FLORIDA BUSINESS INSIGHT

MAY JUNE 1999

The Magazine Of Free Enterprise & Public Policy

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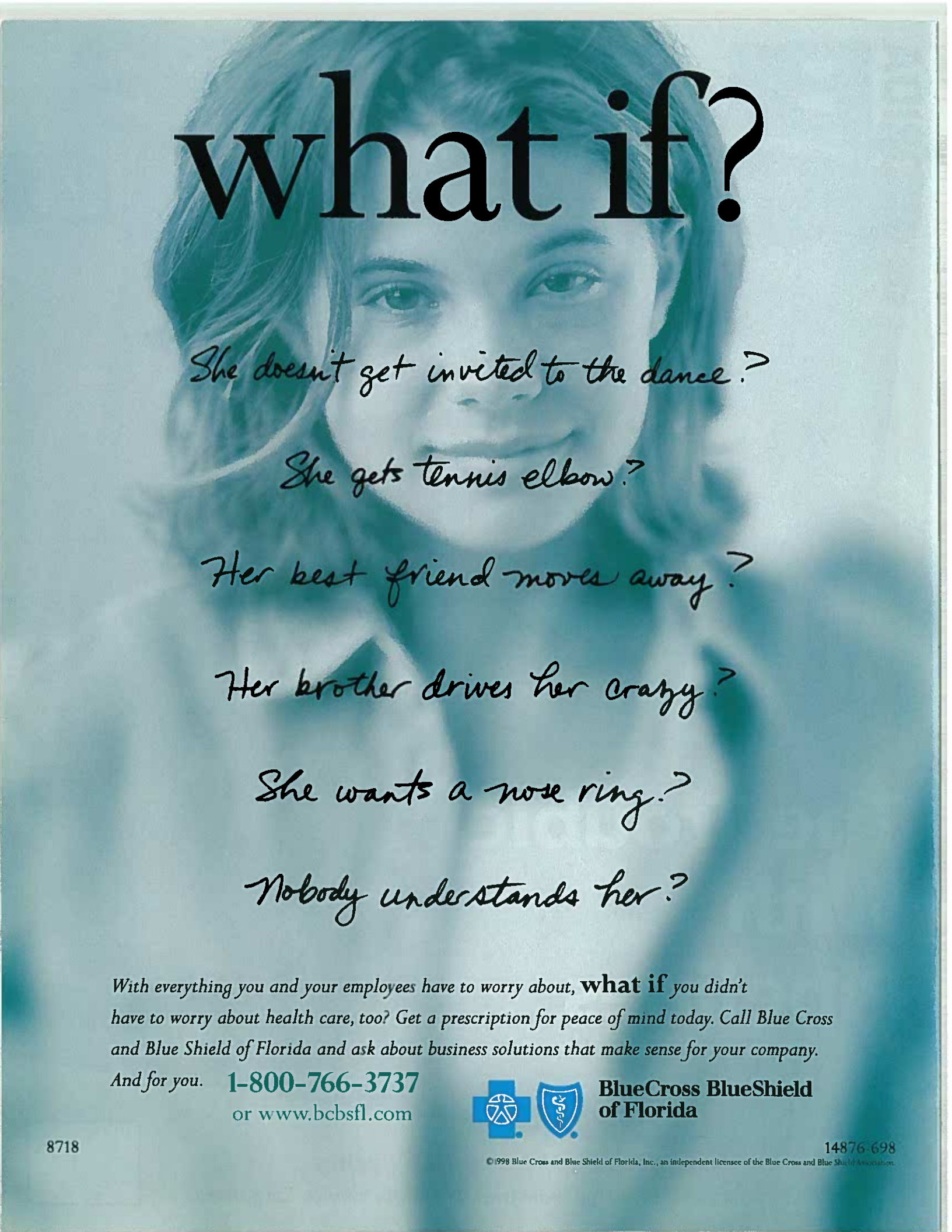
BUCKEYE TECHNOLOGIES

The Trouble With Pipelines

The Voice Of Florida Business

A Publication Of Associated Industries Of Florida Service Corporation



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FLORIDA BUSINESS INSIGHT
The Magazine of Free Enterprise & Public Policy

May/June 1999
Volume 3, Issue 3

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The Fenholloway River Downstream of the Buckeye Foley Mill
COVER PHOTO ILLUSTRATION: DWIGHT M. SUMNERS

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by jon l. shebel, publisher

Perversity

Some bureaucrats are giving government of the people, by the people, and for the people a bad name.

The governing class typically demands ever higher levels of funding, but the very perversity of their actions argues that they've got too much time and money on their hands. You'll find evidence of that in a couple of articles in this month's *Florida Business Insight*.

Our frequent labor-law contributors John-Edward Alley and Amy Littrell write about two pending Supreme Court decisions on how to define disability under the Americans with Disabilities Act. The plaintiffs and the Equal Employment Opportunity Commission seem to believe that the definition should be set so broadly that virtually any American worker could choose to define himself as disabled. This seems to put employment — supporting oneself — into a category of voluntary activity. If you like to work, fine. If you don't, there's gotta be a law out there somewhere to force someone else to work for you.

The other article is our feature story on the Buckeye Technologies project to clean up the Fenholloway River. This is a case where activists and regulators are defying science and common sense because the solution violates one of the tenets of their creed, namely, "Dilution is not the solution to pollution."

Dr. Robert "Skip" Livingston has commented on the project's opponents, "From a scientific point of view, they're all wet. From an environmental point of view, they've done a great disservice to the state of Florida."

Livingston should know. He's researched the Fenholloway for more than two decades. In fact, in the early 1970s, he sued Buckeye over the river. He is a well-respected voice for environmental protection here in Tallahassee. But all his credentials go for naught when ideology is at stake.

This situation is a small-scale version of the EPA's new ozone and particulate matter rules. Agency officials admitted to Congress that the new air regulations might have the perverse effect of worsening pollution because the rules delay current deadlines for cities and states to meet existing guidelines. This is all being done for the sake of new standards that science shows will have no appreciable affect on human health.

EPA Administrator Carol Browner (whose anti-business career includes a stop in Tallahassee as Florida's environmental chief) insists that particulate matter — soot and the like — is causing an increase in asthma. But asthma rates have been rising at the same time that air quality has been getting better. In fact, science shows that the asthma increase is caused by cockroach droppings and another environmental enthusiasm: energy savings. New buildings are now shut so tightly that the air inside doesn't circulate and renew itself.

Need further proof that science is a subject that never disturbs the sleep of federal regulators and environmental activists? In March, the Consumers Union, an ardent foe of pesticides, published an article in its magazine *Consumer Reports*, warning parents to avoid fruits and vegetables treated with pesticides in favor of organic produce. This is a potentially dangerous claim. Consumers of organic produce are more likely to be attacked by a deadly new strain of the E. coli bacteria than they are to suffer from cancer or endocrine disruption loosely linked to chemical residues on fruits and vegetables.

So how are the activists and regulators able to dodge science and common sense? By shifting the debate to motives differentiated by purity and greed.

The indoctrination begins at the earliest levels. Here's a quote from *Environmental Science*, a popular school textbook: "Some see risk analysis as a useful and much-needed tool. Others see it as a way to justify premeditated murder in the name of profit."

Now that's perverse. ■

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FLORIDA BUSINESS INSIGHT

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Florida Business Insight is published bi-monthly by Associated Industries of Florida Service Corporation to inform readers about issues pertinent to Florida's business community.

Comments and opinions expressed in this magazine represent the personal views of the individuals to whom they are attributed and/or the person identified as the author of the article and may not necessarily be those of the magazine and/or its publisher. Further, the publisher reserves the right to edit all manuscripts and submissions.

Postmaster: Send address changes to Florida Business Insight, 516 North Adams Street, P.O. Box 784, Tallahassee, FL 32302-0784.

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by david p. yon

Deducting Vehicle Expenses

Operating an automobile or truck is expensive, so anytime we can get some help paying for it we tend to grab it.

Fortunately, some assistance is available in the form of income tax deductions when a vehicle is utilized in trade or business. Unfortunately, this gets the Internal Revenue Service involved in an area of particular sensitivity.

There are two methods available for claiming deductions in connection with the use of a vehicle in trade or business: mileage and actual expense.

The mileage method is the simplest to compute and apply. It may, however, result in lower deductible expenses, especially if the vehicle is relatively new. All that is required to claim a deduction under this method is to multiply the total number of miles driven for business purposes by the current mileage rate allowed by the IRS (In 1999, that rate is 32-1/2 cents per mile until April 1, and 31 cents per mile thereafter). If the mileage method is used, deductions cannot be taken for any vehicle operating costs or depreciation, although travel expenses not related to actual vehicle cost (tolls, parking fees, etc.) can be deducted.

When using the mileage method, a log of miles traveled must be kept. The log should be updated at the same time the travel is incurred ("contemporaneously" in IRS jargon) and should include the date of travel, the destination, the business purpose of the travel (name of the person visited and the business relationship), and the beginning and ending odometer readings.

The actual expense method *must* be used if the following conditions apply:

- There is more than one vehicle used in the business.
- The vehicle is leased.
- Any depreciation has ever been deducted on the vehicle.

The actual expense method involves keeping accurate records of all the expenses incurred in the operation of the vehicle. Use a log similar to the one used for the mileage method and add expenses paid. These expenses are gas, repairs, insurance, tags, interest paid, etc. The costs of depreciation of the vehicle can also be added to the costs deducted. There are limitations, however, on the amount of depreciation that can be taken each year. This varies from year to year and is designed to limit the amount claimed on more expensive vehicles. If the business usage of your vehicle is less than 50 percent, another set of rules applies.

If you use your vehicle for both business and personal purposes, you must be especially careful to document the business portion of the usage. This is a sensitive area with the IRS, since there has been much abuse (intentional and unintentional) of this in the past. If you own only one vehicle you obviously cannot claim 100 percent business use. On the other hand, if you have two vehicles and one has specific capabilities needed for your business and has your business sign on it you can probably claim 100 percent business use and be able to justify it.

Regardless of the method involved, it is very important to keep good records of the business usage and costs of your vehicle. The time to do that is at the time of usage. Believe me, if you get audited three years later and have not documented business usage and/or costs, you'll have a hard time getting the agent to allow what you claim. ■

David P. Yon is executive vice president and CFO for Associated Industries of Florida and affiliated companies (e-mail: dyon@aif.com).

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by robert d. mcrae

Beam Me Up, Scotty

Sometimes the only thing stranger than science fiction is science fact. Some of the strangest facts coming out of science today involve the use of machines to assist the disabled to improve their quality of life. These range from simple prosthetics, such as limb replacements, all the way to neural implants.

Scientists are now working on methods to restore a limited but useful visual sense to the profoundly blind. The cortical visual neuroprosthetic device would consist of a video encoder, signal-processing circuitry, and a means of applying the signal through an implanted array. In layman's terms, by placing the electrode array in contact with the vision centers of the brain and then providing stimuli from the camera, limited vision may be restored.

Another method of restoring limited vision involves ocular implants, which are placed directly on the retina, that feed optical signals into the nervous system at the point at which they normally originate. The system is easier to install and can be attached to the retina using standard ophthalmic surgical techniques.

Eyes aren't the only organs drawing attention. Some researchers are investigating a combination microphone/earphone that can sense vibration in the bones of the head and translate them into meaningful commands. Not only could someone communicate verbally without making a sound, but external interference, such as noise and static, would be kept to a minimum.

At the National Institute of Health in Bethesda, Maryland, researchers want to implant microelectronics directly in the brain to detect imminent movements from the pattern of electrical activity in the brain's motor cortex. By coupling the neural prosthetics with electronic devices, you might be able to turn the lights on, change the television channel, or start the coffee machine just by thinking the right thoughts.

While much of this research is focused on medical applications, there are some practical products in development. Several voice recognition products on the market do a great job of allowing the user to "talk" to a computer. The latest versions of products from developers, such as Dragon Dictate, allow a user to use his natural, conversational tone of voice to dictate a letter directly into the computer and verbally command the computer to print and save the document.

Heads-up displays are used on military aircraft to provide information to the pilot through the windscreen, allowing the pilot to concentrate on the situation rather that glancing down for a peek at dials and gauges in the cockpit. Now you can purchase your own heads-up display from i-O Display Systems, a supplier of head-mounted personal display devices. The company offers something called i-glasses, a combination television/goggles product that displays private video or computer-generated content for your eyes only.

That last one reminds me a little too much of the Borg Collective from *Star Trek: The Next Generation.* For those non-trekkies out there, the Borg were a half-man-half-machine species with intimidating power but no free will. They marched blindly about with special electrodes, implants, and headgear that allowed them to follow the commands generated by their collective consciousness. If that's what the world is coming too, all I can say is, "Beam me up, Scotty." ■

Here is a list of URL's for products mentioned in this article:
Human-Computer Research General Information:
http://www1.shore.net/~rodc/hcibci.html
i-O Display Systems:
http://www.vio.com
Dragon Dictate:
http://www.dragonsys.com/products/dictate.html

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PHOTO: WHITE/PACKERT

compiled by jacquelyn horkan, editor

The Gentle Touch Of The Invisible Hand

Once again the command-and-control crowd in the Legislature (led by a Republican, Miami Rep. Alex Diaz de la Portilla) demanded government restraints on the fees banks charge for using ATM machines. According to their argument, greedy money men were profiteering at the expense of poor consumers who just needed a little cash.

Now it appears that ATM fees are leveling off because customers changed their habits in response to market incentives. They've stopped using ATMs that charge higher fees to nonclients, they're withdrawing larger amounts in each transaction so that they use the teller machines less often, and they're relying more on debit cards that don't charge fees for withdrawals.

Banks are countering by putting more ATMs in high-traffic areas. Some are planning to increase the value of the machines by offering new services (such as selling stamps and movie tickets), and making it possible to apply for loans or make stock purchases.

When it comes to individuals making intelligent choices, greater efficiency will always follow the market's invisible hand, not the regulator's heavy hand. ■

Lighter, Not Lightweight

According to Chris Meyer, director of Ernst & Young's Center for Business Innovation, the economy is working better because it's working lighter. Literally.

A March 26, 1999, article in *Investor's Business Daily* explains Meyer's analysis of productivity in terms of pounds of economic output. In 1977 each American accounted for 5,300 pounds of production. In 1997 the average was 4,100 pounds per worker. At the same time, the value of each pound increased 79 percent to $6.52.

The reason is simple. Our modern economy relies more on "light" sectors — services, technology, retail — and less on weighty things such as manufacturing and mining. Meyer explains that a car isn't appraised in terms of its weight, but on the basis of the on-board and factory software that account for 90 percent of its value. A heavy, bulky laptop computer is worth less than a svelte, streamlined one.

