

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC 00-1527

IN RE GOLDENBERG

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ALAN L GOLDENBERG, M.D.,  
and  
ALAN L. GOLDENBERG, M.D., P.A.  
Appellants,

v.

SHIRLEY SAWCZAK  
and  
KENNETH WELT,  
as Chapter 7 Trustee  
Appellees

---

ON A CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT  
11<sup>th</sup> Circuit No. 99-10411-F

**INITIAL BRIEF OF APPELLANTS**

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Appellants' counsel

Jeanne C. Brady, Esq.  
Florida Bar No. 0997749

Frank R. Brady, Esq.  
Florida Bar No. 0588024

Brady & Brady, P.A.  
370 Camino Gardens Blvd.  
Suite 200C  
Boca Raton, FL 33432  
Phone: (561) 338-9256

THE FLORIDA SUPREME COURT

ALAN L. GOLDENBERG, ) Florida Supreme Court No. SC 00-1527  
)  
Appellant, ) 11<sup>th</sup> Circuit Case No. 99-10411-FF  
-vs- ) LT Case no. 97-6203-CV-FERGUSON  
)  
SHIRLEY SAWCZAK and KENNETH )  
WELT, as Chapter 7 Trustee )  
)  
Appellees, )  
)  
\_\_\_\_\_ )

**APPELLANTS' CERTIFICATE OF INTERESTED PERSONS  
AND CORPORATE DISCLOSURE STATEMENT**

The listed persons have an interest in the outcome of this case:

Jeanne C. Brady, Esq.  
Frank R. Brady, Esq.  
attorneys for Appellants

Brady & Brady, P.A.  
370 Camino Gardens Blvd., Suite 200C  
Boca Raton, Fl. 33432

The Honorable Wilkie D. Ferguson  
presiding judge in appeal to U.S.  
District Court

c/o U.S. District Court for the Southern  
District of Florida, 299 East Broward  
Blvd, Ft. Lauderdale, Fl 33302;

Robert J. Fiore, Esq.  
state court trial counsel for Appellee  
Sawczak

Russomanno Fiore & Borrello, P.A.,  
Museum Tower, Suite 2101, 150 W.  
Flagler Street, Miami, FL 33130

Alan L. Goldenberg, M.D.,  
Alan L. Goldenberg, M.D. P.A.  
Debtors in Bankruptcy  
Appellants

c/o Brady & Brady, P.A.  
370 Camino Gardens Blvd., Suite 200C  
Boca Raton, Fl 33432

Timothy C. Norris Esq.  
appellate counsel for  
Appellee Sawczak

Buchanan Ingersoll, P.A.  
NationsBank Tower  
100 SE Second Street, Suite 2100  
Miami, Florida 33131

Henry J. Russomanno, Esq.  
trial counsel state court for Appellee  
Sawczak,

Russomanno Fiore & Borrello, P.A.,  
Museum Tower, Suite 2101, 150 W.  
Flagler Street, Miami, FL 33130

The Honorable Raymond B. Ray,  
presiding judge in Bankruptcy Court  
proceedings

c/o United States Bankruptcy Court for  
the Southern District of Florida  
299 East Broward Blvd  
Ft. Lauderdale, Fl 33302

Shirley Sawczak  
creditor in bankruptcy

c/o Timothy Norris Esq.  
Buchanan Ingersoll, P.A.  
NationsBank Tower  
100 SE Second Street, Suite 2100  
Miami, Florida 33131

Jack F. Weins, Esq.,  
attorney for Trustee

Abrams & Anton, P.A.  
One Boca Place, Suite 411E  
2255 Glades Road  
Boca Raton, Fl 33431

Kenneth A. Welt,  
Chapter 7 Trustee for Appellants'  
bankruptcy case

c/o Jack F. Weins, Esq.  
Abrams & Anton, P.A.  
One Boca Place, Suite 411E  
2255 Glades Road  
Boca Raton, Fl 33431

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**PRELIMINARY STATEMENT REGARDING**  
**REFERENCES TO THE RECORD**

This case arrives at this Court with a certified question from The United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit submitted the parties' briefs, its certification opinion, and the certified original record on appeal.

The appellate record was initially transmitted from the U.S. Bankruptcy Court to the U.S. District Court, and then to the 11<sup>th</sup> Circuit Court of Appeals. It consists of 11 separate documents, including two exhibit registers containing 16 exhibits. All of those materials were placed into an expandible file listed as one docket entry by U.S. District Court, which was assigned document no. 2 on the District Court's docket sheet. Due to the number of documents included in District Court document no. 2, references to the documents contained in District Court document no. 2 will be prefaced by "DC Doc 2" followed by the document number of the specific document assigned by the docket sheet of the bankruptcy court proceedings (prefaced by the initials "Bkc"), followed by the page number of the specific document.

References to documents contained only in the District Court proceeding will be made to the document number assigned by the docket sheet of the U.S. District Court proceedings prefaced by the initials "DC".

References to Appellants' Appendix filed with their Initial Brief at this Court are

prefaced with the initials “AA” followed by the exhibit number and page of the specified document.

### **STATEMENT OF TYPESETTING**

This Initial Brief is typed using times new roman 14 point font in Corel WordPerfect™ for Windows format.

### **JURISDICTIONAL STATEMENT**

The Eleventh Circuit certified its July 17, 2000 opinion to this Court stating that this case involves an unanswered question of state law that is determinative of this appeal (hereinafter the “Certified Opinion”) [AA ex. 4].

Article V, section 3(b)(6) of the Florida Constitution authorizes the Florida Supreme Court to exercise discretionary jurisdiction to review questions of state law certified by a United States Court of Appeals. ***Rule 9.030(a)(2)(C), Fla.R.App.P.***

## STATEMENT OF THE CASE AND FACTS

### *Nature of the Case:*

Appellants, Alan L. Goldenberg, M.D. (hereinafter either “Dr. Goldenberg” or “Annuitant” or “Debtor”), and Alan Goldenberg, M.D., P.A. (the “PA”), are debtors in federal bankruptcy. This case evolves from Mrs. Shirley Sawczak’s (“Sawczak” or “Appellee”) appeal of the decision the United States Bankruptcy Court that Dr. Goldenberg’s seven commercial single premium annuity contracts are exempt from forced process under § 222.14, Florida Statutes.

Dr. Goldenberg, a surgeon, performed routine gallbladder surgery on Sawczak in April of 1992 [R DC Doc 21 - p 1; R DC Doc 2 - Bkc Doc 67 - p 2; AA ex 4 - p 1; AA ex. 6- p 2]. Sawczak sued for medical malpractice. In April of 1996, a jury trial commenced, and Dr. Goldenberg and his P.A. were among several defendants at the trial court<sup>1</sup> [Id.]. Dr. Goldenberg commenced a chapter 7 bankruptcy case on May 1, 1996, the day the jury was to start deliberations [R DC Doc 1 - p 3; R DC Doc 21 - p 1; AA ex 4 - p 1; AA ex. 6- p 2]. Later that day, the bankruptcy court granted limited relief from the automatic stay to permit the jury to render its verdict, and that afternoon, the jury found Dr. Goldenberg 100% liable for Sawczak’s injuries. The jury awarded

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<sup>1</sup>*See Sawczak v. Goldenberg*, 710 So. 2d 996 (Fla. 4<sup>th</sup> DCA 1998) (affirming zero verdict in favor of co-defendants), *rev. pending*, case no. 93,353 Florida Supreme Court 1999 (neither Dr. Goldenberg nor his PA. are parties in that appeal).

damages in the amount of \$4,000,629.00 [R DC Doc 21 - p 2; R DC Doc 1 - p 4.; DC Doc 2 - Bkc Doc 59 - p 5-7].

