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SEP 19 1991
CLERK, SUPREME COURT
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Chief Deputy Clerk

SUPREME COURT OF THE STATE OF FLORIDA

ALVA ALLEN INDUSTRIES, INC.,

Petitioner,

vs. Case No.: 78,435

MIGUEL TORRES,

Respondent.

FIRESTONE TIRE & RUBBER COMPANY, et al.,

Petitioner,

vs. Case No.: 78,255

MARIA ACOSTA as Personal Representative of the Estate of LUIS ACOSTA, SR., deceased,

Respondent,

Appeal from the District Court of **Appeal** of Florida for the Third District, Case No. 90-2024

FLORIDA DEFENSE LAWYER'S ASSOCIATION
AMICUS CURIAE BRIEF

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INTRODUCTION

The FDLA has received permission to participate amicus curiae on behalf o Petitioner Firestone Tire and Rubber Company in **Case** No. 78,255. Accordingly, the argument is directed to the lower court decision involving Firestone. The Torres case is not discussed, although the legal arguments would obviously pertain to the issues raised therein.

STATEMENT OF CASE AND FACTS

As suggested by Firestone Tire & Rubber Company [hereinafter "Firestone or Petitioner"] in its brief to the Third District Court of Appeal, the material facts relevant to the motion for summary judgment may be succinctly stated. The allegedly defective tire rim assembly was delivered to the initial purchaser no later than December 31, 1966; the effective date of Florida's product liability statute of repose, Section 95.031(2), Florida Statutes was January 1, 1975 **[see,** Laws of Florida, Ch. 74-382, §§ 3 and 36]; the 12 year statute of repose ran with respect to this tire and rim on December 31, 1978; the statute of repose was repealed by the Florida legislature effective July 1, 1986. The Plaintiff's cause of action did not accrue until **August** 18, 1987, some 21 years after the product was delivered to its initial purchaser and some seven and one half years after the 12 year statutory repose period had expired. (R. 382-83). The FDLA otherwise adopts the statement of the facts noted in Petitioner's initial brief.

SUMMARY OF ARGUMENT

When the legislature enacted the statute of repose codified at Section 95.031(2), Florida Statutes in 1975 it did so in light of articulable public policy concerns facing manufacturers of durable goods and their insurers. As the trial court correctly recognized, the repeal of that legislation did not purport to divest manufacturers of the defense acquired under the statute. Acosta v. Firestone Tire & Rubber Co., Case No. 87-5315 (Fla. 11th Cir.Ct. 1990)(memorandum opinion by Judge Korvick); Walker v. Miller Manufacturing Co., 16 F.L.W. 2148 (Fla. 4th DCA Aug. 14, 1991).

In Melendez v. Dreis and Krump Manuf. Co., 515 So.2d 735 (Fla 1987), this court held the legislature did not repeal the statute of repose retroactively and that the repeal legislation would have prospective effect only. This court also recognized that the repose period runs regardless of when the cause of action accrues. Melendez, at 736. Thus, implicit to the Melendez decision and the language of the repose statute is the conclusion that manufacturers of products shielded from liability by the statute of repose are entitled to the defenses afforded by that statute irrespective of the subsequent legislative amendments.

Melendez recognized that the repeal would not be retroactive for causes of action that accrued before the date of repeal. There is no basis for concluding that the repeal legislation may be construed as having prospective effect for claims brought before the date of repeal yet retroactively effective for claims brought after the date of repeal. Unless this court overrules Melendez, the Plaintiff cannot claim to be exempt from the effect of the statute of repose which rendered the allegedly defective rim non-actionable in 1978 (twelve years after the last date of delivery). Even assuming the

Respondent had raised below constitutional objections to the application of the statute of repose, it is undeniably true that the legislature has the power to define spheres of immunity from tort liability for different classes of individuals if there is any rational basis for the legislation. The jurisprudence of Florida is replete with statutorily created **(as well as** common law) immunities which insulate individuals from liability for otherwise tortious acts.

The Plaintiff does not have a vested right to any common law products liability claim. To hold that the legislature in declining to repeal the statute retroactively may not legitimately decide to render certain products non-actionable would be to impermissibly impinge upon the legislature's legitimate sphere of activity within the system of checks and balances inherent to our tripartite system of government. Moore v. State, 343 So.2d 601 (Fla. 1977). This court should reverse the lower court which under the guise of statutory interpretation undermined the legislature's irrefutable constitutional right to shape and define the tort law of Florida.

