IN THE SUPREME COURT OF FLORIDA

SHIRLEY SAWCZAK,
Appellee,

vs. CASE NO. SC00-1527

ALAN L. GOLDENBERG,
Appellant.
_____/

ON CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ANSWER BRIEF OF APPELLEE SHIRLEY SAWCZAK

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Other Authorities

STATEMENT OF THE CASE AND OF THE FACTS

The Nature of the Case, the Course of the Proceedings, and the Disposition in the Federal Courts

Appellee Shirley Sawczak (hereinafter, "Sawczak") concurs in the description by Appellant Alan L. Goldenberg (hereinafter, "Dr. Goldenberg") of the nature of the case, the course of the proceedings, and the disposition in the federal courts.

Statement of the Facts

Sawczak accepts Dr. Goldenberg's recitation of the facts insofar as they describe the contracts for annuities at issue, subject to the further details necessarily set forth at appropriate points in the Argument, and subject to the following further explication.

The malpractice committed by Dr. Goldenberg on Sawczak consisted of transecting her common bile duct causing life-long injuries. (R. 21, p.1)

[1] The jury's verdict of $4,000,629 in damages included $287,813 in past medical

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[1] "R." refers to the record transmitted to the U.S. Court of Appeals for the Eleventh Circuit by the U.S. District Court for the Southern District of Florida and in turn transmitted to this Court; the index, or docket sheet, is included in Appellants' Appendix at tab 1. "R.2" is the district court docket reference to the record transmitted by the bankruptcy court (the index to which, the docket sheet in included in Appellants' Appendix at tab 2); the "#" following is the bankruptcy court docket number, which in this Brief is to the exhibits introduced by Sawczak in the U.S. Bankruptcy Court.

expenses and $7,350,000 (reduced to a present value of $2,450,000) of future medical expenses (including a likely liver transplantation). (R. 2, #59 Ex.1 p.3)

Dr. Goldenberg's claimed virtually all of the $3.8 million of assets he scheduled in his bankruptcy proceedings as exempt. (R. 2, #59 Ex.13 Sched. C) He has liberally used the form of ownership of property of tenancy by the entireties

[2] to shield $126,434 in stock in a hospital corporation, a condominium in the Florida Keys valued at $210,000, three bank accounts, and an office condominium where he practiced medicine. (R.2, #59 Ex.13 Sched. C and D) He is claiming as exempt seven contracts to provide annuities with cash surrender values totaling $355,894 as of the commencement of his case,

[3] Individual Retirement Accounts valued at $2,546,319, and his homestead, scheduled at a value of $220,000 owned virtually free and clear of a mortgage paid down to $3,185. (R.2, #59 Ex. 13 Sched. C) Essentially the only thing of value which Dr. Goldenberg does not claim as exempt is his interest in Goldenberg Enterprises, Ltd., a family partnership in which he values his interest at $40,000. (R.2, #59 Ex.13 Sched.

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[2] *See* section 522(b)(2)(B) of the Bankruptcy Code, 11 U.S.C. § 522(b)(2)(B)

[3] These are the subject of this proceeding.

B) One of its assets is all of the stock of a corporation, carried at a value of $142,881 (R.2, #59 Ex. 11), whose sole significant asset is an unencumbered 34-foot yacht used for personal family purposes but not used to generate income by being chartered to the public. (R.2, #59 Ex. 15 pp. 54-55 and 61-62) While Dr. Goldenberg's interest in the family partnership was theoretically available to the trustee in bankruptcy for the benefit of creditors, in Dr. Goldenberg's words, "My interest in the partnership is not salable." (R.2, #59 Ex. 15 p. 50) Indeed, it is virtually worthless to anyone but Dr. Goldenberg or a member of his family (who are the other partners) because the partnership agreement requires the consent of the general partner along with 90% of the interests of the limited partners for a distribution of available cash.

[4] Although the objective of the partnership is stated to be "to accumulate income and assets," this investment partnership, whose sole general partner is Dr. Goldenberg,

[5] spent $31,695.99 for "travel and entertainment" in 1995, $3,600 for "rent/dockage", and $3,390.75 for "repairs and maintenance". (R.2, #59 Ex. 11) Dr. Goldenberg accomplished all of this "asset protection" before the malpractice he committed on

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[4] (R.2, #59 Ex. 10, Section 10.4) Subsequent to the order under review, the Bankruptcy Court authorized the trustee to sell this $40,000 interest to Dr. Goldenberg's wife for $5,000; not surprisingly, there were no other offers.

[5] (R.2, #59 Ex. 10 p. 1; Ex. 15 p. 48)

Sawczak and more than four years before the filing of his bankruptcy petition.

Dr. Goldenberg effectively shielded (or attempted to do so) all of his assets and nevertheless continued to offer his professional medical services to the public while his patients continued to entrust their lives and well-being to his care and to compensate him accordingly. As a result, one of his subsequent patients who has suffered (and continues to suffer) grievously at his hand will receive nothing unless his claimed exemption of the cash surrender values of the annuity contracts is denied.

SUMMARY OF THE ARGUMENT

The question certified to this Court by the U.S. Court of Appeals for the Eleventh Circuit is whether a statute providing certain exemptions from legal process applies to "cash surrender values" of annuity contracts. The query is properly susceptible of a simple negative response. The statute, section 222.14, Florida Statutes, has a plain, unambiguous meaning, free of technical jargon. It undeniably distinguishes between "cash surrender values" (of which those of only life insurance policies are exempt) and "proceeds" (of which those of annuity contracts are exempt). It cannot be read in its plain words to exempt the cash surrender values of annuity contracts. Because this plain meaning is not patently absurd, under this Court's many precedents that clear language is to be applied as it is written.

The term "cash surrender values" is found in the statutes regulating life insurance policies and annuity contracts, where it is found being applied to both. Thus, in related statutes the legislature has used the same terminology, and those statutes make the same distinction between what is available to the owner of a life insurance policy or annuity contract upon its surrender (the "cash surrender value") and what is payable to the beneficiary of a life insurance policy or annuity contract (the "proceeds"). And the contracts at issue, found in Appellants' Appendix at tab 7,

make the same distinction between what is available to the owner of the annuity contract upon surrender and what is available to the "annuitant" upon the contract's "maturity".