Just-in-time inventory, automation, and computerization are just some of the techniques that drive our low-weight, high-value economy. Decisions made over the last decade or so to use new information technologies are paying off now. The traditional curses of labor shortages and rising wages — rising inflation and dropping profits — are nowhere to be seen because the productivity of American workers just keeps improving.

And, according to business executives, there are plenty more labor-saving techniques where those came from. ■

FREE LEGAL ADVICE?

The American Bar Association's Commission on Mental and Physical Disability Law recently undertook a study of the Americans with Disabilities Act (ADA) and found that, since the act took effect for private employers in 1992, the bosses have prevailed in 92 percent of court cases and 86 percent of administrative challenges. The committee's conclusion? The ADA presents no threat to private employers.

Leaving aside the costs of complying with that labyrinthine law, employers also have to defend themselves against claims filed by employees. Could the committee members have forgotten that, unlike employees, employers have to pay their lawyers whether they win or lose? ■

PHOTO: GARY BUSS

Campaign Finance Inform

"Assume that life had worked out a little differently and Steve Forbes had decided that he wanted to spend $100 million of his own money to make Lamar Alexander president. As long as Alexander's dependence on such a sugar daddy were completely disclosed, what would be the problem? The voters could decide whether this was okay or whether they preferred another candidate who made a point of accepting only $100 donations. Why is it inherently more corrupting for a candidate to be beholden to one widely known rich individual, or a few such people, than to thousands of almost invisible rich individuals, as current law virtually requires."

That quote comes from a column by Charles Lane in the March 15, 1999, edition of *The New Republic* about presidential candidate Lamar Alexander. Alexander and Lane are both concerned about the overly restrictive campaign fund-raising regime that forces candidates to spend most of their time trolling for lots of $1,000 donations and less time talking to the voters who don't contribute.

Politicians toil away under a maximum individual limit set in 1974 that has never been adjusted for inflation. In 1984 constant dollars, the $1,000 federal limit is now worth less than $500. Florida's $500 limit implemented in 1992, is now worth about $425.

There is one breathtakingly simple solution out there to most of the problems that vex campaign finance reformers: no limits, no cash, full and immediate disclosure. ■

Speaker Of The Whatever

> "The Vikings had an assembly of all adult males that met once or twice a year and was called the Thing, surely the best name ever for a legislative body."
>
> *Eat the Rich* by P.J. O'Rourke

Nickels And Dimes

According to tax analysts, the average American dual-income family pays $22,500 in taxes to all levels of government each year, more than it spends on food, clothing, shelter, and transportation combined. This year, federal taxes will eat up 20.5 percent of U.S. gross domestic product. That's an all-time high for peacetime levels of taxation. During World War II that level was surpassed only in 1944 when taxes represented 20.9 percent of national economic input.

The genius of withholding and sales taxes means that most Americans pay their taxes piecemeal, never noticing how big a chunk government spenders are really taking. Then there are the indirect taxes we all pay.

According to the Americans for Tax Reform Foundation, direct and indirect taxes account for 25.7 percent of the cost of electricity, 50 percent of phone charges, and 54 percent of the cost of a gallon of gasoline.

From the fields of grain to the grocery store shelves, about 30 different taxes are added to a loaf of bread. The group cites a Price Waterhouse study that analyzed the costs of the list of taxes — income, property, excise, utilities, business licenses, workers' comp, unemployment comp, etc. — on a loaf of bread. They accounted for 27.2 percent of the cost you pay for the foundation of your toast and sandwiches. And that's before you add in the only tax on the bread that you'll see — sales tax.

If you want more bad news visit the group's Web site (*http:www.atr.org/*) and click on the Tax Bites icon. ■

by kathleen "kelly" bergeron

What Do The Numbers Tell Employers?

The Equal Employment Opportunity Commission (EEOC) recently released its 1998 statistical report on charges filed against employers for workplace discrimination. What do these numbers really tell us? Are all the resources that are aimed at training and education in an effort to combat discrimination having any significant impact? Are we as employers making any headway? Is discrimination in the workplace really this pervasive?

The data reveal that the number of charges filed has remained fairly constant across most categories and in the aggregate. It doesn't appear that much progress has been made in decreasing the number of charges despite the increase in training and educational programs that target the elimination of workplace discrimination. For employers the frustration mounts when all of the efforts taken do not result in a dramatic decline in the numbers across the board. Take heed, however. The news could have been worse: There could have been a dramatic increase in the number of complaints. So considering the alternative, employers are holding their own.

One area that deserves special attention: the increase in retaliation charges. The January/February edition of *Florida Business Insight* featured an article titled, *Employed for Life?*, which examined workers' compensation retaliation claims arising from alleged wrongful terminations. An employee can make a claim of retaliation when an adverse employment action follows the employee's engagement in a protected activity (workers' compensation claim, EEOC claim, etc.). The article gives advice for avoiding claims of retaliation and, in light of the 1998 statistics, I encourage you to review the article.

The EEOC statistics are a warning to employers that they need to keep up with the preventive maintenance programs implemented in order to avoid lengthy, costly EEOC investigations that have the potential to lead to even lengthier and more costly litigation. ■

Kathleen "Kelly" Bergeron is executive vice president and chief of staff of Associated Industries of Florida and affiliated companies (e-mail: kbergeron@aif.com).

CHARGE STATISTICS
FY 1992 Through FY 1998

Total Charges*

1992	1993	1994	1995	1996	1997	1998
72,302	87,942	91,189	87,529	77,990	80,680	79,591

Race

1992	1993	1994	1995	1996	1997	1998
29,548	31,695	31,656	29,986	26,287	29,199	28,820
40.9%	36.0%	34.8%	34.3%	33.8%	36.2%	36.2%

Sex

1992	1993	1994	1995	1996	1997	1998
21,796	23,919	25,860	26,181	23,813	24,728	24,454
30.1%	27.2%	28.4%	29.9%	30.6%	30.7%	30.7%

National Origin

1992	1993	1994	1995	1996	1997	1998
7,434	7,454	7,414	7,035	6,687	6,712	6,778
10.3%	8.5%	8.1%	8.0%	8.6%	8.3%	8.5%

Religion

1992	1993	1994	1995	1996	1997	1998
1,388	1,449	1,546	1,581	1,564	1,709	1,786
1.9%	1.6%	1.7%	1.8%	2.0%	2.1%	2.2%

Retaliation - All Statutes

1992	1993	1994	1995	1996	1997	1998
11,096	13,814	15,853	17,070	16,080	18,198	19,114
15.3%	15.7%	17.4%	19.5%	20.6%	22.6%	24.0%

Title VII

1992	1993	1994	1995	1996	1997	1998
10,499	12,644	14,415	15,342	14,412	16,394	17,246
14.5%	14.4%	15.8%	17.5%	18.5%	20.3%	21.7%

Age

1992	1993	1994	1995	1996	1997	1998
19,573	19,809	19,618	17,416	15,719	15,785	15,191
27.1%	22.5%	21.5%	19.9%	20.2%	19.6%	19.1%

Disability**

1992	1993	1994	1995	1996	1997	1998
1,048	15,274	18,859	19,798	18,046	18,108	17,806
1.4%	17.4%	20.7%	22.6%	23.1%	22.4%	22.4%

Equal Pay Act

1992	1993	1994	1995	1996	1997	1998
1,294	1,328	1,381	1,275	969	1,134	1,071
1.8%	1.5%	1.5%	1.5%	1.2%	1.4%	1.3%

*The number for total charges reflects the number of individual charge filings. Because individuals often file charges claiming multiple types of discrimination, the number of total charges for any given fiscal year will be less than the total of the eight listed types of discrimination.

**EEOC began enforcing the Americans with Disabilities Act on July 26, 1992.

Source: The Office of Research, Information, and Planning, EEOC. Updated December 29, 1998.

Meet our latest Lottery Winners.

These kids may not be old enough to play the Florida Lottery, but they're already winners. Next year, they will attend West Navarre Elementary, a new school being built for them with the help of Lottery dollars.

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So, keep playing the Florida Lottery because for kids like Brittany, Laura and Jessica, every ticket is a winner.

Florida Lottery

When you play, we all win.

Visit our website at www.flalottery.com.

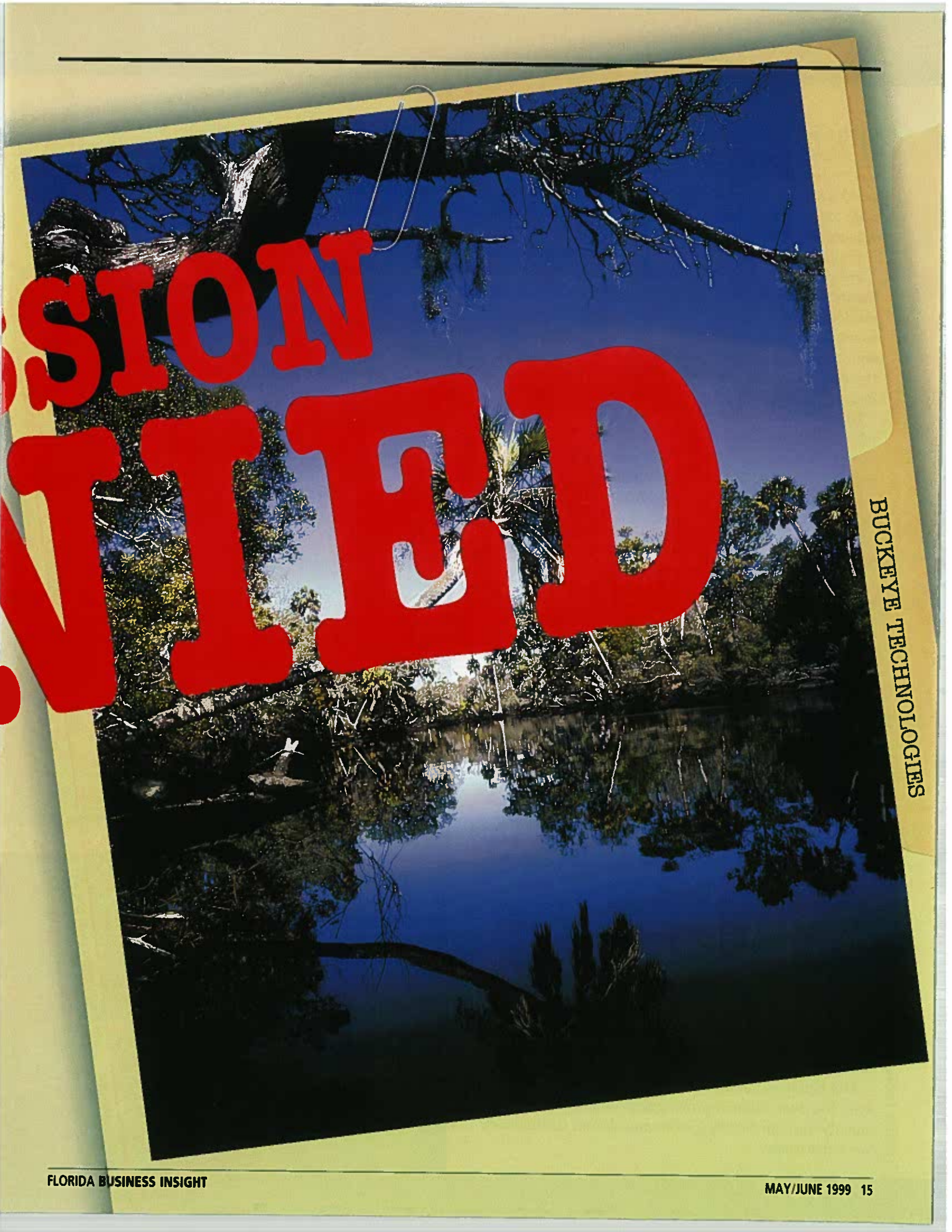
THE TROUBLE WITH PIPELINES

PERMIS DEL

by Jacquelyn Horkan, Editor

On March 18, 1997, Chip Aiken stood before the large crowd and held up a watch with a new, 36-month battery. Entering the watch into the public record, Aiken issued his promise and his challenge: "If the permits we seek are approved quickly, this project will be completed before the battery runs out."

Aerial view of Buckeye Technologies's Foley Mill (above), the Fenholloway River, near the proposed new discharge point where the river widens (opposite page).



BUCKEYE TECHNOLOGIES

The venue was the armory in Perry, Florida, and the occasion was yet another in a long line of permit meetings and hearings. The project that Aiken, then plant manager at Buckeye Technologies's Foley pulp mill, referred to involved a pipeline to move the plant's wastewater discharge point further downstream on the Fenholloway River.

The project, designed to make the river suitable for fishing and swimming, was the result of a three-year, $3 million scientific and technological analysis of methods to remediate the plant's impact on the river. The studies showed that, with the pipeline and process changes in the mill, the health of the river could be restored without degrading the estuary at the mouth of the river.

Today Aiken's watch ticks on with about 10 months of life left. Aiken himself has moved on to the company's Memphis headquarters where he is vice president of business systems. But the project remains stalled.

In March of 1998, the Environmental Protection Agency objected to the Buckeye permit and asked Buckeye to consider other alternatives to the pipeline. In return for implementing its favored technologies, EPA dangled a carrot: Buckeye would receive a variance on water quality standards, indefinitely delaying achievement of Class III fishable, swimmable standards for the river.

"Here's an irony," says Dan Simmons, a spokesman for Buckeye's Foley mill. "The industry wants to go all the way to meet the letter and spirit of the law, to meet the Class III standards for the river, and our critics are saying, 'Well let's not go all the way right now.' "

DUELING EXPERTS

After EPA registered its objections to the permit, it sent a team of consultants to Perry to evaluate the mill.

"We invested significant dollars in actually bringing some of the best technical people that EPA has available to see if there was an in-plant improvement approach that would bring the kind of environmental benefits that would be in the same price range as the pipeline," says John Hankinson, regional administrator of EPA Region 4 and the federal agency's overseer of the Buckeye permit.

According to EPA's consultants, by implementing a technology called oxygen delignification (along with other recommendations), Buckeye could eliminate the need for a pipeline, all for a cost of about $48 million, approximately the same amount it planned to spend on the Fenholloway project.

EPA believes that its recommended technologies will help the river while improving the company's efficiency, mainly through recycling of chemicals and cutting back on water usage.

"If you're going to spend $50 million," says Dan Bodien, EPA's resident expert on pulp mill technology, "you're better off to put the money into the mill than to spend it to move the same amount of pollution."

