SUPREME COURT OF FLORIDA

Case No. SC00-2242

On Appeal from the Third District Court of Appeal

Lower Tribunal No. 3D99-1597

BARRY I. HECHTMAN and BRENDA HECHTMAN,

Petitioners/Appellants,

v.

NATIONS TITLE INSURANCE OF NEW YORK, INC. and COMMONWEALTH LAND TITLE INSURANCE CO.,

Respondents/Appellees.

APPELLANTS' BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases **Page(s)**

TABLE OF CITATIONS (continued)

Cases **Page(s)**

Constitution and Statutes

Other Authorities

ABBREVIATIONS

In this brief, "R." refers to the record below and "App." refers to documents in the accompanying Appendix.

STATEMENT OF THE CASE AND OF THE FACTS

On April 1, 1998, Barry and Brenda Hechtman, ("the Hechtmans") were two of several private mortgage lenders who filed a third-party claim against Nations Title Insurance of New York, Inc., ("Nations Title"), alleging that Nations Title was liable to them for the theft of their money, held in trust by Nations Title's insurance agent - the Law Offices of Jorge E. Hernandez, P.A. (R-95, 98).[1]

One of the Hechtmans' claims was based on Fla. Stat. § 627.792 (1997) which provided as follows:

> **§ 627.792 Liability of title insurers for defalcation by title insurance agents.**
>
> A title insurer is liable for the defalcation, conversion, or misappropriation by a licensed title insurance agent of funds held in trust by the agent pursuant to s. 626.8473. If the agent is licensed by two or more title insurers, any liability shall be borne by the title insurer upon which a title insurance binder, commitment, policy, or title guarantee was issued prior to the illegal act. If no binder, commitment, policy or guarantee was issued, each title insurer represented by the agent at the time of the illegal act shares in the liability in the same proportion that the premium remitted to it by the agent during the 1-year period before the

[1] Jorge E. Hernandez has since resigned as a member of the Florida Bar as a result of these and many other millions of dollars of thefts, involving other parties and other title insurers.

> illegal act bears to the total premium remitted to all title insurers by the agent during the same time period.

(R-95-99)

On July 14, 1998, Nations Title moved for partial summary judgment on the Hechtmans' statutory claim, arguing that since Hernandez, as an attorney licensed to practice by the Florida Bar was exempt from licensure by the Department of Insurance, he was not a *licensed* agent of Nations Title within the meaning of Fla. Stat. § 627.792 and, thus Nations Title had no responsibility under the statute for the trust fund thefts which he had committed. (R-179-182)

On October 2, 1998, the court agreed with Nations Title and entered an order that the Hechtmans had no claim against Nations Title under Fla. Stat. § 627.792. (R-263-267)

On May 20, 1999, the court allowed the Hechtmans to dismiss their remaining claims against Nations Title, and entered final judgment as to the Hechtmans only, thus rendering the ruling on the Hechtmans' claim under Fla. Stat. § 627.792 a final order for appellate purposes. (R-268-269).

On June 15, 1999 an appeal to the Third District Court of Appeal ensued. (R-241-250; 251-260). In the course of briefing, Commonwealth

Land Title Insurance Company ("Commonwealth") was given leave to intervene and file a brief in the appeal, as being directly affected by reason of an earlier partial summary judgment entered on identical grounds against other Plaintiffs in the action, which was not yet final and could not yet be appealed. (Undisputed)

On June 7, 2000, a majority of the Third District, composed of Judges Green and Fletcher issued their opinion, which stated in part that:

> Although we certainly understand and share the appellants' concerns about the wisdom of a legislative enactment which allows title insurers to escape statutory liability for the misdeeds of its duly appointed attorney agents, we nevertheless are constrained to give effect to the plain and ordinary meaning of the words utilized in section 627.792 ... that title insurers are only liable under its provisions for the defalcation, conversion or misappropriation of their title insurance agents who are duly licensed by the Department of Insurance. The fact that attorney agents have been expressly exempted from the licensure requirement (and hence regulation by the Department of Insurance) evinces a clear legislative intent that title insurers are not to be held liable for attorney agents' thefts under this statute.

App. A, p. 5-6.

