FLORIDA BUSINESS INSIGHT
SEPT. OCT. 1999
The Magazine Of Free Enterprise & Public Policy

Washington's SHADOW Government

Returning Power To The People

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FLORIDA BUSINESS INSIGHT
The Magazine Of Free Enterprise & Public Policy

September/October 1999
Volume 3, Issue 5

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Putting "We The People" Back In Power

COVER PHOTO ILLUSTRATION: DWIGHT SUMNERS

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Who Needs Laws When You've Got Rules?

Legislators seem to be magnets for more than their share of the cynicism that swirls around the governing class, perhaps because they attract so much attention but remain rather unphotogenic. After all, aren't the most enduring images from each legislative session those that punctuate its messiness?

But the next time your heart is filled with disgust at those publicity-seeking, money-grubbing, interest-group-pandering political creatures we call lawmakers, you might want to stop to ponder the question: And the alternative is?

This month's cover story is about a process called rulemaking, which some would like to see supplant the process called lawmaking. As you will find in reading the article, unlike the constitutional regime with its checks and balances, there are no similar reins on government power in the federal rule-making regime.

The threat embodied in the shadow government of the cover story is easy to underestimate. It is a slow, steady, drip-drip-drip erosion of freedom that converts individual liberty into government power. The transfer is accomplished one small, barely noticeable piece at a time.

The accomplices to the assumption of power by the unelected are the members of the federal judiciary and sometimes the federal lawmakers themselves. The Equal Employment Opportunity Commission and the judiciary have turned the Americans With Disabilities Act into a law that designates oversleeping as a disability, thereby protecting chronically late employees from discipline. The Office of Civil Rights and the judiciary have turned the anti-discrimination provisions of Title IX into a vehicle to shut down men's athletic programs in order to equalize sexual representation in college sports. But neither ends could have been accomplished (as easily) if Congress had not supplied the means with poorly crafted legislation.

The latest exhibit in this museum of federal malfeasance is the Food Quality Protection Act. The FQPA, as it is affectionately known in acronym-hungry Washington, was debated, passed, and signed into law within a space of two weeks in the summer of 1996. Hailed by agricultural and environmental groups alike, the act replaced the old Delaney Clause, an anti-pesticide relic of the 1950s that prohibited any detectable level of cancer-causing agents in processed food.

The act gave the Environmental Protection Agency the authority to restrict pesticide use in order to achieve a standard of "reasonable certainty of no harm" in the nation's food supply. This August EPA finally exercised that authority by restricting and banning the use of two popular and previously undangerous pesticides. The groups who supported the FQPA responded by filing lawsuits against EPA.

One side, led by the National Resources Defense Council, objects to EPA's timid enforcement of the law. The other side, with the American Farm Bureau at its helm, is suing EPA for overstepping its authority. Thus litigation trumps regulation, which trumps legislation.

Elite spin would have it otherwise, but of the three branches of government, the legislative branch is the one peopled by the politicians closest to their constituents. That makes them the easiest for us — all of us, not just a chosen few — to influence, supervise, and restrain.

We should all use our power to force those in Congress to take their obligations more seriously. And part of that obligation is to put a leash on the federal bureaucracy. Serious reform of the Administrative Procedure Act is the first step. ■

Jon L. Shebel is president and CEO of Associated Industries of Florida and affiliated companies (e-mail: jshebel@aif.com).

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by david p. yon

Limited Liability Companies

The series of letters "LLC" is becoming so ubiquitous that you might think it's the name of an up-and-coming relative of a popular mail-order company.

In fact, LLC, which stands for "limited liability company," represents a new (relatively speaking) way to organize a business, and even though you can't buy clothes from one, it may just be a more useful way to organize your company.

Historically, sole proprietorships, partnerships, and corporations (both "C" and "S") have been the forms of ownership and organization of businesses. Each offers varying degrees of protection from the claims of business creditors and each has different income and estate-taxation treatments, as well as unique recordkeeping requirements.

An LLC provides several advantages over the other three forms of organization. An LLC can give an owner or owners (the *Florida Statutes* refer to owners as members) protection against the claims of business creditors that a sole proprietorship or partnership can't. Business creditors cannot attach the assets of the LLC's owners (members), but are "limited" to the amount of capital in the organization. Also, the owners (members) of an LLC can participate actively in the operation of the business without exposing themselves to personal liability.

LLC's are taxed similar to general partnerships, which means that income and losses are passed through to the owners (members) and not taxed at the LLC level. The LLC fills out its own tax return with the income or loss of the LLC being allocated to the owners (members) and reported on each owner's (member's) individual income-tax return. If an owner (member) actively participates in the operation of the LLC, he or she also is liable for the self-employment (Social Security and Medicare) tax of 15.3 percent on income. Owners (members) who are not actively participating (i.e., who are investors only) are not liable for this tax.

A disadvantage of LLC taxation is that the maximum individual income rate is 39.6 percent versus the maximum corporate income-tax rate of 34 percent. Also, an LLC is not able to accumulate income to fund future expansion. An LLC can, however, choose to be taxed as a corporation, although there is generally no reason to do so.

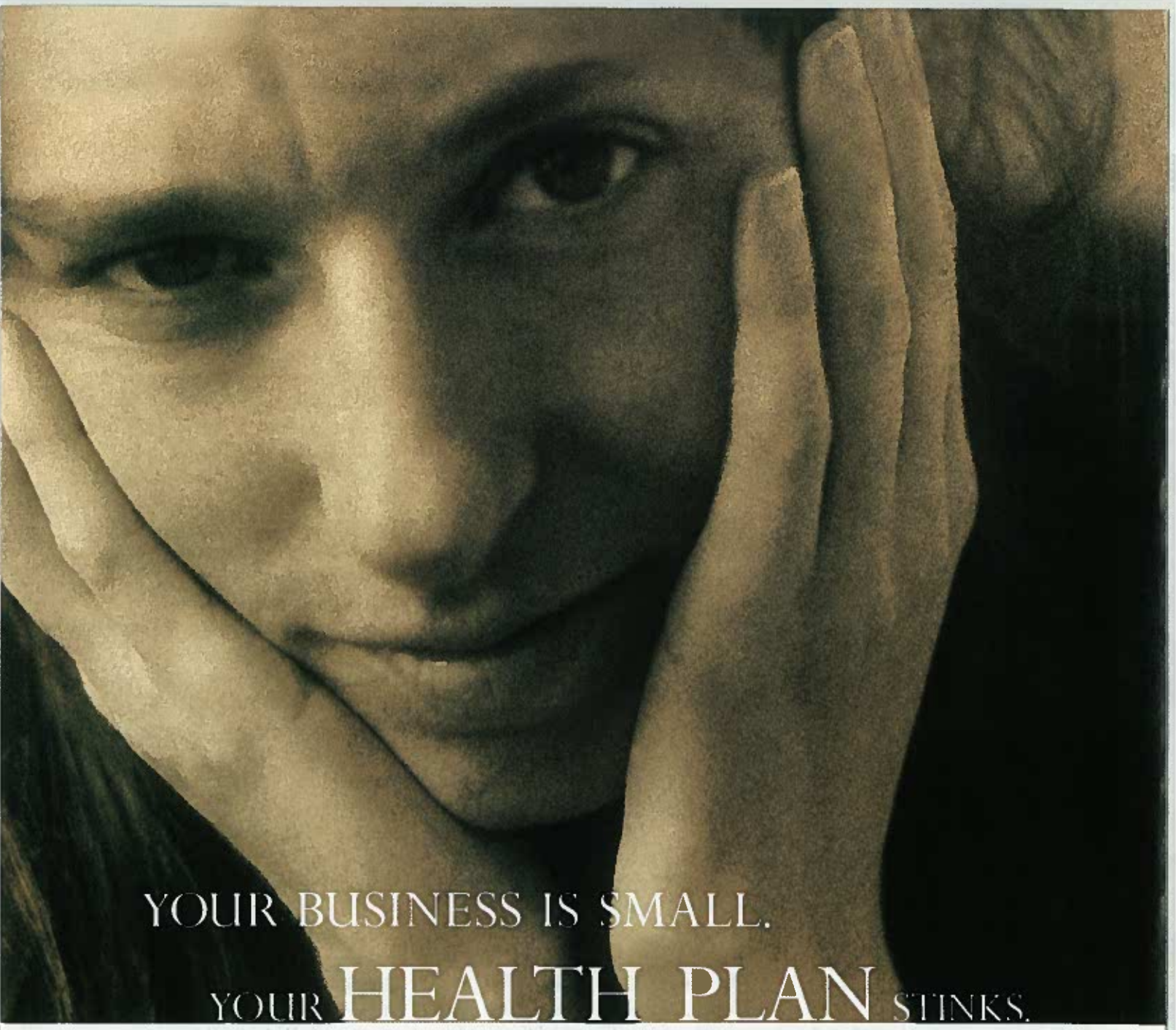
To form an LLC, articles of organization must be filed with the secretary of state and, naturally, fees must be paid. The Florida Department of State's Division of Corporations maintains a Web site (*http://www.sunbiz.org*) containing forms that may be downloaded for LLC's, both Florida and foreign.

Starting an LLC from scratch or converting from a sole proprietorship or partnership generally presents no unusual tax problems; however, converting an existing "C" or "S" corporation into an LLC can trigger taxable income and can be legally complex. Legal and tax advice should be obtained prior to doing this.

One caveat: Since LLC's are a relatively new form of organization, there are legal and tax issues that could arise and provide unwanted outcomes. Most of the known issues have been resolved, however, and this should not stand in the way to using the LLC as a form of business organization.

LLC's provide a viable and clearly beneficial form in which to conduct business operations. While they might not be appropriate to all businesses, they are very suitable to most and can provide valuable asset protection and tax savings. ■

David P. Yon, CPA, is the senior financial advisor for Associated Industries of Florida and affiliated companies (e-mail: dyon@aif.com*).*



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by robert d. mcrae

Hackers Find The Back Orifice

Perhaps it was fitting that cyber-gossipist Matt Drudge broke the story of a new cyber-threat.

The July 30, 1999, "Drudge Report" reported that "computer giants Microsoft and Compaq admitted on Friday that Internet pirates and pranksters now have the ability to damage millions of computers worldwide via e-mail or through commands sent from a malicious Web site." According to the next day's edition of the *New York Times*, Microsoft and Compaq blamed "several significant security flaws" for this problem.

In fact, the problem isn't really a security flaw but rather is inherent to the design of Windows 95/98. Both versions of Windows are designed to operate in a network environment and, as such, have built-in facilities that allow hackers access to your machine.

Unless you make it your business to stay abreast of Internet security problems, you have probably never heard of Back Orifice. Back Orifice (a pun on the name of "Back Office," a legitimate network management tool) is a program that can give uninvited guests access to and control of your computer by way of its Internet link. Orifice runs on Windows 95/98 systems and gives a remote user administrator privileges to your computer.

Back Orifice was released by the Cult of the Dead Cow, self-described as the most influential group of hackers in the world (*http://www.cultdeadcow.com*), in August of 1998. By some indications over 100,000 people have downloaded the program since then, and the number of Orifice sites is growing daily. Experts fear that its full potential for harm still hasn't been realized.

While it is not a virus, Back Orifice arrives at your computer in the same manner as a virus, attached to another program or file. Once it gets there the program can be launched and run by a remote operator. There are no outward signs that the program is running on your computer, but once it is running your system is easily accessed any time you connect to the Internet.

At present there is no antivirus tool that can reliably prevent the installation of Back Orifice or reliably remove it once installed. Both Symantec's Norton AntiVirus and McAfee's anti-virus programs detect Back Orifice, but neither removes it when it is running. Common sense is the best defense. Don't install and run just any program that's sent to you. If you don't know the person sending you the file or if you suspect that it has been passed on without much scrutiny, don't install it.

There is one surefire way to determine if Back Orifice is installed on your system. An entry in the Windows registry file allows Back Orifice to be invoked at startup. The most complete site for information on Back Orifice (*http://www.bardon.com/boelimbyhand.htm*) includes information on how to remove that entry from the registry file. The site also contains additional information on Back Orifice, how it is used, and other services to protect your computer from it.

Detecting and removing Back Orifice from your system is relatively easy. Internet Security Systems's Web site (*http://www.iss.net/xforce/alerts/advise5.html*) has the necessary technical facts in its security alert advisory on Back Orifice.

Remember: The best defense against an infected computer is a healthy fear of downloading or running programs unless you are 100 percent sure that they are trustworthy. The best rule of thumb is: When in doubt — don't. ■

Robert D. McRae is senior vice president and information services director for Associated Industries of Florida (e-mail: rmcrae@aif.com*).*

Does your business *know* the answers?

What is WAGES?

Florida's Work and Gain Economic Self-Sufficiency (***WAGES***) program was established in 1996 to restructure a failed welfare system. ***WAGES*** establishes locally designed programs better tailored to meet the needs of individuals and families working their way off of welfare.

What is Medicaid?

Medicaid is a federally created health care benefit program funded through federal and state participation to provide health care services to Florida's welfare recipients. Medicaid beneficiaries must meet very specific poverty guidelines in order to receive much-needed health care.

What is a Drug Formulary?

A prescription drug formulary is a list of specific drugs that are available to Medicaid recipients through authorized health care providers. Some drug formularies can restrict the patient and the physician to a limited list, not including newer, innovator medicines.

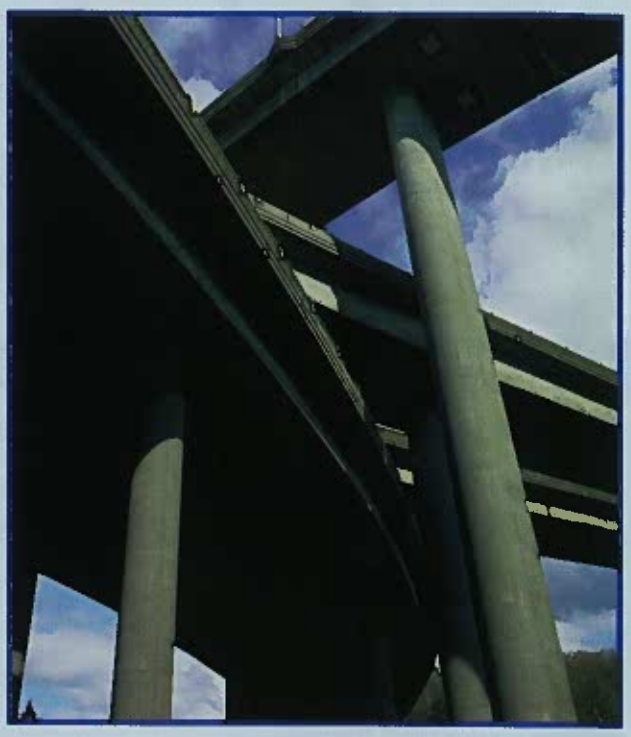
Over the past several years, serious attempts have been made to reduce the Medicaid budget by implementing a restricted drug formulary. A restricted formulary would deny access to needed innovative prescription medicines that help Medicaid recipients achieve and maintain good health. The legislature has continued to reject efforts to restrict the drug formularies. They realize that allowing physicians to prescribe those needed medications to treat their Medicaid beneficiaries is one of the most cost-effective forms of health care. This provides opportunities to become involved in programs like ***WAGES*** that ultimately allow recipients to become self-sufficient and productive contributors in Florida's businesses.

