IN THE SUPREME COURT OF FLORIDA

ANDREW KRAUSE and
DAVID BAUTSCH,

Petitioners

v.

Case No.: **SC09881**
Lower Ct. Case No.: 2D07-4060

RESPONDENT TEXTRON FINANCIAL
CORPORATION,

Respondent.
_____/

PETITIONERS' AMENDED BRIEF ON THE MERITS

On Review from the Second District
Court of Appeals, State of Florida

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PRELIMINARY STATEMENT

In this brief, the Petitioners, Andrew Krause and David Bautsch, will generally be referred to as "Petitioners" or "Krause" and "Bautsch," as context requires. The Respondent, Textron Financial Corporation, will be referred to as "Respondent" or "Textron." Twin Eagles Golf and Country Club, Inc. will be referred to as "TwinEagles." TwinEagles Development Company, Ltd, the developer of the TwinEagles project, will be referred to as "TwinEagles Development."

The United States Bankruptcy Court for the Middle District of Florida will be referred to as the "Bankruptcy Court." The United States District Court for the Middle District of Florida will be referred to as the "Middle District Court". The Circuit Court for the Twentieth Judicial Circuit in and for Collier County, Florida will be referred to as the "Circuit Court". The Florida Second District Court of Appeals and other District Courts of Appeal will be referred to as the "Second DCA," etc. The United States Courts of Appeals for a particular Circuit will be referred to as the "Eleventh Circuit" or the "Fifth Circuit," etc.

The adversary proceeding brought by the Petitioners against TwinEagles and Textron in the Bankruptcy Court will be referred to as the "adversary proceeding." The July 18, 2002 Order Granting Motion for Summary Judgment in favor of Textron on the merits in the Bankruptcy Court adversary proceeding will be referred to as the "2002 Bankruptcy Court Summary Judgment." The January 12, 2006 Order and Opinion of the Middle District Court, that dismissed Petitioners' appeal of the 2002 Bankruptcy Court Summary Judgment, will be referred to as the "January 2006 Dismissal Order." The May 9, 2007 Circuit Court Order Granting Motion to Dismiss, that is the subject of this appellate proceeding, will be referred to as the "2007 Circuit Court Order."

Title 28 U.S.C. § 1367 will be referred to as "§ 1367."

The Record is not large, but it contains duplicate documents. Rather than referring to pages in the Record, Petitioners will append the relevant documents (all from the Record, except case law, to their brief, and those documents will be referred to in the Appendix as "App," with the appropriate page noted, for example, App. at Tab 1, P. 1-4, etc.

STATEMENT OF THE CASE AND THE FACTS

The dispute between the parties arose out of the purchase and sale of equity memberships in a private golf club, TwinEagles that was being constructed in the late 1990s in Naples, Florida. Prior to July 6, 2008, Petitioners, Krause and Bautsch, purchased equity memberships, which were issued and owned subject to the terms of the TwinEagles Plan ("Plan") (App. at Tab 6, P. 2). The Plan provided rules and procedures for the sale or transfer of existing, but resigned, equity memberships, as opposed to the sale of new memberships. An equity member was required to resign and deliver his or her membership certificate to TwinEagles, which would sell that membership to a new member. One in three (1 in 3) membership sales would be from the resigned equity membership category. (App. at Tab 6, P. 17) The cost of entry was related to what the market would bear. There was a waiting list.

In March and April of 1998, Petitioners purchased "Golden Eagle" equity memberships that, upon resignation and re-sale, entitled them to 90% of the membership fee then charged by TwinEagles, with the other 10% being the property of TwinEagles. Bautsch and Krause resigned in April and May of 1999, respectively. When Bautsch's membership was re-sold, the entry fee was $100,000, which entitled him to $90,000. When Krause's membership was re-sold,

the entry fee was $110,000, which entitled him to $99,000 (App. at Tab 6, P. 3 ¶13-14). In contrast, TwinEagles was entitled to 100% (its property) of fee for sale of new memberships, as opposed to resigned memberships. TwinEagles collected the sales proceeds for the benefit of the resigned members. It was a contractual relationship of confidentiality and trust.

The developer, TwinEagles Development, had acquired sufficient land to construct two 18-hole golf courses, a clubhouse and residential subdivisions. The Plan refers to as many as 550 potential equity memberships, some of which were to be the property of TwinEagles Development (App. at Tab 6, P. 9). The second course was not built, so, for our purposes, there were only 275 potential equity memberships, 200 of which were referred to as Club Equity Memberships and allocated as TwinEagles' property Those 200 memberships were sold first. The other 75 were called “Partnership Equity Memberships,” and were the property of TwinEagles Development (App. at Tab 6, P. at 38). Of the first 200 TwinEagles memberships, 150 were designated “Golden Eagle” equity memberships (App. at Tab 6, P. 12). Both Krause’s and Bautsch’s “Golden Eagle” equity memberships’ numbers were below ‘200’ (App. at Tab 6, P. 3 ¶13).

Respondent, Textron, loaned the developers several million dollars to complete the construction of the TwinEagles project. The loan transaction closed

on July 6, 1998 (App. at Tab 6, P. 3 ¶10). Textron received a promissory note secured by a mortgage on the real property and a security agreement on other assets. Textron's security interest did not extend to memberships resold by the TwinEagles for its members Pursuant to the Plan (App. at Tab 6, P. 3 ¶10). Textron disputes this.

After Bautsch and Krause resigned, their equity memberships were sold to new members on May 5, 1999 and June 4, 1999, respectively. Petitioners demanded their equity funds ($189,000 total) from TwinEagles, but they did not receive a nickel. In May, 1999 (pre-petition) or November, 1999 (post-petition) TwinEagles deposited the sales proceeds from the Petitioners' equity memberships into a Textron account, contrary to the terms of the plan (App. at Tab 6, P. 3 ¶15-16).

On September 9, 1999, TwinEagles, TwinEagles Development, and related entities filed for Chapter 11 Bankruptcy, and Petitioners were listed as creditors. On June 15, 2000 Petitioners filed an adversary complaint against TwinEagles **and** Textron in Bankruptcy ("adversary proceeding") (App. at Tab 1, P. 1-48). In the first count against TwinEagles, their complaint alleged that "upon information and belief" TwinEagles had used Petitioners' money to fund prepetition operations. That turned out not to be the case, which is why, as stated earlier, the 2006

Amended Complaint in Circuit Court alleged that Petitioners' funds had been deposited in Textron's account in May or November of 1999.

The first count of the adversary complaint was against TwinEagles. It alleged that Petitioners' funds had been misappropriated and converted, and asked that the court declare Petitioners rights and TwinEagles' right "in the golf membership sale proceeds which Golf converted to its use; alternatively, their rights in the combined bankruptcy estates of the instant bankruptcy cases and for such other and further relief as this court deems just and proper" (App. at Tab 1, P. 4).

The second count against Textron incorporated the allegations of the first count, and further alleged that TwinEagles, Textron and Petitioners shared a confidential relationship relative to the proceeds of the sale of the golf memberships, that the proceeds from the sale of their memberships were used to secure Textron's loan, and that Textron had been unjustly enriched by retaining Petitioners' funds. Petitioners requested "imposition of a constructive trust against any remaining golf membership's sale proceeds or, alternatively, in Textron's secured claim to the extent of the membership sale proceeds used by Golf or encumbered with Golf's permission by Textron's secured claim." (App. at Tab 1, P. 4-5)

Textron filed its Answer, but it did not raise lack of subject matter jurisdiction as an affirmative defense. (App. at Tab 5, P. 6) Textron moved for a summary judgment on the merits of Petitioners' claim for constructive trust, and that the effect of the Bankruptcy confirmation plan operated as res judicata against Petitioners. (App. at Tab 5, P. 3) On July 18, 2002, the Bankruptcy Court granted Textron's motion for summary judgment (App. at Tab 3, P. 1-7). Petitioners appealed the summary judgment twice, but the appeals were dismissed. (App. at Tab 5, P. 4)

On May 16, 2005, in an attempt to perfect that appeal, Petitioners voluntarily dismissed with prejudice their adversary complaint against TwinEagles. (App. at Tab 4, P. 1-2) They then filed their third notice of appeal of the 2002 summary judgment in favor of Textron. On September 12, 2005 Textron filed a motion to dismiss the appeal, and in **a reply**, **not in its motion**, [1] for the first time, asserted that the Bankruptcy Court **never** had jurisdiction. (App. at Tab 5, P. 6)

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[1] This is a significant point, but it can only be gleaned from a close reading of the 2006 Dismissal Order. (App. at Tab 5, P. 6-7) "Appellee's **Reply** asserts, **for the first time**, that the district court lack jurisdiction because the Bankruptcy Court never had jurisdiction." Unfortunately, Textron's motion was not made a part of the Circuit Court Record, and was therefore not in the Record before the Second DCA. Petitioners are cognizant of rules prohibiting the attachment of documents not in the lower court Record as part of a brief's appendix, and will not do so here. Counsel for Petitioners did inquire concerning opposing counsel's objection, and represents that opposing counsel did object.