The plain meaning of the terms used in section 222.14 is further supported by the historical development of the exemption laws for life insurance policies. When federal courts held that the Florida statute exempting "proceeds" of life insurance policies did not exempt the cash surrender values of those policies, the legislature enacted what became the present section 222.14, limited, however, to exempting the cash surrender values of life insurance policies. (The text of that enactment is found *infra* at 15.) Thus, when the legislature later amended section 222.14 to add the exemption for "proceeds of annuity contracts" (the act is set forth *infra* at 16), it was legislating in an arena which specifically distinguished between "proceeds" and "cash surrender values". It would be a strange and unknown concept of statutory construction to now read "proceeds" as including "cash surrender value" in that statute.

When the issue presented to this Court was before the U.S. District Court for the Southern District of Florida, it answered the question using a different analysis but

arriving at the same conclusion. It reasoned that there are no annuities presently in existence, only contracts which give the owner, Dr. Goldenberg (and now his bankruptcy trustee), the choice or "option" to acquire annuities (using that term was defined by this Court in an earlier examination of section 222.14 or to surrender the contracts. Therefore, the District Court concluded, there are no "proceeds of annuity contracts" described by the statute in existence to be exempted.

Dr. Goldenberg's efforts to avoid the plain meaning of section 222.14 take various forms, each to no avail. He urges, erroneously, that this Court's earlier consideration of section 222.14 resulted, by unwitting judicial fiat, in annuity contracts (and therefore their cash surrender values) being exempted, while the issue then before the Court was defining what was an annuity in order to reach the ultimate determination of whether the proceeds of a certain arrangement were within the exemption provided. He tries to change the meaning of the statute by using its caption or "catch-line", which is impermissible and, in this instance, ignores the wording of the title to the act which amended section 222.14 to add the exemption for "proceeds of annuity contracts". He tries to use legislative history to vary the plain meaning of the statute, but the legislative history adds nothing anyway. And he advances various other cases and

statutes to attempt to create a reason why his reading of the statute is correct.

Dr. Goldenberg's attempts to circumvent the unmistakable meaning of section 222.14 are not persuasive and cannot be successful. The plain meaning must prevail and govern the result in this case, and accordingly this Court must answer the certified question negatively.

ARGUMENT

I. THE PLAIN MEANING OF SECTION 222.14 IS THAT ONLY "PROCEEDS" OF ANNUITY CONTRACTS HAVE BEEN EXEMPTED FROM LEGAL PROCESS

A. The Question Certified by the U.S. Court of Appeals

The question certified to this Court by the U.S. Court of Appeals for the Eleventh Circuit directly addresses the meaning of section 222.14, Florida Statutes. Without limiting this Court's consideration of relevant matters posed by the question, that court certified the following:

> ARE THE CASH SURRENDER VALUES OF DR. GOLDENBERG'S "ANNUITY CONTRACTS" EXEMPT FROM LEGAL PROCESS UNDER FLA. STAT. ANN. § 222.14 (WEST 1998)?

Sawczak v. Goldenberg (In re Goldenberg), 218 F.3d 1264 (11th Cir. 2000). While the question posed is an issue of first impression in this Court, as it was in the federal courts which considered it, the answer is clearly, and emphatically, "NO".

B. The Starting Point of the Answer—The Text of the Statute

The starting point in the analysis of the meaning of a statute is with its text. Section 222.14, as set forth in Florida Statutes preceded by its caption, reads:

222.14 Exemption of cash surrender value of life

> **insurance policies and annuity contracts from legal process.**—The cash surrender values of life insurance policies issued upon the lives of citizens or residents of the state and the proceeds of annuity contracts issued to citizens or residents of the state, upon whatever form, shall not in any case be liable to attachment, garnishment or legal process in favor of any creditor of the person whose life is so insured or of any creditor of the person who is the beneficiary of such annuity contract, unless the insurance policy or annuity contract was effected for the benefit of such creditor.

The language of the statute reads easily enough. Ambiguities are not apparent, nor is the terminology so specialized as to require an expert to decipher it.

Three points immediately emerge from a look at this section: First, it addresses "the proceeds of annuity contracts". Second, it does not address "cash surrender values of annuity contracts". Finally, the "cash surrender values" the statute does address are "the cash surrender values of life insurance policies".

C. The Plain Meaning of Section 222.14

In construing a statute, this Court first looks at the plain meaning of the statute. *Moonlit Waters Apartments, Inc. v. Cauley*, 666 So.2d 898, 900 (Fla. 1996) (hereinafter, *Moonlit Waters*). Indeed, when this Court earlier was called on by the U.S. Court of Appeals for the Eleventh Circuit to interpret this very statute, the Court

began its analysis by stating:

> When the language of a statute is clear and unambiguous and conveys a clear meaning, the statute must be given its plain and ordinary meaning. Legislative history is irrelevant where the wording of the statute is clear. This Court will not go behind the plain and ordinary meaning of the words used in the statute unless an unreasonable or ridiculous conclusion would result from a failure to do so.

LeCroy v. McCollam (In re McCollam), 612 So.2d 572 (Fla. 1993) (citations omitted)(hereinafter, *McCollam*). *See also Rinker Materials Corp. v. City of North Miami*, 286 So.2d 552 (Fla. 1973), where this Court noted that statutes should be given their "plain and obvious meaning" and that the legislature is assumed to know the "plain and ordinary meanings" of the words it chose to use and held that "[t]he distinction between 'cement' and 'concrete' is clear." 286 So.2d at 553, 555.

Here, the issue is whether the cash surrender values of annuity contracts are exempt. Because the legislature has used within the very same section the terms "proceeds" and "cash surrender values", the "plain and obvious" meaning of the statute is aided by the principle of expressio unius est exclusio alterius. Thus, where the legislature has used a term in one section of a statute but has omitted it in another, then this Court "will not imply it where it has been excluded." *Leisure Resorts, Inc.*

v. Frank J. Rooney, Inc., 654 So.2d 911, 914 (Fla. 1995). *See also Beach v. Great Western Bank*, 692 So.2d 146, 152 (Fla. 1997).

This Court applied this legal principle several years ago in determining whether a statute governing a "lease of recreational or other commonly used facilities" of a cooperative association applied to a land lease. The Court noted that the statute said a "lease of" not a "lease including" but went on to "buttress" its conclusion with a comparison of the terms used by the legislature in the next following section of the statutes, where the text read "land leases or other leases or agreements for recreational facilities, land or other commonly used facilities". The Court applied the principle and concluded that a "land lease" was not covered by the first statute. *Moonlit Waters*, 666 So.2d at 900.

