "fraud that was not discovered or discoverable until more than 12 years after the date of its commission". [Fla. App. p. 24]. However, Florida law and the record requires this Court to conclude that the facts which plaintiffs allege were fraudulently concealed or misrepresented by defendants during the settlement negotiations were "discoverable" in 1960.[13] Apparently, the court of appeals misapprehended either the issue before it or Florida law on the subject.

The district court dismissed plaintiffs' action pursuant to section 95.031(2) of the Florida Statutes. The twelve-year bar of section 95.031(2) commences to run from the "date of the commission of the alleged fraud, regardless of the date ... the fraud was or should have been discovered." § 95.031(2), Fla. Stat. (1986). In contrast, the four-year bar of section 95.11(3) will commence to run from the time that a claimant "should have discovered an alleged fraud. § 95.031(2), Fla. Stat. (1986). Defendants triggered the bar

[13]For the sake of brevity, the ability to uncover facts allegedly concealed or verify facts allegedly misrepresented shall be referred to simply as "discoverable" or "discoverability".

of section 95.031(2) by establishing that more than twelve years transpired from the commission of the alleged fraud to the filing of plaintiffs' action.

Plaintiffs sought to escape the twelve-year bar of section 95.031(2) by attacking its constitutionality. In rejecting the constitutional attack, the district court stated:

> We cannot view this as an instance where a cause of action was undiscoverable during the statutory period and thus unconstitutionally barred before it ever arose. ***Cf. Diamond v. E.R Squibb*** *and* **Sons, *Inc.*, 397 So. 2d 671, 672** ([Fla.] **1981)** (McDonald, **J.** concurring).

[1st Cir. App. p. 565].

Over two pages of the opinion of court of appeals addresses the discoverability issue. [Fla. App. pp. 8-10]. However, it appears that there may have been some confusion between the issue of discoverability and the issue of when the alleged fraud should have been discovered. The former issue arguably is relevant to the constitutionality of section 95.031(2). The latter issue is relevant only to the four-year bar of section 95.11(3). Apparently the court of appeals addressed the discoverability issue in the context of the four-year bar of section 95.11(3), while the district court addressed the issue in the context of the constitutionality of the twelve-year bar of section 95.031(2).

As **a** result of this confusion, the court of appeals reversed the finding by the district court that the facts allegedly concealed or misrepresented were discoverable. [Fla. App. pp. **8-10].** Discoverability, it stated, was a genuine issue of material fact. [Fla. App. p. 10]. The court of appeals thus concluded that in **a** summary judgment proceeding the district court should have made the factual inference on the discoverability issue in favor of plaintiffs. [Fla. App. p. 8]. This conclusion is not in accord with Florida law.

A statute is "presumed valid and "should not be toppled unless it is determined invalid ***beyond a reasonable doubt."*** ***Knight & Wall Company v. Bryant,*** **178 *So.*** 2d **5, 8**

(Fla. 1965), ***cert. denied,*** 383 **U.S.** 958, 86 **S.** Ct. 1223, 16 **L.** Ed. 2d 301 (1966)(italics in original). "It is a fundamental principle that a party asserting the nullity of a statute is charged with the burden of proving that it is invalid." ***Milliken v. State,*** 131 ***So.*** 2d 889, 892 (Fla. 1961).

The discoverability issue was not raised by the defendants in their motion for summary judgment and supporting papers. [1st Cir. App. pp. 134-3511. It was not necessary to address the question because the twelve-year bar of section 95.031(2) was triggered regardless of the discoverability of the alleged fraud. Plaintiffs admitted in their reply brief to the court of appeals that "[i]t was the District Court which first introduced the factual element of the discoverability of the fraud in its decision...." [1st Cir. reply brief of plaintiffs at p. 8 n.2].

Rule 311.12 of the Local Rules for the United States District Court for the District of Puerto Rico required plaintiffs to specifically raise and support all genuine issues of material fact in a separate statement of facts.[14] Plaintiffs neither raised nor supported the discoverability issue in their separate statement of facts in opposition to the motion for summary judgment as required by Local Rule 311.12. [1st Cir. App. p. 383-88].

"Rule 56(e) ... requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,'

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[14] Local Rule 311.12 reads, in relevant part:

> The papers opposing the motion for summary judgment shall include a separate, short, and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried, properly supported by specific references to the record.

Dist. P.R. R. 311.12.

designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, 477 **U.S.** 317, 106 **S.** Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986) ***(quoting*** Rule 56(c) and (e) of the Federal Rules of Civil Procedure). Once again, plaintiffs failed to designate any fact showing that discoverability was a genuine issue for trial **as** required by Rule 56 of the Federal Rules of Civil Procedure.