Many welfare recipients are able to move off of welfare into self-sustaining jobs because of access to quality medicines.

The Florida Coalition For Access To Quality Medicine

compiled by jacquelyn horkan, editor

This Land Is My Land



Is protecting landowners' rights a waste of money? That appears to be the conclusion of Florida's Office of Program Policy Analysis and Government Accountability (OPPAGA) justification review of the state Department of Transportation's right-of-way acquisition program.

DOT uses government's power of eminent domain to buy the property it needs to build roads. Under eminent domain, if government wants the property, it's going to get it; the only question is how much is it going to pay.

Eminent domain is one of the greatest — and ripest for abuse — powers enjoyed by government. In all categories of legal trials save two are cases heard by juries of six members. The two exceptions — when a 12-member panel is seated — are eminent domain cases and capital cases, i.e., where government either wants to take your property or your life.

With eminent domain, citizens have to protect against the government low-balling its appraisals and using its coercive power to cheat landowners out of just compensation for the property it takes. On the hand, citizens also need to be wary of land speculators who try to finagle out of government more money than their property is worth.

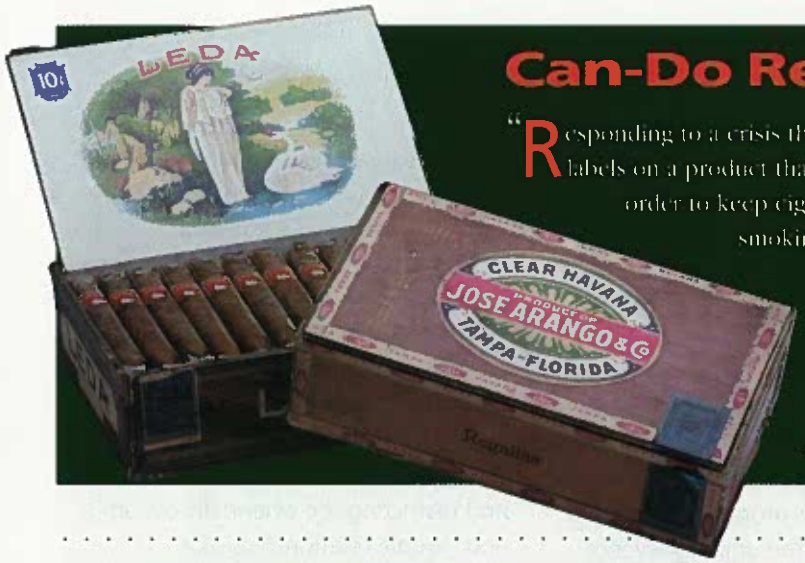
In 1994, the Florida Legislature devised a system to protect landowners and taxpayers against unethical parties on either side of the eminent domain bargaining table. DOT is required to reimburse the landowner for the costs he incurs (on legal representation, independent appraisals, and other costs) in determining the fair value of property subject to state condemnation under eminent domain. If the state and the landowner have to turn to a jury to decide an acceptable price for the property, the state reimburses the landowner's fees only if the jury awards a price higher than that of DOT's last offer. The landowner's attorney is awarded fees based on the difference between the jury's higher price and DOT's lower price. DOT must also pay business damages to owners who lose profits because of a right-of-way acquisition.

Thus, DOT has an incentive to treat the property owner fairly and the property owner has an incentive not to gamble that litigation will bring him a higher price. OPPAGA recognizes only DOT's incentive, however, ignoring that the landowner faces the risk of paying all of his legal and expert fees if he takes a shaky case to court. By refusing to acknowledge the dual mechanism in the 1994 legislation, OPPAGA has rendered itself unable to recognize the law's benefits.

During the fiscal year that ended on June 30, 1998, DOT spent $432.9 million on right-of-way acquisitions; 14.7 percent of that amount ($63.5 million) was spent on reimbursing landowners for their expenses during the acquisition period. OPPAGA wants to cut these costs to about $27 million.

The most persuasive argument OPPAGA can muster for dismantling the 1994 reforms is that few states are as solicitous of landowners' rights as Florida. The report presents no evidence that landowners are abusing the taxpayers in right-of-way acquisitions, although OPPAGA apparently believes that the only reason Florida is spending so much to compensate landowners' must be an excess of generosity or of landowner abuse. But OPPAGA never considered that the expenditure might be excessive (a dubious conclusion in itself) because landowners are successfully standing up to DOT's abuse of its eminent domain power.

Either or neither conclusion could be true. OPPAGA, however, prefers to draw an inference that clearly reflects its own bias. It is a misassumption that is made more and more frequently: Government's interests are always the same as the people's; therefore, anyone who opposes any expansion of government power must be our enemy. ■



Can-Do Regulators

"Responding to a crisis that isn't a crisis, the [Federal Trade Commission] will require labels on a product that is already labeled and ban advertising that doesn't exist, in order to keep cigars from children who don't seem terribly interested in smoking them. [The FTC report] *Cigar Sales* is thus a signal document of the age — an elaborate, data-laden rationale that serves to obscure the real reason the federal government wants to launch another flotilla of pointless regulation: Because it can."

"Hands Off Our Cigars," *The Weekly Standard*, August 2, 1999

I Am Fifi, Hear Me Roar!

Plaintiff lawyers are using the bonds of affection between owner and pet to overturn a centuries-old legal doctrine that limits any award for damages in a negligence case to payment of the creature's fair market value. The plaintiff lawyers' new doctrine would have animal owners reimbursed for such things as loss of companionship, boosting the size of the awards and, not coincidentally, the lawyers' contingency fees.

The trend worries veterinarians who will end up paying higher and higher rates for their malpractice insurance (which will drive up their fees, leaving some people unable to afford medical treatment for their pets). Of greater concern is the threat the pet-owners' lawsuits pose to community efforts to control dangerous animals. Earlier in this decade, a 110-pound dog bit a small child in the city of Haworth, New Jersey. The dog's owners objected to the city's plan to euthanize the animal. After the city spent $60,000 during three years of appeals, Gov. Christine Todd Whitman signed an executive order giving the dog clemency.

Animal law is a growing discipline; student animal law groups have been created at some of the nation's most prestigious colleges of law, including those at Harvard, Stanford, and Georgetown. These soon-to-be lawyers are not eyeing a future of veterinarian malpractice cases, however. The pet-owners' rights movement is a wedge in a larger battle to secure equal rights for animals. That conflict is embodied in the international Great Ape Project, which has the long-term goal of securing a United Nation's Declaration of the Rights of Great Apes.

Backers of the declaration "demand the extension of the community of equals to include all great apes: human beings, chimpanzees, bonobos, gorillas, and orangutans." According to the Animal Legal Defense Fund, the primary promoters of the Great Ape Project in the United States, "we assert that [our fellow apes] are our *moral* equals in the crucial areas of right to life, protection of freedom, and prohibition of torture" (emphasis in the original).

Animal rights' fanatics, in addition to making a mockery of morality, pursue an extremist agenda that seemingly will not end until litigation has freed animals from laboratory experiments, livestock farms, zoos, or any other situation in which a lawyer decides that an animal's "humanity" is being denied.

Take a close look at any radical effort to reshape American society and chances are you'll find a gang of plaintiff lawyers on the make. And so it is with the animal rights movement.

Biting The Hand

Over a four-year period, the typical Yale doctoral student can collect up to $163,540 from the university in the form of tuition, stipends, and fellowships. In addition to that compensation, he receives free health care; access to university libraries, athletic facilities, and cultural centers; and free job-placement assistance. Not too shabby a deal, is it?

So why are these intellectual wunderkind fighting to join the Hotel Employees and Restaurant Employees International Union? The students argue that they are employees who apparently are subject to the capricious and despotic rule of management meanies in the administration.

Yale is fighting the effort. In a story in the August 3 *Investor's Business Daily*, Provost Alison Richard foresees a future where "such matters as poor grades, level of stipend awarded, nonselection for departmental honors, the contents of recommendations, [and] disapproval of theses or thesis proposals" would all become grist for the union grievence mill.

Universities have long been a hotbed of hostility toward the free market, and left-wing academics have been some of the strongest backers of preferential treatment for unions. With private-sector union membership declining, however, labor officials are shifting their sights to those in the ivory towers of academia and government.

Yale, at least, resents its new role as union target. If the grad students are allowed to unionize, Richard cautions, "a universe of pervasive and intrusive external regulation and regulatory processes would apply, burdening and restricting the essentially dynamic and flexible relationships of an educational system that has long been in place."

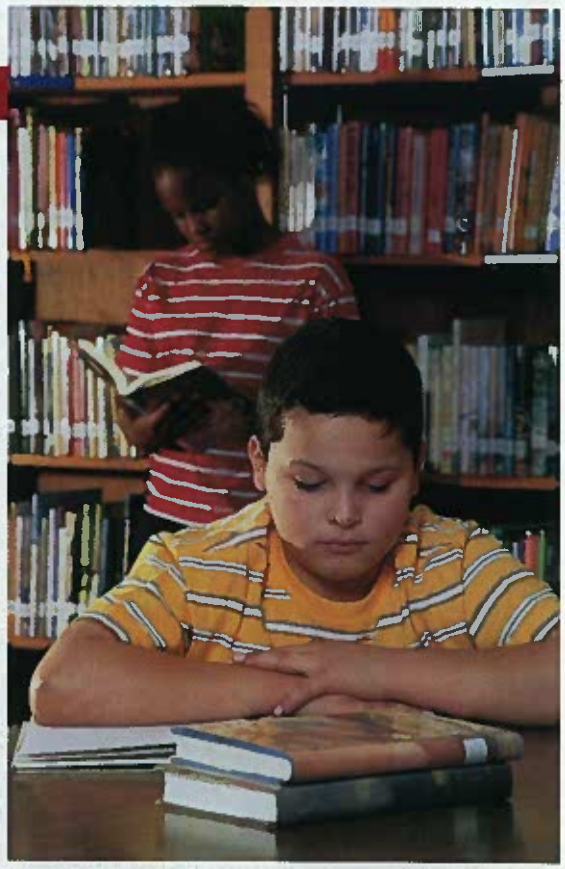
Substitute "free market system" for "educational system," and you get the same argument voiced by employers for decades. ■

Blame The Victims

In her September 2 column in the *Orlando Sentinel*, Helen Parramore, a 30-year teaching veteran, criticized the Bush-Brogan education reforms by writing, "It's the students who earned the grades, not the teachers. ... Let's put the low grades where they belong: on the students who made them." In other words, teachers can't be blamed for students who don't learn.

True, there are some students who come from such chaotic homes that teaching them would test the patience of a saint and the competence of a genius. But just as harmful to the rest have been the teaching fads fancied by colleges of education. The idea that teachers should be "facilitators" who allow students to "discover" knowledge without "stifling" their creativity lets classroom instructors escape the rigors of shaping young minds imprisoned in bodies that would rather be outside playing. And since colleges of education would rather train future educators on theories of teaching instead of the subject matter they will use those theories to impart, is it any wonder that Johnny can't read ... or spell, or multiply, or write a complete sentence, or explain the difference between mammals and amphibians?

Perhaps the healthiest consequence of school choice is that it is forcing the education establishment to reveal what many long suspected were its true stripes: Protecting the status quo, not children, is its first priority. ■



by kathleen "kelly" bergeron

COBRA: What, Who, And When

All employers with at least 20 employees would be well-served to acquaint themselves with COBRA, which gets its name from the Consolidated Omnibus Budget Reconciliation Act enacted by Congress in 1985.

Under COBRA, employers must give "qualified beneficiaries," who would otherwise lose health insurance coverage due to a "qualifying event," the option to elect, within a specified amount of time, to continue coverage under the employer's group health plan (see chart for definitions of "qualified beneficiary" and "qualifying event").

A qualified beneficiary must notify the plan administrator within 60 days of the occurrence of a qualifying event. The plan administrator must inform the qualified beneficiary of his right to purchase continuation coverage within 14 days after the administrator is informed of the qualifying event.

After he receives notification from the administrator, the beneficiary has 60 days to elect coverage continuation. The beneficiary then has 45 days from the day he elects coverage to pay the initial premium. The coverage must be identical to that in the group health plan provided to the qualified beneficiary at the time of the qualifying event. Group health plans covered by COBRA usually include insurance coverage for medical, dental, vision, and prescription drug expenses.

An employer does not have to offer continuation coverage to an employee who is terminated for "gross misconduct," although neither COBRA regulations nor the law itself defines that term. General legal usage, however, indicates that gross misconduct involves a large degree of fault (such as a criminal act) on the part of the terminated employee.