As this Court has noted, in statutory construction "[i]nference and implication cannot be substituted for clear expression." *Carlile v. Game & Fresh Water Fish Comm'n*, 354 So.2d 362, 364 (Fla. 1977) (citation omitted). The text of the statute is clear, and under the principles employed by this Court in *McCollam* and *Moonlit Waters*, "cash surrender values" and "proceeds" are two distinct concepts. The certified question should be answered with a negative.

D. Elsewhere in Related Statutory Provisions the Legislature has Distinguished between "Cash Surrender Values" and "Proceeds"

In applying a statute, this Court has recognized that related statutes should be read together and construed to be in harmony. *Young v. Progressive Southeastern Ins. Co.*, 753 So.2d 80, 84 (Fla. 2000), *McGee v. Volusia County*, 679 So.2d 729, 730 (Fla. 1996)(characterizing this rule as the principle of in pari materia); *T.R. v. State*, 677 So.2d 270, 271 (Fla. 1996). Section 222.14 deals with life insurance and annuities, so it is natural and indeed necessary to review other statutes dealing with life insurance and annuities to see if the term "cash surrender value" is applied to annuities as well as life insurance or only to life insurance.

Indeed the term "cash surrender value" is used with respect to annuity contracts. In section 627.470, Florida Statutes, is a provision for the reinstatement of a "fixed-dollar annuity contract" and "variable annuity contract" "unless the cash surrender value has been paid". Section 627.482, Florida Statutes, provides for the payment of interest specified in section 625.121(6)(e) when payment of "the cash surrender value of a policy" is made; the latter section specifically deals with annuity contracts. Meanwhile, section 627.423, Florida Statutes, refers to "the proceeds of or payments under a life or health insurance policy or annuity contract". When

insolvency proceedings are initiated with respect to an insurance company, insureds are required to file a proof of claim, "except that no proof of claim for cash surrender values or other investment values in life insurance policies and annuities need not be filed . . ." Section 631.181(1)(a), Florida Statutes. In the insolvency proceedings, "All claims under life insurance and annuity policies, whether for death proceeds, annuity proceeds, or investment values,

[6] shall be treated as loss claims." Section 631.271(1)(b), Florida Statutes. Section 717.107, Florida Statutes, deals with the presumed abandonment of "[f]unds held or owing under any life or endowment insurance policy or annuity contract" (subsection (1)); subsection (4) provides a clarification with respect to nonforfeiture provisions in such policies where the insured or beneficiaries would have "become entitled to the proceeds before the depletion of the cash surrender value" by application of the provisions. (emphasis added)

Thus, with the knowledge that the legislature uses the term "cash surrender value" with respect to annuity contracts when it wishes to do so and distinguishes "cash surrender values" from "proceeds" of annuity contracts" in other, related

[6] By reference back to section 631.181(1)(a), we see that "investment values" includes "cash surrender values".

sections of Florida Statutes, giving effect to all statutory provisions and construing them in harmony leads to the conclusion that section 222.14 does not exempt from legal process the cash surrender values of annuity contracts.

Furthermore, as shown *infra* at 36, the contracts at issue likewise refer to the availability to the contract owner of their "cash surrender values" prior to the contracts' maturity dates, when the benefits (the "proceeds") become payable to the beneficiary. This usage by the parties to the annuity contracts conforms to the terminology used by the legislature in section 222.14 and should be given effect.

E. A Historical Analysis of the Enactment of Section 222.14 Arrives at the Same Result—"Proceeds" and "Cash Surrender Values" are Two Different Things

The exemption from legal process for the "proceeds" of annuities was created by an amendment to section 222.14 in 1978, by chapter 78-76, 1978 Fla. Laws 109. The amendment was appended to what was then an exemption from legal process for cash surrender values of life insurance policies. How cash surrender values of life insurance policies came to be the subject of their own exemption statute sheds light on its meaning and on the meaning of the term "proceeds" in section 222.14.

The analysis begins with the predecessor of section 222.13, Florida Statutes,

section 4977, Revised Statutes of Florida (1920). That statute provided an exemption from legal process and read much like today's section 222.13:

> Whenever any person shall die in this state leaving insurance on his life, the said insurance shall inure exclusively to the benefit of the child or children and husband or wife of such person in equal portions, or to any person or persons for whose use and benefit such insurance is declared in the policy; and the proceeds thereof shall in no case be liable to attachment, garnishment or any legal process in favor of any creditor or creditors of the person whose life is so insured, unless the insurance policy declares that the policy was effected for the benefit of such creditor or creditors . . .. [emphasis added]

Two federal courts were called upon to apply this statute in bankruptcy proceedings. In both instances, they were presented with the argument of bankrupts that the statute exempted from the claims of their creditors (and of the bankruptcy trustee) the cash surrender values of their life insurance policies; in both instances, the courts held that the exemption did not apply. *Morgan v. McCaffrey*, 286 F. 922 (5th Cir. 1923); *In re D.F. & C.P. Long*, 282 F. 383 (S.D. Fla. 1918). The Fifth Circuit explained:

> We think that the language of [section 4977] plainly shows that the only subject intended to be dealt with was the situation arising upon the death of any person leaving insurance on his life. . . . The words "and the proceeds thereof shall in no case be liable to attachment," etc. cannot properly be so separated from their context as to be made

> to refer to anything other than the proceeds of a deceased person's insurance on his life. So far as the avails of life insurance policies are concerned, the statute does not purport to create or safeguard any rights, except such as come into existence upon the death of the insured. An intention to exempt or put beyond the reach of an insured's creditors during his lifetime what may be realizable by him from a policy on his life is not disclosed.
>
> * * *
>
> The conclusion is that under the law of Florida the bankrupt is not entitled to have the policies mentioned or the cash surrender value thereof included in what is made exempt from the claims of his creditors.

286 F. at 923-4 (emphasis added).

The Florida legislature responded to these two decisions in 1925, by enacting the predecessor of section 222.14, chapter 10,154, 1925 Fla. Laws 312:

> Section 1. That the cash surrender values of life insurance policies issued upon the lives of citizens or residents of the State of Florida, upon whatever form, shall not in any case be liable to attachment, garnishment or legal process in favor of any creditor or creditors of the person whose life is so insured, unless the insurance policy was effected for the benefit of such creditor or creditors.

By so doing, the legislature provided for the exemption from legal process of the "cash surrender values" of life insurance policies available to the owners of those policies in addition to the exemption for the "proceeds" payable to the policies'

beneficiaries.