Given the state of the record, the district court correctly concluded that the facts allegedly concealed **or** misrepresented during the settlement negotiations were discoverable during the twelve-year period of section 95.031(2). [1st Cir. App. p. 565]. Plaintiffs had the burden of proof on this issue, and failed to carry it. Thus, should this Court conclude that the discoverability of facts allegedly concealed or misrepresented is relevant to the constitutional analysis of section 95.031(2), it must resolve this issue in favor of the statute's validity.

Additionally, the conclusion of the district court that the facts allegedly concealed or misrepresented were discoverable is more an issue of law than of fact. It was addressed by the district court solely for the purpose of the constitutional analysis under the ***Diamond*** case. This Court is in a better position to determine what Justice McDonald meant by discoverable in ***Diamond*** than the court of appeals. A simple reading of plaintiffs' amended complaint shows that the district court's conclusion that the alleged fraud was discoverable is legally correct.

Paragraph 13 of the amended complaint alleges that properties disclosed in the Settlement Agreement "were grossly undervalued in order to convince plaintiff that her share was less than what it was really worth." [Fla. App. p. **90,** 1st Cir. App. p. 88]. Plaintiffs further allege that the Giménez Child was thus deceived to sell for only

$175,000.00 her share of her father's Florida estate, which share was worth over $2,000,000.00. [Fla. App. p. 90, 1st Cir. App. p. 88].

Plainly, the fair market value of the alleged grossly undervalued Florida properties was discoverable during the 21-month period between the death of Rafael Arrieta Ríos and the signing of the Settlement Agreement. Their fair market value was likewise discoverable within the statutory period of section 95.031(2). The principal Florida asset was a 6,000-acre cattle ranch. Distinguished Florida counsel, M. Lewis Hall, and the Giménez Child could have inspected, measured and surveyed the cattle ranch and other properties during this period, pursuant to Rule **1.28** of Florida's 1954 Rules of Civil Procedure, and determined for themselves their now alleged value.

Paragraph **14** of the amended complaint alleges that defendants concealed the fact that Central Juanita, Inc. (the "sugar mill") owned real properties in Puerto Rico worth in excess of **$15,000,000.00.** [Fla. App. p. 90, 1st Cir. App. p. 88]. This Court may take judicial notice of the fact that under Puerto Rican law information concerning the ownership and size of all Puerto Rican land may be found at the registry of property. P.R. Laws ***Ann.*** tit. 30, **§§ 2101,** 2308 (1979); see also P.R. Mortgage Law, **§** 63 (July **14,** 1893)(repealed 1979). All real property belonging to the sugar **mill,** allegedly concealed, could have been easily discovered at the registry of property in **1960.**

Paragraph **14** of the amended complaint also alleges that the defendants fraudulently represented that the sugar mill was an unprofitable business and that the mill itself had only scrap metal value, when in reality it was worth over $1,000,000.00. [Fla. App. p. 90, 1st Cir. App. p. 88]. This Court may take judicial notice of the fact that under Puerto Rican law a local corporation must file each year at the commonwealth

department of state a complete financial statement, verified and certified by a licensed public accountant. P.R. Laws ***Ann.*** tit. 14, § 2301 (1984). Prior to 1984, the corporations law also required that this annual report be filed with the department of treasury. P.R. Law No. 45, § 1 (June 7, 1977)(amended 1983, effective 1984). This requirement dates back to 1911. P.R. Law No. 30, § 25 (March 9, 1911)(amended).[15] Once again, the profitability and value of the sugar mill could have easily been discovered at the department of state and the department of treasury in 1960. The sugar mill could also have been inspected in 1960 to determine its worth.

Paragraph 17 of the amended complaint alleges that defendants concealed the fact that Rafael Arrieta Rios at the time of his death was the owner of numerous real properties recorded in his name in Puerto Rico. [Fla. App. p. 91, 1st Cir. App. p. 89]. These are properties other than those alleged to have belonged to Rafael Arrieta Rios but held in the names of the defendants. As with the sugar mill properties, their existence could easily have been discovered at the registry of property in 1960.

Plaintiffs submitted in support of their opposition to the motion for summary judgment a department of treasury notice of death listing seven properties recorded in the name of Rafael Arrieta Rios. [lst Cir. App. p. 444]. The existence of these properties could also have been discovered by examining the estate file at the department of treasury.

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[15]The requirement that the annual report filed at the secretary of Puerto Rico, now department of state, be signed by a public accountant was added in 1936. P.R. Law No. 92, § 1 (May 13, 1936). The same requirement for the annual report filed at the department of treasury was added in 1948. P.R. Law No. 154, § 1 (May 11, 1948).

