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IN THE SUPREME COURT OF FLORIDA

BRUCE A. JOHNSON, et al.,

Petitioners,

v. CASE NO. 82,237

PLANTATION GENERAL HOSPITAL, LIMITED PARTNERSHIP,

4TH DCA CASE NO. 93-0059
- CLASS REPRESENTATION -

Respondents,

_____/

PETITIONERS' BRIEF ON THE MERITS
- DISCRETIONARY REVIEW -

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Date: January 10, 1994

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES AND OTHER AUTHORITIES

REFERENCES

References to the Appendix accompanying the Jurisdictional Brief previously filed will be noted as (Jur. Br. App __).

References to the Appendix separated from the Merits Brief by a divider and tabs will be noted as (Merits Br. App. __).

STATEMENT OF CASE

This cause is one of eight consumer class actions presently pending in several Florida circuit courts. The instant cause arises from Broward County. The hospital defendant applied to the Circuit Court for an order dismissing the case for lack of subject matter jurisdiction. The basis for the motion was that the monetary amounts of the individual claims of the class representatives and the vast majority of the class members did not meet the jurisdictional threshold of the Circuit Court and could not be aggregated (Jur. Br. App. 2). The trial court, The Honorable Leonard L. Stafford, denied the defendant's motion (Jur. Br. App. 6).

Upon defendant's application to the Court of Appeal, Fourth District, that Court, treating the application for a Writ of Certiorari as a Writ of Prohibition, granted the hospital the jurisdictional relief it sought in an opinion and decision dated July 14, 1993 (Jur. Br. App. 12) and reported at 621 So.2d 551 (4th DCA, Fla. 1993).

Discretionary review application was made to this Court by the plaintiffs and class on August 10, 1993 for review of the decision of the Fourth District which held that the Circuit Court was without subject matter jurisdiction because the claims of the individual class representatives did not meet the Court's monetary jurisdictional threshold.

Mandate was issued by the Fourth District on September 20, 1993 assigning the case below to the County Court of Broward County. This Court accepted this action for review by its order of December 15, 1993.

Pursuant to the Clerk's letter and instructions to counsel of December 15, 1993, this Court was advised of a similar pending action in which the same issue as exists in the instant cause was decided by the Court of Appeal for the Fifth District in exactly an opposite manner in philosophy and result as that of the Fourth District's opinion accepted for review by this Court.[1] Application to this Court for Discretionary Review of the Fifth District Opinion has been made by all parties to that action.

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[1] *Ansell Arscott, et al. v. Galen of Florida, d/b/a Humana Hospital Daytona Beach*, 5th DCA #93-79, December 3, 1993.

STATEMENT OF THE FACTS

The underlying claim for relief in this action is that the plaintiffs and class of approximately 50,000 patients have been the victims of a plan by the defendant hospital to engage in a uniform method of overcharging them for specific categories of goods and services. The operative complaint alleges that an identical and uniform type of overcharging system has been imposed on all class members by the defendant hospital. (Jur. Br. App. 1) The complaint seeks certification of the class so that the class claims may be presented to a jury and a judgment for the class in an amount contemplated to be in the tens of millions of dollars obtained on those claims on behalf of the class.[2]

The complaint defines the class essentially as those patients who pay or are obligated to pay their hospital bill based on the total undiscounted amount of their bill. Excluded from the class are patients who benefit from discounts afforded to third party payers such as insurance companies or government programs. The overcharges alleged are limited to medical supplies, pharmaceuticals and laboratory services. These are either items that the hospital purchases from a vendor at a bulk-or wholesale-prices and resells to the patient at the price shown on the

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[2] In each of two similar class actions now pending, the class was certified by the trial court and affirmed on appeal: *Galen of Florida, Inc., d/b/a Humana Hospital Daytona Beach v. Arscott*, 5th DCA #93-79 and *Galencare, Inc., f/k/a Humhosco, d/b/a Humana Hospital Brandon v. Dale Daniel, etc.*, 2nd DCA #93-02409.

hospital bill or services for which the hospital's cost is an ascertainable sum, for which the hospital then charges the patient a higher than reasonable amount.

The legal theory upon which the class action is premised is that the unarticulated terms of admission to the hospital relating to what will be imposed on the patient places a legal duty on the hospital to be reasonable. The hospital's opportunity to impose these excessive charges and the method of doing so, based upon the relative bargaining positions of the parties, clearly places this situation within the doctrine of "imposition" long ago enunciated by this Court in *Southern States Power Co. v. Ivey*, 118 Fla. 756, 160 So. 46 (1935).

> Where a person taking advantage of his position, or the circumstances in which another is placed, exacts a greater price for services rendered than is fair and reasonable, where such a compensation only is allowable, the exaction of the unreasonable price for the service rendered may be said to be an imposition. ... such an imposition would support an action of assumpsit for money received. ...
>
> *Southern States* at 47.[3]

Though assaulted in those pending cases where the classes have been certified, the trial courts have rejected legal arguments challenging the class' theory of action based upon the doctrine of imposition.

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[3] This Court has never receded from the imposition doctrine announced in *Southern States Power*.

The instant review by this Court, however, is limited to the jurisdictional threshold issue as framed above and in the brief on jurisdiction earlier filed.

SUMMARY OF ARGUMENT

The instant case, like class actions generally, provides a solution to a problem that would otherwise force the legal system into either futility or contradiction. The whole idea of the class action is that the legal system aspires to treat all similarly situated persons alike. If the offending hospital systematically has treated this group of 50,000 patients unlawfully, it is appropriate that it be required to "mend its ways" as to all.

Typical of today's class actions, the instant case would not exist at all without the aggregation of the class members' claims and a judicial recognition that it is *the class* which asserts the claim, not each of 50,000 former patients individually. The idea of the class action is the collective treatment of the 50,000 grievances of these patients as a single wrong -- and not the treatment of multiple wrongs individually. Because aggregating the individuals' claims into a single claim may change the lawsuit for overcharging a single patient $100 into a much greater risk for overcharging all patients $100 each on their collective bills over five years, a powerful incentive is created for the defendant to refrain from just the sort of business conduct alleged in the instant complaint. Public policy supports this incentive and its application here.[4]

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[4] A class suit may be seen as a mass production remedy for mass production wrongs. Geoffrey C. Hazard, the Effect of the Class Action Device on Substantive Law." 58 F.R.D. 307, 308 (1993).

The use of a single action to adjudicate many small, individual claims (probably not worth pursuing individually) as a unitary claim is not new or revolutionary. That beneficial theory was recognized as having judicial and public value long ago.[5]

The economy of judicial labor and resources is a natural consequence of the class action device. Those benefits have met with favor and hospitality by our courts. Those same benefits to the judicial system would be lost under the Fourth District Court's decision under review. No single class member seeks or will obtain a separate or individual judgment from the court. Rather, here will be only a single judgment for the total overcharge to the class.[6] The class members are then compensated through well established class claims administrative procedures in which the defendant has no interest. A common fund is created and claims are made against it through a fund administrator (commonly one of the major national accounting firms).

