FLORIDA BUSINESS INSIGHT

JULY AUG. 1998

The Magazine Of Free Enterprise & Public Policy

INSIDE:

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FLORIDA BUSINESS INSIGHT
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July/August 1998
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ON THE COVER:
Helping the next generation grow into the business.

features

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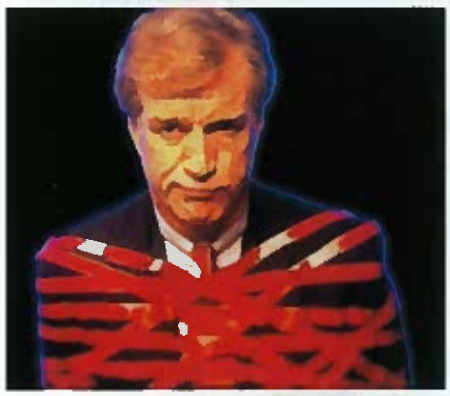

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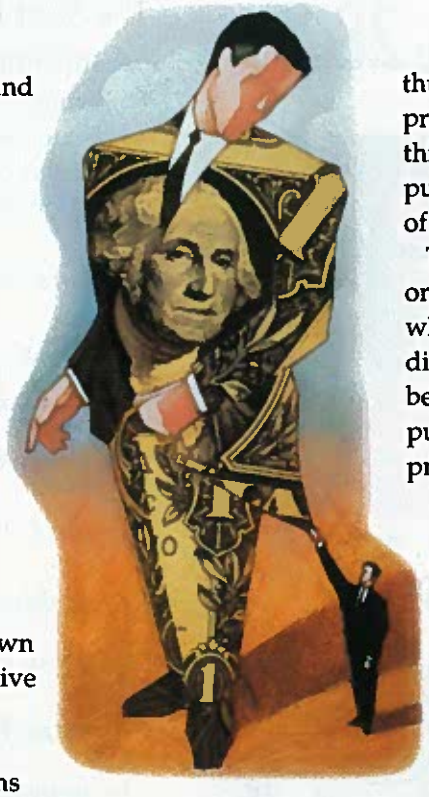
columns

by jon l. shebel, publisher

For Public Consumption

Hollywood director Quentin Tarantino is making his Broadway debut in the play "Wait Until Dark." A *Newsweek* magazine theater critic panned both Tarantino's performance and his impudence at learning the craft of acting on a Broadway stage: "He's having fun at the public expense."



What's interesting — and revealing — about this statement is the idea expressed by the phrase "public expense." As far as the reviewer is concerned, since he hates the performance everyone must hate it and no one would voluntarily pay to see it. Therefore, people are coerced into paying the ticket price, slaves to Tarantino's egotistical desire to act.

This is the watered down version of Marxism we live with today in America. There is no free market; only coercive transactions between "big business" and the little guy, the consumer so lovingly fretted over by the likes of Ralph Nader and his trial bar comrades.

Once upon a time, a public expense was something on which tax dollars were spent. In the reviewer's hands, it means that there are no private expenses, and thus no private property; everything is in the public sphere of control.

Tort reform is one of those issues where the lines of distinction between what is public and what is private have been blurred. In the 1998 session, the business community finally succeeded in getting passed a comprehensive reform of the state's civil justice system, only to have the governor veto the bill.

In his veto message, the governor justified his action by writing, "If victims do not receive adequate compensation for their injuries by wrongdoers, Floridians overall will pay." That would be fine if it were an accurate description of what the bill did.

The bill attempted to address those aspects of the system that cause damages to become dependent upon ability to pay rather than wrongdoing. Nothing in its provisions absolved wrongdoers of their duty to pay for their wrongdoing.

If the wrongdoer has no money to pay damages, that is a horrid and unfair burden on the victim. When horrid and unfair things happen — as they, sadly, frequently do — others step in with solace and help. Sometimes those others are relatives, friends, church members. Sometimes they are government employees.

The tort system seems to be the only area where liberals see a need and don't want to fill it with a government program. In this situation, they'd rather leave the helping of others to someone else. That someone else inevitably comes equipped with a deep pocket that, coincidentally, can provide a cash infusion for the bottomless pocket of some member of the trial bar.

With the goal of getting money to victims (and their lawyers), the definition of wrongdoer must be expanded broadly enough until it catches up someone who can pay the damages. What difference does it make if the one who's doing the paying did nothing wrong (or only partially contributed to the wrong)?

It's all for the common good. At the public expense. And we don't really pay for all this generosity any way. Do we? ■

Jon L. Shebel is president & CEO of Associated Industries of Florida and affiliated companies.

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by frank t. white

Subsidizing Fraud

It's one of the economic facts of life that many choose to forget: when government directly or indirectly increases the cost of doing business, consumers end up paying more because businesses just pass the cost on through. Taxes are one of the costs directly imposed by government; insurance fraud is one the costs indirectly imposed. When anti-fraud laws are not effectively enforced, insurance cheats get rich at the consumers' expense.

Earlier this year, the statewide grand jury empaneled to investigate insurance fraud issued a report on workers' compensation premium fraud. The report honed in on the magnitude of the problem, the lack of adequate enforcement by the compliance arm of the Division of Workers' Compensation, and the fact that "the burden falls not so much on the insurer, but on the legitimate business that is paying its fair share."

How do we pay for fraud? Let the grand jury count the ways.

Unscrupulous employers who either do not buy any insurance whatsoever or buy inadequate coverage by engaging in premium fraud secure a tremendous economic advantage over their competitors. This advantage manifests itself in one (or more) of three ways. First, if a business sells products, it will be able to undersell its competitors. Second, if it bids on contracts, it will be able to underbid its competitors. Finally, the business can afford to pay higher salaries and thereby lure away competitors' more experienced employees, albeit without offering compensation coverage. Eventually, legitimate businesses will face a difficult and depressing choice. They will either be driven out of business or join the ranks of the unscrupulous and stop paying all or part of the workers' compensation insurance in order to compete. As more and more businesses stop paying insurance, the rates eventually will be driven up even further for those remaining legitimate businesses, thereby increasing the pressure on them to also stop buying insurance so that they may survive. This then becomes a vicious cycle.

Spurred by these findings, the Legislature enacted further anti-fraud legislation this year, in part based upon some of the grand jury's recommendation. The new law aims at more clearly defining an independent contractor and requires an independent contractor to execute a sworn affidavit to that effect. Furthermore, an employer who coerces his employees to classify themselves as independent contractors will now be guilty of criminal offenses.

Additional responsibilities and powers were given to the Division of Workers' Compensation to enforce coverage requirements, including investigation and subpoena powers. The division may also issue stop-work orders should an employer fail to show proof of full compliance within 24 hours of a division order to do such.

Associated Industries of Florida applauds these efforts and only hopes that the division now feels empowered to detect and deter fraud. It is estimated that workers' compensation premium fraud is costing the legitimate businesses of Florida over $500 million per year in higher premiums. This figure doesn't even account for the lost business opportunities to the honest employer.

As a final note, suspicions of premium fraud should be reported to the division on its toll-free fraud hot line, (800) 378-0445. ■

Frank T. White is executive vice president and COO for Associated Industries Insurance Services, Inc.

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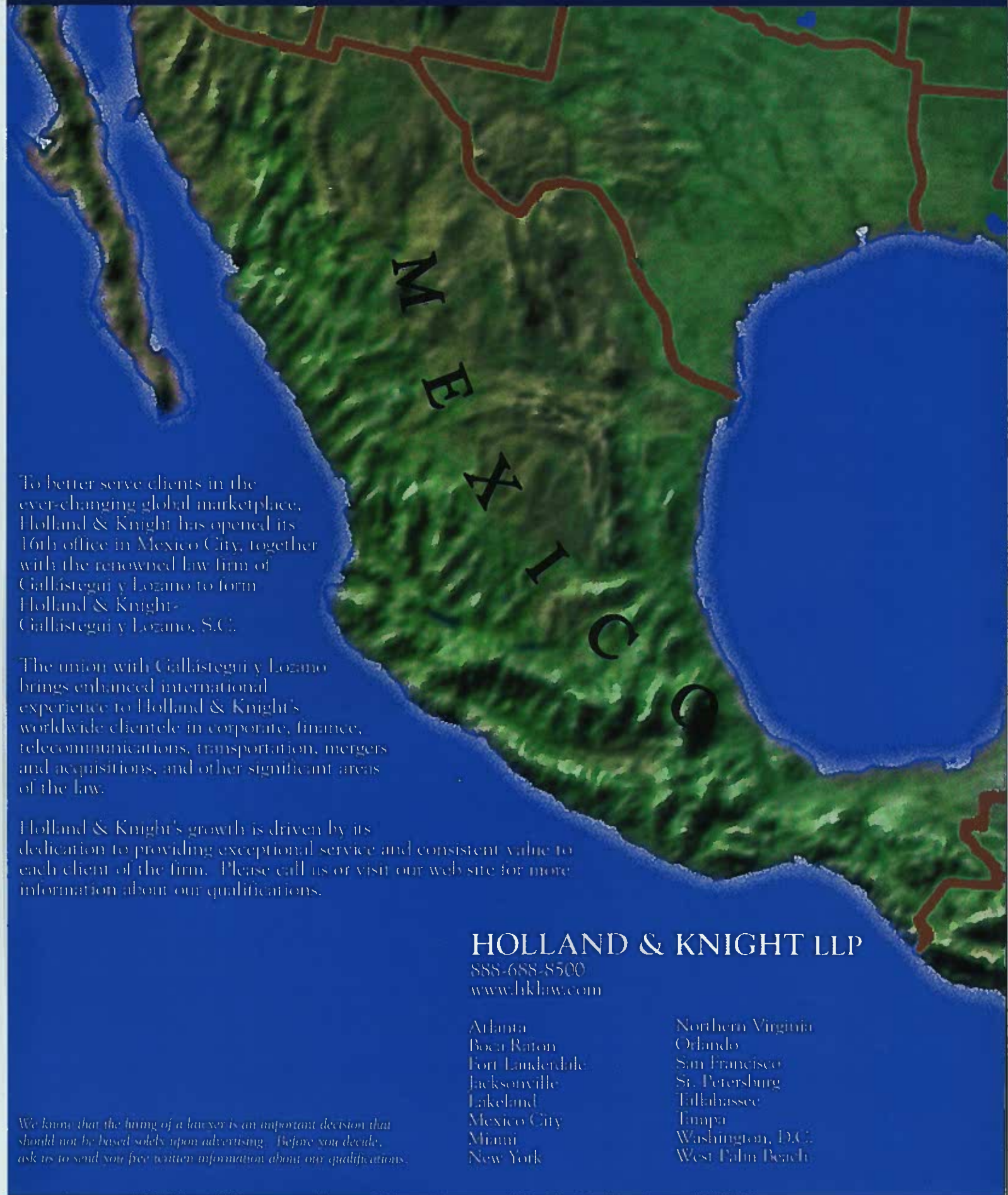

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by marian p. johnson

Something Old, Something New

On a morning commute not too long ago, I suddenly realized how little my professional life has changed in the last 20-plus years since I first became involved in the business of running political campaigns.

Or, for that matter, how little campaigns have changed since Abraham Lincoln designed his brilliant campaign plan.

- Know who is registered to vote.
- Know who is going to vote.
- Know who is going to vote for you.
- Make sure those are voters who vote on election day.

Today we call that strategy GOTV — get out the vote. One of my most memorable GOTV efforts was in a North Florida county commissioner's race. The year was 1976. Jimmy Carter was squaring off against Gerald Ford in the presidential contest and I was in charge of Okaloosa County's phone bank operation for all Republican candidates.

Phone banks were still a novelty then. We had 10 lines. It was my job to keep every line operating, 12 hours a day, six days a week. I spent most of my time finding volunteers to man the lines (we couldn't afford to pay people), assigning them their hours, and then trying to convince them to be there when they said they would.

Every single GOP voter in Okaloosa County who had a phone heard from us. We gave them a simple message: If Okaloosa County is to ever elect a Republican, every Republican is going to have to vote. Then we put together a list of likely Democratic supporters and called all of them.

We would tell them our candidate's feelings about an issue then ask them whether knowing his position made them more likely to vote for him. An affirmative answer earned them a follow-up phone call. The calls to the Democratic voters served two purposes. It gave us a chance to tell them about the candidate, and helped us learn who his potential supporters were. On election day, we called them to remind them to vote and to offer our help. Did they need a ride? Someone to watch the kids?

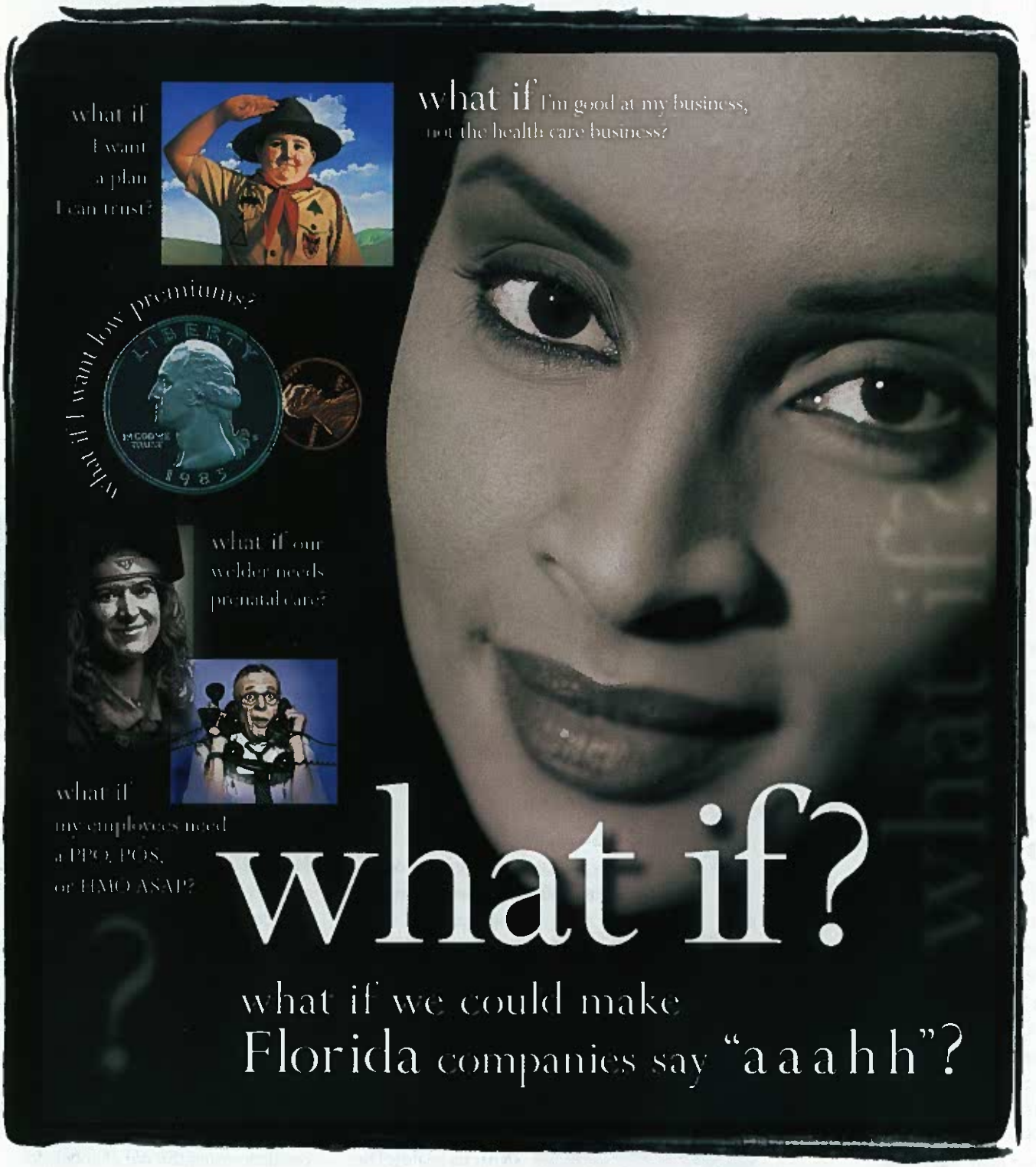
It was a close race, but in the end there was a Republican county commissioner — by the slimmest of margins, 36 votes out of a total of 31,224 votes cast. Without that phone bank, there wouldn't have even been a contest.