But when Buckeye asked BE&K Engineering to estimate the cost of implementing EPA's recommendations, the price tag jumped to $97 million, twice EPA's prediction. Sondra Dowdell, a chemical engineer who heads up Buckeye's corporate communications office in Memphis, explains the difference between estimates as a difference in methods used.

"EPA used a cost-model," she explains, "which in engineering terms is sort of a conceptual way to cost technologies. We went one step further, really two steps further, and asked our engineering partner to estimate how much it would cost to install the technologies in our plant specifically."

BUCKEYE TECHNOLOGIES, INC.

PRODUCT:
Specialty cellulose and absorbent products

HEADQUARTERS:
Memphis, Tennessee

PRODUCTION FACILITIES:
Memphis; Perry, Florida; Lumberton, North Carolina; King, North Carolina; Glueckstadt, Germany; Vancouver, Canada; and Cork, Ireland

SALES OFFICES:
Memphis and Geneva, Switzerland

1998 FINANCIALS
(fiscal year ends June 30)
NET SALES:
$630 million
OPERATING INCOME:
$122 million
NET EARNINGS:
$55 million
EARNINGS PER SHARE:
$1.45

Clockwise from top left: Crane moves a shipment of timber to debarker; hydraulic truck-dump unloads wood chips; mill employees reviewing performance chart for new color reduction system; scheduler in mill's computerized coordinating room.

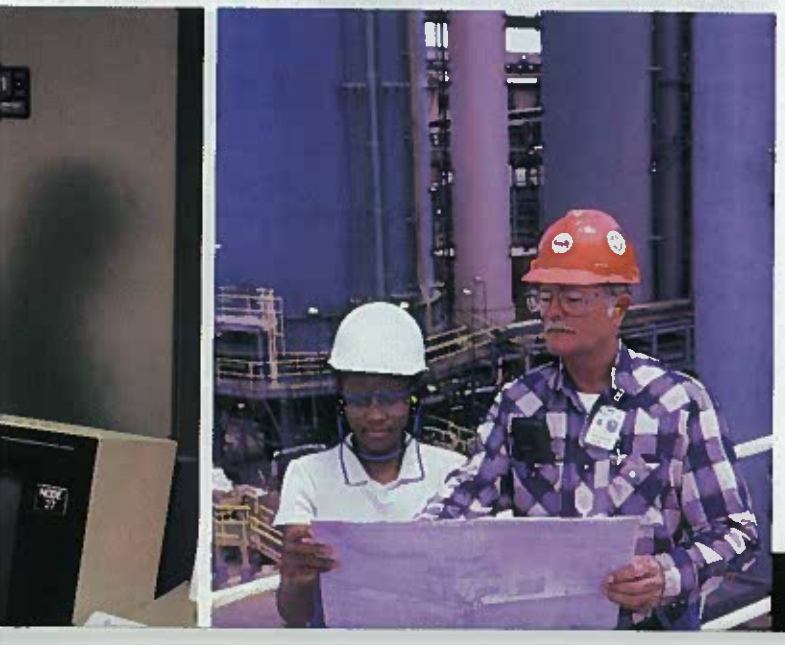
PHOTOS: DOC KOKOL

The different cost estimates have become contentious. Bodien and Don Anderson, another EPA technical expert, say they haven't seen Buckeye's numbers and attribute the gap to a padding of numbers by the company. Hankinson, who has seen the BE&K report, believes the numbers would actually be closer if the project were implemented.

"The folks who own and operate the mill have a level of knowledge of the facility that someone coming from the outside wouldn't have," he says. "And I give way to that when I look at the numbers."

Buckeye and EPA's dueling experts are in accord on one aspect of EPA's proposal. Both predict that the company would save about $4 million a year on operating costs. But even if they agreed on the capital costs, there would hardly be a dollar-for-dollar trade-off between the cost of the pipeline and EPA's recommendations, because the pipeline only represents about $30 million in the total Fenholloway cost. Another $20 million has already been spent on in-plant process changes to reduce the amount of color in the effluent by 50 percent, a goal reached last autumn. Buckeye is also preparing to spend another $30 million to implement one of the other in-plant process changes recommended by EPA.

As this suggests, money is not Buckeye's primary objection to EPA's recommendations.



BLINDED BY SCIENCE

In 1954 Procter & Gamble built the mill on the site of an abandoned town named Foley, just north of Perry. In 1993, Proctor and Gamble sold its Buckeye Cellulose division, including the Foley mill, to a consortium of former employees.

The Foley mill extracts a substance called cellulose from pine trees. The cellulose is sold to companies that use it to make products ranging from disposable diapers to automobile tires to pharmaceuticals to plastic eyeglass frames. The remaining parts of the trees are either burned to produce energy or they are sent through a wastewater treatment plant; what's left over is discharged into the Fenholloway.

The leftover parts of the tree are the major source of the Fenholloway's problems. They cause the water to run darker, saltier, and with lower levels of dissolved oxygen than is normal. The portion of the project designed to reduce color has already been completed. The pipeline would take care of the problems of salinity and oxygen by moving the effluent to the estuarine area of the river, where the salty water of the Gulf of Mexico blends with the fresh water of the Fenholloway. The higher volume of water flow in the estuary would mitigate the effluent's low levels of dissolved oxygen.

The primary basis of the opponents' objection to the pipeline is summed up in a couple of environmental slogans: "Dilution is not the solution to pollution," and "There is no such place as away."

To a certain degree they are correct. As EPA's Anderson explains it, "If Buckeye were on the Mississippi River, there would be greater assimilative ability."

In other words, sometimes dilution is the solution to pollution. Thus was born the idea of a pipeline. During dry spells the river often slows to a trickle in some places. At the current discharge point, there are times of the year when the mill's effluent comprises almost 100 percent of the river's flow. The pipeline, however, would move the discharge point 23 miles downstream to a spot in the river where assimilative ability exists.

Opponents of the pipeline claim that it will worsen the

effluent's impact on the estuarine area and the gulf, an allegation that defies common sense.

"The pipeline opponents don't seem to understand that water flows downhill," says Simmons, "that the neckbone's connected to the head bone." In other words, the effluent is already flowing into the estuary and the gulf; the pipeline would just get it there by a different route.

A pipeline is a pragmatic solution to a problem, offering immediate relief to the river. Opposition to a pipeline is ideological, based on a belief that the only environmental goal worth pursuing is pollution prevention, turning factories into closed-loop systems so that nary the two — industry and environment — shall meet. So the question about oxygen delignification is not how much it will cost, but what it will accomplish.

POLITICAL FLORA AND FAUNA

Oxygen delignification is an expensive technology," says Sondra Dowdell. "But even if it weren't expensive, it still would not deliver on our objective, which is to restore the river."

According to Dowdell, oxygen delignification would improve the problems with dissolved oxygen and salinity, but not to the degree required to return the river to a healthy state. For example, the standard Buckeye must meet for salinity at its current discharge point is 1,275 (µoh/cm. Today, they are at 2,000 to 2,200 (µoh/cm; the EPA technologies would bring them to 1,700 to 1,800 (µoh/cm.

EPA officials agree that their recommendations will not solve the river's problems but say they are trying to prepare the company for new environmental rules that will be released in a few years. Dowdell concedes the point.

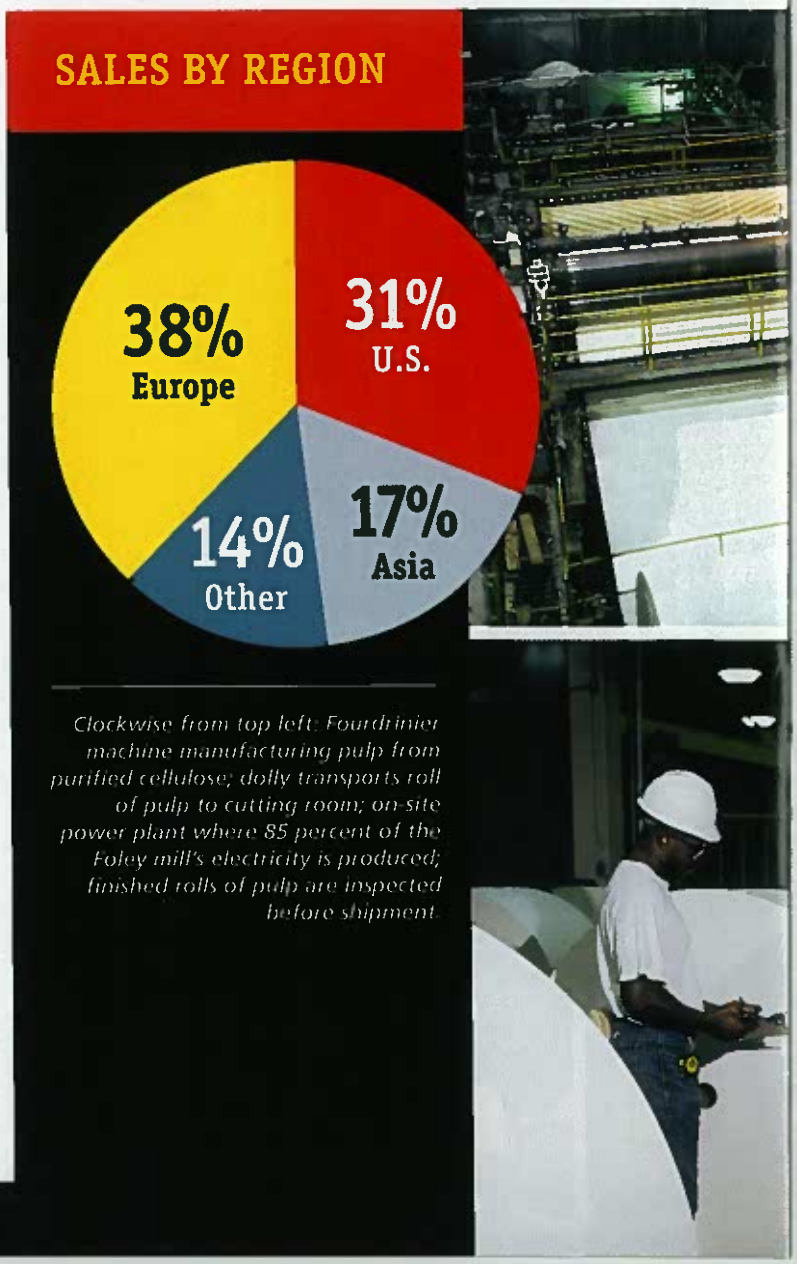
"I believe they started off in good faith with us," she says, "wanting to make sure that we didn't relocate the discharge point and then still have to come back and spend more money on some cluster rule technologies."

The cluster rule technologies she refers to are an attempt by EPA to integrate all water, air, and land pollution regulations into one. In developing the cluster rules, EPA sets guidelines for plant discharges based on what the regulators believe can be achieved using best available technology. Cluster rules have already been established for most of the nation's pulp and paper mills. The Foley mill, however, falls into a special category that was exempted from the first round because there are only three such mills in the country (two other mills in a similar category will also be included in the next round of rule-making).

The first round of cluster rules was surrounded by controversy. EPA, at the behest of environmental groups, had planned to use the cluster rules to mandate the installation of oxygen delignification systems in every U.S. mill. The mandate was eliminated from the final rule, much to the consternation of environmentalists who did not hesitate to make their anger public.

Some paper industry insiders believe that Buckeye is being made a scapegoat for the environmental community's displeasure over the first round of cluster rules. According to this analysis, environmentalists are flexing their muscles in preparation for the upcoming presidential campaign. EPA administrator Carol Browner is a protege of Vice President Al Gore, who will want to pacify his core constituencies in the months leading up to the 2000 elections. And according to rumors, Browner is casting an ambitious eye at the U.S. Senate seat being vacated by Connie Mack in 2001.

It does seem to be the case that pressure is being



Clockwise from top left: Fourdrinier machine manufacturing pulp from purified cellulose; dolly transports roll of pulp to cutting room; on-site power plant where 85 percent of the Foley mill's electricity is produced; finished rolls of pulp are inspected before shipment.

PHOTOS: DOC KOKOL

applied from above. In a memo to her supporters, pipeline opponent Linda Young urged them "to let Carol Browner know how much we appreciated [EPA's assistance]." Young is the Southeast field coordinator (in fact, the only field coordinator) for the Clean Water Network, a coalition of environmental activist groups. She has become the lead spokesman for the anti-pipeline movement.

Adding intrigue is the matter of timing. The final draft of the first round of cluster rules was issued in November of 1997. One month later, the Buckeye permit was submitted to EPA. Three months after that, in March of 1998, EPA formally objected to the permit. One of the most outspoken opponents of the cluster rules was Jessica Landman of the Natural Resources Defense Council. Landman is co-chair of the Clean Water Network's steering committee.

Young's memo also helped damage any trust remaining between Buckeye and EPA. The assistance Young wants Browner thanked for involves the scheduling of an open meeting, demanded by Landman and Young, in Tallahassee on January 14, 1999, to discuss pulp mill technology. EPA, however, neglected to advise Buckeye or the Perry newspaper about the meeting. Hankinson insists that there was no subterfuge involved, that it was merely a service to concerned citizens. Nevertheless, the episode hardened suspicions at the company that it will not receive impartial treatment from EPA.

WHERE NOW?

Buckeye, EPA, and the Florida Department of Environmental Protection (DEP) have spent the last year in negotiations over the permit, a process that now seems irrevocably stalled. EPA refuses to approve the pipeline and Buckeye refuses to install technologies that it says are too expensive, will hamper their ability to produce some of their brands of cellulose, and will not help the river. DEP is left in the middle as the agency that prepared the permit pursuant to legal guidelines but can't get EPA to bless it.

According to Jennifer Fitzwater, a DEP lawyer, the next formal step in the process would be for EPA to grant a public hearing to reconsider its objections to the permit. Unlike Florida, however, federal law does not include an independent review mechanism. The federal hearing officer who would hear the appeal would be none other than John Hankinson, the official who rejected the permit in the first place.

"EPA does have the upper hand," Fitzwater admits.

Furthermore, EPA's objections are not really based on solid grounds. To qualify for the permit, Buckeye has to show that it is meeting the effluent guidelines, which it is, and that it is meeting water quality standards, which with the pipeline it would. Both Fitzwater and Jerry Brooks, assistant director of DEP's Division of Water Quality, say that EPA began by couching its objection to the permit in terms of water quality standards, but it quickly became apparent that EPA really was objecting to the idea of a pipeline as a technological solution to pollution.

"I support technology to improve effluent," says Brooks, "but in the end [Buckeye] has to meet water quality standards and we can't compromise that."

