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IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,004

W.R. GRACE & CO.-CONN.,
a Connecticut corporation,

Petitioner

vs.

THOMAS WATERS and ELOISE AGNES WATERS, his wife,

Respondents

Third DCA Case Nos. 90-1838; 90-2010; 91-282

REPLY BRIEF OF PETITIONER W.R. GRACE & CO.-CONN.

KUBICKI, DRAPER
GALLAGHER & McGRANE, P.A.
Attorneys for Petitioner
25 West Flagler Street
Penthouse Suite
Miami, FL 33130
Telephone: (305) 374-1212

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I

NEITHER FLORIDA PUBLIC POLICY NOR DUE PROCESS PERMITS THE AWARD OF PUNITIVE DAMAGES AGAINST A DEFENDANT FOR CONDUCT WHICH OCCURRED TWENTY OR MORE YEARS EARLIER, AND WHERE THE GOALS OF PUNISHMENT AND DETERRENCE HAVE BEEN ADEQUATELY SERVED BY PRIOR PUNITIVE DAMAGES AWARDS

A. Doctrinal basis supporting a limitation on punitive damages awards in mass tort litigation.

In this action, the Court is called upon to mold the judge-made rule recognizing punitive damages in a manner which will allow it to pass constitutional muster and serve public policy. Over the years, numerous judges have wanted to solve the problems associated with the imposition of punitive damages in mass tort litigation, including Judge Nesbitt in this case and Judge Altenbernd in Baione v. Owens-Illinois, Inc., 599 So. 2d 1377 (Fla. 2d DCA 1992), but the majority of lower courts have felt precluded from articulating a solution by a perceived lack of precedent. This is the first occasion that the limitation question has been squarely presented to the highest judicial authority in Florida.

The time is ripe for this Court to restrict the successive recovery of punitive damages for a single wrongful conduct in mass tort cases, in particular those involving asbestos. Multiple punitive damages awards for the same behavior (1) fail to serve the goals of punishment and deterrence, thus defeating the legal justification and constitutional validity of such awards, (2) impose severe societal costs by threatening the solvency of some asbestos defendants and diminishing the pool of funds available to compensate injured plaintiffs, and (3) violate principles of fundamental fairness by punishing defendants in excess of what is reasonably necessary to punish and deter.

Although Respondents recognize some of the problems posed by successive awards of punitive damages in mass tort litigation, they urge the Court to await a legislative resolution. Contrary to Respondents' suggestion, it is the judiciary, not the legislature, which is the appropriate body to address the scope of the common law doctrine of punitive damages. This Court's authority to act arises from its power to interpret the constitution and decisional law, and its power to shape Florida public policy.

Notably, this Court has already demonstrated its authority and willingness to shape the common law of punitive damages and to refuse to allow punitive damages recovery where it is not supported by public policy goals. In Lohr v. Byrd, 522 So.2d 845 (Fla. 1988), the Court was called upon to construe the law of punitive damages as it applied to an injured party's right to recover against a deceased tortfeasor's estate. After considering the public policy ramifications, the Court rejected the imposition of punitive damages upon a decedent's estate concluding that the goals of punishment and deterrence were not satisfied. Id. at 846-47. Likewise, in Mercury Motors Express, Inc. v. Smith, 393 So. 2d 545 (Fla. 1981), the Court examined the justifications of punishment and deterrence and determined that the goals were not served by imposing vicarious liability for punitive damages upon an employer who is without fault. Id. at 549; see also Fisher v. City of Miami, 172 So. 2d 455 (Fla. 1965); Waldron v. Kirkland, 281 So. 2d 70 (Fla. 2d DCA 1973).