The third member of the Court, Chief Judge Schwartz, issued a trenchant dissent in the following terms:

In my view, the court has violated the most basic principle of statutory construction: that the law should be interpreted in accordance with the intent of the legislature by vindicating an obvious purpose of the statute in question to remedy a particular harm. 48A Fla. Jur. 2d Statutes §§ 113, 153-55 (2000). I cannot agree that the statutory scheme, which was designed to protect bilked title insurance customers can properly be read to eliminate a large number, perhaps a majority, of those persons simply because they have dealt with company agents who, if anything, should be regarded as more trustworthy than others because they are members of the Florida Bar. It is all the more incongruous to suppose that the legislature meant to, and did, achieve this result by the entirely offhanded method of providing (a) that the statute applies only to a "licensed title insurance agent," § 627.792, Fla. Stat. (1997), and (b) in another section dealing with a quite different matter, that attorneys are exempt from obtaining a specific license to act as such agents. §626.8417 (4) (a), Fla. Stat. (1997).

As in Schneer v. Allstate Indemnity Co., ___ So. 2d ___ (Fla. 3d DCA Case no. 3D98-2541, opinion filed, May 17, 2000), the same majority professes itself regretfully bound by the letter of the law to reach what it seems to recognize is an unjust result. See Schneer, ___ So. 2d ___ n.1 (Schwartz, C.J., dissenting in part). In fact I believe it is a victim of a self-imposed hardship by unjustifiably inserting the words "only" and "as" into a statute in which they do not appear so that the words "licensed title insurance agent" turn out to mean "only one licensed as a title insurance agent.

I would instead effect the legislative intent by reading section 627.792 as written, that is, as non-exclusive, thus applying to all transactions which fall within its

> general ambit. Putting it somewhat differently, the word licensed should be construed to apply to everyone who is authorized by law to act as a "licensed title insurance agent" including the person who is "licensed" as a lawyer.

App. A, pp. 8-9.

On September 20, 2000, rehearing en banc was denied by a majority of six to five of the eleven judges of the Third District. The six judge majority was composed of Cope, Gersten, Green, Fletcher and Sorondo, JJ. The five dissenters were Schwartz, C.J., and Jorgenson, Levy, Shevin and Ramirez, JJ. App. B.

That same day, the panel who had issued the June 7, 2000 opinion, nevertheless, certified to this Honorable Court that the decision herein passed upon the following question of great public importance:

> Whether § 627.792, Fla. Stat. (1997), which provides that an insurer is liable for the misfeasance of a "licensed title insurance agent" applies to a title insurance agent who is an attorney and is therefore exempt from licensing as a title insurance agent by the Department of Insurance under § 626.8417, Fla. Stat. (1997).

App. C, p. 2.

On November 6, 2000, this Court postponed its decision on jurisdiction and ordered briefing on the merits.

SUMMARY OF ARGUMENT

The vast majority of title insurance in Florida is written by attorney-agents. The statute under discussion deals with the liability of title insurers for the trust fund thefts of their agents. The first limb of the statute addresses the circumstance where the agent acts for a single principal. The second limb addresses the situation where the agent acts for several insurers, but one in particular has been identified in relation to the transaction in which the theft occurred. These provisions codify the common law of principal and agent. The third limb, however, which is involved in the facts of this case, deals with the allocation of liability where there are several possible principals and none has been identified to the transaction, but a theft has occurred. Where the common law would - without more - absolve all principals of responsibility, the legislature has provided for joint responsibility, shared in relation to the amount of income each insurer received from that agent in the year prior to the theft.

The issue is whether the statute makes title insurers liable for thefts committed by their attorney-agents, who account for the bulk of their profits in this state, or whether it applies only to the tiny minority of non-attorney agents, in which case it is basically a dead-letter. We suggest that the dissent

posited by Chief Judge Schwartz below, holding that the statute applies to all agents, should be adopted as the rationale for a correct decision in this case.