COBRA places specific and complicated responsibilities on employers, and the penalties for noncompliance are severe and expensive. Space does not allow a comprehensive presentation of COBRA, thus you would be wise to consult with an attorney or benefits consultant for the specific requirements that apply to you as an employer. ■

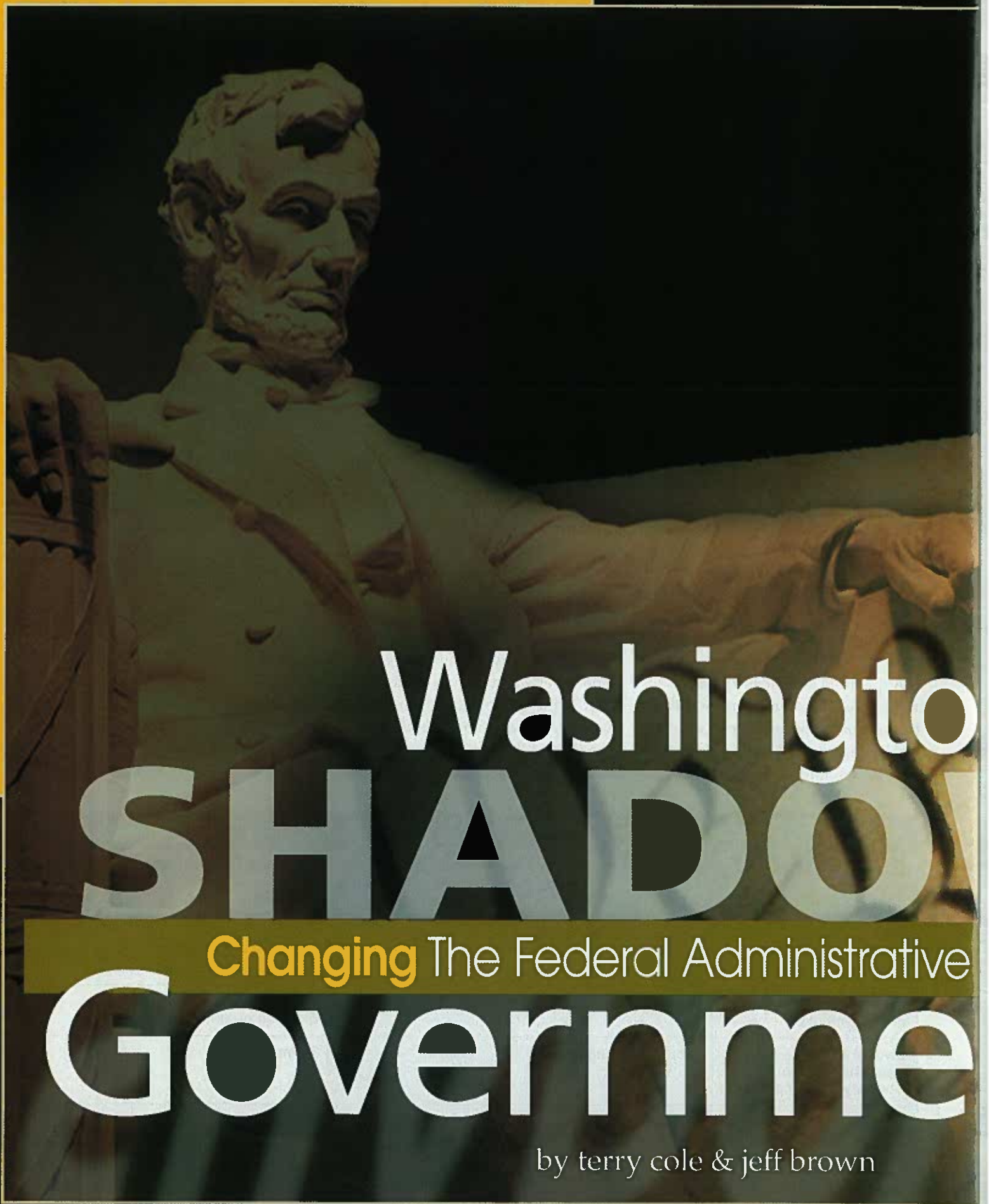
Kathleen "Kelly" Bergeron is executive vice president and chief of staff of Associated Industries Insurance Services (e-mail: kbergeron@aif.com).

COBRA and Continuation of Coverage

Qualifying Event	Qualified Beneficiary Entitled To Continuation	Duration Of Continuation Coverage
Death of employee	Spouse and children of the employee	36 months
Termination of employee's employment (including layoff)	Employee, spouse, and dependents	18 months (29 months for a disabled qualified beneficiary)
Reduction in work hours of the employee	Employee, spouse, and dependents	18 months (29 months for a disabled qualified beneficiary)
Divorce or legal separation of spouse from covered employee	Spouse and dependents	36 months
Employee becomes entitled to Medicare	Spouse and/or dependents who are ineligible for Medicare	36 months
Child loses dependent status	Child who lost dependent status	36 months

Source: "The Labor and Employment Law Source Book," published by the firm of Ford & Harrison L.L.P.

COVER STORY



Washington's SHADOW Government

Changing The Federal Administrative

by terry cole & jeff brown

PHOTO ILLUSTRATIONS: DWIGHT SUMMERS

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Procedure Act To Return **Power To The People**

In a system where government gets its authority from us, government should be held accountable to us. When it comes to government rulemaking in Washington, D.C., however, the chain of command is reversed. Individual citizens are at the mercy of federal bureaucrats, lacking adequate means to protest unfair, burdensome, or unpublished regulations.

Regulations serve an important purpose. By setting out a clear, stable, and dependable blueprint of the regulatory process, they keep government in check and provide crisp guidelines for private citizens. But in the absence of a mechanism that allows citizens to participate in the rulemaking process, or to have their objections heard when bureaucrats overstep their boundaries, we lose some of our authority over government.

Florida's Administrative Procedure Act (APA) establishes that mechanism for citizens of the Sunshine State. In comparison, the federal APA is a source of weak and unreliable protection for those who fall under federal regulations. It yields power to the shadow government of unelected bureaucrats.

COVER STORY

THE TRIUMPH OF EXCESS

Both the Florida and the federal acts spell out the procedures agencies must follow in developing rules, including allowance for citizen input on rules before they are finalized. Both acts also define the process by which citizens can challenge either the rules themselves or the decisions made pursuant to the rules.

In some cases, federal agencies simply elude the confines of the federal APA by developing so-called guidance documents that allow them to avoid the formality of rule-adoption proceedings. A "guidance document" is a common label used by federal agencies when announcing the agency's detailed position in the interpretation of a statute and when undertaking other policy initiatives. By preparing a guidance document an agency can avoid following the formal procedural requirements of providing advance public notice and opportunity for comment that must be followed when adopting rules. The federal APA does not adequately discourage the promulgation of, and agency reliance upon, guidance documents. As a result, citizens have no advance notice of policies formulated by federal agencies and no meaningful opportunity to provide input.

The provisions allowing citizens to challenge rules or regulatory decisions under the federal APA are similarly ineffective. Federal administrative agencies are able to appoint employees within the agency to serve as administrative law judges. In effect, one of the parties to the dispute is also the referee, setting up an unavoidable conflict of interest.

The problems with the federal APA are particularly acute with agencies such as the Environmental Protection Agency, which increasingly forsakes science-based rules for ones seemingly based on the preferences of whichever administration is currently in charge. A number of examples illustrate this, most recently EPA's particulate and ozone standards.

Those standards were promulgated under the Clean Air Act, ostensibly to protect citizens from respiratory ailments caused by smog and soot. EPA set new, more stringent standards even though its Clean Air Scientific Advisory Committee recommended against doing so. The rules were challenged and, in May of this year, a federal appeals court ruled against EPA, finding that some of its air-quality standards were arbitrarily defined and others defined so broadly that EPA had exceeded its power in setting them.

Regulatory excess in Washington, D.C., is no small matter. According to one widely used analysis, the cost of complying with federal regulations in 1996 was $677 billion; the cost was estimated to rise to $721 billion in 2000. Reining in overzealous and indiscriminate regulations would help lower that burden. Replicating the APA lessons learned in Florida would give citizens the means to do so.

FLORIDA'S MODEL FOR RULEMAKING

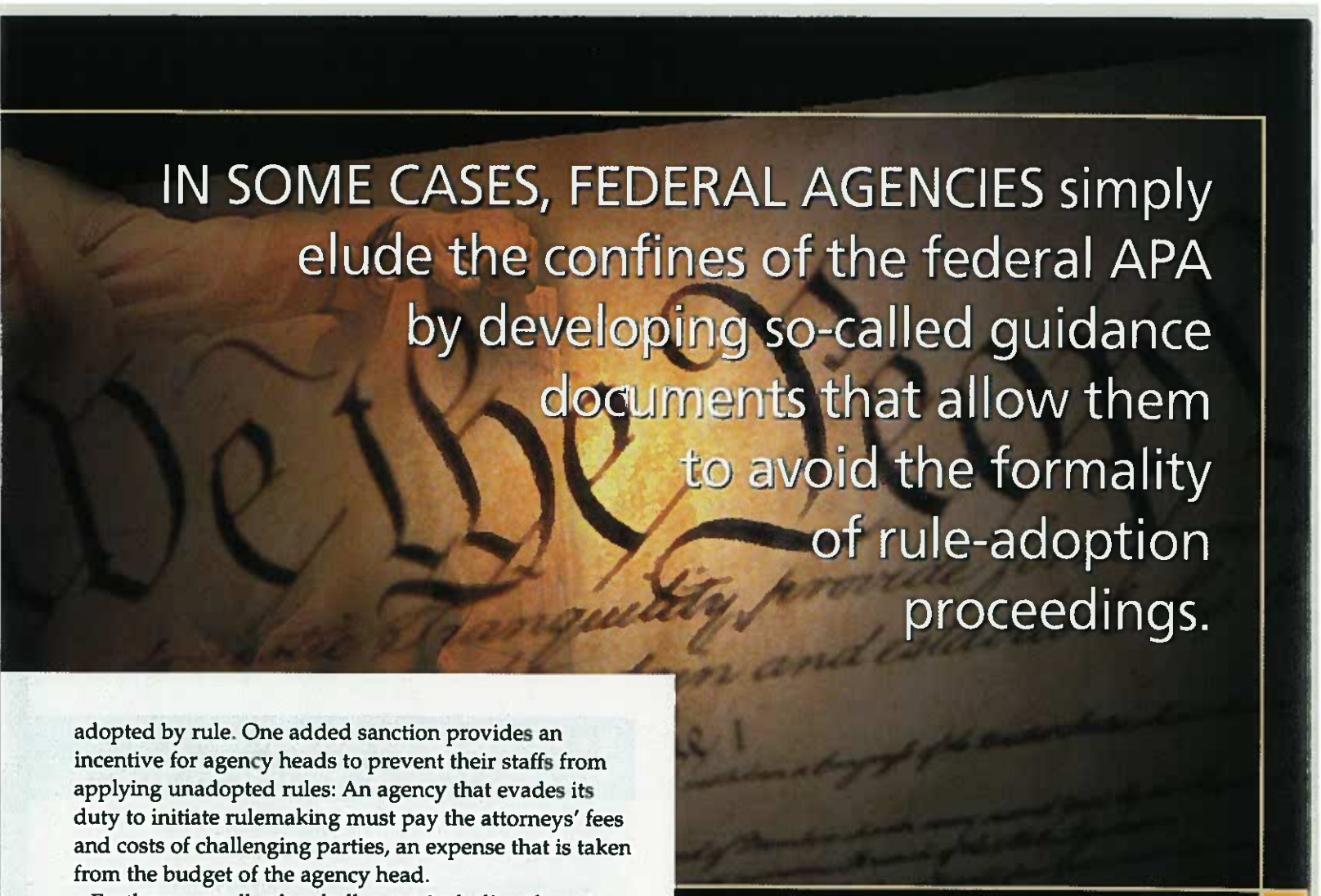
The first version of Florida's APA was adopted in 1974. Over the next 20 years, legislative amendments and judicial interpretation revised the original statute by transferring to administrative agencies immense leeway in the exercise of discretion in establishing policy within their purported fields of expertise. The result was a proliferation of written and unwritten regulations.

In 1992, representatives of the regulated community began clamoring for reform of Florida's APA. An extensive rewrite of the law, approved by the Florida Legislature in 1995, was vetoed by Gov. Lawton Chiles. The next year, the reformers went back to work and crafted a package that became law. Subsequent revisions to the 1996 reforms reinforced the Legislature's intent to limit agency discretion and to enforce procedural fairness in dealing with citizens.

Florida agencies are creatures of statute and have no powers other than those that can be fairly derived from legislation. This principle advances public accountability by assuring that public policy originates in elected legislative bodies. The Florida Legislature recently acted to protect that assurance by narrowing the areas that agencies may address through regulation. Agencies may adopt only those rules that "implement, interpret, or make specific the particular powers and duties granted by the enabling statute."

Limits on rulemaking authority are useless, however, unless agencies are required to set policy through formal rule-adoption procedures. In the past, using flexibility as their excuse, agencies effectively enacted legislation in the guise of case-by-case adjudication. By developing "statements of general applicability," implemented outside the guidelines of the APA, agencies gave themselves the power to interpret rules and statutes as they saw fit in individual cases, and thereby greatly expanded upon the powers conferred upon them by the Legislature.

Under Florida's new law, however, statements of general applicability must be adopted through formal rulemaking proceedings, with opportunities for public comments, questions, and, if necessary, challenges to the proposed rule. Of even greater practical utility, Florida has created a statutory procedure for the challenge of an "agency statement" that *should*, by law, have been



IN SOME CASES, FEDERAL AGENCIES simply elude the confines of the federal APA by developing so-called guidance documents that allow them to avoid the formality of rule-adoption proceedings.

adopted by rule. One added sanction provides an incentive for agency heads to prevent their staffs from applying unadopted rules: An agency that evades its duty to initiate rulemaking must pay the attorneys' fees and costs of challenging parties, an expense that is taken from the budget of the agency head.

Furthermore, all rules challenges, including those to agency statements, are assigned to an administrative law judge employed by the Division of Administrative Hearings, a separate, independent agency under the executive branch, rather than to an employee of the agency itself. This is yet another area where Florida's system of administrative procedure has progressed beyond the federal model. Assigning rules challenges directly to an independent administrative law judge, or hearing officer, eliminates the opportunity for and the appearance of a conflict of interest. The hearing officer enters the final order, which can be directly appealed to an appellate court without further review by the agency.

The hearing officers also decide cases where a citizen is not challenging a proposed rule, but rather a proposed decision under a rule, such as denial of a permit. The hearing officer presides over a formal hearing on the dispute over facts alleged by the agency and then submits a proposed order to the agency. After the hearing officer submits the recommended order, the agency then has the obligation to issue a final order and to address the hearing officer's proposed findings of fact and conclusions of law.

The Florida APA imposes stringent limits on the agency's ability to reject or modify the hearing officer's findings of fact. Such a rejection or modification is

Some Features Of Florida's Administrative Procedure Act

- Limitation of agency rulemaking authority
- Mandatory rule adoption and statutory rule challenge procedures
- Mandatory review of economic impacts and risk assessment for health-based rules
- Creation of an independent division of administrative law judges
- Provision to assure that the citizen is on an equal footing with the agency in a dispute so that there is not a presumption of agency correctness
- Agencies have the burden of establishing the technical and scientific justification for proposed rules

justified only when the findings were not based upon competent substantial evidence, or when the proceedings did not comply with the essential requirements of the law. Although the agency is given more discretion to change or reject the hearing officer's proposed conclusions of law, an agency may reject or modify only the conclusions of law and rule interpretations over which it has substantive jurisdiction.

The agency's findings of fact and conclusions of law are then stated in a final order, which is subject to judicial review. If the appellate court determines that the agency improperly reversed the hearing officer's findings of fact, the agency is required to pay the attorney's fees of the opposing party. Under these refinements to the manner in which formal hearings are conducted, the Florida APA provides citizens with additional assurances of fair and impartial hearings when disputing proposed agency actions.

There are some who recommend further restrictions to an agency's authority in reviewing a hearing officer's proposed order, but the Legislature has not yet acted on those recommendations. Nevertheless, by assigning rule challenges and factual disputes to an independent tribunal, Florida's APA helps to remove the appearance of favoritism that inevitably arises when cases are decided by an employee of the agency defending the challenge.

REVERSING THE FLOW OF AUTHORITY

Can Florida's successful experience with regulatory reform be transplanted to Washington, D.C.? Obviously, provision must be made for constitutional differences between government at the state and federal levels, (e.g. the Office of the President, national defense and security, and diplomacy), but a comparison between the weaknesses of the federal APA and the strengths of the Florida act illuminates how such a transfer can be made.