The instant class, as that in all consumer class actions, is comprised of individuals. They each have a viable claim as a victim of overcharging against the defendant hospital for pharmaceuticals, supplies and laboratory tests. Typical of

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[5] Joseph Story, "Commentaries on Equity Pleading" (2d ed. Boston 1839). The Supreme Court later recognized the same in Equity Rule 48, 42 U.S.1 (1 How) (1843).

[6] It is not rhetorical to ask how a county judge could enter a multimillion dollar judgment.

consumer classes, the individual class member's claim is well below the jurisdictional threshold of the Circuit Court. Also, typical of consumer class actions, the aggregated sum of the class of many thousands of patients greatly exceeds the threshold barrier by several million dollars.

The lower tribunal, in a 2-1 decision (Judge Stone dissenting) stated what it believed to be the governing case law: that individual class member's claims, even though arising from the same business relationship with and course of business conduct by the defendant, may not be considered as a unitary claim by the class.

The Fourth District Court decision contradicts and disregards this Court's governing authority and precedent and constitutes a departure from an essential requirement of law. The District Court's jurisdictional decision casts the cause of hundreds of thousands of class members seeking monetary damages and recovery of tens of millions of dollars in this and other actions into the several county courts which do not have the jurisdictional authority to render judgment in the multi-million dollar amounts claimed by the respective classes.

Separate and apart from the Fourth District's decision being contrary to this Court's governing authority, on December 3, 1993, the Court of Appeal for the Fifth District expressly acknowledged the decision here under review and rendered a decision and issued an opinion directly opposite in philosophy and result. *Galen of*

Florida, Inc., d/b/a Humana Hospital Daytona Beach v. Arscott, et al., 5th DCA #93-79.

ARGUMENT

I. IT IS APPROPRIATE TO CONSIDER THE CLAIM OF THE CLASS RATHER THAN THE INDIVIDUAL CLASS MEMBER TO DETERMINE JURISDICTION OF THE COURT.

The entire issue of the "amount in controversy" has been misperceived by the Fourth District in the decision under review. The Fourth District Court improperly frames an inquiry that preordains the conclusion. It reasons:

Major premise - Claims for less in than $15,000 must be heard in County Court.

Minor premise - Each class members material to this action has a claim for less than $15,000

Conclusion - Therefore, all such claims must be heard by the county court.

The appeal of such "perfect" Aristotelian logic is emotionally compelling *but wrong*! While this might bring joy to the heart of a student of freshman logic, it fails in this instance because it is simply inapplicable to the legal, not "logic" issues important to a correct statement of the law.

The reason is as elementary as it is fundamental: the claim to be adjudicated is that of the *class*: the 50,000 patients who have been victimized by the hospital's scheme to impose unlawful overcharges. The claim is not that of any single person. It is the patient class whose standing is asserted. The representative

Plaintiffs are just that, "representatives" of the patient class. Thus, if the answers to critical questions of law are to be found in Logic 101, the proper framing of the inquiry is essential. The proper reasoning is:

Major
premise - Circuit Court jurisdiction begins at $15,000

Minor
premise - The class is the claimant in this case and alleges a claim in excess of $10 million

Conclusion - Therefore, Circuit Court is the appropriate court for jurisdiction.

The District Court's misdirection of focus on the question to be addressed led inexorably to the erroneous conclusion stated in the decision being reviewed.

> "we construe the pleadings to mean that none of the class representatives has a claim within the jurisdictional minimum of the Circuit Court. 621 So.2d at 552

A summary of the correct rule and one which this Court is urged to announce as the standard in Florida is stated by the Fifth District Court of Appeal in its opinion of December 3, 1993 in a parallel case:

> We recognize the opinion of the Fourth District Court of Appeal in [the instant case]. ... Unlike the Fourth District Court, we agree with courts of other states that have concluded that individual claims filed in a class action are aggregated to determine jurisdiction. Slip Opinion at p.2, *Galen of Florida, Inc., d/b/a Humana Hospital Daytona Beach v. Arscott, et al.*, 5th DCA #93-79.

The opinion of the Fourth District Court, while making reference to Section 34.01(1)3, Florida Statutes (1993) that establishes jurisdictional threshold amounts for County and Circuit Court, is an obvious parallel to the practice of federal courts which disallows aggregation of class claims in *diversity* jurisdiction cases. In an attempt to clarify the confusion generated by a cursory, non-analytical reading of federal case law rejecting aggregation of class claims (or reading only the headnotes), the Petitioners hope to assist the Court in its undertaking to announce a clear and correct rule in this and similar cases.

The leading federal case rejecting class claim aggregation is *Zahn v. International Paper Co.*, 414 U.S. 291, 95 S. Ct. 505 (1973). However, legal analysis of *State ex rel. City of West Palm Beach v. Chillingworth*, 100 Fla. 489, 129 So. 816 (1930), and *Frankel v. City of Miami Beach*, 340 So. 2d 463, 466 (1976), on remand 341 So.2d 1076 (Fla. 3d DCA 1977)[7] shows that it is proper to aggregate the claims of individual class members to determine the amount in controversy in the present case.

In *Zahn*, the United States Supreme Court held that, in a federal class action suit based on diversity of citizenship, each class member must satisfy the jurisdictional amount and that their claims may not be aggregated to meet the jurisdictional require-

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[7] Citation continued: Partially overruling on other grounds, *Curtis Pub. Co. v. Bader*, 266 So.2d 78 (Fla. 3d DCA), *cert. denied*, 271 So.2d 142 (Fla. 1972)

ment. *Zahn*, 414 U.S. at 301. In arriving at this conclusion, the Court was governed by the historical construction of the "matter in controversy" component of 28 U.S.C.S. § 1332(a) (Law. Co-op. 1986 & Supp. 1993), which sets forth the requirements for federal court diversity jurisdiction. *Zahn*, 414 U.S. at 292-94. In the opinion, the U.S. Supreme Court reviewed a long line of cases that had restrictively construed the statutes defining federal court jurisdiction. This historic construction of the federal jurisdictional statutes compelled the Court's conclusion that individual claims based upon diversity may not be aggregated for jurisdictional purposes.

The underlying premise there is that the federal district courts are courts of limited jurisdiction. In diversity cases, Congress sought to control the caseload of the federal courts and leave to state courts of general jurisdiction those cases falling outside of the limited Congressional criteria. The conclusion is therefore obvious: if an action sought to be brought *under diversity* in federal court does not meet the criteria, it must *a fortiori* be heard in a state court of general jurisdiction empowered to enter appropriate relief.