In none of the above-cited cases did the Court defer to the legislature to decide the scope of punitive damages law. The

issues in this case are no more a legislative concern than were those relating to punitive damages in Lohr, Mercury Motors, Fisher, or Waldron. Respondents' reliance upon Carter v. City of Stuart, 468 So. 2d 955, 957 (Fla. 1985), as support for its position is also misplaced. Carter dealt with the doctrine of sovereign immunity and the court's power to hold a city liable for its decision not to enforce an animal control ordinance. The instant case does not involve a question of deciding what law should be enacted or how the law is to be enforced, but a question of its scope and constitutionality. Moreover, unlike the Federal courts which have declined to fashion relief due to their inability to change state law or impose uniform rules, see Racich v. Celotex Corp., 887 F.2d 393, 399 (2d Cir. 1989), this Court's ruling will be controlling throughout the Florida court system.

Particularly unpersuasive are Respondents' arguments against judicial limitation based upon the legislature's enactment of Florida Statute section 768.73.[1] Indeed, much of Respondents'

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[1] Section 768.73 Fla. Stat. (1991), reads as follows:

> (1)(a) In any civil action based on negligence, strict liability, products liability . . . the judgment for the total amount of punitive damages awarded to a claimant may not exceed three times the amount of compensatory damages awarded to each person entitled thereto by the trier of fact, except as provided in paragraph (b). However, this subsection does not apply to any class action.
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> (b) If any award for punitive damages exceeds the limitation specified in paragraph (a), the award is presumed to be excessive and the defendant shall be entitled to remittitur of the amount in excess of the limitation unless the claimant demonstrates to the court by clear and convincing evidence that the award is not excessive in light of the facts

negative analysis of Grace's position is based upon the mistaken view that Florida Statute section 768.73 applies in this case and either precludes or conflicts with the relief sought by Grace. See Respondents' Brief at 19-20, 22-24, 36. Section 768.73 is not applicable, however, since Respondents' complaint was filed June 30, 1986, most likely in a deliberate attempt to avoid the effect of Florida's Tort Reform Act and any limits it might place on Respondents' recovery of punitive damages.[2] Accordingly, Respondents' arguments based upon the statute must be rejected as irrelevant to the issues before this Court. Moreover, section 768.73 does not address the issue of multiple punitive damages awards.

Both constitutional requirements and compelling societal concerns call out to the Court to restrict the recovery of multiple punitive damages awards in mass tort cases. The summary judgment entered for Grace on the punitive damages claim can be upheld on any one of a number of alternative grounds, all of which were presented to the trial court.

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and circumstances which were presented to the trier of fact.

[2] The Act became effective July 1, 1986. Since section 768.73 is not applicable, the additional constitutional challenges of excessive fine and double jeopardy, which arise from the statute's decree of state involvement in both seeking and receiving a punitive damages award, are not a part of Grace's attack on Respondents' claim for punitive damages.

B. Successive recoveries of punitive damages for a single wrongful act in mass tort cases violate due process and public policy.

1) Multiple punitive damages awards are inconsistent with the goals of punishment and deterrence.

The facts of this case are that Grace has incurred punitive damages liability of $2,000,000.00. Grace has been punished. Grace has been deterred from engaging in like conduct in the future.[3] To impose a second, or third, or one-thousandth award of punitive damages, as Respondents would have occur, is to excessively punish.

The jury, in assessing punitive damages, is instructed to consider the enormity of the wrong and to award a commensurate punishment. Fla. Std. Jury Instr. 6.12; see also Bankers Multiple Lines Ins. Co. v. Farish, 464 So. 2d 530 (Fla. 1985); Arab Termite & Pest Control of Florida, Inc. v. Jenkins, 409 So. 2d 1039, 1043 (Fla. 1982). The award is not tied to the circumstances surrounding the specific incident in litigation, although it is a factor that may be considered by the jury. Farish, 464 So. 2d at 533; Rinaldi v. Aaron, 314 So. 2d 762, 763 (Fla. 1975).[4] Since

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[3] Grace cannot be deterred from repeating the same conduct for which it has been punished since it stopped manufacturing the product twenty years ago.