Dr. Goldenberg filed bankruptcy schedules listing assets totaling \$3,791,119, of which he claimed \$3,751,678 as exempt. *Certified Opinion* at 1; [R DC Doc 21 - p 2; R DC Doc 1 - p 4; AA ex. 4 - p 2; AA ex. 6 - p 2]. The exempt assets listed in Dr. Goldenberg's bankruptcy schedules include seven annuity contracts with an aggregate value of \$ 355,894, claimed as exempt property under § 222.14, Florida Statutes. *Id.*

Sawczak is an unsecured creditor of Dr. Goldenberg's bankruptcy estate [R DC Doc 21-p 1]. Sawczak filed a proof of claim in the bankruptcy case for the amount of the verdict, as well as an objection to exemption of the cash surrender value of the annuity contracts under § 222.14, Florida Statutes. [R DC Doc 21- p 2; DC Doc 2 - Bkc Doc 43 - p 1 & 2; AA ex. 4 - p 2; AA ex. 6 - p 2]. Sawczak did not challenge the dischargeability of her unsecured claim, nor did she object to or challenge Debtor's discharge [R DC Doc 2 - Bkc Doc 48 - p 1; AA ex. 6 - p 10]. Debtor was granted a discharge, including Sawczak 's claim, on August 27, 1996 [R DC Doc 2 - Bkc Doc 48 - p 1- ].<sup>2</sup>

The bankruptcy court conducted an evidentiary hearing on Sawczak 's objections

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<sup>2</sup>Dr. Goldenberg's individual retirement accounts were held exempt under Fla. Stat. § 222.21 by the Eleventh Circuit, the District Court and Bankruptcy Court.

to Appellant's exemptions in November of 1996 [R DC Doc 1 - p 3; 11/6/96 transcript - p 5-6]. Sawczak objected to:

The annuities scheduled by Debtor *to the extent of the surrender value of each*, which include, as listed on Schedule C, "Hartford, "Jackson National", "Keyport", "Life SW", Nationwide", "PFL" and "Pacific Mutual Life Insurance" (emphasis supplied).

[R DC Doc 1 - p 3; R DC Doc 2 - Bkc Doc 43 - p 1; AA ex. 6 - p 2] (emphasis supplied).

At the bankruptcy court hearing, Sawczak entered six annuity policies into evidence<sup>3</sup> [R DC 2 - Bkc Doc 59 - p 1, 2; T 11/6/96 p 5-6]. Sawczak neither raised nor argued at the Bankruptcy Court that the annuity policies do not constitute annuity contracts [R DC 2 - Bkc Doc 43 & 57; R DC Doc 35]. Rather, Sawczak objected to the claim of exemption of the annuities "to the extent of the surrender value of each" annuity policy, contending that our Legislature did not intend to exempt the cash surrender value of the annuity contracts when it amended § 222.14 in 1978 [RDC Doc 10 - p 2-3 notes 1&2; R DC Doc 2 - Bkc Doc 43 - p 1, 2]; *Certified Opinion* at 2.

***Statement of the Facts:***

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<sup>3</sup>ITT Hartford Policy # 990969727 [R DC Doc 2 - Bkc Doc 59 - ex. 4]; Jackson National Life Policy # 0031555920 [Id. - ex. 5]; Keyport Policy # KA00094830-02 [Id. - ex. 6]; LSW Policy # SP 804942 [Id. - ex. 7]; Nationwide Policy # 01-3065421 [Id. - ex. 8]; PAL Policy # 0200x027773 [R Bkc 59 - ex. 9]. All contracts are contained in Appellants' Appendix at exhibits 7(a) through 7(f).

“The annuities are single premium deferred annuities”. *Certification Opinion* at 2. “Goldenberg paid a single premium for them, which accumulates interest until the maturity date”. *Id.* “All of the annuities provide for a commencement or maturity date at which time certain sums become payable to the annuitant or his survivors under various settlement options”. *Id.* All of the annuities “contain a provision for ‘surrender’ of the contract in exchange for a specified lump sum payment, defined as either the ‘surrender value’ or ‘net surrender value’”. *Id.* at 2-3. “Goldenberg is both the owner and annuitant of each annuity policy”. *Id.* at 3.

#### ***The Bankruptcy Court’s Ruling:***

The Bankruptcy Court found that Dr. Goldenberg listed seven annuity contracts having an aggregate value of \$355,894 [R DC Doc 1 - p 4; AA ex. no. 6 - p 2], and that he purchased the annuity contracts in 1989, remarking that the contracts are commonly referred to as single premium annuities [Id.]. The bankruptcy court also found that the source of the monies used to purchase the annuities was Debtor’s pension plan, which had been funded on a regular basis since 1972 [Id.]. In holding the annuity policies exempt, the bankruptcy court ruled:

Florida Statute 222.14 is entitled “Exemption of cash surrender value of life insurance policies and *annuity contracts* from legal process.” Neither the title of the statute nor its text distinguishes the proceeds received from a surrender of the annuity contract from the proceeds received after the contract is annuitized. Indeed if the legislature had desired that the



exemption enure only after the stream of payments commenced, it could have easily made this clear. The statute contains no such limiting language. Indeed, even if one were to accept Sawczak's strained interpretation, the exemption she attributes to the stream of payments would be illusory if the value of the contract itself were subject to levy and attachment. Obviously if the surrender of the annuity contract were levied upon, the annuitant or his beneficiary would no longer be entitled to receive the payments due under the contract [internal footnote omitted]

Just as life insurance is not merely a device to provide financial protection in the event of death [internal footnote omitted], annuities are not simply contracts that offer financial protection for those who may live beyond their life expectancies. Perhaps this was once so, but as life insurance policies and annuities have evolved, they have become far more diverse and complex. With the evolution of universal life insurance policies and single premium deferred annuities contracts, life insurance and annuities have become investment vehicles, each motivated by a particular set of objectives, including income and estate tax considerations. Under these circumstances, the Court does not accept Sawczak's suggestion that the legislature intended to treat the surrender value of an annuity contract differently than that of a life insurance policy.

[Id.]. Sawczak then appealed to the U.S. District Court for the Southern District of Florida [R DC Doc 1 - p 1-6].

***The District Court's Ruling:***

Sawczak conceded at the district court that there are no material factual disputes, and only legal conclusions should be reviewed [R DC Doc 5 - p 2]. The district court agreed that proceeds of annuity contracts are exempt from judgment creditors' claims pursuant to § 222.14, but ruled that Dr. Goldenberg "did not have annuity contracts until the funds in the annuity account reached maturity [AA ex. 4 - p 3]. He had, instead,

option contracts to buy annuities at a future date which option could be revoked by him at anytime prior to the maturity dates”. *Certification Opinion* at 2. The district court also stated that Dr. Goldenberg held \$355,894 in the “annuity contracts”, and that “when the judgment was entered *the funds on deposit* were not protected ‘proceeds of annuity contracts’ as described by statute” (emphasis supplied). *Id.*; [R DC Doc 5 - p 2; AA ex. no. 4 - p 2]. “Thus the district court concluded that there was no exemption as to the \$ 355,894 held in the ‘annuity contracts’, and those payments are reachable by process to partially satisfy Sawczak’s judgment. *Certification Opinion* at 2.

***The Eleventh Circuit’s Ruling:***

Dr. Goldenberg appealed the district court’s decision as to the annuities to the United States Court of Appeals for the Eleventh Circuit.<sup>4</sup> The parties entered into an agreed order staying the district court’s mandate [AA ex. 5].

Dr. Goldenberg argued at the Eleventh Circuit that the 7 annuity contracts listed in his bankruptcy schedules are in fact annuity contracts exempt under § 222.14, and that the cash surrender value of each is included in the § 222.14 exemption. *Certification Opinion* at 2. Conversely, Sawczak argued in the alternative that (a) the contracts were not annuities when Dr. Goldenberg filed for bankruptcy, but were only

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<sup>4</sup>Sawczak cross-appealed the exemption of Dr. Goldenberg’s individual retirement accounts (IRA’s). The Eleventh Circuit affirmed the exemption of the IRA’s, and only certified a question as to the annuities.

options to buy annuity contracts at a future date, which are not exempt under § 222.14, and (b) that § 222.14 only exempts proceeds of annuity contracts, which does not include cash surrender value. *Id.* Concluding that no Florida case directly addresses this important issue of Florida law, the Eleventh Circuit certified the following question to this Court:

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

The Eleventh Circuit also specified in its *Certification Opinion* that it does not intend the particular phrasing of its question to limit this Court's consideration of the problem posed. *Id.*

### **STANDARD OF REVIEW**

In reviewing a bankruptcy court judgment as an appellate court, legal conclusions are reviewed de novo. *In Re Englander*, 95 F.3d 1028, 1030, (11<sup>th</sup> Cir. (Fla.) 1996), *cert. den.*, 520 U.S. 1186, 117 S. Ct. 1469, 137 L.Ed.2d 682 (U.S. 1997). No independent factual findings can be made unless the bankruptcy court's findings of fact are clearly erroneous. *Id.*

### **SUMMARY OF THE ARGUMENT**

Debtor's commercial annuity contracts, and any cash surrender value or proceeds thereof, are exempt under § 222.14, Florida Statutes. Florida's Insurance Code

expressly regulates single premium deferred annuity contracts, and includes annuity contracts in the statutory definition of “life insurance” under the Insurance Code. *See §§ 625.121(5)(h)3 and 624.602, Florida Statutes.*

One can only glean from the face of Debtor’s commercial annuity contracts that the parties to these contracts intended to enter into formal annuity contracts, and did so. Each annuity contract is clearly and repeatedly denominated as an “annuity” within its four corners. In each annuity contract, Dr. Goldenberg is denominated as the “Annuitant” and “Owner”. As “Annuitant”, Dr. Goldenberg is entitled to receive, and the annuity company is obligated to pay, annuity payments to commence on an “Annuity Date”. Annuity contracts typically promise several payment alternatives. No matter the form or method of the payment, Annuitant is entitled to annuity payments at stated intervals over a period of time. Payment is guaranteed by the annuity company.