The effect of the 2006 Order of Dismissal was to direct the Bankruptcy Court to vacate the 2002 Bankruptcy Court Summary Judgment, and to dismiss Petitioners' adversary complaint against Textron. The Bankruptcy Court complied by order dated January 26, 2006. That effectively ended 5 ½ years of adversary Bankruptcy litigation between the parties. That much is clear, but beyond that, Petitioners and Respondent disagree.

Within 30 days of that dismissal, on February 10, 2006, Petitioners filed their complaint against Textron in the Circuit Court, and Textron filed a motion to dismiss, as opposed to a motion for summary judgment, claiming that Petitioners' action was barred by the five-year statute of limitations, §95.11(2)(b) (App. at Tab 7, P. 1-6). Textron attached the 2002 Bankruptcy Court Summary Judgment (App. at Tab 3, P. 1-7) and an affidavit, executed by a Textron representative in April of 2002, in support of that summary judgment. (App. at Tab 2, P. 1-4)

The parties had not engaged in discovery, so, the Circuit Court did not have the benefit of facts and documents that had been discovered in the adversary Bankruptcy proceeding. In due course, the matter was briefed and argued based on the allegations of the Amended Complaint and the documents attached to the motion to dismiss. In opposition to the motion, Petitioners asserted that equitable estoppel and § 1367(d) operated to toll the running of the five-year statute. On May

29, 2007, the Circuit Court entered the Order Granting Motion to Dismiss, finding that Petitioners could not avail themselves of the tolling provisions of § 1367(d), and that the court could not rely upon the doctrine of equitable estoppel to toll the running of the statute of limitations, and thus avoid dismissal. (App. at Tab 8, P. 1-5)

Petitioners appealed that order of dismissal to the Second DCA, and on April 17, 2009, it rendered its opinion affirming the Circuit Court's ruling, and further ruled, although it was not part of the Circuit Court's ruling, that because Petitioners' claim against Textron for unjust enrichment was not part of the adversary complaint, the tolling provisions of § 1367(d) did not apply, and that claim was also barred by the statute of limitations.

Petitioners timely appealed to this court on the basis that in *Krause v. Textron Financial Corporation*, 10 So. 3d 208 (Fla. 2d DCA 2009) (App. at Tab 9, P. 1-4), expressly and directly conflicted with the decision of the Fourth DCA in *Scarfo v. Ginsberg*, 817 So. 2d 919, (Fla. 4th DCA 2002). This court accepted jurisdiction on October 15, 2009.

STANDARD OF REVIEW

This Court has accepted jurisdiction of this matter based on express and direct conflict with a decision of another District Court of Appeals. It may consider

other issues decided by the court below which are properly raised and argued before it. This Court reviews the Second District's opinion, affirming the Circuit Court's legal conclusion that the claims asserted by Petitioners in their Amended Complaint were time barred de novo. See *Caulfield v. Cantele*, 837 So. 2d 371 (Fla. 2002), *Chrestensen v. Eurogest, Inc.*, 906 So. 2d 343 (Fla. 4th DCA 2005) and *City of Hollywood v. Petrosino*, 864 So. 2d 1175 (Fla. 4th DCA 2004).

SUMMARY OF THE ARGUMENT

The Second DCA was circumspect in its decision when it affirmed the Circuit Court ruling. It erred on several points.

The language of 28 U.S.C. § 1367, including the tolling provisions of subsection (d), is ambiguous and subject to differing interpretations. It should be interpreted to accomplish its intended effect, which would toll the running of Florida's limitation of action statute as to the claims of Petitioners in this case.

It erred in affirming the Circuit Court's decision that because Petitioners' adversarial claim in Bankruptcy against Textron was not "related to" the claim against the bankrupt debtor, Twin Eagles, its state law claims filed in Circuit Court were not entitled to the tolling provision of § 1367(d). The tolling of the federal statute only requires that a claim must be asserted under § 1367(a), regardless of the reason for the dismissal, to be entitled to that section's tolling provision. That

Petitioners' adversary claim was dismissed when the federal court factually determined that it did not have subject matter jurisdiction did not operate to bar the application of subsection (d)'s tolling provisions.

It erred because the tolling provisions of § 1367(d) operated to stop the running of the statute of limitations on the date that Petitioners' state claim was filed in federal court (8 to 12 months had run), and the running did not begin again until the state law claim was finally dismissed in federal court, plus an additional 30 days. Petitioners' state law claims accrued, according to their amended complaint, in May or November of 1999, and the running was "tolled" from June 15, 2000 until January of 2006. The statute of limitations did not begin to run again until 30 days after the dismissal.

It erred because Petitioners' adversary claims against Respondent were "related to" the bankrupt debtor's Bankruptcy case, and supplemental jurisdiction over the claims against Respondent existed until Petitioners voluntarily dismissed with prejudice the adversary complaint, a core proceeding, against the bankrupt debtor on May 16, 2005, at the earliest. Therefore, roughly 8 additional months, at the most, had run on the statute of limitations when Petitioners filed their state court action on February 10, 2006. Their filing was timely.

It erred because Petitioners brought their adversary claims in Bankruptcy

without delay, and Respondents litigated the matter on the merits for five years before first asserting lack of jurisdiction. The common law doctrines of equitable estoppel or equitable tolling are encompassed by § 1367(d), or they operate independently to trigger the tolling of the running of the statute of limitations or avoid its running.

It erred because the facts and circumstances, as alleged in Petitioners' adversary claims in Bankruptcy, provided a sufficient basis, including notice and lack of prejudice to Respondent, to support a number of theories of recovery and remedies that could afford relief as to Respondent, including the imposition of a constructive trust and a claim based on unjust enrichment.

ARGUMENT

The federal statute, relevant to this case, is 28 U.S.C. § 1367. It addresses federal court supplemental jurisdiction over state law claims. The relevant subsections are (a), (c) and (d), and they read as follows:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
>
> (c) The district courts may decline to exercise supplemental jurisdiction over

a claim under subsection (a) if--

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

§95.11(2)(b)**,** Fla. Stat., the statute of limitations, and §95.051)**,** Fla. Stat., which relates to tolling, are implicated, and the relevant sections read as follows:

§95.11(2)(b) of the Florida Statutes:

Actions other than for recovery of real property shall be commenced as follows:

(2) Within five years.

(b) A legal or equitable action on a contract, obligation, or liability founded on a written instrument, except for an action to enforce a claim against a payment bond, which shall be governed by the applicable provisions of ss. 255.05(2)(a)2. and 713.23(1)(e).

§95.051 of the Florida Statutes:

When limitations tolled

> (1) The running of the time under any statute of limitations except ss. 95.281, 95.35, and 95.36 is tolled by:
>
> …This section shall not be construed to limit the ability of any person to initiate an action within 30 days of the lifting of an automatic stay issued in a Bankruptcy action as is provided in 11 U.S.C. s. 108(c).

§95.11(2)(b), Fla. Stat. establishes a five year limitations period to bring Petitioners' causes of action. Tolling is covered in §95.051, Fla. Stat., which was amended in 1989 to acknowledge pending proceedings in Bankruptcy as a tolling mechanism. *Brown v. MRS Mfg. Co.*, 617 So. 2d 758 (Fla. 4th DCA 1993) held that the 1989 amendment to §95.051, Fla. Stat. did not modify Florida law, but simply clarified the legislature's original intent.

In this case, the only disputed issue, with respect to the statute of limitations, is whether federal or state law tolled its running. It is likely that Petitioners' causes of action accrued in 1999, and it is certain that their state law claims against Textron were filed on February 10, 2006, at least 6 years later. Therefore, absent applicable tolling mechanisms, Petitioners' Circuit Court claims are time barred.

The federal tolling provision is codified in § 1367(d). It is not a model of legislative clarity. As a result, the courts in the various jurisdictions, both state and federal, throughout the country, have labored to determine what the language means, and how it affects the viability of state law claims after an initial, and improvident, foray into a federal arena, where dismissal occurred. There is no

consensus, and the state of the law is in disarray.