When Abraham Lincoln first took national office (in Congress in 1847), Alexander Graham Bell was a nine-month old infant in Scotland.

Lincoln's assassination predated Bell's first telephone call by 11 years. One hundred years after the invention of the telephone, the political genius of the one man combined with the tech-nological mastery of the other helped a long-shot candidate win office in a quiet rural county.

The technology doesn't really change what we do, but how we do it. The 1998 campaigns I'm now preparing for are going to rely on many of the same tactics I used in 1976 (and that Lincoln used 150 years ago). The tools are different and we know how to use them better, but the same simple strategy still applies: know who is going to vote for you — and make sure they do it. ■

Marian P. Johnson is senior vice president of political operations for Associated Industries of Florida Service Corporation.



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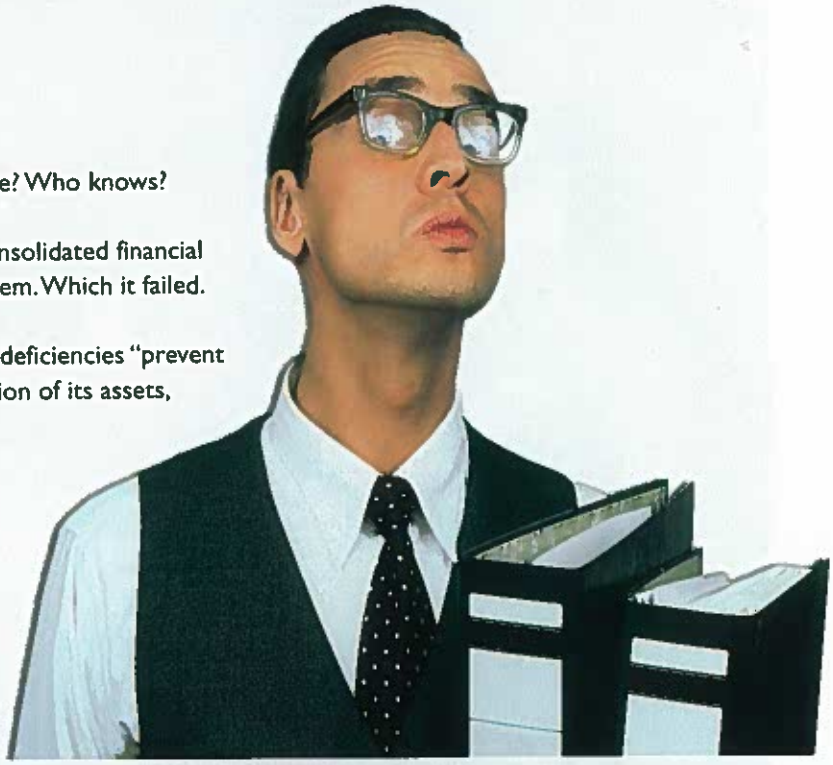
compiled by jacquelyn horkan, editor

Money, Money, Who's Got The Money?



How big is the deficit? Will the budget really balance? Who knows? Certainly not the feds.

Earlier this year, the federal government prepared consolidated financial statements and put itself through a rigorous audit of them. Which it failed. Abysmally.

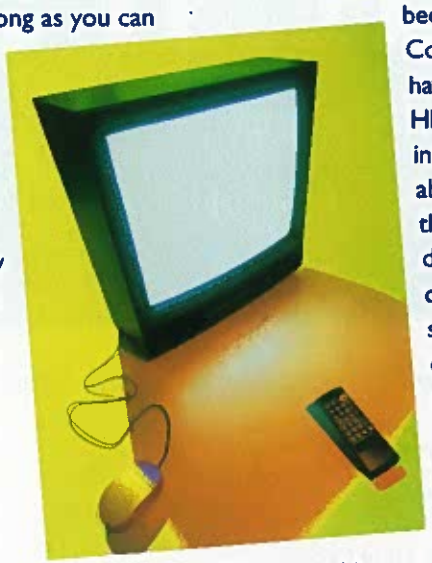
According to the General Accounting Office, system deficiencies "prevent the government from accurately reporting a large portion of its assets, liabilities, and costs."

The auditors cite the government's inability to:

- properly account for and report billions of dollars of property, equipment, materials, and supplies
- properly estimate the cost of most federal credit programs and the related loans receivable and loan guarantee liabilities
- accurately report major portions of the net costs of government operations
- determine the full extent of improper payments that occur in major programs and that are estimated to involve billions of dollars annually
- properly account for billions of dollars of basic transactions, especially those between government entities
- ensure that the information in the consolidated financial statements is consistent with agencies' financial statements
- ensure that all disbursements are properly recorded
- effectively reconcile the change in net position reported in the financial statements with budget results ■

Must-See Budget Deal

If you're thinking of buying a new television, hold off as long as you can because in a few years the old boob tube will be obsolete.



Congress has ordered the end of all television broadcasting in the current analog format by 2006, a scant eight years from now. Replacing analog will be the digital format High Definition Television (HDTV). The digital format offers cleaner, crisper pictures and sound on a theater-style wide screen. It also allows for the transmission of five times the amount of information, promising the long-awaited integration of television with the Internet.

The only problem is, when analog is switched off, 250 million televisions will become useless. Consumers will either have to buy a new HDTV set — a 19-inch set will cost about $5,000 — or they can purchase a decoder box to convert the HDTV signal to analog. The converter box will transform the longer, narrower HDTV picture into letterbox format with black bars on the top and bottom.

It gets curiouser and curiouser. Eight years is an unrealistic time frame for construction of the infrastructure necessary for the HDTV transmissions. State governments will probably not be eager to pay for upgrading their public broadcasting stations to the new standards. And just wait until consumers (a.k.a. voters) find out what a hefty hunk of change they'll have to fork out for a new TV set.

So why is Congress doing this? To balance the budget. Under the deal, broadcasters are getting new channels to transmit digital signals as they continue using the old channels for analog transmissions. As the analog channels are surrendered over the next eight years, they will be auctioned off, yielding a hoped-for $5.4 billion in sales, an estimate that some industry experts say is ridiculously over-inflated.

If only all that creative effort that's going into faking a balanced budget could be harnessed for the good of mankind. ■

PHOTOS: (TOP) TMP; (LEFT) MICHEL TCHEREVKOFF; (RIGHT) CHIP SIMONS

Diversity By Any Means, Part I

The Equal Employment Opportunity Commission must have been shocked when Attorney General Bob Butterworth fought back against accusations of job discrimination. After all, government agencies in Washington didn't raise a fuss when rolled by the diversity police.

As reported in the June 8, 1998 edition of the news magazine *Insight*, the Food and Drug Administration no longer requires applicants for secretarial positions to demonstrate knowledge of the rules of grammar or the ability to spell accurately. These qualifying factors, apparently, are unfair to "underrepresented groups."

At the U.S. Forest Service a lack of female firefighters has resulted in the posting of job announcements that advise, "Only unqualified applicants may apply" and "Only applicants who do not meet job requirement standards will be considered." Apparently the Forest Service could not find enough unqualified applicants so some key positions have been left vacant. ■

Diversity By Any Means, Part II

The University of California at Davis proudly trumpets its diversity fervor in its catalog: "We confront and reject all manifestations of discrimination, including those based on race, ethnicity, gender, age, disability, sexual orientation, religious or political beliefs, status within or outside the community."

So what happened when a male admissions counselor expressed his pride in his Scottish heritage by wearing a kilt to work on National Tartan Day? He was sent home and warned to leave his skirt in the closet, as it were. ■

Pop Quiz

Compliments of the American Tort Reform Association, here's your chance to test your knowledge of the absurdity quotient in our modern civil justice system. Get a perfect score and earn a chance to cast two votes in November for a governor who won't veto tort reform.

Frivolous lawsuits have led manufacturers to come up with some pretty ridiculous warning labels. Can you tell which of the following examples of warning labels are truly absurd and which are false? (Answers at right of the page.)

True ○ False ○ **1. Batman costume**
PARENT: Please exercise caution - FOR PLAY ONLY: Mask and chest plate are not protective; *cape does not enable user to fly.*

True ○ False ○ **2. Beach hat**
This hat is not a substitute for sunscreen; prolonged exposure to the sun can lead to skin cancer.

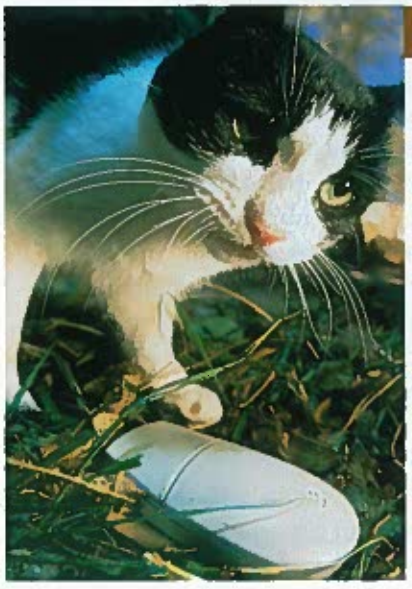
True ○ False ○ **3. Plastic sled**
Users should wear helmets and avoid trees, rocks, or manmade obstacles. This product does not have brakes.

True ○ False ○ **4. Set of knives**
These knives are precise instruments designed for cutting food. They should not be used to cut materials such as plastic and wood or to puncture cans. Improper use can lead to serious injury. As with all sharp objects, caution is advised.

True ○ False ○ **5. Half sheet of plywood**
Wood is an inherently dangerous material. Prolonged exposure to its dust should be avoided. *Exposure to heat can cause this product to ignite.*

True ○ False ○ **6. Beach towel** (designed to stay in place on breezy days)
During a hurricane or other severe weather conditions this product should not be used to secure yourself or anything else of value.

Answers: 1. True; 2. False; 3. True; 4. False; 5. False; 6. True.



Not Just Any Pad

MIT researchers are developing a "smart mousepad" that turns that unassuming slab of plastic into a powerful information tool for consumers and a hot marketing tool for manufacturers.

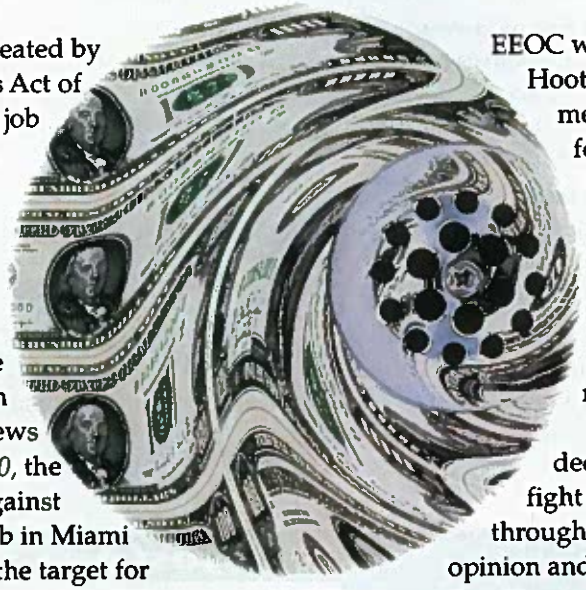
How it works: A product label would include an electronic tag that, when placed on the mousepad, would call up the manufacturer's Web site where the consumer could access product information or promotions.

Who needs a better mousetrap? Give us the pad. ■

by kathleen "kelly" bergeron

EEOC: A Discriminating Bureaucracy?

Is the Equal Employment Opportunity Commission (EEOC) on a witch hunt? Why is it that House Speaker Newt Gingrich testified in March that he would agree to support a significant budget increase in exchange for major reforms and a tighter rein on EEOC activities?



The EEOC, created by the Civil Rights Act of 1964 to combat job discrimination, has been the object of growing controversy over the last several months. On the April 21 edition of ABC-TV's news magazine, *20/20*, the EEOC's case against Joe's Stone Crab in Miami Beach made it the target for some sarcastic criticism: "The government is on a very important and vital mission. Federal officials think that when you sit down in a restaurant, you should be served by equal numbers of men and women. Now, that's a problem for some businesses, since equal numbers of men and women don't always apply for the same job."

The show also criticized the EEOC for investigating sex discrimination in the hiring practices of another restaurant (Hooters) and a women's clothing store (Lillie Rubin). The EEOC wanted Hooters to hire men to serve food and it wanted Lillie Rubin to hire men to assist females in dressing rooms. Hooters decided to fight back through public opinion and an advertising campaign. It seems to have worked because the restaurant hasen't heard from the EEOC. The government also backed down in the Lillie Rubin case. Unfortunately, both businesses spent considerable amounts of money during the investigative process. See, that's the kicker. Win, lose, or draw, the employer pays money regardless of whether the case results in litigation.

In December 1997, the EEOC began an experiment with "employment testers." Under the experiment, pairs of job applicants with identical qualifications but certain different characteristics (i.e., race, sex, physical ability, national origin) apply for the same jobs. The experiment is designed to determine whether employers illegally discriminate against applicants in protected classes. Sound like entrapment to you? Well, currently the courts are divided on the legality of employment testers. The use of testers assumes guilt on the part of the employer where there has been no indication of discrimination.

The EEOC's backlog of cases is currently 65,000. The 1999 budget proposed by the Clinton administration would increase funding from $242 to $279 million. How is it that the EEOC has a backlog of cases yet has the time to investigate the offenses manufactured through the tester experiment? Why does it need more money if it has the resources to manufacture offenses? Is this the best use of taxpayers' money?

What the EEOC fails to recognize is that modern human resource management has led to the creation of many proactive programs by employers that ensure fair and equitable treatment in the workplace. Apparently, EEOC bureaucrats can't accept the existence of the transformation of the last 30 years that has made discrimination a cultural oddity, perhaps for fear that the gains made threaten their own employment.

Politicians and business people must remain on guard against the vigilante justice promoted by the EEOC that invents discrimination for it to combat. ■

Kathleen "Kelly" Bergeron is executive vice president and chief of staff of Associated Industries and affiliated corporations.