The Third District Court of Appeal overlooked the express and implied holding of this court in Melendez. The Third District Court of Appeal misconstrued the affect of the repeal legislation, and erred in reversing the summary judgment properly entered **by** the trial court.

ARGUMENT

I. THE TRIAL COURT CORRECTLY INTERPRETED THE STATUTE OF REPOSE IN ENTERING SUMMARY JUDGMENT FOR THE PETITIONERS, AND THE APPLICATION OF THE STATUTE OF REPOSE TO CLAIMS BROUGHT AFTER ITS REPEAL REFLECTS THE LEGISLATURE'S RIGHT TO MODIFY COMMON LAW TORT LIABILITY.

A. THE LEGISLATURE COULD RIGHTFULLY CONCLUDE IN FAILING TO REPEAL THE STATUTE OF REPOSE RETROACTIVELY THAT THE FORMER STATUTE SHOULD CONTINUE TO APPLY TO CLAIMS BASED UPON ACCIDENTS OCCURRING AFTER THE DATE OF REPEAL BECAUSE OF LEGITIMATE PUBLIC POLICY CONCERNS FACING MANUFACTURERS.

When the legislature enacted the products liability statute of repose in 1975, it and other state legislatures were responding to legitimate public policy concerns facing manufacturers of durable goods, their insurers, and the liability crisis occasioned in part by developments in products liability law in the 1960's and 1970's. Those decades witnessed the erosion of privity as a bar to personal injury claims by subsequent purchasers, the expansion of strict liability, more class actions made possible by improved communication systems and discovery methods (e.g., videotaped depositions), the implementation of comparative negligence in place of the centuries old contributory negligence rule, and greater statutory and administrative liability. See e.g., West v. Caterpillar Tractor Company, 336 So.2d 80 (Fla. 1976)(expressly recognizing strict liability for manufacturers and discussing erosion of privity requirement); Hoffman v. Jones, 280 So.2d 431 (Fla. 1973)(adopting comparative negligence).

The Florida legislature's decision to enact the statute of repose and its

application to the Plaintiffs claim here is well supported by legitimate public policy concerns within the province of the legislature, Like common law laches and statutes of limitation, a statute of repose prevents a defendant from being required to defend a claim "when evidence has been lost, memories have faded, and witnesses have disappeared." Klein v. Catalano, 386 Mass. 701, ___, 437 N.E.2d **514, 520** (1982)(quoting Rosenbera v. Town of North Beraen, 61 N.J. 190, 201, 293 A.2d 662, ***667-68*** (1972). Time does not play so roughly upon the plaintiff's case as it does the Defendant's. To negate (in the minds *of* jurors) the natural tendency to infer fault from the very happenstance of injury, the defendant in reality bears the burden of establishing the reasonableness of its design at the time of manufacture. See Wells v. coutter Sales. Inc., 306 N.W. 2d 411 (Mich.App. 1981)(discussing manufacturer's "state of the art" defense in products liability cases). A statute of repose reflects a recognition that jurors are too quick to compare the subject product to current state of the art technology rather than to the time of manufacture. See Thornton v. Mono Manufacturing, 99 Ill.App.3d 722, 725, 425 N.E.2d 522, **524** (1981). **See** generally, McGovern, "The Variety, Policy and Constitutionality of Product Liability Statutes of Repose" 30 Am.U.L. Rev. 579-80 (1981). Young jurors charged with applying their "experience and commons sense"' in products liability claims are given the formidable task *of* judging in a historical context the reasonableness of the design and manufacture of a product which was made before the juror was born.