1. **The language of § 1367(d) "<u>the period of limitations for any claim asserted under subsection (a)</u>," applies to any claim technically "asserted" under subsection (a), as long as it was later dismissed, regardless of the reason for dismissal.**

In *Raygor v. Regents of University of Minnesota*, 534 U.S. 533 (2002), the United States Supreme Court determined that § 1367(d) did not operate to toll the limitations period for state law claims asserted against **non-consenting state defendants,** where those state law claims were dismissed on Eleventh Amendment (sovereign immunity) grounds in the federal court, and later filed in state court. The decision avoided the constitutionality of § 1367(d) issue, and turned on whether congress intended to abrogate a state's sovereign immunity when it implemented 28 U.S.C. § 1367.

Raygor upheld the Minnesota Supreme Court's decision that § 1367(d) did not apply to toll the statute of limitations as to **non-consenting state defendants,** but it avoided the constitutional issue, and based its decision on prior precedent to the effect that it would not abrogate state sovereign immunity unless Congress made its intention to alter the constitutional balance between the States and the Federal Government **unmistakably clear in the statute's language**. From the language of § 1367(d), it was not unmistakably clear that Congress intended to abrogate a state's sovereign immunity, so it did not toll the running of the statute as

to a non-consenting state.

While the holding of *Raygor* is not germane to this case, in its analysis of the language of § 1367(d), the Court did make a keen observation. It noted:

> On its face, subsection (d) purports to apply to dismissals of "*any* claim asserted under subsection (a)." *Ibid.* (emphasis added). Thus, it could be broadly read **to apply to any claim technically "asserted" under subsection (a)** as long as it was later dismissed, **regardless of the reason for dismissal**.

Id at 1005. (Emphasis added)

If the United States Supreme Court could so read § 1367(d), then Petitioners suggest that it was sending a message to other courts yet to determine the effect of the tolling provisions of § 1367(d). Petitioners more than just "technically" asserted their adversary claims under subsection (a), they actually litigated those claims for five years on the merits before they were finally dismissed. Petitioners submit that *Raygor* brings the circumstances of this case within the broad language of the tolling provisions of § 1367(d). If this Court chooses to interpret § 1367(d) as suggested by *Raygor*, and Petitioners believe it could and should, excepting the sovereign immunity issue, judges, lawyers and litigants in Florida would have an efficient and economical bright line to follow. Simply put, as to state law claims technically asserted under subsection (a), the tolling provisions of subsection (d) apply as long as those state law claims were later dismissed, **regardless of the**

reason for dismissal.

In *Jinks v. Richland County, S.C.*, 538 U.S. 456 (2003) the United States Supreme Court answered the question that *Raygor* avoided, when it held that § 1367(d) was constitutional, and that its tolling provisions applied to claims against political subdivisions of a state government.

2. **The tolling provisions of § 1367(d) stop the running of a state's statute of limitations on the date that the state claim was filed in, or removed to, federal court, and the statute of limitations does not begin to run again until the state law claim is finally dismissed, voluntarily or involuntarily, in federal court at the trial or appellate level, plus an additional 30 days.**

   Again, the language of § 1367(d) reads:

   > The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), **shall be tolled while the claim is pending and for a period of 30 days after it is dismissed** unless State law provides for a longer tolling period.

At a minimum, the emphasized language implicates the meaning of "toll," "pending," and "dismissed."

In Florida, as it relates to statutes of limitation, "toll" means that the time period stops running. In *Hankey v. Yarian*, 755 So. 2d 93 (Fla. 2000) this Court confirmed that when it held:

> We agree with the Fourth District's concise explanation in *Rothschild* that: "Since a tolling provision interrupts the running of the statutory limitations period, the statutory time is not counted against the claimant during that

> ninety-day period. In essence, the clock stops until the tolling period expires and then begins to run again."*Rothschild,* 707 So. 2d at 953.
>
> *Id*. at 97.

More recently, this Court re-affirmed the meaning of "toll" in *Major League Baseball v. Morsani,* 790 So. 2d 1071 (Fla. 2001).

The Florida District Courts of Appeal that have considered the operation and effect of § 1367(d), as it relates to the running of the statute of limitations, faced situations where the various Plaintiffs filed their state law claims in state court within 30 days of dismissal of those claims in federal court. So, the appellate issues are primarily focused on whether or not the circumstances of the federal court dismissals brought the state law claims within the 30-day tolling period. Naturally, there is conflict among the Districts. There is a larger issue, and it will be discussed after reviewing the current state of Florida law. There are only a handful of Florida decisions, so, we'll review them chronologically.

The first marginally relevant decision was *Black v Florida Department of Corrections*, 652 So. 2d 1291 (Fla. 1st DCA 1995). It is a one paragraph opinion that stands for the proposition that because Plaintiff's complaint alleged that § 1367(d) tolled the running of the statute, a motion to dismiss based on the statute of limitations should have been denied.

Andujar v. National Property and Casualty Underwriters, 659 So. 2d 1214

(Fla. 4th DCA 1995) was not a statute of limitations case. The issue was whether a **state claim** (violation of Florida Human Rights Act) that was **not asserted** in the federal court action (violation Title VII of the Civil Rights Act of 1964) was subject to res judicata or issue preclusion when, subsequent to the adverse federal judgment of dismissal, the state law claim was brought in state court. The Fourth DCA held that there was no res judicata or issue preclusion effect, and it doubted that the federal District Court was a court of competent jurisdiction. § 1367(d) was only implicated in the discussion about pendent (supplemental) jurisdiction.

Ovadia v. Bloom, 756 So. 2d 137 (Fla. 3d DCA 2000) involved the tolling provisions of § 1367(d). Dr. Ovadia filed suit in federal court claiming violation of various state law rights, but significantly he filed **no federal law claims.** The sole claimed basis for federal jurisdiction was diversity of citizenship. Defendants timely answered, asserted lack of subject matter jurisdiction as an affirmative defense, and they followed that up with a motion for judgment on the pleadings asserting that the court lacked subject matter jurisdiction because of a lack of complete diversity. The federal court dismissed the case, and within 30 days, Dr. Ovadia re-filed his state law claims in state court. The two-year statute of limitations had run, unless it was tolled. Defendants filed a motion for summary judgment on that issue, and the Court granted the Defendants' motion, which

dismissed the state court action as being time barred.

On appeal, the Fourth DCA dealt with § 1367(d) in one paragraph:

> As a threshold matter, we cannot grant Dr. Ovadia relief under 28 United States Code section 1367. Under the plain language of that section, **the limitations period is not tolled because the federal court never had original jurisdiction over Dr. Ovadia's action**. Any arguable jurisdiction was based on diversity, and the presence of non-diverse Defendants in the action destroyed jurisdiction on that basis.

Id. at 139.

Likely, Textron will claim that *Ovadia* should dictate the outcome of this case. Like *Ovadia*, in this case the Second DCA determined that jurisdiction was lacking. However, Petitioners see a difference between a dismissal for lack of complete diversity, a threshold jurisdictional requirement that was the sole basis for federal jurisdiction, and dismissal of a Bankruptcy supplemental claim that based its federal subject matter jurisdiction on being "related to" the Bankruptcy matter, which, by definition, is exclusively a federal matter. Petitioners' case is more closely aligned with the facts of *Scarfo v. Ginsberg*, 817 So. 2d DCA 919 (Fla. 4th DCA 2002), which will be discussed below.

In *Blinn v. Florida Department of Transportation*, 781 So. 2d 1103 (Fla. 1st DCA 2000) a Plaintiff brought both state law and federal law claims against her employer in federal court. Plaintiff voluntarily dismissed the federal court action, and refilled her state law claims in state court within 30 days of that voluntary

dismissal. The issue was whether a **voluntary dismissal qualified** for the tolling afforded by § 1367(d). The trial court concluded that the tolling did not apply to voluntary dismissals, and dismissed the state court action.

The First DCA examined the language of § 1367(d), found it to be ambiguous, and commented:

> Although subsection (d) does not state that the tolling provision is applicable only where the federal district court declined to exercise supplemental jurisdiction of a claim under subsection (a), this is the construction generally adopted by commentators who have addressed the statute. *See, e.g.*, Patrick D. Murphy, *A Federal Practitioner's Guide to Supplemental Jurisdiction Under 28 U.S.C. § 1367,* 78 Marq. L. Rev. 972, 1032 (1995); Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute-A Constitutional and Statutory Analysis,* 24 Ariz. St. L.J. 849, 985 (1992). **These commentators recognize that the tolling provision, section 1367(d), leaves many questions unanswered and may be difficult to apply. Arguably, the omission could be interpreted to mean that section 1367(d) would toll state statutes of limitation without regard to the reason for the dismissal, unless the claim were dismissed on the merits.** *See* Brian Augustus Beckcom, *Pushing the Limits of the Judicial Power: Tolling State Statutes of Limitations Under 28 U.S.C. § 1367(d),* 77 Tex. L. Rev. 1049, 1075, n. 168 (1999).
>
> *Id.* at 1107. (Emphasis added)

Delving further, the Court looked to the legislative history, and found that it actually conflicted with the wording of the statute.