The unique nature of diversity jurisdiction in the federal system goes back to its origins and "Blackletter-Hornbook" law that there is no federal general common law. Unless an action is brought under a federal statutory or constitutional provision and thus states a federal question, the judicial systems of the several

states are the appropriate forum. The federal courts do not entertain common law or common count jurisdiction, with two significant and important exceptions. The first is the concept of pendent jurisdiction, *i.e.*, the acceptance of state law or common law claims (that would be otherwise heard in state courts) if they are pendent to and arise out of the same facts as the primary claim based on established federal jurisdiction. The second is the concept of diversity jurisdiction, which Congress told the federal courts to exercise based upon the anxiety of non-resident, large-scale litigants being subjected to the "hometown" effect in contested issues of what would otherwise be purely state matters.

The key to understanding this structure is the recognition that in cases based on a federal question (antitrust, EEOC, civil rights, labor law, environmental regulation, interstate commerce) there is no floor or threshold jurisdictional amount whatever that a class action litigant must satisfy in order to obtain relief in the federal courts. Thus, purchasers of publicly traded stock (the sale of which is regulated by federal law) may properly claim federal court class jurisdiction in a "fraud-on-the-market-case" with nominal damages alone. Similarly, a lone woman, claiming price-fixing damages of less than $10.00, can represent thousands of hearing aid purchasers in a class action antitrust case in federal court. *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979).

That is clearly an apt analogy for cases arising solely under state or common law, and the only sensible answer to the so-called

"aggregation" issue in the instant case. When federal questions are raised, there is *no* dollar minimum for federal courts to consider. The same would be true of the common law causes of action raised in this cause (under the common law of Florida) for the class of thousands of hospital patients who seek a single judgment in excess of $10 million. Such a scenario is precisely the reason why class actions are viewed as a salutary and favored judicial vehicle for efficient adjudication.

State courts have a different jurisdictional genesis and criteria than federal courts, and are not bound by the Congressional intent that prevents aggregation of claims presented to federal courts on a diversity theory.[8] This is because state courts are courts of general jurisdiction, while federal court jurisdiction is limited. As stated by the U.S. Supreme Court:

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[8] Newberg on Class Actions states that in addition to the inapplicability of *Zahn* because of the federal diversity issue, *Zahn* has been overruled by statute. In 1990, Congress enacted § 1367 of the Judicial Code. *See* 28 U.S.C. § 1367. The effect of this new enactment is to overrule *Zahn* and permit the exercise of supplemental jurisdiction over the claims of class members who do not meet the diversity statute's jurisdictional minimum. Therefore, any jurisdictional argument based on the authority of *Zahn* is now emasculated. This illustrates why Florida should not rely on federal jurisdictional precedents and why Florida should instead recognize that its jurisdictional decisions are independent of federal decisions. At least one United States District Judge disagrees with the Newberg treatise: *Averdick v. Republic Financial Services, Inc.*, 803 F. Supp 37 (E.D. Ky. 1992). However, that disagreement is only of academic interest here since the gravamen of the instant argument of this class is that the federal diversity standard is *non sequitur* a position with which the Fifth District Court agrees. (Merits Br. App. Tab 1)

> certain basic principles ... limit the power of every federal court. Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto.

Bender v. Williamsport Area School District, 475 U.S. 534, 541, 106 S. Ct. 1326, (1986).

In *City of West Palm Beach v. Chillingworth*, 100 Fla. at 489, 129 So. at 816, (1930) the Florida Supreme Court addressed a question similar to that raised in *Zahn* and rejected the standards used by federal courts for the purpose of determining federal diversity jurisdiction. The Florida Supreme Court rejected such a restrictive view and confirmed that Florida allows aggregation of individual claims that "are in some way related to each other." *Chillingworth*, 129 So. at 817.

In *Chillingworth*, this Court addressed the question of whether individual claims could be aggregated so as to bring the amount involved within the jurisdiction of the Circuit Court. The Supreme Court held that aggregation of the individual claims was proper because the individual demands were affected by a common right, were related, or had arisen out of the same circumstance.

In considering the rule adopted in some states that "jurisdiction is fixed by the amount of each separate demand," This Court cited an Arkansas case that represented this view, and said:

> This court is, however, committed to the rule that, if the demands from their nature or character are joint or composite, *or are in some way related to each other* or arise out of the same

> transaction, *circumstance*, or occurrence, they may be aggregated to confer jurisdiction. *Id.* (emphasis added).

Thus, the Florida Supreme Court expressly rejected the view expressed by the Fourth District Court in the decision under review that jurisdiction is fixed by the amount of each separate demand. The Supreme Court's rule in *Chillingworth* is completely consistent with the position urged here by the class/petitioner.

The *Chillingworth* Court further limited the prohibition against aggregating of claims to confer jurisdiction only to those situations in which the claims

> are substantive and *are not in their nature joint or composite* and do not arise out of the same transaction, *circumstances*, or occurrences, and are not consequent *upon a continuous course of dealing* as evidenced by an open account or a continuing contract, *and are in no way related*, but represent distinct and wholly independent demands. ...

Id. at 818 (emphasis added).

Whether or not aggregation is appropriate depends upon whether the plaintiffs have "distinct and separate interests" or whether the plaintiffs are "claiming under a common right." Class members in this cause claim under a common right based on being subjected to a single institutionalized scheme of overcharging every patient who fits within the definition of the class.

The Fourth District Court's opinion states that: "plaintiffs seek to torture [*Chillingworth*] into a meaning that would allow these claims to be aggregated because they *are in some way related*

to each other. 621 So.2d at 552 (emphasis in the original). However, as this Court said in *Chillingworth*, aggregation is appropriate where (as in the instant case) the class claims are "in some way related to each other, or arise out of the same transaction, *circumstance* or occurrence. *Chillingworth* at 817 (emphasis added).

The claim of the class alleged in the instant cause arises from a single institutionalized method by which the defendant imposed overcharges the class. It is immaterial that each patient/class member has a separate hospital bill. The class as a whole alleges and claims under a common right, specifically founded upon the contractually implied covenant of reasonableness and the doctrine of "Imposition" as announced in *Southern States Power v. Ivey*, 118 Fla. 756, 160 So. 46 (1935). Thus characterized, the claims of all class members are related to each other and "arise out of the same ... circumstance ..." *Container Corp. of America v. Seaboard Air Line RR*, 59 So.2d 737 (1952) favorably citing, *Burkhart v. Gowin*, 86 Fla. 376, 98 So. 140 at 142 (Fla. 1923). In *Container Corp. of America*, this Court recited a well-settled rule that has particular application in the class action context:

> when several parties sue jointly for the recovery of money or property claiming under a common right, *and the adverse party is wholly unaffected by the manner in which it may be apportioned in case of recovery, it is the aggregate sum of their several claims which determine(s) the amount in controversy*. *Id.*(emphasis added).

Commonality has been well pled and fully described in the complaint. The common right to be vindicated arises from the consistent course of business conduct by which the hospital imposed overcharges on each patient for the three categories of items also described in the complaint.

Each and every class member is a victim of the defendant's imposition upon them of exactly the same overcharge methodology. The scheme implemented to effect the overcharge is consistent as to each class member. The amount of the overcharge varies only with respect to what specific items, and the quantity of each, that were sold to each class member during his hospitalization. The wrongful scheme is a common imposition (*Southern States Power v. Ivey, supra*), the specific amount of money damages due each class member is a ministerial calculation by the common fund administrator when it entertains individual hospital bills to determine reimbursement.