We show further that the restrictive reading of the statute by the majority of the Third District is fundamentally flawed, since, while it purports to give effect to the "plain meaning" of the word "licensed" as used in the first sentence of the statute as meaning "licensed by the Department of Insurance," it nevertheless wholly ignores the fact that the same term is used in the second sentence - in "licensed by two or more title insurers" - where it must mean something quite different. As used there, the word means "authorized to act." If the word is given that consistent meaning, then all agents are covered by the statute.

Beyond the fact that the majority's construction does not harmonize all the words used, beyond the fact that the majority's construction frustrates the presumed intent of the legislature, and beyond the fact that they as good as confess that their own conclusion seems an unwise result for the legislature to have intended, there is the fact that the majority's construction results in a 14th Amendment, equal protection problem, since it makes a completely invidious distinction between the tiny minority of title insurance customers who are granted full recourse against title insurers for their agents' trust account

defalcations, and the vast majority who are denied any such relief. If constitutionality is a touchstone of construction, then this is a result to be avoided and an alternative construction adopted.

ARGUMENT

1.

Attorneys act as title insurance agents in the vast majority of the real estate transactions concluded in Florida and are, therefore, presumably, the greatest source of profit to title insurance companies transacting business in Florida.

Real estate transactions account for many billions of dollars changing hands in Florida every year. Title insurance is the norm. The attorneys who handle those real estate transactions are very often title insurance agents. This Court may take judicial notice of the fact that a single title insurer, Attorneys Title, has 6,000 agents in Florida, all of whom are attorneys, who between them account for roughly a quarter of market share in Florida.[2] The

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[2] A Court may take judicial notice of: "[f]acts that are not subject to dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned." Fla. Stat. § 90.202 (12)(2000). Insurer credit ratings available on the internet from leading national rating agencies fall into such a category. Duff & Phelps Credit Rating Co., for instance, identifies Attorneys Title Insurance Fund, Inc.'s 6,000 attorney-agents as accounting for 24% of market share in Florida in 1998. See App. "D."

other title insurers also have attorney agents - as is exemplified by this appeal. In litigation between the Department of Insurance and a title insurer regarding the constitutionality of the less stringent reporting requirements imposed on attorney-agents under the title insurance statutes, it was: "undisputed between the parties, and indeed ... it appears that the non-attorney title agents comprise a small minority of the title agents in the State of Florida." *See e.g. State of Florida, Dept. of Ins. v. Keys Title and Abstract Co. Inc.,* 741 So.2d 599, 603 (1st DCA 1999). (dissenting opinion). It is a fair conclusion, therefore, that attorney-agents present the greatest source of profit to title insurance companies transacting business in Florida.

2.

Fla. Stat. § 627.792 (1997) provides a remedy where the common law provided none, by allocating liability for losses, where the agent has not yet identified a particular principal, in the proportion that each has profited from the agent's activities over the year preceding the theft.

The Legislature has enacted a statute that addresses the vicarious liability of Florida's title insurers for their agents. This statute provided, until recently, as follows:

627.792 Liability of title insurers for defalcation by title insurance agents.

> A title insurer is liable for the defalcation, conversion, or misappropriation by a licensed title insurance agent of funds held in trust by the agent pursuant to s. 626.8473. If the agent is licensed by two or more title insurers, any liability shall be borne by the title insurer upon which a title insurance binder, commitment, policy, or title guarantee was issued prior to the illegal act. If no binder, commitment, policy or guarantee was issued, each title insurer represented by the agent at the time of the illegal act shares in the liability in the same proportion that the premium remitted to it by the agent during the 1-year period before the illegal act bears to the total premium remitted to all title insurers by the agent during the same time period.

The issue on this appeal is, of course, whether this statute applies to attorney-agents. Before approaching that issue, however, it is well to step back and take in the statute's general purport. There are three sentences and three concepts here.

The first sentence expresses a concept that a principal should be liable for the theft of money entrusted to his agent by a third party. The receipt of money into trust is an ordinary incident of the work of a title insurance agent. That the principal should be liable for his agent's defalcation in such circumstances is a concept that is already covered by the common law of

principal and agent.[3] This provision, therefore, does little more than enshrine the existing law in statutory form.

The second sentence provides that where an agent is authorized to act for more than one principal and the particular principal has been identified to the transaction prior to the theft, that principal only is liable. As noted in the preceding paragraph, the common law would reach substantially the same result. Again the statute does little more than codify the general common law of principal and agent in the specific context of title insurer and title insurance agent.