PHOTO: CHRIS MICHAELS

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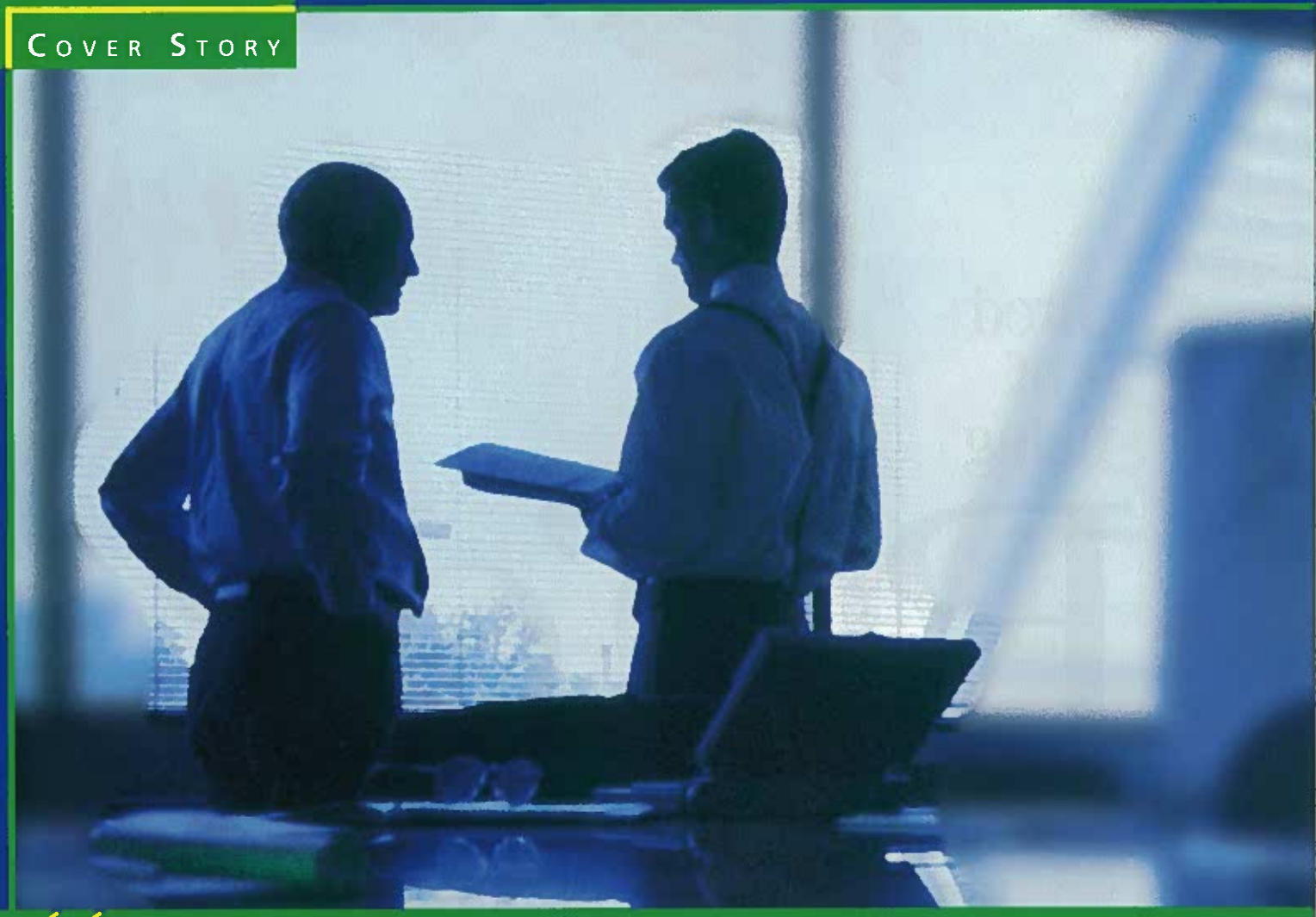
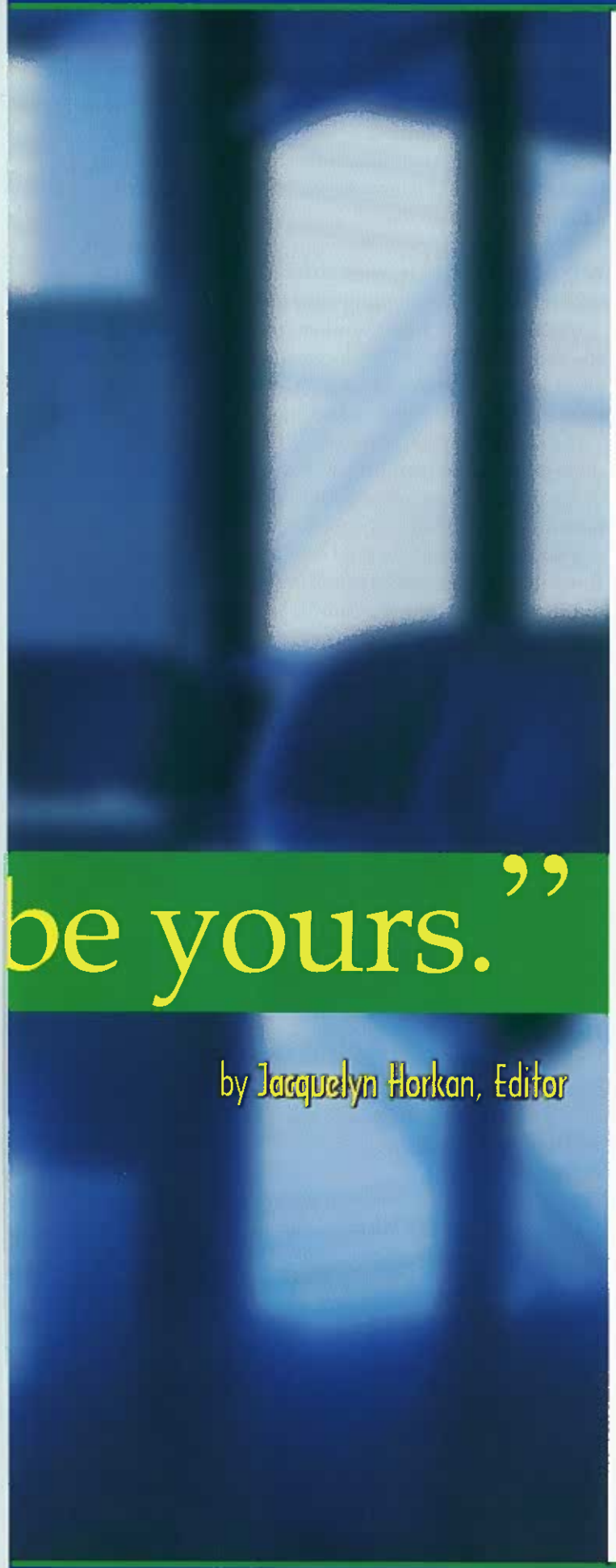


"One day this will all be The Next Generation's"



be yours."

by Jacquelyn Horkan, Editor

It's a part of the lexicon of the American Dream. Working for yourself. Owning your own business. Building something to pass on to the next generation.

The only problem is, a lack of planning can turn "One day this will all be yours" from promise into curse.

The challenges a company founder faces in turning his creation into an ongoing legacy are manifold. Estate taxes can consume up to 55 percent of the business's worth once the founder passes on. Rivalries between siblings can destroy their birthright. And how does a parent train a child to keep the business growing and thriving?

According to the American Family Business Survey, the owners of up to 20 million family-owned businesses plan to retire in the next five to 10 years, involving a transfer of $350 billion to $450 billion. If the law of averages holds, fewer than 35 percent of those companies will survive into the second generation; fewer than 15 percent will make it to the third generation.

Beating those odds means making a start on succession preparations today. It means taking time out from launching new products, attracting new customers, and solving day-to-day crises to plan for the future. And it means grooming your successor, whether he's five or 50.

SUCCESSION SUCCESS

This issue of succession planning has been a hot news item in the financial world lately, and not just because of the upcoming transfer of wealth predicted by the American Family Business Survey.

Earlier this year, Disney shareholders staged a rebellion — ultimately unsuccessful — against the company's board of directors because the board would not force management to develop a succession plan. AT&T's chairman's inability to choose a successor generated a year's worth of unfavorable publicity. Frank Sinatra's death cast a spotlight on family squabbles over who controlled the licensing of the crooner's recordings and merchandise.

For most family-owned businesses, the problems involved in making the transition to the next generation are less newsworthy but more potentially devastating; without proper planning the family could easily lose the business to bankruptcy or estate taxes.

At the very least, succession planning for a family-owned business must include an estate plan. The world of estate planning is accompanied by its own arcane lingo of SCINs and GRATs and GRUTs, and the high priests (lawyers and CPAs) to perform the necessary rituals.

The point of such a plan is to get more of your estate into the hands of your heirs and less into the hands of the IRS. That becomes doubly important because a company is not a liquid asset and paying estate taxes on it can wipe out a family's available cash.

Joel Bronstein, a St. Petersburg lawyer with Bronstein, Carlson, Gleim, and Smith advises his clients on how to "shift the benefit of their business interest to their children and cut out the IRS. Legally of course."

Some of the most common forms of shifting the business to the next generation include:

- gifting — the owner transfers the business to his children in annual increments ($10,000 per individual a year)
- life insurance policy — a policy is bought, commensurate with the value of the business, to pay for the purchase of the business upon the owner's death
- buyouts — a plan for the children to buy the business from their parents thereby ensuring a steady stream of retirement income for the parents
- family limited partnerships — all family members become equal partners in the business and the parents retain control until retirement.
- trusts of various kinds

Bronstein urges his clients to begin planning for the transfer early on. "Value creates tax. The earlier you do something in the life cycle of the business, the lower that value probably is, and the more you can do with less tax consequences."

By planning ahead, an owner can start giving the business away before it appreciates, thereby reducing the amount subject to the hefty estate tax without losing control of the company.

There is another aspect of business succession planning beyond the mere transfer of ownership. That is the transfer of management. This is the area that involves sticky emotional issues such as the controversies that arise between heirs who work in the business and those who don't. Those who work for the company draw salaries and perks — and sometimes the resentment of their non-working siblings. And the two groups often clash over management issues and distribution of dividends.

Formal estate planning can eliminate, or at least minimize, the possibility of antagonism. For example, non-working heirs, instead of inheriting shares in the business, could inherit other assets. Or plans could be made for the working heirs to buy them out after the patriarch's death.

The discipline of estate planning — and the objective insight of financial advisors — can also help a business owner confront the biggest question: Who's going to take over once I'm gone?

IT'S A FAMILY AFFAIR

Long a fixture in cities and towns across the Lower South, W.S. Badcock Corp. is the quintessential family business. The home furnishings company was begun in 1904 and is now in the hands of the fourth generation of Badcocks.

In November of 1996, the third-generation patriarch, Wogan S. Badcock, Jr., passed away at the age of 64, leaving three 30-something sons to take over.

"Dad should've lived another 10 years," says eldest son Wogan S. "Wogie" Badcock III. "We don't retire at 65, at least my forefathers didn't. They worked until 85. So we probably got cheated a little."

The elder Badcock, suffering from a progressive disease, knew he wouldn't survive to the advanced age of his predecessors and carefully groomed his sons to take his place. What he neglected to do was select the one son who would succeed him as president and CEO. It would have been a grievous failing in some families, but the Badcocks enjoy a carefully inculcated family ethic that keeps family rivalries from boiling over into the business of the business.

"We all understand that if we have infighting, we lose the valuation in our business," says Wogie Badcock.

Instead of losing that valuation, the Badcocks have hired an executive search firm and are looking outside the family for the next CEO. Badcock says that one day someone in the family may take over again, but for now they are seeking someone to help them "solidify our ideas, our growth patterns — to teach us."

The Badcocks are proof that the right kind of family culture can ease a business through a less-than-ideal succession. So too is the Nicklaus family.

The Nicklaus family business was begun in 1961 by Harry Nicklaus. The senior Nicklaus died in 1981 after having accumulated several hotel properties but no will. His two sons split the properties. Today the four children of the older son operate two of the hotels, the Best Western Sirata Beach Resort and the Quality Inn Beach Front Resort.

Because the estate was tied up in the hotel properties, both branches of the Nicklaus family found themselves cash-poor and owing about $500,000 in estate taxes. Taking advantage of one of the friendlier provisions of the estate tax law, the family elected to pay the taxes plus interest over a 15-year period. In July of 1996, they fulfilled their obligation to Uncle Sam with a final check and a big party.

"[The tax] was a large burden at the beginning," says Deborah Nicklaus. "We were a smaller hotel. But we were able to grow and it makes a big difference after 15 years what the price of a dollar is."

Today, it is an $8 million (1997 revenues) company getting ready to embark on a nine-month, $11 million expansion project.

The four Nicklauses meet over lunch every day and schedule a mini family retreat at the beginning of every year to go over goals for the year. Nonetheless, Deborah admits that sometimes they don't reach decisions as quickly as they should, preferring to wait until they can build consensus.

Like the Badcocks, the Nicklaus siblings all worked at the family business as children on summer and Christmas vacations, learning about operations and sharing in the family work ethic at an early age. That shared experience helped build a lasting sense of family solidarity. Today, three of the four siblings live within a mile or two of each other and the hotels.

"Friends come and go," says Deborah Nicklaus. "People come and go but your family is always there."

PASSING IT ON

Developing the family's next generation of leaders takes time: time to allow the children to grow into management roles; time to develop relationships of trust with employees, suppliers, and customers; time to learn the business. And time to decide whether a career in the family business is what the child really wants to pursue.

One of the questions most commonly *not* asked of heirs is, "Who wants to run the business." Sometimes a child's earliest impression of the family business is gained at the dinner table listening to his parents gripe about the demands it makes on them.

But those dinner conversations can also become the first step in preparing Junior to take over.

"You're teaching them values and a work ethic," says John Dufresne, a Tampa business consultant. "You're teaching them what Daddy or Mommy does."

Dufresne's consulting group provides the full array of succession planning services, from short-term management of the company in emergencies to ironing out wrinkles in the family dynamic. One of the intangibles in planning for succession is the planting of entrepreneurial fervor.

"One of the difficulties in transitioning from one generation to the next," says Dufresne, "is that the founder has a real passion for the business. You've got to find a way of passing the passion on to the next generation."

Passing on the intangible qualities — such as passion and family unity — are just as important and require just as much prepration as do estate planning and management training. Conflict cannot be eliminated; the field can only be sown with a family culture and ethic that minimizes the potential for damage inflicted by internecine warfare.

From the board room to the CPA's office, and yes, even the kitchen table, it's never too early to start planning for the next generation to take over — it can only be too late. ■

Steps to be taken in PREPARING THE NEXT GENERATION can include the following:

- Written job descriptions for family employees, outlining specific jobs and responsibilities as well as prerequisite qualifications.
- An arrangement for children to work outside the family business for a period of time, preferably in the same industry. This gives the heirs exposure to different business practices and management styles, as well as outside validation of talents and abilities.
- Objective evaluation by outside advisors (CPA, lawyer, consultant) of heirs' management capabilities and leadership qualities.
- As more responsibility is turned over to heirs, the founder should take longer and longer vacations, giving himself and the heirs increased confidence in their ability to manage the business.
- Formalize the plan of succession and write it down so there is no question as to what you want to do.
- Discuss your plans with family members, both inside and outside of the business, and with key employees. Open discussion gives them the opportunity to express their viewpoints and allows you the chance to share your reasons for your decisions and to ensure agreement with them. ■

One Big Disappointment Among VICTORIES

For those accustomed to the rule of the lords of misrule, the 1997 and 1998 sessions were a vacation of relative calm, with meetings ending at a reasonable hour, last-minute amendment feeding frenzies cut to a minimum, the session concluding by the scheduled deadline. Sure there was a record-breaking amount of turkeys in the budget, a few shouting matches, and even a fistfight, but all in all the savage beast of lawmaking behaved itself.

The general air of decorum was not the only triumph of the 1998 session, however. Jon L. Shebel, president and CEO of Associated Industries of Florida (AIF), called this the best session of his 30 years in Tallahassee, with the business community celebrating a series of key policy victories.

The Legislature adopted the bundle of bills that comprised AIF's Jobs Package (see *One At A Time*, March/April 1998 issue of *Florida Business Insight*). Individually, and in their entirety, the provisions were conceived as a vehicle to knock down specific barriers to the creation of high-paying jobs in Florida. Important measures to combat fraud in the workers' compensation system are now in the law. And the business community finally won repeal of one of the worst anti-business bills ever enacted in this state, the 1994 sneak amendments to the Medicaid Third-Party Liability Act.

The one bitter taste from the session came with Gov. Lawton Chiles's veto of the tort reform package, a disappointing but not particularly surprising finale. Now the battle to inject fairness into the civil justice system moves to campaign season, where November's elections may hold the key to unlocking the long-awaited promise of tort reform.

by jacquelyn horkan, editor

GOV. LAWTON CHILES'S VETO of the tort reform package was a disappointing but not particularly surprising finale.

LEGAL AND JUDICIAL

CS/SB 874 Tort Reform (Vetoed) by the Senate Committee on Rules and Calendar and Sen. John McKay (R-Bradenton)

Tort reform began in the House of Representatives with six bills comprising a comprehensive package of reforms. The House moved quickly on the bills, approving them in the second week of the session. The Senate moved more slowly and less favorably, as the effort lingered in the Senate Select Committee on Litigation Reform, which was heavily influenced by two trial lawyers, Sens. Fred Dudley (R-Cape Coral) and Walter "Skip" Campbell (D-Tamarac).

On April 9, the Senate finally approved its version of tort reform, one significantly weaker than that passed by the House and favored by the business community. Both chambers met in conference to hash out their differences and released their final work product during the second-to-last week of the session and sent it to the governor.

The final bill contained a key compromise on joint and several liability, establishing a 20-percent threshold and $300,000 cap. In other words, joint and several would only apply to those defendants 21 percent or more at fault; their joint and several liability for economic damages would be capped at $300,000. The business community sought a total repeal of joint and several, but accepted the partial limitation for the purposes of getting the measure passed. Nevertheless, it wasn't enough.