That common feature of an overcharge scheme being similarly imposed on all class members is consistent with the organic purpose of class action litigation. The law in Florida clearly favors class actions. The cases demonstrate that despite varying factual situations, class actions are appropriate when the proposed class representative(s) share either a common question of fact or a common question of law with the class.

> A class action and class certification should not be denied merely because the claim of one or more class representatives arises in a factual context that varies somewhat from other plaintiffs or class members; rather, the Court's primary concern should be whether the

> representatives' claims arise from the same course of conduct that gave rise to the remaining claims, and whether the claims are based on the same legal theory. [citations omitted] *Powell v. River Ranch Property Owners Assoc.*, 522 So.2d 69, 70 (Fla. 2d DCA, 1988), *rev. denied* , 531 So.2d 1354 (826-88).

The very purpose of a class action suit is:

> to save a multiplicity of suits, to reduce the expenses of litigation, to make legal processes more effective and expeditious, and to make available a remedy that would not otherwise exist.

Tenney v. City of Miami Beach, 152 Fla. 126, 11 So. 2d 188 (1942) (TerreIl, J.). As further stated by Mr. Justice Terrell, "To have required 232 separate suits here would have been prohibitive and ridiculous and would have deprived many of a remedy." *Id.*; *Frankel v. City of Miami Beach*, 340 So. 2d 463, 466 (1976) (quoting *Tenney*).[9]

In *Frankel v. City of Miami Beach*, 340 So.2d 463 (Fla. 1977).[10] This Court clearly understood that the analysis to determine whether aggregation is appropriate must begin with the examination of commonality. The previous decision *Bader* was found to be wrong because in examining commonality it misapplied the fraud class action commonality rule to cases not involving fraud.

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[9] What would Mr. Justice Terrell likely have said about 50,000 separate small claim actions in the instant case and more than 300,000 in the other pending cases?

[10] *Frankel* overruled and clarified the earlier decision of *Curtis Publishing Co. v. Bader*, 266 So.2d 78 (Fla. 3d DCA), *cert. denied*, 271 So.2d 142 (1972).

The instant case does not involve, suggest or even raise the hint of fraud.

In *City of Miami v. Keton*, 115 So.2d 547 (Fla. 1959), the Florida Supreme Court affirmed the trial court's decision to allow a class action consisting of 240,000 persons who were challenging the authority of the City of Miami to impose fines under its traffic ordinance. No individual's fine for the various violations of the city's traffic ordinance reached the jurisdictional amount of the Circuit Court where the case was filed. Jurisdiction in Circuit Court could only be established by aggregation of the individual fines of the class of 240,000 persons. *The Florida Supreme Court never mentioned aggregation as an issue of jurisdiction*. It is clear that the amount in controversy claimed by the class was controlling in *Keton*. This Court in *Keton* held that, although each person had a separate fine, along with other indicia of differences, class action was proper because *the question of law was common to the class*. *Frankel*, 340 So.2d at 466. *See also Lance v. Wade*, 457 So.2d 1008 (Fla. 1984) (explaining difference between individual contracts involving fraud and individual contracts not involving fraud for class action purposes).[11]

In *Frankel*, this Court explained in detail how the *Bader* Court erred in applying the fraud class action commonality rule to a non-

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[11] The Court in *Frankel* traces the history of its class action decisions culminating in the *Tenny* decision. See *Frankel* at pages 465-466.

fraud situation and thus incorrectly concluded that commonality did not exist. It should follow that the *Bader* Court's conclusion as to aggregation in that case was also incorrect. This Court has made clear that the controlling consideration must be whether common questions of law or fact exist among the plaintiff class members. *Frankel*, 340 So.2d at 466.[12]

The rationale of the Fourth District Court under review is similar to the argument advanced by the defendant in *Love v. General Development Corp.*, 555 So.2d 397 (Fla. 3d DCA 1990). In that case several land owners brought an action under the class action rule claiming that the defendant developer breached its sales contract by failing to complete in a timely manner roads leading to their properties. The defendant argued that the claims could not be aggregated because they were individual claims based on individual contracts with distinct and separate reasons for the alleged non-compliance.

The Third District, citing several cases rejected this argument and held that:

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[12] If common questions of law and fact do not predominate, the Circuit Court will not certify the class and the aggregation issue becomes moot. In that regard, it should be noted that every Circuit Court that has considered a motion to certify the class in the parallel cases has granted the motion and certified the class (Volusia, Hillsborough and Palm Beach Counties). Except for the venue and the named parties, these other class actions are being prosecuted by the same class counsel, state almost identical facts and are based upon the same legal allegations.

> Although claims may arise from different factual contexts, they may be pled as a class action if:
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> > the subject of the action presents questions of common or general interest, and where all members of the class have a similar interest in obtaining the relief sought. The common or general interest must be in the object of the action. There must be a common right of recovery based on the same essential facts.[13]
>
> ....
>
> Although other clauses in the contracts may not be common to all contracts and the reasons for [the defendant's] delays in providing roads may vary, class certification is appropriate because each claim is based on the same essential facts and each complaint seeks enforcement of the contractual remedy.

Love at 398. See also *Frankel* footnote 11, *supra*.

Few things are clearer than the fact that commonality exists among the plaintiff class as alleged in the instant case.

The rationale offered below by the Fourth District Court has been addressed by other courts and the results have been consistently in favor of the class' entitlement to aggregate claims. The most recent articulation illustrating why the Fourth District's analysis and conclusions are faulty is found in a lengthy opinion by The Honorable Marvin Shoob, Senior Judge,

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[13] It is axiomatic that each and every patient/class member would have to prove the same thing in order to prevail in any individual action addressing the same substantive issues in any court.

Northern District of Georgia, in *In re Domestic Air Transportation Antitrust Litigation*, 137 F.R.D. 677 (N.D. Ga. 1991). In that action, hundreds of thousands of travelers, none of whom had large claims, had entered into over 400 million separate and distinct contracts for overpriced airline tickets. The Court in that case said:

> The Court finds a class action the only fair method of adjudication for plaintiffs. The individual claims of many class members are so small that the cost of individual litigation would be far greater than the value of those claims. See *Du Pont Glore Forgan, Inc. v. American Tel. & Tel. Co.*, 69 F.R.D. 481, 487 (S.D.N.Y. 1975). Thus, if this case is not certified as a class action, a majority of class members would likely abandon their claims even if it can be proven that defendants have conspired to fix prices of domestic air transportation. Justice Douglas, concurring in Eisen, recognized the necessity of a class action in a case such as this:
>
> > [A] class action serves not only the convenience of the parties but also prompt, efficient judicial administration.... [plaintiffs may be] consumers whose claims may seem de minimis but who alone have no practical recourse for either remuneration or injunctive relief.... The class action is one of the few legal remedies the small claimant has against those who command the status quo. 417 U.S. at 185, 94 S. Ct at 2156.