It is the third sentence which makes a radical change to the common law. In a case where the agent steals money from a title insurance customer, but has not yet identified a particular principal, the common-law would probably say that - without more - none of the principals were liable. In this case, however, the Legislature has provided that *all* the principals are liable and they share in responsibility for the loss in direct proportion to their gain from that agent's activities over the year preceding the theft. In essence, joint liability for an agent's dishonesty is predicated on a "Risk vs. Reward" basis.

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[3] See, e.g. Restatement (Second) of Agency § 261 (1958), Agent's Position Enables Him to Deceive; *Industrial Ins. Co. of New Jersey v. First Nat. Bank of Miami*, 57 So.2d 23 (Fla. 1952).

It is this “third limb” of the statute, which applies to the facts of this case, which is our primary focus, here.

3.

Fla. Stat. § 627.792 (1997) cannot be fairly construed as exempting Florida's title insurers from vicarious liability for the theft losses caused by their greatest source of profit - their attorney-agents.

The issue on this appeal is whether, in enacting the "Risk v. Reward" provisions of Fla. Stat. § 627.792 (1997), the Legislature intended to enact a statute of general application, to ensure that title insurers be responsible for trust fund thefts committed by all their agents - with the risk commensurate with the reward - or whether the Legislature intended to limit the statute to a tiny minority of agents, leaving the industry free to reap the vast majority of their rewards, risk-free.

The majority opinion and the dissent frame the opposing arguments on this debate. The majority believe that the "plain meaning" of the words of the statute mandate a result which they confess is of questionable wisdom. The dissenter sees an evident mischief to be remedied and a logical, just result which can be achieved without doing violence to the words used. We believe that the rationale of Chief Judge Schwartz is infinitely to be preferred on the issue, and we adopt his reasoning and the law he cites as if set out *in extenso*

here. However, we believe that there are further logical justifications for that position, as we explain below.

Both opinions focus on the word "licensed" as it is used in the first sentence, only. Neither opinion, however, discusses the fact that the word "licensed" also appears in the second sentence of the statute. Thus, the first sentence refers to "a licensed title insurance agent." But then the second sentence of the statute continues: "If the agent is licensed by two or more title insurers ...." Fla. Stat. § 627.792. In this second sentence the act of "licensing" is used to describe some action taken "by two or more insurers," not by the Department of Insurance. In fact the Department does not "license" agents to act, insurer by insurer: it issues a single license, after which the agent may act for as many insurers as wish to appoint him. Therefore, leaving aside the issue of the meaning of "licensed" in the first sentence for a moment, it is clear that in the second sentence, "licensed by two or more insurers" *cannot* mean "licensed by the Department of Insurance."

If this is so, then what does "licensed by two or more insurers" mean? Is there any sense in which title insurers can be said to "license" their agents? The answer to that question is "yes." The word "licensed," as used in ordinary English denotes the giving of permission to act. It is synonymous with

"appointed" or "authorized."[4] If the word licensed is given this meaning, then the sentence makes sense. The expression "licensed by two or more title insurers" means "authorized to act for two or more title insurers."

A statute must be read and interpreted in its entirety and must be so construed that it is meaningful in *all* its parts.[5] Given that the word "licensed" as used in the second sentence of the statute *cannot* mean "licensed by the Department of Insurance" and *must* mean "authorized to act" by the title insurers; given, further that it is highly unlikely that the legislature gave the word "licensed" different meanings in consecutive sentences; should the word not, then, be given the same meaning in both sentences? Such a construction would, of course, mean that title insurers are liable for all their agents, including attorney-agents, which - even the majority in the Third District would agree - would be a wiser and more just result.[6]

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[4] In ordinary English "licensed" is the equivalent of "appointed" in the context under discussion, since a person who has been "licensed" has been given "permission to act." Merriam Webster's Collegiate Dictionary, 10th ed.; Black's Law Dictionary, 829 (5th ed. 1979)

[5] *See Wilensky v. Fields,* 267 So.2d 1, 4 (Fla. 1972). *See also Engelwood Water Dist. v. Tate,* 334 So.2d 626, 627 (Fla. 2d DCA 1976); *State v. Gale Distributors Inc.,* 349 So.2d 150, 153 (Fla. 1977).