The governor's negotiators, while stopping short of a wholesale veto threat, indicated that the governor was unhappy with the bill. Unfortunately, provisions favored by the governor's office would have weakened the bill to the extent that it would have been rendered meaningless, lacking any possibility to effect cost savings in the system.

The bill contained the following provisions:

- a series of jury reform measures to inform and instruct jurors and allow greater participation by the jurors in civil trials
- greater sanctions to deter frivolous litigation and tactics designed to delay the process
- a safe harbor for employers when they hire new employees
- a definition of adequate security for premises liability
- a definition of trespassers and the duty owed to them by the owners of property
- punitive damage reforms including: raising the burden of proof for entitlement to punitive damages to clear and convincing evidence; repealing vicarious liability for punitive damages; caps on punitive damages when they are imposed because of gross negligence; clear definitions of conduct necessary to impose punitive damages; and single punitive damage
- reformed joint and several liability for economic damages for defendants who are less than 21 percent at fault, and required that all defendants be

PHOTO ILLUSTRATION: DWIGHT SUMNERS

jointly and severally liable for $300,000 in economic damages and liable for their percentage of fault thereafter

- cap of $800,000 on vicarious liability damages for owners of vehicles
- government rules defense that is a rebuttable presumption; allows a jury to consider a manufacturer's adherence to government rules if a three-part test is met
- 12-year statute of repose but gives claimants five years to file cases

■ **Vote: Senate 24-16; House 70-46**
Vetoed by the governor on May 18

HB 3077 Third-Party Liability
by Rep. Harry Goode (D-Melbourne)

This bill repealed the 1994 amendments to Florida's Medicaid Third-Party Liability Act that enabled the state to pursue a settlement against the tobacco companies.

This year's legislation essentially restores the language of the statute governing third-party reimbursement of medical expenses as it existed prior to changes secretly passed in the final hours of the 1994 Legislative Session. It reinstates affirmative defenses taken from defendants sued by the state under the 1994 amendments. The act also removes authority for the state to consolidate into one proceeding claims for reimbursement for treatment of multiple Medicaid recipients, and eliminates the state's ability to use statistical evidence to prove causation and damages.

Additionally, the bill addresses the concerns of Gov. Lawton Chiles and Attorney General Bob Butterworth regarding the potential impact of a repeal on the current status of the tobacco settlement.

The bill became effective upon passage into law and is retroactive to July 1, 1994, with a specific exception to protect the current tobacco settlement.

■ **Vote: Senate: 39-0; House 113-0**
Became law without the governor's signature on June 12

TAXATION

CS/HB 3171 Sales Tax Exemptions/Aircraft
by the House Committee on Finance and Taxation and Rep. Bob Starks (R-Casselberry)

Florida had imposed a sales tax on parts and equipment used in the repair and maintenance of commercial aircraft. Since other states exempt aircraft parts from taxation, the airline industry only performs emergency repairs or maintenance in this state. Any scheduled maintenance is performed elsewhere, even though Florida is better suited for performing year-round maintenance because of its climate.

This bill exempts from sales tax the purchase or lease of commercial aircraft for use by a common carrier. The bill also exempts replacement engines, parts, and equipment used in the repair and maintenance of certain aircraft, including rotary wing.

The exemption became effective upon becoming law.

■ **Vote: Senate 37-0; House 116-3**
Signed into law by the governor on May 15.

CS/CS/HB 3229 Sales Tax Exemption/Pollution Control Equipment
by the House Committee on Finance and Taxation, the House Committee on Environmental Protection, and Rep. John Thrasher (R-Orange Park)

This bill provides for a sales tax exemption for certain facilities, devices, fixtures, equipment, machinery, and structures used for pollution prevention or control in manufacturing, processing, compounding, or producing for sale certain items of personal property. The bill also provides an exemption for certain machinery, equipment, or materials purchased for use at privately owned and operated waste management facilities.

The exemption becomes effective on Jan. 1, 1999.

■ **Vote: Senate 39-0; House 117-0**
Became law without the governor's signature on May 29

CS/CS/HB 3249 Tax Exemption/Steam/Electricity
by the House Committee on Finance and Taxation, the House Committee on Business Development and International Trade, and Reps. Mike Fasano (R-New Port Richey) and Jerry Burroughs (R-Pace)

The 1996 Legislature adopted AIF's proposal to phase in an exemption on electricity used in manufacturing.

This bill clarifies the provisions of the exemption to address inconsistencies between statutory intent and Department of Revenue interpretations. Under the new provision, in order to receive the full exemption a manufacturer does not need to implement separate metering of electricity used for manufacturing, but a minimum of 75 percent of the energy used must be for manufacturing. If the energy devoted to manufacturing is less than 75

percent of the total but more than 50 percent, the facility is eligible for a 50-percent exemption.

Steam energy is also granted the same sales tax exemption as electrical energy.

The exemption is effective as of July 1, 1998.

■ **Vote: Senate 39-0; House 116-2**
Became law without the governor's signature on May 29

CS/CS/HB 3351 Corporate Income Tax/ Sponsored Research and Development
by the House Committee on Finance and Taxation, the House Committee on Colleges and Universities, and Rep. Mike Fasano (R-New Port Richey)

This bill encourages the development of the high technology sector in Florida by fostering a tax climate more receptive to research and development activities.

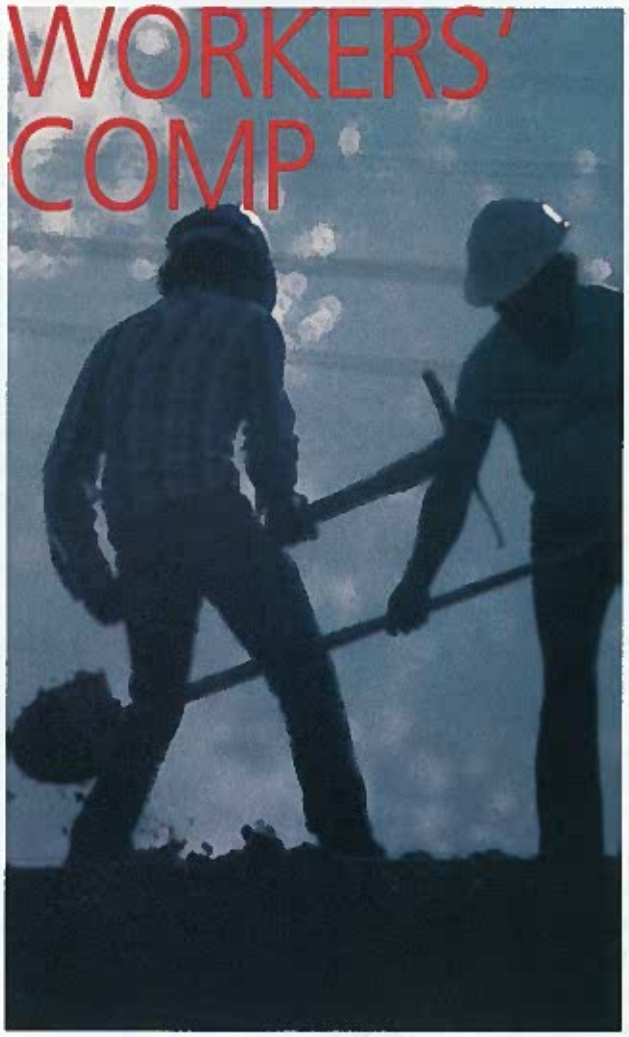
The bill provides that any company willing to contract with a state university to conduct sponsored research in connection with its research and development activities will be able to have property or payroll involved with the research and development excluded from the apportionment formula used to apportion income among the various states in which the company operates. This exclusion would ignore any expenses in the state related to research and development and therefore would not increase the amount of Florida corporate income tax due as a result of research and development activities done in conjunction with universities. Furthermore, any expense for property and payroll would not subject a company to Florida's corporate tax if it is otherwise not subject to Florida's tax.

The exemption is effective as of July 1, 1998.

■ **Vote: Senate 40-0; House 119-0**
Became law without the governor's signature on May 29

CS/SB 1450 Intangible Personal Property Tax
by the Senate Committee on Ways and Means and Sen. Bill Bankhead (R-Jacksonville)

The intangibles tax is one of the strongest deterrents to attracting new business to the state. Intangible personal property to which the tax applies includes, among other things, stocks, bonds, notes, other obligations to pay money, and accounts receivable — the latter a term that was not defined in statute.



The 1998 Legislature enacted significant revisions to the law, including the following:

- Increases from $5 to $60 the minimum amount of tax due before a return and payment are required. This equates to exemptions in the following amounts: $80,000 in taxable securities for a single taxpayer; $100,000 in taxable securities for a married taxpayer filing a joint return; and $30,000 of taxable assets for businesses.
- Defines "accounts receivable" as a "business debt that is owed by another to the taxpayer or the taxpayer's assignee in the ordinary course of trade or business and is not supported by negotiable instruments."
- Begins a three-year phaseout of the tax on accounts receivable. On Jan. 1, 1999, one-third of accounts receivable are tax exempt. The phaseout is to be completed for taxes due on Jan. 1, 2001, pending further legislative action.
- Exempts banks, savings associations, and insurance companies from the taxes due on or after July 1, 1999.
- Reduces penalties significantly.

The measure is effective July 1, 1998, and applies to taxes due on or after Jan. 1, 1999.

■ **Vote: Senate 37-0; House 117-0**
Became law without the governor's signature on May 21

WORKERS' COMPENSATION

CS/CS/SB 1406 Workers' Compensation Insurance Fraud
by the Senate Committee on Ways and Means, the Senate Committee on Banking and Insurance, and Sen. Charlie Clary (R-Destin)

This bill addresses the problems of fraud in the workers' compensation system. According to the Department

of Insurance, fraud adds $500 million in costs to the system each year. Hundreds of thousands of dollars are lost each year due to the abuse of the law's provisions that allow construction workers to exempt themselves from carrying workers' compensation coverage. (The bill did not eliminate the exemption in the construction industry.) Actuarial analyses indicate that requiring all employees in the construction industry to carry workers' compensation insurance will cause an overall decrease in the rates for the construction trades. AIF estimates this at a 10-percent reduction in one year alone.

This bill requires an independent contractor to execute a sworn affidavit that he meets the criteria outlined in the statute when filing for an exemption. The bill makes it a third-degree felony to make false statements knowingly on an exemption notice. The independent contractor must refile for the exemption every two years. The bill gives authority to the Division of Workers' Compensation to revoke exemption certificates that are based on invalid information. Carriers must recognize the exemption. Any independent contractor who executes the affadavit will not be entitled to benefits.

The bill also increases penalties for workers' compensation fraud and increases the statute of limitations on bringing an action from three to five years. The division is also required to issue stop-work orders when an employer is suspected of committing fraud. A judge of compensation claims and an administrative law judge may deny workers' compensation benefits if an employee intentionally commits fraud. The bill also gives an employer 24 hours after issuance of an order by the division to produce documentation that it is in compliance with the law; neglecting to do so could result in a stop-work order by the division.

This bill allows the Division of Workers' Compensation to monitor compliance by inspecting business records and gives it subpoena authority to gain access to these records.

The bill becomes effective on Jan. 1, 1999, except as otherwise noted.

■ **Vote: Senate 40-0; House 118-0**
Signed into law by the governor on May 22

CS/SB 1408 Confidentiality of Workers' Compensation Records
by the Senate Committee on Banking and Insurance and Sen. Charlie Clary (R-Destin)

The bill provides that investigatory records, obtained through the subpoena power given to the Division of Workers' Compensation to ensure compliance with coverage requirements by employers, be confidential and exempt from public records. This applies if the disclosure would

- jeopardize the integrity of another investigation
- reveal investigative techniques or procedures
- reveal a trade secret
- reveal business or personal information
- reveal the identity of a confidential source
- defame or cause unwarranted damage to a good name or reputation of an individual
- or jeopardize the safety of an individual.

This bill is tied to CS/CS/SB 1406, the workers' compensation fraud bill, which contains the substantive provisions relating to the subpoena power of the Division of Workers' Compensation.

The bill takes effect on the same date as CS/CS/SB 1406.

■ **Vote: Senate 40-1; House 119-0**
Became law without the governor's signature on June 12

SB 1972 Workers' Compensation/Intoxication/Drugs
by Sen. Tom Lee (R-Brandon)

The workers' compensation law includes provisions that allow an employer to establish itself as a drug-free workplace, thereby discouraging drug abuse while helping an employer eliminate the costs that follow when employees suffer work-related accidents cause by substance abuse.

The law stated that if an employee at a drug-free workplace was injured and tested positive for drugs or alcohol, there was an irrebutable presumption that the injury was caused by the drugs or alcohol and, thus, the employee was denied payment of workers' compensation benefits. The Florida Supreme Court subsequently held that this language in the workers' compensation statute creating an irrebutable presumption violated the employee's constitutional right to due process. This bill overturns that decision by establishing a rebuttable presumption. An employee of a drug-free workplace who is found to be intoxicated or under the influence of drugs at the time of an injury can rebut the presumption by clear and convincing evidence that drugs or alcohol did not contribute to the injury. This bill is necessary in order to keep the protection of the drug-free workplace program of the workers' compensation system in place.

The bill takes effect on July 1, 1998.

■ **Vote: Senate 37-0; House 111-0**
Became law without the governor's signature on May 21

CS/SB 1626 Division of Safety (Vetoed)
by the Senate Committee on Commerce and Economic Opportunities and Sen. Katherine Harris (R-Sarasota)

This bill repealed provisions in Chapter 442, *Florida Statutes*, relating to the Division of Safety and private employers' workplace safety programs.

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ENVIRONMENT

It would have eliminated the division's power to mandate employee safety and health programs for employers with a high frequency or severity of work-related injuries. It also would have removed the division's power to enter and inspect the work sites of private employers.

Gov. Lawton Chiles vetoed the bill, citing fears of a "drastic reduction of safety services provided to the private sector." AIF believes that any impact the divisions has on safety is marginal, making it a waste of money.

In the four years since attaining division status, the Division of Safety has quadrupled in size and now has an annual budget approaching $11 million. This money does not come from general revenues but from assessments employers pay on their workers' compensation premiums. In a recent report by Office of Program Policy Analysis and Government Accountability (OPPAGA), the division was cited for not following statutory guidelines and wasting taxpayer money. Furthermore, many of the division's services are duplicated by federal agencies, and the past four years have not justified such a large bureaucracy and budget. There is also little evidence to indicate that the division's private consultation program is effective or cost-productive.

■ **Vote: Senate 35-1; House 67-47**

Vetoed by the governor on May 22

ENVIRONMENT

CS/SB 1202 Brownfields Redevelopment by the Senate Committee on Natural Resources and Sen. Jack Latvala (R-Palm Harbor)

Brownfields are abandoned, contaminated urban sites. The environmental regulatory regime made development of these areas problematic, driving developers toward pristine, undeveloped land.

In 1997, the Legislature passed the Brownfields Redevelopment Act (sections 376.77-84, *Florida Statutes*). The act established processes for local governments to formally designate areas as brownfields to clear the path and create incentives for their development.

The 1998 brownfields "glitch" bill addressed several problems or roadblocks to the brownfield redevelopment effort uncovered since the passage of the 1997 Brownfields Redevelopment Act. The 1998 bill provides a brownfields area loan and guarantee program and other incentives to promote cleanup and redevelopment of brownfields. The bill authorizes closed military bases to be automatically designated as brownfields areas. Additionally, the bill revises eligibility criteria and liability protection provisions.

These provisions become effective on July 1, 1998.

■ **Vote: Senate 38-0; House 113-1**

Signed into law by the governor on May 21

CS/SB 1458 Coastal Redevelopment by the Senate Committee on Community Affairs and Sen. Jack Latvala (R-Palm Harbor)

The bill expands the scope of the Community Redevelopment Act to include incentives for redevelopment of coastal resort or tourist areas that are deteriorating or economically distressed. The bill also contains a pilot project for the Daytona Beach area allowing exemptions from certain coastal construction requirements and targeting the area for meaningful development.