Furthermore, there should be no significant budget impact since implementation of a federal APA based on the Florida model can, for the most part, be accomplished within existing budgets. A new federal division of administrative hearings, for example, could be created by transferring the budget and staff of existing administrative law judges out of each regulatory agency and into an independent agency or division. Administrative law judges would then be prohibited from hearing cases involving their former agencies.

Florida's experience demonstrates, yet again, that the revolutionary idea of providing citizens with rights and standing equivalent to that of agencies does not bring government to a halt. Although federal agencies can be expected vigorously to oppose any limits to their power, their objections should not be allowed to scuttle regulatory reform.

One approach to accomplishing this task would be for the retention of several respected law professors to develop draft legislation for appropriate congressional committees, as was done in Florida. Another would be to ask an organization such as the American Bar Association to form a special committee to develop such legislation.

Regardless of the method used, the acquiring of fair rights in dealing with federal regulatory agencies is of crucial importance to business as well as all citizens who are required to deal with these agencies. ■

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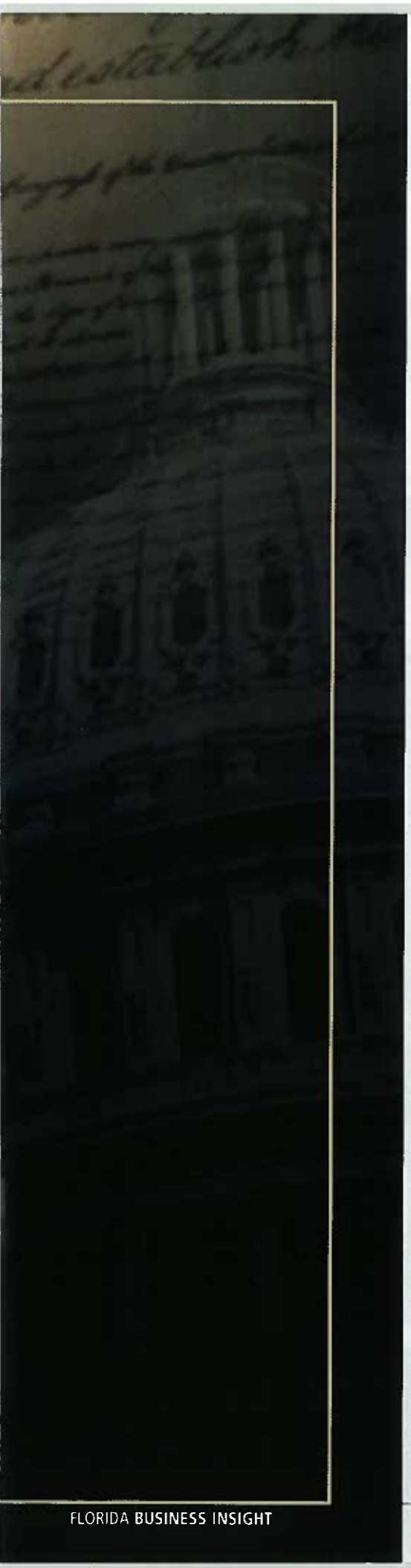
Transplanting Florida's Success In The Nation's Capital

Using the Florida model, the following are some principles that should guide federal APA reform:

- Federal agencies should be bound to enact policy through formal rule-adoption proceedings.
- Rule adoption should include a mandatory analysis of economic impacts.
- Risk assessments should be required of certain agencies when a proposed rule is intended to reduce the risk of public harm.
- Adjudication of a dispute should be assigned to a separate and independent administrative law judge, instead of to an employee within the agency in litigation.
- Federal agencies should have the burden of proving the validity of a rule, including compliance with legislative intent, fairness in procedure, and evidence of scientific and technical support for proposed rules.
- Strict schedules should be provided on the maximum amount of time an agency has to take action on a permit application.
- Provision should be made for formally answering questions posed by citizens. In Florida the process is known as a declaratory statement. Timelines are provided for responding to such a request. Decisions are publicly noticed.
- Uniform procedural rules should be adopted, which apply to all regulatory agencies.



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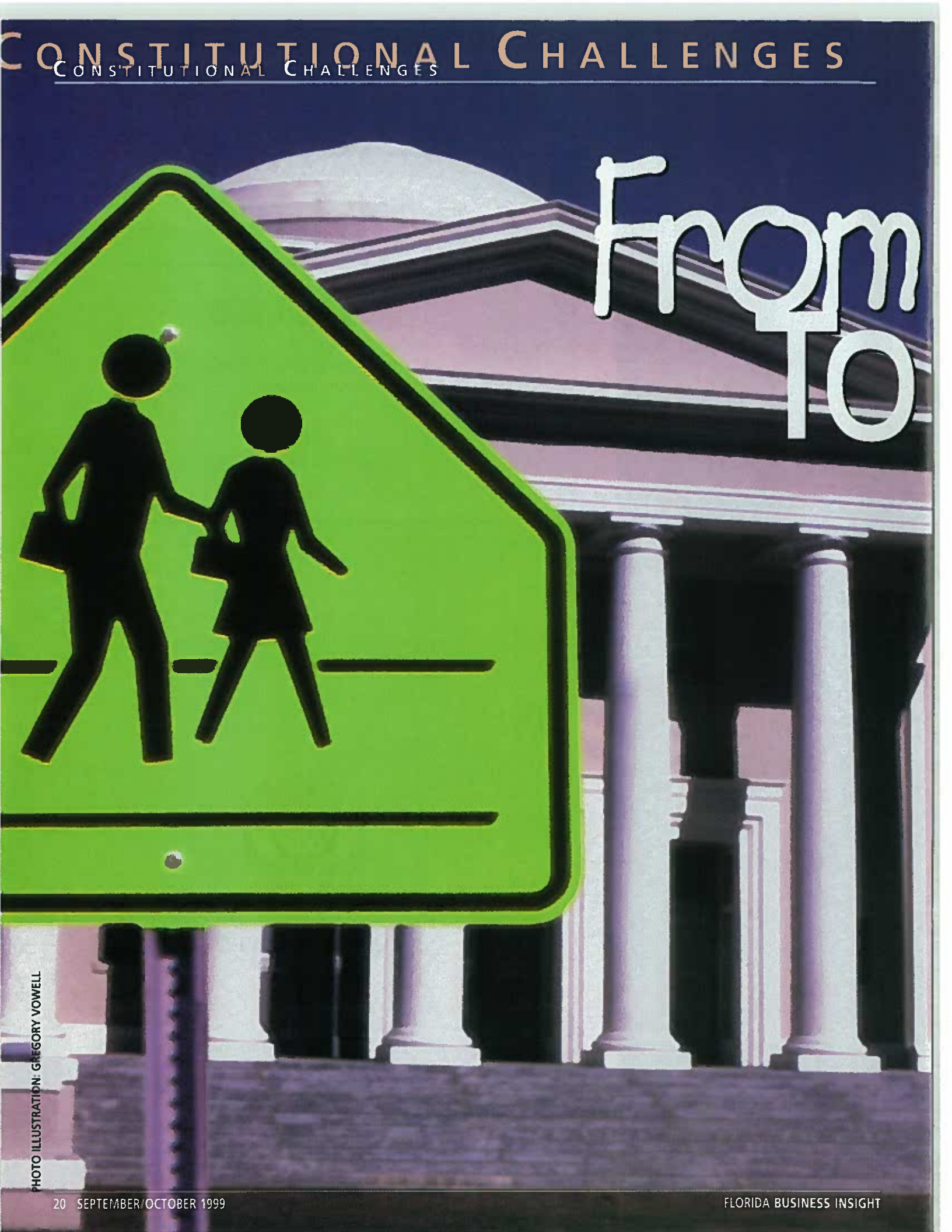


PHOTO ILLUSTRATION: GREGORY VOWELL

by matthew berry & vanessa countryman

Schoolhouse Courthouse

In last November's general election, Florida voters made an important change to the Sunshine State's constitution. The document now proclaims, "The education of children is a fundamental value of the people of the State of Florida."

This statement is a pledge to all of Florida's children, a vow to improve the quality of education for every child in the state. But there is a long way to go before this promise is fulfilled. How it will be fulfilled is now the subject of a constitutional challenge.

FUNDING OPPORTUNITY

On the 1998 National Assessment of Educational Progress, only 23 percent of Florida's fourth and eighth graders demonstrated proficiency in reading. And in what should have been the class of 1998, more than 50 percent of Florida students failed to graduate from high school within the traditional four years. These statistics, as well as a host of others, paint a picture of a school system in trouble, unable to provide a decent education to many of Florida's children.

In response to this dismal situation, candidates Jeb Bush and Frank Brogan proposed their A+ Plan for Education during last year's gubernatorial campaign. This comprehensive program set out to overhaul the existing public education system through a package of groundbreaking reforms. The A+ Plan increases funding for public education, rewards good schools, gives extra help to bad schools, and strengthens standards and testing to provide an accurate measurement of whether students are learning what they need to know to compete in our global, information-age economy.

This spring the Florida Legislature passed the A+ package, and on June 21, 1999, Gov. Bush signed the far-reaching plan into law, ushering in a new era in Florida education. As part of the plan to improve educational quality for every child, the A+ law created the opportunity scholarship program, a small but essential part of the overall plan.

The program is simple: The Florida Department of Education will evaluate each public school for educational quality and give it a "grade" on a scale of A through F. The grade is primarily based upon students' scores on standardized achievement tests, as well as dropout and attendance rates. If a school receives a failing grade, an "F," for two years in any four-year period, students assigned to that school become eligible for the opportunity scholarship program. Those students then will be given the option of transferring to another public school, graded "C" or better, or to a private school of their parents' choice. Should the child attend private school, he will receive a grant of money — called an opportunity scholarship — roughly equal to the per-pupil allotment provided by the state. The private school then must accept the scholarship as full payment of a student's tuition and fees.

While supporters know that school choice gives children — all children — the opportunity for a better education, critics claim that it violates both the U.S. and the Florida constitutions and have filed suit seeking to block the program. A closer examination of the issues, however, reveals that the program should withstand judicial scrutiny.

THE ESTABLISHMENT CLAUSE

The American Civil Liberties Union, National Association for the Advancement of Colored People, teachers' unions, and other groups have filed suit in Leon County Circuit Court, claiming that the scholarship program violates the U.S. Constitution's establishment clause, which states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Opponents claim that since parents may use scholarships to send their children to religious schools, the scholarship program constitutes an unconstitutional establishment of religion.

While it is true that scholarships may be used at religious schools, precedent suggests that the program does not violate the establishment clause. When evaluating the constitutionality of a law challenged under the establishment clause, the U.S. Supreme Court applies what is known as "the *Lemon* test," which was established in the case of *Lemon v. Kurtzman* in 1971.

THE SCHOOL-CHOICE PROGRAM is similar in that public funds are being spent on behalf of a neutral program to promote the general welfare.

Any action by the government that affects religious organizations must pass a three-pronged test: (1) the action must have a secular purpose; (2) its primary effect must neither advance nor inhibit religion; and (3) the government must avoid excessive entanglement with religion. The Florida scholarship program passes all three of these tests.

First, the goal of the program is secular in nature, as it is designed solely to provide broader educational opportunities for Florida's children. Two aspects of the program confirm that its primary purpose is secular. Schools may not require children participating in the program to pray or worship, and students must be admitted to private schools on a random basis, regardless of their religion.

Second, the primary effect of the program is not to advance religion, but to improve the quality of education received by Florida's children. Scholarships are given on the basis of neutral criteria: students may attend another public school, private school, or religious school. The choice is dictated solely by parental choice — not by the government.

Finally, there is no excessive entanglement between religious schools and the government, as religious schools will not be regulated by the government, but will remain under private control.

Government money finding its way to religious schools is not unique to the opportunity scholarship program. The GI Bill and Pell Grants, for example, provide students with government money to use at the colleges of their choice. Often that choice is a religious college or university, such as Notre Dame. Additionally, other states have instituted school-choice programs that have withstood similar court challenges. The Ohio Supreme Court ruled that Cleveland's scholarship program was consistent with the establishment clause, and Milwaukee's school-choice program was upheld as constitutional by the Wisconsin Supreme Court.

The Wisconsin Supreme Court followed clear precedents established by the U.S. Supreme Court in cases spanning the last 16 years. These cases have upheld the constitutionality of general educational assistance programs, which include religious schools as an option. In the 1986 case of *Witters v. Washington Department of Services for the Blind*, for instance, the U.S. Supreme Court allowed a sight-impaired man to use a post-secondary education grant to attain a divinity degree at a religious college. In the Milwaukee school-choice case, the Wisconsin Supreme Court distilled the U.S. Supreme Court's rationale into a clear principle:

> State educational assistance programs do not have the primary effect of advancing religion if those programs provide public aid to both sectarian and nonsectarian institutions (1) on the basis of neutral, secular criteria that neither favor nor disfavor religion; and (2) only as a result of numerous private choices of the individual parents of school-age children.

The Florida opportunity scholarship program clearly conforms to these criteria.

EDUCATION v. RELIGION?

Critics also allege in their suit that the scholarship program violates the Florida Constitution. They point to Article 1, Section 3, which declares, "No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution." But opportunity scholarships are not given in aid of churches; they are provided in aid of students.

The Florida Supreme Court has permitted religious organizations to participate in government programs as long as those programs do not favor a particular religion and are administered according to neutral criteria for the advancement of the public welfare. For example, in the 1970 case of *Johnson v. Presbyterian Homes of the Synod of Florida*, taxpayers challenged the constitutionality of granting tax-exempt status to homes for the elderly run by religious organizations. The Florida Supreme Court upheld the constitutionality of the statute, saying that all homes for the elderly — religious or non-religious — were tax-exempt and that "under the circumstances, any benefit received by religious denominations is merely incidental to the achievement of a public purpose."