Carefully monitoring the situation are two other Florida mills, the Georgia Pacific facility in Palatka and the Champion mill in Cantonment. Both are similar to the Foley mill in that they discharge into small rivers with insufficient assimilative ability. Both Georgia

Pacific and Champion are investigating the option of pipelines, but neither has reached the permitting stage.

BUILDING PRESSURE

What happens next is hard to guess. John Hankinson and Linda Young appear to have placed their hopes for progress in the new governor and secretary of DEP. Linda Young has written her supporters to warn them, "While we want to give the new administration an opportunity to do the right thing, we have to be ready to put as much pressure as necessary on them."

The anti-pipeline crowd may hope to make the Buckeye permit a litmus test for the new secretary of DEP, David Struhs, forcing him to prove his environmental credentials in a state where any sensitivity to business concerns is viewed as environmental apostasy.

Some of the pipeline opponents believe that Buckeye is just stalling for time, but if the deadlock is hurting anyone, it is the company. The global economy and pressure from customers to reduce prices resulted in a drop in earnings for the quarter ending in December. The development of new absorbent materials is also shrinking the market for some of the pulp made in the Foley mill.

Those, however, are the typical pressures of competing in a global marketplace. More frustrating are the stalling tactics of federal bureaucrats who seem concerned with neither environmental nor economic progress.

"Buckeye Foley does not have unlimited funds to spend on piecemeal solutions and still operate as a financially successful business," says Robert E. Cannon, Buckeye's chairman and CEO.

"I've talked to Bob Cannon and he has made it clear to me, as recently as a couple of weeks ago, that they are not a pipeline advocate," says Hankinson. "They want a result that puts them in compliance with the law."

The problem from Buckeye's perspective, however, is that no one has come up with an alternative to a pipeline that achieves that objective.

"Our critics have said, 'Let's blue sky this,' "says Simmons. " 'Set aside science. Set aside the legality. Set aside economics.' Well, if we get rid of good science, economics, and the law, we've got nothing. You get rid of all that and you've got nothing. ■

The Fenholloway River upstream of the Foley mill (above)

PHOTO: DWIGHT SUMNERS

ON THE RECORD

In 1947, the city fathers of Perry, Florida, asked the Legislature to designate the Fenholloway River for industrial usage, hoping to lure jobs to rural Taylor County. The Legislature obliged and in 1954, Proctor and Gamble opened the Foley mill for production.

In the next decade, however, the nation underwent a cultural change as environmentalism entered the mainstream. Suddenly the project to ameliorate the impact of industry on the environment became a major public concern.

"Buckeye is owned by a bunch of retired Proctor and Gamble managers," says Linda Young of the Clean Water Network. "They were in the pulp and paper business in a different era. There was a lot of resistance in the older management-type people to cooperating with [environmental] regulations." Actually, efforts to clean up the Foley mill began more than three decades ago and continue to this day. Here's a look at the Foley mill's environmental progress. ■

1964—Planning is begun at the Foley mill for one of the nation's first industrial wastewater treatment systems.

1970—A program to reduce air pollution at the mill is begun. President Nixon creates EPA.

1972—Congress enacts the Clean Water Act.

1974—Congress enacts the Clean Air Act.

1977—The mill is one of the first recipients of the Izaak Walton League's water quality improvement award for taking "independent, voluntary actions above and beyond the call of duty to abate water pollution."

1989—A sulfur emission control program is brought on line, eliminating the rotten egg smell associated with pulp and paper mills.

1990—A $40 million chlorine reduction project is completed, making the mill's wastewater three times cleaner than federal dioxin standards.

1998—Buckeye completes a $20 million project to reduce by 50 percent the color of the effluent discharged into the Fenholloway.

1999—Buckeye begins a $30 million project to improve the quality of its discharge. Another project is begun to restore wetlands at the headwaters of the Fenholloway in order to increase flow in the river.

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INTRODUCING DAVID STRUHS

The newly appointed secretary of the Department of Environmental Protection

"Most people want to do what's right. My theory is that if you make it easier to comply, compliance rates go up, and if compliance rates go up the environment is better off. So we really should be focused on making it easier to do what's right."

Though the view from his glass-enclosed corner office on the tenth floor of the Marjorie Stoneman Douglas building at Commonwealth Centre in Tallahassee, is stunning, David Struhs admits, "I'm hardly ever here to enjoy it." What with a 10-day trip across Florida to introduce this Massachusetts transplant to the terrain, followed by long days roaming the halls of the Capitol while the Legislature was in session, the 38-year-old Struhs hardly had time to find a residence for his family of five, much less get settled into an office routine.

Still, he made time in his schedule to explain his ideas for change in a department that historically hasn't been considered a friend to Florida business and is — according to Gov. Jeb Bush — suffering from the effects of low employee morale.

Insight You earned a reputation in Massachusetts for your efforts in streamlining environmental regulation. How do you propose doing that in Florida and standing up to environmental forces that maintain you can't streamline and still adequately protect the environment?

Struhs I believe that if you streamline regulation correctly, you actually improve environmental protection. Streamlined means you're doing it more efficiently, and if you're doing it more efficiently, you'll be able to get more protection from the resources you already have available. We have to go back to the basics and ask ourselves, why are we doing these programs? What is it we're getting in return for our investment? The reason you have to go back to the basics is that in the last two decades environmental regulation has grown rather haphazardly. You have a lot of the same people [at DEP] today who were here when the rules were written. What happens is sometimes you become almost unconsciously more concerned with the process than you are with the product. You become more concerned with protecting the rules than you are with the environment. And if you were there fighting the fight getting rules into place, then anything that comes in and threatens to undo that means you're rolling back protection.

So we need to go back to the very starting point — what is it we're trying to accomplish? Then ask, "Are there ways we can change the rules to allow us to use our resources more efficiently?" Most people want to do what's right. My theory is that if you make it easier to comply, compliance rates go up, and if compliance rates go up the environment is better off. So we really should be focused on making it easier to do what's right.

There will always be the exception, as there is in anything, but far better for us to point our resources in a way where we can go after the exceptions than nit-picking at those who are substantially in compliance.

Insight What's the first step?

Struhs You begin by trying to put yourself in the shoes of the regulated. The best way is to pick one particular industry sector and bring all the rules and regulations

ILLUTRATION: DALE FRIENDS

and put them on the table and say, "Is there a way we can convert this all into plain English?", and turn it into a workbook. It's not that you're changing the standards, not that you're making them more lenient, but you're simply making them clearer and simpler.

After you've done all this, the next step is determining how much checking up we should do. You need a system of reporting back. This is where the idea of a self-certification program becomes very attractive. A self-certification program actually replaces the need for conventional environmental permits. The failure with so many of our environmental permits today is that every time you want to make a change, you have to go back and amend your permit, and in this day and age, when you're trying to compete in a global economy, so much of your competitive advantage is time to market.

That's why the idea of setting performance-based standards is very attractive. It allows [companies] to make the process changes and get new products to market faster. What you're saying is, "We don't care how you achieve compliance with the standards, all we care is that you do comply."

Insight How do you implement this idea and avoid the controversy your predecessor created when she tried it?

Struhs Typically where we have failed in the past is not involving the professional staff at DEP. And if we don't involve them up front, it's impossible to make lasting change. Until we bring along the 3,400 people who work here and run these programs day in and day out at the district offices, you really haven't created a program with lasting change. That's the missing formula — bring along the staff so they actually realize the benefits and realize suddenly they're now using their time in a way that's more beneficial and more constructive. What we want them to feel is empowered to protect the environment, and if we get them to focus on the end result, we'll achieve more with less.

Insight You mention the streamlining for operational permits, but what about development permitting?

Struhs Siting becomes a lot more problematic. It really takes a lot more resources.

The first step is figuring out what the rules are and making that available to people in one place, ideally putting it on the Internet. The vision I have is to allow two numbers — the zip code and SIC code — to be plugged into a smart system that generates what the permitting sequence would look like for that kind of facility in that location — to actually tell you what the local process would be, what the county process would be, and ideally the state process. You would be able to pull down those permit applications [from the Web site] and know you're not going to be in a situation where you've started the project and six months into it you realize you've overlooked something that will send you back to square one and meanwhile you're having to pay the bank for your construction loan.

Insight With the exception of the Everglades, which are obviously unique to Florida, how would you compare the environmental challenges you faced in Massachusetts with those you face in Florida?

Struhs I think there's a wide recognition in Florida as to the importance of water supplies to the state's future. People are planning ahead and recognizing that future quality of life and future economic opportunities in the state are probably going to be determined as much by the quality of our water resources as anything else. With the exception of macro issues, water will both fuel and lubricate our economy, and I think it's a good sign that so many people have recognized that. We may not have gotten to the point where we recognize what the solution is, but at least we recognize that it's a problem and there are benefits to an early solution.

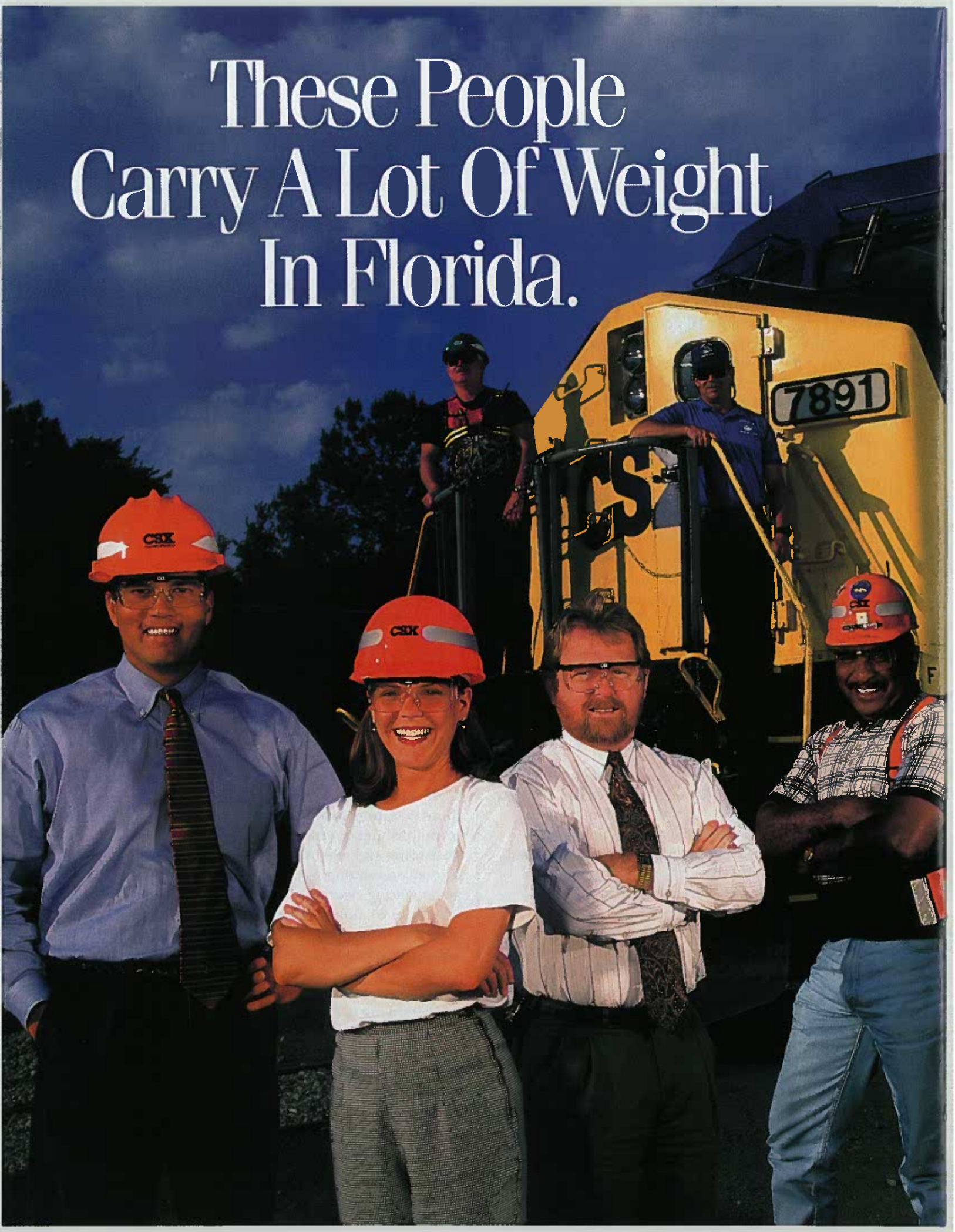
I think Florida has been blessed with relatively clean air, in part because of the types of industries. But as the population grows as rapidly as it has been, we need to ensure we pay as much attention to that as the water resources. It's much cheaper and easier to keep relatively clean air clean than it is to let it go bad and then go in with regulatory fixes.

Insight Is there anything else we're already doing right?

Struhs Florida is farther along than any other state in the country in terms of trying to measure the results of our environmental regulation efforts and making sure we're measuring the right things. Historically, we've found ourselves measuring things like permits issued or number of facilities inspected. And in some cases it's even worse. We measure our success in terms of dollars spent and numbers of people hired. What do any of those measurements tell us in terms of "Are we actually accomplishing our mission or not?" What we want to be measuring and what we owe to the public that supports us is an accounting: Is the air getting cleaner, is the water getting cleaner, and where are we doing well and where are we doing poorly? And taking those useful measurements — not bean-counting measurements — and turning that into a management tool so we can constantly refocus and redirect our resources and our energy on those areas with the most potential.

My thinking is that we should hold ourselves far more accountable to the public in terms of demonstrating results and make sure results-reporting is useful and meaningful. Florida has done a marvelous job. If I do my job right, we'll continue to build on that success.