[6] There can in fact, moreover, be little doubt that the legislature meant

Logic buttresses the conclusion that there was no intent on the part of the legislature to confine this statute to agents who had been issued licenses by the Department of Insurance. For instance, given the fact that, as we show above, the first two limbs of the statute do no more than codify the common law, is it logical to assume that the Legislature meant, when it referred to title insurers being liable for the thefts of their "licensed agents," that they meant to exclude vicarious liability for thefts committed by attorney-agents, when the insurers were already liable for thefts committed by such agents at common law?

The fact is, moreover, that the statute allocates responsibility for loss according to the measure of each insurer's gain from the agent's activities over the prior year. The relevant criteria in such an analysis are how much the agent stole and how much income the agent's principals made over the year preceding the theft. What point could the legislature possibly have had in mind in making the application of this statute turn on which of two bodies had been satisfied that the agent had met the threshold requirements to write title insurance - the Department of Insurance or the Florida Bar?

"licensed," as used in the second sentence to mean "authorized to act," since it was amended in 1999 to make the point clear. The second sentence now reads "If the agent or agency is an agent or agency for two or more title insurers ..." The reference to "licensed" in the first sentence, remains.

Certainly, if the words used in a statute are sufficiently flexible to admit of more than one construction, that construction should be adopted which will effectuate the legislature's intention, for no literal interpretation should be given that leads to an unreasonable conclusion or to a purpose not intended by the lawmakers.[7] Moreover, a literal interpretation of the language of a statute need not be given when to do so would lead to an unreasonable or ridiculous conclusion.[8] Any uncertainty as to the legislative intent should be resolved by an interpretation that best accords with the public benefit.[9]

The fact is that the majority's construction would lead to this law being a virtual dead-letter. The approach of the dissenter, however, is consistent with the words employed, with logic, with the public benefit, and with the presumed intent of the legislature, and should be adopted by this court.

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[7] *See Axtell v. Smedly & Rogers Hardware Co.*, 59 Fla. 430, 52 So. 710 (1910)*; Ozark Corp. v. Pattishall*, 135 Fla. 610, 185 So. 333, 336 (1938).

[8] See *Radio Tel. Communications Inc. v. Southeastern Tel. Co.*, 170 So. 2d 577, 580 (Fla. 1964); *Axtell v. Smedly & Rogers Hardware Co.*, 59 Fla. 430, 52 So. 710 (1910)*; Ozark Corp. v. Pattishall*, 135 Fla. 610, 185 So. 333, 336 (1938); *Curry v. Lehman*, 55 Fla. 847, 47 So. 18 (1908); *State v. Sullivan*, 95 Fla. 191, 116 So. 255, 261 (1928); *State ex rel. Hughes v. Wentworth*, 135 Fla. 565, 185 So. 357, 360 (1938); *Ft. Lauderdale v. Des Camps*, 111 So. 2d 693, 695 (Fla. 2d DCA 1959); *Holly v. Auld*, 450 So.2d 217, 219 (Fla. 1984).

[9] *Sunshine State News Co. v. State*, 121 So.2d 705, 707 (Fla. 3d DCA 1960).

4.

To construe Fla. Stat. § 627.792 (1997) as exempting title insurers from liability for the trust fund thefts of their attorney-agents would, moreover, unconstitutionally deny the equal protection of the laws to the victims of trust fund thefts.

There are, moreover, serious constitutional problems with the approach adopted by the majority of the appellate court.

The intent behind the third limb of Fla. Stat. § 627.792 (1997) is to provide an avenue of recovery to victims of trust fund thefts by title agents against their principals, where the common law afforded none. The rationale behind this is that the insurers choose their agents and they profit from their agents' activities. The title insurers put the agents into a position where they can take money from the public. The insurers are in the best position to monitor their agents' activities and can withdraw their authority at any time. It is only fair, therefore, that the insurers share responsibility for losses when their agents steal trust funds.