Because of improvements in manufacturing, the useful life of goods has been extended geometrically; yet, never does the purchase price contemplate the increased

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[1]See Florida Standard Jury Instruction 2.2

liability exposure from longer useful life, nor even the insurance premiums paid for "long-tail" liability coverage to guard against the potential for claims decades after sale. Statutes of repose in Florida and other jurisdictions were enacted in part in response to the skyrocketing product liability costs fueled by huge increases in the number of product liability claims, large increases in the amounts of settlements and awards, and indications that the victim of an allegedly defective product was favored over the maker of that product in the tort process. ***See*** generally Scalf v. Berkel. Inc., **448** N.E.2d 1201, 1204 (Ind.App. 1983) cited in Burke, "Repose for Manufacturers; Six Year Statutory Bar to Products Liability Actions Upheld - Tetterton v. Lona Manufacturing Co.," **64** N.C.L.Rev. 1157 (August 1986)[hereinafter Burke]. Statutes of repose represent a legitimate legislative response to the "long tail" problem of continuing responsibility of manufacturers and sellers of older products. See generally Turner, "The Counter Attack to Retake the Citadel Continues, An Analysis of the Constitutionality of the Statutes of Repose in Products Liability," **46** J. Air L & Com. 449, 451-55 (1981); Yarbro v. Hilton Hotels Corporation, ___ Col. __, 655 P.2d **822** (1982). By cutting off the defendant's liability after a given number of years, statutes of repose lead to more certain liability and thus provide greater actuarial precision in setting insurance rates. More certain liability and stabilized insurance rates facilitate efficient business planning and ultimately benefit insurance consumers and small businesses often saddled by large insurance premiums.

A study by the Insurance Services Office indicates that ninety-seven percent of all products liability claims arise within the first six years of ownership.* Thus, the

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[2]Insurance Services Office, Product Liability Closed Claim Survey; A Technical Analysis of Survey Results 81-83 (1977).

number of manufacturers entitled to the protection of any repose period in Florida or elsewhere is small, and the argument that repose periods discourage incentives for safety becomes unavailing. Immediate post-sale claims, governmental regulatory safety requirements, and notices from agencies such as the Consumer Product Safety Commission, competition (witness the development of automobile air bags as a marketing tool), and increased liability premiums caused by potential claims provides more than ample impetus for seeking safer designs in manufacturing. Moreover, the repose legislation does not insulate manufacturers as a whole, but rather only specific, identifiable, older goods. Because the repose statute does not offer a blanket immunity to manufacturers, it like other limitation periods cannot be credibly claimed to discourage safety engineering.

All of the reasons articulated above independently justify the decision of the Florida legislature to enact a statute of repose for older goods, and similarly justify its decision to decline to repeal the leaislation retroactively. This court should reject Respondent's invitation to substitute its judgment for that of the legislature in the exercise of its plenary police power. See Pacheco v. Pacheco, 246 So.2d 778 (Fla. 1970)(discussing the police power) app. dis. 404 U.S. 804, 92 S.Ct. 85, 30 L.Ed.2d 36 (1971); State v. Minge, 119 Fla. 515, 160 So. 670 (Fla. 1935)(that statute may have been drawn to extend to other persons does not support invalidation on constitutional grounds).

B. THE TRIAL COURT CORRECTLY INTERPRETED THE LEGISLATIVE AMENDMENTS IN LIGHT OF MELENDEZ AND RECOGNIZED THAT RESPONDENT'S PUTATIVE CLAIM WAS EXTINGUISHED BY THE PRIOR STATUTE.

It is well established that a statute of repose does not bar a cause of action. Its

effect rather is to prevent what might otherwise be a cause of action from ever arising. Eddinas v. Volkswagenwerk, A.G., 835 F.2d 1369,1371-1372 n. **2** (11th Cir. 1988) cert. den. Griffin v. Ford Motor Co., 488 **U.S.** 822, 109 S.Ct. 68, 102 L.Ed.2d 44 (1988); Walker v. Miller Electric Manufacturina Co., 16 F.L.W. **2148** (Fla. 4th DCA Aug. 14, 1991)(citing Rosenberg, supra), **A** statute of repose cuts off a right of action within a specified time limit after the delivery of the product or the completion of an improvement regardless of when the cause of action actually accrues. Melendez v. Dreis & Crump Manufacturina Co., 515 So.2d 735, 736 (Fla. 1987) citing Bauld v. **J.A.** Jones Construction Co., 357 So.2d 401 (Fla. 1978); Walker at **2149.** This court held in Melendez, 515 So.2d 735 (Fla. 1987) that the legislative amendment would have only prospective effect; it would not operate retroactively. Thus, claims brought before the date of amendment but which involve products delivered to the original purchaser more than 12 years prior to accrual of the claim **are** barred. Melendez at 736-737; Diaz v. Curtiss-Wriaht Corporation, 519 So.2d 610 (Fla. 1988).