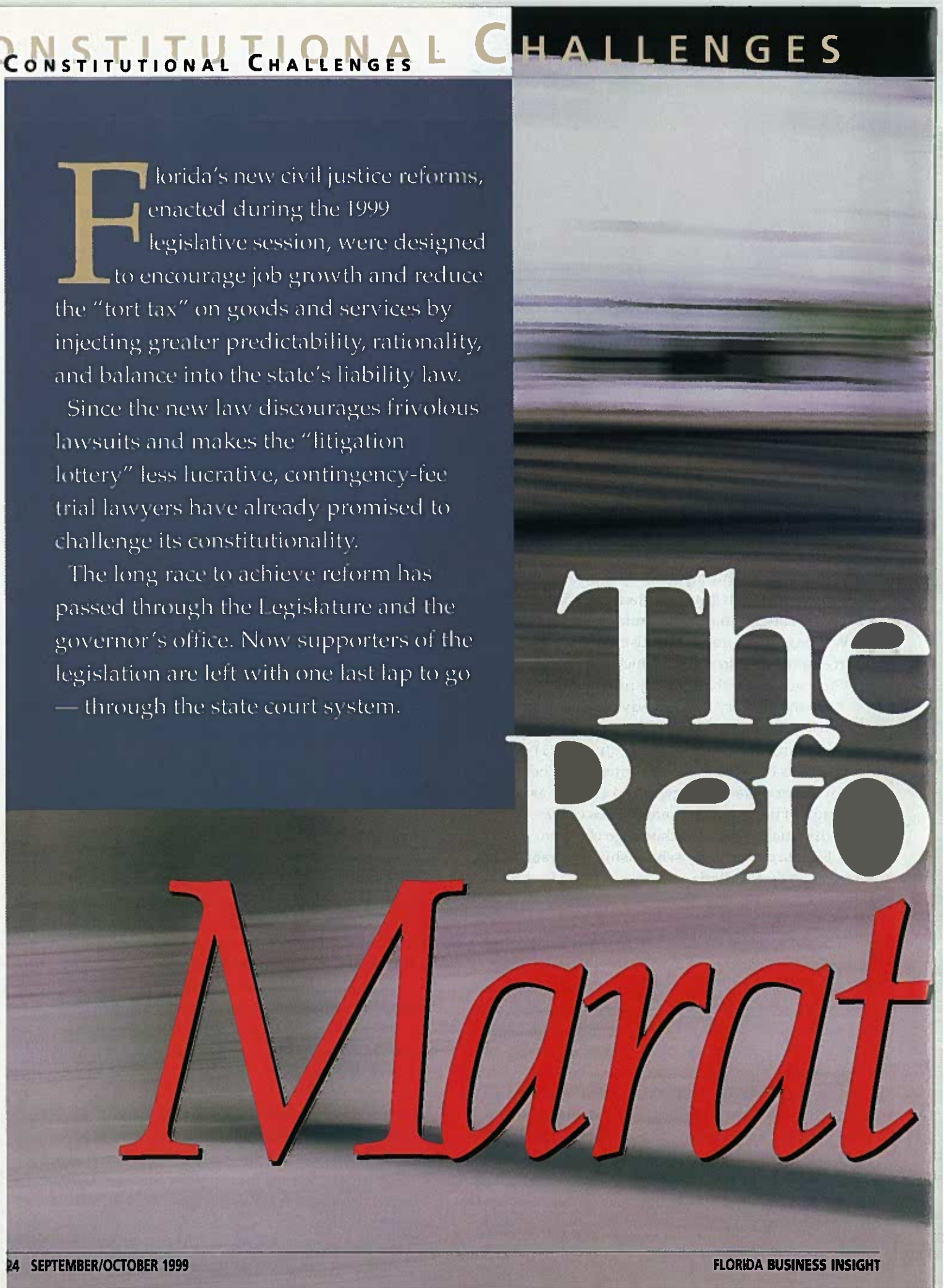
The school-choice program is similar in that public funds are being spent on behalf of a neutral program to promote the general welfare. And currently, the state provides grants to students studying at religious universities under Bright Futures Scholarships and Florida Resident Access Grants. Thus, precedent suggests that the school-choice program will withstand this challenge as well.

Opponents also cite the Florida constitutional clause that declares it is "a paramount duty of the state to make adequate provision for the education of all children residing within its borders," and therefore a "uniform, efficient, safe, secure, and high quality system" of public schools must be provided. They claim that by funding opportunity scholarships, the state violates this provision by undermining the existing public schools.

But the public school system will not be drained financially as money follows students to private schools. The allocation of funds to a school currently depends upon the number of students attending it. So the school's funds per student will remain the same, regardless of whether a student goes to a public or a private school. Furthermore, the A+ Plan provides public schools with record levels of funding and extra assistance targeted to improve failing schools.

Florida has promised to provide its children with a quality education. If this "paramount duty" of the state is to be carried out, the government must not allow some of its students to be trapped within substandard schools. The A+ Plan not only permits these students to escape, but encourages all schools to provide excellent, consistent education. Opportunity scholarships therefore fulfill the promise of quality education made by voters last November and should survive the ongoing court challenge. ■

Matthew Berry is a staff attorney at the Institute for Justice, which represents Pensacola families participating in the opportunity scholarship program and the Urban League of Greater Miami, Inc. in the program's courtroom defense. Vanessa Countryman is a researcher at the Institute. (e-mail: mberry@ij.org*).*

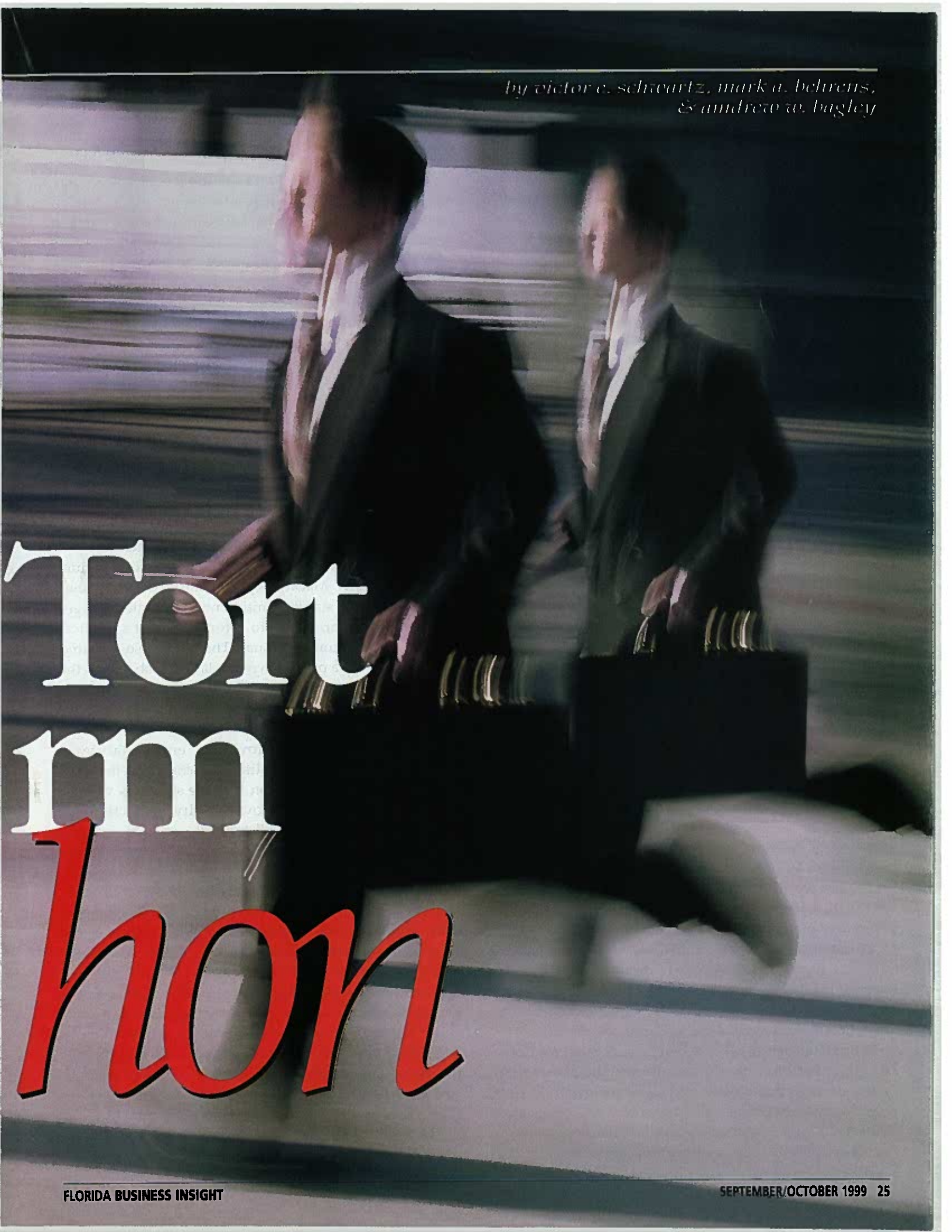


The Refo Marat

Florida's new civil justice reforms, enacted during the 1999 legislative session, were designed to encourage job growth and reduce the "tort tax" on goods and services by injecting greater predictability, rationality, and balance into the state's liability law.

Since the new law discourages frivolous lawsuits and makes the "litigation lottery" less lucrative, contingency-fee trial lawyers have already promised to challenge its constitutionality.

The long race to achieve reform has passed through the Legislature and the governor's office. Now supporters of the legislation are left with one last lap to go — through the state court system.



Tort rm hon

by victor e. schwartz, mark a. behrens, & andrew w. bagley

THE WILL OF THE PEOPLE?

Historically, the authority to decide liability law rules rested with state legislatures. When the colonies and territories became states, one of the first acts of the new legislatures was to "receive" the Common Law of England as of a certain date and use that law as a basis for the state's tort law. At the same time, lawmakers delegated to state courts the authority to develop that law consistent with the public policy of the state. This was because the legislatures did not have the time, or perhaps the interest, to develop an extensive tort code. They were immersed instead in the more pressing details of developing the essentials for a "new society," such as a criminal code. As some state legislatures — including Florida's — made clear, however, what the legislature delegated it could retrieve at any time.

Legislatures are in the best position to develop sound and balanced liability rules. Through public hearings and debate, legislators can gather information from people with numerous and diverse perspectives. They can use this information to develop carefully considered liability-law policies and embody those principles in laws that give fair notice to all.

Ignoring the dictates of history and sound public policy, however, plaintiff lawyers have begun arguing that civil-justice-reform legislation is unconstitutional merely because they do not like it. Plaintiff lawyers throughout the country have established a modus operandi: When they are unable to stop the will of the people in the legislative and executive branches, they turn to the courts to try to nullify the law.

They also try to game the legal system by utilizing provisions in state constitutions to challenge tort reform legislation, instead of the well-recognized provisions of the U.S. Constitution. Indeed, Mark Mandell, a former president of the Association of Trial Lawyers of America (ATLA), recently bragged about a brief written by ATLA and argued by Harvard law professor Laurence Tribe that helped overturn an Indiana liability statute. According to Mandell, the brief relied on a state constitutional provision "that was previously regarded as toothless."

By relying solely on state constitutions, plaintiff lawyers are able to preclude any appeal of an adverse decision against the defendant to the U.S. Supreme Court. In other words, plaintiff lawyers are cutting down on the number of courts that can second-guess them.

Plaintiff lawyers also know that the U.S. Supreme Court, in constitutional challenges under the Fourteenth Amendment's due process and equal protection clauses, has clearly distinguished situations in which a legislature violated a person's constitutional rights from those in which a legislature has made a public policy decision that the U.S. justices might not have personally endorsed. Except in a highly discredited period in the Supreme Court's history known as "The *Lochner* Era," which occurred around the mid-1930s, the Court has shown appropriate deference to legislative policy judgments. If the legislature had a rational basis for its action, the law would be sustained.

Most state courts have followed the lead of the U.S. Supreme Court by rejecting invitations to issue decisions that ignore the legislative role in developing liability law. By almost a two-to-one margin, state supreme courts across the country have sustained state legislative efforts to formulate state liability law. Some state courts, however, have issued decisions that embrace the arguments of contingency-fee trial lawyers. These decisions amount to little more than an assertion of raw power by the courts to overturn the will of the people as it is expressed through the legislative and executive branches of state government.

OTHER STATES' EXPERIENCES

In December 1997 the Illinois Supreme Court overturned a comprehensive 1995 Illinois tort reform statute in its entirety, holding that it violated the state's constitution. In *Best v. Taylor Machine Works*, the court held that provisions of the statute limiting noneconomic damages and providing for access to a tort claimant's medical records were unconstitutional. The court also declared unconstitutional a provision of the law that abolished the doctrine of joint-and-several liability. This was the first time that any court had ever overturned a modification of that doctrine.

The court then struck down the entire statute as unconstitutional. In any constitutional challenge, the court begins with the presumption that the statute is valid, a form of innocent-until-proven-guilty protection for legislative acts. A court will typically address only the constitutional issues before it, cutting out the troublesome portions of a law while allowing the rest of it to stand. The Illinois Supreme Court, however, held that the provisions it was ruling on were so inextricably linked to other, totally unrelated product liability reforms in the legislation, that not one section in the multi-section statute could be severed and saved. The decision completely ignored the fundamental principle that a court should only decide an actual case or controversy presented to it.

The Illinois Supreme Court's overreaching opinion in *Best* also ignored the fundamental separation of powers principle upon which our system of government is based. As Justice Benjamin Miller wrote in his dissent:

> [T]he judicial role in assessing the constitutionality of legislation is quite limited, and the majority's result here cannot be defended under

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traditional standards of review. *Today's decision represents a substantial departure from our precedent on the respective roles of the legislative and judicial branches in shaping the law of this state. Stripped to its essence, the majority's mode of analysis simply constitutes an attempt to overrule, by judicial fiat, the considered judgment of the legislature* (emphasis added).

Another challenge to legislative attempts to reform the civil justice system occurred in Kentucky. In the 1998 case of *Williams v. Wilson*, the Kentucky Supreme Court struck down a 1988 punitive damages reform statute. That law simply required plaintiffs to show that the defendant acted with "flagrant indifference to the rights of the plaintiff and with a subjective awareness that such conduct [would] result in human death or bodily harm" before punitive damages could be imposed. In overturning the statute, the court relied on an obscure doctrine in Kentucky law, which the court applied in a novel and expanded manner to hold that the Legislature could not affect a jury's right to decide an issue before it.

In July 1999, the Oregon Supreme Court struck down a law allowing injured persons to receive up to $500,000 in pain and suffering damages. In *Lakin v. Senco Products, Inc.*, the court ruled that the Oregon Constitution prohibited the Legislature from limiting excessive liability by "interfering with the full effect of a jury's assessment."

Most recently, in August of this year, in *State ex rel. Ohio Trial Lawyers v. Sheward*, the Supreme Court of Ohio overturned that state's 1996 civil justice reform statute in a particularly troubling decision. According to a common-law principle dating back to Elizabethan England, a plaintiff must have standing to file a lawsuit. This means that the plaintiff must show that he has a substantive, legally protected interest that has been violated. In the Ohio case, however, because there was no case or controversy before the court, the trial lawyers avoided the issue of standing by asking the court to issue what was essentially an advisory opinion. The court took the bait.

How did the majority get around a centuries-old common-law doctrine? It invented a new judicial doctrine pursuant to which any public interest group can challenge the constitutionality of virtually any legislation that might affect its members at some point in the future. In Ohio there is no longer any need to let an issue ripen by developing a record in a trial court proceeding that can then be reviewed by a mid-level appellate court, and then by the highest court of the state. A public interest group can skip the formalities and ask to have its argument heard right away at the highest level. This aspect of the majority's opinion was heavily criticized by the dissenting members

of the court, Chief Justice Thomas Moyer and Justices Deborah Cook and Evelyn Lundberg Stratton.

