SUPREME COURT OF FLORIDA

David R. May, as Administrator Ad Litem
of the Estate of Oscar T. Bradley, deceased,

Appellant/Plaintiff,

v. CASE No.: 96,652

Illinois National Insurance Company,

Appellee/Defendant,

ON CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
APPEAL NO.: 98-2580

DISTRICT COURT DOCKET NO. 3:97cv110/RV

ANSWER BRIEF OF APPELLEE

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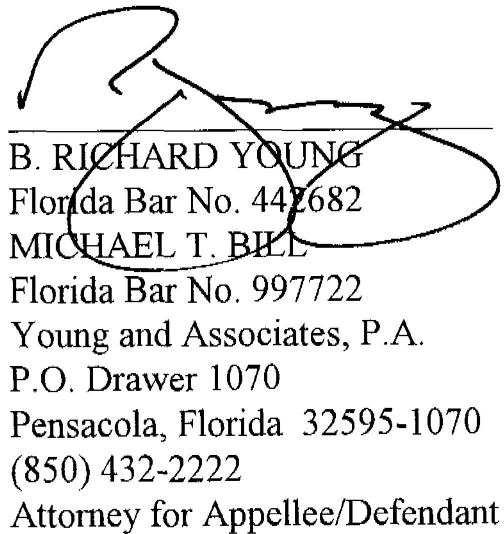
PREFACE

Within this brief, Appellant shall be referred to as "May", Appellee shall be referred to as "INIC" and Atlanta Casualty Company shall be referred to as "ACC".

CERTIFICATE OF TYPE SIZE AND STYLE

I HEREBY CERTIFY THAT INIC's Answer Brief was prepared using proportionally spaced Times New Roman 14 point type in accordance with this Court's administrative order dated July 13, 1998.



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STATEMENT OF THE CASE

On or about September 21, 1991, Donald J. Prockup, Sr. and Inez Prockup were involved in a motor vehicle accident with Oscar Bradley while Mr. Bradley was driving a vehicle owned by Velma Murphy. R1-1. (Complaint at ¶5). Inez Prockup died as a result of the aforementioned accident and Donald J. Prockup, Sr. sustained personal injuries in said accident. R1-1 (Complaint at ¶5). Oscar Bradley died at the scene of this accident. R2-85 (Exhibit "A"). Donald J. Prockup, Sr., individually and as personal representative of the Estate of Inez Prockup, pursued claims against Velma Murphy and the Estate of Oscar Bradley. R1-1 (Complaint). INIC, the insurer for the Estate of Oscar Bradley, disputed coverage throughout Mr. Prockup's claim. R1-5; R1-12. Mr. Bradley's bodily injury policy limits with INIC were $10,000 per person and $20,000 per accident. R2-85 (Exhibit "B").

As of May 20, 1992, no estate had been opened on behalf of Oscar Bradley. On May 20, 1992, Lefferts L. Mabie, III, as attorney for Donald J. Prockup, Sr., personal representative of the Estate of Inez Prockup, filed a petition for appointment of David May as Administrator Ad Litem of the Estate of Oscar Bradley in Escambia County Probate Court. R2-85 (Exhibit "C"). On May 26, 1992, Escambia County Circuit Judge John T. Parnham appointed David R. May Administrator Ad Litem of the Estate

of Oscar T. Bradley in association with the accident of September 21, 1991. R2-85 (Exhibit "C").

On February 4, 1993, Emmer Bell Johnson, one of Oscar Bradley's nieces, filed a Petition for Administration of the Estate of Oscar Bradley. R2-85 (Exhibit "E"). On February 4, 1993, Emmer Bell Johnson gave written notice of her Petition for Administration to Donald John Prockup, Sr., and to David R. May. R2-85 (Exhibit "F"). On March 1, 1993, Donald John Prockup, Sr., as personal representative of the Estate of Inez Prockup, filed an answer, affirmative defenses and counter petition for administration in which Mr. Prockup requested that David R. May be appointed personal representative of Oscar Bradley's estate in response to Ms. Johnson's Notice of Petition for Administration. R2-85 (Exhibit "G"). As one of his affirmative defenses to Ms. Johnson's appointment as personal representative, Mr. Prockup cited Mr. May's prior appointment as Administrator Ad Litem. R2-85 (Affirmative Defense 2). On March 18, 1993, Fred T. Bradley, a nephew of Oscar T. Bradley, filed a petition to be appointed co-personal representative of the Estate of Oscar Bradley along with Emmer Bell Johnson, and Mr. Prockup received notice of said petition. R2-85 (Exhibit "I"). On July 23, 1993, a hearing was conducted on Ms. Johnson's petition and Mr. Prockup received notice of said hearing. R2-85 (Exhibit "I"). Upon completion of the aforementioned hearing, Judge Parnham appointed Emmer Bell

Johnson and Fred Bradley as co-personal representatives of the Estate of Oscar Bradley, thereby rejecting Mr. Prockup's request for the appointment of David R. May as personal representative. R2-85 (Exhibit "J").

Donald J. Prockup, Sr., individually and as personal representative of the Estate of Inez Prockup, filed a personal injury/wrongful death suit against Velma Murphy and David R. May, as personal representative of the Estate of Oscar Bradley, on May 15, 1992. R2-85 (Exhibit "K"). At no time after Judge Parnham's appointment of Ms. Johnson and Mr. Bradley as co-personal representatives of the Estate of Oscar Bradley, did Mr. Prockup substitute Ms. Johnson and Mr. Bradley for Mr. May as defendants in his personal injury/wrongful death suit. In Mr. Prockup's counter petition for administration, he specifically stated that he intended to make such a substitution if David May was not appointed personal representative. R2-85 (Exhibit "G" at P.2, ¶3).

Mr. Prockup did, however, participate directly in the Estate of Oscar Bradley. After appointment of Ms. Johnson and Mr. Bradley as co-personal representatives of Oscar Bradley's estate, Mr. Prockup requested that he continue to receive notice of further probate proceedings and any further probate pleadings as long as he remained an interested party to the proceedings. R2-85 (Exhibit "L"). On August 23, 1993, letters of administration were issued to Ms. Johnson and Mr. Bradley by Judge Parnham and the notice of administration was published in The Escambia Sun-Press in

the issues of September 2, 1993 and September 9, 1993. R2-85 (Exhibits "M" and "N").

On December 27, 1993, Donald Prockup, Sr., as personal representative of the Estate of Inez Prockup, deceased, filed a statement of claim "for damages which arose out of an accident in Holmes County, Florida on September 21, 1991, in which Inez Prockup sustained fatal injuries." R2-85 (Exhibit "O"). At no time did Donald J. Prockup, Sr. file a statement of claim in the Estate of Oscar Bradley for his own personal injuries arising from the accident of September 21, 1991. At no time did Donald J. Prockup, Sr. request an extension of time to file a statement of claim based on fraud, estoppel or insufficient notice of the claims period.