The Petitioner's urge this court to only make express that which **is** already implicit to Melendez and hold: if the repose period runs during the time the statute is in effect there is no legal harm which may be redressed even if the injury giving rise to the claim does not occur until after the effective date of the amendment. Based on the holding in Melendez Petitioners ask this court do no more than enforce the unambiguous statutory language of Section 95.031(2), Florida Statutes (1977) which in 1978 extinguished the possibility for suit on the wheel rim at issue which had been delivered to its original purchaser in 1966.

On the other hand, Respondents would have this court adopt a theory of statutory interpretation never before recognized in any court which has construed a

statute of repose. Put simply, they maintain that the repeal legislation has prospective effect in regard to claims brought before the date of the amendment (Melendez), but should have retroactive effect for claims involving injuries occurring after the effective date of the amendment. The logic of Respondent's position fails when **asserted.** The retroactive or prospective effect of legislation can never turn on the timing of a subsequent accident. The effect of the amending legislation is determined by analyzing the intent of the legislature at the time it enacted the legislation. Melendez, at 736 citing Homemakers, Inc. v. Gonzales, 400 So.2d 965 (Fla. 1981); Enlev v. Morris, 339 So.2d 215 (Fla. 1976). That intent - that the legislation should have prospective effect only - was discussed and determined without qualification by this court in Melendez and later reaffirmed in Diaz, supra. Respondents have failed in both lower courts to produce any evidence or legislative history to suggest this court erred in its prior interpretation of the legislative amendments of **1986.**

Some lower courts have erroneously reasoned that to apply the statute of repose to a current claim after the effective date of the repeal legislation would be to invalidate the legislature's power of repeal. **See** Acosta, 16 F.L.W. at 1547; Ramos v. Carnahan, 16 F.L.W. C76 (Fla. 10th Cir. Ct. April 1, 1991). Acosta and Ramos fail to distinguish between the two ways legislation is repealed - retroactively or prospectively. These decisions fail to recognize that the repeal legislation does prevent newer products from ever acquiring the defense afforded by the former statute. Those **goods** delivered to the initial purchaser after **1974** will never receive the benefit of the former statute, **so** the amendment has substantive effect notwithstanding the application of the statute to claims involving injuries occurring after the repeal date involving older goods rendered non-actionable while the statute **was** in effect.

The trial court in Acosta and the Fourth District Court of Appeal in Walker, supra, correctly held that the repeal legislation did not purport to divest the Petitioners of the repose defense afforded by the former statute, The trial court's use of the phrase "vested rights," well summarizes the result of the amending legislation. Circuit Judge Korvick's statutory analysis was correct.

C. THE FLORIDA LEGISLATURE HAS THE POWER TO CREATE SPHERES OF TORT IMMUNITY WHERE THERE IS ANY RATIONALE JUSTIFICATION FOR THE IMMUNIN CREATED.

For all of the reasons articulated in section I[A] the Florida legislature could have properly concluded that certain goods should become non-actionable after 12 years from the date of delivery to the original purchaser irrespective of when the injury occurs. Such legislation is supported by long-standing precedent.

The United States Supreme Court **has** recognized that no plaintiff has a vested right to any common law theory of recovery. "The Constitution **does** not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object." Silver v. Silver, 280 U.S. 117, **122,** 50 S.Ct. 57 ___, 74 L.Ed. 221 (1929). Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984); Burke at 1170 and cases cited therein.