Thus existed the statutory framework when in 1978 the legislature amended chapter 10,154, which had become section 222.14 with the enactment of chapter 78-76-76*Nicoll v. Baker*, 668 So.2d 989 (Fla. 1996)*Bridges v. Williamson*, 449 So.2d 400 (Fla. 2d DCA 1984) a meaning at variance with the meaning in section 222.13 would turn that principle on its head.

As this Court recently explained, a "proper construction" of a statute must place the statute in "historical context", that is, with an examination of the development of the statute over time. *Talat Enterprises, Inc. v. Aetna Casualty & Surety Co.*, 753 So.2d 1278, 1282-3 (Fla. 2000). This historical analysis concludes where the plain reading of the statute ends as well—section 222.14 does not exempt cash surrender values of annuity contracts.

F. The U.S. District's Court's Reading of the Annuity Contracts is Elegant in its Simplicity that Dr. Goldenberg has a Choice (an Option) to Acquire Annuities, and that Choice is not Exempt

When the United States District Court for the Southern District of Florida considered the issues presented to this Court, it reached the same conclusion but upon a decidedly different analysis than that expressed above. (Appellants' Appendix at tab

4)

The district court noted that Dr. Goldenberg had paid a single premium which accumulated interest until the maturity date, when the annuitant would begin receiving the periodic payments. The court further noted that the "full cash amount . . . could be withdrawn in full or in part at any time prior to the maturity date."

[7] District Judge Ferguson phrased the issue this way:

> The narrow issue . . . is whether a lump sum payment of cash for an option to purchase an annuity contract in the future, where the purchaser retains the unfettered right to withdraw the payments up to a future date, is exempt from attachment . . ..

Tab 4 at 2. After quoting section 222.14 and reciting the relevant law that a bankrupt debtor must prove its right to an exemption, the court made this analysis:

> An annuity policy is one which provides for periodic payments to an insured to begin at a fixed date and continues throughout the insured's life or for a term of years.

[8] See Nationsbank of North Carolina v. Variable Annuity Life Ins. Co., 513 U.S. 251, 254 (1995). Those periodic payments are proceeds. Dr. Goldenberg did not have annuity contracts until the funds in the annuity account reach maturity. He had, instead, option contracts to buy annuities at a future date which options could be

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[7] This statement of the meaning of the annuity contracts is irrefutable. *See infra* at 36.

[8] Note the similarity of expression with this Court's definition in *McCollam*, 612 So.2d at 574.

revoked by him at anytime prior to the maturity dates. . . . When the judgment was entered the funds on deposit were not protected "proceeds of annuity contracts" as described by the statute. For that reason there is no exemption . . ..

Tab 4 at 3-4 (emphasis added).

Indeed, using common parlance, under the contracts at issue Dr. Goldenberg has a choice (an option)—he can surrender the contracts for their cash surrender value, or he can await their maturity dates and, as annuitant, receive the proceeds. But until the maturity date, he continues to have that choice. And it is that choice which passes to his bankruptcy trustee. *See infra* at 38. And because the surrender of the contracts prevents the maturity date from being reached (which is when the contracts provide that the issuer will start making the periodic payments), the cash value received on surrender cannot be proceeds.

The district court's independent analysis is an alternative basis for concluding that the cash surrender values are not exempt under section 222.14.

G. Under any Analysis, Section 222.14 does not Exempt from Legal Process the "Cash Surrender Values" of Annuity Contracts

Simply reading section 222.14 establishes that it does not exempt from legal process the cash surrender values of annuities. Looking at other statutes demonstrates that the legislature uses the term "cash surrender value" with respect to annuity

contracts when it chooses to do so, just as it uses the term “proceeds” where it deems appropriate. And the history of section 222.14 shows that the courts and the legislature recognized the difference in meaning between “proceeds” and “cash surrender value”. Any way one looks at it, the conclusion is the same.

II. DR. GOLDENBERG'S ARGUMENTS FAIL TO REFUTE THE PLAIN MEANING AND HISTORICAL DERIVATION OF SECTION 222.14

Dr. Goldenberg attempts to create an exemption for annuity contracts and their cash surrender values (as opposed to the proceeds of the annuity contracts) where one does not exist and attempts to create a meaning of "proceeds" at variance with the meaning recognized in the exemption statutes. His arguments are not persuasive and indeed defective.

A. Section 222.14 acts to Exempt "Proceeds" of Annuity Contracts, not the Annuity Contracts Themselves

Dr. Goldenberg takes two different approaches to try to have this Court effectively hold that section 222.14 exempts either the cash surrender values of annuity contracts or annuity contracts themselves (so that, arguably, the cash surrender values thereby would be exempted as well). Neither this Court's prior holdings nor the act of the legislature so conclude.

1. *McCollam* does not hold that annuity contracts are exempt.

Dr. Goldenberg quotes this sentence from *McCollam* for his conclusion: "Section 222.14 clearly exempts all annuity contracts from creditor claims." 612 So.2d at 574. The quotation omits the prior sentence which quotes from the statute

that portion dealing with "proceeds of annuity contracts". 612 So.2d at 573. Dr. Goldenberg's argument misses the point of *McCollam*. There was no question that there were proceeds being paid to the bankrupt; the issue was whether those proceeds were the "proceeds on an annuity contract" within the meaning of section 222.14. This Court concluded that the agreement at hand constituted an annuity contract within the meaning of that term in section 222.14, and accordingly the proceeds thereof were exempt.

Indeed, the decision of the federal district court which lead to the Eleventh Circuit's certification to this Court in *McCollam* is instructive on this point:

> The statute merely requires that the proceeds of the annuity contracts be paid to a Florida resident, and does not state any requirement as to the annuity contract itself. . . . [citing *In re Benedict*, 88 B.R. 387, 389 (M.D. Fla. 1988)]
>
> . . . The annuity itself is not what is exempted by Florida Statute § 222.14. The proceeds from the annuity contracts . . . are protected by the exemption.

LeCroy v. McCollam (In re McCollam), 118 B.R. 129, 131 (S.D. Fla. 1990) (emphasis added), *aff'd*, 986 F.2d 436 (11th Cir. 1993).

[9] *See also Berghman v. J.G. Wentworth S.S.C. Limited Partnership (In re Berghman)*, 235 B.R. 683, 694 (Bankr. M.D. Fla. 1999).