On April 21, 1994, after Mr. Prockup, as personal representative of the Estate of Inez Prockup, had filed his unliquidated statement of claim, final judgment was entered in favor of Donald J. Prockup, Sr., individually and as personal representative of the Estate of Inez Prockup, deceased, in the personal injury/wrongful death action in the total amount of $1,106,522.70.[1] R2-85 (Exhibit "Q"). Of the aforementioned

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[1] ACC, the insurer for Velma Murphy, provided a defense to the underlying personal injury/wrongful death action for both Murphy and the Estate of Oscar Bradley as ACC was primarily responsible for providing indemnity and a defense to Murphy and the Estate of Oscar Bradley under Florida law. See *Fowler v. Allstate*, 480 So. 2d 1287 (Fla. 1985).

total, $175,000 constituted damages to Donald Prockup, Sr. for his own personal injuries, $850,000 constituted damages to Donald Prockup, Sr., for the death of Inez Prockup and $81,522.73 constituted loss of net accumulations to the Estate of Inez Prockup.[2] R2-85 (Exhibit "Q"). At no time after entry of the aforementioned final judgment did Mr. Prockup file a petition to amend his late filed statement of claim as personal representative of the Estate of Inez Prockup to provide the liquidated damage amount nor did Mr. Prockup move for an extension of time to file his own individual statement of claim.

On September 23, 1994, Ms. Johnson and Mr. Bradley filed a Petition for Discharge as co-personal representatives of the Estate of Oscar Bradley. R2-85 (Exhibit "R"). Both Mr. Prockup and Mr. May received notice of Ms. Johnson's and Mr. Bradley's petition for discharge. R2-85 (See Exhibit "C" to Exhibit "R"). Neither Mr. Prockup nor Mr. May filed any objection to the petition for discharge or to the proposed distribution plan. On January 20, 1995, an order requiring filing of an order

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[2] After the entry of final judgment against Murphy and the Estate of Oscar Bradley, Donald J. Prockup, Sr. executed a release in favor of ACC and Velma Murphy in exchange for ACC's payment of Murphy's policy limits of $20,000. INIC and the Estate of Oscar Bradley were specifically excluded from said "release". R3-153 (P.2). At the time Donald J. Prockup, Sr. executed the "release", he also executed a "loan agreement" pursuant to which ACC "loaned" Donald J. Prockup, Sr. $280,000. R3-153 (P.2). Repayment of the aforementioned loan was directly contingent on the success or failure of a "bad faith" case against INIC. R3-153 (P.2).

of discharge was entered and a copy of said order was forwarded to Lefferts L. Mabie, III, Mr. Prockup's attorney, on January 29, 1995. R2-85 (Exhibit "T"). On June 23, 1995, almost six months after Mr. Prockup's attorney was notified of the order requiring filing of the order of discharge, an order discharging Ms. Johnson and Mr. Bradley as co-personal representatives of the Estate of Oscar Bradley was entered upon a finding that the estate had been properly distributed and that the claims of creditors had been paid or otherwise disposed of. R2-85 (Exhibit "U"). At no time did Mr. Prockup or Mr. May voice any objection to the closing of the Bradley estate or to the discharge of the co-personal representatives. At no time did Mr. Prockup or Mr. May request that the Bradley estate be re-opened.

After entry of judgment against Murphy and the Estate of Oscar Bradley in the personal injury/wrongful death action and after Donald J. Prockup, Sr.'s execution of the "release" and "loan agreement" involving Murphy and ACC, May filed an action for "bad faith" against INIC in Escambia County Circuit Court. R1-1. In filing his "bad faith" action against INIC, May was represented by Lefferts L. Mabie, III, the same attorney who represented Prockup in the underlying suit against May for personal injury/wrongful death. R1-1. Subsequently, INIC removed May's "bad faith" action to the United States District Court for the Northern District of Florida based on diversity of citizenship. R1-1. In his complaint against INIC, May alleged that INIC

failed to act in the best interests of Bradley's estate in investigating and attempting to settle Donald J. Prockup, Sr.'s claims against the Bradley estate. R1-1 (Complaint ¶¶9-13). In its second amended answer, INIC raised several affirmative defenses, including an affirmative defense based upon the fact that May could not maintain his "bad faith" action against INIC because the Bradley estate had no personal exposure to the Prockup excess judgment in excess of Bradley's policy limits. R2-79 (Exhibit "B", ¶25). After some initial discovery, INIC filed a motion for summary judgment alleging that it was entitled to judgment in its favor as a matter of law because the Bradley estate had no responsibility for the judgment entered in favor of Prockup in excess of Bradley's policy limits. R2-85. Specifically, INIC maintained that Prockup's failure to file a statement of claim in the Bradley estate within the time limits provided by §§733.702 and 733.710, Florida Statutes, barred any claims for bad faith by May against INIC. R2-85.

In the event that INIC was successful in its motion for summary judgment, neither the Bradley estate, its personal representatives nor its beneficiaries would be responsible for any part of Prockup's judgment in excess of Bradley's policy limits. Despite the foregoing, May, allegedly representing the interests of the Bradley estate, filed a memorandum in opposition to INIC's motion for summary judgment. R2-95. In his opposing memorandum, May contended that Mr. Prockup's counter-petition for

administration of the Bradley estate satisfied the statement of claim requirements of the Florida Probate Code, that Prockup's alleged non-compliance with the statement of claim requirements of the Florida Probate Code had been waived either in the probate proceedings or in the personal injury/wrongful death action and that May was entitled to maintain his "bad faith" action against INIC even if the Bradley estate did not remain personally liable for the excess judgment. R2-95.

The United States District Court for the Northern District of Florida granted INIC's motion for summary judgment and entered final judgment in favor of INIC. R3-153, 154. In granting INIC's motion for summary judgment, the District Court determined that Prockup had failed to timely file a statement of claim in the Bradley estate under the Florida Probate Code and that Prockup's counter petition for administration of Bradley's estate did not constitute a valid statement of claim. R3-153-5, 9. The District Court also determined that §733.710, Florida Statutes, was a statute of repose under Florida law which could not be waived by a failure to raise the statutory bar as an affirmative defense in the underlying action. R3-153-11. Finally, the District Court determined that, even assuming the statutory bar of §733.710, Florida Statutes, was waived if not raised as an affirmative defense, May could still not maintain the "bad faith" action against INIC because the estate had been settled, final

distribution had been made, the co-personal representatives had been discharged and, therefore, Bradley's estate was no longer liable on the excess judgment. R3-153-11.

May appealed the District Court's entry of final summary judgment in favor of INIC to the United States Court of Appeals for the Eleventh Circuit. In its opinion, the Eleventh Circuit specifically recognized that "[r]ecovery of damages by an estate administrator on a bad faith claim against an insurance company, however, is barred unless the estate itself is liable in the probate proceeding to the third-party claimant for the excess damages." Slip Op. at 2. In other words, the Eleventh Circuit explained, "[i]f a deceased insured's estate is not obligated to pay the excess judgment, then no cause of action for bad faith exists." Slip Op. at 2. (citing *Fidelity & Casualty Co. of New York v. Cope*, 462 So. 2d 459, 461 (Fla. 1985). Of the three issues raised by May on appeal, the Eleventh Circuit affirmed the District Court's decision as to two of the issues and certified a question to this Court as to one of the issues. Slip Op. at 3.