> The legislative history relating to section 1367 suggests legislative intent that section 1367(d) would provide a tolling period only after the federal court declined to exercise supplemental jurisdiction, pursuant to the reasons set forth in section 1367(a)-(c). *See, generally*, Steven H. Steinglass, *Litigating State Employment Discrimination Claims in Federal Courts*

Under The New Doctrine of Supplemental Jurisdiction, C780 ALI-ABA 467 (June 1993). This limitation on the tolling provision was not included in the statute. One commentator has phrased the question thusly:

> Whether supplemental claims that are dismissed without prejudice for reasons other than those set forth in § 1367(a)-(c) also gain the benefit of § 1367(d)'s tolling provisions is unclear. The legislative history states that § 1367(d) is intended to apply to "any supplemental claim that is dismissed under this section," implying that supplemental claims that are dismissed without prejudice for other reasons, such as insufficiency of service of process or lack of personal jurisdiction, do not fall within § 1367(d)'s tolling provisions.
>
> However, the limitation on the type of dismissals found in the legislative history (i.e., dismissal "under this section") did not find its way into the statute. **A literal reading of § 1367(d)-"any claim asserted under subsection (a) ... shall be tolled"-would certainly permit application of the tolling provisions to supplemental claims later dismissed without prejudice for reasons other than those found in § 1367(a)-(c).**

Patrick D. Murphy, *A Federal Practitioner's Guide to Supplemental Jurisdiction Under 28 U.S.C. § 1367,* 78 Marq. L. Rev. 973, 1033 (Summer 1995) (footnotes omitted) (emphasis added)

As appellant notes, the perception of ambiguity in section 1367 seems to arise from a comparison of the language of the statute with the legislative history and views expressed by various commentators. The Florida Supreme Court has ruled unequivocally that where the language of a statute is clear, the language must be given effect, rather than the purpose or intent indicated by legislative history. *See Florida Birth-Related Neurological Injury Compensation Ass'n v. Florida Division of Administrative Hearings,* 686 So. 2d 1349 (Fla.1997).

Id. at 1108.

Significantly, the Court stated:

> **In our view, the tolling provision of section 1367 ought not be interpreted as applicable only to dismissals predicated on a federal court's decision to decline supplemental jurisdiction, pursuant to the criteria set forth in section 1367(c)(1)-(4). A policy of this nature would force a Plaintiff to litigate the supplemental jurisdiction question in order to gain the savings protection of section 1367(d).** In cases such as this, where the basis for the exercise of supplemental jurisdiction clearly exists, it appears a voluntary dismissal should receive the same treatment as a refusal of the federal district court to exercise supplemental jurisdiction, i.e., the Plaintiff should have the benefit of the section 1367(d) thirty-day tolling provision to refile the case in state court. In this case, appellant's voluntary dismissal of her federal action served to preserve judicial labor and resources. We do not wish to encourage a policy which would interpret section 1367(d) as inapplicable to a voluntary dismissal of claims where the federal court has original jurisdiction, and could exercise supplemental jurisdiction.

Id. at 1109. (Emphasis added)

In short, The First DCA held that a voluntary dismissal of the state law claims in a federal action triggered the tolling provisions of § 1367(d), but the emphasized above language was even more significant as it relates to this case. Should a Plaintiff be forced to litigate the supplemental jurisdiction question in order to gain the savings protection of §1367(d)? Petitioners think not.

Of interest, is that on motion for rehearing, the *Blinn* Defendant attempted to assert that the federal court did not have jurisdiction over the state law claims, and for that reason, Plaintiff's voluntary dismissal should not be entitled to the tolling of § 1367(d). Since the Defendants had not previously raised that issue, the First DCA declined to address it, commenting that it would leave that issue "to another

court before which the issue may be properly asserted for determination." *Id*. at 1111. The deferred issue in *Blinn,* from one perspective, is now before this Court.

Scarfo v. Ginsberg, 817 So. 2d DCA 919 (Fla. 4th DCA 2002) also involved the tolling provisions of § 1367(d). Plaintiff filed her state law and federal law (civil rights violation) claims in federal court. The federal court granted a summary judgment only on the federal civil rights claim, finding that none of the Defendants could be liable under that statute because none of the Defendants qualified as "employers, " as defined by Title VII (more than 15 employees). That decision was affirmed on appeal, the federal trial court dismissed Plaintiff's state law claims without prejudice, and within 30 days, Plaintiff filed her state law claims in state court. Defendants moved to dismiss, arguing that the claims were barred by the statute of limitations. Plaintiff countered that its running had been tolled by § 1367(d). The state court dismissed her case.

On appeal, the Court noted that in the federal action Plaintiff's state law claims were asserted under the authority of section 1367(a). Defendant argued that since Plaintiff's federal law claim was dismissed for lack of federal subject matter jurisdiction, the tolling provision in 1367(d) was inapplicable. The Fourth DCA was not persuaded by Defendant's argument.

> **It is true that the federal court of appeals rationalized the dismissal of the federal claim on grounds of subject matter jurisdiction. We**

> **disagree, however, that such a dismissal makes the tolling provision of section 1367(d) inapplicable.** We do not think the text of section 1367(d) supports such a narrowing of the sweep of that provision.
>
> In this case Plaintiff based subject matter jurisdiction in federal court on federal question grounds, rather than on diversity of citizenship. We note that in this instance the issue as to subject matter jurisdiction raised by Defendants did not contend that Plaintiff's claim was of a class that on its face could not be brought in federal court. Instead **Defendants' attack was based on a factual dispute** as to whether any of the Defendants qualified as employers under Title VII. After a "trial" on that issue, the court determined that none of the Defendants met the Title VII requirements for liability. **It was only on the basis of the resolution of that factual dispute that the court dismissed Plaintiff's federal claim**…
>
> Section 1367(d) provides for a tolling of state law limitations on *any* state law claim *asserted* in federal court under section 1367(a). The only requirements are that the claim be *asserted* under section 1367(a). Plaintiff's dismissed claims arose under state law and they were asserted in federal court under section 1367(a). **The mere fact that the federal court of appeals saw the question of the employers' liability under Title VII as an issue of subject matter jurisdiction does not change the text of section 1367**. Section 1367(d) exactly fits the facts and circumstances of this case.
>
> *Id*. at 920. (Emphasis added)

Petitioners contend that the facts of *Scarfo* were sufficiently close to the facts of this case to have created a direct and express conflict with the Second DCA's opinion in *Krause*. As will be discussed in more detail, later in this brief, Petitioners adversary proceeding in the Bankruptcy matter involved **both** the bankrupt debtor **and** the secured creditor, Textron. As to the bankrupt debtor, Petitioners' claim was a core proceeding, clearly a federal claim that arose by

virtue of the bankruptcy proceeding itself. It was subsequent to the voluntary dismissal with prejudice of that core federal law claim that the Middle District made a **factual determination** that the Bankruptcy Court did not have subject matter jurisdiction over Petitioners' state law claims against Textron.

Petitioners have found themselves in the same position as the *Scarfo* Plaintiff, and believe that their rights to the tolling provisions § 1367(d) are equal to, or even stronger than, the Plaintiff's in *Scarfo*. The law, as established by the Fourth DCA in *Scarfo,* would change the result in *Krause*.

Dahl v. Eckerd Family Youth Alternatives, Inc., 843 So. 2d 956 (Fla. 2d DCA 2003) involved § 1367(d), but it did not turn on an interpretation of it. Plaintiff's state law (violation of private whistle blower act) and federal law claims were brought and then dismissed in a federal action. Within 30 days of dismissal, Plaintiff brought her claims in state court. The case turned on an issue not relevant to this discussion (whether Plaintiff could bring her state law claim under the private versus public whistle blower act), and there was no analysis of the effect of § 1367(d), other than to note that Plaintiff's state law claim in state court was not time barred because she filed within the 30 day grace period of § 1367(d).

In *Manning v. Tunnell*, 943 So. 2d 1018 (Fla. 1st DCA 2006) the latest Florida case, other than *Krause*, § 1367(d) was mentioned only in the context that

it was not raised as a defense at trial, so could not be raised on appeal. That is not the situation confronting this Court.