[9] The Eleventh Circuit's opinion, on appeal from the district court and certifying the issue to this Court, clearly shows that the debtor was the annuitant and that the owner of the annuity contract was the settling insurance company. 955 F.2d 678, 679 n.1 (11th Cir. 1992).

Likewise, payments or a stream of payments are not exempt unless they are the proceeds of an annuity contract:

> We read *McCollam* to require the existence of an actual annuity contract before a series of payments may be exempt under section 222.14.

Guardian Life Ins. Co. v. Solomon (In re Solomon), 95 F.3d 1076, 1078 (11th Cir. 1996)(emphasis added; citation omitted).

Since the issue was not whether the periodic payments available were "proceeds"—they clearly were—but rather whether the source of the funds was an annuity contract within the meaning of section 222.14 (and not, for example, a promissory note), *McCollam* exempts annuity contracts themselves and their cash surrender values as part and parcel of the annuity contracts.

2. The caption to section 222.14 does not exempt an annuity contract or its cash surrender value.

The other argument posited by Dr. Goldenberg is that the caption of section 222.14 clearly indicates that the cash surrender values of annuity contracts are exempted. The caption of section 222.14 reads, "Exemption of cash surrender value of life insurance policies and annuity contracts from legal process". The argument fails for several reasons.

The statutory caption cannot be used to enlarge the operation of a statute. For example, in *Cook v. Blazer Financial Services,Inc.*, 332 So.2d 677 (Fla. 1st DCA 1976)(hereinafter, "*Blazer Financial*"), the issue was whether section 559.77(1) of Part V of Chapter 559, Florida Statutes, was limited in application to collection agencies or applied more generally to all "persons". Although section 559.77(1) speaks to "persons", the argument was that the application of the statute was limited to collection agencies by the title to Part V, which is entitled "Consumer Collection Practices". In the course of holding that the statute applied to all "persons", not just collection agencies, the court noted:

> A court may look to the title of an act to aid in the interpretation of the act but the meaning may not be enlarged by the title.

332 So.2d at 679 (citations omitted). A prior holding of that court is the same:

> Unless otherwise specified by a statute or arising by necessary implication, the captions thereto are nothing more than catch phrases, inserted as an aid or convenience to research, and as such have no legal intendment.

Agner v. Smith, 167 So.2d 86, 89 (Fla. 1st DCA 1964),

[10] *cert. dismissed*, 172 So.2d 598 (Fla. 1965). *See also Merritt Square Corp. v. State Dep't of Revenue*, 354 So.2d 143, 144 (Fla. 1st DCA 1978) (Caption or "catchline" is "not part of and do[es] not modify the unambiguous text of the statute.")

Dr. Goldenberg cites *State v. Webb*, 398 So.2d 820, 824 (Fla. 1981), in support of his argument that the caption of the statute adds content to the text of the statute.

[11] However, a review of that case shows that this Court, when it referred to the "title", was in fact referring to the title of the act, not the caption in Florida Statutes.

[12] Thus, *State v. Webb* supports Sawczak's position, is contrary to the conclusion sought by Dr. Goldenberg, and does not conflict with the holdings of the authorities cited above.

Instead of looking at the caption, the court in *Blazer Financial* looked to the

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[10] That court also made a comment applicable to Dr. Goldenberg's policy argument (if one were to accept that argument) that the plain reading of the statute should be expanded:

> [T]he problems latent in this appeal provide an excellent example of statutory shortcomings which it were doubtless better to boil in the crucible of legislative adjustment than to stir in the kettle of judicial experimentation.

167 So.2d at 89.

[11] Initial Brief of Appellants at 40-41.

[12] At 398 So.2d at 825, this Court quoted in full the title of the act at issue; the caption of the codified statute, section 901.151, also set forth at 825, reads simply "Florida Stop and Frisk Law" and contains no assistance to anyone in determining the issue then before the Court, the meaning of "probable cause" in that statute.

"title to the original session law" for aid in resolving any doubt. 332 So.2d at 679. In so doing, the court implicitly refers to a constitutional requirement for legislation:

> Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title. No law shall be revised or amended by reference to its title only. Laws to revise or amend shall set out in full the revised or amended act, section, subsection or paragraph of a subsection. The enacting clause of every law shall read: "Be It Enacted by the Legislature of the State of Florida:".

Art. III, § 6, Fla. Const. Deference to this constitutional provision likewise defeats Dr. Goldenberg's attempt to enlarge the meaning of section 222.14.

The purpose of this constitutional provision is to give notice of the contents of proposed legislation. *Santos v. State*, 380 So.2d 1284, 1285 (Fla. 1980).

> [It] was intended to require that the general nature and substance of the contents of the body of a statute be apparent to one who reads the title. It is not intended, nor is it necessary, that the title fully express the subject matter of the statute. Were such the requirement, the statute would have to be twice stated, first, in the title and then in the act itself. The title may be broader than the statute itself.

Leigh v. State ex rel. Kirkpatrick, 298 So.2d 215 (Fla. 1st DCA 1974)(citations omitted). However, the scope of the enactment cannot be broader than its title. *Raulerson v. General Finance Corp.*, 350 So.2 1111 (Fla. 1st DCA 1977). *See also*

State v. Tindell, 88 So.2d 123, 124 (Fla. 1956).

When enacting legislation, the legislature obviously intends to comply with this constitutional requisite. Thus, "[r]eference to the title of the legislative act is . . . appropriate in determining legislative intent." *Carlile v. Game & Fresh Water Fish Comm'n*, 354 So.2d 362, 365 (Fla. 1977). Indeed, when the title to the enactment makes no reference to a matter, the appropriate conclusion is that the legislature did not intend to cover it, because the opposite conclusion would render the act unconstitutional. *Id.* at 365. And the re-enactment of the law in the state's general statutes without the title "does not change or enlarge the scope of the law in the absence of an indicated intent to alter the scope of the enactment." *Atlas Rock Co. v. Miami Beach Builders' Supply Co.*, 89 Fla. 340, 344, 103 So. 615, 616-7 (1925).

Sawczak is not arguing that the enactment of the 1978 amendment to section 222.14 (as that amendment would be applied by Dr. Goldenberg's interpretation of it) would be unconstitutional for violating the single-subject and notice requirements of Article III, section 6 of the Florida Constitution. Such an argument would be to no avail because the subsequent re-enactments of section 222.14 in Florida Statutes would have cured any such deficiencies. *E.g., Salters v. State*, 758 So.2d 667 (Fla.