Either the case proceeds as a class action or it is over. *Domestic Air Transportation*, 137 F.R.D. at 693-94.

If the Domestic Air Transportation case had been brought in a Florida court, according to the Fourth District Court's opinion, these hundreds of thousands of airline travelers would have been required to take their 400 million separate ticket purchase overcharge claims to County Court because virtually none of the claimants would have met the Circuit Court monetary jurisdictional threshold. In this hypothetical instance, The Fourth District Court's comment that the plaintiffs seek to "torture" *Chillingworth* would be just as applicable to the class of airline passengers as to the instant class of hospital patients. The result would be no less preposterous than if the approximately 500,000 former patients in the other presently pending class actions, which the instant decision will control, had to turn to County Court or the Small Claims Rules for relief.[14]

The instant action fits squarely within the reasoning of the Fifth District Court in the cited parallel case of *Galen of Florida, Inc., d/b/a Humana Hospital Daytona Beach v. Arscott*, 5th DCA #93-79: (Merits Br. App. Tab 1).

> The class action rule contemplates a single judgment, not hundreds or thousands of judgments for each individual claim. Moreover, as is more

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[14] Under the rationale of the Fourth District's opinion all Florida residents who owned those infamous Oldsmobile with the diesel Chevrolet engines would have had to resort only to the County Court if that complex class action had been brought here. No single Olds owner was injured beyond the difference in value between the lesser and better engine, approximately $1,200. However, the class damages were in excess of $200 million.

> fully discussed in the above-cited cases, given the purpose of the class action procedure and the size and complexity of the usual class action, *we conclude that the class action rule contemplates that the amount of the claim of the entire class determines the dollar amount jurisdiction*. Our circuit courts are designed to hear such complex cases; our county courts are not. If the aggregated individual claims do not exceed the $15,000 jurisdictional amount, the class action belongs in county court. If it exceeds the circuit court threshold, it belongs in circuit court. (*supra* - Slip Opinion at 3). (Emphasis added)
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> * * * *
>
> Indeed, given the recently enhanced jurisdiction of county court, the lack of aggregation would mean that most class actions in Florida would be maintained in county court, with appeal to circuit court. (*Id.* at 4)

See also: Herbert Newberg: Class Actions, 3d ed. Vol. 3 §13.24 "Aggregation of Claims." (Merits Br. App. Tab 2).

The result flowing from the opinion of the Fourth District Court would be contrary to the very purpose of the modern and historic class action. Instead of eliminating repetitious litigation by providing claimants with a method of obtaining redress for claims that otherwise would be too small to warrant litigation, the Fourth District's standard would force one of two equally non-favored results:

(a) It would leave multiple and repetitious litigation as the only means for claimants of small amounts to vindicate their rights; or (b) it would render meaningless the constitutional

guarantee in Florida that the "courts shall be open to every person for redress of any injury. ..." Art. I, Section 21, Florida Constitution.

> ... there is nothing too absurd but what authority can be found for it. Sir Henry Maristy, *Henderson v. Preston*, 4 T.L.R. 632, 633 (1888).

II. THE LEGAL ANALYSES OF OTHER STATES SUPPORTING AGGREGATION SHOULD BE PERSUASIVE.

Courts in four states - Alabama, Arizona, Iowa, and Michigan - have held that aggregation is proper.[15] *Thomas v. Liberty National Life Insurance Co.*, 368 So. 2d 254 (Ala. 1979); *Judson School v. Wick*, 494 P.2d 698 (Ariz. 1972); *Ackerman v. International Business Machines Corp.*, 337 N.W.2d 486 (Iowa 1983); *Paley v. Coca-Cola Co.*, 209 N.W.2d 232 (Mich. 1973); *Dix v. American Bankers Life Assurance Co.*, 415 N.W.2d 206 (Mich. 1987). One court has held that while aggregation is generally not permitted, an exception exists where the claim is equitable in nature. *Carvalho v. Colletta*, 457 A.2d 614 (R.I. 1983). Two courts have refused to permit aggregation. *Pollokoff v. Maryland*

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[15] At least four other states provide in their own class action rules for aggregation or for the filing of any class action in the "greater" branch. Ohio R. Civ. P. 23(F); Ore. Rev. Stat. §19.013; N.H. Superior Ct. Rule 27-A(c); Pa. R. Civ. P. 1703(a) & (b).

National Bank, 418 A.2d 1201 (Md. 1980);[16] *Lamar v. Office of Sheriff of Daviess County*, 669 S.W.2d 27 (Ky. App. 1984).[17]

The decisions refusing to permit aggregation generally do so with little analysis other than citing the federal diversity jurisdiction decisions in *Snyder v. Harris*, 394 U.S. 332 (1969), and *Zahn*, *supra*, 414 U.S. 291 (1973). The real underpinning of *Zahn*, however, was that without a prohibition of aggregation, virtually any state law claim would allow entry into the otherwise supposedly limited federal court system simply virtue of class and diversity allegations.

Such a rationale simply does not apply to a state court system. The issue here (unlike that in the federal court system) is not whether the case can be brought at all, but whether potentially multi-million dollar litigation should be brought in the "greater" court because of its aggregate size, or in the "lesser" court because that aggregate size is the product of thousands of small individual claimants. It is apparent on the face of our legislative scheme that the circuit courts are to

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[16] *See* Note, "*Pollokoff v. Maryland National Bank* - Multiple Plaintiffs May Not Aggregate Their Claims to Meet the Jurisdictional Amount," 41 Md. L. Rev. 464 (1982).

[17] *Lamar* is otherwise difficult to understand, because the Kentucky statute under which the plaintiff sued specifically provided for any challenge to a fee-bill to be presented "to the circuit judge" (the "greater" branch in Kentucky), regardless of the amount in controversy, which would appear to have obviated any need for aggregation of class members' claims.

handle the larger and more complicated matters, which would certainly include this class action, and that the county courts are to handle smaller and less complicated disputes. As the Fifth District Court said in its December 3, 1993 opinion:

> Our circuit courts are designed to hear such complex cases; our county courts are not. *Id.* at page 3. (Merits Br. App. Tab 1).

It is respectfully urged that the decisions and analyses of sister states that have considered this issue should be persuasive on this Court.

In *Judson School*, *supra*, the Arizona Supreme Court held that it was not bound by federal case law concerning aggregation of claims for class actions. The Arizona Supreme Court recognized that the limited jurisdiction of federal courts was one of the most basic distinctions between federal and state court jurisdiction.

The *Judson School* decision of the Arizona Supreme Court describes a case strikingly similar to the instant matter. There too, a class action was pursued in a state court of general jurisdiction. There too, the defendant raised the same issue of aggregation. The Superior Court (equivalent to the Circuit Court in Florida) refused to accept jurisdiction.