It is clear that there is conflict among the several Florida District Courts of Appeal with respect to the effect of § 1367(d) on the running of the Florida's statutes of limitations. The Fourth DCA, in *Scarfo*, and the First DCA, in *Blinn*, were troubled with harsh results of not applying the tolling provisions of § 1367(d) to the dismissed state law claims. Both *Scarfo* and *Blinn* involved circumstances where the Plaintiffs brought both state law and federal law claims in federal court, had them dismissed, and then re-filed the state law claims in state court within 30 days of dismissal. The Third DCA, in *Ovadia*, which **only involved state law claims** with federal jurisdiction solely and erroneously being founded on diversity, and the Second DCA, in *Krause*, would appear to have less concern with the tolling provisions of § 1367(d) not being available to ameliorate improvident forays into the federal arena. Although this Court accepted jurisdiction based on conflict, the meaning and application § 1367(d), as it relates to Florida's statutes of limitation, is a question of great public importance.

As stated earlier, Petitioners assert that "**The period of limitations… shall be tolled while the claim is pending**" language in § 1367(d) means that a state's statute of limitations literally stops running when the state law claim is either filed

in, or removed to, federal court. If that is true, and Petitioners believe that it is, once the running has stopped, it does not begin to run again until the state law claim is finally dismissed at the federal trial or appellate level, plus an additional 30 days. That is literally what the language of § 1367(d) means.

State courts in California, Pennsylvania, Minnesota and Maryland have analyzed § 1367(d) and its interplay with their respective statutes of limitations. In chronological order, the cases are: *Bonifield v. County of Nevada,* 94 Cal. App. 4th 298 (CA 3d Dist Ca. 2002), *Oleski v. Department of Public Welfare,* 822 A. 2d 120 (Pa. Comm. Ct. 2003), *Goodman v. Best Buy, Inc.*, 755 N.W.2d 354 (Minn. App. 2d 2008) and *Turner v. Kight*, 957 A. 2d 984 (CA Md. 2008). All four cases involved situations where Plaintiffs brought state law and federal law claims in federal court, or had their state cases removed to federal court, where their claims were dismissed. All were refilled in state court, and all were dismissed on the basis that the statute of limitations had run, and that § 1367(d) did not operate to toll the running.

At the appellate level, all four cases held that "**The period of limitations… shall be tolled**…," language in § 1367(d) meant that the statute of limitations literally stopped running when the state claims were filed in, or removed to, federal court, and the statute of limitations did not begin to run again until the state law

claims were dismissed in the federal court, before or after appeal, plus an additional 30 days after final dismissal. Rather than laboriously reciting the factual scenarios and holdings of each case, since they build upon each other, it will probably suffice to address the most recent cases, *Goodman* and *Kight.*

The Plaintiff in *Goodman* was a frequent absentee, and his employer, Best Buy, terminated him. Plaintiff claimed that he had a disability due to a blood pressure condition that caused him to miss work. He sued Best Buy in Minnesota state court alleging violations of the Family Medical Leave Act, a federal claim, and the Minnesota Human Rights Act, a state claim, both of which prohibited disability discrimination. Best Buy removed the entire state action to federal court, where it obtained a summary judgment on, and dismissal of, the state law claim. About 95 days after the federal dismissal, Plaintiff refilled his state law claim (MHRA) in state court. Best Buy asserted that the one-year statute of limitations had expired, and it and sought dismissal. The state court dismissed the state claim, reasoning that § 1367(d) **only granted a thirty-day window** to file a state claim in state court after dismissal of that claim in federal court.

On appeal, the Court confronted the issue directly. In a well reasoned opinion, it analyzed the meaning of the "shall be tolled" language of § 1367(d). It noted three possible interpretations.

First, the statutory language "shall be tolled" could mean that section 1367(d) would "annul" the state limitations period completely and replace it with a fixed period: the thirty-day period after federal dismissal. (noting that word "toll" is sometimes used "to establish a fixed period [for filing suit] without regard to the length of the original limitations period or the amount of time left when tolling began").

Second, and related, is the interpretation that section 1367(d) would only toll the *expiration* of the state limitations period: it "annuls" the state limitations period if the state filing deadline would otherwise have occurred during the period in question. This interpretation treats that period in the statute-the federal claim period plus thirty days-as a single span of time. If the state limitations period runs out during that span, the thirtieth day after dismissal becomes the new filing deadline. Under these circumstances, the outcome is the same as under the "annul and replace" interpretation. If, however, the state limitations period does not run out during that span of time, the state limitations period is unaffected and terminates without regard to any federal court filings.

The third and final possibility is based on the second definition from Black's Law Dictionary. The "shall be tolled" language is read to mean that the state limitations period is *suspended*-i.e., the clock is stopped and the time is not counted-while the federal court is considering the claim and for thirty days after the claim is dismissed. Under this interpretation, whatever time remained on the state clock when the federal claim was filed starts to run again thirty days after the federal claim is dismissed.

Id. at 356-357. (Internal citations removed.)

The Court easily rejected the second interpretation, focused on the text of § 1367(d), and in evaluating the first and third possible meanings concluded:

Thus, two possible meanings remain: the "annul and replace" meaning and the "suspension of the clock" meaning. Context again provides our answer. If Congress had intended the "annul and replace" meaning of "toll," it would have designated a specific *moment* in time at which annulment was meant to

> take place. **But section 1367(d) does not designate a particular moment in time at which annulment takes place: it does not state that the statute of limitations is tolled "*when* the federal claim is filed," or "*on* filing the claim," or "*at the time* of filing the claim." Instead section 1367(d) states that the limitation period is tolled "*while* the claim is pending and *for a period* of [thirty] days after it is dismissed." Because this language designates a period of time, it must refer to an ongoing occurrence-a suspension, not an annulment. Section 1367(d) thus can reasonably be understood only as intending a suspension of the statute of limitations.**
>
> *Id*. at 357. (Emphasis added)

Consequently, it found that Plaintiff's state law claim, despite a one-year statute of limitations, was timely filed. Specifically, Plaintiff was terminated on February 21, 2005, and absent tolling, the Minnesota statute of limitations would have run on February 21, 2006. When Plaintiff originally filed his state law claim in state court on July 12, 2005, less than five months had run on the statute of limitations. When Best Buy removed the state law claim to federal court on August 4, 2005 (about three weeks later), the statute of limitations stopped running, and did not begin to run again until January 3, 2007, when the state law claim was dismissed in federal court, plus thirty days. Technically, when Plaintiff filed his state law claim in state court on March 9, 2007, only eight months of the 2-year limitations period had expired.

In *Kight*, Plaintiff was arrested on April 19, 2000. She claimed that her civil rights had been violated, so, she brought state law and federal law claims in federal

court. On March 26, 2002, the federal trial court granted a summary judgment in favor of the Defendant on the federal claims and dismissed (declined to exercise jurisdiction) the state claims. Plaintiff appealed, and the District Court judgments were affirmed. That terminated the federal action on March 21, 2005.

On March 11, 2005, Plaintiff filed her state law claims in state court. The applicable statute of limitations was three years, and since the state causes of action accrued in April of 2000 (almost five years earlier), the state trial court dismissed her case, entirely. Reviewing the matter on a writ of certiorari, the appellate court phrased two pertinent issues:

> (1) Whether § 1367(d) serves (i) to suspend the running of limitations during the period that the State-law claims are pending in Federal court, so that, when those claims are dismissed, the Plaintiff has as much time remaining as he or she had when the claims were filed in Federal court (plus 30 days), or (ii) merely to extend the limitations period until 30 days after the claims are dismissed if the period otherwise expires while the Federal action was pending;
>
> (2) Whether the 30-day grace period commences when the State-law claims are dismissed by the U.S. District Court or when all Federal proceedings that may affect them, including appellate proceedings, are concluded;
>
> *Id*. at 987.

The court then performed an exhaustive analysis of the current state of the law on these two issues. It pointed out ambiguities in the language of § 1367(d), acknowledged the conflicts among the various jurisdictions, and came to a well

reasoned conclusion. The first issue was whether the "**shall be tolled**" language of subsection (d) suspended the statute of limitations, and the court answered affirmatively as follows:

> The point made by the *Kolani* court, that an extension approach is entirely satisfactory to avoid forfeitures and that a suspension approach is not necessary to achieve that objective, is undoubtedly true. The fact that a better mechanism-one less intrusive on State sovereignty and interests-could, or perhaps *should,* have been chosen does not require a conclusion that Congress intended that mechanism if the language it used indicates otherwise. The intent of Congress must be measured by what it said, not by what it might have said. It used the word "tolled" without qualification, presumably aware of how that word had previously been interpreted and applied by the Supreme Court, in *Chardon, American Pipe* and *Crown Cork & Seal,* among other cases, and we can find nothing in the legislative history of the statute to indicate that it intended any other meaning. We agree, therefore, with the *Goodman, Bonifield,* and *Oleski* courts that § 1367(d) must be read as adopting the suspension approach.
>
> *Id* at 991.