The fact that each annuity contract has a provision for surrender is not dispositive as to whether the annuity contract, its value or proceeds are exempt from forced process under § 222.14. This Court exempts the contract itself.

In any event, Dr. Goldenberg has not elected to surrender the annuity contracts to the annuity companies. No election can be forced absent Dr. Goldenberg’s express and written election to do so.

The cash value of Dr. Goldenberg’s annuity contracts is exempt. Any payment,

including surrender or settlement value, is also exempt. Even if an election to surrender the annuity contract had been made, our Legislature unequivocally articulated that the proceeds of annuity contracts “*upon whatever form*” are exempt. This Court has long ruled that the words “upon whatever form” are clear, unambiguous, and dispositive as to the exemption of cash surrender values. It was error for the district court to deem annuity contracts exempt only upon reaching a stated annuitization date (i.e., maturity date), when the stream of payment to the annuitant has commenced. According to the district court’s reasoning, unless an annuity contract is in its pay-out phase, it is not exempt. The problem with that ruling is that should an exemption vest only after the stream of payments commences, the exemption as to the stream of payments would be illusory if the value of the contract is itself subject to levy and attachment. Further, it effectively limits the exemption statute to those annuitants already at retirement age and receiving payments under their annuities. Moreover, the District Court’s reasoning that “funds on deposit” under the annuity contracts are not “proceeds” creates a slippery slope as to attachment of any annuity contract, life insurance policy, or other exempt instrument in its payout phase where “funds” remain “on deposit” with the obligor/ issuer from which future payments will disbursed. If followed, the district court’s ruling could turn Florida’s insurance industry on its head, expose most annuity policies and life insurance policies, as well as other retirement benefits, to forced process, and

may foster additional litigation.

Most insurance policies, including annuities, contain multiple settlement options, such as lump sum payment in exchange for surrender of the policy. Our Legislature statutorily requires settlement options to be provided for in individual annuity contracts that issue pursuant to our state's university retirement system. Thus, if the district court's reasoning is followed, it will impact this state's university retirement system.

The method by which an annuity company funds its obligation to pay the annuitant, be it purchase of a second annuity or use of the accumulated cash value generated by the single premium, should not be the litmus test to determine whether the annuity contract or the proceeds thereunder qualify for the exemption. Rather, the Court must look to whether the parties intended to create an annuity and whether the contract is defined as an annuity within the four corners of the document. The semantics of "proceeds" versus "surrender value" should be disregarded for purposes of determining whether the contract is exempt under § 222.14. Our Legislature expressly includes "annuity contracts" within the statutory definition of "life insurance" under the Insurance Code. Further, the legislative history of the 1978 amendment of § 222.14 shows that the addition of "annuity contracts" to § 222.14 was done for the purpose of avoiding unnecessary litigation over whether annuity contracts were to be treated the same as life insurance for purposes of the exemption from forced process. Further, the

term “proceeds” encompasses “funds on deposit” under the contract and all cash value of the contract. Thus, there is no distinction to be made between “cash surrender value” and “proceeds”. Cash surrender values of annuity contracts are exempt.

### ARGUMENT

**I. The certified question should be answered in the affirmative; the cash surrender value of Dr. Goldenberg’s annuity contracts is exempt under Fla. Stat § 222.14 (West 1998).**

***Introduction:***

Dr. Goldenberg is named as both the “owner” and “annuitant” of each annuity policy at issue in this appeal. *Certification Opinion* at 1. All of Dr. Goldenberg’s annuity contracts were purchased in 1989 with exempt pension funds. [R DC Doc 1 - p 4; AA ex. 6 - p 2].

The four corners of each annuity policy unmistakably evinces the parties’ intent to enter into an annuity contract.[AA ex. 7(a) - 7(f)]. The ITT Hartford policy<sup>5</sup> recites that it is an “Individual Single Premium Deferred Annuity Contract” [AA - ex. (7)(a) - p 4; R DC Doc 2 - Bkc Doc 59 - ex. 4 - p 4; Record Excerpts - ex. (7)(a) - p 4]. It has a market adjustment formula, “annuity specifications” and several “annuity options” consisting of an “annuity” payable monthly with the last payment due prior to death of

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<sup>5</sup>ITT Hartford assumed the Fidelity Bankers Life annuity listed in Debtor's schedule C [AA ex. 7(a) - p 1].

annuitant, an “annuity” providing for monthly income to annuitant for a fixed period, an “annuity” payable during the lifetime of annuitant, an “annuity” payable monthly during the joint lifetimes of the annuitant and a secondary payee, or a monthly payment for a number of years as may be selected [Id. p 8]. Under the first three options, payment depends on the age and sex of the Annuitant at the time the first payment is due [Id. p 8]. The Annual Mortality Tables give rise to annuity tables that determine the sum of the monthly payments [Id. p 8]. The annuity policy also provides for a surrender charge and net surrender value [Id. p 7].

The Jackson National Life policy provides a “Statement of Annuity Values”, and provides for commencement of benefit payments by April 1<sup>st</sup> of the calendar year that Annuitant reaches 70½ years of age [AA - ex. (7)(b) - p 1,4; Record Excerpts ex. (7)(b) - p 1, 4]. The annuity contract provides for a surrender charge that declines over the life of the annuity policy and has an “annuity provision” that provides for alternative payment methods [Id. p 9, 11]. If living on the maturity date, Annuitant is entitled to a monthly life income annuity with 120 months certain [Id. p 11]. The amount is on the “Table of Guaranteed Values” of the policy [Id. p 12]. While alive, Annuitant has all rights to the policy [Id. p 9]. If Annuitant dies prior to the maturity date, the company will pay to Annuitant’s “Beneficiary” the death benefit proceeds [Id.].

The Keystone Provident Life Insurance Policy recites it is a “Single Premium



Deferred Annuity Non-Participating - No Dividends” contract [AA - ex. (7)(c) - p 2; R DC Doc 2 - Bkc Doc 59 ex. 6 - p 5; Record Excerpts ex. (7)(c) - p 5]. The term “Annuitant” is defined as the person to whom the annuity payments are made [Id. p 11]. The "Beneficiary" is defined as the person to whom benefits are paid if Annuitant dies before the "Income Date" [Id. p11]. The “Income Date” is defined as the date that “annuity payments” start [Id.]. It contains several payment alternatives: surrender, death benefits if the annuitant dies before the Income Date, monthly annuity payments if Annuitant lives until the Income Date, or surrender and annuity benefits after Annuitant’s death [Id. p 17-18]. Under the "Annuity Payment Provisions", if Annuitant is alive on the Income Date, payments will begin under the option chosen [Id. p 16-17]. Unless otherwise indicated, Annuitant is entitled to payment for 120 months, and the sum is to be determined by applying the accumulated value on the Income Date in accordance with the payment options [Id. p 16]. Annuitant can elect to receive either monthly payments for a certain number of years, life income payments of an annuity as long as the payee lives, payment of an annuity of life income with 5 or 10 years guaranteed, or joint and last survivor income [Id.]. The contract provides for an “accumulated value” as well as a surrender value after a surrender charge [Id. p 15].

The Life Insurance Company of the South West Policy recites that it is a “Single Premium Deferred Annuity” [AA - ex. (7)(d) - p 2, 15; R DC Doc 2 - Bkc Doc 59 ex.

7 - p 13, 15; Record Excerpts ex. (7)(d) - p 13, 15]. Debtor is the contractual “Annuitant” and “Owner” of the policy [Id. p 1,3,4,5,12]. The policy provides for several payment options: monthly income payments to Annuitant starting on the “Annuity Date”; a "Death Benefit" payable before the “Annuity Date”; monthly payments for life; monthly payments for ten or twenty years, and then for as long as Annuitant is alive or equal monthly payments until the company has applied the accumulated amount in the annuity [Id. p 7]. The policy describes its annuity benefits as “an annuity (monthly income payments) subject to the terms of this contract”, which will be made according to “the selected payment option” if Annuitant is alive on the Annuity Date [Id. p 2], the company applies the proceeds from the “Cash Surrender Value” less applicable tax to provide an “annuity (monthly income payments)” for Owner [Id. p 5 ]. The Life Income Option is automatic unless, the Owner selects a different alternative. The annuity also provides monthly income to the annuitant's survivor, and guarantees monthly income payments based on the “1971 Annuity Morality Tables” [Id. p 7, 11]. The endorsement page provides that the distributions under the contract are designed to conform to the individual retirement annuity provisions of section 401(a)(9) of the Internal Revenue Code [Id. p 10].