Basing their decision upon a state class action rule similar to that of Florida, the Arizona Supreme Court said:

> Were we to hold that claims of less than $200.00 cannot be aggregated in Arizona, there would be no forum where class actions potentially involving millions of dollars and hundreds, possibly thousands of parties could

> find effective relief. A justice of the peace court clearly is not equipped to handle the serious legal questions frequently posed by a suit on a small claim which should be determinative of the rights of many and it becomes either impossible or it is improvident for one litigant alone to absorb the enormous expense of prosecuting his claim or defending his position. *Id.* at 699.

Accord: Paley v. Coca Cola Co., 209 N.W.2d 232 (Mich. 1973).

In permitting claims of less than $200.00 to be aggregated to satisfy jurisdiction, the Arizona court examined *Snyder v. Harris*, 394 U.S. 332, 89 5. Ct. 1053, (1969), which was a precursor to *Zahn*. In *Snyder*, the United States Supreme Court observed that the Congressional purpose of the "matter in controversy" statute was to limit federal court caseloads. *Snyder*, at 339-41. The Court further observed that "*suits involving issues of state law and brought on the basis of diversity of citizenship can often most appropriately be tried in state courts.*" *Id.* at 341. (Emphasis added). Because of the strict statutory requirement, therefore, the U.S. Supreme Court held that individual claims could not be aggregated to satisfy the jurisdictional amount for a class action suit *based on diversity of citizenship*. This is clearly distinguished from jurisdiction based upon federal issues of law where *no* dollar barrier pertains to class actions. The whole concept of higher and lower trial courts based upon the amount in controversy is totally absent from federal jurisprudence.

The Arizona Supreme Court decided that *Snyder* did not apply to state court proceedings. *Judson School*, 494 P.2d at 699. According

to the Arizona court, the United States Supreme Court intended *Snyder* to result in more cases being tried in state courts. The Arizona court held that just because Arizona had adopted the amended Rule 23 (as has Florida), it did not mean that Arizona had to adopt all federal law concerning the rule's limitations.

The Arizona Court further reasoned that, if it disallowed aggregation, there would be no adequate forum in which to address the class members' claims, because a justice of the peace court, which was the lower court in which the smaller claims would have had to have been tried and is equivalent to Florida's County Courts, could not effectively hear all the cases, either singly or as a class. Recognizing that *Snyder* applied only to federal courts, and to ensure an adequate forum, the Arizona Court recognized the laudable public purpose extant in aggregation of class claims.

The reasoning of the Alabama, Iowa, and Michigan courts is also instructive. The rationale of the Alabama court was that, where the legislature had not shown intent to divest trial courts of jurisdiction in class suits, and where there is a concomitant presumption against divestiture of jurisdiction from a higher court to a lower court (*e.g.*, Circuit Court to County Court), then aggregation is appropriate. *Liberty National*, 368 So.2d at 254 The Michigan Supreme Court upheld aggregation because it found that class suits were historically in equity and equitable principles justify aggregation. *Paley*, 209 N.W.2d at 234-37.

Subsequent to *Paley*, the Michigan Supreme Court expanded on the holding. *Dix v. American Bankers Life Assurance Co.*, 415 N.W.2d 206 (Mich. 1987). Focusing on the rationale underlying the federal diversity jurisdiction cases, the *Dix* court stated:

> In contrast with litigants in a diversity action in the federal courts, litigants seeking to maintain a class action in a state court would have no further recourse if they are not allowed to bring a class action somewhere in the state court system. The rationale for not allowing aggregation in the federal courts is not applicable at the state level. *Id.* at 210.

Further reasoning that because the Circuit Court is the trial court of general jurisdiction in Michigan and is better equipped to adjudicate class actions than is the lower court, the *Dix* court held that class actions may be maintained in the Circuit Court without regard to the amount in controversy.

In the Alabama case, *Thomas v. Liberty National Life Insurance Co.*, 368 So. 2d 254 (Ala. 1979), the claims of policy holders for interest on the face amounts of their individual insurance policies were all less than the $500 jurisdictional threshold of the trial court of general jurisdiction. The trial court granted Liberty National's motion for summary judgment (dismissal) on that basis. The Alabama Supreme Court reversed and reinstated the class action, and said:

> .... *so long as the aggregate claim of the plaintiff class is in excess of $500.* The district court system was not established, nor is it equipped, to handle the complexities of a class action. Our present Unified Court System

> was established in order to expedite the business of the judiciary and to afford speedy, just and inexpensive relief to parties involved in a lawsuit. ...
>
> The complexities of class actions and the jurisdictional limitations of the district court make it necessary to withhold applicability of Rule 23. ... [T]he only sensible solution to this jurisdictional problem would be to permit the aggregation of claims . . . to exceed the $500.00 limitation.

Liberty National, 368 So. 2d at 256 (emphasis added).

In *Ackerman v. International Business Machines Corp.*, 337 N.W.2d 486 (Iowa 1983), the Iowa Supreme Court applied similar reasoning in analyzing appellate court jurisdiction of class actions. The Iowa Appellate Court rules generally required a claim of at least $3,000 for appellate court jurisdiction. Although Iowa does not permit aggregation of claims in non-class action cases, the Supreme Court reasoned that the unique nature of class actions compelled a different rule. *Id.* at 488-89. The Court noted that the underlying reason for class actions was to provide small claimants with an economically viable vehicle for redress of common grievances in court. The Court concluded a requirement that each class member have a claim of at least $3,000 to invoke appellate court jurisdiction would violate the basic principles and policies underlying class actions.

III. COUNTY COURTS ARE INAPPROPRIATE AND ILL-SUITED TO ADJUDICATE COMPLEX CLASS ACTIONS IN WHICH THE RELIEF SOUGHT FOR THE CLASS EXCEEDS TEN MILLION DOLLARS.

To what forum may a class in Florida go to obtain judicial relief under state law when the County Courts may not enter a judgment in excess of the maximum amount allowed by the legislature? The answer is obvious by the very asking of the question. The "amount in controversy" in the instant cause exceeds ten million dollars. The dilemma is apparent, obvious and undeniable: How can a County Judge enter an enforceable judgment in this action under a single case number for the relief sought? Will this Court tell these more than 50,000 potential plaintiffs to file their individual lawsuits separately against a giant health care provider for their individual claims of under $200 each (on the average)? What happens when the underlying class action is presented to a County Court jury? Will counsel be instructed to refrain from argument which might suggest a jury verdict in excess of $14,999? Will that jury's potential verdict for several million dollars for the class of patients be subjected to a remittitur? Will the County Judge who seeks to issue a judgment consistent with a jury verdict be subject to yet another Writ of Prohibition seeking to prevent him from rendering such a judgment because it exceeds his authority? These are the real and jurisprudentially confusing problems with the opinion and decision at issue here.

The state of the law in Florida -- if this Court adopts the challenged decision as its own standard -- would be that no class

action will be properly maintainable in our state's court of general jurisdiction.[18] That prohibition would also include those class actions seeking only injunctive relief without a monetary claim due to the fact that the Legislature recently granted authority to the County Courts to also exercise equity jurisdiction.