A search at the Puerto Rican registry of property in 1960 would have disclosed the complete extent of real properties in Puerto Rico owned and held in the names of defendants, but alleged to have belonged to Rafael Arrieta Rios. Doubts concerning the ownership of those properties could have been resolved in 1960. Indeed, defendants contend that these doubts were resolved by the Settlement Agreement, for otherwise references in the agreement to the settlement of "claims ... against the Negron Children and their properties..." would be meaningless verbiage. [Fla. App. p. 64, 1st Cir. App. p. 225].

Finally, paragraph 17 of the original and amended complaints admits that numerous facts allegedly concealed or misrepresented during the settlement negotiations, unrelated to the declaration of trust, were discovered by plaintiffs prior to the filing of the complaint in 1983. [Fla. App. pp. 30, 91, 1st Cir. App. pp. 5, 89]. These facts which plaintiffs admit were discovered "upon further investigation" in 1983 were just as discoverable in 1960. [Fla. App. pp. 30, 91, 1st Cir. App. pp. 5, 89].

The finding of the district court, that the facts allegedly concealed or misrepresented by defendants during the settlement negotiations were discoverable during the twelve-year period of section 95.031(2), is both legally and factually correct.

3. The Florida statute of repose is constitutional.

The first question certified by the court of appeals concerns the constitutionality of Florida's statute of repose, section 95.031(2), under article I, section 21 of the Florida

constitution. However, should this Court hold that Judge Blanton's order precludes plaintiffs' cause of action, it need not decide this constitutional issue. *Singletary*, 322 **So.** 2d at 552.

The district court held that plaintiffs' cause of action was barred by section 95.031(2) of the Florida Statutes, which the district court concluded "quite clearly bans an attempt to redress a wrong that may have been committed more than twenty years ago." [1st Cir. App. pp. 563-64]. Although this Court in two recent product liability cases found section 95.031(2) to be constitutional, the court of appeal considered the matter in fraud actions to be an unsettled question of Florida law. [Fla. App. p. 11]. It certified the issue to this Court. [Fla. App. pp. 23-24].

Florida's statute of repose, **as** in effect prior to October 7, 1983, the date the original complaint in the present action was filed, provides in pertinent part **as** follows:

> (2) Actions for ... fraud under subsection 95.11(3) must be begun within the period prescribed in this chapter, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in subsection 95.11(3) but in any event ... within 12 years after the date of the commission of the alleged fraud, regardless of the date ... the fraud was or should have been discovered.

§ 95.031(2), Fla. Stat. (1978)(amended 1986).[16] Section 95.11(3) establishes a four-year statute of limitations for "[a] legal or equitable action founded on fraud." § 95.11(3)(j), Fla. Stat. (1974). The twelve-year absolute bar of section 95.031(2) thus applies to all legal or equitable actions founded on fraud.

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[16]Section 95.031(2) (1978) was amended in 1986. Prior to 1986, there was a twelve-year bar on actions for product liability, **as** well **as** on actions for fraud. The absolute twelve-year bar on product liability claims was deleted **in** 1986, while that on actions for fraud remained intact.

Pursuant to section 95.031(2) plaintiffs had twelve years from the date of the commission of the alleged fraud to institute their cause of action. However, because claimants' cause of action would be barred by the 1974 (effective January 1, 1975) amendments to the Florida law on limitations of actions, and would not have been barred under prior law, the Florida legislature allowed claimants a one-year period, until January 1, 1976, to commence their actions. § 95.022, Fla. Stat. (1975).[17] As plaintiffs did not commence their action prior to January 1, 1976, it was absolutely barred on that date by sections 95.022 and 95.031(2).

Plaintiffs contend that section 95.031(2) denies their right of access to the courts, as guaranteed by article I, section 21 of the Florida constitution. Florida decisions, prior to August 1985, had held that the Florida statute of repose, in the context of product liability actions, violated article I, section 21 of the Florida constitution. Plaintiffs cite in their initial brief much of this Florida case law to support their position.

However, on August 29, 1985, this Court reversed its position on the constitutionality of section 95.031(2). ***Pullum v. Cincinnati, Inc.,*** 476 ***So.*** 2d 657 (Fla. 1985), ***appeal dismissed,*** 475 **U.S.** 1114, 106 S. Ct. 1626 (1986). It held "that section 95.031(2) is not unconstitutionally violative of article I, section 21 of the Florida constitution." *Pullum*, 476 So. 2d at 659.