Tax incentives, technical assistance to expedite permitting, and exemptions from certain siting and design criteria will be allowed in the pilot project area, so long as the redevelopment meets other design and structural requirements.

The provisions take effect upon becoming law.

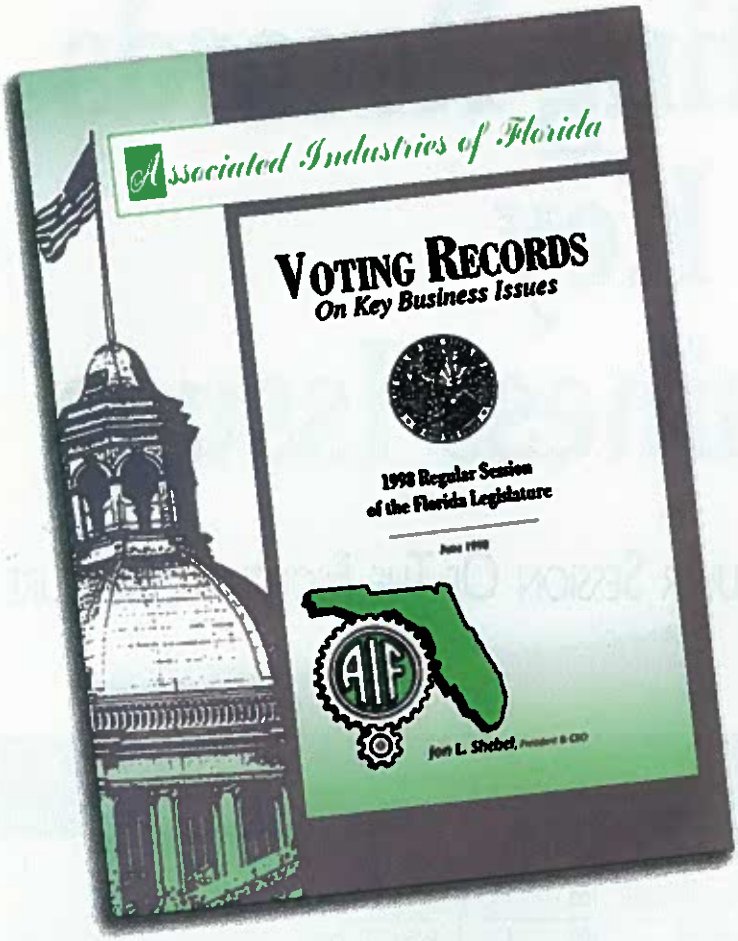
■ **Vote: Senate 37-0; House 118-0**

Became law without the governor's signature on May 22 ■

Editor's note: Bill information compiled with the assistance of the AIF Legislative Department.

PHOTO: PAT CROSS

WHO SUPPORTED BUSINESS



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Voting Records On Key Business Issues

1998 REGULAR SESSION OF THE FLORIDA LEGISLATURE

SENATE VOTES

Name/Party/City	% w/AIF	Rank	Name/Party/City	% w/AIF	Rank
Bankhead (R)–Jacksonville	100	1	Horne (R)–Orange Park	100	1
Bronson (R)–Indian Harbour Beach	100	1	Jennings (R)–Orlando	100	1
Brown-Waite (R)–Brooksville	100	1	Jones (D)–Miami	90	39
Burt (R)–Ormond Beach	98	15	Kirkpatrick (D)–Gainesville	100	1
Campbell (D)–Tamarac	90	39	Klein (D)–Delray Beach	93	29
Casas (R)–Hialeah	98	15	Kurth (D)–Palm Bay	93	29
Childers (R)–Pensacola	92	36	Latvala (R)–Palm Harbour	98	15
Clary (R)–Destin	98	15	Laurent (R)–Bartow	97	23
Cowin (R)–Leesburg	98	15	Lee (R)–Brandon	100	1
Crist (R)–St. Petersburg	100	1	McKay (R)–Bradenton	100	1
Diaz-Balart (R)–Miami	98	15	Meadows (D)–Lauderhill	93	29
Dudley (R)–Cape Coral	95	26	Myers (R)–Stuart	100	1
Dyer (D)–Orlando	95	26	Ostalkiewicz (R)–Orlando	96	25
Forman (D)–Hollywood	95	26	Rossin (D)–West Palm Beach	94	28
Geller (D)–Hallandale	92	36	Scott (R)–Ft. Lauderdale	100	1
Grant (R)–Tampa	100	1	Silver (D)–Aventura	93	29
Gutman (R)–Miami	97	23	Sullivan (R)–Seminole	100	1
Hargrett (D)–Tampa	91	38	Thomas (D)–Tallahassee	98	15
Harris (R)–Sarasota	100	1	Turner (D)–North Miami	93	29
Holzendorf (D)–Jacksonville	93	29	Williams (D)–Tallahassee	98	15

Total Votes With AIF/Business = 97%

HOUSE VOTES

Name/Party/City	% w/AIF	Rank
Albright (R)–Ocala	100	1
Alexander (R)–Winter Haven	100	1
Andrews (R)–Delray Beach	97	37
Argenziano (R)–Crystal River	79	106
Arnall (R)–Jacksonville Beach	98	25
Arnold (D)–Ft. Myers	74	116
Bainter (R)–Eustis	100	1
Ball (R)–Titusville	98	25
Barreiro (R)–Miami	100	1
Betancourt (D)–Miami	87	81
Bitner (R)–Port Charlotte	100	1
Bloom (D)–Miami Beach	89	70
Boyd (D)–Monticello	90	66
Bradley (D)–St. Petersburg	91	62
Brennan (D)–Pinellas Park	80	104
Bronson (D)–Kissimmee	100	1
Brooks (R)–Winter Park	98	25
Brown (D)–Sarasota	79	106
Bullard (D)–Miami	82	96
Burroughs (R)–Pace	88	76
Bush (D)–Miami	83	92
Byrd (R)–Plant City	98	25
Carlton (R)–Osprey	89	70
Casey (R)–Gainesville	97	37
Chestnut (D)–Gainesville	79	106
Clemons (D)–Panama City	88	76
Constantine (R)–Altamonte Springs	100	1
Cosgrove (D)–Miami	92	58
Crady (D)–Yulee	97	37
Crist (R)–Temple Terrace	91	62
Crow (R)–Dunedin	83	92
Culp (R)–Tampa	97	37
Dawson-White (D)–Ft. Lauderdale	83	92
Dennis (D)–Jacksonville	82	96
Diaz de la Portilla (R)–Miami	91	62
Dockery (R)–Lakeland	100	1
Edwards (D)–Auburndale	97	37
Effman (D)–Plantation	76	113
Eggelletion (D)–Lauderdale Lakes	88	76
Fasano (R)–New Port Richey	89	70
Feeney (R)–Oviedo	100	1
Fischer (D)–St. Petersburg	74	116
Flanagan (R)–Bradenton	100	1
Frankel (D)–West Palm Beach	68	120
Fuller (R)–Jacksonville	100	1
Futch (R)–Indialantic	97	37
Garcia (R)–Hialeah	100	1
Gay (R)–Cape Coral	98	25
Goode (D)–Melbourne	97	37
Gottlieb (D)–Miramar	87	81
Greene (D)–West Palm Beach	82	96
Hafner (D)–St. Petersburg	87	81
Harrington (R)–Punta Gorda	100	1
Healey (D)–Palm Springs	82	96
Heyman (D)–North Miami Beach	81	101
Hill (D)–Jacksonville	85	89
Horan (D)–Key West	76	113
Jacobs (D)–Delray Beach	80	104
Jones (R)–Seminole	98	25
Kelly (R)–Tavares	98	25
King (R)–Jacksonville	97	37
Kosmas (D)–New Smyrna Beach	92	58
Lacasa (R)–Miami	92	58
Lawson (D)–Tallahassee	81	101
Lippman (D)–Hollywood	89	70
Littlefield (R)–Dade City	98	25
Livingston (R)–Ft. Myers	100	1
Logan (D)–Opa Locka	86	85
Lynn (R)–Ormond Beach	97	37
Mackenzie (D)–Ft. Lauderdale	86	85
Mackey (D)–Lake City	95	52
Maygarden (R)–Pensacola	100	1
Meek (D)–Miami	81	101
Melvin (R)–Ft. Walton Beach	97	37
Merchant (R)–North Palm Beach	98	25
Miller (D)–Tampa	79	106
Minton (D)–Ft. Pierce	100	1
Morroni (R)–Clearwater	86	85
Morse (R)–Miami	100	1
Murman (R)–Tampa	88	76
Ogles (R)–Bradenton	90	66
Peaden (R)–Crestview	98	25
Posey (R)–Rockledge	86	85
Prewitt (D)–New Port Richey	79	106
Pruitt (R)–Port St. Lucie	88	76
Putnam (R)–Lakeland	100	1
Rayson (D)–Pompano Beach	76	113
Reddick (D)–Orlando	82	96
Ritchie (D)–Pensacola	73	118
Ritter (D)–Tamarac	77	112
Roberts-Burke (D)–Miami	84	91
Rodriguez-Chomat (R)–Miami	89	70
Rojas (R)–Hialeah	95	52
Safley (R)–Clearwater	95	52
Sanderson (R)–Ft. Lauderdale	100	1
Saunders (R)–Naples	85	89
Sembler (R)–Vero Beach	100	1
Silver (D)–Boca Raton	72	119
Sindler (D)–Apopka	95	52
Smith (D)–Palatka	97	37
Spratt (D)–Sebring	97	37
Stabins (R)–Spring Hill	92	58
Stafford (D)–Ft. Lauderdale	83	92
Starks (R)–Casselberry	98	25
Sublette (R)–Orlando	89	70
Tamargo (R)–Tampa	98	25
Thrasher (R)–Orange Park	100	1
Tobin (D)–Coconut Creek	87	81
Trovillion (R)–Winter Park	100	1
Turnbull (D)–Tallahassee	90	66
Valdes (R)–Miami	100	1
Villalobos (R)–Miami	97	37
Wallace (R)–Tampa	97	37
Warner (R)–Stuart	95	52
Wasserman-Schultz (D)–Weston	78	111
Webster (R)–Ocoee	100	1
Westbrook (D)–Marianna	95	52
Wiles (D)–St. Augustine	90	66
Wise (R)–Jacksonville	97	37
Ziebarth (R)–Deland	91	62

Total Votes With AIF/Business = 91%

Compiled by the AIF Legislative Department

Instinctively Driven To Success

Another difficult situation behind her, Sandi breathed a short sigh of relief as the office door closed behind her exiting colleague. Her expectations were very clear, and Sandi knew that Christy would rise to the occasion.

Although the demands of the rapidly growing company were many, Sandi's management style was quite effective in handling the innumerable situations that arose. Despite the chaotic environment, she operated quietly and comfortably and her confidence was noticed by all. It appeared as if Sandi's decisions, difficult as they might seem, came easily to her.

Sandi's fellow manager Robert, often the subject of breakroom jokes because of his obsessive and calculating nature, was wringing his hands over a personnel issue, unsure how to handle it. After thinking it through repeatedly, he finally approached Sandi and asked her advice.

Her calm presence relaxed Robert, but her advice shocked him. "Why should I suggest a promotion for an employee who isn't performing as well as I'd like?" asked Robert. Sandi replied, "Because she has what it takes, and with the right guidance she'll be in the top 1 percent of our sales force within the next year."

Although it was difficult for Sandi to explain just *how* she knew this to be the case, her track record was indisputable, and Robert followed her advice. As expected, Robert's decision to follow Sandi's instincts paid off, as Elaine rose through the ranks to become the leading salesperson of the company.

by scott a. west, m.d.

When all else fails, follow your instincts — the old cliche' plays a pivotal role in many business decisions. Despite our sophisticated business methodologies, the so-called human element of decision-making should never be discounted. Indeed, whether we realize it or not, our instincts are always at work, guiding us and directing our decisions. Successful business people almost always have good instincts, or surround themselves with people who do. These people know how to "stay ahead of the curve," having learned and paid attention to the art of integrating data and business methodologies with this intangible human element known as "instinct." It is this integration and decision-making process that allows for the best decisions to be made, which ultimately leads to the greatest success.

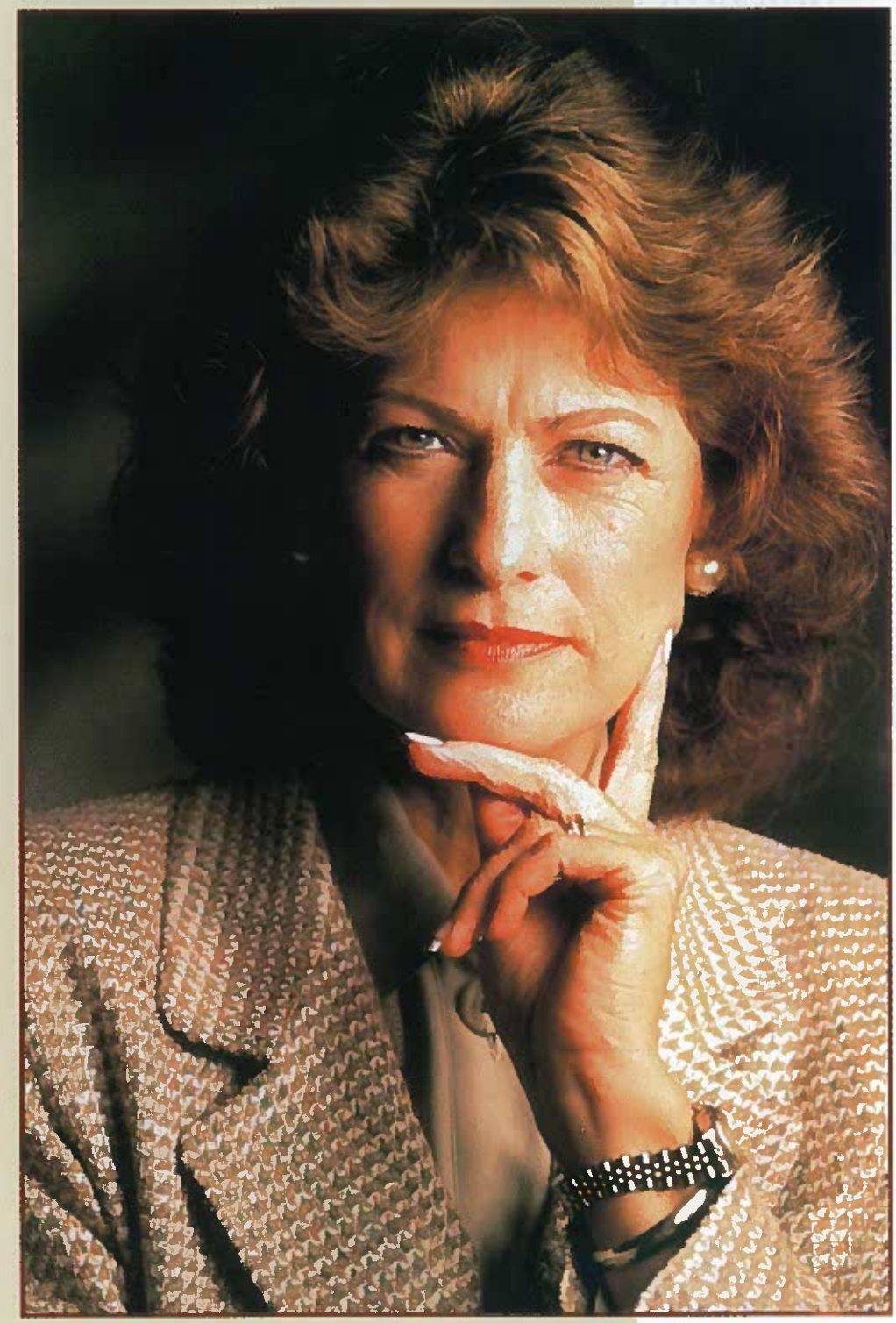

PHOTO: RON CHAPPLE

Instincts are based upon unlearned, complex, and adaptive functions that are hard-wired in our brains and are, at least in part, genetically determined. Instincts represent the integration of the most primitive areas of the brain, such as the brain stem and limbic system (where emotions and basic drives, such as appetite, are regulated) with the most complex areas, such as the frontal lobes, (where executive functions take place like complex problem-solving).