Julie S. Bettinger is a free-lance writer in Tallahassee, Florida (e-mail: jbettinger@flsheriffs.org).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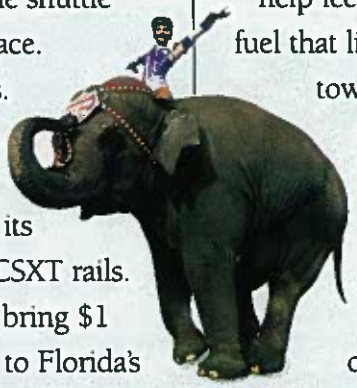

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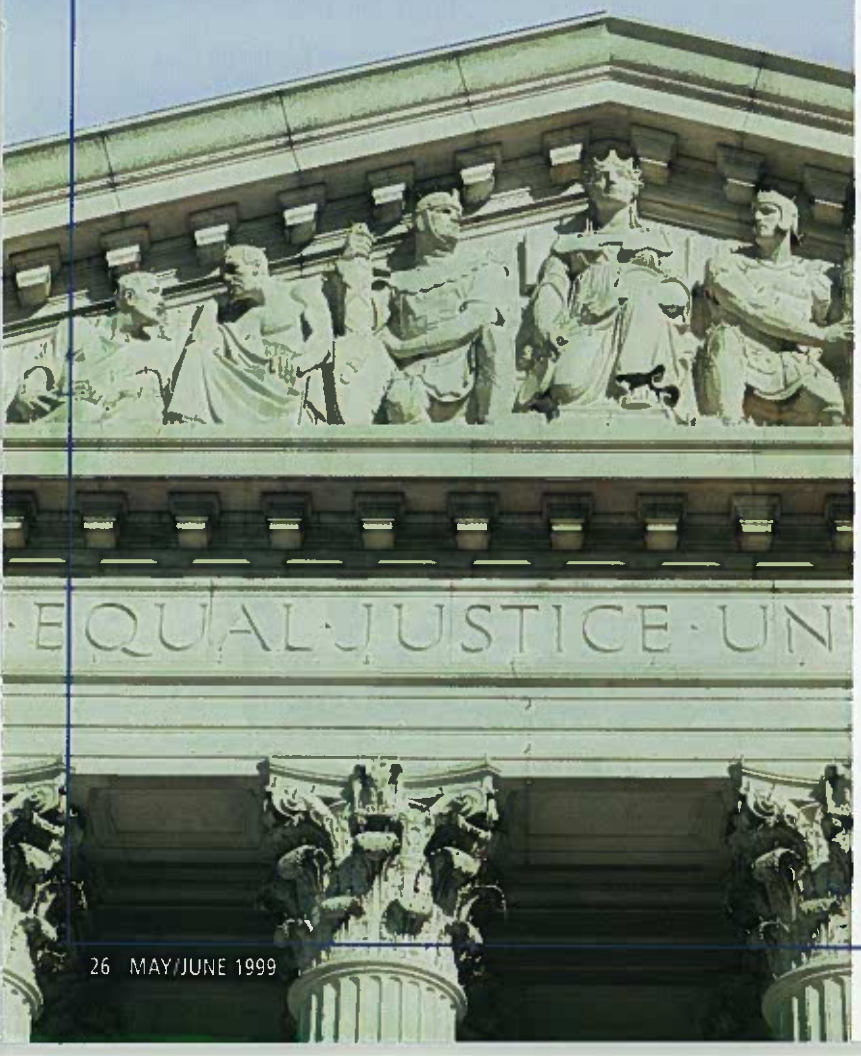

The U.S. Supreme Court will soon decide an issue that could put millions of Americans under the protection of the Americans with Disabilities Act (ADA) even though their health conditions, when treated, do not adversely affect their ability to function in everyday society.

In two cases pending before the Court, the Equal Employment Opportunity Commission (EEOC) is urging the Court to adopt an interpretation of the ADA that requires employers to determine whether an employee is disabled without considering his use of medication or corrective devices such as eyeglasses. This interpretation could apply ADA protection to people with conditions such as high blood pressure and high cholesterol levels as well as those who wear glasses or contacts. Employers could find themselves required to act as physicians, theorizing whether an employee's condition would be severe enough to render him disabled if it went untreated.

In effect, the EEOC seeks to expand a complex and inconsistent law so that it would reach out to almost every American worker, ignoring the ability of modern medicine to control and manage disease and illness.

Editor's note: The authors wish to thank Peter J. Petesch, Thomas J. Walsh Jr., Timothy Bland, and David S. Harvey Jr. of Ford & Harrison. Many of the arguments in this article are based on an amicus brief they filed for the Society of Human Resource Management on behalf of United Air Lines in the case of Sutton v. United Airlines.

by john-edward alley & amy w. littrell

THE ADA'S TERMS AND DEFINITIONS

Since its enactment, the ADA has caused confusion and litigation exposure for employers even when they attempt to comply with its requirements. The ADA, among other things, prohibits an employer from discriminating against disabled individuals in employment. While the definitions of some key terms are found within the statute itself, other terms have been left to the courts to define, resulting in time-consuming and expensive litigation. Even when definitions are provided in the statute, they are often ambiguous or circular, further exacerbating the confusion about and the increase in ADA-related litigation.

Unlike most other employment-related legislation, the ADA imposes an affirmative duty on an employer to provide a reasonable accommodation to a "qualified individual with a disability." The ADA defines the term "disability" as a physical or mental impairment that substantially limits one or more major life activities. Additionally, a person may be defined as disabled if he is regarded by the employer as having such an impairment.

Major life activities are those that an average person can perform with little or no difficulty, such as walking, speaking, breathing, performing manual tasks, seeing, hearing, learning, caring for oneself, working, sitting, standing, lifting, or reading. To meet the threshold of "substantially limited" a person must show that he is "significantly restricted" in the ability to perform that activity.

For example, in order to prove that he is substantially limited in the ability to work, a person must prove that he is unable to perform the general type of employment in question rather than just a narrow range of job tasks. It is the definition of who is disabled under the ADA that has created the conflict now before the Supreme Court.

SIGNIFICANTLY RESTRICTED WITH OR WITHOUT MEDICATION?

Sutton v. United Air Lines is focusing the attention of the Supreme Court on the definition of disability. The case involves twin sisters who applied for and were denied jobs as pilots with United Air Lines. The company refused to hire the sisters because their uncorrected vision did not meet the company's requirement that its pilots have uncorrected vision of 20/100 or better. The sisters' vision was 20/200 in the right eye and 20/400 or worse in the left eye, which is below the level often used to define legal blindness.

The sisters claim that without glasses or contacts they cannot perform basic activities, such as driving a car or watching television. With glasses or contact lenses, however, both women have 20/20 vision. In fact, both possess Federal Aviation Administration first-class medical certificates and were employed as pilots for a commuter airline when they applied for work with United.

The lower federal courts dismissed the sisters' lawsuit based on the determination that the women were not substantially limited in any major life activity when they wore glasses or contact lenses, a conclusion unacceptable to the sisters.

In a similar case, *Murphy v. United Parcel Service, Inc.*, a former UPS employee claimed that the company discriminated against him when it discharged him from a driver position because his blood pressure was too high. Without treatment, Murphy's blood pressure was 250/160. Prior to his discharge, Murphy's blood pressure was tested on several occasions and the final tests showed it at 160/104 and 160/102. UPS required that drivers have blood pressure of 160/90 or lower.

Prior to being hired by UPS Murphy passed a Department of Transportation physical examination. As a result he received a health card certifying him as fit to drive. About a month later, a UPS nurse reviewed Murphy's results from the physical and noticed that his blood pressure was reported as 186/124. She ordered him off work to be tested again because his blood pressure exceeded the company's maximum standard. Eventually UPS fired Murphy.

Murphy claims that he is disabled and that his termination violates the ADA. According to Murphy, without medication his blood pressure would put him in the hospital, he would incur organ damage, and he would eventually die of high blood pressure. Therefore, since the consequences of the untreated illness were so severe, he was due reasonable accommodation under the ADA, even though the medication virtually eliminated the risk of those consequences.

The lower federal courts dismissed Murphy's claim on the grounds that he did not suffer a disability covered by ADA because, with treatment, his high blood pressure did not substantially limit a major life activity. His case has also found its way to the U.S. Supreme Court.

The issue before the Supreme Court in both *Murphy and Sutton* is whether the effect of medication or other corrective treatment should be considered in determining whether an individual is substantially limited in the ability to perform a major life activity and thus entitled to the protection of the ADA.

The individuals bringing these lawsuits have urged the Court to analyze their status as disabled under the ADA

without regard to their use of medication or corrective devices. Specifically, Murphy asserts that the ADA should be construed broadly to cover hundreds of thousands, if not millions of individuals who rely on medication, such as those with high blood pressure, diabetes, and epilepsy.

In both cases the plaintiffs and the EEOC express concern that, by allowing employers to consider the corrective effects of medication and other devices, the Court would exclude numerous individuals whom Congress intended to protect by the ADA. The question the Supreme Court must ultimately decide is whether the ADA was intended to protect a broad range of people who, with some form of medical intervention, can function fully in society.

THE DISABLED MAJORITY?

If the Supreme Court decides that disabilities are to be evaluated under the ADA without considering medication or other devices, the vast majority of the population could be considered protected by the ADA. According to the 1998 annual report of the American Optometric Association, 147 million Americans, or 55 percent of the population, wear eyeglasses or other corrective lenses. This figure does not include people who no longer need vision correction because they have successfully undergone corrective laser surgery. In most cases, these visually impaired individuals are not limited in their ability to function in everyday life and can perform all of the activities of the "average" person.

Millions of Americans suffer from potentially serious health conditions (such as high cholesterol, hypertension, asthma, depression and other psychological disorders, diabetes, seizure disorders, and heart arrhythmia) that could have severe debilitating effects if left untreated but that are fully treatable with medication. The great majority of these individuals do undergo some form of treatment that allows them to live as fully functioning individuals.

The original and admirable purpose of the ADA was to eliminate discrimination against disabled persons and to bring them into the mainstream of American society. Numerous court decisions, in analyzing claims brought under the ADA, have reiterated that in enacting the statute Congress intended only to protect a limited class of persons. Specifically, Congress intended to protect those who suffer from impairments significantly more severe than those encountered in everyday life.

The ADA was never intended to protect those who suffer from common, relatively minor conditions, because to hold otherwise would debase the laudable purpose of a statute that seeks to protect those who are truly handicapped. In *Fussell v. Georgia Ports Authority*, the court expressed the concern that the ADA had the potential of becoming the greatest generator of litigation ever. The judge in *Fussell* wondered whether Congress, "in its wildest dreams or wildest nightmares" intended such a result. In construing the ADA to exclude claims by those with minor impairments, courts have acted consistently with the views of Congress that disabled persons are a "minority of the population."

PERCEPTION OF DISABILITY?

EEOC's position that protection under the ADA should be analyzed without considering the effects of medication or other medical assistance conflicts with its interpretation of other aspects of this statute.

For example, EEOC's interpretive guidance on qualified persons with disabilities explains that a determination of whether an individual is qualified should be based on the person's capabilities at the time the employment decision is made. It should not be based on speculation that the employee may become unable to perform his duties and responsibilities in the future.

EEOC also requires employers to consider the negative side effects of medication in determining whether a condition is substantially limiting. Yet in the two pending Supreme Court cases, EEOC takes the position that the positive effects of medication should be ignored.

Moreover, adopting EEOC's position on this issue requires an employer to "perceive" an individual as disabled, even when that person is capable of functioning in society without restriction. Adopting the EEOC's argument on this issue would mandate that, instead of evaluating an individual based upon his current ability to function, an employer would be required to attribute speculative limitations to an employee or applicant who lacks such limitations because of his use of medication.

It is evident that the Supreme Court's decision on this issue will have far-reaching implications for employers covered by the ADA. Employers can only hope that the Court will recognize the illogic and impracticality of requiring employers to disregard an employee's use of medication and corrective devices. Such an interpretation of the ADA, which undermines the purpose and intent of that statute, will undoubtedly serve only to increase the confusion and litigation surrounding the ADA and further detract from its original, laudable goals. ■

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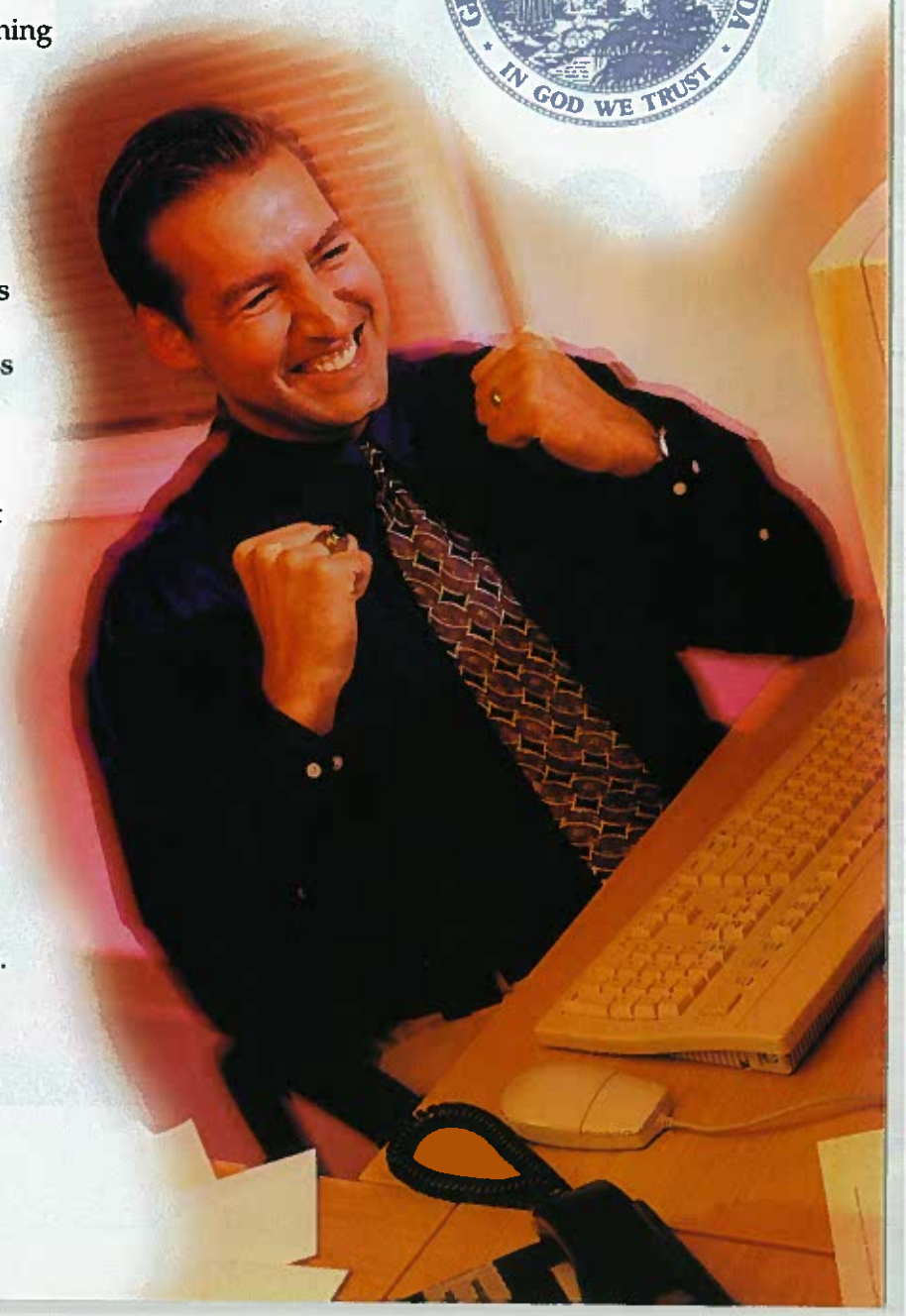

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A FREE MARKET SOLUTION TO contin

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by bert w. rein & john e. barry

ent Fees

The spectacle of the nation's leading trial lawyers swooping down in their private jets to carve up billions of dollars in tobacco settlement contingent fees has reinvigorated public and political debate over the contingent fee system.