[4] Respondents argue that based upon Florida Statute section 768.73, punitive damages are limited to three times the compensatory award and imposition of a one award rule will turn punitive damages into a creature of chance. Again, the statute is not applicable to this case and Respondents' analysis of the interaction of a one award limitation on punitive damages with the statute is not only unpersuasive, it is immaterial to the issues to be decided. In any event, the limit to three times compensatory damages is not absolute since it can be exceeded if supported by clear and convincing evidence.

punitive damages are based on the nature of a defendant's conduct, where there is only one incidence of conduct there should be only one punishment. Once a single award of punitive damages has been assessed for a particular conduct, the goals of punishment and deterrence, both specific and general, are served.[5]

Respondents, however, assert that repeated awards of punitive damages are necessary to serve the goals of punishment and deterrence. Their explanation for this remarkable position is that multiple awards will create greater unpredictability[6] and therefore act as a greater deterrent than just allowing a single award. In addition, Respondents assert that defendants will escape relatively unscathed if only a single punitive damages recovery is allowed.[7] Both of these arguments ignore the fact that by incurring one punitive damages award for a single conduct, the societal goals which justify punitive damages have been satisfied and the defendant has been punished. In addition, the probability of a punitive damages award is predictable after the first such assessment; if unpredictability works as a deterrent, it is only effective prior to the first punitive damages award.

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[5] Respondents' concerns regarding the administration of a one award rule are unfounded. If a "prior award of punitive damages" is defined as a final judicial determination imposing punitive damages, there is no doubt that a single award for single conduct can be easily enforced.

[6] While Respondents assert that unpredictability is essential to the deterrent effect of punitive damages awards, the contrary is true. "Deterrence is facilitated by predictability . . . ." Tort Reform: Interim Report By The Florida Senate Committee on Commerce at 35 (March 1986).

[7] See supra note 4.

The doctrine of punitive damages was not created with the concept of multiple awards in mind. See generally Dorsey D. Ellis, Fairness & Efficiency in the Law of Punitive Damages, 56 S. Cal. L. Rev. 1, 14-18 (1982). A single punitive damages award for single conduct satisfies any interest the state has in meting out punishment and deterrence. If a plaintiff possessed an independent right to punitive damages, then multiple awards might be justified; however, punitive damages are designed to punish for a public wrong. Once the goals of punishment and deterrence are satisfied, subsequent plaintiffs have no independent right to punitive damages.[8]

2) General public policy considerations support a prohibition against multiple punitive damages awards.

Despite Respondents' statements, W.R. Grace has in no way asserted that it faces bankruptcy as a result of multiple punitive damages or on any other basis. In fact, Grace is a profitable and solvent corporation. As Grace has pointed out, however, this is not the situation for many other less stable asbestos defendants. A decision by this Court setting public policy on punitive damages awards should take into consideration the potentially devastating effects of multiple awards upon the industry as a whole and the ability of future asbestos plaintiffs to recover compensatory damages.

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[8] It is for this reason that Respondents' cries that it is unfair for the first plaintiff to the courthouse to recover punitive damages to the exclusion of all others must fall on deaf ears. Individual plaintiffs have no right to punitive damages; there is merely a societal interest in the defendant being punished and deterred and once this occurs, the issue is resolved.

The assertion that threats of insolvency are greatly exaggerated is rebutted by the history of asbestos litigation. See John C. Jeffries, A Comment on the Constitutionality of Punitive Damages, 72 Va. L. Rev. 139, 142 (1986). It is common knowledge that fifteen asbestos defendants have been driven into bankruptcy by the asbestos litigation burden. See Lester Brickman, The Asbestos Litigation Crisis: Is there a Need for an Administrative Alternative?, 13 Cardozo L. Rev. 1819, 1819 n.2 (1992). In 1991, statistics numbered asbestos related cases pending in United States courts at "more than 100,000" with "more than 366,000 claims . . . projected to be filed in the future." See In re Asbestos Cases, 586 N.E.2d 521, 523 (Ill. App. 1991), citing, Re: Johns-Manville Corp., Nos. 82 B 11656 (BRL) through 82 B 11676 (BRL) pp. 50-51, 97-99 (U.S.D.C. S.D.N.Y.), filed May 16, 1991. The amount of litigation continues to grow. At the end of 1992, Grace was a defendant in 30,900 lawsuits involving approximately 53,000 claims. Mealey's Litigation Reports, Asbestos, Vol. 8, Issue #10 at 13. Through the end of 1992, Grace paid $39.4 million in settlement of asbestos related personal injury claims. Id.