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[17]**Section** 95.022 of the Florida Statutes provides as follow:

> This act shall become effective on January 1, 1975, but any action that will be barred when this act becomes effective and that would not have been barred under prior law may be commenced before January 1, 1976, and if it is not commenced by that date, the action shall be barred.

§ 95.022, Fla. Stat. (1975).

In the Pullurn case, section 95.031(2) reduced the time that plaintiff Richard Pullurn had to file suit from four years to one and one-half years after the date of his accident. Pullurn, 476 So. 2d at 658. Pullum neither argued, nor could have argued, that section 95.031(2) barred his cause of action before it ever accrued. Pullurn, 476 So. 2d at 658-659. Rather, he argued that section 95.031(2), as "amended by the decision in ***Battilla v. Allis Chalmers Mfg. Co.,*** 392 So. 2d 874 (Fla. 1980), violated his right to equal protection of the laws. Pullurn, 476 So. 2d at 659.

This Court in Pullurn receded from its decision in ***Battilla*** and found that section 95.031(2), as originally enacted by the Florida legislature, did not deny equal protection under the Florida constitution. Id. In so holding, this Court stated that "[t]he legislature, in enacting this statute of repose, reasonably decided that perpetual liability places an undue burden on manufacturers...." Pullurn, 476 So. 2d at 659.

Any lingering doubts concerning the constitutionality of section 95.031(2) were put to rest in ***Melendez v. Dreis and Krump Mfg.*** Co., 515 So. 2d 735 (Fla. 1987). Unlike Pullurn, the action in ***Melendez*** was barred by section 95.031(2) almost seven years before it accrued. ***Melendez,*** 515 So. 2d at 736. The trial court entered summary judgment dismissing the action based on section 95.031(2). Id. This Court affirmed. ***Melendez,*** 515 So. 2d at 737. It implicitly held that section 95.031(2) did not violate art. I, section 21, of the Florida constitution, "even with respect to causes of action which did not accrue until after the twelve-year statute of repose had expired." ***Melendez,*** 515 So. 2d at 736.

Plaintiffs argue at pages 16 to 19 of their initial brief that section 95.031(2) would violate the Florida constitution if it barred an action that was not discovered until twenty-two years after the commission of the alleged wrongful act. They cite ***Diamond v.*** E.R

Squibb and Sons, Inc., 397 So. 2d 671 (Fla. 1981) and footnote "*" at page 659 of Pullurn to support their contention. [Initial brief at pp. 18-19].

However, a reading of *Diamond* shows that this Court in *Diamond* did not base its decision on the fine distinction drawn by plaintiffs or Justice Alderman in the Pullurn footnote. This Court in *Diamond* plainly found that section 95.031(2) was unconstitutional because, just as in *Overland Const.* Co. *v. Sirmons*, 369 So. 2d 572 (Fla. 1979), it "operated ... to bar a cause of action before it ever accrued, so that no judicial forum was available to the aggrieved plaintiff." *Diamond,* 397 So. 2d at 672. Whatever merit that argument may have had in 1981 or even at the time Pullurn was decided in 1985, it clearly has none after the 1987 *Melendez* decision. Plaintiffs' efforts to revive and expand the *Diamond* ruling are futile.

Section 95.031(2) would still constitutionally bar plaintiffs' action under *Diamond* and the *Pullurn* footnote, even if the *Melendez* decision could be ignored. The facts in *Diamond* considered critical to Justice Alderman in the *Pullurn* footnote are not present in the instant action.

Nina Diamond in 1955 and 1956, while yet unborn, had administered to her diethylstilbestrol, a cancer causing drug. *Diamond,* 397 So. 2d at 671. Although the drug was administered before the bar date of section 95.031(2), the injury did not manifest itself until after the bar date. *Diamond,* 397 So. 2d at 672 (Justice McDonald, concurring). Justice McDonald in *Diamond* concluded that "when an injury has occurred but a cause of action cannot be pursued because the results of the injury could not be discovered, a statute of limitation barring the action does, in my judgment, bar access to the courts and is constitutionally impermissive." Id.

Justice Alderman in the *Pullum* footnote recites the same critical facts addressed by Justice McDonald in his concurring opinion in *Diamond*. Pullurn, 476 So. 2d at 659 n."*". However, unlike Justice McDonald, Justice Alderman concludes that because the injury did not manifest itself until after the bar date

> [t]he legislature, no doubt, did not contemplate the application of this statute to the facts in *Diamond*. Were it applicable, there certainly would have been a denial of access to the courts.

Pullurn, 476 So. 2d at 659 n."*". Two important aspects of the *Pullurn* footnote should be kept in mind.