The Nationwide Life Insurance Company Policy recites that is a “Individual Flexible Purchase Payment Deferred Variable Annuity, Non-Participating” [AA - ex.

(7)(e) - p 7; R DC Doc 2 - Bkc Doc 59 - ex. 8 - p 7; Record Excerpts ex. (7)(e) - p 7].

The term "Annuitant" is defined as the person receiving annuity payments and upon whose continuation of life any annuity payment involving life contingencies depends [Id. P 11]. The "Annuity Payment Option" is defined as the "method" for making annuity payments [Id. ]. Several payment options are available: monthly payments for annuitant's life; monthly payments for the life of annuitant and continued for the life of survivor beneficiary; monthly payment of annuitant's life with 120 payments or 240 payments guaranteed [Id. p 2, 221]. The "Annuity Payment Option" is the form named in the application, unless changed [Id. p 11]. Debtor's application provides that the "Life Annuity Option" was elected, which is monthly payments during his lifetime [Id. p 31]. The number of Annuity Units remains fixed during the annuity payment period [Id p 19]. At the Annuitization Date, the Contract Value will be applied to the Annuity Table. The Annuity Tables are based on the "1971 Individual Annuity Mortality Table" [Id. p 23, 30]. This annuity contract also provides for surrender in whole or in part in exchange for the accumulated value of the annuity [Id. p 16], and is expressly intended to qualify for the individual retirement annuity provisions of section 408 of the Internal Revenue Code [Id. p 1, 24-28].

The Pacific Fidelity Life Insurance Company ("PFL") annuity contract is a "Single Premium Deferred Annuity Income Payable At Annuity Commencement Date Non-

participating” [AA - ex. (7)(f) - p 3; R DC Doc 2 - Bkc Doc 59 - ex. 9 - p 3; Record Excerpts ex. (7)(f) - p 3]. PFL agreed to provide “annuity benefits” as set forth in the policy [Id. p 3]. The annuity is intended to qualify as an individual retirement annuity under section 408 of the Internal Revenue Code [Id. at pp. 1, 8], and has several guaranteed payment options calculated from the annuity purchase value. The "Annuity Purchase Value" is the sum of the single premium plus interest earned thereon, less any amounts withdrawn [Id. p 6]. The guaranteed payment options include: monthly payments for the life of the annuitant; monthly payments for a certain number of years; monthly payments for the life of the annuitant and his surviving spouse; and one lump sum [Id. p 9]. The Amendatory Endorsement page provides that the policy is issued to provide Annuitant with an individual retirement annuity within the provisions of Section 408 of the Internal Revenue Code [Id. p 7].

Sawczak did not enter the Pacific Mutual Life annuity contract claimed non-exempt into evidence [R DC Doc 2 - Bkc Doc 59 - p 1, 2; DC Doc 35 - p 5-7]. As a result, it is not part of the record. Rule 4003(c) Fed. R.Bankr.P. (objecting party has burden of proving exemptions not proper); *In re Wilbur*, 206 B.R. 1002 (Bankr. S.D. Fla.1997)(same).

***The Guiding Bankruptcy Principles :***

Upon filing a petition in bankruptcy, all interests in property of the debtor becomes

property of the estate. *Title 11 U.S.C. § 541*. Nonetheless, a debtor may exempt certain property from the estate by filing a claim of exemption. *Title 11 U.S.C. § 522*. As Florida has opted out of the federal exemption scheme provided in § 522(d), the Debtor's right to exempt property from the bankruptcy estate is controlled by Florida law. § *222.20, Florida Statutes; In re McCollam*, 955 F.2d 678 (11th Cir. (Fla.) 1992).

In *NationsBank of North Carolina v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 115 S.Ct. 810, 815, 130 L.Ed.2d 740 (1995), the United States Supreme Court held that brokerage of annuities is an incidental power that is necessary to carry on the business of banking, and that annuities are investments under the National Bank Act. In reaching its decision, Justice Ginsburg defined annuities as:

. . . contracts under which the purchaser makes one or more premium payments to the issuer in exchange for a series of payments, which continue either for a fixed period or for the life of the purchaser or a designated beneficiary. When a purchaser invests in a "variable" annuity, the purchaser's money is invested in a designated way and payments to the purchaser vary with investment performance. In a classic "fixed" annuity, in contrast, payments do not vary.

*Id.* at 513 U.S. 254, 115 S.Ct. at 812.

***Section 222.14 Exempts Annuity Contracts:***

Section 222.14 is entitled “Exemption of cash surrender value of life insurance policies and annuity contracts from legal process”. *Ch. 78-76 § 1, Vol I Part I, Laws of Florida 1978*. From the title of the statute, it is clear that both the “cash surrender

value” of life insurance and the “cash surrender value” of annuity contracts are exempt.

*Id.*<sup>6</sup> As the Legislature included annuity contracts within the statutory definition of life insurance in 1977, it is clear from the plain language of § 222.14 that the cash surrender value of Dr. Goldenberg’s annuity contracts is exempt. *See Fla. Stat. § 624.602*;<sup>7</sup> *Ch. 77-295, §1, Laws of Florida* (1977); *House Judiciary Committee Staff Analysis HB 153* [AA ex. 8 p. 4]

The text of § 222.14 reads as follows:

**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.

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<sup>6</sup>The title of § 222.14, Florida Statutes was authored by the Florida Legislature (not West Publishing Co.)

<sup>7</sup>§ 624.602 "Life insurance," "life insurer" defined

(1) "Life insurance" is insurance of human lives. *The transaction of life insurance includes also the granting of annuity contracts*, including, but not limited to, fixed or variable *annuity contracts*; the granting of endowment benefits, additional benefits in event of death or dismemberment by accident or accidental means, additional benefits in event of the insured's disability; and optional modes of settlement of proceeds of life insurance. Life insurance does not include workers' compensation coverages.

§ 624.602(1), Florida Statutes (emphasis supplied).

§ 222.14, Fla. Stat. (emphasis supplied); *Laws of Fla. 1978, ch. 78-76 § 1*.

It is well settled that “[e]xemption statutes ... should be liberally construed in favor of a debtor so that he and his family will not become public charges.” *Killian v. Lawson*, 387 So. 2d 960, 962 (Fla. 1980). In the context of exemption statutes, this Court has long interpreted the words “upon whatever form” to include cash surrender value. *Bank of Greenwood v. Rawls*, 117 Fla. 381, 158 So. 173 (Fla. 1934) (rehearing en banc). *Greenwood*, held the words "upon whatever form" *exempted* from garnishment *any* cash value "obtained either by means of negotiation, *or pursuant to an agreement for surrendering the policy* in consideration of a sum of money to be paid in whole or in part conditioned upon a surrender of the life insurance feature of the policy...." *Id.* at 384 (emphasis supplied). This Court explained that the plain language of the statute provides in express terms 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 of the person whose life is so insured, unless the policy of insurance was effected for the benefit of such creditor. *Id.*

In 1994, this Court again relied on its earlier *Greenwood* opinion with favor when it interpreted the use of the nearly identical words "of whatever form" in a similar

exemption statute concerning disability policies.<sup>8</sup> *Zuckerman v. Hofrichter & Quiat, P.A.*, 646 So. 2d 187 (Fla. 1994) (analyzing § 222.18). In *Zuckerman*, judgment creditors obtained a writ of garnishment against proceeds of a settlement the debtor received in settling claims against his disability insurer. *Id.* This Court held that benefits paid under a settlement fall within the statutory exemption, explaining that the exemption is simply *not* contingent upon the form of payment, i.e., lump-sum versus monthly payments, nor does it discriminate between monies paid pursuant to settlement or otherwise unless the contract is effected for the benefit of the creditor. *Id.* (emphasis supplied). Thus, proceeds under a settlement agreement, pursuant to which the insured would receive \$75,000 in exchange for general release and the *surrender* of a disability insurance policy was exempt under § 222.18. *Id.* at 187. (emphasis supplied). Not only did this Court characterize monies derived from the “surrender” of an insurance policy as “proceeds”, *see Greenwood* at 174, it also made crystal clear that the words “upon

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<sup>8</sup>222.18. Exempting disability income benefits from legal processes

Disability income benefits under any policy or contract of life, health, accident, or other insurance of whatever form, shall not in any case be liable to attachment, garnishment, or legal process in the state, in favor of any creditor or creditors of the recipient of such disability income benefits, unless such policy or contract of insurance was effected for the benefit of such creditor or creditors.



whatever form" are dispositive:

The clarity of these words leads us to conclude that the section 222.18 exemption is not contingent upon the form of payment, i.e., lump sum versus monthly payments, nor does it discriminate between monies paid pursuant to settlement or otherwise. We find support for our conclusion in *Bank of Greenwood v. Rawls*, 117 Fla. 381, 158 So. 173 (1934), which interpreted section 7066, Compiled General Laws (1927), a statute similar to the statute being considered. *Greenwood* held that the words "upon whatever form" exempted from garnishment any cash value "obtained either by means of negotiation, or pursuant to an agreement for surrendering the policy in consideration of a sum of money to be paid in whole or in part conditioned upon a surrender of the life insurance feature of the policy...."