Our instincts exist to help us survive in our environment, whether it is on Wall Street, at the local doctor's office, or on the Serengeti. Each new experience is encoded into the circuitry of the brain, just as we update our computer hardware with new software. Subsequently, decisions typically become easier over time and with repetition as we build upon the existing "software." The difficult then becomes the routine, even without *consciously* thinking about it; hence the saying, "it just happens automatically."

It is important to realize that instincts are not really "feelings" but unconscious thought processes that occur instantly and spontaneously.

Balancing our instincts with our conscious, rational thought processes is a critical skill that matures with time. Although we are all given a basic set of instinctual behaviors on which to build, the degrees to which people are equipped vary, both initially and as we mature; hence the difference between Sandi and Robert.

Neurologically, this may reflect the degree of right or left brain with which one predominantly operates (we all rely heavily on both). Those who are more right-brain predominant tend to be more instinctive and creatively driven. Typically, people who operate in this fashion are quite colorful and, although their style may not fit in at the local bank, they often become highly successful in business.

INSTINCTS ARE BASED UPON unlearned, complex, and adaptive functions that are hard-wired in our brains and are, at least in part, genetically determined.

Instinct is a skill that should be assessed and developed. It should be integrated and evaluated when examining the performance of individuals. It is often helpful to look at trends in decision-making in order to determine the role of instinct. Exploring this makes it possible to identify employees who don't trust their instincts and should, as well as those who shouldn't and do. Instincts are honed through trial and error and, as with any other skill, progress should be expected.

At times it is difficult to trust our instincts, especially when we have data suggesting a decision contrary to what we think is right in our "gut." For example, if a potentially large market is identified that may be worth expanding into, but market analyses cast doubt on the idea, how does one make the decision? If it's purely a numbers game, the answer may be obvious. Throw in a little risk, follow your gut instinct, and you could have the next big hit on your hands.

Using available data with well-developed instincts will always pay off over time, just as investing in the stock market does. The long-term approach is essential in hitting the home runs, which are driven by creativity and instinct. Indeed, learning to trust your instincts (or those of others) is vital to operating comfortably and managing your business most effectively.

In this age of information, with data changing on a monthly, weekly, and even a daily basis, it is impossible at times to have all the available information prior to making some important business decisions. In fact, waiting for all the information may result in costly indecision. Competition never stands still, and everyone wants to stay ahead of the pack. Therefore, it becomes important to determine how much information is enough so that your business continues to grow.

Although instincts can guide us in making profitable decisions, they may also serve as invaluable warning signals of impending danger. When a person "strikes you funny" or you "feel uneasy" about a meeting or a potential business relationship, pay attention to these instincts and discuss these situations with colleagues as appropriate.

Intuitive warning signals should be given the utmost respect; over the long haul they tend to keep us headed in the right direction. Often, these perceptions of peril or threat are more obvious and more intensely sensed than those that arise from positively focused instincts; and the stronger the feeling, the more cautious one should become.

Part of the repertoire of excellent business acumen is having good instincts. They can pave the way to an easier road to success and nicely complement more traditional business skills. Instincts shape us personally and professionally, and should be developed and heeded. Indeed, trusting well-developed instincts has financial rewards that are difficult to measure simply on a spread sheet. ■

Scott A. West, M.D., practices at the Psychiatric Institute of Florida and is a nationally recognized researcher in the field of psychopharmacology.

Disclosure and Approval: The NEW C Rep

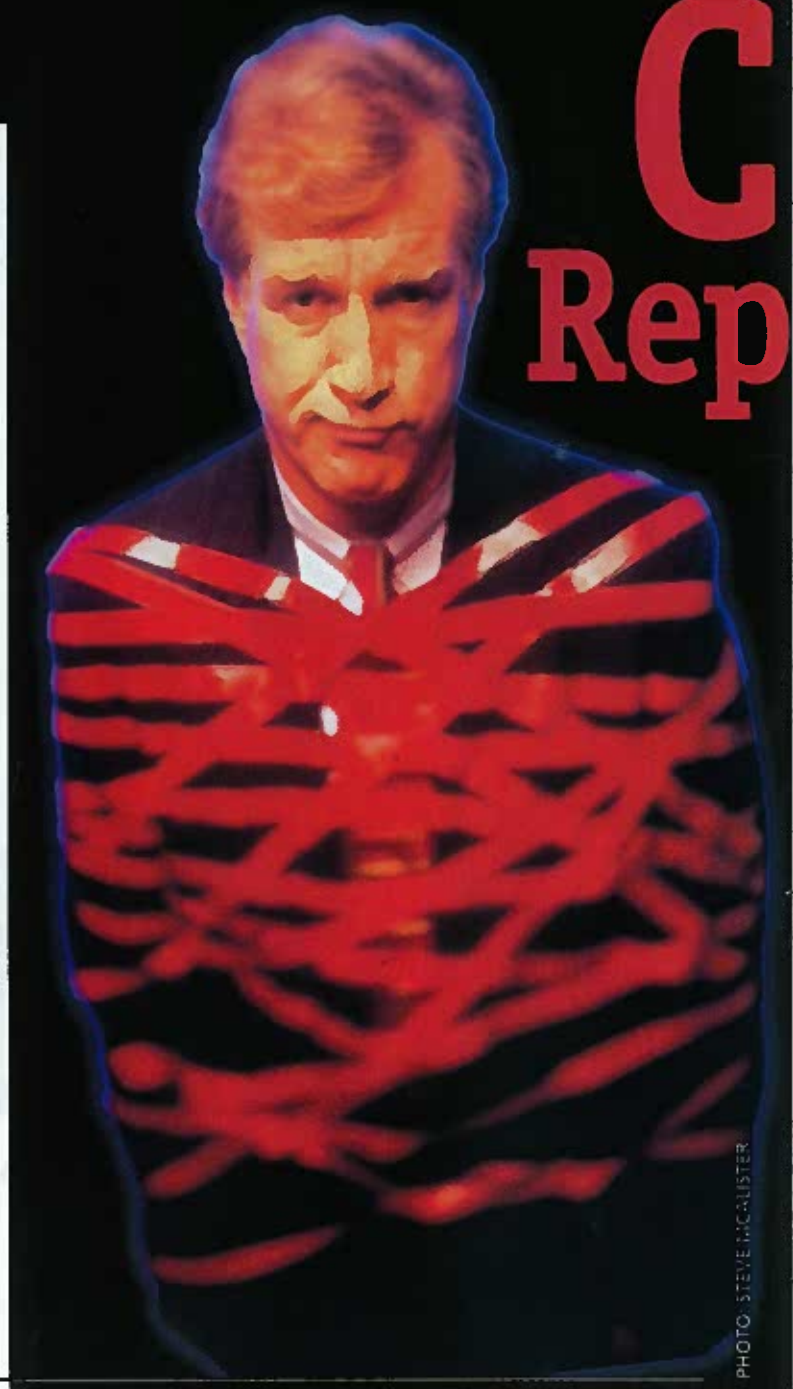

PHOTO: STEVE MCALISTER

As with so many other aspects of running a business, employers are finding themselves on the horns of a dilemma when it comes to qualifying candidates for employment. On the one hand, the employer who unknowingly hires an ex-con, who then commits another crime while on the payroll, may find itself being sued for negligent hiring practices. On the other hand, thanks to the federal Fair Credit Reporting Act, an employer who conducts a background check on an applicant to avoid one lawsuit could quickly find itself involved in a lawsuit over the manner in which it conducted the background check.

Congress passed the Fair Credit Reporting Act in 1970, in recognition of the fact that false or inaccurate information on a credit report can have serious (and embarrassing) consequences for an individual. The act regulates the kind of information that can appear in credit reports, allows individuals access to their reports, and sets up a system for individuals to contest the contents of their credit reports. The act has laudable goals, but like so many other statutes, it also has broader implications than might be expected from reading the title.

The act applies to many situations beyond the loan or credit application process. For example, it covers employers who obtain background or criminal history checks on employees or applicants for employment.

When drafting the act, Congress included regulation of consumer reports and investigative consumer reports under its aegis. As with any statute passed by the Congress, one should always carefully review the statute's definitions. In general, a consumer report is defined as a summary of a person's credit standing, credit capacity, credit

by john-edward alley & david s. harvey jr.

FAIR REDIT orting Act

worthiness, character, general reputation, personal characteristics, or mode of living. An investigative consumer report is defined as a consumer report that is based upon personal interviews with the subject's neighbors, associates, and friends.

Many employers utilize background checks as a routine part of their hiring process. The most common of these are inquiries into an applicant's credit, workers' compensation claims, and criminal conviction histories. In the past, these inquiries were usually made without the written consent of the subject, a practice the Fair Credit Reporting Act now makes unlawful.

On Sept. 30, 1997, amendments to the Fair Credit Reporting Act went into effect that restrict the use of consumer reports and investigative consumer reports by employers. Employers are now restricted in their ability to obtain background information without the written authorization of the individual, whether an applicant or existing employee.

Employers are now required to obtain written consent and give several mandated notices to the employee or applicant before using a consumer or investigative consumer report. Although consumer reporting agencies will often offer assistance and guidance, employers should independently ensure that they incorporate all of the necessary safeguards, and that they adhere to all of the necessary disclosure, notice, and authorization requirements. If an employer chooses to use either type of report — as it should to help select the right employee — it should review and revise its policies, forms, and procedures to ensure compliance with all of the new requirements in the law.

Employers must recognize that different requirements are imposed depending on the type of report being obtained. They also must recognize that the notice requirements will change depending on the contents of the consumer report and what the employer intends to do with it.

CONSUMER REPORTS

Before an employer may obtain a consumer report or cause one to be prepared on any individual, the employer must get the individual's written authorization. The employer must give the individual a "clear and conspicuous disclosure" of its intent to obtain the report. The written authorization and disclosure must appear on a separate document; it cannot be part of an employment application or another authorization form.

In addition, before a consumer reporting agency may prepare or provide a consumer report for an employer, the employer must make the following certification to the agency:

- The subject of the report has been provided with the required "clear and conspicuous disclosure."
- The employer has received written authorization to obtain the report.
- The information will not be used in violation of any applicable federal or state equal employment opportunity law or regulation.
- The employer will abide by the additional statutory requirements if any adverse action is taken wholly or partially as a result of the report.

Let's assume an employer finally receives a report and it contains information the employer considers damaging. Based on that damaging information, the employer decides to take an adverse action (either to discharge the employee or not to hire the applicant).

Is this employer able to carry out its intentions without further paperwork? Unfortunately not; there are more layers of red tape for the employer to unwind before taking any adverse action based on information contained in the report. In fact, according to the law, the employer can't even *make* its decision until it completes another round of paperwork.

HOW TO TAKE ADVERSE ACTIONS

At this point, the law takes on an Alice-in-Wonderland aspect of regulating the decision to decide. Before choosing a course of action, the employer must advise the individual that it *might* take adverse action and then it must

THERE ARE MORE LAYERS OF RED TAPE for the employer to unwind before taking any adverse action based on information contained in the report.

provide the individual with a copy of the report on which the decision might be based.

The employer must also provide a written description of that individual's rights under the Fair Credit Reporting Act. Consumer reporting agencies are required to provide a form outlining the rights of the individuals for distribution to applicants and employees.

The employer may wish to get written verification that it informed the individual that it was considering taking adverse action. The act only requires that the employer inform the individual; it does not have to be in writing. Written verification that it has done so, however, is a wise safeguard.

This micromanagement of the decision-making process is designed to protect employees and applicants from suffering the consequences of erroneous blots on their character. The individual must have the opportunity to review and dispute the contents of the report. The individual must also be given the opportunity to correct the report or submit information to the employer contradicting any allegedly incorrect information in the report.

Employers are cautioned against filling a position or starting the termination process until fully complying with all the requirements of the act. The employee or applicant must receive some period of time to respond to the information in the report; we generally advise our clients to give the individual at least three days to respond. If an employer fills the position or takes an action without giving the individual an opportunity to respond, the individual may have a claim under the act if a fact finder subsequently determines that the report contained errors.

After giving the employee or applicant an opportunity to refute the information contained in the report, if the employer decides to take adverse action against the subject of the report, the employer must provide notice of the adverse action to the affected individual, along with the following:

- name, address, and telephone number of the consumer reporting agency that provided the report to the employer, along with a statement that the agency was not responsible for the adverse action and thus cannot tell the applicant or employee the specific reasons for the action
- notice of the individual's right to obtain a free copy of the report on which the adverse action was based within 60 days of notice of the action
- notice of the individual's right to dispute the accuracy or completeness of any information in the report with the consumer reporting agency

These last two items might seem absurd and duplicative. After all, the individual has already been provided with a copy of the consumer report and an opportunity to dispute the information in the report. Nevertheless, the Federal Trade Commission believes that this notice at the time of the action is required. According to the commission's reasoning, the consumer report may have changed since the earlier consumer report was provided to the employee. Again, the employer is advised to provide these additional notices in writing to give it written documentation that it has complied with the law.

Once this final step is completed, the employer is empowered to take action against the employee or to refuse to hire the applicant. The employer does not have to delay its decision until the individual's allegations are either proved or disproved; it merely has to follow the process outlined here, giving the individual the opportunity to contradict any information in the report, before making its decision.

If an employer receives a report that contains information that it believes is negative, it would be well-advised to follow the entire notice and disclosure process, even if the employer is making the adverse decision based upon other negative information obtained during the hiring process. A little extra paperwork will provide a shield against a potential future claim.

INVESTIGATIVE CONSUMER REPORTS

Similar requirements were already in place for investigative consumer reports because they involve considerably more intrusion into the individual's private life. An employer is authorized to receive an investigative con-

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FINDING A QUALIFIED EMPLOYEE can be a long and complicated process, but hiring an incompetent employee can have even more disastrous consequences.

sumer report only if the employer gives the individual notice that it is requesting such a report. Employers must do this, in writing, within three days of requesting the report.

An employer must also notify the individual that he has the right to request information on the nature and scope of the investigation, and that the employer will then completely disclose the information, in writing, within five days of receiving the request. Additionally, an employer must give the individual a copy of the form outlining the individual's rights under the Fair Credit Reporting Act.

Because an employer must obtain written authorization for the release of any consumer report, we recommend that an employer obtain the consent of each individual before obtaining an investigative consumer report. The notices and disclosures that employers must make can be given to individuals at the same time that the employers obtain the consent.

Care must be taken to obtain the results of the background investigation before any medical inquiries are made of the applicant. For employers with 15 or more employees, the Americans with Disabilities Act places limitations on the nature and timing of medical inquiries.

Put simply, medical inquiries can be made *after* an employer has extended the applicant a conditional offer of employment, but *before* the applicant has started work. The key to handling such inquiries, for those employers who decide to use them, is to separate the medical inquiry stage of the employment process from all other inquiries or reports. Keep in mind, the Equal Employment Opportunity Commission will take the position that if the employer decides not to hire an individual after it receives medical information on the employee, the decision must be based on the medical information.

An employer who does not properly space these inquiries could be placed in an awkward position. The applicant could reveal the presence of a disability or potentially stigmatizing condition such as AIDS. Shortly after that revelation, the employer could receive a background investigation report on the applicant that reveals damaging information, such as conviction of a violent crime. The employer is now stuck with a difficult choice: hire a convicted violent criminal and face possible negligent hiring claims or decide not to hire the applicant and face claims of disability discrimination.