Experienced lawyers providing counsel to indigents in criminal cases, where liberty and life itself may be at risk, labor at rates comparable to those charged by the most junior lawyers at large law firms. But the civil trial bar has managed to enrich itself and accumulate vast political power by representing those who it claims would otherwise be denied access to civil justice.

The explanation that this phenomenon merely illustrates the possibility of "doing well by doing good" is an attractive myth but a far cry from economic reality. In fact, trial lawyers have enriched themselves at the expense of their clients — and society itself — by advantageously purchasing claim assets from disadvantaged clients and litigating on their own behalf with limited regard to their duties as officers of the court.

Yet the calls for increased regulation of contingent fees, however understandable, are misguided.

Editor's Note: This article is adapted from a working paper published by the Washington Legal Foundation.

Regulation of attorneys' fees is a form of price control. Any effective system of regulation would be costly and raise a host of complex balancing issues. Most fundamentally, any regulation permitting lawyers to continue accepting contingent fees will not cure the problems inherent in a lawyer-client joint venture where the lawyer's proper dual role as an advocate of the client and the justice system is compromised.

Instead, a more appropriate solution would be to prohibit lawyers from entering into any arrangement that directly or indirectly constitutes the acquisition of a financial interest in all or part of a client's claim. Lawyers should be required to certify that they have no direct, proportional financial stake in the outcome being pursued on behalf of a client. Permitting everyone except lawyers to obtain a financial stake in a claim held by another would serve the interests of litigants and the public without the need for intrusive regulation. Furthermore, to enable indigent claimants to use the potential value of their legal claims to secure access to the courthouse, a competitive market could be created for the purchase and sale of claims by those who would act as middlemen between claimants and lawyers.

HOW DID WE GET HERE?

Historically, English law barred contingent fees under the rubric of doctrines such as maintenance (providing material assistance to a litigant) and champerty (acquiring a financial stake in a claim held by another). In the nineteenth century, American courts gradually departed from the English rule and began to recognize a narrow champerty exception for lawyers on the grounds that contingent fee arrangements were the only practical way in which indigent plaintiffs with legitimate grievances could gain access to the court system. Limited concepts of liability and damages curbed many of the excesses that mark today's contingent fee system and permitted the development of the champerty exception on a case-by-case basis until it eventually gained widespread acceptance.

While the contingent fee is now ingrained in our legal culture, there is no evidence that the relative advantages and disadvantages of the champerty exception were systematically considered, or that alternative ways to afford court access to indigent claimants with legitimate claims were seriously explored. Thus the origins of the contingent fee have more to do with historical accident and expedience than with a searching analysis of possible means to provide court access to deserving claimants.

THE ORIGINS OF THE CONTINGENT FEE have more to do with historical accident and expedience than with a searching analysis of possible means to provide court access to deserving claimants.

The legalization of contingent fee arrangements through the champerty exception had considerable populist appeal because it provided individuals of modest or no means with access to counsel to redress legitimate grievances. Indeed, to the present day, defenders of contingent fees place primary emphasis on the democratic virtues of a system that permits injured parties from all walks of life to take on wealthy defendants and vindicate their rights in court.

More cynically, however, the contingent fee system has helped to promote steadily expanding concepts of liability and damages, contributed to the litigation explosion, and fostered an enormous oligopoly in which trial lawyers have exploited their unique champerty exception to reap staggering windfalls by making bargain purchases of shares in lucrative claims.

Contingent fee lawyers routinely turn away long-shot claims and carefully cull their claims portfolios, leading to estimates that, in personal injury cases, contingent fee lawyers obtain more than merely nominal settlements and awards in upwards of 70 percent of the claims they accept. Leading contingent fee scholar Lester Brickman examined this phenomenon in *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, published in 65 *Fordham Law Review* 247, 277 (1996). "These high success ratios," writes Brickman, "reflect the very careful selection processes that contingency fee lawyers employ. ... Firms constantly reassess their claim portfolio and change resource allocation in order to devote more time, and advance more funds, to stronger cases rather than to weaker ones."

PRIVATE AND PUBLIC COSTS

Under the contingent fee system, claimants are injured when they overpay for the legal services or suffer the consequences of representations that are compromised by conflicts of interest. The public is injured when inflated legal bills are passed on to consumers through insurance premiums and increased costs for goods and services. The polity is injured when attorneys, who are ostensibly officers of the court, erode public confidence in the administration of justice.

Three elements conspire to undermine the commercial reasonableness of contingent fee arrangements. First, in the typical contingent fee case, the plaintiff is not legally sophisticated. He has no real choice but to rely upon the "expert advice" of would-be counsel and is ill-prepared to render an independent, informed judgment regarding either the value of the claim or the reasonable cost of legal services necessary to prosecute the claim to a successful conclusion.

Second, although an attorney has both an ethical and a fiduciary responsibility to obtain a client's informed consent to a fee agreement, many potential clients are vulnerable to overreaching by attorneys who either fail to adequately disclose the factors that should be considered in concluding a commercially reasonable fee agreement (value of the claim, amount of effort required, likelihood of success, etc.), or who affirmatively misrepresent those factors. Indeed, a casual inspection of "yellow pages" advertisements for plaintiff's attorneys suggests that few if any market their services to the public by disclosing up front that they charge a fee ranging upwards of one-third of the value of any recovery. Instead, such advertising typically entices consumers with the assurance that there will be no fee if there is no recovery, a representation that may be accurate but is also incomplete.

Third, a plaintiff's ability to shop his claim in the marketplace is sharply limited both by the oligopoly that lawyers enjoy on the pricing of contingent fee services and by the legal prohibitions on selling an interest in a claim to others. The current system depends heavily on the wildly optimistic assumption that lawyers will act in good faith in pricing their services to a captive class of consumers—in effect, that the fox will guard the henhouse.

Commentators have observed that the risk of abuse is particularly high in cases where the plaintiff's success on the merits is assured or virtually assured. By definition, contingent fees are only appropriate to a case (or that portion of a case) for which there is some genuine risk of non-recovery. When the plaintiff's recovery is effectively guaranteed, the lawyer's fee is not contingent at all. In such a situation, charging a fee that could be justified only by a significant assumption of risk allows a lawyer to reap a tremendous windfall with an expenditure of little or no effort.

Contingent fee arrangements also create perverse incentives that place the lawyer's interest at odds with the client's. A contingent fee lawyer may urge the client to accept an unfavorable settlement offer to avoid having to expend further resources on a case, or encourage the client to reject a favorable settlement offer so that the lawyer can obtain a jury verdict in a high-profile case and the free publicity that goes with it. Unsophisticated clients are particularly vulnerable to such manipulation.

Moreover, the champerty exception has traditionally not been extended to criminal cases and divorce actions on the grounds that members of the bar should not be given financial incentives to suborn perjury or discourage reconciliation of warring spouses. Similarly high-minded concerns have not been applied to the equally unacceptable incentives presented by contingent fee arrangements in the context of multi-million-dollar civil claims.

Apart from the substantial legal and ethical concerns that contingent fee arrangements present in individual cases, they frustrate the larger objectives of the liability system by diverting resources from victims and eroding public confidence in the courts. The costs are usually hidden from view, but businesses and consumers alike bear the burden of a justice system that fails to price legal services at competitive rates. When the justice system condones conflicts of interest in the lawyer-client relationship and tolerates fee arrangements that are widely viewed as inequitable, cynicism and doubt undermine the very principles on which the justice system is founded.

CREATING A MARKET for the purchase and sale of claims would preserve (if not improve upon) whatever efficiencies of scale inhere in the current system.

The bizarre economics of the contingent fee system have been spotlighted most recently in widespread media coverage of the enormous fees that plaintiff's lawyers in state-sponsored tobacco cases stand to recover when settlements in those matters are concluded. In hindsight, any blame for the wisdom of such arrangements can be laid squarely at the feet of the state officials who approved the fee agreements. Nevertheless, the trial lawyers' ability to conclude agreements on terms that would make a futures trader blush was facilitated both by a legal culture that actively discourages competitive pricing of legal services for entire classes of claims and by a dearth of readily available alternatives in the private sector.

EXISTING REGULATION

Efforts to address the inherent shortcomings of the contingent fee system by the organized bar and state and federal lawmakers have done relatively little to curb the potential for abuse. For example, while acknowledging that the contingent fee system has provoked "intense public policy debate," the American Bar Association (ABA) has declined to propound any firm guidelines limiting contingent fees. Instead, the ABA has stressed that its rules and codes of conduct are sufficient. According to the ABA, "any lapse from the applicable requirements by some members of the profession simply suggests that the profession should redouble its efforts to assure that the ethical obligations associated with entering into a contingent fee arrangement are fully understood and observed."

Although the ABA's ringing endorsement of the status quo should not come as a great surprise, the premise that the profession will police contingent fees itself and do so effectively is wishful thinking. The organized bar is notoriously lax in matters of enforcement, a point ably made by R. Abel, in *Why Does the ABA Promulgate Ethical Rules?*, published in 59 *Texas Law Review* 639, 648-49 (1981). "Study after study has shown that the current rules of professional conduct are not enforced. Misconduct is rarely perceived. If perceived, it is not reported. If reported, it is not investigated. If investigated, violations are not found. If found, they are excused. If they are not excused, penalties are light. And if significant penalties are imposed, the lawyer soon returns to practice, in that state or another."

State and federal lawmakers have approached the problem by enacting legislation or adopting court rules that limit an attorney's ability to charge a contingent fee in defined circumstances. Some states have placed uniform caps on contingent fee percentages, instituted a graduated series of caps based on the amount of the plaintiff's recovery, or barred contingent fees outright in certain classes of cases. Similarly, Congress has limited contingent fees recoverable in certain claims arising under federal law.

The difficulty with these approaches, however, is that they do nothing to address situations where there is nothing contingent about the plaintiff's prospects for recovery, and they fail to address the inherent tensions that arise when an officer of the court has a direct financial stake in the proceeds of the judgment. Even assuming that our overburdened court systems were equipped to police contingent fee arrangements effectively (which they are not), a legislative limit accomplishes little if plaintiffs are not informed of the limit and there is little or no guarantee of independent judicial review and enforcement.

Absent onerous, costly, and possibly unlawful monitoring of the lawyer-client relationship, external regulation of contingent fee arrangements is bound to produce unsatisfactory results. The financial incentives for mischief are too great.

THE CASE FOR ABOLISHING CONTINGENT FEES

There are four arguments traditionally used to justify contingent fees. The first posits that contingent fee arrangements grant deserving plaintiffs access to the courts by enabling them to afford the high cost of legal services. While our society values the principle that individuals from all walks of life should have access to the courts, there is no rational reason that this societal interest must be advanced by contingent fee lawyers, or that contingent fee lawyers should be the only ones holding the keys to the courthouse for vast numbers of claimants.

The second defense — that contingent fees create eco-

nomic incentives for plaintiff's counsel to litigate diligently and efficiently — is nothing more than a restatement of the common-sense proposition that a cost-conscious lawyer working for a contingent fee will expend the minimum amount of effort necessary to obtain the maximum reward. The difficulty is that, under the current regime, there is ample reason to believe that the contingent fee system inflates the costs of legal services and that substantial numbers of attorneys are collecting fees that are grossly disproportionate to either the risk that they are assuming or the effort that they are putting in.

According to the third argument, contingent fees promote settlement by discouraging well-financed defendants from stonewalling in the hope that an impecunious plaintiff will never find the resources necessary to vindicate his rights. This adds little to the first because well-financed defendants will no longer be able to defeat meritorious claims by stonewalling when deserving claimants are provided with meaningful access to the courts.

Finally, the fourth justification argues that contingent fees advance the principle of freedom of contract by permitting claim holders to barter a stake in their claims for legal services in an open market. This is largely illusory. Although advocates of contingent fees purport to espouse a free market in fee-setting, the absence of meaningful price competition saps this principle of any vitality in the contingent fee arena.

What is required is a fundamental restructuring of the manner in which legal services are delivered to plaintiffs, preserving the societal benefits of the contingent fee system while getting attorneys out of the contingent fee business altogether. How? Antiquated barriers to champerty and maintenance would be eliminated, the standard contingent fee banished, and counsel prohibited from taking on representations if he had a direct, proportional financial stake in the outcome. Lawyers would be confined to their proper roles as advocates and officers of the court, and injured parties would obtain legal representation by marketing their claims to "brokers" acting as middlemen between claimants and the providers of legal services.

Assuming that appropriate protections were installed against improper collusion between organizations representing the interests of plaintiffs and defendants, there is no principled reason that plaintiffs — particularly in open-and-shut cases — should not be allowed to shop their claims to brokers in markets similar to those that currently exist for such equally valuable commodities as court judgments and accounts receivable.

The ability to analyze and value a claim and any attendant litigation costs does not require a law degree. With no formal legal training claims handlers for liability insurers capably perform such services every day for defendants. Creating a market for the purchase and sale of claims would preserve (if not improve upon) whatever efficiencies of scale inhere in the current system. It would introduce vigorous price and product competition where none currently exists. And, arguably, it would make compensation available to many claimants who are currently barred from the court system by contingent fee lawyers who refuse to take on low-value cases.

Because they would be purchasers rather than providers of legal services, claims brokers would have every incentive to purchase legal services at fixed rates that accurately reflect the relative merits, value, and complexity of individual claims, rather than seeking a standard one-third fee regardless of the cause.

ENDING THE OLIGOPOLY

Defenders of the contingent fee system have consistently decried reform efforts on the grounds that they are calculated to deprive deserving claimants of legal representation and to protect wealthy defendants. There is no logical reason, however, that society's interests in affording access to the court system can only be advanced by contingent fee lawyers. There are numerous reasons to conclude that the contingent fee system is doing a poor job of advancing those interests in an equitable and efficient manner.

There is strong evidence to suggest that increasing the amount of information available to the holders of valuable claims effectively reduces the cost of legal services associated with the prosecution such claims. Brickman cites the example of aviation accident cases, where preemptive action by airline liability insurers — admitting liability and informing the victims of an imminent settlement offer — has had a demonstrable impact on reducing the fees charged by plaintiff's counsel.