The Eleventh Circuit specifically held that May's argument that the bad faith action against INIC could be maintained even if the Bradley estate was not liable for the excess judgment and even if there had been no waiver was without merit. Slip Op. at 6. The Eleventh Circuit held that because the Bradley estate would be "insulated from liability by operation of law, if the failure to file a claim in the probate estate bars the claim, the decisions in *Camp v. St. Paul Fire & Marine Ins. Co.*, 616 So. 2d 12

(Fla. 1993) and *Venn v. St. Paul Fire & Marine Ins. Co.*, 99 F. 3d 1058 (11th Cir. 1996) were distinguishable on their facts. Slip Op. at 7-8.

The Eleventh Circuit similarly rejected May's contention that Prockup complied with the notice requirements of the Florida Probate Code by petitioning to have May appointed as administrator ad litem and by filing an answer and counter-petition for administration of the Bradley estate. Slip Op. at 8. The Eleventh Circuit determined that neither Prockup's petition for appointment of May as administrator ad litem nor his answer and counter-petition for administration satisfied the requirements for a statement of claim under Florida Probate Rule 5.490. Slip Op. at 10-11. It was also determined that the two documents relied upon by May to satisfy the statement of claim requirements of the Florida Probate Code were insufficient to notify interested parties that Prockup was making a statement of claim in excess of the liability insurance coverage available to the Bradley estate. Slip Op. at 10. Based on the foregoing, the only issue left for determination by the Eleventh Circuit was whether the time bars of §§ 733.702 and 733.710, Florida Statutes, were waived because they were not raised by the personal representatives in the estate or by the estate in the personal injury/wrongful death proceedings. Slip Op. at 11.[3]

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[3] The position taken by May in this matter is hard to comprehend in light of his position. David R. May, a licensed Florida attorney, was appointed administrator

Relying on the plain language of § 733.702 (3), Florida Statutes, the Eleventh Circuit rejected May's argument that the failure of the personal representatives to raise a timeliness objection constituted a waiver. Slip Op. at 12. Similarly, the plain language of § 733.702(1), Florida Statutes, provides that partial payment of a claim by the personal representatives does not effect the timeliness requirements. Slip Op. at 12-13. Thus, the Eleventh Circuit affirmed the District Court's decision on every single issue raised by May on appeal except the issue of whether May waived the timeliness requirements of the relevant statutory provisions by failing to raise them as affirmative defenses in the personal injury/wrongful death action.

With regard to the waiver issue in the affirmative defense context, the Eleventh Circuit specifically stated that:

> [t]o answer that question, we must determine whether the statutes [§§ 733.702 and 733.710] operate as statutes of limitations or statutes of repose or nonclaim. The distinction

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ad litem of the Bradley estate to be a defendant in the personal injury/wrongful death action by Prockup. Despite the fact that Mr. May owes a fiduciary duty to act in the best interest of the Bradley estate, May argues that the estate that he represents waived the timeliness requirements of §§733.702 and 733.710, Florida Statutes, by failing to raise them as an affirmative defense in the wrongful death/personal injury action and that the Bradley estate, therefore, should remain liable for a judgment in excess of $1,000,000.00. Conversely, if INIC's position is correct, the estate that Mr. May purportedly represents would be completely insulated from any liability for the Prockup judgment over and above the insurance policy limits.

> is significant. If they act as jurisdictional statutes of nonclaim or statutes of repose, untimely claims are automatically barred. Prockup would then have had no claim against the estate, and May would have no basis for its bad faith failure to settle suit. If, as May contends, they operate as statutes of limitations, they must be pleaded and proved by the estate as an affirmative defense or on a motion to dismiss. Under this characterization, May would be correct in his assertion that the estate's failure to raise the untimeliness issue constitutes waiver.

Slip Op. at 13. The Eleventh Circuit found that Florida law on the status of both §733.702 and § 733.710 as statutes of limitations or statutes of repose/nonclaim was unsettled and that resolution of said status was determinative of this appeal. Slip Op. at 17. Thus, the United States Court of Appeals for the Eleventh Circuit Certified the following question to this Court:

> WHETHER SECTION 733.702 AND SECTION 733.710 OF THE FLORIDA STATUTES CONSIDERED SEPARATELY AND/OR TOGETHER OPERATE AS STATUTES OF NONCLAIM SO THAT IF NO STATUTORY EXCEPTION EXISTS, CLAIMS NOT FORMALLY PRESENTED WITHIN THE DESIGNATED TIME PERIOD ARE NOT BINDING ON THE ESTATE, OR DO THEY ACT AS STATUTES OF LIMITATIONS WHICH MUST BE PLEADED AND PROVED AS AFFIRMATIVE DEFENSES IN ORDER TO AVOID WAIVER.

Slip Op. at 18.

CERTIFIED QUESTION PRESENTED

WHETHER SECTION 733.702 AND SECTION 733.710 OF THE FLORIDA STATUTES CONSIDERED SEPARATELY AND/OR TOGETHER OPERATE AS STATUTES OF NONCLAIM SO THAT IF NO STATUTORY EXCEPTION EXISTS, CLAIMS NOT FORMALLY PRESENTED WITHIN THE DESIGNATED TIME PERIOD ARE NOT BINDING ON THE ESTATE, OR DO THEY ACT AS STATUTES OF LIMITATIONS WHICH MUST BE PLEADED AND PROVED AS AFFIRMATIVE DEFENSES IN ORDER TO AVOID WAIVER.

SUMMARY OF ARGUMENT

Whether considered separately or together, §§ 733.702 and 733.710 constitute statutes of repose or statutes of nonclaim rather than statutes of limitation. At common law, causes of action against a tortfeasor died with the tortfeasor and could, therefore, not be pursued by a claimant after the tortfeasor's death. However, the Florida legislature derogated the common law by permitting, under certain limited circumstances set forth in the Florida Probate Code, a claimant to bring claims which were pending at a decedent's death against the decedent's estate. In conjunction with creating the "right" to pursue a claim against a decedent's estate, the Florida Legislature also created the framework whereby those rights are extinguished by enacting and amending §§ 733.702 and 733.710. The aforementioned statutes of

nonclaim evidence the legislature's recognition of the substantial public interest in having the estates of decedents speedily and finally determined.

When § 733.702, Florida Statutes, is analyzed in conjunction with the long-standing definition of a statute of repose versus the definition of a statute of limitation, it is evident that § 733.702 was intended by the legislature to be a statute of repose or a "jurisdictional" statute of nonclaim. A comparison of court pronouncements regarding § 733.702's status with the Florida Legislature's reaction to these pronouncements clearly reflects the legislature's intent to maintain § 733.702 as a "jurisdictional" statute of nonclaim or a statute of repose rather than as a statute of limitations. Contrary to May's contention, the First District Court of Appeal's opinion in *In re Estate of Parson*, 570 So. 2d 1125 (Fla. 1st DCA 1990) accurately examines the response of the Florida Legislature to attempts to characterize § 733.702 as a statute of limitations as do other cases not discussed by May. In light of the clear and unambiguous language used by the Florida Legislature, this Court should interpret §733.702, Florida Statutes, as a "jurisdictional" statute of nonclaim or statute of repose which acts as an automatic bar to untimely claims not subject to a statutory exception.