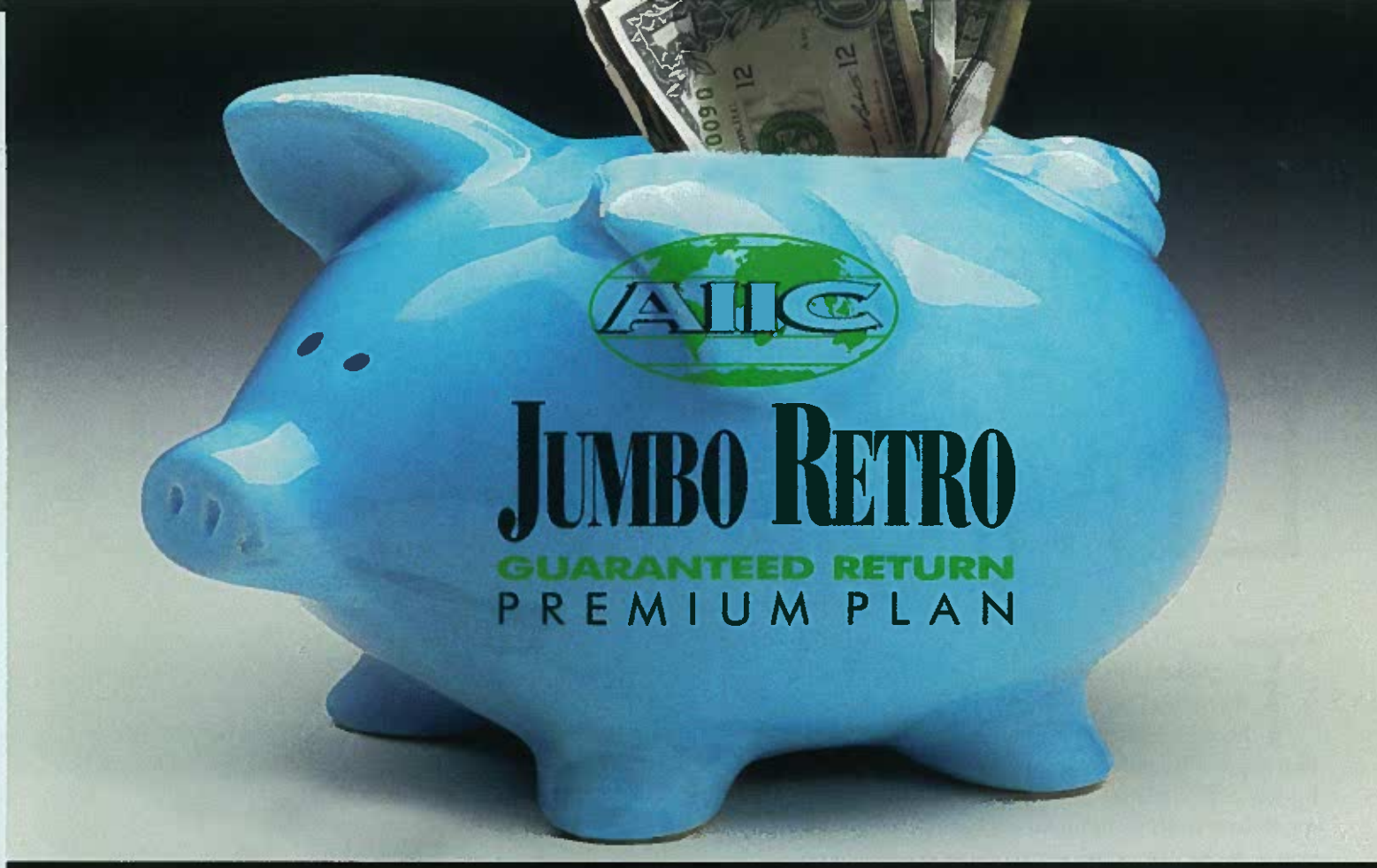
The complicated notice requirements of the act may cause some employers to forgo the use of background and criminal history investigations. However, employers who take this approach will be doing themselves a disservice.

Finding a qualified employee can be a long and complicated process, but hiring an incompetent employee can have even more disastrous consequences. Besides the obvious disadvantage of poor work performance, employers are now being successfully sued for such things as negligent hiring. What if the applicant has some glaring defect that would have been revealed in the investigation process (for example, a conviction for a violent crime)? If this individual were to injure anyone, the employer could be exposed to serious liability over the employment of this individual and the failure to check the applicant's background.

The employer must proceed carefully in conducting background checks, however. An employer that violates the provisions of the Fair Credit Reporting Act could find itself paying an award of economic damages and attorney's fees to a plaintiff. If the violation is found to arise from the employer's willful misconduct, punitive damages could be tacked on to the award.

Therefore, employers in today's litigious world would be well served to review their hiring processes carefully. Considering the complexities of the law, an employer may wish to seek the guidance of an employment lawyer or human resources professional. The employer should make a well-reasoned decision about the inquiries it needs to make to find a qualified employee. Once the decision is made, an employer needs to ensure that procedures and forms are in place to comply with the myriad of laws that apply to the hiring and disciplining of employees, including the Fair Credit Reporting Act. ■

John-Edward Alley and David S. Harvey Jr. are with the law firm Alley and Alley/Ford & Harrison LLP, where Alley is a partner.



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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%	
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The Other Environmentalists

The poll results are in and they show conclusively that we Americans are in favor of a clean, healthy environment — in much the same way that we are in favor of good schools, good jobs, and nice homes. So why is it that the nation's so-called environmentalists want us to make a choice between the environment and the other trappings of the good life?

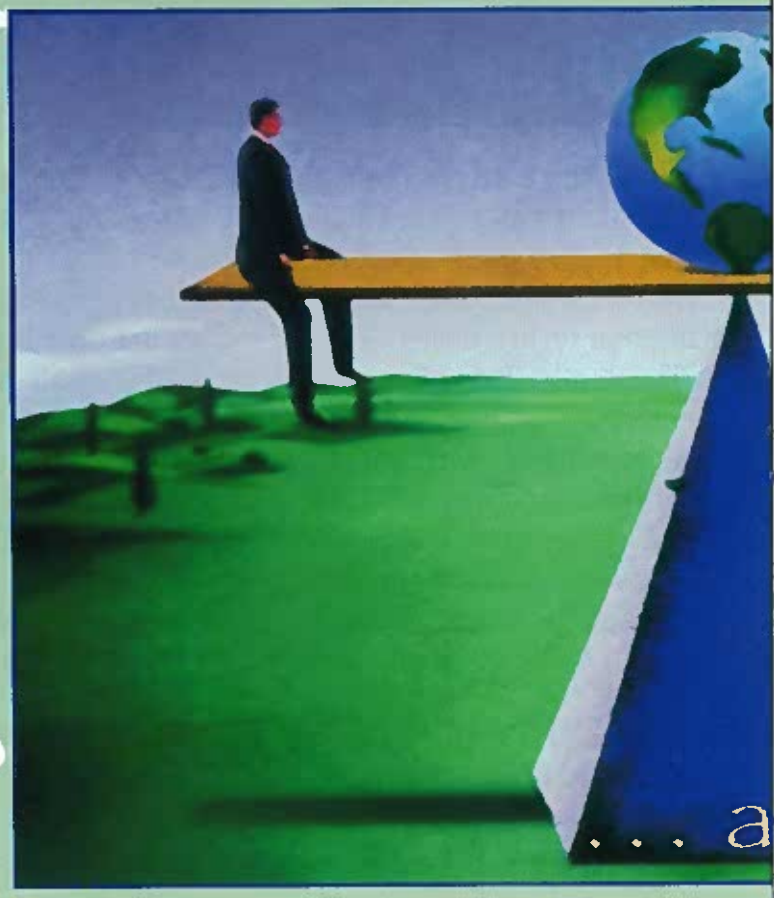
For almost three decades our country has labored under a mistaken belief that to be an environmentalist one must always be aligned with traditional left-wing groups. Those are clearly the liberal environmentalists. But there is another category and that group represents mainstream America. These are conservative environmentalists.

There are core differences in the approach between the two. Liberals fall into the Al Gore wing, accusing anyone who doesn't march in lockstep with them of favoring policies that kill people. Left-wing environmentalists favor strong federal control over states. They are predisposed to an anti-industry, anti-technology, anti-development bias. Liberals have traditionally put the rights of property owners low on the priority list. They frequently embark on environmental crusades that are based upon mere theories.

Conservatives favor more state and local management of environmental concerns. We believe that environmental protection and economic development are not mutually exclusive activities. We require sound science as the basis for serious policy changes. And conservatives understand that confiscation of private property is a poor way to conserve natural resources.

To date, the debate over how to protect the environment has almost exclusively been framed by liberal environmentalists and their non-profit organizations. The conservative point of view has not been well represented. In fact, conservative environmental philosophy has been defined, not by its proponents, but by those on the left. That is now changing as conservatives are beginning to come to grips with how to develop and implement an environmentalism grounded in the standards of liberty and free enterprise.

Conservative environmental groups are springing up to unite those of like mind on this issue. On the national level, Rob Gordon and Ben Patton (grandson of General



by dale patchett

George Patton) formed the National Wilderness Institute in 1989. Their mission has been to foster a scientifically driven form of environmentalism, one based on stewardship of our natural resources and our principles of a free society, such as property rights and respect for the Constitution. Gordon says that part of the mission, for example, is to explain to the public at large that the Endangered Species Act and property rights are not mutually exclusive things, but are fundamentally intertwined.

A similar effort is underway in Florida. In January 1998, after a year of behind-the-scenes preparation, the Republican Party of Florida announced the formation of the Theodore Roosevelt Society, a think tank centered on an idea best summarized in one word: *balance*. The Theodore Roosevelt Society (TRS) is based in Tallahassee and chaired by former Gov. Bob Martinez. Its goal is simple: to reconcile the necessity to develop good-quality, high-paying jobs in Florida with the need to protect our state's fragile environment and the rights of property owners. Input will be received from board members comprised of water experts, landowners, developers, farming interests, elected officials, and legal experts.

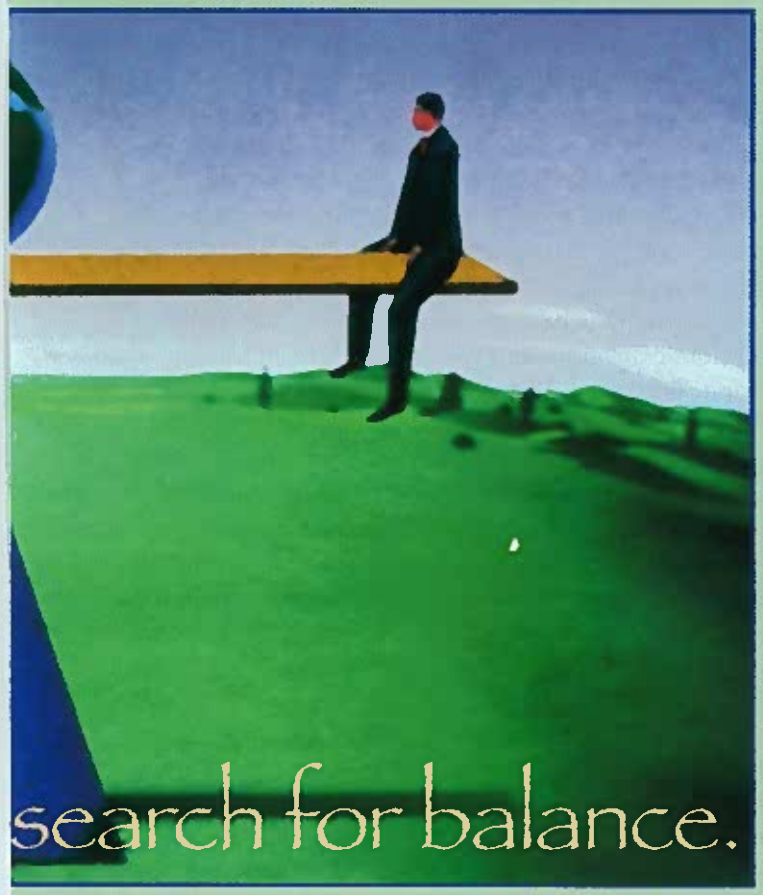


ILLUSTRATION: DICKRAN PALULIAN

The mission statement of TRS states that it will "present ideas, including free-market concepts, that benefit all living things. ... The Society will provide a source for media interface, ensuring that the positions of all sides will be heard. Most importantly, it will advance policies that will unite those with common concerns for *their* environment."

A key component of the statement above is the inclusion of *all living things*. Too many times radical liberals concern themselves exclusively with flora, marine life, and animals, no matter the cost to human beings. The Theodore Roosevelt Society seeks to involve human concerns in these debates without excluding the legitimate concerns of other living things. Doing otherwise is morally and intellectually indefensible.

What is the potential impact of the injection of conservative environmentalism into the overall discussion? Liberals bow at the altar of the Environmental Protection Agency (EPA). It is safe to say that many business owners, small and large, have tangled with EPA. In the past, EPA has unfairly branded businesses as polluters, ordered companies to clean up sites they did not contaminate, and used dubious reasoning to fight a company's expansion or relocation to a particular site.

While businesses have run-ins with the state Department of Environmental Protection (DEP), there is at least some satisfaction gained in the realization that they are dealing with an entity that is approachable and closer to the concerns of private and public interests. Yes, permitting can be interminably slow. Yes, there are plenty of businesses that have spent two years trying to get a permit from DEP, then were told they could not expand or relocate their operations because of ecological concerns.

There are hopeful signs, however, that streamlining of the permitting process at the state level is working. We should also note that DEP has made some effort to balance the concerns of economic growth and environmental protection. Proof of that is the criticism the agency is receiving at the hands of liberal environmentalists and some editorial boards.

There is growing friction between the state environmental agencies and the EPA. New York Law School Professor David Schoenbrod, writing in *The Wall Street Journal*, draws the conclusion, shared by many, that EPA believes "that the states would despoil the environment." Thus an on-going regulatory power grab has ensued. This confiscation has intensified under EPA administrator Carol Browner, Florida's former environmental chief.

At last year's meeting of the state environmental

WE BELIEVE THAT ENVIRONMENTAL PROTECTION AND economic development are not mutually exclusive activities.

commissioners, T-shirts were distributed bearing the message: "The states are not branches of the federal government." As conservatives know, the federal government does have a prescribed role in environmental regulation. The EPA is there to solve problems on interstate pollution not adequately controlled by states or interstate compacts, protect the great national parks, and regulate nationally marketed goods. Schoenbrod writes that "it can also offer the states and the public information on local pollution levels and draft model pollution laws, but let [the states] decide."

The most recent uses of junk science on the part of liberals comes in the furor over the EPA's crusade for new clean air standards, billed as "clearing the urban skies of smog and soot," and the Kyoto conference on global warming. Just as many communities were coming into compliance with current clean air standards, EPA has moved the goalposts further back. The big losers: those holding jobs that are threatened by the new standards and the companies that will be forced to expend current resources to either fight the new standards, or implement them, or both. Many Democrats and Republicans alike are in opposition to this federal power play.

The Kyoto treaty, negotiated by Vice President Al Gore, will have significant economic side effects on American industry if implemented. There is yet to arise any clear scientific proof that global warming is moving beyond mere theory and into an actual phenomenon. Even so, the vice president warns that scientists skeptical of the global warming theories, "should not be given equal weight with the consensus now emerging in the scientific community about the gravity of the danger we face." The consensus Gore cites as the reason to chill scientific inquiry does not actually exist in the scientific community, however; the consensus is among some scientists, some politicians, and the environmental advocacy groups. It is liberal environmentalism at its worst.

The rights of property owners have traditionally received short shrift in the debates on environmental issues. People have had their property taken away by bureaucratic fiat, or have lost the use of their land without compensation. In Florida those rights were taken into consideration with passage of the land-buying program, Preservation 2000. Through this program, begun in 1990 under the guidance of then-Gov. Bob Martinez, pristine areas have been preserved and landowners have been compensated. It represents a merging of competing interests into workable public policy that meets with overwhelming approval from the citizens. It is for that overriding reason — balance — that the Theodore Roosevelt Society advocates the continuation of Preservation 2000.

This issue may progress to a greater degree of cooperation and the balancing of diverse interests. In some cases cooperation is made impossible, however, by the decidedly partisan biases of some groups that bill themselves as non-partisan. For instance, each year, the League of Conservation Voters, under the guise of environmental advocacy, publishes a scorecard that deliberately includes certain votes while excluding others in order to create artificially low environmental scores for Republicans and high scores for Democrats.

However, the Theodore Roosevelt Society has held helpful and promising discussions with The Nature Conservancy and the Florida Audubon Society in recent weeks. The outreach to both groups has been met with a similar response, welcoming initiatives that combine environmentalism with economic development. It is in this atmosphere that the needs of industry can be communicated to these environmentalists, and to end the false segregation of conservatism from environmentalism.