It then turned to the next issue, the meaning of "**pending**," but first it commented:

> Section 1367(d) is hardly a model of clarity in this regard. The only court called upon to construe the meaning of "pending," as used in that statute, had to rely on interpretations given to the word in other contexts. In part, that may be because the structure of the statute itself creates some ambiguity.
>
> *Id*. at 994.

In its analysis of "pending," the Court reasoned:

> Upon this analysis, we conclude that § 1367(d) serves to suspend the

> running of a State statute of limitations from the time the State-law claim is filed in U.S. District Court until 30 days after (1) a final judgment is entered by the U.S. District Court dismissing the pendant State-law claims, or (2) if an appeal is noted from that judgment, issuance of an order of the U.S. Court of Appeals dismissing the appeal or a mandate affirming the dismissal of those claims by the District Court. Because the issue is not presented here, we need not consider whether the tolling would continue in the event a petition for *certiorari* is filed with the Supreme Court. Upon entry of the District Court judgment or issuance of the appellate order or mandate, the Plaintiff will have whatever time that remained when the claims were filed with the District Court plus 30 days in which to file the State court action. The action now before us was filed well within that period.
>
> *Id* at 996.

To be sure, other jurisdictions have reached different results, but *Bonifield*, *Oleski*, *Goodman* and *Kight*, from California to Maryland, stand for the proposition that § 1367(d) operates to stop the running of a state statute of limitations when the state law claim is filed in, or removed to, federal court, and that its running remains stopped until the state law claim is dismissed, at the trial or appellate level, in federal court, plus an additional 30 days.

Applying *Bonifield*, *Oleski*, *Goodman* and *Kight* to the circumstances of Petitioners' case, the 5-year statute of limitations started running when the causes of action accrued in May or November of 1999, and stopped running on June 15, 2000, when the adversary complaint in Bankruptcy was filed against TwinEagles **and** Textron. At that point, about 1 year and 6 weeks had run on the May, 1999 claim and about 6 months on the November, 1999 claim. The statute of limitations

did not begin to run again until final dismissal of Petitioners' state law claims against Textron on January 26, 2006, plus 30 days, which would mean February 25, 2006. Petitioners filed their civil action in Circuit Court on February 10, 2006. Under *Bonifield*, *Oleski*, *Goodman* and *Kight*, as to Petitioners' state law claims, the statute of limitations had not even started to run again. Petitioners' filing in Circuit Court was timely.

The Florida District Courts of Appeal have not fully analyzed the implications § 1367(d)'s language. That may be a function of § 1367(d)'s ambiguity, or it may be related to the fact that the Eleventh Circuit federal court dismissals of state law claims were specifically without prejudice, and more often than not used standardized language to the effect that that the Court has chosen not to exercise supplemental jurisdiction, and that the tolling provisions of § 1367(d) apply with respect to re-filing in state court. Recently, that applies to roughly 88%[2] of the orders and opinions.

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[2] A search for all Eleventh Circuit cases that contained "28 U.S.C § 1367(d)," from 2005 through 2009, inclusive, returned about 73 hits, and 64 of the cases either utilized a standardized order of dismissal without prejudice, or otherwise recited that state law claims were "related to," but supplemental jurisdiction was being declined pursuant to subsection (c). All referenced the tolling of § 1367(d). Some of those cases mentioned § 1367(d), but primarily dealt with other federal matters, so, the 88% calculation is probably conservative. Example of standardized order: *Carris v. Storage Express I, LLC,* (2008 WL 3851433 S.D. Fla) (App. at Tab 10).

Should Florida's citizens be faced with the roll of the "related to" die, every time they venture or get dragged into the federal arena? Generally, in the context of Bankruptcy creditors don't choose to venture, but once there, they are faced with a choice; to assert their claims in the Bankruptcy proceeding or not. If they don't assert their claims in the Bankruptcy proceeding, they run the risk of confronting res judicata, estoppel by judgment, issue preclusion or similar defenses when they later file their state law claims in state court. If they first choose to file in state court, their claims are most often removed to Bankruptcy Court. If they choose to litigate their claims in the Bankruptcy proceeding, they face the risk of dismissal on some ground that, from a defense vantage, would not trigger the tolling provisions of § 1367(d). For Plaintiffs, it is a classic "Catch-22."

3. Petitioners' adversary claims against Respondent were "related to" the bankrupt debtor's Bankruptcy case. Supplemental jurisdiction existed, and was exercised, until Petitioners voluntarily dismissed with prejudice their adversary complaint, a core proceeding, against the bankrupt debtor on May 16, 2005.

Textron has taken the position that Petitioners' adversary claim was not "related to" to the TwinEagles Bankruptcy case, and that the 2006 Dismissal Order held that it was never "related to" the bankrupt debtor's case. Petitioners do not agree.

With respect to the "related to" issue, the language of § 1367(a) provides

little to no guidance. It simply says:

> Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

One must turn to the body of federal case law for direction, but unfortunately there really is no bright line. The several jurisdictions are in conflict, and a claim that was "related to," in one matter may not be "related to," in another matter.

Although *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984) was decided about six years prior to the enactment of 28 U.S.C. § 1367, it is often cited as clearly expressing the test of pendent jurisdiction (related to), which in § 1367(a) became supplemental jurisdiction. *Paycor's* enunciation of the test has been adopted by several jurisdictions, including the Eleventh Circuit, which includes Florida federal courts. See *In re Gallucci*, 931 F. 2d 738 (11th Cir. 1991) and *In re Lemco Gypsum, Inc.*, 910 F.2d 784 (11th Cir. 1990).

Pacor expressed the test in the following language:

> The usual articulation of the test for determining whether a civil proceeding is related to Bankruptcy is whether ***the outcome of that proceeding could conceivably have any effect on the estate being administered in***

> ***Bankruptcy***. Thus, the proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to Bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate…
>
> "[J]urisdiction over nonBankruptcy controversies with third parties who are otherwise strangers to the civil proceeding and to the parent Bankruptcy does not exist." (Bankruptcy Court lacks jurisdiction to decide disputes between third parties in which the estate of the debtor has no interest).
>
> *Id*. at 996. (Internal citations omitted) (Emphasis added)

To determine what "any effect on the estate being administered" means we have to delve deeper. The same holds true for "disputes between third parties." Not to belabor the point, but Petitioners' case was not just a dispute between third parties. From June 15, 2000 until May 16, 2005, it involved **both** the bankrupt debtor, TwinEagles and Textron, a creditor.

Matter of Xonics, Inc., 813 F.2d 127 (7th Cir. 1987) was a Bankruptcy case that involved competing claims of secured creditors to the receivables (an abandoned fund) of the debtor in Bankruptcy. The Seventh Circuit acknowledged that since the claim's resolution could affect **other creditors' claims,** it was arguably related.

> Yet there could be a link between the disposition of claims to abandoned property and the treatment of other creditors. A plan of reorganization might say: "The estate abandons all of its claims to the Empire State Building. To the extent Creditor A receives any money on account of its claims against the Empire State Building, this money shall be counted toward satisfaction

> of its other, outstanding debt." If a reduction of A's debt left more money for Creditor C (who had never claimed an interest in the Empire State Building), then the decision who owned the Empire State Building still would be important to the winding up of the estate.
>
> *Id*. at 133.

Matter of Ark-La-Tex Timber Co., Inc., 482 F.3d 319 (5th Cir. 2007), was also a Bankruptcy case that involved competing claims between creditors. The bankrupt debtor, Ark-La-Tex, purchased of all of the membership interests in Pearl and Alba, separate entities. There was an erroneous assumption that there was a merger of the Ark-La-Tex, Alba and Pearl assets. General Electric held the priority secured lien on the assets of Pearl and Alba. Peoples Bank had the priority secured lien on the assets of Ark-La-Tex. An auctioneer sold property of the bankrupt debtor, Ark-La-Tex, and delivered all of the proceeds, $433,908, to Peoples Bank. Some of the property was owned by Alba and Pearl. General Electric demanded that Peoples Bank deliver to it the funds that were derived from the sale of the Alba and Pearl assets, and litigation ensued. General Electric sued Peoples Bank in state court to recover $322,208 delivered to Peoples Bank but not due it. The bank removed the case to federal court, which transferred the matter back to the Bankruptcy Court. Ultimately, General Electric prevailed, and was awarded the $322,208 that was mistakenly delivered to Peoples Bank. The following is the published summary of the issues analyzed and addressed in *Ark-La-Tex*:

(1) Under Louisiana law, bank's receipt of auction proceeds of $322,208.62 attributable to affiliated entities' movables constituted a payment of a thing not owed it, and so bank was bound to restore that amount to secured creditor;
(2) Secured creditor's alleged own negligence did not preclude its claim;
(3) Res judicata did not preclude secured creditor's claim;
(4) Secured creditor's claim was not barred as a forfeited compulsory counterclaim;
(5) Secured creditor's claim was not barred by judicial estoppel;
(6) Bank did not rely to its detriment on representations made by secured creditor in the various Bankruptcy proceedings; and
(7) Bankruptcy Court did not abuse its discretion in barring bank from introducing evidence that the affiliated entities and debtor constituted a single business enterprise.