Other jurisdictions have passed similar repose periods which have been upheld against a myriad of constitutional attacks. Cf., Eddinas v. Volkswagenwerk, **A.G.,** 835 F.2d 1369 (11th Cir. 1988)(discussing Florida's repose period); Braswell v. Flintkote Mines. Ltd., 723 F.2d 527 (7th Cir. 1983) cert. den., 467 **U.S.** 1231 104 S.Ct. 2690, 81 L.Ed.2d 884 (1984); Van Den Hul v. Baltic Farmers Elevator Co., 716 F.2d 504 (8th Cir. 1983); Pitts v. Unarco Indus., Inc., 712 F.2d 276 (7th Cir. 1983); cert. den. 464 **U.S.**

1003, 104 S.Ct. 509, 78 L.Ed.2d 698 (1983); Thornton, supra; Dague v. Piper Aircraft Corp., 275 Ind. 520, 418 N.E.2d 207 (1981); Tetterton v. Long Manuf. Co., 332 S.E.2d 67 (N.C. 1985); Davis v. Whitina Corp., 66 Or. App. 541, 674 P.2d 1194, rev. den., 297 Or. 82, 679 P.2d 1367 (1984).

That the legislature should create, in effect, an immunity over time for certain manufacturers is not essentially different from any other immunity which defeats what once may have been previously considered an actionable legal wrong. The jurisprudence of this state is replete with qualified and absolute immunities for categories of individuals and otherwise tortious actions. **See** Section 440.11, Florida Statutes (1989) (worker's compensation immunity for employers), Section 768.13, Florida Statutes (Good Samaritan legislation); Section 608.436, Florida Statutes (members and managers of limited liability companies); Section 607.0831, Florida Statutes (corporate directors); Section 828.05, Florida Statutes (veterinarians); Section 240.268, Florida Statutes (university police); Section 322.13, Florida Statutes (driver's license examiners); Section 550.023, Florida Statutes (para-mutual commission members), and Section 732.919, Florida Statutes (funeral directors). Common law immunities extend, for example, to building inspectors,[3] and qualified immunities render non-actionable otherwise defamatory statements.[4] The right to recovery damages in tort is not a fundamental right. Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, S.Ct. 2620, 57 L.Ed.2d 595 (1978). The enactment of the statute of repose has the effect of rendering the product at issue non-actionable; the legislature in adopting the

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[3]Trianon Park Condominium Association. Inc. v. Hialeah, 468 So.2d 912 (Fla. 1985).

[4]Nodar v. Galbreath, 462 So.2d 803 (Fla. 1984); Abraham v. Baldwin, 52 Fla. 151, 42 So. 591 (1906); Drennan v. Wash. Elec. Corp., 328 So.2d 52 (Fla. 1st DCA 1976)

repose period declares there shall be no injury for which the law affords redress after 12 years from the date the product is delivered to the initial purchaser. Under the statute of repose the injured party literally has no cause of action. The harm that has been done is damnum absaue iniuria - a wrong for which the law affords no redress. Eddinas, at 1372 n. 2 citinq Lamb v. Volkswaqenwerk Aktienqesellschaft, 631 F.Supp 1144, 1147 (S.D. Fla. 1986). The application of the statute of repose to the Respondent's putative claim presents no constitutional concerns since the legislature, acting under its lawful police powers, has determined that any accident involving the tire rim at issue does not constitute a legally cognizable wrong. Id. Other courts construing similar repose periods have likewise concluded that plaintiffs injured after the expiration of the repose period have no legally cognizable injuries. Van Den Hul v. Baltic Farmers Elevator Co., 716 F.2d 504, 512 (8th Cir 1983); Lamb v. Wedaewood South Corp., 308 N.C. 419, 433, 302 S.E.2d 868, 882 (1983).

Further, this court and others have recognized that refusing to give force and effect to legislation because that legislation affects putative causes of action favored by courts impermissibly impinges upon the legislature's ability to shape state law. Moore v. State, 343 So.2d 601 (Fla. 1977); Freezer Storaae Inc. v. Armstrona Cork Co., 476 Pa. 270, 281, 382 A.2d 715, 721 (1978)("[T]his court would encroach upon the [l]egislature's ability to guide the development of the law if we invalidated legislation simply because the rule enacted by the [l]egislature rejects some cause of action currently preferred by the courts"). The failure of the Third District Court of Appeal to apply constitutional legislation because of the perceived unfairness runs afoul of the fundamental scheme of checks and balances which inheres in our system of state and federal government and impinges upon a legitimate sphere of activity entrusted to the

legislative branch. In Moore. ante, this court declared, "We are mindful of our duty to give effect to legislative enactments despite any personal opinions as to their wisdom or efficacy. No principle is more firmly embedded in our constitutional system of separation of powers and checks and balances." Moore at 603-4; International Ass'n of Machinists v. State, 153 Fla. 672, ___, 15 So.2d 485, 489 (1943); Hartford Fire Ins. Co. v. Lawrence. **Dykes.** Goodenberaer. Bower & Clancy, 740 F.2d 1362, 1369-70 (6th Cir. 1984)(discussing repose legislation); Scalf **v.** Berkel, Inc., ___ Ind. App. ___, 448 N.E.2d 1201 (1983).