Respondents go so far as to suggest that asbestos companies may be getting what they deserve if punitive damages lead to bankruptcy. Respondents' Brief at 31; see also Brief of Amicus Curiae Academy of Florida Trial Lawyers at 18. Such a statement completely ignores the well-excepted tenet of Florida law that punitive damages are not supposed to cause bankruptcy. Arab Termite & Pest Control of Florida, Inc. v. Jenkins, 409 So. 2d at 1043 ("Punitive damages should be painful enough to provide some

retribution and deterrence, but should not be allowed to destroy the defendant.").

As a matter of general public policy, even if the law would permit multiple punitive damages awards, there should be an exception for asbestos litigation. Asbestos defendants have incurred enormous compensatory liability,[9] including amounts in excess of their historical liability share due to joint and several liability, paid staggering litigation costs,[10] and paid punitive damages awards. As a practical matter, asbestos defendants have been both punished and deterred, and other manufacturers have been deterred from risking a similar fate. At this stage, the goals of punitive damages are served by the sheer magnitude of asbestos litigation. R. Barclay Surrick, Punitive Damages & Asbestos Litigation in Pennsylvania: Punishment or Annihilation?, 87 Dick. L. Rev. 265, 295 (1983). Moreover, society's interest in having asbestos companies remain solvent so that all injured parties might be compensated for their injuries outweighs any interest in awarding additional punitive damages. Cf. University of Miami v. Echarte, 618 So.2d 189, 197 (Fla. 1993) (recognizing Florida public policy interest in maintaining viability of doctor defendants).

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[9] The total cost of compensatory damages awards as of early 1991 has been estimated at $7 billion for all defendants. S. Oliver & L. Spencer, Who Will the Monster Devour Next?, Forbes Magazine, Feb. 18, 1991, at 75, 79. The final tab could reach $50 to $100 billion. Id.

[10] See Eagle-Picher Indus. Inc. v. Cox, 481 So.2d 517 (Fla. 3d DCA 1985), rev. denied, 492 So.2d 1331 (Fla. 1986) ($1 billion spent on litigation between 1970 and 1982).

In Eagle-Picher Indus., Inc. v. Cox, 481 So. 2d at 525-26, the court crafted a modification to the rule against splitting causes of action based upon fears that there would not be enough money for later asbestos-injury plaintiffs if those suffering from asbestosis, but not cancer, were allowed to recover for the enhanced risk of developing cancer. See also Baione 599 So.2d at 1380 (Altenbernd, J., concurring) (suggesting that punitive damages be limited to claims in which the wrongful acts occurred within twenty years of filing the lawsuit based upon societal concerns). As in Cox, societal concerns warrant a limitation on punitive damage awards in asbestos litigation.

3) Maintaining the status quo violates constitutional fundamental fairness concerns.

The cases Respondents rely upon in arguing that there can be no due process challenge to multiple punitive damages awards are most notably distinguishable in that they were decided before Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991), which held due process considerations applicable to the determination of whether a punitive damages award is excessive. See Johnson v. Celotex Corp., 899 F.2d 1281 (2d Cir.), cert. denied, 498 U.S. 920, 111 S.Ct. 297, 112 L. Ed. 2d 250 (1990); In Re Air Crash Disaster at Sioux City, Iowa, 734 F. Supp. 1425 (N.D. Ill. 1990); Puppe v. A.C. & S., Inc., 733 F. Supp. 1355 (D.N.D. 1990). Moreover, these cases do not all stand for the proposition Respondents assert. See Johnson v. Celotex Corp., 899 F.2d at 1288 ("We follow this same course, and leave for another day and a better documented record the question of whether

successive awards are violative of due process.").