First, unlike the injury alleged in *Diamond*, the facts allegedly concealed or misrepresented in the instant case were discoverable before the January 1, 1976 bar date imposed by the statute of repose. Plaintiffs' arguments notwithstanding, concealing and misrepresenting facts is not the equivalent of administering diethylstilbestrol to an unborn child. The cancerous effects of diethylstilbestrol are not discoverable until they manifest themselves. Additionally, there is no injury until the cancer manifests itself, other than perhaps a claim for the mental distress caused by the fear of cancer. Defendants previously showed that the facts allegedly concealed or misrepresented during the settlement negotiations were discoverable at least as early as 1960.

Second, Justice Alderman in the Pullurn footnote did not approve of the ruling in *Diamond*, from which he dissented, that section 95.031(2) was unconstitutional. Rather, he considered *Diamond* to be an atypical products liability case to which the legislature did not contemplate the application of section 95.031(2). Pullurn, 476 So. 2d at 659 n."*". In contrast, plainly the Florida legislature did contemplate the application of section 95.031(2) to plaintiffs' rather typical fraud action.

Plaintiffs rely on yet another footnote, arguing that section 95.031(2) has been declared to be unconstitutional, in the context of an action based on fraud, in ***Kempfer v. St. Johns River Water Management District***, 475 ***So.*** 2d 920,924 n.14 (Fla. 5th DCA 1985), ***appeal dismissed,*** 488 ***So.*** 2d 68 (Fla. 1986). [Initial brief at pp. 7-81. This is not the case. Footnote 14 of ***Kempfer*** is **dictum.**[18] Furthermore, ***Kempfer*** was decided prior to Pullurn, and the dictum therein cited by plaintiffs has no validity after Pullurn and ***Melendez.***

Plaintiffs place importance on the fact that the date of the dismissal of the appeal in the ***Kempfer*** case was subsequent to the date of the decision in Pullurn. [Initial brief at p. 8]. However, a dismissal of an appeal by this Court does not signify approval of dictum in a lower court's opinion. The fact remains that plaintiffs do not cite any case decided after *Pullum* to support their contention that section 95.031(2) is unconstitutional under any set of circumstances.

The only case found involving fraud and applying section 95.031(2) is ***Armbrister v.*** Roland ***Intern. Corp.***, 667 F. Supp. 802 (M.D.Fla. 1987). Plaintiff in ***Armbrister*** attacked the validity of section 95.031(2) under article I, section 21 of Florida's constitution. ***Armbrister,*** 667 F. Supp. at 811. Judge Kovachevich in ***Armbrister*** considered and rejected the same *Kempfer*-footnote argument advanced by plaintiffs in their initial brief. ***Armbrister,*** 667 F. Supp. at 811-12.

Plaintiffs also rely on ***Kluger v. White,*** 281 ***So.*** 2d 1 (Fla. 1973) for the proposition that section 95.031(2) denies access to the courts under the Florida constitution. [Initial

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'The trial court in ***Kempfer*** held that claims were barred by section 95.12 of the Florida Statutes (1979), sovereign immunity and insufficiency of the allegations of extrinsic fraud. The appeals court affirmed the judgment insofar as the insufficiency of the allegations. The ***Kempfer*** court did not, therefore, rule on the constitutionality of section 95.031(2).

brief at pp. 9, 17-18]. The decision in ***Huger*** turned on the fact that the legislature ***abolished*** a common law and statutory right of action without providing an adequate alternative or showing an overpowering public necessity. ***Huger,*** 281 So. 2d at 4. However, section 95.031(2) did not abolish plaintiffs' cause of action, it only required that it be filed within a reasonable time.

Section 95.031(2), by placing a twelve-year cap on fraud actions, established "the date of the commission of the alleged fraud as a new accrual event. § 95.031(2), Fla. Stat. (1975). "[T]he acts from which the time limited shall begin to run, will generally depend upon the sound discretion of the Legislature..." ***Terry v. Anderson,*** 95 U.S. 628, 24 L. Ed. 365, 366 (1877) ***(quoting Jackson v. Lampire,*** 28 U.S. ***(3*** Pet.) 280, 290, 7 L. Ed. 679, 683 (1830)). A saving clause allowed claimants a one-year period, from January 1, 1975 to January 1, 1976, to commence any action that would otherwise be barred by the new statute. § 95.022, Fla. Stat. (1975). Plaintiffs cited ***Terry,*** at page **23** of their initial brief to the court of appeals, for the proposition that a legislature may constitutionally shorten a limitations period. This is the action that the Florida legislature adopted.