CONCLUSION

On behalf of the position urged by Petitioners, the Florida Defense Lawyers Association respectfully submits the Third District Court erred in setting aside the summary judgment entered by the trial court.

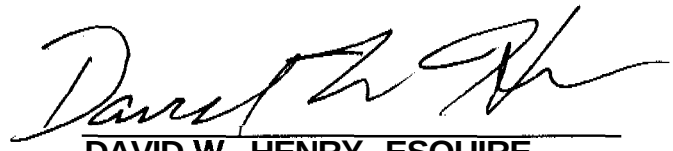
Articulable legislative concerns over long term liability exposure for manufacturers, increased insurance costs, and the host of problems encountered by manufacturers in defending claims involving older products are more than sufficient to justify the enactment of the repose period and the legislature's refusal to repeal that legislation retroactively.

No Plaintiff has a vested or inalienable right to any common law cause of action. Silver v. Silver, Duke Power, supra. The foregoing authorities demonstrate the historical precedent for statutes of repose and the constitutional prerogative of the legislature to enact repose periods. Respondent has in no way demonstrated in the lower court that the application of the statute of repose violates any provision of the state or federal constitutions.

Melendez held the repeal legislation would have prospective effect only; the amending legislation cannot fairly be deemed prospective for accidents occurring before the effective date of repeal, yet, retroactive for purposes of accidents occurring after the date of repeal. No authority exists for this novel theory of statutory interpretation, The unambiguous language of the statute reveals the repose period ran 12 years after the product was delivered to the original purchaser. When the statute ran any injuries caused by the product became legally non-actionable. The trial court correctly applied past precedent in entering summary judgment for the Petitioners. The

FDLA respectfully requests the decision of the appellate court be reversed and the summary judgment reinstated.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy **of** the foregoing has been furnished **by** U.S. Mail to **RIKKI TANEN, ESQUIRE, 4000** Hollywood Blvd., Suite 620 North, Hollywood, Florida 33021; **BRUCE SCHWARTZ, ESQUIRE,** 2750 N.E. 187th Street, North Miami Beach, Florida 33180; **STEVE BEFERA, ESQUIRE,** Grove Plaza Building, 5th Floor, 2900 S.W. 28 Terrace, Miami, Florida 33133; **CLIFFORD B. SELWOOD, JR., ESQUIRE,** Post Office Box **14128,** Fort Lauderdale, Florida 33302; **NANCY LITTLE HOFFMAN, ESQUIRE, 4419** West Tradewinds Avenue, Suite 100, Fort Lauderdale, Florida 33308; **LOVE PHIPPS, ESQUIRE,** 116 West Flagler Street, Miami, Florida 33130; **EDWARD T. O'DONNELL, ESQUIRE,** 801 Brickell Avenue, Suite 1501, Miami, Florida 33131; **CLIFFORD M. MILLER, ESQUIRE,** Barnett Bank Building, Suite 408, 601 - 21st Street, Vero Beach, Florida 32960; **ROBERT F. JORDAN, ESQUIRE,** 100 **S.E.** 6th Street, Fort Lauderdale, Florida 33301; **LARRY KLEIN, ESQUIRE,** 501 **S.** Flagler Drive, Suite 503, Flagler Center, West Palm Beach, Florida 33401; **RICHARD B. DOYLE, JR., ESQUIRE,** 315 **S.E.** 11th Street, Fort Lauderdale, Florida 33316; **HERMAN M. KLEMICK, ESQUIRE,** 1953 **S.W. 27** Avenue, Miami, Florida 33145; and **G. WILLIAM BISSETT, ESQUIRE**, Preddy, Kutner, et al., 501 N.E. First Avenue, Miami, Florida 33132; **this** 18th day of September, 1991.

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