2000); *Loxahatchee River Environmental Control District v. School Board of Palm Beach County*, 515 So.2d 217 (Fla. 1987). Rather, our argument is directed to the intent of the legislature in amending section 222.14. The plain language of the statute covers "proceeds of annuity contracts", as does the title to the act,

[13] indicating that the act would exempt from legal process "the pro-

[13] The complete text of the act, including its title, is set forth *supra* at page 16.

ceeds of certain annuity contracts". Since the title uses precisely the same term as the text with no ambiguity whatsoever, there is no room for Dr. Goldenberg's argument to use the catchline in Florida Statutes to expand the scope of the statute beyond that clearly intended by the legislature.

This deference to the constitutional requirement provides further support to the other principles of statutory construction to again lead to the same conclusion, that section 222.14 does not exempt annuity contracts and their cash surrender values but only the proceeds of those contracts.

B. The Legislative History of Section 222.14 should be Disregarded and adds Nothing to the Statute's Plain Meaning

In his Appendix, Dr. Goldenberg has submitted legislative staff reports and other legislative materials to support his argument. His argument still fails.

First, this Court long ago made clear that legislative history is irrelevant where the wording of a statute is clear. *Maryland Casualty Co. v. Sutherland*, 125 Fla. 282 So. 679 (1936). Indeed, this Court made that observation with respect to section 222.14 in *McCollam*, 612 So.2d at 573. The wording of section 222.14 could not be clearer that the exemption from legal process applies only to proceeds of annuity contracts and not to their cash surrender values.

In addition, the legislative history contained in the Appellants' Appendix (at tab 8) contains nothing to resolve the issue at hand. Nowhere is there any discussion or presentation of a definition of "proceeds" at variance with the definition in section 222.13 or a statement that "proceeds" of annuities includes the cash surrender values of annuity contracts. The most that can be read is the statement in the staff report to House Bill 153 that that bill would "provide annuities [not annuity contracts] the same protection now given to life insurance policies."

[14] Appellants' Appendix at 8-4. However, House Bill 153 did not become law. Appellants' Appendix at 8-11. Nor is there any explanation of what is meant by "the same protection". Meanwhile, the staff report for Senate Bill 163 states that the bill "would give <u>beneficiaries</u> of such annuities statutory protection against garnishment or attachment of their funds' proceeds." Appellants' Appendix at 8-6 (emphasis added).

[15] Senate Bill 163 did become law, as chapter 78-76. Appellants' Appendix at 8-10.

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[14] If the term "annuities" is given *McCollam*'s definition of annuities as periodic payments, then that bill would have accomplished what the staff report indicated, because the periodic payments (the "proceeds") would be protected.

[15] The legislative history says nothing about protecting the <u>owner</u> of an annuity contract by exempting its cash surrender value. It is the owner, not the beneficiary, of an annuity contract who is entitled to receive the cash surrender value, as explained *infra* at 36.

At best, the legislative history is unclear. As such, it cannot be used to vary the clear, plain meaning of section 222.14.

C. The Term "Proceeds" in Section 222.14 does not Encompass Cash Surrender Values

Decisions of federal courts applying Florida's exemption laws held that the term "proceeds" did not include cash surrender values of life insurance policies, and the legislature recognized those decisions with the subsequent enactment of the statute exempting from legal process the cash surrender values of life insurance policies (discussed *supra* at 13-17). In addition, the statutes regulating life insurance and annuities distinguish between "cash surrender values" and "proceeds" (*supra* at 11-13). Nonetheless, Dr. Goldenberg continues to insist that the "proceeds" of annuity contracts encompass their cash surrender values.

1. The expression "upon whatever form" does not change the substance of section 222.14.

This argument rests upon Dr. Goldenberg's view that the words "upon whatever form" in section 222.14 can transform the meaning of a statutory term into something more. The cases he cites are readily distinguishable and hardly as broad as the argument suggests.

The first case relied upon is *Bank of Greenwood v. Rawls*, 117 Fla. 381, 158 So. 173 (1934). There, it was held that the cash disability benefits payable upon the surrender of a life insurance policy were within the exemption afforded to the "cash surrender value" of a life insurance policy; in other words, the cash disability benefits were a form of "cash surrender value". This Court further held that "cash surrender value" encompassed not only what could be legally enforced upon surrender of the policy but also "any cash value" that could be obtained by negotiations or agreement to surrender the policy. 117 Fla. at 34-5, 158 So. at 175. However, "cash surrender value" did not become "proceeds" or *vice versa*.

To the same effect is the more recent decision in *Zuckerman v. Hofrichter & Quiat, P.A.*, 646 So.2d 187 (Fla. 1994), also cited by Dr. Goldenberg for his "substantive" view of "form". There, a judgment debtor was receiving disability benefits, there was a dispute with the insurer, and the dispute was resolved by a settlement with a lump sum payment to the judgment debtor. This Court held that the payment was exempt under section 222.18, Florida Statutes, following the reasoning in *Bank of Greenwood v. Rawls* that "upon whatever form" in that statute included the receipt of lump sum disability benefits in a settlement with the insurer. Again, the

disability benefits did not become something else; rather, the benefits received on account of the disability insurance policy by negotiation were within the exemption.

These cases are more fully understood when read in conjunction with a case pre-dating the 1941 enactment of the statute which is now section 222.18. There, the trial court had concluded that disability income benefits payable under a life insurance policy were exempt under the statute now denominated section 222.14. This Court rejected that result:

> Section [222.14] exempts the cash surrender values of life insurance policies . . .. Disability income benefits are provided under separate contract from cash surrender values and the one is no part of the latter. . . . In the law of insurance disability income benefits and cash surrender values are clearly distinguishable, operate on separate and well defined subjects and there is nothing whatever in Section [222.14] to indicate that it intended to reach disability income benefits.

Western Casualty & Surety Co. v. Rotter, 139 Fla. 854, 861, 191 So. 78, 80 (1939).

Reading these cases together leads to the conclusion that variation in the "form" of an entitlement under an insurance policy will not result in a loss of a statutory exemption but that the exemption for a particular entitlement will not be used to enlarge the category of the entitlement (and thus the exemption) beyond that which is clearly

set forth by the legislature.

Dr. Goldenberg also relies on the case of *In re Ebenger*, 40 B.R. 463 (Bankr. S.D. Fla. 1984). That case undertook none of the analysis presented by Sawczak to this Court and below. What the case really addressed was the meaning of the term "beneficiary" in section 222.14—the court rejected the argument that "beneficiary" did not include the annuitant. 40 B.R. at 464.