This Court in ***Campbell v. Home,*** 147 Fla. 523, 3 So. 2d 125 (1941) stated that "statutes of limitation affecting existing rights are not unconstitutional if a reasonable time is given for enforcement of the right before the bar takes effect." ***Campbell,*** 3 So. 2d at 126 (citations omitted). In ***Campbell,*** a statute of limitation imposing a twenty-year bar where none existed before was considered to be constitutional because a one-year saving clause preserved a reasonable period of time to enforce existing rights. Id.; ***see also In re Brown's Estate,*** 117 ***So.*** 2d 478 (Fla. 1960)(An eight-month saving clause rendered a statute of limitation constitutional). The ***Campbell*** and ***Brown's Estate*** cases were decided

under article III, section 33 of Florida's constitution of 1885.[19] Nonetheless, they may be interpreted as implicit findings that access to the courts is not denied when a one-year saving clause is provided.[20]

Plaintiffs' action was not abolished by section 95.031(2). The one-year saving period, which plaintiffs had under section 95.022 to enforce any right they may have had before the bar took effect, was a reasonable time. This is particularly so taking into consideration that every fact allegedly concealed or misrepresented in 1960 was discoverable at any time before the January 1, 1976 bar date of section 95.022.

Assuming for the sake of argument that sections 95.022 and 95.031(2) of the Florida Statutes abolished plaintiffs' action without providing an adequate alternative, the statutes would still be constitutional under the "overpowering public necessity" exception of the *Huger* case. *Huger,* 281 *So.* 2d at 4.

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[19]Article III, section 33 of the 1885 Constitution read: "No statute shall be passed lessening the time within which a civil action may be commenced on any cause of action existing at the time of its passage." Art. III, § 33, Fla. Const. (1888). "The current applicable provision, Art. III, § 11(a)(7) of the 1968 Constitution, retains only one restriction upon the Legislature's power to alter the statutes of limitation--that such alteration may not be accomplished by means of a special law." *Kluger,* 281 *So.* 2d at 6 n.4 (Justice Boyd, dissenting).

[20]The access to the courts provision of the 1885 constitution, in effect when *Campbell* and *Brown's Estate* were decided, read:

> All courts in this state shall be open, so that every person for any injury done to him in his lands, goods, person or reputation shall have remedy, by due course of law, and right and justice shall be administered without sale, denial or delay.

Art. I, § 4 Fla. Const. (1885). Article I, section 21 of the 1968 constitution "condensed without change in substance" article I, section 4 of the 1885 constitution. *Handbook on Recommended Constitution for Florida,* p. 8, § 9 (Florida Constitution Advisory Commission). [Florida State Archives, record group 005, series 726, carton 2, folder 18].

The legislative history to Florida's statute of repose indicates that the objectives of such a statute are:

> (1) To compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend while the evidence is still fresh.
>
> (2) Protect potential defendants from the protracted fear of litigation.
>
> (3) Promote security and stability in human affairs by stimulating activity and punishing negligence.

T. Bevis, ***Project*** on ***Statutes of Limitation: Some Policy Considerations,*** p. 1 (Statutory Revision Commission April 8, 1972). [Florida State Archives, record group 940, series 1052, carton 14, folder entitled "Tom Bevis - Statutes of Limitation"].

Prior to 1975, section 95.11(5)(d) of the Florida Statutes provided a three-year limitation period, running from the date of discovery, for fraud actions. The practical effect of section 95.11(5)(d) was to subject potential defendants to perpetual liability. The three aforementioned objectives of the statute of repose could never be attained so long as an indefinite limitation period existed. Attainment of these three objectives is the overpowering public necessity justifying section 95.031(2).

The facts underlying the instant action demonstrate the public importance of each of the three mentioned objectives.

(a) A fair opportunity to defend while the evidence is still fresh.

The record plainly shows that the passage of 23 years from the signing of the Settlement Agreement to the filing of the original complaint has prejudiced defendants' fair opportunity to defend themselves while the evidence is still fresh. Almost all of the

potential witnesses, except the parties themselves, have died.[21] Defendant Rafael Arrieta Negrón is incompetent. Efforts to locate the legal file of M. Lewis Hall, Esquire, have not succeeded, and the file must be considered lost. [1st Cir. App. p. 321]. Likewise, the legal file of Marshall O. Mitchell, Esquire could not be found and must be considered lost. [1st Cir. App. p. 325]. Defendants contend that these files would have proved that all of the claims made in the amended complaint were previously made by the Giménez Child, the Widow and their counsel during the settlement negotiations.??