The United States Supreme Court's most recent ruling on punitive damages, TXO Production Corp. v. Alliance Resources Corp., 1993 WL 220266 (June 25, 1993), confirms the Court's holding in Haslip that "general concerns of reasonableness . . . properly enter into the constitutional calculus." 111 S. Ct. at 1043; TXO, 1993 WL 220266 at 7. In both TXO and Haslip, the Supreme Court focused on the fact that the punitive damages awarded were "reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." Haslip, 111 S.Ct. at 1045; TXO, 1993 WL 220266 at 8-9. Although the punitive damages awards were upheld in those two cases, the Court made clear that an award which is greater than what is necessary to punish and deter is unconstitutional. Haslip, 111 S.Ct. at 1045; TXO, 1993 WL 220266 at 8-9.

Accordingly, the award of multiple punitive damages would necessarily violate due process since a single award satisfies the goals of punishment and deterrence, particularly when the act sought to be punished has not been repeated for twenty years. See Discussion supra at 5-6. Any award beyond that which is necessary to satisfy the stated goals is excessive. Both TXO and Haslip indicate the need to create limits on punitive damages awards so that an unconstitutional, excessive punishment is avoided.

Contrary to Respondents' assertions, the due process considerations are not premature. If multiple punitive damages awards are invalid under a due process analysis, then the summary judgment dismissing Respondents' punitive damages claims should be

affirmed on this ground. The fact of Grace's prior punitive damages liability was established to the satisfaction of the trial court and can be further documented if this Court so requires.

C. Formulating a solution.

Grace urges the Court to interpret punitive damages law to allow for only a single punitive damages award for the same conduct, to adopt a solution to the excess of multiple punitive damages awards by eliminating such claims from asbestos litigation, or to hold that multiple punitive damages awards are unconstitutional.

Respondents' attacks on Grace's proposals are groundless. Respondents' alternative suggestions that punitive damages can be kept in check by (1) requesting class action certification, (2) seeking remittitur of excessive verdicts, (3) moving for a new trial, and (4) presenting evidence of prior punitive damages awards and their effect on long term solvency, are not viable options. Not only do these suggestions ignore the substantive due process challenges, they also give rise to procedural due process concerns.

The difficulties with class action certification of the punitive damages issue in asbestos litigation are well documented.[11] In addition, neither a motion for remittitur nor new trial contains a procedure for addressing the effect of prior

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[11] See, e.g., In re: School Asbestos Litigation, 789 F.2d 996, 1005-6 (3d Cir.), cert. denied sub nom, Celotex Corp. v. School Dist. of Lancaster, 479 U.S. 852, 107 S.Ct. 182, 93 L. Ed. 2d 117 (1986) (proposed class under-inclusive because it cannot include all litigants who seek punitive damages awards); Juzwin v. Amtorg Trading Corp., 705 F. Supp. 1053, 1064 (D.N.J. 1989), vacated, 718 F. Supp. 1233 (D.N.J. 1989) ("certification of a class on the issue of punitive damages is not a possible remedy").

punitive damages awards.[12] Finally, evidence of prior punitive damages awards and their effect on long term solvency are not issues that should be presented to the jury. See TXO, 1993 WL 220266 at 10 (prejudicial influence on jury resulting from consideration of defendant's financial status may violate due process). The prejudice that would befall a defendant if such evidence was admitted is well understood. See Jackson v. Johns-Manville Sales Corp., 727 F.2d 506 (5th Cir. 1984), op.vacated & reh. granted, 750 F.2d 1314 (5th Cir. 1985), op. after certif. declined, 781 F.2d 394 (5th Cir. 1986), cert. denied, 478 U.S. 1022, 106 S.Ct. 3339, 92 L. Ed. 2d 743 (1986); Juzwin, 705 F.Supp. at 1056; Jeffries, supra at 146; Dennis N. Jones, S. Brett Sutton & Barbara D. Greenwald, Multiple Punitive Damages Awards for a Single Course of Wrongful Conduct: The Need for a National Policy to Protect Due Process, 43 Ala. L. Rev. 1, 29-30 (1991); Richard A. Seltzer, Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control, 52 Fordham L. Rev. 37, 59-60 (1983); Malcolm Wheeler, The Constitutional Case for Reforming Punitive Damages Proceedings, 72 Va. L. Rev. 269, 295 (1983); Alan Schulkin, Mass Liability and Punitive Damages Overkill, 30 Hastings L.J. 1797, 1806-1807 (1979).