The majority's holdings with respect to the substance of the civil-justice-reform legislation are equally shocking examples of judicial overreaching run wild. The court upended the doctrine of separation of powers under the Ohio Constitution and the notion of mutual respect between the Legislature and the courts. Without so much as a passing reference to the need to preserve legislative independence in liability-law policymaking, the court broadly declared tort law to be within the exclusive domain of the judiciary.

The majority also held that the statute violated the "one-subject rule" of the Ohio Constitution, which prohibits totally unrelated subjects from being bundled in a single statute. Even though the statute was plainly focused just on tort actions, that was not enough for the members of the court who were bent on overturning it.

Never before have state constitutional provisions been used on so grand a scale to overturn state legislative policy decisions. The Illinois, Kentucky, Oregon, and Ohio decisions are wrong as a matter of history and sound public policy.

In Florida, however, there is hope that justice for the state's citizens will prevail.

PLAINTIFF LAWYERS THROUGHOUT THE COUNTRY have established a modus operandi: When they are unable to stop the will of the people in the legislative and executive branches, they turn to the courts to try to nullify the law.

SUNSHINE COURTS

Florida courts have wisely chosen to give reasonable deference to the Legislature, rather than subsequently second-guessing the Legislature's public-policy decisions and, based on past case law precedents, the new law's outlook for survival seems good. There is always a chance, however, that a newly constituted court, with fresh precedents from other states, and under trial lawyer pressure, could nullify the will of the Legislature, the governor, and the people of Florida.

What can the Florida business community do to preserve the new legal-reform law? First, it should identify state constitutional challenges to tort reform statutes. Plaintiff lawyers may seek a direct appeal to the Supreme Court, as they did in Ohio, but the challenge most likely will arise in the local trial courts. The business community would best be served if it set up a clearinghouse to track any challenges and to fund and coordinate the filing of *amicus curiae* ("friend of the court") briefs. These briefs can signal to the court the importance of a particular case and draw the court's attention to broad public-policy issues that may not be covered by the attorneys representing the private parties in the case.

Second, supporters of the new law should explain to the media the issues involved. Efforts to protect the Legislature's historical and proper prerogatives will be effective only if the public cares. It is difficult to get the public's attention focused on topics as complex as the constitutionality of legal reform, but if messages are framed in a fair, balanced, and thoughtful way, the public — and the judges themselves — will appreciate that government functions best when there is mutual respect among its co-equal branches. While debates can be held about the wisdom of any civil-justice-reform provision, generally those exchanges belong in the halls of the legislature and in the office of the governor. They should not be abruptly terminated by judges who do not like the results of those debates.

Finally, supporters of the new law must get involved in judicial selection and elections. Contingency-fee lawyer groups have long recognized that judicial selection is an important factor in the overall legal-reform debate. While no one should ever expect a particular outcome from a court, the public has a right to expect a balanced judiciary that is appropriately deferential to the perspectives of other elected leaders, including state legislators and governors.

Floridians have good reason to be pleased with their new legal-reform bill. It is fair and balanced. It will improve the economic climate for job-creators and revenue-raisers in the state. And it will offer savings to Florida consumers by letting companies divert money now wasted on defending against frivolous lawsuits back to the development of better products at lower prices.

Nevertheless, supporters of the new law must stand at watch for possible constitutional challenges to the legislation. Victory can be achieved in the courtrooms of Florida, just as it was in the Legislature — as long as supporters of the law realize that their job is not over. There is still another lap to be run before tort-reform supporters can celebrate in the winner's circle. ■

The authors are attorneys in the Washington, D.C., law firm of Crowell & Moring LLP. Schwartz and Behrens both testified in support of the Florida legal reform legislation in 1997, and also serve as counsel to the American Tort Reform Association in Washington, D.C. (e-mail: vschwartz @cromor.com *or* mbehrens@cromor.com*).*

Breing

The Lawye Monopoly On Legal Services

In Europe there is a growing trend whereby the largest providers of legal services are not law firms, but accounting firms.

In some countries, professional rules limit cooperation between accountants and lawyers to the formation of affiliations between their respective firms.

But in others, entire law firms have been acquired by the Big Five accounting firms, which now have many hundreds of attorneys on their payrolls. This integrating process has proceeded so far and fast in France and Spain that the legal departments of some of the Big Five accounting firms have more lawyers providing more services than do their competitors in the largest independent law firms. And for Europe as a whole, the largest single law department no longer practices as a law firm, but as a service group within an accounting firm.

Editor's Note: This article is based on a Legal Backgrounder *published by the Washington Legal Foundation.*

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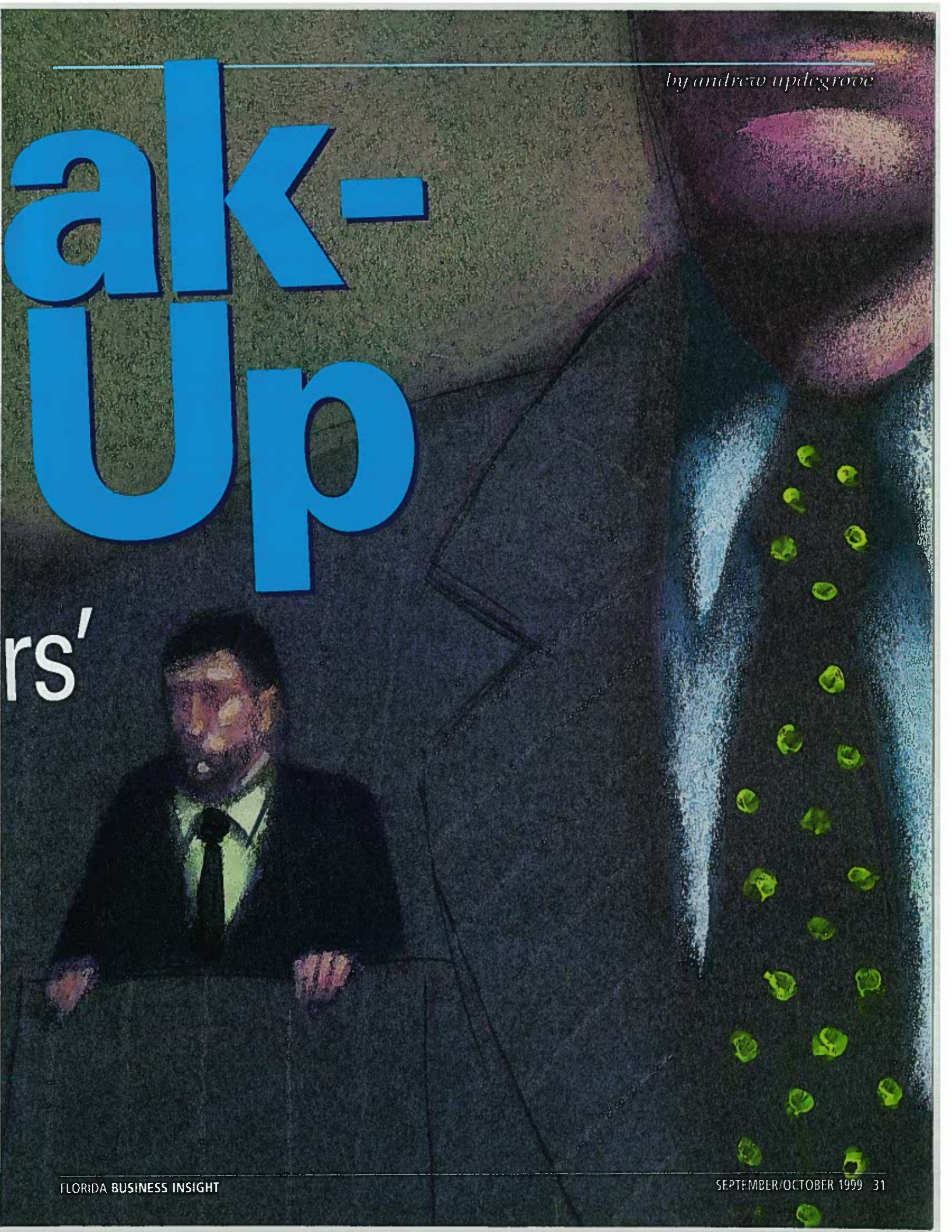
by andrew updegrove



LEGAL & JUDICIAL

ALLOWING LAWYERS AND ACCOUNTANTS to draw on a wider range of expertise across a broader spectrum of disciplines within their own organizations will enable them to provide such advice more effectively to American businesses.

Why is this so? Are the rules that prohibit multidiscipline practices in the United States defensible or are they against the public interest? Do they merely protect lawyers from competition while sacrificing the best interests of modern clients?

While reasonable objections exist for unregulated multi-discipline practices, those concerns may be addressed by adopting appropriate professional rules that guard against abuse.

THE HISTORY OF THE LEGAL MONOPOLY

Since 1928, the professional rules promulgated by the American Bar Association have prohibited non-lawyers from owning an interest in a firm providing legal services, and have prevented lawyers from practicing in any entity owned in whole or in part by non-lawyers. With minor variations these rules have been adopted, and continue to be enforced, by the organized bar of every American state. Only the District of Columbia permits a degree of flexibility with respect to the conduct of multi-discipline practices.

Ostensibly, these rules were originally intended to restrict the practice of law to those who were properly trained to represent clients competently, and who were bound by appropriate rules ensuring that the public was protected from inappropriate conduct. Various proposals and recommendations have been made over the years to loosen the grip of lawyers on the economic benefits of the practice of law. To date, however, each recommendation tendered by a professional association committee or commission to reform the rules has been rejected. Most recently, an American Bar Association committee did recommend reform of the rules, but it included so many constraints that expansion of legal services by accounting firms would be problematic.

At the same time that efforts to deregulate ownership of legal practices have failed, there has been a partial loosening of the rules prohibiting law firms from having an ownership interest in entities that provide ancillary services to their clients. Virtually all of the hazards that

allegedly threaten clients if non-lawyers (such as accountants) were permitted to have an economic interest in the provision of legal services, however, could also arise when lawyers provide certain types of ancillary services.

THE BENEFITS OF BREAKING THE MONOPOLY

There are a number of reasons to allow the public to benefit from receiving reasonably related professional services from a single provider. In public securities work, for example, accounting and securities issues are inextricably combined, yet the accountants and the lawyers work on parallel but separate tracks. While this separation is necessary and healthy with respect to the individuals involved (e.g., those trained as accountants should still leave the legal issues to those trained as lawyers, and vice versa), enforcement of the physical, billing, and administrative separation of these providers is inefficient.

This is particularly true with respect to initial public offerings, where fees charged by law firms and accounting firms may range from $100,000 to more than double that amount for each firm. In amounts of that magnitude, any significant percentage of savings is important, particularly when an offering is abandoned before shares are sold but after most of the professional fees are incurred. Moreover, the higher bills in those situations are very often attributable to the issuing company's neglect of its legal and/or accounting departments' operations in the years preceding the offering. Closer coordination between the legal and accounting advisors of a company can often bring such lapses to light before they become serious. As a result, the client may be saved from costly and distracting reconstructive efforts during the stressful period of preparing to go public while still trying to run the business.

Similarly, in the area of intellectual property, even a small company must now wend its way through a global labyrinth of patent, trademark, and copyright laws. Even in a situation where two or more countries have adopted common treaties, local filing requirements and practices vary, as do enforcement conventions. As a company grows, it must institute more complex internal controls to police the protection of its intellectual property. While many law firms now market "intellectual property audits" as a service product, the accounting firms, with their auditing expertise and hundreds of offices around the world, are better equipped to staff and provide such reviews than are U.S.-based law firms. Few, if any, law firms can offer the combination of global offices, familiarity with local practices, and close attention to evaluating practices and compliance that any of the Big Five accounting firms can provide.

Moreover, it has long been the case that more companies seek international tax advice from Big Five accounting firms than from their law firms. In fact, many law firms have happily handed this responsibility over to accounting firms since only the largest law firms find it cost-effective to remain current on the tax laws of every nation on earth. In effect, a firm without international tax expertise may securely (for now, at least) refer its clients to a major accounting firm for international tax advice, without worrying that the new tax advisor will seek to persuade the client to send other legal work the accountant's way.

Notwithstanding the existing rules that apply in other situations, tax advice rendered by accounting firms is often provided by licensed lawyers. When the clients are called on the carpet by taxation authorities, the accounting firms may even represent them with respect to their alleged infringements. And yet, for some reason, all other types of legal services are presumed by the bar associations to present especially problematic quagmires from which clients must be protected.

THE ARGUMENTS LEVELED AGAINST MULTI-DISCIPLINE PRACTICES DO NOT HOLD UP

Most of the objections raised against permitting multi-discipline practices are disingenuous when applied to accounting firms. Concerns regarding the preservation of confidentiality are particularly groundless since accountants are bound by comparable rules.

Similarly, specific (although somewhat different) rules relating to conflicts of interest apply to accountants, and these rules are, in many cases, stricter than those that apply to lawyers. Accountants already practice in a disciplined fashion, where awareness of conflicts is high and appropriate screening procedures are in place.

Finally, arguments asserting that lawyers and accountants will feel constrained to recommend their partners rather than unaffiliated professionals are no more compelling than the potential for abuse in "cross-selling" legal services within law firms. No law firm is equally strong in all departments. Assuming lawyers today can summon the moral strength to refer a client elsewhere to secure a particular type of service from a superior provider, then presumably lawyers working for accounting firms will find the ethical courage to recommend a different accounting (or law) firm as well.

And, of course, it will also be true that the client will often have chosen the multi-discipline practice because he wished to centralize more of its service purchases under one roof. In doing so, the client may receive greater expertise in some practice categories and lower, but still sufficient, levels of expertise in other practice categories.

The provider is awarded a larger portion of the client's overall package of work; in most cases, the provider will respond by negotiating a fee agreement that gives the client a greater discount on the professional fees.

Some have also claimed that permitting the Big Five and their smaller brethren to expand their services to the legal arena would be anti-competitive. But consider the following: The accounting firms have brought broader knowledge, wider global coverage, a greater range of services, more integrated consulting packages, and intensively competitive rate bidding to their clients. U.S. law firms, on the other hand, have continued to operate almost exactly as they have done for the last century. Although there certainly has been centralizing of more work in fewer firms with broader legal expertise, the number of firms supplying this range of services does not much exceed 100, and the global outreach of those firms is minimal.

In a recent survey of the 50 largest international law firms, conducted by *The American Lawyer* magazine, the largest number of foreign countries in which any American law firm maintained offices was 35 (Baker & MacKenzie). The second highest number was only 11, and the tenth largest number for any American firm was five.

In short, while accounting firms have been innovating and expanding their services intensively, law firms have been largely stagnating, offering legal services (only) in ways that have changed marginally. At the same time, the hourly cost of legal services has exploded. It is difficult to argue, therefore, that opening the American legal market to competition from other types of service providers could restrict or stifle competition. In point of fact, American law firms, protected by restrictive professional rules, have been ineffective at providing the sort of competition that leads to the provision of more, better, and cheaper legal services to the American business community.