The twelve-year bar of section 95.031(2) also protects the judicial system from stale claims. Plainly the preservation of judicial integrity is an overpowering public necessity. There comes a time when a defendant is not able to fairly defend himself because "evidence has been lost, memories have faded, and witnesses have disappeared. *Cf. Order of R Telegraphers v. Railway E. Agency,* 321 U.S. 342, 348-349, *64* S. Ct. 582, 586, 88 L. Ed. 788 (1944) ***quoted in American Pipe*** *and* ***Construction Co. v.*** Utah, 414 U.S. 538, 554, 94 S. Ct. 756, 766, 38 L. Ed. 2d 713 (1974). Unless courts have a means of preventing a claimant from prosecuting a claim after a reasonable limitation period has expired, a defendant who can no longer fairly defend himself risks an adverse jury finding. In cases in which fraud is falsely alleged, the judicial system is forced to become an

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[21]The list of potential witnesses, now dead, includes: Judge W. F. Blanton, the Widow, M. Lewis Hall, Esquire, George W. Whitehurst, Jr., Esquire, Celestino Iriarte, Esquire, F. Fernández Cuyar, Esquire, Marshall O. Mitchell, Esquire, and Frank W. Williamson, Sr. The importance of each one of these persons is shown in the statement of facts to this answer brief.

[22]The legal file of M. Lewis Hall, Esquire, of the firm of Hall & Hedrick, would probably have constituted the single most important piece of evidence in this action. As late as three years after filing the complaint, plaintiffs had not even bothered to contact Hall & Hedrick to inquire whether this important piece of evidence was available. [1st Cir. App. p. 324].

unwitting co-conspirator with the claimant. Section 95.031(2) of the Florida Statutes was designed to prevent this possible evil.

Defendants established that "evidence has been lost, memories have faded, and witnesses have disappeared" during the passage of 23 years from the signing of the Settlement Agreement to the filing of the instant action. This has made it impossible for defendants to fairly defend themselves before a jury at a trial.

It is anticipated that plaintiffs will argue in their reply brief, just as they did below, that defendants' "fair opportunity to defend" argument has already been rejected by this Court in *Overland*. This Court in *Overland* concluded that the difficulties of proof caused by the passage of time "would seem to fall at least as heavily on the injured plaintiffs...." *Overland*, 369 So. 2d at 574. While that may be the case in improvement to realty actions, it is not the case in fraud actions.

Improvement to realty actions are commenced soon after the accident occurs, while the evidence concerning the accident is fresh. Although construction may have ended years earlier, a building's plans are usually a public record, which "speak" for themselves as loudly at trial as when drafted. The conformity of the building to its plans can also be verified immediately before the trial by inspecting the building. Issues concerning acceptable industry standards can be determined by examining building codes in effect at the time of the construction. These building codes are also public documents, which likewise "speak" for themselves. The trial often becomes a battle of experts, not of fact witnesses. The tort usually is one of negligence, not intentional misconduct.

The passage of time is not so benign on fraud actions. A fraud action is always a dispute over who said or did not say what. Documents may have recorded what

representations were made, but often these documents are lost. Third-parties may be fact witnesses as to what transpired, but these third-parties often die before trial. Often the only fact witnesses are the parties themselves. Fraud is an intentional tort, and the accusation of fraud is a serious matter. As a result, one of the sides to the action has usually engaged in serious misconduct--defendants if they committed fraud, or plaintiffs if they have falsely alleged it. An innocent but accused defendant may have no reason to preserve evidence. A false accuser may profit by selectively preserving evidence. The environment is ripe for distortion, and the passage of time becomes a tool for the false accuser who waits until his victim is no longer able to fairly defend himself.

This is the type of harm which section 95.031(2) was designed to prevent. The Florida legislature reasonably determined that evidence was no longer "fresh" twelve years after "the date of the commission of the alleged fraud". § 95.031(2), Fla. Stat. (1978).

(b) Protect potential defendants from the protracted fear of litigation.

Plaintiffs and their counsel appear to have lost sight of the fact that a jury has not yet entered a verdict in this action. In instances too numerous to detail, plaintiffs' initial brief asserts, as if proven, that defendants are guilty of fraudulent conduct. The truth of plaintiffs' allegations was neither at issue here nor in the summary judgment proceedings or appeal below. These gratuitous assertions of "fact" will be denied by defendants, if necessary, at trial.