2. The statutory regulation of annuity contracts does not support Dr. Goldenberg's contentions.

Dr. Goldenberg also refers to several sections in the Florida Insurance Code. Section 627.469, Florida Statutes, is cited with respect to a mandatory requirement of Florida law pertaining to annuities. What is left unexplained is that sections 627.464 through 627.470 contain the provisions which the State of Florida requires to be included in contracts for annuities; nowhere is there a requirement that the contract provide for a cash surrender value. Another section cited is section 625.121; of note is that subsection (6)(c)3.e. of that statute describes various types of annuity contracts, including those with surrender provisions, those with no surrender provisions, and those whose withdrawal rights are limited to "an immediate life annuity". Section 625.121 (6)(c)3.e.(I). Another subsection of that statute, section

625.121 (5)(h)3., distinguishes single premium deferred annuity contracts from single premium immediate annuity contracts. From these statutory provisions it is obvious that a contract for an annuity need not have a surrender provision and may provide only for an annuity (periodic payments), either immediately upon payment (single premium immediate annuity contracts) or upon a stated maturity date. Thus, there is no impediment under Florida law from a debtor purchasing an immediate annuity and thus beginning to receive the proceeds thereof immediately or having a deferred annuity with no surrender rights but only rights to an annuity (periodic payments of the proceeds of the annuity contract) in the future, which rights would be protected from the claims of creditors.

[16]

Dr. Goldenberg also relies upon some U.S. Supreme Court authority for a description of annuities and annuity contracts. These cases are relevant for providing background to this type of investment vehicle. Significantly, however, the Court did note the similarity between contemporary annuities and bank accounts:

> In sum, modern annuities, though more sophisticated than

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[16] For an example of this latter type of annuity, *see Turner v. Marshack (In re Turner),* 186 B.R. 108, 111 (Bankr. 9th Cir. 1995).

> the standard savings bank deposits of old, answer essentially the same need. By providing customers with the opportunity to invest in one or more annuity options, banks are essentially offering financial investment instruments of the kind congressional authorization permits them to broker.

NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 260, 115 Sup. Ct. 810, 815 (1995). This is exactly the point that has been made by Sawczak consistently throughout this litigation: The annuity contracts purchased by Dr. Goldenberg function just like a savings account—they accrue interest, and any part or all of the deposit (premium) and accrued interest (denominated in the policies as "surrender value" or "cash surrender value") can be withdrawn by Dr. Goldenberg as the owner at any time. Just as savings accounts are not exempt, these savings in the form of cash surrender values of contracts for annuities should not be exempt as well.

3. Accepting the plain meaning of section 222.14 will not render state retirement system benefits and contributions open to legal process of creditors of state employees.

In the category of "parade of horribles" which will come to pass if this Court answers the certified question with a negative, the Dr. Goldenberg asserts without explanation that individual retirement accounts and annuity contracts provided under the Florida Retirement System Act somehow would lose their exempt status.

Apparently, the argument is that if the accumulated surrender values of contracts for annuities are not exempt, then the accumulated values of individual retirement accounts or of annuity contracts provided by the State of Florida would likewise not be exempt. However, those statutes are worded differently. The relevant section of the Florida Retirement System Act, section 121.131, Florida Statutes (1997), provides that the "benefits accrued" and the "accumulated contributions" provided by the Act are exempt; this statute clearly covers more than "proceeds". Likewise, the statute governing the retirement program for the State Community College Program exempts the "benefits payable" and "any contribution accummulated". Section 240.3195, Florida Statutes. Again, the terms used are much broader than is the term "proceeds". The only "horrible" result of affirmance is that Dr. Goldenberg will not be able to keep the cash surrender values of these contract for annuities on top of the millions of dollars of exempt assets he otherwise has been able to shield from his patients and other creditors.

4. Because the cash surrender value of an annuity contract is available to the contract's <u>owner</u> at any time, it is not within the "proceeds" protected from the creditors of the <u>beneficiaries</u> of the annuity and is available to Dr. Goldenberg's bankruptcy trustee.

The contracts scheduled by Dr. Goldenberg as exempt are so-called single

premium deferred annuities, that is, under each Dr. Goldenberg paid a single premium which accumulates interest until the maturity date (the date of the commencement of periodic payment to the annuitant). (Appellants' Appendix at tab 7, pages 7(a)-5, 7(b)-4, 7(c)-3, 7(d)-15, 7(e)-9, 7(f)-4) However, under each the accumulated value (the premium plus accrued interest, which is designated the surrender value), may be withdrawn in whole or in part at any time prior to the maturity date by the owner. (Appellants' Appendix at tab 7, pages 7(a)-6, 7(b)-11, 7(c) 11, 15, 7(d)-5, 7(e)-16

[17], 7(f)-5) Once the maturity date arrives, the periodic payment amounts (the "proceeds") begin to be paid to the annuitant, and the owner loses the ability to withdraw any value—that surrender value has been converted into the obligation to pay the annuitant the periodic payments (the annuity or "proceeds of the annuity contract"). For example, the contract with Jackson National Life Insurance Company (Appellants' Appendix at tab 7(b), page 7(b)-4)) shows that the debtor purchased the contract on August 29, 1989, for a one-time premium of $50,000 and that the anticipated maturity date is August 29, 2010. It also shows that Dr. Goldenberg is

[17] As an example, the cited text reads, "The Owner may Surrender part or all of the Contract Value at any time this Contract is in force and prior to the earlier of the Annuitization Date or the death of the Designated Annuitant."

both the owner of the contract as well as being the annuitant.

[18] Page 7(b)-11 contains the provisions which allow the partial or full withdrawal of the accumulated value of the contract by the owner,

[19] and page 7(b)-10 obligates the company to pay "on the Maturity Date, a monthly life income annuity with 120 months certain" to the annuitant.

[20]

The other contracts at issue contain similar provisions. In particular, in each instance the maturity date has not arrived (and thus no periodic payments are being made to the annuitant, Dr. Goldenberg), and he (as the owner of the contract) has the absolute right under the contract to withdraw in whole or in part the accumulated cash surrender value of the contract.

Dr. Goldenberg complains that he has bought the right to have the accumulated

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[18] This distinction is significant—in the McCollam line of decisions, the fact that the insurance company was the owner of the annuity contract ultimately was held to be irrelevant; what was relevant was that the proceeds were being paid to that debtor, and those proceeds were held exempt.