The search for balance between environmentalism and economic development is just one of the unique political events occurring this year. Florida and the nation will be much better off with a quiet, reasoned approach to conservation of natural resources. Tourism is a vitally important segment of our economy. A vibrant environment fosters a vibrant tourism industry. On the other hand, business development can be done in such a way and in the right areas to create jobs within pristine surroundings.

We need to strongly advocate common sense environmentalism. Common sense equals business cents, that is appealing to the senses. ■

Dale Patchett, president of R. Dale Patchett Management, Inc., is an AIF lobbyist and a former Republican leader of the Florida House of Representatives and a top-ranking official of state environmental agencies.

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THE START OF SOME-THING BAD

PHOTO: STEVE BRONSTEIN

by jon l. shebel, publisher

In April 1994, the Florida Legislature passed a law that dramatically tilted the scales of justice against targeted businesses and in favor of the state attorney general in so-called Medicaid reimbursement suits. Amendments to the Medicaid Third-Party Liability Act were conceived by a group of elite plaintiffs' lawyers who wanted to give the state — and the private attorneys it would retain — an edge in their soon-to-be-filed lawsuit against tobacco manufacturers.

The law, however, widely exceeded its advertised purpose of giving the advantage to the state. It virtually guaranteed the state victory in this and future cases against any business. It created a new, state-based cause of action. It relieved the state retroactively of the need to prove causation and damages. And it stripped defendants of time-honored defenses such as assumption of risk, contributory negligence, subrogation, or lien. Those of us who opposed the law warned of the damage it did to basic legal protections and principles, and warned that it would encourage the passage of laws like it in other states.

Those fears are now coming to realization, as a number of states, some of which have already suffered court defeats in their Medicaid reimbursement suits, are taking steps to rig the civil justice system. Just as Florida did, these state politicians are acting against business to place victory — and apparently billions of dollars — securely in their hands. Policymakers in those states would be wise to take a step back from their current zealous quest and consider the broader legal, and practical ramifications of imposing such changes on the civil justice system.

As a general matter, specifically empowering a state to sue a particular business or industry is troubling. It is unconscionable, and clearly constitutionally suspect, however, to apply this and other changes to *pending* litigation. The attorneys general of Iowa and Maryland are currently attempting this in order to reverse those states' earlier court defeats. Judges in both states ruled that several of the state's claims in its lawsuit could only proceed based on the principle of subrogation, where the state "stands in the shoes" of each allegedly injured Medicaid recipient. The principle of subrogation would require the state to satisfy the inconvenient requirement of proving direct injury and to counter affirmative defenses like assumption of risk.

Proposals in these two states would essentially wash away the common law concept of subrogation in the middle of a lawsuit, dictating to the respective state judges that these dismissed claims should now be revived under new law. Such a maneuver sets a chilling precedent for any litigation opponent of the state, and certainly offends basic constitutional notions of due process and separation of powers.

Editor's note: This article was originally published by the Washington Legal Foundation as part of its Legal Opinion Letter *series. Since then, the legislatures of Maryland and Vermont have both enacted laws similar to Florida's; Vermont's law is under constitutional challenge. Florida's Medicaid Third-Party Liability Act was repealed during the 1998 Legislative Session and Gov. Lawton Chiles permitted the repealer to become law without his signature (see Ch. Law #98-411, effective June 17, 1998).*

IT IS INCREASINGLY PLAUSIBLE that this taxation-by-litigation approach can be replicated in other contexts.

In addition to creating this new legal cause of action, Maryland, as well as Vermont, Missouri, and California may follow Florida's lead in allowing the state to present evidence that a statistical correlation exists between the defendant's product and the harm alleged in order to prove causation and damages. This would relieve the state (but not the private parties) from meeting a fundamental burden of proof — that the injury suffered was due to the particular acts or omissions of the defendant. Several states would go even farther, stating specifically, as Florida's law did, that defendants have no access to any information revealing the identity of individual Medicaid recipients or the treatment they received.

These provisions create an *irrebuttable* presumption that defendants are responsible for Medicaid recipients' injuries. They deny defendants the ability to determine whether any recipients used their product, whether there might be other contributing or sole causes of the illnesses, or whether the recipient was even diagnosed with the statistically associated disease. The Florida Supreme Court struck down as an unconstitutional denial of due process the provision in Florida's law that kept recipients' identities secret. States considering these radical changes should heed not only that court's ruling, but also be aware of the disturbing precedent they would be setting for the civil justice system. These changes could be used to prosecute claims against beef, dairy, sugar, or other producers of food products implicated by statistical studies as causes of certain health problems.

The Florida law also provides a disgraceful model for other changes several states are pursuing to ensure victory in their Medicaid suits. Those states want to, as Florida's law did, abrogate "principles of common law and equity," such as lien, comparative negligence and assumption of risk, and other defenses "normally available to a liable third party" in order to "ensure full recovery" (section 409.910, *Florida Statutes*). Under these provisions, any defendant unfortunate enough to be accused of harming a Medicaid recipient cannot assert common law defenses that it could argue if it had allegedly harmed someone paying for their own medical expenses.

As the dissenting Supreme Court justices said in the suit filed by Associated Industries of Florida and others to challenge the law, "the due process implications are overwhelming." And, although the slim majority of justices in that decision ruled that removing defenses was constitutional "on its face," they went out of their way to state that these provisions could be vulnerable to a "constitutional due process attack as to [their] application." Such a challenge was never lodged because of the recent settlement in Florida.

The impact of implementing into law such a radical retooling of states' civil justice systems would be felt far beyond the targeted industry and those specific jurisdictions. Adoption of these ideas will set a dangerous precedent for *all* businesses that reside and do business in those states. If a state government is permitted in this instance to fund its basic services by selecting an unpopular industry, stripping it of legal protections and defenses in *pending* lawsuits, can any industry be assured that it will not be the next target of this approach?

While the states and their attorneys general, as well as other proponents of these Medicaid suits, argue that tobacco is a "unique" product requiring these unusual legal maneuvers, it is increasingly plausible that this taxation-by-litigation approach can be replicated in other contexts. This is especially true because of the involvement of enterprising private plaintiffs' lawyers in the states' lawsuits. As reported in the July 21, 1997, edition of *Fortune* magazine, one plaintiffs' lawyer deeply involved has boldly stated that "we're negotiating with [attorneys general] in another disease area. And some consumer protection cases." One city's mayor is currently contemplating a Medicaid-style reimbursement suit against firearms manufacturers. Creative public officials and lawyers could certainly target other products with which there is a statistical correlation between their use and health problems for which Medicaid must be paid.

While Florida's Legislature finally repealed the Medicaid Third-Party Liability Law in the last session, the action came too late to rein in the evil loosed when it first opened that Pandora's Box in 1994. In the end, states considering changes to the law such as those discussed above should ask themselves if it is worth imperiling their respective business environments, and creating substantial uncertainty and unfairness in the civil justice system, to tilt the scales of justice against a currently unpopular defendant. The answer will affect its citizens for decades to come. ■

Jon L. Shebel is president & CEO of Associated Industries of Florida and affiliated companies.

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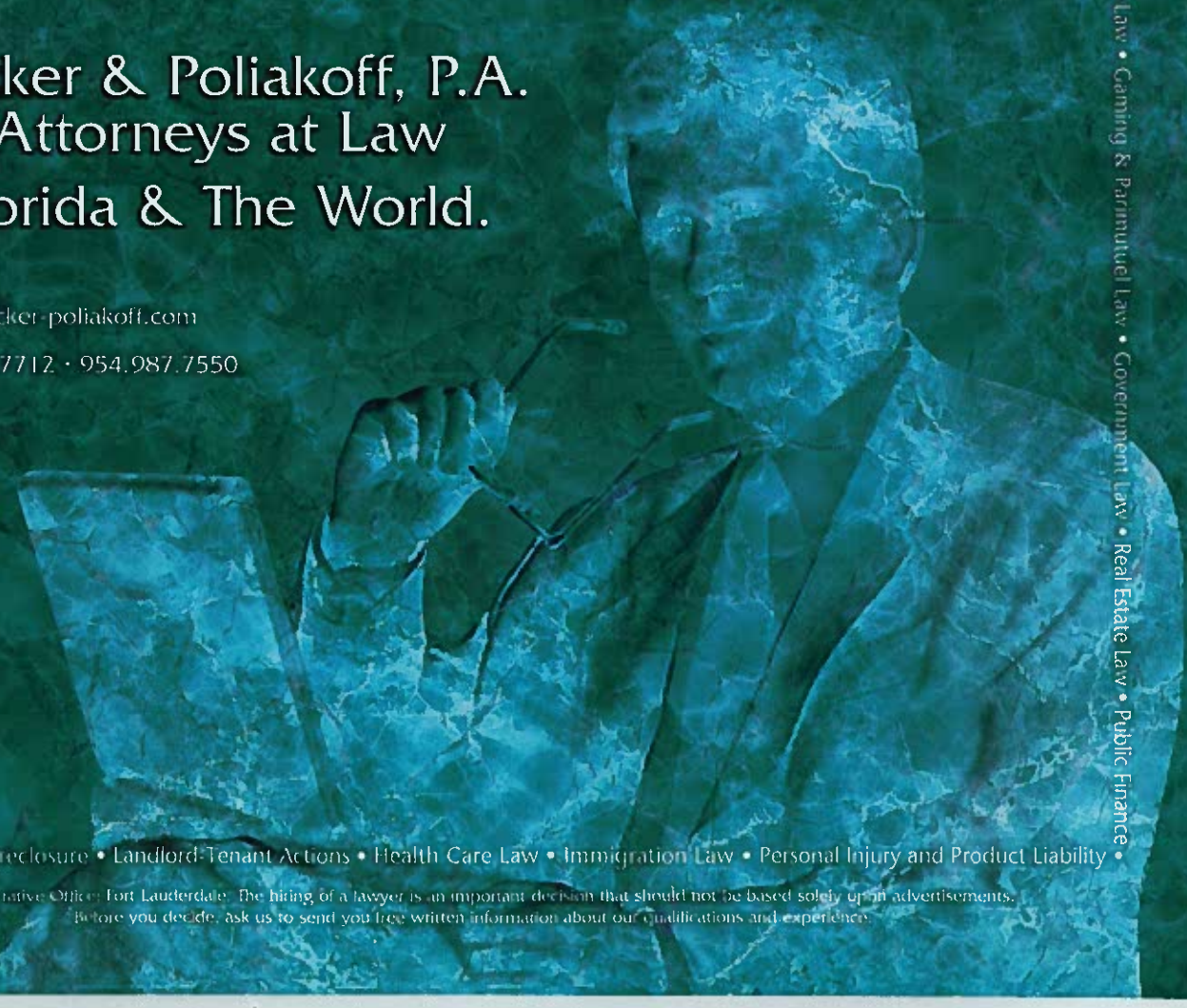

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Charles Johnson Post,
The Little War of Private Post

PHOTO: FLORIDA STATE ARCHIVES

With the onset of the Spanish-American War on April 24, 1898, the people of Tampa never expected the kind of invasion of their city that would follow.

That summer, the city would play host to 34,000 soldiers as they prepared to embark for Cuba. At first, the young servicemen were welcomed by the patriotic folk of Tampa, but the hospitality was quickly withdrawn as the soldiers remade the town for their pleasure. New York-born infantryman Charles Johnson Post remembered searching for a glass of milk to soothe a stomach upset and finding nothing but saloons and whorehouses.

There was the gunfight between some of Teddy Roosevelt's Rough Riders and the ladies at one the houses of ill repute. There was also the infamous "Charge of the Yellow Rice Brigade," when another group of Rough Riders herded their horses through a local restaurant. And then there was the owner of one joint who gleefully let his customers shoot up his establishment every night — as long as they paid dearly for the privilege and their whiskey.

On July 17, Spain surrendered and by the end of August most of the troops were gone from Tampa. Last Chance Street was paved over and family housing replaced the dens of iniquity. The city had survived the war and the invasion and settled into peacetime. ■

Hickory driver and shaft, circa 1895.

Persimmon driver with enamel-coated shaft, circa 1935.

Persimmon driver with steel shaft, 1955.

Laminated wood driver with steel shaft, 1976.

Graphite driver and shaft, 1988.

Oversized, perimeter-weighted metal driver, 1994.

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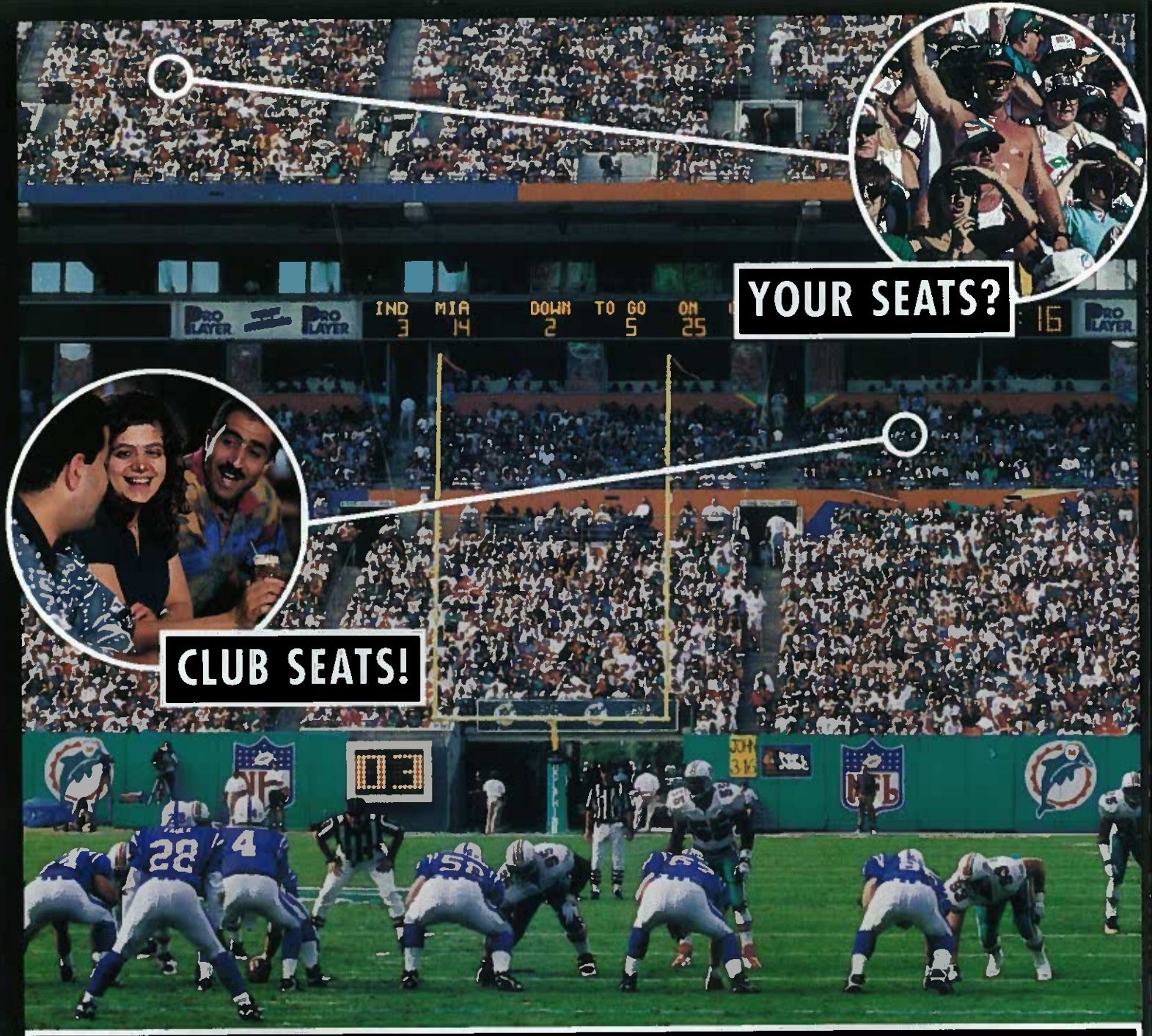

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