The suggestion that defendants, like murders and muggers, should not be allowed to raise the statute of repose defense is also rejected. [Initial brief at p. 12]. Section 95.031(2) was not enacted to protect the perpetrators of fraud. Plaintiffs state the obvious

when they say that there is no "overriding public interest in protecting the perpetration of fraud." [Initial brief at p. 11]. But they overlook the obvious, failing to recognize that one of the fundamental purposes of section 95.031(2) is to protect an innocent defendant from a false accusation of fraud. Until it is judicially determined otherwise, defendants are presumed innocent. As such, defendants have the right to be free from the protracted fear of litigation.

There is no denying that this five-year old litigation has inflicted both emotional and financial harm on defendants. At times plaintiffs' conduct toward defendants appears to have been motivated by pure maliciousness. For example, plaintiffs asserted as fact to the district court that defendants were guilty of "fiscal fraud on the government of Puerto Rico." [1st Cir. App. p. 364 n.6]. The "family laundry" has been dragged through three separate courts. Defendants were forced to produce to plaintiffs personal tax returns and bank records. The intrusion on their privacy has been enormous.

"[T]he right to be free of stale claims in time comes to prevail over the right to prosecute them." *Order of R. Telegraphers*, 321 U.S. at 349, 64 S. Ct. at 586. The Florida legislature reasonably determined that a potential defendant in fraud actions should not live in fear of litigation for more than twelve years.

c. Promote security and stability in human affairs.

The claims made in the amended complaint question the ownership of numerous real properties. Numerous real properties were attached without the posting of bond. Plaintiffs also sought to attach interest payments which constitute the primary means of support for defendants, all of whom are elderly individuals. The sale and development

of real properties was halted by plaintiffs' attachments. Long-standing business relationships have been strained. The uncertainty caused by this action has cast a cloud over all of defendants' lives and reputations.

The twelve-year bar of section 95.031(2) sets a reasonable limit on the instability that can be caused by a fraud action. The promotion of security and stability is a legitimate legislative function.

Plaintiffs argued below that these facts were irrelevant, claiming that "[o]nce a legislature establishes a Statute of Limitations at a certain number of years, it is not within the providence of any Court to determine or consider any perceived damage that may result to any party because of the application of such a Statute."[23] [1st Cir. App. p. 371]. These facts are material to the constitutional analysis of section 95.031(2). They underscore the critical policies underlying the enactment of a statute of limitations and repose.

Defendants end their argument on the constitutionality of section 95.031(2) with a restatement of plaintiffs' principle on constitutional adjudication which is considerably more eloquent and accurate.

> Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.

Missouri, K. & T. R. Co. v. May, 194 U.S. 267, 270, 24 S. Ct. 638, 639, 48 L. Ed. 971 (1904) (Justice Oliver Wendell Holmes).

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[23]This is a principle of law plaintiffs apparently consider valid, unless the "party" to which the principle applies is plaintiffs themselves.

Section 95.031(2) of the Florida Statutes does not violate article I, section 21 of Florida's constitution. It is a reasonable and legitimate enactment by the legislature, designed to safeguard the liberties and welfare of the people.

4. The matter of an alleged continuing and concealed fraud is not properly before the court.

Plaintiffs' argue that the statute of repose did not commence to run until 1981 because there was a continuing fraud perpetrated against them. [Initial brief at pp. 20-21]. This argument is without merit and should not even be considered by this Court.

The burden of establishing at a trial the existence of a continuing and concealed fraud falls upon plaintiffs. Rule 9(b) of the Federal Rules of Civil Procedure states that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b).

Rule 56(e) of the Federal Rules of Civil Procedure required plaintiffs "to go beyond the pleadings" and designate "specific facts showing that there is a genuine issue for trial." *Celotex*, 106 S. Ct. at 2553. Rule 311.12 of the Local Rules for the United States District Court for the District of Puerto Rico likewise required plaintiffs to specifically raise and support all genuine issues of material fact. Dist. P.R. R. 311.12.

Plaintiffs did not raise the continuing fraud issue as required by the rules governing the summary judgment proceedings. The district court correctly entered summary judgment dismissing the amended complaint. It would be improper for this Court to consider on an appeal an issue which was in effect waived below.

The continuing fraud argument is also without merit as a matter of fact. The court of appeals correctly observed that "[a]ll frauds are 'continuing' in the sense that the victim

remains fooled until the fraud is discovered." [Fla. App. p. 20]. It also correctly concluded that the limitations period of section 95.031(2) commenced to run in "1960, when the settlement agreement was signed." [Fla. App. p. 20].

CONCLUSION

For all of the foregoing reasons it is respectfully urged that this Court find that the order approving and confirming the Settlement Agreement precludes plaintiffs' action. In the alternative, it is respectfully urged that this Court find that section 95.031(2) of the Florida Statutes constitutionally bars plaintiffs' action.

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