By breaking the contingent fee lawyers' oligopoly on champerty and prohibiting lawyers from acting as co-venturers in their clients' claims, the financial alternatives available to plaintiffs would be enhanced without impeding access to the courts. Legal fees would be reduced, to the benefit of plaintiffs, defendants, and the public. Substantial strides would be made toward restoring confidence in the integrity of the justice system. ■

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The Night The Lights Stayed On In

Let's make this clear.

In case the title doesn't give you a hint,

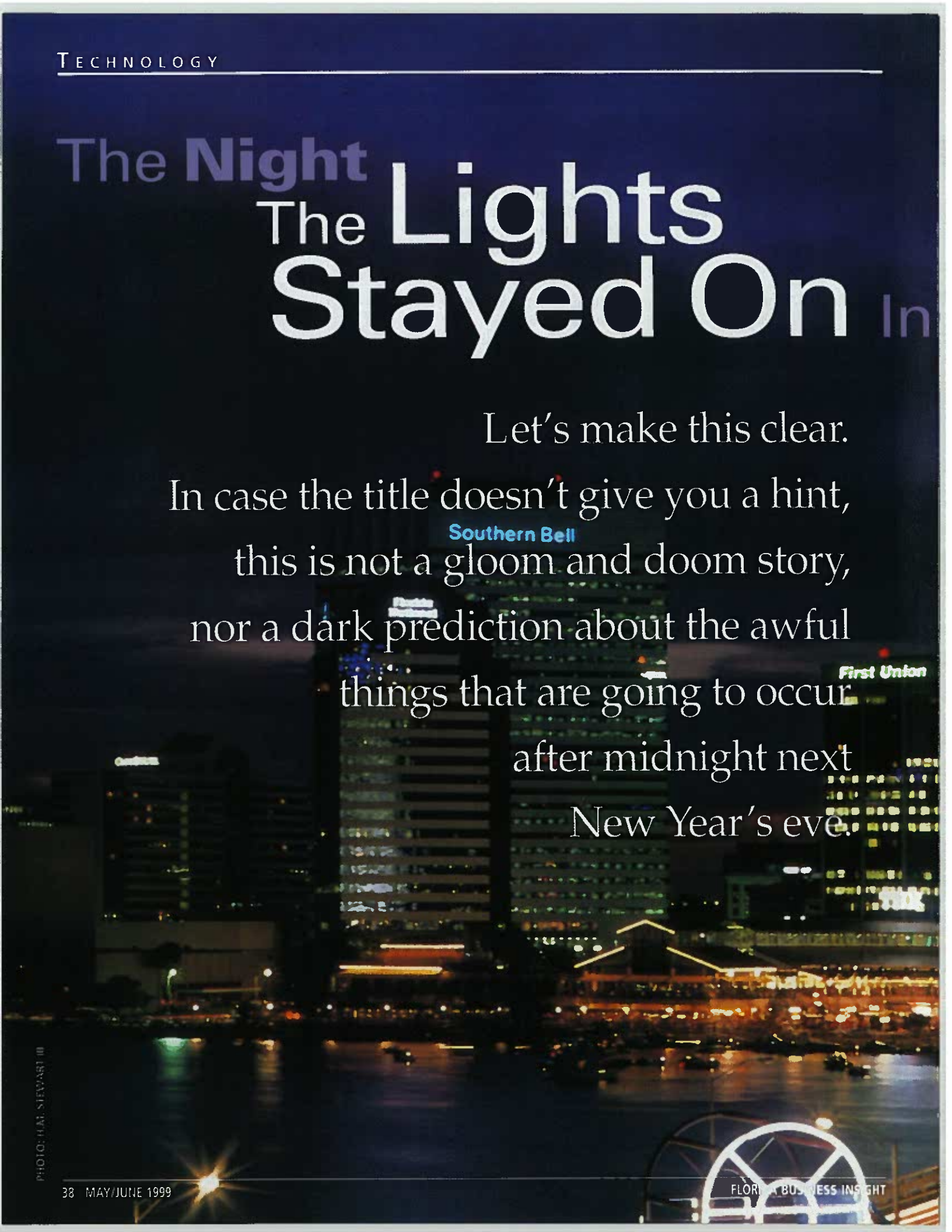
this is not a gloom and doom story,

nor a dark prediction about the awful

things that are going to occur

after midnight next

New Year's eve.



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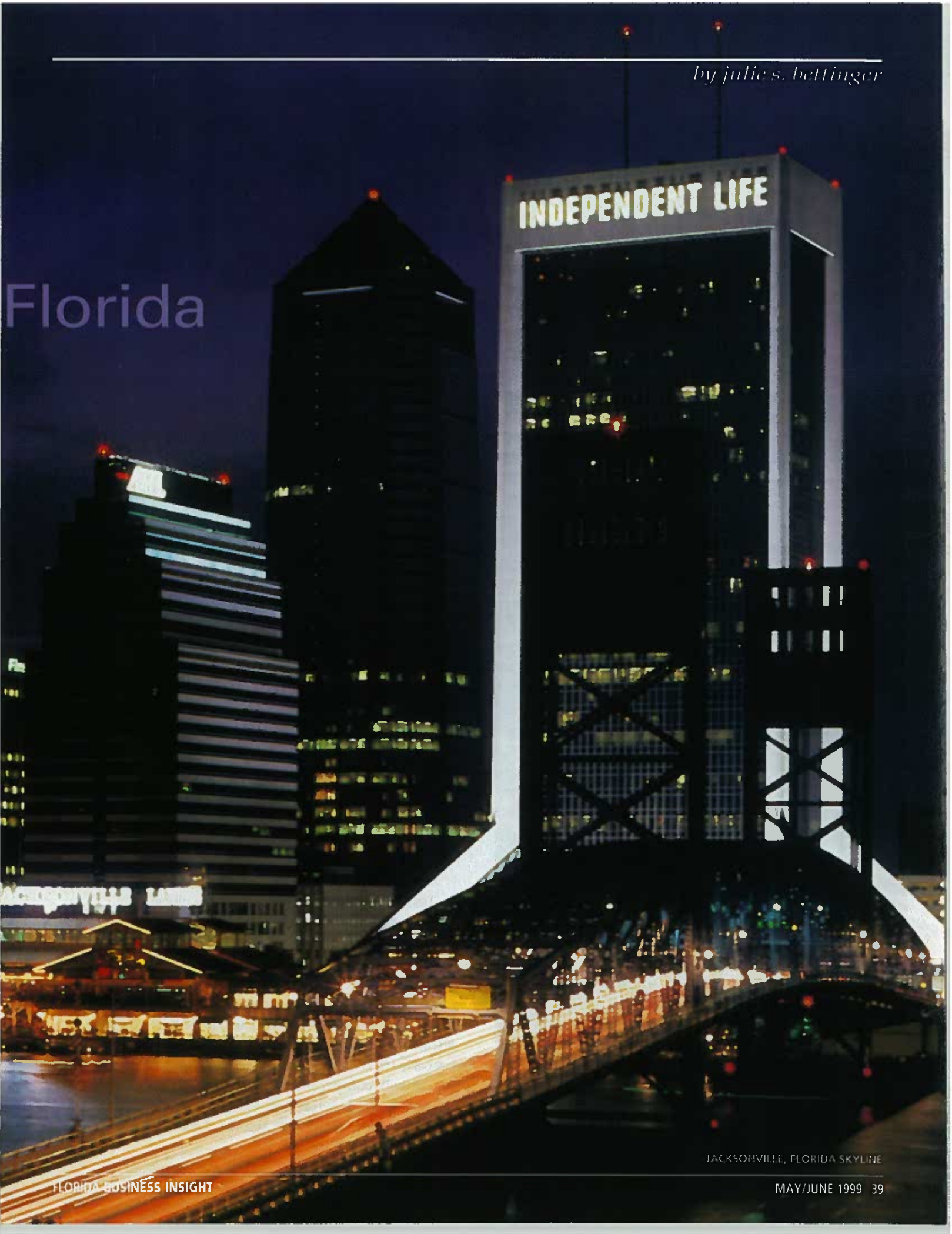
by julie s. bettinger

Florida



JACKSONVILLE, FLORIDA SKYLINE

If you're reading this in Florida, vital infrastructure industries want you to know that more than likely, on January 1, 2000, your toilet will flush, your lights will turn on, and your tap will still be able to dispense water—even if your personal computer goes on the blink, and that will be your fault.

Over the last several years, miles worth of ink has been spent on news stories about the so-called Y2K (shorthand for "Year 2000" or "Year Two Kilo") bug. Early computers lacked storage capacity so programmers saved space by recording years by the last two digits, e.g. "99" instead of "1999." Speculation arose over how computers might react when they have to process dates after Jan. 1, 2000. Would the machines calculate the time between 12/31/99 and 1/1/00 as one day or 100 years? What would happen to a wired society if computers misread the date?

Vital infrastucture industries have been working on Y2K readiness for so long that they're no longer worried about it. In fact, most aren't even worried about their vendors anymore. What they are worried about is public perception of the problem and the damage that could cause.

HOW DO YOU EAT AN ELEPHANT? ONE BITE AT A TIME

"There is so much money being spent on Y2K, it's incredible," says Brenda Buchan, Year 2000 coordinator for the Florida Public Service Commission. She says generally all utilities and vital infrastructure industries have been following a five-step plan:

1. Inventory: identifying systems that might have an embedded chip or Y2K implications
2. Assessment: what it will take to bring identified items into Y2K compliance
3. Remediation: including modification, upgrading, or replacement of systems and equipment
4. Testing: including accelerating the clock to January 1, 2000, to find out what happens
5. Contingency planning: identifying alternatives and backups in the event that something should fail

Most infrastructure industries have also forged partnerships with their competitors through trade organizations that act as clearinghouses for reports on efforts and readiness. The trade groups' activities take precedence over any rivalry among companies, even in the fiercely competitive banking and telecommunications arenas. They have set timelines for readiness and companies are competing against the clock to meet those deadlines.

"It's a race," says Scott McPherson, coordinator of Team Florida 2000, Gov. Jeb Bush's committee to coordinate communication on the state's Y2K efforts. "But it's not a race to see who finishes first. It's a race to make sure no one finishes last."

THE COST OF TWO KILOS — TIME AND MONEY

Companies have been pouring both resources and money into Y2K compliance at a phenomenal rate, and the efforts seem to be paying off.

Winn Dixie food stores budgeted approximately $20 million to address Year 2000 issues, according to Mickey Clerc, company spokesman. They established a Year 2000 Project Office and are following the five-step plan. Clerc estimates that all critical systems will be compliant by September 30.

The grocery chain is currently developing strategies to determine if key outside vendors are compliant, but Clerc says none are material to the operations, so their failure would not have a significant adverse effect.

Not so for industries that rely on a large number of different vendors for key functions, as in the case of health care. While hospitals and health-care entities may appear sluggish in their response to Y2K readiness, it's not because they haven't been working on it. Florida hospitals can bring their backbone operations into compliance — including electric, phones, and computer systems — but it takes a lot longer to gain reassurances on medical equipment because of the sheer volume of vendors involved.

David Flagg, director of government relations for Shands HealthCare, says they have a full-time staff person assigned to the job of Y2K readiness and the company has budgeted $5 million to mitigating any issues that arise.

Still, the first two steps of the plan — inventory and assessment — resulted in a lengthy list of medical equipment and vendors, each of which is being inundated with requests on Y2K compliance. The result is a massive backlog and slowed reaction.

"At this point our energy and focus are on the vendors," says Flagg. "We can take care of ourselves; that's within our control, but the vendors are not."

Health-care facilities aren't without their leverage, though. "These vendors know that if they want to continue to do business with Shands, they'd better cooperate by providing Y2K readiness assurance," he says.

So how does a company know when a supplier's word is good enough?

To gain assurance of suppliers' readiness, Florida Power Corp. is developing an in-house risk assessment for each supplier, says Roy Conner, director of Y2K contingency planning. "We base it on what they say and our knowledge of the sophistication of the supplier, plus other things they are able to show us, such as test results."

When there is doubt, he says, they may ask for a face-to-face meeting or even run a joint test. For vital supplies, he says part of the contingency plan could include locating alternate vendors and stocking extra supplies.

STATE OF THE COMPETITION

In addition to suppliers, the electric and telecommunications industries also need to be concerned about their competitors because of the extent of inter-connectedness. Florida is on its own electric grid, meaning all the electric companies are tied to one another, making it even more critical that each company avoid a failure. If a computer system operating a power plant crashed, a large chunk of power would be lost on the grid, which could potentially cause a domino effect on other companies.

"Substantial loss of a block of power could result in everybody else's power plants being dumped off line," explains Florida Power Corp.'s Paul Lewis, who is serving on Florida Task Force 2000. And that could put the entire state in the dark.

Fortunately for Floridians, electric companies have learned to "play nice" together, as each has a major stake in the others' Y2K compliance efforts.

Florida Power & Light, the single largest electric utility in Florida, has been working on Y2K since 1995, says Sol Stamm, FP&L's Year 2000 project manager. "We fully recognized that it was an issue — and a big issue," he says. "A challenging one, but certainly one that's manageable." He estimates they have 80 full-time positions working on Y2K and several hundred others with some kind of part-time responsibility.

Like other electric companies in Florida, FP&L expects to complete all five steps, including testing, by June 30. "That will leave us the full second half of the year to drill and train for contingencies," Stamm says.

The North American Electric Reliability Council (NERC), a voluntary regulatory agency, is responsible for the grid on a national basis, says Stamm. They were given the task by the Department of Energy of reporting on the industry's readiness as a whole.

"NERC has asked for two drill dates," he says. One was in April and the other will be in September. The second will be what he calls "a full dress rehearsal," including turning the calendars ahead to 2000.

HELLO? HELLO?

BellSouth, the largest provider of telecommunications in the state with over six million access lines, and GTE, the second largest, are assuring their customers that they are on schedule to be ready by June 30 of this year.

Clay Owen, Year 2000 spokesman for BellSouth, says the company established a Year 2000 program management office in 1995 for all of BellSouth International — including local, mobile, and wireless telecommunications services and wireless digital television. Over the life of the project, Owen estimates the company will spend between $250 to $350 million. BellSouth has between 500 to 1,000 people a day working on Y2K and has even appointed a vice president of Year 2000.

But the key to making it work has been communication with other telecommunications companies. "I can't emphasize enough the amount of cooperation we've had with the rest of thetelecommunications industry and the testing we've been able to do," he says."Competition is not an issue here."

The Network Reliability and Interoperability Council is the technical organization within the telecommunications industry which is keeping tabs on Y2K readiness. Industry members also formed a new group — TELCO Year 2000 Forum — which consists of eight local telephone companies that make up 90 percent of access lines (local calls) throughout the US.