As to the status of § 733.710, Florida Statutes, as a "jurisdictional" statute of nonclaim or statute of repose or a statute of limitation, this Court should resolve the conflict in accordance with the Fourth District Court of Appeal' opinion in *Comerica*

Bank & Trust, F.S.B. v. SDI Operating Partners, L.P., 673 So. 2d 163 (Fla. 4th DCA 1996). The clear and unambiguous language of the Florida Legislature in § 733.710(1) provides an absolute jurisdictional bar to claims against an estate, a personal representative or an estate's beneficiaries which are made more than two years after the decedent's death. The foregoing bar applies regardless of when the cause of action accrued and notwithstanding any other section of the Florida Probate Code. In light of the lack of ambiguity in the language of § 733.710, May's reliance on the "legislative history" of § 733.710 is misplaced. Similarly, it is difficult to imagine how the Legislature could have used words that are more "absolute" than the words actually used in § 733.710. Contrary to May's position, the Florida Legislature has made a clear and unambiguous statement that the maximum time that an estate, a personal representative or an estate's beneficiaries should remain potentially liable for a claim against an estate is two years from the date of the decedent's death. In order to effectuate the decision of the Florida Legislature to bring finality and closure to the estates of Florida decedents two years after the decedent's death, § 733.710, Florida Statutes, should be interpreted as a jurisdictional statute of non-claim which the courts may not avoid.

ARGUMENT

At common law, tort claims against a decedent died with the decedent and statutory provisions which abrogate this common law principal should be narrowly construed. *Gates Learjet Corp. v. Moyer*, 459 So. 2d 1082, 1085 (Fla. 4th DCA 1984). The Florida Probate Code has abrogated the foregoing principal to some extent under very specific conditions. *See* § 733, et seq., Florida Statutes. One of the most important principals formulated by the Florida Legislature in enacting the Florida Probate Code was to specify the time period during which an estate is exposed to claims of creditors. *See* §§ 733.702(1) and 733.710(1), Florida Statutes. In 1960, this Court succinctly summarized the concerns which are at the heart of §§ 733.702 and 733.710 as follows:

> [p]ublic policy requires that estates of decedents be speedily and finally determined. It is pursuant to this policy that statutes of non-claim have been enacted by the Legislature. It is not the purpose of the probate act to unreasonably restrict the rights of creditors, but the object of the act is to expedite and facilitate the settlement of estates in the interest of the public welfare and for the benefit of those interested in decedents' estates.

In re: Estate of Brown, 117 So.2d 478, 480 (Fla. 1960). Because non-claim statutes are intended to assist in the orderly and efficient administration of estates, courts may not create exemptions to their provisions where none exist in the plain language of the

statute. *Id.* at 481 (citing *In re: Woods Estate*, 183 So. 10 (Fla. 1938)). Even in situations where the result of strict application of the non-claim statute is harsh and where "equity and good conscience require that the [claimant] not lose his claim", courts are not authorized to change the statute. *Brown* at 481, *Moyer* at 1085-86. By beginning the examination of whether §§ 733.702 and 733.710 are "jurisdictional" statutes of nonclaim or statutes of repose rather than statutes of limitations from the foregoing historical perspective, it becomes evident that the legislature enacted these sections to act as statutes of repose.

As noted by May in his initial brief to this Court, it is important to understand the distinctions between a statute of nonclaim/repose and a statute of limitation in order to resolve the question certified by the Eleventh Circuit. As this Court has noted, there is significant confusion over the relationship between statutes of limitation and statues of repose. *Kush v. Lloyd*, 616 So. 2d 415, 418 (Fla. 1992). The critical characteristic which distinguishes a "statute of repose" from a "statute of limitations" is the event which causes the statute to begin to run. With "statutes of repose", the period of time begins to run on the date of occurrence of a specific event set forth in the statutes without regard to date of accrual of the cause of action. *WRH Mortgage, Inc. v. Butler*, 684 So.2d 325, 327 (Fla. 5th DCA 1996)(citing *Kush supra, Universal Engineering Corp. v. Perez*, 451 So.2d 463 (Fla. 1984) and *University of Miami v. Bogorff*, 583 So.

2d 1000 (Fla. 1991)). On the other hand, a "statute of limitations" begins to run from the time the cause of action accrues. *Butler* at 327. Another distinction between the two types of statutes is that "statutes of repose" are substantive and extinguish claims which have accrued and claims which have not yet accrued while "statutes of limitation", are procedural and only limit the time frame to bring causes of action which have already accrued. Butler at 327. As acknowledged by May in his brief, "statutes of nonclaim" are "more akin to a statute of repose" and "operate as an automatic bar to untimely claims."[4] *Comerica* at 164; *Thames v. Jackson*, 598 So. 2d 121,123 (Fla. 1st DCA 1992). Applying the foregoing concepts to §§ 733.702 and 733.710 reveals that both sections are statutes of nonclaim as opposed to statutes of limitation.

I. SECTION 733.702

Section 733.702, Florida Statutes, should be construed as a statute of nonclaim because the bar to claims provided for under § 733.702 is automatic, unless a statutory exception applies and because the bar is unrelated to the accrual of the cause of action. Section 733.702, Florida Statutes, (1991), states, in pertinent part that:

> (1) **If not barred by s.733.710**, no claim or demand against the decedent's estate that arose before the death of

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4 For simplicity's sake, INIC's brief will hereafter use the term "statute of nonclaim" to refer to both statutes of repose and "jurisdictional" statutes of nonclaim.

the decedent, including claims of the state and any of its subdivisions, whether due or not, direct or contingent, or liquidated or unliquidated; no claim for funeral or burial expenses; no claim for personal property in the possession of the personal representative; and **no claim for damages, including, but not limited to, an action founded on fraud or another wrongful act or omission of the decedent, is binding on the estate, on the personal representative, or on any beneficiary unless filed within the later of 3 months after the time of the first publication of the notice of administration** or, as to any creditor required to be served with a copy of the notice of administration, 30 days after the date of service of such copy of the notice on the creditor, **even though the personal representative has recognized the claim or demand by paying a part of it or interest on it or otherwise**....

(2) No cause of action heretofore or hereafter accruing, including, but not limited to, an action founded upon fraud or other wrongful act or omission, shall survive the death of the person against whom the claim may be made, whether an action is pending at the death of the person or not, unless the claim is filed within the time periods set forth in this part.

(3) Any claim not timely filed as provided in this section is barred **even though no objection to the claim is filed on the grounds of timeliness or otherwise** unless the court extends the time in which the claim may be filed. Such an extension may be granted **only** upon grounds of fraud, estoppel, or insufficient notice of the claims period. **No independent action or declaratory action may be brought upon a claim which was not timely filed unless such an extension has been granted**....

(4) Nothing in this section affects or prevents:

* * *

> (b) To the limits of casualty insurance protection only, any proceeding to establish liability of the decedent or the personal representative for which he is protected by the casualty insurance.

* * *

> (5) **Nothing in this section shall extend the limitations period set forth in s. 733.710.**

(emphasis added).

Although the Eleventh Circuit's discussion of the treatment of § 733.702 by Florida courts reviews some of the more recent applicable cases, a more comprehensive examination of the opinions in this area reflects significant support for the conclusion that § 733.702 should be construed as a statute of nonclaim which automatically bars claims not filed within three months of the publication of the notice to creditors unless a specific statutory exception has been proved by the claimant. As far back as 1938, this Court recognized that § 120, one of the predecessors to § 733.702, was a specialized statute of nonclaim rather than a generalized statute of limitation. *In re Woods' Estate*, 183 So. 10, 12 (Fla. 1938); *Jones v. Allen*, 184 So. 651 (Fla. 1938). The decisions in *In re Woods' Estate* and *Jones* acknowledge that the overriding concern of the legislature in instituting the "specialized statute of nonclaim" within the

Florida Probate Code was to expedite the disposition of estates. *In re Woods' Estate* at 12; *Jones* at 652. The foregoing decisions also indicated that the courts were powerless to create exceptions to the requirements of § 120 which were not provided for by the statute itself. *In re Woods' Estate* at 12; *Jones* at 652.