Id. at 319.

First NLC Financial Services, LLC, 410 B.R. 726 (Bankr. S.D. Fla. 2008) was an adversarial proceeding where former employees of a Chapter 7 debtor were allegedly laid off without proper notice. They joined the non-debtor parent claiming it was jointly and severally liable with debtor for any obligation that debtor owed under the "single employer" theory. The District Court determined it was a proceeding over which Bankruptcy Court could exercise "related to" jurisdiction. To the extent that the non-debtor parent was jointly liable with the debtor, this might affect amount of estate's own liability.

In Re Winn Dixie, 349 B.R. 744 (Bankr. M.D. Fla. 2006) was a case where "related to" jurisdiction was invoked by the Chapter 11 debtor to defeat a creditor's claim against the debtor's agent, a third-party non-debtor that pre-petition agreed

to settle the creditor's claim against the debtor, but didn't because debtor filed for Bankruptcy. The "related to" issue was addressed as follows:

> If Schweitzer prevails against Sedgwick in the District Court Action, Plaintiffs' estate will be required to indemnify Sedgwick and pay the Schweitzer settlement in full as an administrative expense claim. Because the outcome of the District Court Action could affect the administration of Plaintiff's estates, it is related to these cases. The Court does have subject matter jurisdiction.
>
> *Id*. at 746.

In *Su-Ra Enterprises, Inc. v Barnett Bank*, 142 B.R. 502 (S.D. Fla. 1992), a lessee brought a state court action to obtain equitable relief under Florida law against Barnett Bank, the purchaser of the debtor lessor's rights to operate the leased premises. The bank removed the action to the Bankruptcy Court. The Court, although it declined to exercise it, found that it had "related to" jurisdiction.

> Applying the *Lemco* test to this action, the undersigned finds that its outcome "could conceivably have an effect on the estate being administered in Bankruptcy." The landlord for Su-Ra's lease was Sovereign 1986-1, Ltd. ("Sovereign"). Sovereign filed for Bankruptcy under title 11 in March, 1990. On October 29, 1990, the Bankruptcy trustee for Sovereign sold the right to operate the leased property to Barnett. If bound to a lease agreement with Su-Ra, Barnett claims it will pursue an action for breach of warranty of title against the Bankruptcy trustee. Barnett has also raised the United States Bankruptcy Code as an affirmative defense. Similarly, Su-Ra may pursue an action against the Bankruptcy trustee if it eventually loses its rights under the lease to Barnett.
>
> *Id*. at 505. (Internal citations removed)
>
> From June 15, 2000 until May 16, 2005, a resolution of the adversary claim

in favor of Petitioners and against Textron would have had an effect on the Bankruptcy estate, its administration and the distribution to other creditors. If Petitioners had prevailed, and if Textron had paid that $190,000 to Petitioners, Textron, being a secured creditor, would have had a priority right to an additional $190,000 satisfied from what was remaining in the Bankruptcy estate. That would have reduced the value of the estate by that full amount. Petitioners, as unsecured creditors of the debtor's estate, were only entitled to a pro-rata distribution of what turned out to be cents on the dollar for that class. Removing that pro rata claim would not have materially offset the full payment of Textron's $190,000 claim. Clearly, the distribution amounts to the other creditors would have been significantly impacted. It would not simply have been a wash.

The 2006 Dismissal Order was ambiguous. It should be interpreted to give effect to what the Middle District Court was being asked to do, and that request was Textron's motion to dismiss Petitioners' appeal.

To put this in perspective, one must keep in mind that the 2006 Dismissal Order was generated by Textron's September 12, 1999 motion to dismiss Petitioners' appeal of the 2002 Bankruptcy Court Summary Judgment (R at p. 85). That motion was filed after five years of litigation, but less than four months after Petitioners May 16, 2005, Petitioners voluntary dismissal with prejudice of their

adversary claim against the debtor in bankruptcy, TwinEagles. (App. at Tab 4, P. 1-2) According to the 2006 Order of Dismissal, Textron's motion claimed:

> that the district court lacked jurisdiction to hear the appeal because the matter does not satisfy the outer limit of bankruptcy jurisdiction, set for in the "related to" test, because the outcome of this appeal cannot conceivably have an effect on the bankruptcy estate… On May 16, 2005, appellants dismissed their claims in the adversary proceeding against TwinEagles Club, the only party to the adversary proceeding that was a debtor before the Bankruptcy Court. Therefore, no relief can be obtained in the appeal with respect to TwinEagles Club as to either Counts I or II. If appellants are successful as to Count II, the only appellate relief would be against Textron. As such, **the lawsuit is <u>now</u> a matter solely between third-party non-debtors, and cannot affect the Bankruptcy estate of TwinEagle or related entities.**
>
> (App. at Tab 5, P. 4-5)

Textron's assertion was well taken. The dismissal of the bankrupt debtor left two remaining non-debtors parties, and that the outcome of that litigation could have no conceivable effect on the Debtor's estate. Therefore, the adversary claim was no longer "related to" TwinEagles' bankruptcy proceeding. Either the Bankruptcy Court lost supplemental jurisdiction of the adversary complaint against Textron on May 16, 2005, or it did not.

Reading the 2006 Dismissal Order in that light, it is understandable that the Middle District Court would conclude that there was **then** no supplemental jurisdiction. As of May 16, 2005, arguably, Petitioners' claim against Textron, regardless of how it was decided, would not affect the debtor's estate.

28 U.S.C. §157(b)(3) specifically mandates:

> The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

In this case, the bankruptcy judge, since lack of jurisdiction was never raised, exercised jurisdiction over the claims asserted in the adversarial proceeding. In fact, the Middle District acknowledged the Bankruptcy Court's jurisdiction when it stated:

> …facts demonstrating federal jurisdiction must be set forth n the complaint… and ordinarily depends on the facts as they exist when the complaint is filed. After jurisdiction has been determined to exist on the basis of the allegations of the complaint, the court has the power to decide the dispute between the parties even though the complainant ultimately fails to prove the cause of action on which jurisdiction was originally based... The adversary Complaint alleged that the proceeding was "a core proceeding pursuant to 28 U.S.C. § 1334."

(App. at Tab 5, P. 8) (Internal citations removed.)

Petitioners suggest that the Bankruptcy Court, if not explicitly, implicitly determined that it had jurisdiction over the adversary claim against TwinEagles, a core proceeding, and that it had "related to" or supplemental jurisdiction over the adversary claim against Textron. Further, until the Bankruptcy Court arguably lost supplemental jurisdiction on May 16, 2005, Textron not only explicitly consented to the Bankruptcy Court's exercise of supplemental jurisdiction, it elicited it, and

took advantage of it. Even the implicit consent of a party to have a bankruptcy court enter appropriate orders and judgments will bind that party, subject to appellate review.

In *In re OCA, Inc.*, 551 F. 3d 359 (5th Cir. 2008), the Fifth Circuit determined that in a non-core proceeding, the bankruptcy court exercised its adjudicative power appropriately because a party impliedly consented to the bankruptcy court's entry of final orders and judgments. See also *Matter of Pal Nissan, Inc.*, 126 B.R. 966 (Bkrtcy. W.D. Mich. 1991) and *In re Southern Indus. Banking Corp.*, 809 F. 2d 329 (6th Cir. 1987).

Petitioners suggest that the linchpin of the 2006 Order of Dismissal is found in the following language:

> On May 16, 2005, appellants dismissed their claims in the adversary proceeding against TwinEagles Club, the only party to the adversary proceeding that was a debtor before the Bankruptcy Court. Therefore, no relief can be obtained in the appeal with respect to TwinEagles Club as to either Counts I or II. If appellants are successful as to Count II, the only appellate relief would be against Textron. As such, **the lawsuit is <u>now</u> a matter solely between third-party non-debtors, and cannot affect the Bankruptcy estate of TwinEagle or related entities.**
>
> (App. at Tab 5, P. 4) (Emphasis added)

The 2006 Dismissal Order should be interpreted as having granted the relief that Textron requested in its motion to dismiss, and nothing more. Even if this Court determines that June 16, 2005 (May 16, 2005, plus 30 days) was the date when

Florida's 5-year statute of limitation re-commenced running, under the law of *Goodman, Bonifield,* and *Oleski*, it only ran an additional 8 months (June 16, 2005 to February 10, 2006) before Petitioners filed their claims in Circuit Court.