In addition to its original proposals as alternatives to

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[12] Moreover, the standards currently employed in reviewing a motion for remittitur or new trial are similar to those criticized on procedural due process grounds in Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 109 S.Ct. 2909, 106 L. Ed. 2d 219 (1989), and Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 108 S.Ct. 1645, 100 L. Ed. 2d 62 (1988). See also Haslip, 111 S.Ct. at 1045 n.10.

successive punitive damages awards,[13] Grace suggests two more for the Court's consideration: the use of setoffs or presumptions. Taking prior punitive damages awards as a "high water mark," a subsequent plaintiff would be permitted to try his punitive damages claim and the jury would determine the amount to be awarded without knowing of prior awards. If the amount recovered were less than the previous high, the award would be set off and plaintiff would recover nothing. If the amount recovered were greater than the previous high, plaintiff would be entitled to recover the difference. The higher award would then serve as the new "high water mark" against which future awards would be measured. The defendant would be punished only to the extent of the highest amount any jury had assessed against it for the same conduct. See Schulkin, supra at 1800-01; §510.263, Mo. Rev. Stat. (1993).

Alternatively, a prior award should be presumed to impose full punishment on a defendant. In a subsequent action based upon the same conduct, a plaintiff could rebut the presumption by showing that the jury in the prior case was expressly instructed to base its punitive damages decision only on the defendant's conduct as it relates to the harm caused to the plaintiff, rather than on any harm caused to other individuals. If the plaintiff overcomes the presumption by producing such evidence, he would then be allowed to ask the jury to award punitive damages.

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[13] See Discussion supra at 5-11.

II

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENDANTS' MOTION FOR MISTRIAL AFTER PLAINTIFFS' PRIMARY MEDICAL WITNESS COLLAPSED ON THE STAND IN FRONT OF THE JURY, THE JUDGE ASKED THE JURORS TO PRAY FOR THE WITNESS, FAILED TO ASCERTAIN WHETHER WITNESS' COLLAPSE WOULD INTERFERE WITH JUROR'S ABILITY TO BE FAIR AND IMPARTIAL, AND DEFENDANTS WERE UNABLE TO CROSS-EXAMINE THE WITNESS.

The issues raised by Respondents in regard to Dr. Tate's testimony were all anticipated and thoroughly argued in Grace's initial brief. Due to page limitations, Grace incorporates by reference its arguments contained in Point II of its initial brief. Grace does so with renewed emphasis.

CONCLUSION

This Court is respectfully requested to answer the question certified by the district court of appeal in favor of limiting multiple punitive damages awards, affirming the partial summary judgment entered in favor of Grace, and quashing the decision of the Third District Court of Appeal. Moreover, this Court is respectfully requested to reverse the final judgment for plaintiffs and the cost judgment, and to remand for a new trial on the merits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 21st day of July, 1993 to all counsel on the attached list.

KUBICKI, DRAPER
GALLAGHER & McGRANE, P.A.
Attorneys for Petitioner
25 W. Flagler Street
Miami, Fl 33130

By : Angela C. Flowers
ANGELA C. FLOWERS
Fla. Bar No. 510408

SERVICE LIST

Marc Cooper, Esq.
Cooper & Wolfe, P.A.
700 Courthouse Tower
44 W. Flagler Street
Miami, Fl 33130

Roger G. Welcher, Esq.
25 S.E. 2nd Avenue
Suite 600
Miami, Fl 33131

Alan K. Petrine, Esq.
100 N. Biscayne Blvd
Suite 2910
Miami, Fl 33132

Thomas Hart, Esq.
1611 Allen Street
P.O. Box 365
Barnwell, S.C. 29812