MEETING WITH THE "ENEMY"

To a much greater extent than is the case with other professionals, lawyers have retained a purist, ivory-tower approach to their profession, and in many cases have rebuffed requests for business advice. Yet clients increasingly choose savvy business/legal advice over purely technical answers. Why? Because the law firm that prides itself on technically superior legal analysis will leave its clients at a commercial disadvantage in a fast-changing, increasingly competitive international marketplace.

Particularly in the case of rapidly growing businesses, clients prefer attorneys who provide pragmatic, efficient solutions to real-world problems. Allowing lawyers and accountants to draw on a wider range of expertise across a broader spectrum of disciplines within their own organizations will enable them to provide such advice more effectively to American businesses.

The highest duty for any professional is to provide the greatest value, in an ethical fashion, to his clients. If there exists a barrier that can be resolved between maintaining the status quo and providing higher value, professionals have a duty to work toward such a resolution. The true conflict facing American lawyers today is the fact that defending the rules that defend the exclusivity of the practice of law doesn't protect clients; it only protects American law firms from a threatened wave of formidable competition.

In the long run, however, even lawyers would benefit from a change. The lack of creativity and entrepreneurship of lawyers, in comparison to accountants, has, arguably, limited the commercial prospects of law firms and lawyers. After all, any change of rules would logically operate in both directions, and the most entrepreneurial and strongest law firms could expand into new ventures from which they are currently barred. And, as has proven to be the case with the smaller accounting firms, there will continue to be a vast amount of work for the smaller law firms regardless of what turmoil is experienced by the largest law firms following a liberalization in the rules.

The way of the future, when seen from the clients' perspective, would seem to be clear. The time has come for the professional associations of the legal and accounting service industries to jointly develop a common set of model rules for adoption by their respective national and state representatives. These rules, if intelligently developed in a cooperative fashion, would permit each type of licensed professional to work with and for the other. Properly conceived, these rules can easily respect and protect the interests of all clients, and would permit a broader, more competitive service marketplace to evolve. Failing to do so, while the rest of the world moves toward permitting global companies to purchase comprehensive services from multi-discipline practices, will not only place American businesses at a competitive disadvantage, but ultimately American law firms as well. ■

Andrew Updegrove is a partner in the Boston law firm of Lucash, Gesmer & Updegrove (e-mail: updegrove@lgu.com*).*

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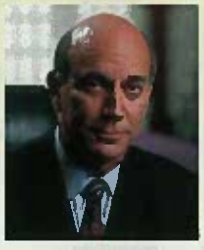

Jon L. Shebel
President & CEO

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Publix Super Markets, Inc.

"AIF does a great job of representing the business perspective before the Legislature. We also rely heavily on AIF's legislative tracking system to help us keep up with the 2,000 or so bills that are filed each year."

Travis Bowden, President
Gulf Power Co.

Associated Industries of Florida

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Tort Reform On The JOB

In 1997 I had the privilege and the pleasure of being one of Associated Industries of Florida's appointees to the negotiations between the business community and the trial lawyers to forge a compromise on tort reform. The input of this poor, simple, "country" labor lawyer was limited to a suggestion that an effort be made to fix some employment-related problems in Florida's tort laws that created difficulties for employers (and thus employees and consumers).

Those negotiations failed but the reform effort continued and eventually succeeded, thanks to the leadership of Associated Industries of Florida, its President and CEO Jon Shebel, and others. The overarching theme of the 1999 tort reform law is protection for employers and businesses who run honest and trustworthy operations, but no protection for those who don't deserve it.

I was pleased to find that, among its many provisions, the new tort-reform act provided significant and much-needed relief in the employment laws, providing better employment opportunities and lower production costs. As a result, all of Florida's workers and consumers will benefit, rather than the small army of personal injury lawyers and those clients of theirs who hit the litigation jackpot.

John-Edward Alley

by john-edward alley & youndy cook

UNTIL NOW, THE RISK OF NEGLIGENT HIRING and retention claims went hand-in-hand with another risk, forming a Catch-22.

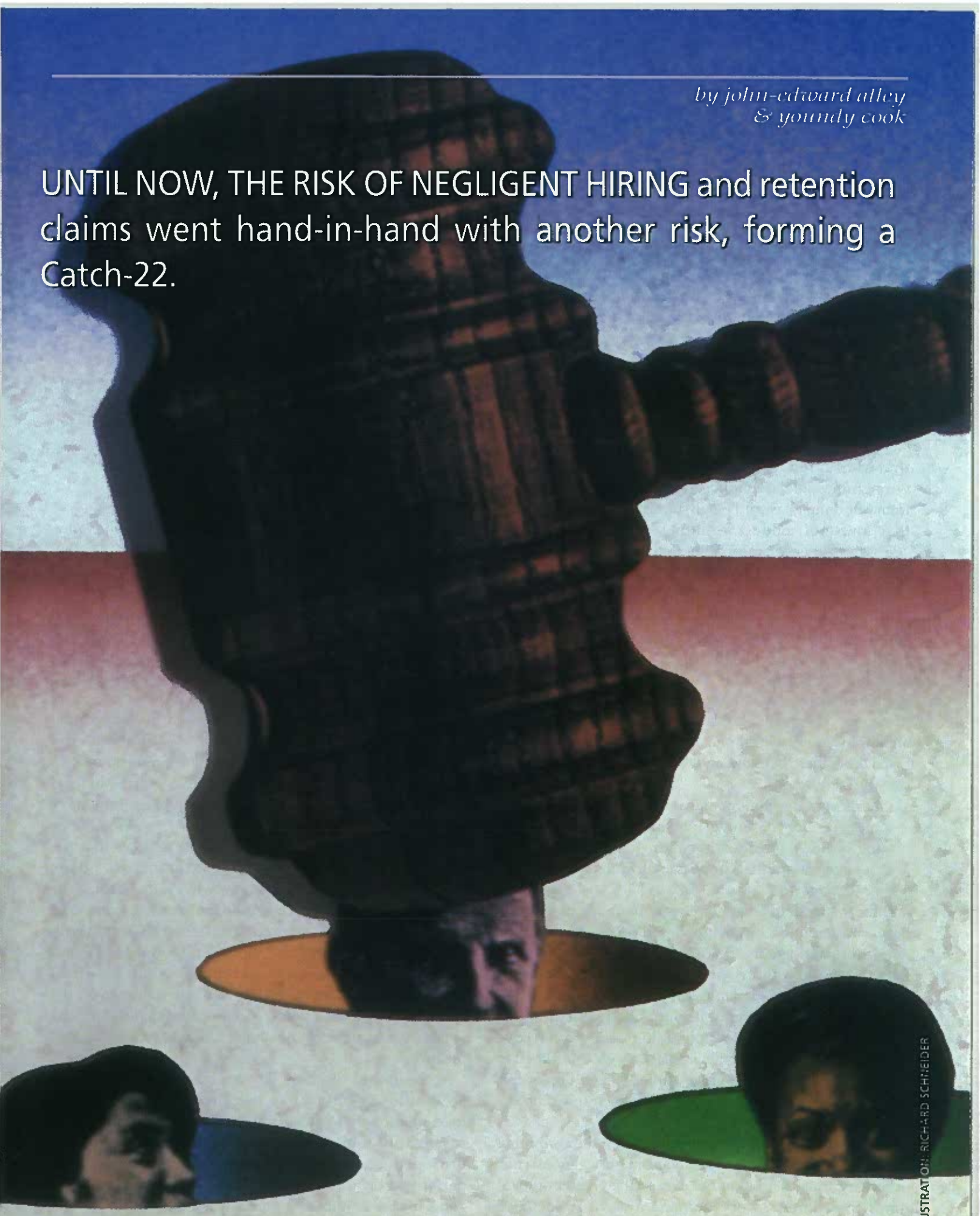

ILLUSTRATION: RICHARD SCHNEIDER

NEW LIMITATIONS ON PUNITIVE DAMAGE AWARDS

Punitive damages have long been the bane of Florida defendants. The mere threat of a claim for punitive damages often gives a plaintiff the leverage needed to extract a settlement.

In 1986 the Legislature imposed an evidentiary requirement upon plaintiffs before a claim for punitive damages could be made. Under the 1999 reforms, even more qualifications on claims for punitive damages — from pleading to proof to limitations on the amount — were enacted.

Under the new act, punitive damages will only be awarded upon proof by *clear and convincing evidence* of intentional misconduct or gross negligence, although the amount of punitive damages may still be established by a *preponderance of evidence*. "Intentional misconduct" means that the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage would result, but intentionally pursued that course of conduct, resulting in injury or damage. "Gross negligence" means the defendant's conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of others.

A business, of course, does not have "intentions" or "conscious disregard" and can only act through its employees and agents. Thus, the 1999 reforms set a new standard for legal entities, such as a business. Punitive damages for intentional misconduct or gross negligence may only be imposed on the business for the conduct of an employee or agent if one of the following occurs:

- the business actively and knowingly participated in the conduct
- the officers, directors, or managers of the business knowingly condoned, ratified, or consented to the conduct
- the business engaged in conduct constituting gross negligence and that conduct contributed to the injury or damage

The new standard gives employers and businesses a safe harbor from punitive damages based on the actions of its employees and agents. If an employer has made "good faith efforts" to comply with laws and to act reasonably, and if it has taken reasonable and prompt remedial action in response to a complaint, it cannot be required to pay punitive damages. An example of the kind of protective policies that an employer can implement were outlined in an article published in the May/June 1998 edition of this magazine, "Sexual Harassment: Shielding Your Company From Liability."

The new law also imposes some limits on the amount of punitive damages that may be awarded. As a general rule, punitive damages now cannot exceed the greater of three times the compensatory damage award or $500,000 (punitive damages under the Florida Civil Rights Act remain capped at $100,000). Punitive damages may exceed that general cap in either of the following two situations only:

- there was a specific intent to harm, in which case there is no cap
- the wrongful conduct was motivated solely by unreasonable financial gain and the decision-maker knew of the dangerous nature of the conduct and the high likelihood of injury, in which case punitive damages will be capped at the greater of four times the compensatory damage award or $2 million

Finally, punitive damages may generally be awarded only once per act or single course of conduct, unless clear and convincing evidence reveals that prior punitive damage awards were inadequate to punish the defendant.

BACKGROUND CHECKS TO PROTECT AGAINST NEGLIGENT HIRING CLAIMS

In recent years, negligent hiring and retention claims have been a source of anxiety for Florida employers. Florida cases such as *Williams v. Feather Sound, Inc.*, and *Tallahassee Furniture Co. v. Harrison* established the liability of employers for injuries inflicted by their employees on third parties. The liability sprang from a determination that the employees were unfit for their positions, knowledge the courts believed the employers would have discovered through adequate background checks.

Two issues in these cases are pertinent in light of the 1999 tort-reform amendments. First, the employers did little or no background check and the employees in question had access to people's homes by virtue of their jobs. Hence, the 1999 amendments likely would not have protected these employers.

Second, the rule arising out of these cases is that the nature of the job will determine the nature of the investigation that should be done. In *Feather Sound*, for example, the lack of investigation may not have mattered when the employee was hired since he had no contact with customers and worked outside with no access to people's homes. Once the employee was transferred to a position in which he had access to the residences, however, the employer had a duty to conduct an investigation that was reasonable in light of the access allowed to him by that position.

According to the new law, an employer should hire an employee only after conducting a background investigation that "[does] not reveal any information that reasonably demonstrate[s] the unsuitability of the prospective employee for the particular work to be performed or for the employment in general." Doing so gains for the employer a presumption of immunity from

liability to third parties injured by the intentional conduct of an employee.

There is some confusion as to the scope of the background investigation that will immunize employers. According to the amendments, the background investigation "must include" one of the following:

- a criminal background investigation, which shall consist of a report from the Florida Department of Law Enforcement
- reasonable efforts to contact references and former employers of the applicant
- a job application form that includes questions about convictions and whether the applicant has been a defendant in a civil action alleging an intentional tort
- obtaining a driver's license record if such information is relevant to the work to be performed
- interviewing the employee

While the statute uses the word "or" — suggesting that an interview would be a sufficient background check — it is possible the Legislature intended to use "and," with the result that an employer must do each of the above items to the extent demanded by the particular duties of the job in question.

Of course, the act does not operate in a vacuum. There are other statutes and laws affecting what employers can and cannot do, and how they must do what they can. For example, background investigations implicate the federal Fair Credit Reporting Act, which covers investigations of persons done by third parties. It also limits both the ability to obtain such background reports (by, among other things, requiring disclosure to the prospective employee) and to use whatever information is obtained (by, among other things, requiring the employer to notify the prospective employee before deciding to take adverse action on the basis of the report). For more information, please see "Disclosure and Approval: The New Fair Credit Reporting Act," *Florida Business Insight* (July/August 1998).

As a final measure, the new law provides that the absence of an extensive background investigation as outlined in the statute will not create a presumption that the employer failed to use reasonable care in hiring.

THE FREEDOM TO GIVE HONEST REFERENCES

Until now, the risk of negligent hiring and retention claims went hand-in-hand with another risk, forming a Catch-22: An employer who gave a negative reference to a prospective employer could be sued by the employee for defamation or tortious interference with a business relationship. That created a situation whereby an employer seeking a reference might get access to only the most general, and often inadequate, information from the former employer.

To further complicate matters, the fear of litigation made some employers leery about conducting background investigations for fear of running afoul of the Fair Credit Reporting Act. Thus, the background check undertaken to protect the employer against a negligent hiring claim could well have resulted in the filing of a lawsuit by the job applicant who was investigated.

The 1999 reforms now give employers who perform thorough background investigations some protection against negligent hiring claims. But what about getting those references? Since the new negligent hiring provisions will not work unless an employer can obtain sufficient information through an adequate background investigation, the new law gives employers much greater freedom to release information on former employees.

The new standard allows employers to "disclose information about a former or current employee"; this presumably would extend to *any* information about the employee. Furthermore, under the previous statute, liability could be imposed if the information disclosed was deliberately misleading or rendered with malicious purpose; the new statute eliminates those two grounds for liability. Unless the employee can prove by clear and convincing evidence that the employer disclosed information it knew was false or that violated any civil right of the employee, the employer gains immunity from civil liability.

In sum, employers may more freely give references about their former and current employees. A reasonable policy with respect to employee references would still limit the

number of people who have the authority to give out references. The information provided, however, can safely be much broader than in the past, better allowing employers to escape the contradictory situation whereby the employer could be held liable both for disclosing and for failing to disclose negative information about current and former employees.

REDUCING LIABILITY FOR EMPLOYEE LEASING COMPANIES

Prior to the 1999 reforms an employee leasing company could be held liable for the misconduct of and injuries caused by a leased employee who was under the supervision of the leasing company's client. This was justified on the grounds that the employee leasing company and the client to whom the employee was leased were joint employers and thus jointly responsible for any damages or injuries.