*Zuckerman* at 188 [internal footnote omitted].

Here, the words "upon whatever form" in § 222.14 are dispositive. Having decided the issue under § 222.14 before the 1978 amendment in *Greenwood*, and again in 1994 in *Zuckerman* concerning § 222.18, Fla. Stat., this Court should hold the words "upon whatever form" include cash value of annuity contracts as exempt under § 222.14. Moreover, this Court has already characterized (without expressly so ruling) moneys derived from the surrender of a policy as "proceeds" within the meaning of the exemption statutes. *See Greenwood* at 174. Accordingly, the money that may be derived from surrender of Dr. Goldenberg's annuity policies constitutes "proceeds" of an annuity contract, which are exempt under § 222.14. Therefore, the certified question should be answered in the affirmative.

In *In re Ebenger*, 40 B.R. 463 (Bankr.S.D.Fla.1984), Judge Britton also had

occasion to interpret § 222.14, Florida Statutes. In *Ebenger*, the debtor's law firm provided him with an annuity contract under the terms of which debtor at all times had the *option* to receive the lump sum value of the contract. *Id.* at 464 (emphasis supplied).

Overruling the Trustee's objection to the claimed exemption, the court, stated:

I reject the trustee's construction of the statute and agree with the debtor that the Florida legislature intended to exempt *the value of annuity contracts* from the claims of creditors not only of third party beneficiaries under the annuity contract but also of *the annuitant*.

*Id.* (emphasis supplied).

This Court broadly defines § 222.14. "Section 222.14 clearly exempts all annuity contracts from creditor claims." *In re McCollam*, 612 So. 2d 572, 573 (Fla. 1993) (emphasis supplied). *McCollam* reasoned that "had the legislature intended to limit the exemption to particular annuity contracts, it would have included such restrictive language [in the statute]." *Id.* at 574.

With no restriction or limitation on the type of annuity exempt under § 222.14, single premium deferred annuity contracts fall within the definition of an annuity contract under § 222.14. Moreover, as Debtor is entitled to payments under each annuity contract, this Court should decline to embrace semantics as to the term "proceeds". *See In re McCollam*, 118 B.R. 129, 131 (Bankr. S.D. Fla. 1990) (creditor's argument over "semantics" behind term "proceeds" rejected where debtor entitled to payments under

annuity contract), *question cert.* 955 F.2d 678 (11th Cir. (Fla.) 1992), *cert. question answered*, 612 So. 2d 572 (Fla.), *answer to cert. question conformed* 986 F.2d 436 (11th Cir. (Fla.) 1993).

***The District Court's reliance on Levine is misplaced***

The district court erroneously relied on *Levine v. Weissing*, 134 F. 3d 1046 (11<sup>th</sup> Cir. (Fla.) 1998). *Levine* involves conversion of non-exempt assets to exempt assets in the face of a known and existing creditor, and whether conversion constitutes a fraudulent transfer within the meaning of 11 U.S.C. §101(54). *Id.* at 1050. Here, the bankruptcy court expressly found that Debtor purchased the annuity contracts in 1989 with *exempt* pension assets years before the incident giving rise to Creditor's claim [R DC Doc 1 - p 4] (emphasis supplied). *Levine* does not stand for the proposition that because monies can be withdrawn in whole or in part under an annuity contract, the annuity contact does not qualify for an exemption under § 222.14. *See id.* As the Eleventh Circuit certified the question to this Court, it must have agreed that *Levine* does not apply here. Should the recasting of *Levine* be followed, virtually all annuity contracts and other exempt assets that contain surrender provisions would be non-exempt, and § 222.14 would be meaningless.

***Settlement Options Do Not Affect An Exemption***

It is not appropriate to look to settlement options as dispositive of an exemption

under §222.14. It is well settled that insurance policies, including annuities, contain multiple settlement options. *E.g., Pendas v. Equitable Life Assur. Soc.*, 129 Fla. 253, 176 So. 104 (Fla. 1937) (1937 case discussing insurance settlement options). Florida law requires annuity issuers to provide annuitants with information about surplus accruing on an annuity contract. *See § 627.469, Florida Statutes* (if fixed or variable annuity contract participating, it shall contain provision that insurer annually ascertain and apportion divisible surplus accruing on contract). If settlement options are dispositive of an exemption, then Florida's State University System optional retirement program, the State's community college optional retirement program and the individual or group annuity contracts thereunder would all stand to lose their exemption. This is so because § 121.35, which establishes an optional retirement program for employees of the State University System, and § 240.3195, which establishes an optional retirement program for employees of the Community College System, each requires individual contracts and group annuity contracts as the means of providing retirement and death benefits for the state employees eligible to participate therein. *See Fla. Stat. §121.35(1)* (establishing the optional retirement program for State University System employees); and *Fla. Stat. § 240.3195* (establishing optional retirement program for Community College System employees). The optional retirement programs require the annuity contracts to specify annuity income options, whether the contracts provide for fixed, variable or a

combination of annuity payments. *See* § 121.35(1) & (2), *Florida Statutes* (individual annuity contracts shall state annuity income options); *see also* § 121.055(6)(a), *Fla. Stat.* (senior management service optional annuity programs permitting fixed or variable annuities).

***The Guiding Principles for Reviewing Annuity Contracts:***

In order to determine whether Dr. Goldenberg's annuity contracts are exempt under § 222.14, this Court must first ascertain whether the parties to these annuity contracts intended to enter into annuity contracts.<sup>9</sup> *In re Solomon*, 95 F.3d 1076, 1078 (11th Cir. (Fla.) 1996) (so stating). Interpretation of a contract, including resolution of ambiguity, is a matter of law. *Gulf Tampa Drydock Co. v. Great Atl. Ins. Co.*, 757 F.2d 1172, 1174 (11th Cir. 1985). Contract terms provide the best evidence of the parties' intent. *Key v. Allstate Ins. Co.*, 90 F.3d 1546, 1548-49 (11th Cir.(Fla.) 1996). This Court must first examine the natural and plain meaning of the policy language, read each as a whole, and give each provision its full meaning and effect. *Dahl-Eimers v. Mutual of Omaha Life Ins. Co.*, 986 F.2d 1379, 1381 (11th Cir. (Fla.) 1993). When terms are

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<sup>9</sup>As the Eleventh Circuit stated, Sawczak's objection at the bankruptcy court to Dr. Goldenberg's claim of exempt status with respect to the annuities was made "to the extent of the cash surrender value of each". *Certification Opinion* at 1, 2. There was no issue as to whether the contracts were in fact annuity contracts. Reversal of the district court is warranted on this ground alone. *E.g., Rhodes v. Amarillo Hospital Dist.*, 654 F.2d 1148 (5th Cir. (Tex.) 1981); *Dober v. Worrell*, 401 So. 2d 1322 (Fla. 1981) (appellate court will not consider issues not presented to trial judge).

clear and unambiguous, the court must interpret the contract in accordance with its plain meaning. *Id.* Where language is plain, a court must not create confusion by adding hidden meanings, terms, conditions, or unexpressed intentions. *Key*, 90 F.3d at 1549. Unless an ambiguity exists, a court should not resort to outside evidence or to rules of construction to construe the contract. *See id.* Ambiguity does not exist merely because a contract requires interpretation or declines to define a term. *Id.*

When a court determines that the terms are ambiguous, or otherwise not susceptible to a reasonable construction, it may look beyond the contractual language to discern the intent of the parties in making the agreement. *Id.* Ambiguities are to be construed against their drafters in favor of providing coverage. *Hurt v. Leatherby Ins. Co.*, 380 So. 2d 432, 434 (Fla.1980).