The intended beneficiaries of this statute are purchasers of title policies in Florida. That is a huge constituency. It is that huge mass of Florida's public who are involved in the purchase, sale and financing of residential and commercial real estate. It is all those residential buyers of houses,

apartments and condominiums. It is all those commercial purchasers of tower-blocks, strip-malls, hospitals, hotels and all the other buildings that make up Florida's cities and towns. It is all the mortgage lenders who make those acquisitions possible. And the vast majority of the title policies that are bought, the vast majority of the trust funds that are taken in, and the vast majority of the title insurance profits made, are through the title insurance attorney-agents.

The majority of the Third District Court of Appeal believes that it is hamstrung by the language of the statute into applying it to just those few agents who are licensed by the Department of Insurance and not to the vast majority, who are licensed by the Bar. Chief Judge Schwartz, however, stated that he could not:

> agree that the statutory scheme, which was designed to protect bilked title insurance customers, can properly be read to eliminate a large number, perhaps a majority, of those persons simply because they have dealt with company agents who, if anything, should be regarded as more trustworthy than others because they are members of the Florida Bar.

App. A, pp. 8-9.

There is, in truth, no rational basis for deciding that insurers should be liable for the thefts committed by those of their agents who have passed

exams set by the Department of Insurance but not for those who have studied real estate law at a higher, graduate level in a University and have passed an examination set by the Florida Bar. Nor is there a rational basis for deciding that insurers should be liable for the thefts committed by those of their agents who have satisfied the Department of Insurance as to their good character but not for those who have passed the far more rigorous background check performed by the Florida Bar. In short, there is just no rational basis for allowing the issue of liability of a title insurer for trust fund thefts committed by his agent to turn on the fact of *how* he met the threshold qualifications to write title insurance.

The construction adopted by the majority of the Third District leaves the Hechtmans - and the majority of all other Floridians, who purchase title insurance through lawyers - no right of recourse for their agents' defalcations against the title insurers, while that much smaller class who purchase title insurance through non-lawyers have full recourse. Given that all such purchasers of title insurance pay the same premiums for the same coverage, whatever agent they use; and given further that there is not a shred of a legitimate governmental objective that would be furthered by this differential treatment, this leads inevitably to the conclusion that the construction adopted

by the majority of the Third District Court of Appeal impermissibly violates the right to equal protection guaranteed by the XIV Amendment to the Federal Constitution.[10]

Conclusion

Many billions of dollars of title insurance is written in Florida every year. The vast majority of that is transacted through attorney title agents. The issue on this appeal is whether a statute passed by the legislature to make title insurers liable for the trust account thefts of their agents should be construed in such a way as to exclude their attorney agents. Excluding insurance company liability for such agents would render the statute a virtual dead-letter.

The majority of the Third District felt constrained on the language of the statute, nevertheless, to reach such a conclusion, although it did so with regret and felt it to be an unjust result. The dissenter reached a contrary conclusion, which we believe to be just and legally permissible and which will serve the legislative intent.

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[10] In this connection we refer to the analysis and cases collected in *State of Florida, Dep't of Insurance v. Keys Title and Abstract Co.*, 741 So. 2d 599 (Fla. 1st DCA 1999) (concluding there that there was a legitimate governmental purpose and a rational classification behind the disparate reporting requirements of Fla. Stat. § 627.782(8) as applied to attorney-agents and non-attorney-agents).

For the reasons given above, and for the reasons expressed by Chief Judge Schwartz in his dissent, we submit that this Court should reverse the Third District Court of Appeals and remand for further proceedings consistent with such opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was provided to James S. Telepman, Esq., Cohen, Norris, Scherer, Weinberger & Wolmer, 712 U.S. Highway One, Suite 400, North Palm Beach, Florida 33408; Thomas Manick, Esq., Manick Rosenberg & Contreras LLP, Alhambra International Center, 255 Alhambra Circle, Suite 425, Coral Gables, Florida 33134 and Robert A. Cohen, Esq., Cohen Fox, PA, First Union Financial Center, 200 South Biscayne Boulevard, Twentieth Floor, Miami, Florida 33131, via U.S. Mail on this 15th day of December, 2000.

Hendrik G. Milne