In another case from 1938, this Court also acknowledged that § 120 was "in effect a statute of nonclaim" and that filing a claim within the time provided for by the statute was a "prime requisite" of the statute. *In re Jeffries' Estate*, 181 So. 833, 837 (Fla. 1938). In *In re Jeffries' Estate*, Justice Whitfield characterized § 122, dealing with time limitations for objecting to properly filed claims and time limitations on bringing suit to enforce claims which have been objected to, as "rules of judicial procedure to be relaxed only for good cause shown". *In re Jeffries' Estate* at 737-38; *See also In re Estate of Sale*, 227 So.2d 199 (Fla. 1969)(holding that the requirements of § 733.18 (formerly § 122) requiring that suit be filed withing a certain time when a claim had been timely filed in the estate under § 733.16 (formerly § 120) were rules of judicial procedure which could be relaxed for good cause shown rather than statutes of nonclaim). Even though neither the decision in *In re Jeffries' Estate* nor the decision *In re Estate of Sale* involved a determination that the time limitation on the filing of a claim in the decedent's estate was a rule of judicial procedure rather than a statute of nonclaim, subsequent judicial decisions have used the holding in these cases to create

exceptions to the claim filing deadlines of § 733.702 which were not provided for by the statute itself.

During the 1980s, some courts in Florida began using the "rules of judicial procedure" reasoning from *In re Jeffries' Estate* to justify creating exceptions to the automatic bar of § 733.702, Florida Statutes, which were not contained in the statute itself while other courts in Florida continued to acknowledge that the time limitation for filing claims in a decedent's estate were statutes of nonclaim which the courts were powerless to avoid. In *Koschmeder v. Griffin*, 386 So.2d 625 (Fla. 4th DCA 1980), the court held that a claim for contribution against a decedent's estate was a contingent claim which must be brought within three months of the date of first publication of the notice to creditors or the claim is barred. *Koschmeder* at 627. While acknowledging that there would undoubtedly be occasions where the operation of the statute would cause a harsh result, the Fourth District Court of Appeal determined that "to hold otherwise would defeat the public policy considerations which resulted in the enactment of the statute.". *Id. See Also Moyer supra* at 1085(stating, on motion for rehearing, that "[t]he nonclaim statute [§ 733.702] permits tort claims against a decedent if filed within three months of first publication of the notice of administration; it cannot be construed to allow such filings at other times").

In 1983, the Third District Court of Appeal decided the case of *Harbour House Properties, Inc. v. Estate of Stone*, 443 So.2d 136 (Fla. 3d DCA 1983) and began the process of applying exceptions to § 733.702 which were not contained in the statute itself. In *Harbour House*, the court was asked to determine whether a creditor had made a sufficient showing of estoppel against the personal representative of an estate to justify an excuse for late filing of a claim on a lease agreement in the decedent's estate. *Harbour House* at 137. Relying on *In re Jeffries' Estate supra*, the court in *Harbour House* stated that:

> [s]ection 733.702, Florida Statutes (1981) and its predecessors are not nonclaims statutes but guidelines for judicial procedure which may be relaxed in the sound discretion of the probate court for good cause shown.

Id. In reaching the foregoing conclusion, the court in *Harbour House* failed to acknowledge that the decision in *In re Jeffries' Estate* specifically stated that the predecessor to § 733.702 was a statute of nonclaim, failed to acknowledge the holdings in *In re Woods' Estate* or in *Jones* that the courts have no authority to engraft exceptions on the "specialized statute of nonclaim" at issue which are not contained in the statute and completely failed to acknowledge that the language from *In re Jeffries' Estate* on which it relied in making its decision had nothing whatsoever to do with the time limitations for filing a claim in a decedent's estate. In light of all of the foregoing,

the Third District's opinion in *Harbour House* was a significant departure from prior opinions holding that § 733.702 is a statute of nonclaim rather than a "rule of judicial procedure". At least one case from another district has noted this departure.

In *Lasater v. Leathers*, 475 So.2d 1329 (Fla. 5th DCA 1985), the court determined that the fact that litigation was pending against the decedent at the time of his death on the claim at issue did not excuse the claimant from timely filing a claim in the estate as required by § 733.702. *Lasater* at 1330. Although the Fifth District Court of Appeal questioned the requirement by the legislature that a claimant who is already litigating a claim must also timely file a claim in the decedent's estate, the court stated "..., the legislature has seen fit to impose the requirement, and we are bound to give it effect." *Id.* In its opinion in *Lasater*, the Fifth District Court of Appeal quoted the language from *Harbour House* that § 733.702 and its predecessors were not statutes of nonclaim but were only "guidelines for judicial administration". *Lasater* at 1330. After setting forth the holding from *Harbour House*, the court in *Lasater* stated:

> [w]e find this conclusion [that 733.702 and its predecessors were not nonclaim statutes] questionable in view of the many early (and later) cases which refer to similar statutes as statutes of non-claim. *See, e.g., In re Woods' Estate*, 133 Fla. 730, 183 So. 10 (1938), 117 A.L.R. 1202 (a distinction between general statutes of limitation and "non-claim statutes" under which claims against estates of deceased persons must be presented); *In re Brown's Estate*, 117 So.2d 478 (Fla. 1960). On the other hand, it has been held

> that statutory time limitations for filing *objections* to claims already filed and for filing an *appropriate action or suit upon such claim* operate merely as rules of judicial procedure and not as statutes of non-claim. *In re Estate of Sale*, 227 So.2d 199 (Fla. 1969).

Id at N.1. Thus, even though the court in *Lasater* did not create a direct conflict with *Harbour House* by its decision because no potential estoppel issue was presented by the facts of *Lasater*, the Fifth District Court of Appeal certainly recognized the distinction between the statute of nonclaim provision and the provisions dealing with the timeliness of objections to claims which the court in *Harbour House* failed to discuss.

In 1986, this Court was asked to determine whether the three month limitation period on filing claims against a decedent's estate was a statute of limitations which had to be raised as an affirmative defense or was a statute of nonclaim which created an automatic bar to untimely claims. *Barnett Bank of Palm Beach County v. Estate of Read*, 493 So.2d 447 (Fla. 1986). In *Barnett Bank*, the decedent, Read, executed a promissory note in favor of Barnett Bank approximately two months prior to his death. *Barnett Bank* at 448. After publication of the notice to creditors, the personal representative of Read's estate, Richard Ralph, advised Barnett, in person and by letter, that the decedent's obligation to Barnett would be paid by the estate without the necessity of Barnett filing an actual claim in the estate. *Id.* Barnett failed to file a claim

in the estate within the time period prescribed by § 733.702 and the estate failed to pay Read's debt. *Id.* However, the probate court entered an order requiring the estate to pay the late filed claim. *Id.* The Fourth District Court of Appeal reversed the order of the probate court and held that the probate court was not authorized to order payment of a claim which was filed beyond the time limit set forth in § 733.702. *Id.* In setting forth the issue to be decided, this Court stated:

> [w]e must decide whether the three-month limitation period in section 733.702 is a jurisdictional statute of nonclaim or a statute of limitations. An untimely claim filed pursuant to a jurisdictional statute of nonclaim is automatically barred. *Miller v. Nolte*, 453 So.2d 397 (Fla. 1984). However, a claim filed beyond the time set forth in a statute of limitations is only barred if the statute of limitations is raised as an affirmative defense or, if the defense appears on the face of the prior pleading, by way of motion to dismiss. Fla.R.Civ.P. 1.110(d). Failure to plead that the statute of limitations has expired constitutes waiver. *Aboandandolo v. Vonella*, 88 So.2d 282 (Fla. 1956); *Tuggle v. Maddox*, 60 So.2d 158 (Fla. 1952).