***Dr. Goldenberg's Contracts are Exempt Annuity Contracts Under § 222.14***

Looking to the four corners of Dr. Goldenberg's annuity contracts, the plain language of these commercial contracts unmistakably evince the parties' intent to enter into annuity contracts. *See* "Introduction" at pp. 11 - 16 above, describing each annuity contract; *Solomon*, 95 F.3d at 1078 (parties must intend to create annuity contract); *In re Conner*, 172 B.R. at 121 (agreement must be identified as annuity within four corners). When Dr. Goldenberg paid a single premium to each company to purchase each annuity contract in 1989, the consideration bargained for between the parties was

completed, and the funds paid for each policy became subject to the terms of a formal commercial annuity contract. *See Devlin v. Ingram*, 928 F. 2d 1084, 1090 (11<sup>th</sup> Cir. (Fla.) 1991) (discussing formation of contract; elements of contract are agreement with consideration between 2 contracting parties with legal object and legal capacity).

Each annuity contract shows consideration exchanged between two contracting parties (i.e., single premium in exchange for the obligation of the annuity company to pay -- and right of Annuitant to receive -- annuity payments), with a legal object and legal capacity. *Devlin*. At no time has Annuitant elected to surrender any of the contracts to the annuity company. Therefore, annuity payments are to commence upon a mere lapse of time.

***Debtor is the “Owner” and “Annuitant” of each Annuity Policy***

Dr. Goldenberg is both the owner and annuitant of each annuity policy. *Certification Opinion* at 2 (so holding); *see also In re Pizzi*, 153 B.R. 357, 362 (Bankr. S.D. Fla. 1993) (looking to "payee"). Each is a commercial contract drafted by the issuing annuity company that is repeatedly identified as an annuity contract within its four corners [AA ex. 7(a) - 7(f)]. Dr. Goldenberg and each annuity company bargained for the exchange of a single premium in exchange for a bundle of rights [Id.]. Under each contract, the annuity company is obligated to pay the “Annuitant” [Id.]. As “Owner” and “Annuitant”, Dr. Goldenberg is entitled to receive contractual “Annuity Payments”. *See*

*Conner*, 172 B.R. at 121; *In re Ebenger*, 40 B.R. 463 (Bankr. S.D. Fla. 1984) (annuitant beneficiary of annuity contract); *Black's Law Dictionary, 4th Ed.* p 116 (West's 1968) (an "annuitant" is the "recipient of an annuity" or the "one who is entitled to an annuity"). As "Owner" of each contract, Dr. Goldenberg purchased an entire bundle of rights as to each contract. These rights include the right to retain these annuity policies and receive periodic payments thereunder, or to elect to surrender the policies in exchange for their respective accumulated value.

The facts here are in sharp contrast to cases where an individual claims an exemption under § 222.14 without being a party, owner, purchaser, beneficiary, payee, or an annuitant under a formal annuity contract. *Contrast Solomon* (creditor the named beneficiary of debtor's annuity contract). Moreover, this case involves commercially drawn annuity contracts purchased directly by Appellant with exempt pension funds in 1989, years before the existence of this creditor.

Debtor's annuity contracts cannot be equated with agreements that secure lottery winnings, personal injury settlement payments, or accounts receivables. *Contrast Pizzi* (lottery where State of Connecticut was payee). These annuity contracts contain provisions that allow Annuitant to exercise one of several alternatives. All provide for a date certain at which sums become payable to Annuitant or his survivors under various settlement alternatives [AA ex. 6 - p 2-3; R DC Doc 1 - p 4-5]. The policies all contain



a provision for “surrender” of the contract in exchange for a specified lump sum payment, defined either as the “surrender value” or the “net surrender value” (which represents the ‘accumulated value’ less a ‘surrender charge’) [Id.].

Notably, the cash value alternative under Dr. Goldenberg's annuity contracts requires the "Annuitant" to make a written request and to surrender the policy to the company [Id.]. Dr. Goldenberg's right to surrender the policies, and receive their accumulated surrender value, has not been exercised. Rather, Sawczak seeks to force the surrender of the policies.

As there has been no election for the option to receive the accumulated cash surrender value of any of the annuity contracts, the cash surrender value is not available even if it is deemed not to be exempt under § 222.14. *See Plymouth Cordage Co. v. Ward*, 202 So. 2d 600 (Fla. 1<sup>st</sup> DCA 1967). In *Plymouth*, the First District explained that even if a life policy has cash surrender value available to the insured, a creditor of the insured cannot obtain any cash surrender by garnishment proceedings until the option to receive the cash surrender has been exercised. *Id.* at 601. It follows that absent Debtor's express election to surrender his annuity contracts, the cash value or proceeds cannot be obtained by process. *See id.*

As to payment alternatives, each annuity contract promises payment to Annuitant at specified commencement dates under various settlement options [R DC Doc 1 - p 5;

AA ex. 6 - p3]. Debtor owns fully paid policies, has the right to retain the policies, and the right to receive monthly payments for a term of years or to have payment made to his beneficiary upon his death. When purchased, each annuity contract was the product of a single, integrated transaction. The parties neither intended, nor acted as if any of the payment alternatives that the annuity company is obligated to pay to Annuitant would have a quality of divisibility. *See e.g. Meyer v. U.S.*, 364 U.S. 410, 411, 81 S.Ct. 210, 212, 5 L.Ed. 2d 161 (1960) (optional mode of settlement, and insurer's act of dividing proceeds, does not create two divisible contracts from proceeds of policy where monthly payment for 240 months followed by survivor benefits). Moreover, Annuitant's right to receive payments was purchased and fully paid for many years prior to Dr. Goldenberg's adjudication in bankruptcy [AA ex. 6 - p 2; R DC Doc 1 - p 4] The consideration that Annuitant paid for each annuity passed at the time of contract execution.

In holding Dr. Goldenberg's annuity contracts to be non-exempt, the district court apparently looked to the annuitization provision of only one annuity contract (Nationwide), which permits the annuity company to purchase another annuity to fund the payments to Annuitant at a designated maturity date [AA ex. 7(e) - p 20]. The district court erred. The fact that one annuity contract (Nationwide) provides the annuity company with the right to purchase a second annuity to fund the payments it promised to the Annuitant does not mean that any of the underlying annuity contracts are non-

exempt under § 222.14. The process of annuitization does not affect *formation* of the *underlying* annuity contract. *See Devlin*, 928 F. 2d at 1090 (discussing elements of formation). Rather, it merely marks the time when the annuity company must *perform* under the terms of the contract by commencing the annuity payments to Annuitant. *Id.*

The district court also essentially held that a payment stream must commence prior to an annuity qualifying for exemption under § 222.14 [R DC Doc 21 - p 3; AA ex. 4 - p 3]. The problem with such reasoning is that annuity contracts are frequently purchased to provide for monies in retirement. Using the commencement of payment stream as the controlling basis for entitlement to exemption under § 222.14 will effectively narrow and limit the exemption to those over the age of retirement who actually receive their stream of payment. It would also create a slippery slope. That is so because even after the stream of payments commence, funds may very well remain on “deposit” from which future payments will be drawn. Thus, the remaining value of any annuity contract (or any other exempt instrument) yet to be paid could be subject to forced process as well.

In 1993, this Court examined § 222.14 in *In re McCollam*, 612 So. 2d 572 (Fla. 1993), and held that the purpose or source of funds does not affect an exemption. Whether an annuity contract is fixed or variable -- the company issuing the annuity is obligated to make annuity payments on the basis of a mortality prediction. In fixed annuities, payments are made periodically and continue until the annuitant's death. *See*

*NationsBank*, 115 S.Ct. at 815 (defining and describing annuity contracts). In variable annuities, other options are chosen until the end of a fixed term or until the death of the last of two persons; payments are made both from principal and income, and the amounts vary according to the age and sex of the annuitant. *See id*; *see also Securities and Exchange Comm'n v. Variable Annuity Life Ins. Co. of Amer.*, 359 US 65, 69-70, 79 S.Ct. 618, 3 L.Ed. 2d 640 (1959) (describing features of annuity contracts). Both fixed and variable annuities are actuarially calculated by identical principles where the issuer assumes the risk of mortality from the moment the contract is issued based on an actuarial prediction that a certain number of annuitants will survive to specific ages. *See id.* The company issuing the annuity--whether, fixed, variable, or a combination -- is obligated to make annuity payments on the basis of a mortality prediction reflected in the contract. The principle of actuarial predictions, rather than the form, sum, method and/or time when payments commence, should control whether the contract itself constitutes an annuity exempt under § 222.14. *See id.* (discussing features of annuity contracts); *Greenwood* (form or method of payment not dispositive); *NationsBank* (discussing features of annuity contracts).