Although this case may ultimately result in overcharge refunds of millions of dollars to several hundred thousand former hospital patients, the jury will essentially be asked to answer three questions -- What is the maximum "reasonable" mark-up for (1) drugs, (2) laboratory tests, and (3) supplies? The actual computation of overcharges compensable to each class member, as well as the proper accounting method to determine the hospital's costs, are mathematical determinations that may be resolved by the Court or through commonly used administrative procedures. All of these matters are ancillary to and flow from the three basic jury decisions regarding the point at which charges for drugs, lab tests, and supplies become unreasonably high. Based on calculations that

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[18] Individual claims of more than the present threshold of $15,000 generally would be viewed by litigants and their counsel as worthy of being pursued individually. The class action as a vehicle for judicial relief for many small claims becomes a mere illusion. The societal and public policy message thus communicated is that those who engage in causing large injury to a few claimants will suffer judicial intervention and will be made to pay to redress the injury. However, those who are astute enough to inflict only individual injuries in small dollar amounts, but do so to many separate persons, will have no fear about the consequences of their conduct because holders of small grievances would have no meaningful access to judicial vindication.

the class counsel have done in other similar hospital class actions, each of these three basic jury decisions could translate into tens of millions of dollars in class overcharges.

The "amount in controversy" should be viewed from the perspective of these three basic decisions of the jury and their real impact on the class rather than from the artificial perspective of the amount of any single class member's own individual claim.

IV. REQUIRING CLASS ACTION CLAIMANTS WHOSE CLAIMS INDIVIDUALLY DO NOT EXCEED $2,500 TO BE LITIGATED IN COUNTY COURT UNDER THE FLORIDA SMALL CLAIMS RULES WOULD UNCONSTITUTIONALLY DENY SUCH CLAIMANTS ACCESS TO THE COURT SYSTEM; HOWEVER, EVEN IF ACCESS IS PERMITTED, THE ENFORCEMENT OF SUCH RULES IN THIS TYPE OF CASE WOULD EFFECTIVELY DENY LITIGANTS THEIR RIGHT TO DUE PROCESS.

Using the logic of the Fourth District Court, the vast majority of the class claims would be tried in County Court under Rule 7.010, et *seq.*, *Fla. Sm. Cl. R.*, as they would individually be for claims which would not exceed $2,500 exclusive of costs, interest and attorneys' fees. Rule 7.010, *Id.* However, for the reasons set forth below, such claims could never be filed as a matter of right by a plaintiff as a class representative on behalf of a class, and such plaintiffs would effectively be denied the opportunity to seek redress for these claims at all, in derogation of the constitutional

rights of all citizens under §§9[19] and 21[20] of Article I of the *Florida Constitution*.

Section 2.01, *Fla. Stat.* (1992) states:

> The common and statute laws of England which are of a general and not a local nature ... down to the 4th day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this state.

On or prior to July 4, 1776, the common law of England recognized an individual's right to bring a class action in a representative capacity in order to seek and obtain redress for grievances alleged to be common to the class.[21] Therefore, pursuant to §2.01, Florida Statutes (1993), the same common law right obtains for citizens of the State of Florida.

Any statute, law, opinion or order having color of law which prohibits the exercise of that right would violate said §§9 and 21 of Article I of the *Florida Constitution*, which sections protect,

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19 "SECTION 9. Due process. No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself."

20 "SECTION 21. Access to courts. The courts shall be open to every person for redress of any injury, and justice shall be administered without fail, denial or delay."

21 For extensive historical antecedents and origins, see generally; Steven Yeazell, *From Medieval Group Litigation to the Modern Class Action*, Yale University Press (1987), and Newberg on Class Actions, §1.09, (Shepard's/McGraw Hill, 3rd ed. Dec. 1992)

preserve and guarantee the right of all citizens to seek and obtain such relief through the Florida court system. Careful analysis shows that, with respect to class action claims that do not individually exceed $2,500, the Small Claims Rules themselves prohibit one from asserting such a claim in County court..

Rule 7.020(a), *Fla.Sm.Cl.R.* provides as follows:

> (a) Generally. Florida Rules of Civil Procedure Rules 1.090(a)(b) and (c); 1.190(e); 1.210(b); 1.260; 1.410; and 1.560 are applicable in all actions covered by these rules.

In addition, Rule 7.020(b), *Fla.Sm.Cl.R.*, provides that Rules 1.280-1.370, *Fla.R.Civ.P.*, relating to discovery may or shall, under certain circumstances, also be applicable to actions covered by the Small Claims Rules. Only those Rules of Civil Procedure set forth in Rule 7.020(a), *Fla.Sm.Cl.R.*, shall *always* be applicable in cases tried under the Small Claims Rules, and Rules 1.280-1.370, *Fla.R.Civ.P.*, relating to discovery *may* be applicable under certain appropriate circumstances. A litigant under the Small Claims Rules has *no absolute right* whatever to proceed or rely upon any of the other rules of civil procedure which may from time to time exist.

Rule 7.010(c), *Fla.Sm.Cl.R.*, provides as follows:

> (c) Additional Rules. In any particular action, the court may order that action to proceed under 1 or more additional Florida Rules of Civil Procedure on application of any party or a stipulation of all parties on the court's own motion.

It is important to note that, with respect to the other rules of civil procedure to which Rule 7.010(c), *Fla.Sm.Cl.R.*, may apply,

they may only become applicable to any given civil action proceeding under the Small Claims Rules *after* the action has been filed, and then if and only if permitted by the Court or all other parties to the action. No absolute right exists in cases tried under the Small Claims Rules to proceed under any additional rules of civil procedure.

Class Actions in Florida are to be filed and tried pursuant to Rule 1.220, *Fla.R.Civ.P.* This rule sets forth very specific prerequisites to class representation; limitations on claims and defenses that may be so maintainable; pleading requirements; determination of certain issues relating to class representation, notice, and judgment that a claim or defense may be maintained on behalf of a class; and the dismissal or compromise of such actions. However, one wishing to file a class action under the Small Claims Rules may not utilize or proceed under Rule 1.220, *Fla.R.Civ.P.*, at the time he files his action or seeks redress for alleged class action grievance. He would only be able to proceed under Rule 1.220, Florida Rules of Civil Procedure, after a case was pending before the Court, and then only with leave of court or stipulation of all other parties. Thus, a party who desires to litigate a proposed class action claim under Florida's Small Claims Rules has no absolute right to file such a claim. This is truly a "catch-22" situation.

Assuming *arguendo* that a class action claim filed by a litigant whose own claim does not exceed $2,500 would not be prohibited under

the above rules, the actual procedures required by the Small Claims Rules to litigate such an action would, by their very nature, effectively deny the claimant his rights to due process.