4. In Florida, equitable doctrines that extend or avoid the running of the statute of limitations are part of our body of common law, and provide for "a longer tolling period," as referenced in § 1367(d), or operate independently to avoid dismissal of Petitioners' claims due to the running of the statute of limitations.

In Florida equitable common law doctrines, like equitable tolling and equitable estoppel, may operate to toll the running of a statute of limitations. This case begs for such application.

The TwinEagles Bankruptcy proceeding was filed in September of 1999. Petitioners' adversary complaint against TwinEagles **and** Textron was filed on June 15, 2000, just nine months later. Petitioners did not sleep on their rights. However, in Textron's answer, it did not raise lack of subject matter jurisdiction as an affirmative defense. There are two implications, either Textron implicitly acknowledged that the Bankruptcy Court had supplemental subject matter jurisdiction, or Textron chose to lie in wait until the statute of limitations had expired before it would raise the jurisdictional issue. Petitioners have no way of knowing, but giving Textron the benefit of the doubt, and consistent with the May 16, 2005 dismissal of the debtor in bankruptcy, it is suggested that there was no

question that supplemental jurisdiction existed.

If Textron had raised lack of supplemental subject matter jurisdiction issue, Petitioners would have been on notice, and could have re-filed their state claim against Textron in state court well within the 5-year statute of limitations. However, Textron litigated the adversary complaint issues on the merits for five years, which robbed the Bankruptcy Court of an opportunity to do its job; to explicitly determine whether it had supplemental jurisdiction. It was only after Petitioners voluntarily dismissed with prejudice their adversary claim against the bankrupt debtor on May 16, 1999 that Textron raised the jurisdictional issue. The fault for the Bankruptcy Court never having made an explicit finding that it had supplemental jurisdiction, which it should have, lies at the feet of Textron.

Textron cannot have it both ways. The running of the statute of limitations should be equitably tolled, as established in this Court in *Machules v. Department of Administration*, 523 So. 2d 1132 (Fla. 1988):

> The doctrine of equitable tolling was developed to permit under certain circumstances the filing of a lawsuit that otherwise would be barred by a limitations period. The tolling doctrine is used in the interests of justice to accommodate both a Defendant's right not to be called upon to defend a stale claim and a Plaintiff's right to assert a meritorious claim when equitable circumstances have prevented a timely filing. Equitable tolling is a type of equitable modification which "'focuses on the Plaintiff's excusable ignorance of the limitations period and on [the] lack of prejudice to the Defendant.'" Contrary to the analysis of the majority below, equitable tolling, unlike estoppel, does not require active deception or employer

> misconduct, but focuses rather on the employee with a reasonably prudent regard for his rights...
>
> Generally, the tolling doctrine has been applied when the plaintiff has been misled or **lulled into inaction**, has in some extraordinary way been prevented from asserting his rights, **or has timely asserted his rights mistakenly in the wrong forum**.
>
> *Id*. at 1134 and 1135. (Emphasis added)

Petitioners' have consistently claimed that their adversary claim against Textron was "related to" their core adversary claim against TwinEagles, and therefore it was within the supplemental jurisdiction of the Bankruptcy Court. However, if that is not the case, then, alternatively, Petitioners assert that they timely asserted their rights mistakenly in the wrong forum. Under the teachings of *Machules*, Petitioners should be entitled to equitable tolling of the statute of limitations on their state law claims. *Machules* was founded on the solid basis of *Burnett v. New York Central Railroad Company*, 380 U.S. 424 (1965), which involved the tolling of a federal statute of limitations while the case was mistakenly pending in state court, but is otherwise directly on point.

Neither is Textron's conduct beyond the reach of the application of equitable estoppel to toll the running of the statute. As explained by this Court in *Major League Baseball v. Morsani*, 790 so. 2d 1071 (Fla. 2001):

> It is not concerned with the running and suspension of the limitations period, but rather comes into play only after the limitations period has run and

> **addresses itself to the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period.** Its application is wholly independent of the limitations period itself and takes its life, not from the language of the statute, but from the equitable principle that no man will be permitted to profit from his own wrongdoing in a court of justice. Thus, because equitable estoppel operates directly on the Defendant without abrogating the running of the limitations period as provided by statute, it might apply no matter how unequivocally the applicable limitation s period is expressed.
>
> *Id*. at 1080. (Emphasis added)

Under the facts of this case, Petitioners assert that equitable common law doctrines are applicable to toll running the 5-year statute of limitations, or that they operate to prevent Textron from taking advantage of the statute of limitations. Petitioners' activities substantially complied with the requirement of timely filing.

5. **Petitioners' adversary claims in Bankruptcy provided a sufficient basis, including notice to Respondent, for permitting a number of claims based on the same set of facts and transactions to be asserted in Circuit Court.**

Petitioners' adversarial complaint (App. at Tab 1, P. 1-5) contained two counts; the first against the bankrupt debtor, Twin Eagles, and the second against Textron. In the first count, Petitioners set forth the material facts, as they understood them to be at the time (hence the "upon information and belief" language in paragraph 14). Significantly, Petitioners specifically alleged that they had a contractual agreement with TwinEagles, and that TwinEagles was in breach.

Petitioners also alleged that their funds had been misappropriated and converted.

In their second count against Textron, Petitioners **incorporated all pertinent allegations in the first count by reference**. They further alleged that there was a confidential relationship among TwinEagles, Textron and Petitioners, that the proceeds from the re-sale of their memberships were to be held in escrow, and that **both** TwinEagles and Textron had been "unjustly enriched" by retaining or encumbering the membership sale proceeds.

It is true that in the "wherefore" clause of the second count, Petitioners requested imposition of a constructive trust. However, the allegations of the adversary complaint support, or could support, several causes of action or remedies. Restitution, money had and received, unjust enrichment, resulting trust, constructive trust, quasi-contract and contract implied in law come to mind. Florida, Fla. R. Civ. P. 1.110(b) specifically provides that "all prayers for relief are deemed prayers for general relief." That was first acknowledged by this Court in *Chasin v. Richey*, 91 So. 2d 811 (Fla. 1957) when it held:

> Under the present rules, which are modeled upon the Federal Rules of Civil Procedure, 28 U.S.C.A., every complaint is considered to pray for general relief, and in the ordinary case it is the facts alleged, the issues and proof, and not the form of the prayer for relief, which determine the nature of the relief to be granted. The federal courts have held that the relief which may be granted the plaintiff is not limited by his prayer. We do not hold that this principle will be applicable in every case, since in some cases, as in the Cartwright case, supra, it may result in surprise at the trial. In the case before

> us, however, defendant was placed upon proper notice by the allegations in the body of the complaint, and cannot now complain of a simple mathematical error which could have been corrected at the pleading stage had it been brought to the attention of the trial court at that time.
> *Id*. at 812. (Internal citations omitted.)

In *Davidson v. Lely Estate, Inc.*, 330 So. 2d 528 (Fla. 2d DCA 1976), the court confronted a situation where the allegations of the complaint were sufficient to support one form of equitable relief that was not requested. The Court held that:

> While the plaintiffs' pleading was certainly not a model of legal craftsmanship, nevertheless, with liberal rules of pleading, we cannot say it did not furnish a basis for relief. Even though the plaintiffs' prayer did not pray for establishment of constructive trust, every complaint does pray for general relief, and the exact form of the prayer for relief is not controlling.
>
> *Id*. at 531.

Textron was put on notice of the core facts of Petitioners' claims on June 15, 2002. To permit Petitioners to rephrase their theories of recovery, consistent with the facts alleged would be in accord with liberal pleading requirements of the Florida Rules of Civil Procedure, and would in no way prejudice Textron.

CONCLUSION

Based on the foregoing, the Court should determine that Petitioners' Circuit Court state law causes of action were timely filed in accordance with the tolling provisions of 1367(d) or common law equitable tolling doctrines, that Petitioners' adversary complaint in the bankruptcy matter were sufficiently pleaded to later

support claims for imposition of constructive trust and unjust enrichment, that the April 17, 2009 decision of the Second DCA be reversed and this matter be remanded to the Circuit Court for a trial on the merits of Petitioners' claims.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this brief was furnished to Jordi Guso and Paul A. Avron, Berger Singerman, P.A., 200 S. Biscayne Blvd., Suite 1000, Miami, FL 33131 by Email and United States Mail, this 24 day of November, 2009.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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