Id. In holding that § 733.702 was a statute of limitation rather than a jurisdictional statute of nonclaim, the Court in *Barnett Bank* voiced its concern that if § 733.702 were held to be a jurisdictional statute of nonclaim, then certain valid excuses for filing an untimely claim, such as fraud and estoppel, could not be raised by a potential estate creditor. *Id.* at 448. The *Barnett Bank* court noted that its decision was in accordance with the holding in *Harbour House* but, like the court in *Harbour House*, the court in

Barnett Bank did not discuss or explain the divergence from the long line of prior cases which had determined that § 733.702 was a statute of nonclaim. *Id.* at 447. Surprisingly, the *Barnett Bank* holding also stated that "[t]he estate must file a motion to strike or other objection to an untimely claim" despite the fact that the plain language of § 733.702 provided that the statutory bar applied regardless of whether the personal representative acknowledged the claim by making partial payment or otherwise. *Id.* at 449; *See* § 733.702(1)(a), Florida Statutes, (1983). In response to the decision in *Barnett Bank* and a decision by the United States Supreme Court, the Florida Legislature made significant changes to §§ 733.702 and 733.705 in order to reinforce its intent that § 733.702 be interpreted as a statute of nonclaim rather than as a statute of limitations.

The Florida Legislature's amendments to § 733.702, Florida Statutes, in 1988 and 1989 clearly reflect the legislature's intent that the time limitation on filing statements of claim in a decedent's estate was intended to act as a statute of nonclaim and not as a statute of limitations. In *Tulsa Professional Collection Servs. v. Pope*, 485 US 478 (1988), the United States Supreme Court examined an Oklahoma statute similar to § 733.702. The Court in *Pope* determined that statutes, such as § 733.702, Florida Statutes, are properly referred to as statutes of nonclaim but that Due Process requires that a personal representative give actual notice of administration to known or

reasonably ascertainable creditors. *Pope* at 480, 489. In the course of her opinion in *Pope*, Justice O'Connor stated that:

> [t]he entire purpose and effect of the non-claim statute is to regulate the timeliness of such claims and to forever bar untimely claims, and by virtue of the statute, the probate proceedings themselves have completely extinguished appellant's claim.

In 1988 and 1989, the Florida Legislature made significant changes to § 733.702 which were clearly intended to accommodate the rulings in *Barnett Bank* and *Pope*. Ch. 88-340, Laws of Fla. In the 1988 amendment to § 733.702, Florida Statutes, the Florida Legislature enacted subsection three which provided that untimely claims were barred, even though the personal representative does not object to the claim on the grounds of timeliness or otherwise, unless an extension of time to file the claim is granted for on a showing of estoppel or fraud. Ch. 88-340, § 6, Laws of Fla. In 1989, the Florida Legislature added insufficient notice of the claims period to the list of exceptions to the automatic bar of § 733.702. Ch. 89-340, Section 5, Laws of Fla. Reviewing the aforementioned changes to § 733.702, it is evident that the Florida Legislature noted the concerns regarding claims of fraud and estoppel referred to by this Court in *Barnett Bank* and Justice O'Connor's discussion of the notice requirements for nonclaim statutes under state probate law in *Pope* and took the necessary steps to alleviate these concerns while maintaining § 733.702 as a statute of nonclaim. A plain reading of the

language used by the Florida Legislature in § 733.702(3) reflects the legislative intent that untimely claims are automatically barred except where it is proven that one of the statutory exceptions of fraud, estoppel or insufficient notice are present. The 1988 amendment to § 733.702(3) even addressed the *Barnett Bank* requirement that the personal representative object to an untimely claim by specifically providing that an untimely claim is barred even if the personal representative does not object. Applying the standard rules of statutory construction that it must be assumed that the legislature intended the plain and obvious meaning of words used in the statute and that courts are without power to construe unambiguous statutes in a way which would extend, modify or limit a statute's express terms, § 733.702, Florida Statutes, should be interpreted as a statute of nonclaim and not as a statute of limitations. *See Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So.2d 911, 914 (Fla. 1995); *Holly v. Auld*, 450 So.2d 217, 219 (Fla. 1984).

In 1990, the First District Court of Appeal decided the case of *In re Estate of Parson*, 570 So.2d 1125 (Fla. 1st DCA 1990) and discussed the changes made by the Florida Legislature to § 733.705 which reflect a clear intent to insure that § 733.705 be recognized as a statute of nonclaim rather than as a statute of limitation. In *Parson*, the claimant maintained that the personal representative had waived any right to object to its admittedly untimely claim because the personal representative failed to object to the

claim for fifteen months after the filing of the claim. *Parson* at 1125. The claimant in *Parson*, a funeral home, relied upon § 733.705(2) to support its position which provided that written objection may be filed to a claim by a personal representative within four months of first publication of the notice of administration or thirty days from the timely filing of a claim. *Parson* at 1125-26. In rejecting claimant's position, the court in *Parson* noted that the personal representative could not have filed an objection within thirty days of a timely filed claim in the instant case because the claim was not timely filed under § 733.702. *Id.* at 1126. In addressing the applicability of the *Barnett Bank* decision to the facts at bar, the First District Court of Appeal determined that changes made to the Florida Probate Code in 1984 and 1986 indicated that § 733.702 was a jurisdictional statute of nonclaim and not a statute of limitations. *Id.*

In his initial brief, May places great importance on the fact that the changes referred to in *Parson* were changes to § 733.705 and not to § 733.702. (See May's Initial Brief at 20). What May fails to acknowledge is that rules of statutory construction require that all parts of a statute be read together to achieve a consistent statutory framework and that related statutory provisions should be construed in harmony with one another. *Forsythe v. Longboat Key Beach Erosion Control District*, 604 So.2d 452, 455 (Fla. 1992). The First District Court of Appeal's discussion of §733.705's relationship with § 733.702 and that court's determination that the changes

made by the legislature to § 733.705 evidence the intent that § 733.702 be recognized as a jurisdictional statute of nonclaim are entirely consistent with the foregoing rule of statutory construction. The foregoing is even more evident when the relevant provision of § 733.705(5) is taken into consideration. Section 733.705(5), Florida Statutes, states:

> [a] claimant may bring an independent action or declaratory action upon a claim which was not timely filed pursuant to s. 733.702(1) only if the claimant has been granted an extension of time to file the claim pursuant to s. 733.702(3).