[19] Contrary to Dr. Goldenberg's assertion on page 29 of his Initial Brief of Appellants, it is the owner and not the annuitant who has the right to surrender the contract and receive the cash surrender value, as reference to the cited pages of the contracts establishes unquestionably.

[20] Florida law provides that once an annuity has become payable, only the annuitant has the right to relieve the issuer of the annuity from its obligation to pay the annuity. Section 627.423, Florida Statutes.

cash surrender values converted into annuities on the respective maturity dates. This argument begs the question—at the date of the filing of his bankruptcy petition, the debtor had the unfettered right to withdraw every penny of accumulated value in these contracts. That right became property of his bankruptcy estate pursuant to section 541 of the Bankruptcy Code, 11 U.S.C. § 541. Unless a provision of law provides an exemption from creditor claims for those withdrawal rights, those rights remain property of the bankruptcy estate which the bankruptcy trustee can exercise for the benefit of Dr. Goldenberg's creditors.

[21]

A similar situation faced a bankrupt in *In re Williams*, 222 B.R. 662 (Bankr. S.D. Fla. 1998). There, the debtor became entitled to receive the proceeds of a life insurance policy subsequent to, but within 180 days of, the commencement of the

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[21] This argument raised in this Court by Dr. Goldenberg was also raised in the federal courts but is not within the scope of the question certified to this Court by the Eleventh Circuit. That court's question assumes (correctly) that the bankruptcy trustee can reach whatever is not exempt from the legal process of creditors. Thus, Dr. Goldenberg's citation to *Plymouth Cordage Co. v. Ward*, 202 So.2d 600 (Fla. 1st DCA 1967), misses the point—the bankruptcy trustee has rights as the owner of the annuity contracts, by operation of law pursuant to section 541(a) of the Bankruptcy Code, unlike the creditor in *Plymouth Cordage*, who was not the owner but only a judgment creditor. As owner, the bankruptcy trustee has the right to request the surrender of the contracts and receive the cash surrender value (so long as this Court holds that the cash surrender values are not within the exemption provided to "proceeds") *See infra* immediately following text.

bankruptcy case, and the bankruptcy trustee claimed those proceeds pursuant to section 541(a)(5) of the Bankruptcy Code, 11 U.S.C. § 541(a)(5). The debtor rejoined that she had the option of receiving the life insurance proceeds in the form of an annuity and thus that the proceeds were exempt as proceeds of an annuity under section 222.14. The bankruptcy court rejected the debtor's argument:

> The bankruptcy estate consists of all legal and equitable interests of a debtor at the time of the filing of the bankruptcy. In certain instances, this interest is extended for 180 days after the filing of the bankruptcy by Section 541(a)(5). Thus, the Chapter 7 Trustee does obtain from the Debtor the right to determine how the insurance proceeds will be distributed.

222 B.R. at 663. Likewise, Dr. Goldenberg's trustee obtained the right to decide how the cash surrender values of the contracts for annuities will be distributed.

D. Policy does not Support Dr. Goldenberg; Instead, Sound Policy favoring the Investment for Retirement Supports the Plan Reading of Section 222.14

Dr. Goldenberg would have this Court believe that the application of section 222.14 limited to "proceeds" of annuity contracts and not to a broader category of "all payments" on account of annuity contracts (which presumably would subsume "cash surrender values") would be a severe blow to the efforts of those choosing annuities as a form of retirement investment. However, quite the contrary is true.

Under Dr. Goldenberg's interpretation of section 222.14, the owner of the annuity contract who has made an investment in an annuity contract with a surrender feature (or "option") can withdraw the funds at any time, for any reason, without regard for the rights of his creditors. On the other hand, Sawczak's plain reading of the statute encourages one investing in an annuity contract to buy one without the surrender feature

[22] so that, in a moment of temptation, the retirement nest egg is not squandered.

The exemption laws in large part are paternal. They are intended and designed to protect the honest debtor who gets in over his head or who suffers unexpected financial reversals. The plain meaning of section 222.14 with respect to annuity contracts is in accord.

E. Dr. Goldenberg is Unable to Avoid the Plain Meaning and Historical Derivation of Section 222.14

The meaning of section 222.14 is clear, and its historical roots demonstrate that the plain meaning of its terms is without ambiguity. The efforts made by Dr. Goldenberg to enlarge the meaning of the statute to include as exempt something that

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[22] As pointed out *supra* at 33, there is no Florida statutory requirement that an annuity contract have a surrender value, and in fact case law discloses instances where an annuity contract specifically has no surrender value but pays only on maturity, when it pays the "proceeds" to the beneficiary, the annuitant.

clearly is not simply are not persuasive. Section 222.14 means what it says and does not mean something that it does not say—"proceeds" of annuity contracts are exempt from legal process, and "cash surrender values" of annuity contracts are not exempted.

CONCLUSION

Section 222.14 does not exempt from legal process the cash surrender values of annuity contracts. This conclusion is reached by viewing its plain meaning, by understanding the origins of its terms, by reading the statute in harmony with the statutes regulating life insurance policies and annuity contracts, and by recognizing the simple reality that the owner of an annuity contract with a cash surrender feature has a choice of being able to take that money at any time (and that choice becomes the choice of the owner's bankruptcy trustee upon the owner's bankruptcy).

Reading the statute as urged by Dr. Goldenberg is contrary to its plain meaning and to established principles of statutory construction. Nor does that reading encourage the investment of funds for retirement years; applying the plain meaning of section 222.14 would result in investment of funds in annuity contracts without surrender features, thus ensuring that upon retirement the investment would be

available. Contrary to Dr. Goldenberg's exhortations, policy coincides with the application of the plain meaning of the statute.

Accordingly, Sawczak respectfully requests that this Court answer the question certified by the Eleventh Circuit with a clear, unambiguous "No".

Dated September 19, 2000.

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CERTIFICATE ON FONT REQUIREMENT

I hereby certify that the size and style of type used in the foregoing Answer Brief of Appellee Shirley Sawczak is 14 point proportionately spaced Times New Roman.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Answer Brief of Appellee Shirley Sawczak has been served by first class mail, postage prepaid, this 19th day of September, 2000, on Frank R. Brady and Jeanne C. Brady, Brady & Brady, P.A., 370 Camino Gardens Boulevard, Suite 200C, Boca Raton, Florida 33432, and on Jack F. Weins, Abrams & Anton, P.A., One Boca Place, Suite 411-E, Boca Raton, Florida 33431-7383.

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