The group has conducted testing, especially on 911 calls. Owen says, "The results were outstanding." They logged a 97 percent success rate in the test, and he says the few glitches they had were corrected.

"What we're finding is that the telephone system is very robust," he says. "It's always been self-healing. If something goes wrong, the call is re-routed automatically, so we're finding that the system works just as it should, even with Y2K circumstances."

LOOK! UP IN THE SKY!!

So everything seems to be coming together on land, but what of the "Chicken Little" scenario? Will the sky and everything in it fall?

Safe skies are actually a two-part concern. First, the airlines have to be ready. And second, the airports and air-traffic-control systems have to be ready.

Delta, like other airlines, has followed the five steps and is now making plans for the "what if?"

"There are no safety-of-flight issues at all," assures Kip Smith, manager of Delta's corporate communications. "Airplanes will be able to take off and fly."

Jan Turner, a specialist with Delta's Year 2000 program, explains that very few systems on board rely on year logic. On an airplane, programming involves the day or month most of the time. "An incorrect date is not going to affect the radar or weather," she says, "so it's not going to make a plane fall out of the sky."

Addressing the second challenge — receiving assurances that the airports and their air-traffic-control systems are functioning correctly — has been a job of

For the latest on Florida infrastructure industries and Y2K check out the following Web sites to read the latest on the state of Y2K readiness from Florida's vital infrastructure industries.

Florida Public Service Commission:
http://www2.scri.net/psc/psc_y2k.html

Florida Power & Light (choose "About FPL"):
http://www.fpl.com/

Florida Power Corp:
http://www.fpc.com/flpowerly2k/

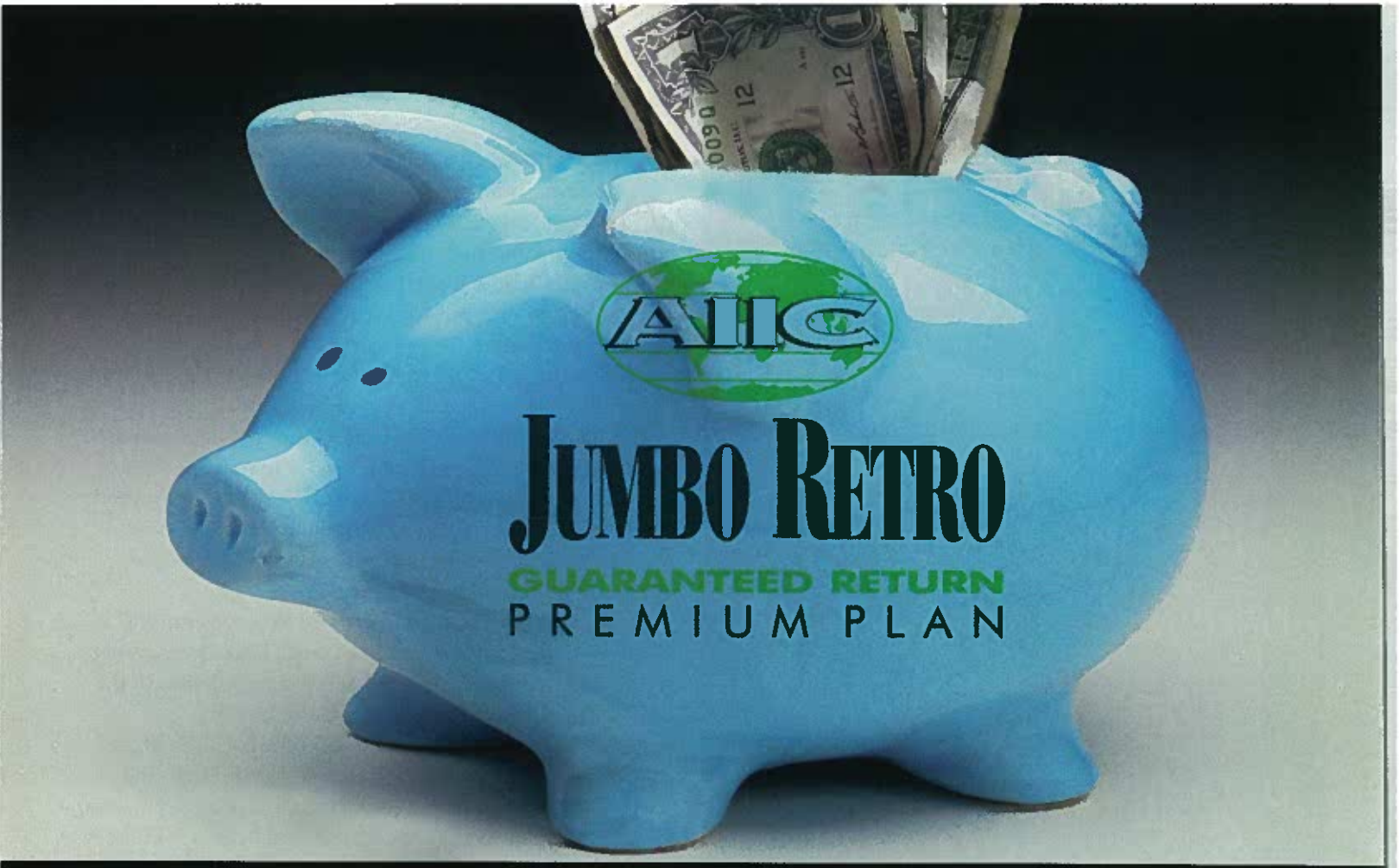
TECO Energy:
http://www.tecoenergy.com/energy/ENY2KHm.html

BellSouth:
http://bsonline.bellsouth.net/year2000/

TELCO 2000 telecommunications trade group:
http://www.telcoyear2000.org/

North American Electric Reliability Council:
http://www.nerc.com/~y2k/y2k.html

Network Reliability and Interoperability Council:
http://www.nric.org/



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$5,000 to $10,000	6%	5%	3%	3%		
$10,000 to $20,000	8%	6%	5%	3%		
$20,000 to $30,000	10%	8%	6%	5%	3%	
$30,000 to $50,000	12%	9%	7%	5%	3%	
$50,000 to $75,000	15%	12%	9%	6%	3%	
$75,000 to $100,000	17%	13%	10%	6%	3%	
Greater than $100,000	20%	15%	10%	6%	3%	

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FIELDS CITED A RECENT EXAMPLE of a couple who withdrew $20,000 from their bank and buried it in their backyard. Somebody else discovered the buried treasure, and now the couple is $20,000 poorer.

industry trade groups. They're collecting data from airports, government agencies, and common suppliers on behalf of all airline members.

"That's the information we use to determine how well any entity is doing with a program," Smith says. In turn, the airlines are sharing information on their own readiness with the trade groups.

Airlines with the largest presence in any airport are spearheading efforts there by working with the airport authorities. And as airlines are putting together their flight schedules, they'll be looking closely at the airport data.

"Any place we're not certain of, we may still plan to fly there," Smith says, "but that will be based on their ability to confirm information on their program [at a later date]. Our first priority will remain the same and that is safe operations. And everyone from the ramp agent who loads the bag to the pilot who flies to the dispatcher in Atlanta — if they're not comfortable with an aircraft for any particular reason, it does not go."

READY OR NOT, HERE IT COMES

Although some might be tempted to use Y2K to their competitive advantage, vital infrastructure industries are pushing that approach aside. "We do not believe that Y2K is a competitiveness issue," says Mike Fields, senior vice president of NationsBank. "It is a collaborative issue."

To date, the banking industry has invested $8 billion to address Y2K.

For NationsBank, Fields says, "Our goal is to prepare our company for global readiness — to make it a non-event for our customers." The company has committed in excess of $411 million to achieving Y2K readiness. "At any one time, we have as many as 3,000 people working on the project," he says.

Regulators, including the Federal Reserve and the Federal Deposit and Insurance Corp., have been giving the banking industry target dates for completion of the steps and most expect to be ready by July 1.

Still, Fields expressed concern over the backlash of the doomsayers, as it could cause some painful learning experiences. Fields cited a recent example of a couple who withdrew $20,000 from their bank and buried it in their backyard. Well, guess what? Somebody else discovered the buried treasure, and now the couple is $20,000 poorer.

That's why fixing Y2K problems is just part of the equation. Customers must also be reassured that they can trust their banks, their telephone companies, their utilities. Associated Industries of Florida (AIF) and its member companies are joining with Gov. Bush and Team Florida 2000 to get the good news out to the people.

"There are a lot of people out there who are using a supposed crisis to draw attention to themselves," says Jon Shebel, AIF's president and CEO. "We're going to help make sure that the other side gets its story out, too. I think we're all going to wake up next New Year's Day to find out that Y2K will be the biggest non-story of the next millenium."

Like the industry representatives, Team Florida 2000's Scott McPherson expresses confidence in the state's Y2K readiness. "We feel very comfortable with the utilities right now," he says. "And whenever or wherever we have good news, we'll publicize it."

The greatest testimony for confidence about Y2K is perhaps best reflected in utility company officials' plans for next New Year's Eve.

As one remarked, "Put it this way: I don't plan to cancel my trip to Paris for the New Year." ■

Julie S. Bettinger is a free-lance writer in Tallahassee, Florida (e-mail: jbettinger@flsheriffs.org).

by julie s. bettinger

Who's Talking Who's Not

THE DANGERS OF SEMANTICS AND SPIN

When inquiring if a major supplier is ready for Y2K don't be surprised if you never hear the term "compliance."

"The word 'compliance' implies that every single piece of all their equipment has been remediated," explains Brenda Buchan with Florida's Public Service Commission. "For some larger companies, they may not have time to do everything. Parts of a business that ensure continuous operation of service may be compliant, but there will be areas that have much lower priority." In some instances a company may just build a firewall as a temporary measure to assure that their data are not contaminated; therefore, they can't claim complete company-wide compliance.

"Words can be used against us, there's no doubt about it," says Mark Grossman, chair of the computer and Internet law department of the Becker & Poliakoff law firm and author of the column "Cyberlaw." Everyone is intimidated by all the predictions of potential litigation. Still, Grossman says, "The key to success is dialogue."

Industries and companies are all so interdependent, he says, that not being willing to share information can be a dangerous game. Plus, he says, "No one gets information unless you give information. It's kind of like 'show me yours, and I'll show you mine.' "

Grossman suggests businesses get to know the new federal Y2K act that defines Y2K safe harbors. "It can provide significant protection if you comply with the act," he says. He suggests consulting legal counsel to assure that all steps are followed.

Still, some city and county entities have been told by their legal counsel not to respond when asked if they are Y2K ready because the response can be used against them in court, says Margo Hammar, assistant vice president of governmental affairs, GTE Service Corp.

But vital infrastructure industries have taken another tack: Instead of assuring readiness, they respond with details about the readiness effort and let that speak for itself.

"Everyone wants to attach his own connotation to compliance, but you can't own up to anyone's definition," says Joe Wiley, director of information systems for TECO Energy. "What we try to address is talking about the positive work being done, the good industry cooperation. The issue becomes, 'Can we provide reliable service?', and we can."

TECO, which is in the business of supplying natural gas, electricity, transportation, and coal, is one of the few companies that has been overtly proactive in its efforts to alleviate fear and to fend off media speculation.

"We have been extremely cooperative with the press on this issue," says Mike Mahoney, assistant vice president of corporate communications and chief spokesman for TECO Energy and its subsidiaries. "If you're not verbal and visible, then what you are is secretive. And if you're secretive, the perception is that you're hiding something. And if you're hiding something, that makes the media want to zoom in even more."

Mahoney has been traveling the media circuit — or as some think of it, circus — telling TECO's story and generally just trying to do damage control.

"I can tell you for a fact that the real fear and panic and paranoia are coming from the Christian Broadcasters of America," Mahoney says. "They're spending several hours a day promoting the link between the coming of the end of the world with the millennium theory. They're advocating all kinds of bizarre proposals for the viewing public."

Mahoney has also been invited to speak at churches, but he says for every few minutes he is given to reassure the audience, the congregation gets an hour of gloom and doom. "The pastor will give a sermon on how Y2K is a clear example of how badly our society has fallen and how close we are getting to the true second coming," he says.

And the mainstream press isn't much better. "They only look at Y2K as news," he says. "The news media want to take advantage of the deep fear and exploit that. All [the] media want is crisis." With the announcement that Hollywood will be launching two films about Y2K in the fall, he says the hysteria's not likely to go away. "It's too perfect a media issue. 'Y2K' is easy to say. It's catchy and you don't have to say a lot to generate panic and paranoia." ■

PHOTO: DENIS COTT

by jacquelyn horkan, editor

Pursuit of Happiness

[The moon] seemed almost as if it were showing us its roundness, its similarity in shape to our earth, in a sort of welcome.

Neil Armstrong

July 16, 1969 was one of those hot, humid Florida days. The kind where, as one observer described it, the air felt like a silk cloth moving across his face.

Nearly one million spectators gathered in the highways and beaches around Cape Canaveral to watch the launch of the Apollo 11 journey to the moon. Representatives from the international news media — 3,500 of them, including 118 from Japan — recorded the event for crowds gathered across a blue and white globe that suddenly seemed smaller.

The race to the moon was a grand challenge in a war of ideologies, and the astronauts were its bold adventurers. And then it happens. At 10:56 p.m. on July 20, a man steps off a ladder and onto the surface of another world.

Soon the word "Apollo" would no longer seem as compelling as other words. Vietnam. Kent State. Watergate. But in the war of words, the ones spoken on July 20 still hold the power to quicken our blood: "That's one small step for man, one giant leap for mankind."

PHOTO: NASA

Caren Snead IS BUILDING A BETTER TOMORROW

Doris Harrell, right, president of Positive Images, shows Caren Snead some of the clothing donations available for clients entering the workforce.

Caren Snead, associate counsel at JM Family Enterprises, frequently shares her time to benefit community organizations like the YMCA, Women in Distress and Florida Rural Legal Services. Recently, she helped Positive Images of Broward County, Inc. establish its by-laws. Because of her knowledge and expertise in the legal profession, Positive Images will continue to follow its mission to assist women in the transition from welfare to work by enhancing their image through professional dress and promoting personal and career skills development. Caren is preparing Florida for a brighter future. A part of Florida for 29 years, JM Family Enterprises, Inc. is a diversified automotive corporation. Beginning as a distributor of Toyota cars and trucks, we have grown to include vehicle distribution, finance, warranty and insurance services, and retail car sales. With nearly 3,000 associates, like Caren Snead, JM Family Enterprises is committed to building a better tomorrow.

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