The new law reduces this threat by providing that a party to a joint employment arrangement is not liable for the tortious acts of shared employees if the following are true:

- the party did not authorize or direct the tortious action
- it did not have actual knowledge of the tortious action
- it did not exercise control over work performed, including the day-to-day job duties of the shared employee or of the job site from which the tortious acts arose

The party seeking to avoid liability must have a clause in the written joint employment relationship contract that absolves it of control over the day-to-day duties of the shared employee and of actual control over that portion of the job site where the shared employee worked or from which the tortious acts arose. To avoid liability, that written contract must also require joint employers to report complaints, allegations, or incidents of any tortious misconduct or workplace safety violation to each other; the party seeking to avoid liability must not have failed to respond appropriately to any such report.

This section of the 1999 reforms does not otherwise alter the responsibilities of the joint employer who does have actual control over the day-to-day job duties of the shared employee or actual control over the job site. ■

John-Edward Alley and Youndy Cook practice in the Tampa office of the law firm of Ford & Harrison, LLP, where Alley is a partner (e-mail: jalley@fordharrison.com *or* ycook@fordharrison.com).

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

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GUEST COLUMNIST: *rob wallace*

When Is Enough Enough?

In the last session, the Florida Legislature enacted The Florida Forever Act, which authorizes another 10-year, $3 billion plan to purchase conservation lands. Mine was the lone vote in opposition to it and here's why.

Florida Forever is the successor to the Preservation 2000 program, which authorized the state to issue a series of 10 bonds from 1991 to 2000. The proceeds of the P-2000 bond sales were dedicated to the purchase of Florida property, keeping the land in its natural state. State agencies, water management districts, universities, cities, and counties have all acquired lands from these bonds.

By the time P-2000 ends next year, it will have brought a total of 1.7 million acres under state control and out of productive use. In fact, by the time P-2000 expires, its purchases will collectively equal the land area of Hillsborough, Pasco, Pinellas, and Manatee counties.

In the next decade Florida Forever will continue with further land acquisitions that will amount to the equivalent of Polk and Hardee counties. The land-grabbing will occur at the rate of about 450 acres per day for 10 years.

The debate on Florida Forever begged the question, "How much government conservation land is enough?" Currently, there is a total of 12,609 square miles of federal, state, and local conservation land in Florida, an amount equal to 19.2 percent of the state's area. Furthermore, the water bodies of Florida, which are also conservation areas, comprise 11,821 square miles, or 18 percent of the state. In other words, government owns and controls 37.2 percent of Florida. Purchasing another 1.5 million acres under Florida Forever will drive the total to over 40 percent. I believe the government currently owns enough Florida property; it doesn't need anymore.

Turning private lands into government land removes the property from the tax roles. In the next 10 years, these purchases will erase somewhere between $15 to $30 million in ad valorem taxes collected annually by local governments.

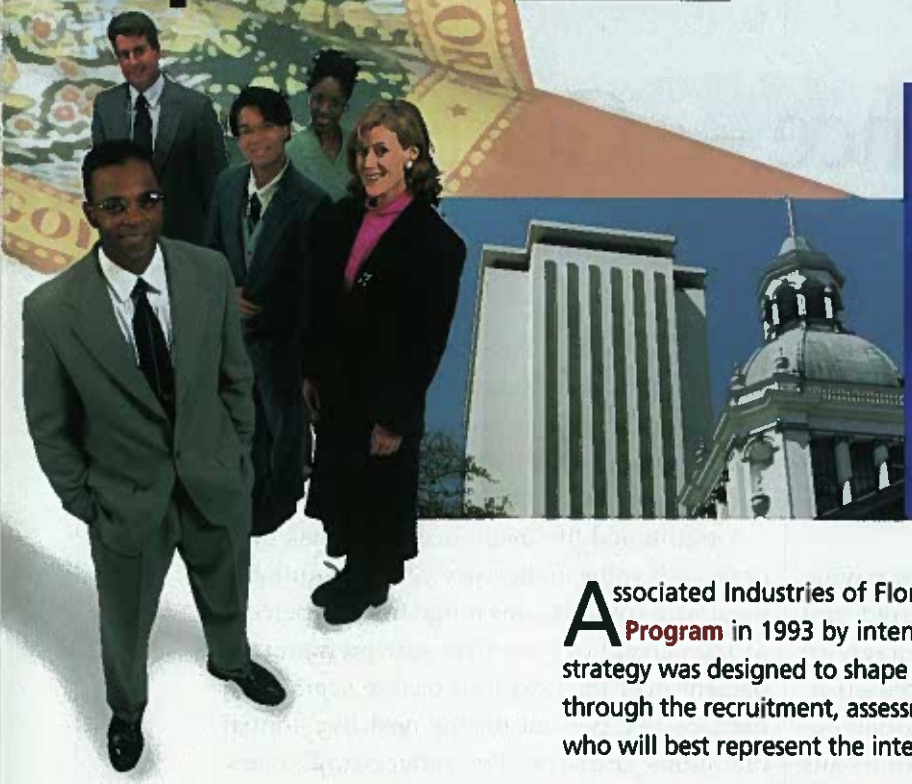
By bonding these purchases we are committing to a mortgage payout that will not be complete until the year 2030. We will spend $3 billion on land and in excess of another $2 billion on interest. We will not pay off the current P-2000 bond series until the year 2013. When both programs are completed they will have cost Floridians $9.7 billion in purchases and debt service.

There was one other important public policy consideration that shouldn't have been ignored but was. For the last 10 years, we have been spending anywhere from $150 to $200 million per year in Public Education Capital Outlay funds to build new K-12 schools. At the same time, we have been spending $300 million each year to buy swamps. I believe most people would not approve of that prioritization if they were informed of it.

The "Buy Florida Forever Act" is a marriage made in the heaven of environmentalists, land barons with regulated lands they cannot develop, and all government entities yearning for turf. This blissful matrimony could not be stopped after one decade. I only hope that the 20 years of government land-grabbing will end after a second decade. Florida's taxpayers and school children can't afford it much longer. ■

*Rob Wallace (R-47) represents portions of Hillsborough and Pinellas counties in the Florida House of Representatives and is an environmental engineer and small-business owner (e-mail:*wallace.rob@leg.state.fl.us*).*

Because Political Action Is More Important Now Than Ever Before



Associated Industries of Florida (AIF) began expanding its **Political Operations Program** in 1993 by intensifying its involvement in election campaigns. This strategy was designed to shape the direction and philosophy of the Florida Legislature through the recruitment, assessment, and financial support of only those candidates who will best represent the interests and concerns of Florida's business community.

The result: since 1994, **contributions** made by the AIFPAC and AIF affiliated companies to pro-business candidates have totaled more than **$1.5 million,** including $249,274 in 1994; $449,126 in 1996; and $821,125 in 1998. Additionally, members of AIF's Florida Business United contributed more than **$6 million** during the 1998 election cycle. Our **success ratio** has been equally impressive since 1994 — more than **93 percent** of the candidates supported by AIF **have won election,** including 92 percent in 1994; 92 percent in 1996; and 95 percent in 1998.

But now, our efforts are more important than ever before due to **eight-year term limits.** Beginning with the 2000 election cycle, there will be **64 open seats** because of term limits, which means many experienced, pro-business lawmakers will be replaced by less experienced legislators.

We encourage you to join our efforts today to help ensure that when the 2000 election rolls around, Florida's business community is represented by **pro-business legislators** who understand and advocate public policies that promote economic freedom and prosperity.

For more information on AIF's Political Operations, Florida Business United, or the AIFPAC, contact Marian Johnson, senior vice president - political operations, at (850) 224-7173, or e-mail her at mjohnson@aif.com.

AIF POLITICAL ACTIVITIES

Political operations at AIF is not just an election-year effort; rather, it's a full-time, year-round continuing operation with the purpose of electing pro-business candidates.

Political Operations

- Electoral district analysis
- Candidate recruitment and assessment
- Campaign evaluation and technical assistance
- Polling and get out the vote phone banks
- Campaign expenditure analysis

Florida Business United

FBU, a membership-based group comprised of Florida business people, keeps its members current on the state's political environment through extensive research and analysis.

AIF Political Action Committee

AIFPAC financially supports those candidates who understand and embrace our free-enterprise system. Contributions to candidates are determined by a board of directors, with input from AIFPAC members.

Associated Industries of Florida

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GUEST COLUMNIST: *john h. chason III*

Life Insurance — Get More For Less

Life insurance. If it means nothing more to you than death, taxes, and high premiums, you might be missing the good news. It's called "low-load insurance."

With low-load insurance, instead of paying the agent a commission for a product sold, you compensate an advisor with a fee for a service provided. A fee-only advisor is a licensed financial professional who offers individual consumers and businesses an alternative means of securing life insurance as a part of their financial planning. The minimum coverage amount is generally $100,000 and can cover multi-million dollar policies, making this is a viable life-insurance alternative for most purchasers.

Low-load policies are underwritten by several nationally known, A+-rated insurance companies. The underwriting process is no different from traditional policies because all insurance companies use the same mortality tables. Thus, the base cost to insure an individual or business owner is identical for all companies. The difference in total cost from policy to policy is directly related to other expenses that the particular carrier incurs.

The reduction in costs for low-load policies is achieved by eliminating insurance-agent expenses such as commissions, renewals, bonuses, fringe benefits, sales contests, and advertising, most of which are not applicable to low-load life insurance companies. In effect, you're buying life insurance in the wholesale rather than the retail market, with an immediate savings of one-third or more of the money you might otherwise have spent buying the policy from a commissioned agent. As time goes by, you will continue to save.

A traditional life insurance policy has little or no cash value in the early years. Traditional insurance commissions range from 75 percent to 150 percent of your first-year premium, 15 percent over the next four or five years, then perhaps five percent for the next five annual premiums, and so on. Even after 20 to 25 years, expenses such as commissions and renewals will continue to drain your insurance dollars.

With low-load insurance, the money you pay in premiums goes directly toward insurance coverage, not expenses. Thus you immediately begin to build cash value that, even in the first year, you can borrow against or walk away with if you cancel the policy. Immediate cash value also benefits the insurance company because, in the event of the policyholder's death, the company is only on the line for the difference between the death benefit and the amount of cash that has built up in the policy.

Life insurance can be an arcane commodity and generally has been the most inefficient part of any financial plan. A low-load insurance policy can increase the value of your nest egg and lower the costs at the same time. ■

John H. Chason III is a member of the board of directors of Tallahassee-based Wealth Management Corporation, a registered investment advisory firm (email: jchasonIII@aol.com*).*

Meet our latest Lottery Winners.

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

They live in Santa Rosa County, a rapidly growing county in Florida's Panhandle. Like many Florida counties, Santa Rosa's population will continue to grow.

To avoid overcrowded classrooms, the Florida Lottery is helping to fund the construction of new schools over the next twenty years. That way, while Florida is growing, class sizes will be shrinking.

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

Florida Lottery

When you play, we all win.

Visit our website at www.flalottery.com

by jacquelyn horkan, editor

Pursuit of Happiness

I was sitting in a "sto' do'," as the "Crackers" say, waiting for a clerk to load some "number eights," when my friend said, "Look at the cowboys."

Frederic Remington, *Harper's Weekly*

In 1895, on assignment for *Harper's Weekly*, Frederic Remington discovered Florida's own version of the frontier.

Florida's cow hunters, as they were called, tended herds of the untamed, scrawny descendants of the stock introduced by Spanish rancheros in the early 1500s. The cattle ran wild through the piney woods, scrub flats, and palmetto thickets that covered southwest Florida from Fort Meade to Fort Myers.

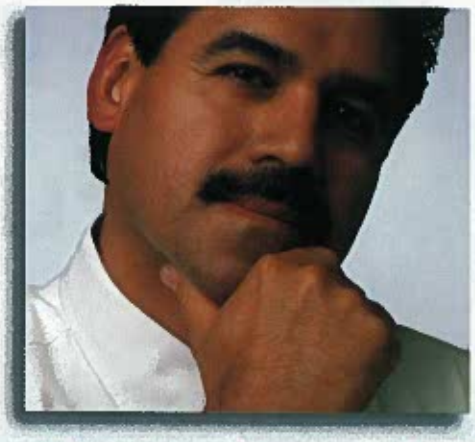
In his illustration, *A Cracker Cowboy*, Remington chose for his model one Morgan Bonapart "Bone" Mizell. A small man who spoke with a lisp, Bone's sharp wit and uncompromising toughness smoothed his way through into his rough and ready profession.

According to legend, Bone once marked a particularly ornery cow as his own by biting a hole in both of her ears. Once, after overindulging in his favorite cheap booze, Bone passed out. His friends then built a circle of fire around him and poked him with sticks to wake him up. Bone lifted his bleary head, remarked, "Dead and gone to hell — 'bout what I expected," and went back to sleep.

Unimpressed by Bone and his cohorts, Remington wrote of them in words dripping with scorn: "As a rule, they lack dash and are indifferent riders, but they are picturesque in their unkempt, almost unearthly wildness."

That wild, unearthly, and unkempt world is gone, but perhaps if you listen closely, over the racket of the cars and the air conditioners, you'll hear the faint echo of the cracking whips that gave the "Cracker Cowboys" their name. ■

PHOTO: FLORIDA STATE ARCHIVES



Pass The BIZ QUIZ

And Work With The State Of Florida

- ❑ Do you want to improve your cash flow?
- ❑ Are you tired of the headaches of dealing with state purchase orders?
- ❑ Do you accept VISA®?
- ❑ Are you ready for an easier way of doing business with the state of Florida?

If your answer is YES to these questions then you're a winner! The State of Florida's economic opportunities for small business and electronic commerce services can now put your business ahead of the game. For instance, state agencies and local governments now have the capability to purchase items from you without a purchase order. This is a great value to businesses everywhere but is especially beneficial for small business because it improves cash flow. By accepting the State Purchasing Card (a VISA® card) you will receive faster payment for goods and services! Soon you'll even be able to send electronic invoices for large dollar purchases.

Contact the State's small business opportunities and electronic commerce team today for more information.

http://fcn.state.fl.us/fcn/centers/purchase/expert.html phone: 1.850.414.6761

Reach Your Full Business Potential

Whether it's assisting with a new business venture or representing clients before state government, our multi-disciplined law practice is experienced in developing strategies that help our clients achieve their objectives.

By basing our services on the principles of knowledge, commitment, dedication and skill, we keep the focus of our efforts on our clients and provide them with comprehensive support through aggressive representation and plain hard work.

For more information on how we can help you achieve your full business potential, contact our primary office in Tampa or one of our other offices throughout Florida.

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The hiring of a lawyer is an important decision that should not be based solely upon advertisements. Before you decide, ask us to send you free written information about our qualifications and experience.