The foregoing statement reinforces the legislature's intent that § 733.702 act as a jurisdictional statute of nonclaim unless a statutory exception is shown to apply.

In *Spohr v. Berryman*, 589 So.2d 225 (Fla. 1991), this Court determined that the timely filing of a lawsuit was insufficient to satisfy the statement of claim filing requirements under § 733.702. *Spohr* at 228. Relying on the opinion in *Barnett Bank* the *Spohr* court stated, indicta, that "[while known as a statute of nonclaim, it [§733.702] is nevertheless a statute of limitations". *Id.* at 227. As the *Spohr* court was applying the 1985 version of § 733.702, the effect of the legislative amendments to § 733.702 in 1988 and 1989 were not discussed. Therefore, as with the opinion in *Barnett Bank*, the dicta in *Spohr* that § 733.702 is a statute of limitations is inapplicable to the version of § 733.702 now at issue.

In 1992, the First District Court of Appeal again discussed the effect of the amendments to § 733.702 by the Florida Legislature on the status of § 733.702 as a statute of nonclaim in *Thames v. Jackson*, 598 So.2d 121 (Fla. 1st DCA 1992). Although holding that the 1985 version of § 733.702 was incompatible with due process pursuant to the United States Supreme Court's decision in *Pope*, the *Thames* court affirmed its prior determination in *Parson* that the amendments reflected in the 1988 version of § 733.705 reflected a legislative intent to make § 733.702 a statute of nonclaim. *Thames* at 123, 125. Additionally, the *Thames* court discussed the 1988 and 1989 amendments to § 733.702 which appeared to be a direct legislative response to the decisions in *Barnett Bank* and *Pope*. *Id.* at 124, N.2. Contrary to the position of May in his initial brief, the Florida Legislature's allowance of extensions of time for filing claims under § 733.702 where fraud, estoppel or insufficient notice is shown does not support the position that § 733.702 is a statute of limitations but supports INIC's position that the Florida Legislature amended § 733.702 to add these specific grounds for extension of time in order to respond to prior judicial determinations that the absence of such provisions would result in § 733.702 being interpreted as a statute of limitations rather than as a statute of nonclaim.

Contrary to May's position, the decision in *Pezzi v. Brown*, 697 So.2d 883 (Fla. 4th DCA 1997) does not support the position that the current version of § 733.702

constitutes a statute of limitations rather than a statute of nonclaim. In stating that § 733.702 was a statute of limitations, the *Pezzi* court relied on this Court's prior statement in *Spohr* which, in turn, relied on this Court's decision in *Barnett Bank*, neither of which were interpreting the amended version of § 733.702. *Pezzi* at 884. Additionally, the issue in *Pezzi* was whether §§ 733.702 and/or 733.710 prevented a claimant from establishing the liability of an estate for the purposes of recovering the liability insurance of the decedent and not whether § 733.702 is a statute of nonclaim rather than a statute of limitations. *Id.*

Based upon the foregoing review of relevant Florida case law, this Court should confirm the legislature's intent that § 733.702 be recognized as a statute of nonclaim rather than as a statute of limitations. Contrary to May's position, § 733.702, Florida Statutes, has long been recognized as a jurisdictional statute of nonclaim which the courts are powerless to avoid. May's reliance on the reference in *Harbour House* indicating that § 733.702 constitutes a "guideline of judicial procedure" rather than a statute nonclaim is misplaced as prior rulings of this Court do not support such a conclusion. What appears clear from the amendments which the Florida Legislature has made to § 733.702 over the years is that the intent of § 733.702 is to create a jurisdictional statute of nonclaim rather than a statute of limitation. As § 733.702's bar is automatic and is not tied to the accrual of the cause of action upon which the claim

is based, § 733.702 is certainly more in the nature of a statute of repose than a statute of limitations. Contrary to May's position, the provision of § 733.702(3) providing that a showing of fraud, estoppel or insufficient notice may provide a basis for a motion for extension of time to file a claim does not require a different conclusion. Prior to the addition of these "statutory exceptions", the decisions in *Barnett Bank* and *Pope* indicated that failing to provide for such exceptions either required a finding that § 733.702 was a statute of limitations or that § 733.702 did not comply with the Due Process clause. In order to alleviate these potential problems, § 733.702 was amended with the clear intent to reiterate that § 733.702 is a jurisdictional statute of nonclaim and not a statute of limitations.

II. SECTION 733.710

In determining whether § 733.710 is a jurisdictional statute of nonclaim or a statute of limitations, this Court should adopt the well-reasoned opinion of the Fourth District Court of Appeal in *Comerica Bank & Trust, F.S.B. v. SDI Operating Partners, L.P.*, 673 So.2d163 (Fla. 4th DCA 1996). Section 733.710, Florida Statutes (1991), provides, in pertinent part, that:

> **Limitations on claims against estates --**
>
> (1) Notwithstanding any other provision of the [probate] code, 2 years after the death of a person, neither the decedent's estate, the personal representative (if any), nor

> the beneficiaries shall be liable for any claim or cause of action against the decedent, whether or not letters of administration have been issued, except as provided in this section.
>
> (2) This section shall not apply to a creditor who has filed a claim pursuant to s.733.702 within 2 years after the person's death, and whose claim has not been paid or otherwise disposed of pursuant to s.733.705.

As discussed by the Eleventh Circuit's opinion in this case, the Fourth District Court of Appeal has determined that § 733.710 acts as a statute of repose or a "jurisdictional" statute of nonclaim while the Third District Court of Appeals determined that § 733.710 is a statute of limitations in its opinion in *Baptist Hospital of Miami, Inc. v. Carter*, 658 So.2d 560 (Fla. 3d DCA 1996). A review of the decisions in *Comerica* and *Baptist Hospital*, along with a prior opinion of the Third District discussing § 733.710, supports the conclusion that the Florida Legislature intended § 733.710 to be a jurisdictional statute of nonclaim rather than a statute of limitations.

In *Comerica*, the Fourth District Court of Appeal was faced with a claim against a decedent's estate for environmental land pollution which was not filed within two years of the decedent's death as required by § 733.710. *Comerica* at 164. The probate court granted the claimant's motion to enlarge the time to file its claim and the personal representative appealed, contending that § 733.710 automatically barred the subject claim. *Id.* In beginning its discussion of § 733.710, the *Comerica* court referred to the

importance of the "self executing" nature of a nonclaim statute which was discussed by Justice O'Connor in *Pope. Id.* By examining the initial phrase of §733.702(1) providing that the provisions of § 733.702 apply only "if not barred by Section 733.710", the *Comerica* court determined that § 733.710 is paramount over § 733.702. *Id.* at 165. The Fourth District Court of Appeals, in *Comerica*, then stated:

> it seems inescapable that the legislative intent for section 733.710 was to create a self-executing period of repose---- without significant action by the state itself, it must be noted-----for all claims after the lapse of the 2-year period. In its own terms, it takes precedence over all other provisions of the probate code. At the same time, the text is formulated to extinguish any liability that the estate, the beneficiaries or the PR might have had for any claim or cause of action against the decedent. Hence, rather than merely fixing a period of time in which to file claims, . . ., in reality it creates an immunity from liability arising from the lapse of the period stated.