It is generally acknowledged that class action litigation is a complex matter. In fact, the Fifth District Court of Appeal repeatedly referred to class action cases as "complex." Slip Opinion at p. 3, *Galen of Florida, Inc. d/b/a Humana Hospital of Daytona Beach v. Arscott, et al.*, 5th DCA #93-79. (Merits Br. App. Tab 1.) Indeed, an entire chapter is devoted to the subject of class actions in the *Manual for Complex Litigation, Second*, produced under the auspices of the Federal Judicial Center. *Manual for Complex Litigation, Second*, §30, *et seq.* (pp. 205-248, inclusive).

The degree and extent to which it would be inappropriate to require litigation of class action claims under the Small Claims Rules in County Court may best be illustrated by an examination of Rule 7.090, Fla.Sm.Cl.R. Rule 7.090(b) states that the court *shall* schedule an initial appearance of the parties for a pre-trial conference not more than 35 days from the date of the filing of the action (emphasis added). Rule 7.090(d) states that the court *shall* set the case for trial not more than 60 days from the date of the pre-trial conference (emphasis added). Only 10 day's notice of the time of trial is required to be given. The Petitioners respectfully submit that the enforcement of such restrictive time constraints would not only be impractical, but would effectively be a denial of due process, as the very nature of class action litigation is such

that such time constraints and deadlines would preclude a party from being able to properly prepare and present his case.

Even the Committee Notes to Rule 7.090, Fla.Sm.Cl.R., state with respect to the 1988 amendment of the third sentence of §(b) thereof that its purpose was to:

> [S]tate within the small claims rules what matters shall be considered at the pre-trial conference rather than by reference to Florida Rules of Civil Procedure Rule 1.220(a), (the class action rule), which has been amended several times and is generally *not applicable* to small claims cases (emphasis added).

Even if a class action claim could be filed under the Small Claims Rules, because Rule 1.220, Fla.R.Civ.P., is inapplicable when the case is initially filed, the statement of claim (complaint) in such an action would not be required to allege the extensive and detailed matters which must be contained in a class action case filed under Rule 1.220, Fla.R.Civ.P.

With respect to pleading requirements, this Court has held repeatedly over a long period of time that in order to satisfy class action requirements, more is required than the mere pleading of the language of the procedural statute or rule governing class actions. *Frankel v. City of Miami Beach*, 340 So.2d 463 (1976), on remand 341 So.2d 1076. That decision any many others by this Court clearly established that the pleading requirements associated with class actions are both specific and extensive, and must include allegations supporting the plaintiff's right to represent the class; that the plaintiff has brought the suit on behalf of himself and all

others similarly situated; that a proper class exists; describing the class with some degree of certainty; that members of the class are so numerous as to make it impractical to bring them all before the Court; that the plaintiff and his counsel adequately represent the class; that the interests of the plaintiff are coextensive with the interests of the other members of the class, etc. This line of cases is diametrically opposed to the simplistic pleading requirements of Rule 7.050(a), Fla.Sm.Cl.R., which only requires the most general and limited allegations.

Rule 7.050(a), Fla.Sm.Cl.R., simply requires that:

> [A]ctions are commenced by the filing of a statement of claim in concise form, which shall inform the defendant of the basis and the amount of the claim. If a claim is based on a written document, a copy or the material part thereof shall be attached to the statement of claim.

Such an approach and interpretation would clearly be contrary to this Court's own intent when it amended Rule 1.220, Fla.R.Civ.P. in 1980. The Committee Note relating to that 1980 Amendment states in part:

> [T]he class action rule has been completely revised to bring it in line with modern practice. ... Generally, the rule provides for the prerequisites to class representation, and early determination about whether the claim or defenses maintainable on behalf of a class, notice to all members of the class, provisions for members of the class to exclude themselves, the form of judgment, and the procedure governing dismissal or compromise of the claim or defense maintained on behalf of a class. ...The notice requirements have been made more explicit and stringent than those in the federal rule.

Additionally, the provisions of Rule 7.050(c), Fla.Sm.Cl.R., require that "the Clerk shall assist in the preparation of a statement of claim and other papers to be filed in the action at the request of any litigant." Obviously, a litigant who needs the Clerk's assistance in preparing his statement of claim or other papers to be filed in the (class) action would, by definition, not be appropriate as an adequate class representative, as is required under Rule 1.220, Fla.R.Civ.P. Similarly, Rule 7.050 (and the Small Claims Rules taken in their entirety) assume that in many cases a litigant will not be represented by counsel. Clearly, this would be inconsistent with the general requirement that competent counsel represent the class so that the interests of the absent class members (and not just the named plaintiff) will be adequately protected. It is the trial court's obligation to see that this protection for the class exists.

Based upon the foregoing, the Petitioners assert than to prohibit aggregation for the purpose of reaching the monetary jurisdictional threshold of the Circuit court, and to require class actions where the individual's claims do not exceed $2,500 to be maintained and tried in County Court pursuant to the Florida Small Claims Rules, would only serve to unconstitutionally limit or eliminate a litigant's constitutional rights to due process and access to the courts. Additionally, it would grotesquely distort this Court's own intentions and philosophy reflected in its adoption of Rule 1.220, Fla.R.Civ.P., its holdings in case law interpreting

and applying the rule, and the entire body of rules it adopted which comprise the Small Claims Rules. Such a result would be unjust and improper, and one which this Court should reject.[22]

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[22] The above analysis is offered to illustrate the significant potential for detriment and confusion to the public, the bar and the orderly administration of civil justice that would result from approval of the Fourth District Court's rationale. Class action is vehicle of judicial invention; the governing rules are promulgated and interpreted by this Court, for an appellate court to talismanically defer to the Legislature to resolve a matter obviously jurisprudential in nature is indeed curious.

CONCLUSION

> As you proceed through life brother whatever be your goal, keep your eye upon the doughnut and not upon the hole. Annon.

The above parable provides an apt analogy to the decision under review. The Fourth District's opinion focuses upon the amount due the individual class member (the hole) while failing to recognize that the class, as the real claimant, asserts a unitary claim in excess of $10 million (the doughnut). Thus, the question: What is the amount in controversy? When the plaintiff class prevails, would the class obtain a single judgment or 50,000 separate judgments one for each class member? The confusion flowing from application of the Fourth District Court's decision demonstrates the very reason for the existence of the class action rule.

The instant cause of action and claim is based upon a common course of business conduct by the hospital common to each class member. The principle should be clearly established by this Court that is the claim of the *class* that determines jurisdiction. Every Circuit Court that thus far has considered class certification has granted the motion. The commonality of the applicable issues of law and fact exist as to each class member.

The view of this issue as articulated by the Fifth District Court and the dissent of Judge Stone in the instant case should be announced as the governing rule by this Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Brief on the Merits - Discretionary Review, has been furnished by Overnight Courier Service/Federal Express to Debora A. Sampieri, Attorney at Law, Kenny, Nachwalter, Seymour, Arnold & Critchlow, P.A., 400 Miami Center, 201 South Biscayne Boulevard, Miami, Florida 33131-2305, this 10th day of January, 1994.

Respectfully submitted,

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