As the bankruptcy court concluded, annuities are not simply contracts that offer financial protection for those who surpass their life expectancies. Annuities have evolved into diverse and complex financial instruments [R DC Doc 1 - p 7; AA ex. 6 - p 5]. With

the development of universal life insurance policies and single premium deferred annuity contracts, life insurance and annuities have become investment vehicles that are motivated by a particular set of objectives, including income and estate tax considerations. *Id.* That being so, it correctly rejected Sawczak's suggestion that the Legislature intended to treat the surrender value of an annuity contract differently than that of a life insurance policy. *Id.* The bankruptcy court's reasoning was in full alignment with this Court. According to *Zuckerman v. Hofrichter & Quiat, P.A.*, 646 So. 2d 187, 188 (Fla. 1994), monies obtained pursuant to surrender provisions of a contract or policy that falls under an exemption statute are exempt. *Id.* In *Zuckerman*, disability income benefits were exempt because there is no distinction between monies paid pursuant to settlement or otherwise. *Id.*

In *In re McCollam*, 612 So. 2d 572 (Fla. 1993), the debtor was awarded an annuity contract as a settlement for a wrongful death claim brought by her father's estate against several parties. *Id.* at 574. The debtor was the payee of an annuity contract purchased to provide payments pursuant to the settlement agreement between debtor and Travelers Insurance Company. After subsequently filing bankruptcy, the debtor claimed the annuity as exempt, under § 222.14. *Id.* Both the bankruptcy and district court held the annuity contract exempt. Deeming the issue to be one of first impression, the Eleventh Circuit certified a question to the Florida Supreme Court. This Court held that

the term “annuity” should be broadly construed and that the contract qualified as an annuity pursuant to § 222.14. *Id.* This Court applied the "plain and ordinary" meaning doctrine, finding that § 222.14 exempts "all annuity contracts from creditor claims". *Id.* at 593. To determine the "plain and ordinary" meaning of the statute, this Court used a working definition of the term "annuity", reviewing meanings given that term by other courts, citing several definitions with favor. One, found in the section of the Florida Statutes concerning retiring teachers, defines an "annuity contract" for purposes of the retirement system for teachers as "annual payments for life derived as provided in this chapter from the accumulated contributions of a member. *McCollam* at 574. All annuities shall be paid in equal monthly installments". *Id.* Another, from Black's Law Dictionary, defines an annuity as "a right to receive fixed, periodic payments, either for life or for a term of years". *Id.* Deeming the contract to be an annuity without specifically defining that term, *McCollam* noted that since the legislature has *not* limited or restricted *the types* of annuities covered by Florida's annuity exemption statute, the annuity was exempt regardless of the purpose for which it was created or the means through which it was funded. *Id.* Moreover, lump sum payments must be treated as part of the annuity with the monthly payments. *Id.* In *McCollam*, in addition to equal monthly payments, the settlement agreement provided for five lump sum payments, with the first two such payments three years apart and the remaining lump sum payments at

five-year intervals. *McCollam*, 955 F.2d at 678 (on certification of question). None of the *McCollam* courts distinguished these lump sum payments.

As our Legislature provides for and regulates single premium deferred annuities, and has placed no limitation or restriction on the type of annuity covered under § 222.14, the subject annuity contracts are exempt regardless of the purpose for which they were created, the manner of its payment options or the means though which they are funded. *See McCollam*. Following Sawczak’s argument here would render an entire class of annuity contracts subject to forced process, undercut *McCollam*, and render § 222.14 meaningless. *See §§ 625.121(3)(h), Fla. Stat.* (standard valuation law regulating single premium deferred annuity contracts). It would also under cut the Legislature’s 1977 amendment of the statutory definition of life insurance, which includes annuity contracts, and its efforts to treat annuities the same as life insurance for purposes of the exemption under § 222.14 to avoid any unnecessary litigation concerning this matter. *Fla. Stat. § 624.602; Judiciary Committee Staff Report on HB 153* [AA ex. 8 - p 4].

The district court ruled that the annuity contracts here are “options” to purchase annuities at a future date. Appellants disagree. Here, mutually binding and enforceable annuity contracts existed from the moment Appellant tendered, and the company accepted, the single premium. *See Devlin*, 428 F. 2d at 1090 (discussing contract formation). At that point, Debtor became an “Annuitant” and “Owner” entitled to

receive payments under the terms of each policy, subject only to a lapse of time. At no time has Debtor elected to surrender his annuity contracts. *Contrast, e.g., Goodman v. Goodman*, 290 So. 2d 552 (Fla. 1st DCA 1973), *cert. den.*, 292 So. 2d 19 (Fla. 1974) (distinguishing acceptance of offer from option that expires at time certain unless optionee accepts offer within time stipulated); *McCollam*, 612 So. 2d at 572 (annuity contract exempt where Florida resident debtor entitled to receive payments under policy).

In the context of lottery winnings claimed to be an exempt annuity, *In re Pizzi* interpreted § 222.14 in light of *McCollam*. *In re Pizzi*, 153 B.R. 357 (Bankr.S.D.Fla. 1993). The *Pizzi* debtor won the Connecticut lottery and received winnings in annual installments. *Id.* at 359. The annuity contract named the State of Connecticut as owner. Since the State of Connecticut cannot be a citizen or resident of Florida, the contract and its proceeds were non-exempt. *Id.* *Pizzi* distinguished *McCollam's* actual annuity contract where the debtor was the payee entitled to the payments thereunder. *Id.* at 360-61.

Here, just like *McCollam*, but unlike *Pizzi*, Debtor is a resident of Florida, who is entitled to receive annuity payments as the named "Annuitant" under each annuity contract. Receipt of those payments is subject only to a lapse of time. No election to surrender any policy as been made. Thus, Debtor has a right to receive annuity payments.



In 1996, the Eleventh Circuit revisited § 222.14 in *In re Solomon*, 95 F.3d 1076 (11th Cir. (Fla.) 1996). Other than requiring periodic payments, the *Solomon* annuity did not bear any similarity to an annuity; it named the creditor, rather than the debtor, as payee, and debtor was neither a party nor a holder of legal or equitable interest in the annuity contract. *Id.* The Eleventh Circuit read *McCollam* to require the existence of an actual annuity contract in order to qualify for exemption under § 222.14 holding that "the parties to the agreement must have intended to create an annuity contract." *Id.* *Solomon* relies on *In re Conner*, 172 B.R. 119, 121 (Bankr. S.D. Fla.1994), for the proposition that an annuity must be identified as such within the contract's four corners.

Here, unlike *Solomon* and cases involving settlement agreements, lottery winnings or accounts receivable, Dr. Goldenberg owns formal commercial annuity contracts that give rise to contractual obligations of the annuity companies. Dr. Goldenberg is the defined "Owner" and "Annuitant". *Contrast Solomon* (creditor payee). Dr. Goldenberg has legal and equitable interests in each annuity contract. Under each, he has a right to receive periodic or monthly installments for a term of time. *See McCollam* (right to payments dispositive). Each annuity company determines the annuity payments actuarially with respect to lives of one or more persons. *See NationsBank*, 115 S.Ct. at 815 (discussing annuities); *Securities and Exchange Commission v. Variable Annuity Life Ins. Co. of Amer.*, 79 S.Ct. at 619-622. (discussing actuarial principles of

annuities). Each annuity contract is in part based on the actual lives of Debtor/Annuitant, and places the obligor and Annuitant in a position where they are each taking certain actuarial risks. *Id.* One of the annuity company's right to purchase a separate annuity contract to fund annuity payments (Nationwide) is merely a means by which the annuity company obligor can fulfill its payment and other contractual obligations under that annuity contract. *See McCollam* (annuity contract exempt irrespective of means of funding); *Meyer*, 81 S.Ct. at 212 (dividing proceeds does not turn proceeds into two properties).

#### ***The Legislative History of § 222.14***

Relying on principles of statutory construction as an aid, *see Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984), the primary purpose of statutory interpretation is to determine, and give effect to, legislative intent. That intent should be determined by considering the statute in its entirety-- "the evil to be corrected, the language of the act, including its title, the history of its enactment, and the state of the law already bearing on the subject." *State v. Webb*, 398 So. 2d 820, 824 (Fla.1981) (quoting *Foley v. State*, 50 So. 2d 179, 184 (Fla. 1951)).