Id. The *Comerica* court also recognizes that there are no exceptions to § 733.710 for fraud, estoppel or insufficient notice of the claims period as § 733.702(5) specifically provides that "nothing in this section shall extend the limitations period set forth in s. 733.710." *Id.* at 166. As noted by the *Comerica* court, to hold that such exceptions are applicable to § 733.710 would be to frustrate the structure and text of the probate code and would result in § 733.710 being "indistinguishable from § 733.702." *Id.*

The holding of the Fourth District Court of Appeal in *Comerica* is based upon a well-reasoned examination of the statutory sections which make up Chapter 733, Florida Statutes, and correctly points out the flaws in the reasoning of the Third District Court of Appeals in *Baptist Hospital*. In holding that § 733.710, Florida Statutes, is an absolute jurisdictional bar, the *Comerica* court stated that:

> [c]learly, section 733.710 creates a self-executing, absolute immunity to claims filed for the first time, as here, more than 2 years after the death of the person whose estate is undergoing probate. It does not depend on the PR timely objecting to a late claim, and the claimant cannot avoid it by showing, as he could for the nonclaim period under section 733.702, fraud or estoppel or insufficiency of notice. The absence of a provision authorizing enlargements of the repose period, together with the provision in section 733.702(5) negating any use of the enlargement provision to extend the repose period, make it clear to us that the lapse of the 2-year period erects an absolute jurisdictional bar to late-filed claims that the probate judge lacks the power to ignore. It obviously represents a decision by the legislature that 2 years from the date of death is the outside time limit to which a decedent's estate in Florida should be exposed by claims on the decedent's assets.

Comerica at 167. The *Comerica* court rejected the reasoning of *Baptist Hospital* that the legislative history of § 733.710 indicated that the legislature intended said statute to be one of limitation because the clear and unambiguous language of § 733.710 provides that the estate, the personal representative and the beneficiaries are simply not liable for any claims filed more than two years after the decedent's death. *Id.* at 167-

68. Therefore, no reference to legislative history should be made in interpreting the clear language of § 733.710. *Id.* at 168. Even assuming that the legislative history of § 733.710 could be considered in interpreting the statute, there is no language in the history which clearly indicate a specific intent that § 733.710 not be one of repose but one of ordinary limitation. *Id.* Finally, the contention that § 733.710 does not contain the absolute cutoff typical of other statutes of nonclaim is without merit in the eyes of the *Comerica* court. As the *Comerica* court noted, the absolute language of § 733.710 clearly, unambiguously and automatically cuts off any liability of the estate, the beneficiaries and the personal representative, without regard to any other provision of the probate code two years after the death of the decendent. *Id.* Additionally, the specific statement in § 733.702 that none of the provisions of that statute will act to extend the time limitation under § 733.710 clearly reinforces such a conclusion. *Id.*

It is difficult to comprehend the decision of the Third District Court of Appeal in *Baptist Hospital* that § 733.710 is a statute of limitations rather than a statute of nonclaim in light of the apparently contradictory decision of the same court just two years earlier in *In re Estate of Bartkowiak*, 645 So.2d 1082 (Fla. 3d DCA 1994). In *Bartkowiak*, Sun Bank was a judgment creditor of record of the decedent who was not provided with a copy of the notice of administration of the decedent's estate. *Bartkowiak* at 1083. Sun Bank failed to file a claim against the decedent's estate

within two years of the decedent's death. *Id.* After quoting § 733.710, the Court in *Bartkowiak* stated that "[c]learly, the legislature intended to provide a point of closure for estates, even if the personal representative or beneficiaries did not comply with the procedures set out in the probate code." *Id.* at 1083-84. Thus, the court determined that:

> . . ., by operation of 733.710, Sun Bank's right to file its claim was extinguished on September 14, 1991, two years after the death of Bartkowiak, regardless of whether Sun Bank knew or should have known of its right to file a claim against his estate and regardless of whether Ms. Ptak [the personal representative] had an alleged responsibility to notify judgment creditors of record.

Id. at 1084. Despite quoting the foregoing language from *Bartkowiak* in its *Baptist Hospital* decision, the Third District Court of Appeal reached what would appear to be an inconsistent ruling when it held that § 733.710 was a statute of limitations subject to claims of fraud or misrepresentation. *Baptist Hospital* at 562-63. The apparent inconsistency is most likely explained by the facts of the case in *Baptist Hospital* where it appears that the personal representative went to great lengths to fraudulently mislead the creditor to prevent the creditor from filing a claim in the estate within the statutory two year time period. However, the fact that the situation which confronted the *Baptist Hospital* court was distasteful does not justify reading exceptions into § 733.710 which do not exist.

May's contention that § 733.710 should be construed as a statute of limitations rather than as a statute of nonclaim is based primarily on *Baptist Hospital* and on his contention that the potential for inequitable results justifies such an interpretation. Both of the foregoing positions are without merit. As the *Comerica* court indicated, the legislative history of § 733.710 is irrelevant to the determination of whether it is a statute of nonclaim or a statute of limitation because the language used by the legislature in both §§ 733.710 and 733.702 clearly reveal the legislature's intent that § 733.710 constitutes an automatic absolute bar to liability of the estate, the personal representative or the beneficiaries for any claims more than two years after the date of death of the decedent. The foregoing interpretation is in accordance with the purpose of the probate code to expedite the resolution of decedent's estates. If this Court were to accept the *Baptist Hospital* interpretation of § 733.710, there would be no end to the potential claims against a decedent's estate because claims of fraud, estoppel or insufficient notice could arise many years after the decedent's death. Personal representatives and beneficiaries would never be confident that their involvement in a decedent's estate would ever be over because of the potential for new claims to arise. In his initial brief, May asks this Court to ignore the clear legislative decision that two years is the outside limit for which a decedent's estate, personal representative and beneficiaries should be exposed to claims against the decedent's assets because of the

potential that valid claims may be barred as a result. As the Court is well aware, statutes of repose in other areas sometimes bar claims which have yet to accrue but are still upheld as representing the legislature's determination that there must be some point where even valid claims must submit to the need for a specific time period beyond which potential defendants will no longer be exposed to liability. It is clear that the Florida Legislature has determined that the aforementioned time period in the probate context is two years from the date of the decedent's death and this Court should adopt the *Comerica* court's determination that § 733.710 is a jurisdictional statute of nonclaim which the courts are powerless to ignore in order that the intent of the legislature can properly be effectuated.

CONCLUSION

INIC respectfully requests that this Court determine that Sections 733.702 and/or 733.710, Florida Statutes, operate as statutes of repose or "jurisdictional" statutes of nonclaim rather than as statutes of limitation.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered to **Lefferts L. Mabie, III, Esquire**, Lefferts L. Mabie, P.A., 777 S. Harbour Island Boulevard, One Harbour Place, Suite 860, Tampa, Florida 33602; **Louis K. Rosenbloum, Esq.,** One Pensacola Plaza, Suite 212, 125 West Romana Street, Pensacola, Florida 32501, **Robert J. Mayes, Esquire,** 517 Deer Point Drive, Gulf Breeze, Florida 32561, and to **David McGee, Esquire**, Beggs & Lane, Blount Building, Suite 700, Pensacola, Florida 32501, by U.S. mail this 8th day of November, 1999.

B. RICHARD YOUNG
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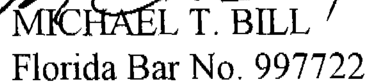

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