Chapter 78-76, Laws of Florida 1978 (the "Amendment"), enacted the only amendment to § 222.14 since its original enactment in 1925. Review of the legislative history relating to the enactment of the Amendment supports the exemption of cash

surrender value of annuities. In 1976, a bill similar to the Amendment died on the house calender after it received a favorable recommendation from the House Commerce Committee. *See Staff Analysis House Bill 483* May 2, 1977 [AA ex. 8 - p 12]. In 1977, both the Florida Senate and House introduced bills similar to the Amendment -- S.B. 1378 and H.B. 483 -- and again they died on the calender. *See History of Legislation 1977 Regular Session Rules and Calender* pp. 438, 126 [AA ex. 8 - p 16]; *Staff Analysis SB 163* January 10, 1978 [AA ex. 8 - p 6]. In 1978, Senate Bill 163 and House Bill 153 were proposed. *History of Legislation 1978 Legislative Information Division* p. 34, 48 [AA ex. 8 - p 9-11]. House Bill 153 died on the calendar, while its companion, Senate Bill 163, passed and § 222.14 was amended. *Chapter 78-76 Laws of Florida*; *History of Legislation 1978 Regular Session*, p. 48, 34 [id.].

The House Judiciary Committee's staff report on the Amendment explains that the purpose of the legislation was to make clear that annuity contracts are to be treated the same as life insurance for purposes of the exemption from forced process [AA ex. 8 - p 4]. The staff analysis explains that Insurance Code had been amended in 1977 to include "annuity contracts" as part of the definition of life insurance, but § 222.14 was not in the Insurance Code [id.]. The staff's analysis remarks that even without the amendment of § 222.14, since annuity contracts were added to the definition of life insurance under the Insurance Code, annuities are to be treated the same as life insurance for purposes of

exemption from forced process [AA ex. 8 - p 4]. The Judiciary Committee's staff further analyzed that the express inclusion of annuities in § 222.14 will be helpful to avoid any unnecessary litigation over whether annuities are similarly exempt from garnishment or other forced process [id.].

Accordingly, the bankruptcy court was correct in its assessment that there is no distinction between life insurance and annuity contracts for purposes of the exemption under § 222.14. Given the broad definition given "annuity" in *McCollam*, the plain meaning of the phrase "upon whatever form" in *Greenwood* and *Zuckerman*, the clear intent to create an annuity on the face of these annuity contracts, and the well settled policy that exemptions should be liberally construed, it is evident that these annuity contracts and any cash value are exempt. Based on *McCollam*, *Greenwood* and *Zuckerman*, each annuity contract, the cash surrender value of the contracts, and the payments that Debtor/Annuitant is entitled to receive on the annuity dates are all exempt from forced process under § 222.14.

***The Title of § 222.14 is Instructive***

Due weight and effect must be given to the title, as constituting a direct statement by the legislature of its intent. *State v. Webb*, 398 So. 2d at 824. The language of the statute should be accorded its common meaning. *Priest v. Plus Three, Inc.*, 447 So. 2d 338, 339 (Fla. 4th DCA), *rev. den.*, 453 So. 2d 44 (Fla.1984). If two or more

interpretations could reasonably be given to a statute, the meaning "that will sustain its validity should be given and not the one that would destroy the purpose of the statute."

*City of St. Petersburg v. Siebold*, 48 So.2d 291, 294 (Fla.1950).

As the bankruptcy court noted, the title of § 222.14 refers to "annuity contracts" and neither the title nor text of the statute distinguish the proceeds received from the surrender of the annuity contract from the proceeds received after the contract is annuitized. *Certification Opinion* at 4. With the title indicating the Legislature's intent to exempt the cash value of annuity contracts, there is no basis to distinguish cash value of an annuity contract from proceeds of an annuity contract for purposes of the exemption. *See ch. 78.76 § 1, Laws of Florida* (1978); *Webb*. Annuity contracts are exempt.

***The plain meaning of the term "proceeds" encompass cash value***

The plain meaning of the term "proceeds" encompass cash value, particularly when read *in pari materia* with the words "upon whatever form". *See Greenwood; Zuckerman*. According to the annuity contracts, the surrender or net surrender value is the accumulated value of the respective contracts.<sup>10</sup> Black's Dictionary defines proceeds:

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<sup>10</sup>See AA ex. 7(a) p 4, 6; ex. 7(b) p 10, 11; ex 7(c) p 14; ex. 7(d) p 9; ex. 7(e) p 16-17; and ex. 7(f) p. 5-6.

Issues; income, yield; receipts; produce; money or articles or other thing of value arising or obtained by the sale of property; the sum amount or value of property sold or converted into money or other property. ... Thus, goods purchased with money arising from the sale of other goods, or obtained on their credit are proceeds of such goods . . . .

**Blacks Law Dictionary, Fourth Edition** , p. 1369 (West 1968).

Here, cash value of the annuity contract is a yield, produce or income on money or thing of value arising from Debtor's payment of a single premium in exchange for a bundle of rights under the annuity contracts .

Even though the plain meaning of the word "proceeds" is sufficient in and of itself to exempt the cash value of these annuity contracts, when the word "proceeds" is considered in *pari materia* with the words "upon whatever form", it is evident that the Legislature intended the exemption to embrace virtually all forms of proceeds without having to specifically define them. *See Greenwood; Zuckerman*. Further, the phrase "cash surrender value" modifies the terms "life insurance policies" and "annuity contracts" in the title of the legislation. With the phrase "proceeds of annuity contracts" also added to § 222.14 in the 1978 amendment, when the text is read *in pari materia* with the phrase "upon whatever form", it is clear that proceeds of annuity contracts are exempt whether they are in the form of a stream of payments, a lump sum, settlement in exchange for surrender of the contract or otherwise. *Zuckerman*, 646 So. 2d at 188. Moreover, the check issued on surrender and settlement of an insurance policy deposited

in the judgment debtor's bank account has been characterized by this Court as "proceeds". *See Bank of Greenwood v. Rawls*, 158 So. 173, 174 (Fla. 1934).

Accordingly, the check(s) or payment received by Dr. Goldenberg under the seven annuity contracts at issue here are "proceeds" of his policies. *See id.*

Numerous cases, including *McCollam*, focus on the exemption afforded to the annuity contract itself, rather than on the manner of payments made thereunder. *See e.g., McCollam; Bank Leumi Trust Co of New York v. Lang*, 898 F. Supp 883, 889 (S.D. Fla. 1995); *In re Covino*, 187 B.R. 773, 777 (Bankr. S.D. Fla. 1995); *In re Davidson*, 178 B.R. 544, 546-547 (Bankr. S.D. Fla. 1995).

#### *Other statutes lend guidance*

Looking to other statutes for the meaning of the term "proceeds" is also instructive. For example, the term "proceeds" is defined in Fla. Stat. § 679.306(1) as "Money, checks, deposit accounts, and the like . . ." Section 679.306 further states that "proceeds" includes whatever is received on the sale or exchange of collateral or proceeds, as well as insurance payable by reason of loss or damage to the collateral.

Thus, any cash surrender value of Dr. Goldenberg's annuity contracts constitutes "proceeds". The district court's reasoning that the "*funds on deposit*" do not constitute "proceeds" is clear error.

#### **CONCLUSION**

Dr. Goldenberg's annuity contracts fall within the plain meaning of annuity contracts under § 222.14. Each contract, any value, and all payments thereunder, upon

whatever form, are exempt under § 222.14 from creditor claims. Accordingly, this Court should answer the certified question in the affirmative.

Respectfully submitted,

Brady & Brady, P.A.  
Attorneys for Appellants  
370 Camino Gardens Blvd.  
Boca Raton, FL 33432  
Phone: (561) 338-92565

By: \_\_\_\_\_  
Jeanne C. Brady, Esq.  
Florida Bar No. 0997749

By: \_\_\_\_\_  
Frank R. Brady, Esq.  
Florida Bar No. 058802



CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a copy of the foregoing has been furnished via U.S. Mail, postage prepaid, to **Jack F. Weins, Esq.**, Attorney for Chapter 7 Trustee/Co-Appellee, ABRAMS ANTON, P.A., One Boca Place, Suite 411-E, 2255 Glades Road, Boca Raton, FL 33431; **Timothy J. Norris, Esq.**, Attorney for creditor/Appellee Shirley Sawczak, Buchanan Ingersoll Professional Corporation, NationsBank Tower, 100 SE Second Street, Suite 2100, Miami, Florida 33130; **Herman J. Russomanno, Esq. and Robert J. Fiore, Esq.**, Co-Counsel for creditor/Appellee Shirley Sawczak, RUSSOMANNO FIORE & BORRELLO, P.A., Museum Tower, Suite 2101, 150 W. Flagler Street, Miami, FL 3300130; all this \_\_\_\_ day of August, 2000

Brady & Brady, P.A.  
Attorneys for Appellants  
370 Camino Gardens Blvd., Suite 200C  
Boca Raton, FL 33432  
Phone: (561) 338-92565

By: \_\_\_\_\_  
Jeanne C. Brady, Esq.  
Florida Bar No. 0997749

By: \_\_\_\_\_  
Frank R. Brady, Esq.  
Florida Bar No. 058802