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DON'T TAKE IT PERSONALLY—LIMITED LIABILITY FOR ATTORNEY SHAREHOLDERS UNDER FLORIDA'S PROFESSIONAL SERVICE CORPORATION ACT

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Multimillion dollar lawsuits and rising malpractice insurance premiums have heightened professional interest in limited liability. In this Article, James M. Grippando examines limited liability as it applies to Florida professional service corporations with attorney shareholders. Grippando provides a detailed analysis of the Florida Professional Service Corporation Act and the court decisions construing it. He concludes that the Act as written provides limited liability for professionals in general and discusses public policy considerations courts have weighed and should weigh in determining whether attorneys in particular should enjoy limited liability.

THE FLORIDA Professional Service Corporation Act (hereinafter "Act" or "Florida Act")¹ created an exception to the traditional Florida rule prohibiting corporations from being licensed to practice a profession.² The Act recognized a new form of business entity, the professional service corporation (PSC).³ By establishing a PSC in accordance with the Act, professionals,⁴ who


2. See In re Florida Bar, 133 So. 2d 554, 555 (Fla. 1961) ("Traditionally, the so-called learned professions have not been permitted to practice as corporate entities"). The leading case establishing this rule is In re Co-op Law Co., 198 N.Y. 479, 92 N.E. 15 (1910), in which the court refused to permit lawyers to incorporate under the general business corporation statute primarily because the court feared that the integrity of the bar would be undermined should corporations performing legal services be owned or controlled by nonlawyers. The rule still retains its vitality. See, e.g., Szteinbaum v. Kaes Inversiones y Valores, 476 So. 2d 247 (Fla. 3d DCA 1985) (corporation's filing of complaint not signed by an attorney constituted the unauthorized practice of law); Angelini v. Mobile Home Village, Inc., 310 So. 2d 776 (Fla. 1st DCA 1975) (corporate official may not sign a pleading for corporation as a corporation is prohibited from practice of law).

3. Although this Article uses the acronym "PSC," it should be noted that the Act prohibits the use of any word or abbreviation other than "professional association," "P.A." or "chartered" in the firm name to indicate incorporation under the Act. FLA. STAT. § 621.12 (1985).

4. For a Florida case demonstrating the potentially broad range of persons who might be considered "professionals," see Parker v. Panama City, 151 So. 2d 469, 472 (Fla. 1st DCA 1963).
had traditionally practiced as partnerships, could associate in an entity with many of the characteristics of a corporation.5

Initially, the significance of these corporate attributes was largely tax related. By imbibing PSCs with certain corporate characteristics, Florida, like many other states, attempted to make professionals eligible for federal income tax benefits that, despite the lobbying efforts of various professional groups, only business corporations had enjoyed.6 Thus, to create parity between professionals and nonprofessionals for purposes of federal income tax treatment, the Florida Act allowed professionals to acquire certain attributes of "corporateness," as defined by case law and the Internal Revenue Service.7 Perhaps the most important of these attributes was limited liability.8

Significant revisions to the Federal Income Tax Code in 19819 and 198210 substantially eliminated the major differences in tax benefits available to partnerships and corporations.11 Consequently, while tax benefits fueled the advent of PSCs, the future will be determined by the nontax advantage12 that loomed so important in determining "corporateness" for tax purposes—limited liability.13 Rising malpractice insurance premiums14 and recent

6. The Florida Supreme Court has been open and frank about the tax motivations behind the Act. See, e.g., Street v. Sugerman, 202 So. 2d 749 (Fla. 1967).
7. See infra text accompanying notes 31-45.
8. See Kurzner v. United States, 413 F.2d 97, 104 (5th Cir. 1969). By no means, however, was limited liability the sine qua non of "corporateness." See, e.g., Foreman v. United States, 232 F. Supp. 134 (S.D. Fla. 1964) (corporate tax benefits held applicable to medical association even though the association did not and could not, under then existing law, meet the criteria of limited liability).
12. See Moore, Incorporated Lawyers Not Eager to Liquidate, Legal Times, Apr. 11, 1983 at 1, col. 1 ("Despite [tax law] changes . . . some tax attorneys maintain there are substantial nontax reasons for remaining incorporated, including limited personal liability and increased control over pension and investment decisions"); cf. Moore, IRS Expected to Render Restrictive Interpretation of New Statute on P.C.s, Legal Times, Nov. 29, 1982 at 1, col. 3 ("tax lawyers remain convinced that partnerships of professional corporations may survive the government's onslaught [because] . . . there are nontax reasons for incorporation, such as limited liability against malpractice suits").
13. Commentators generally regard limited liability as the most important nontax advantage of the PSC. E.g., G. RAY, INCORPORATING THE PROFESSIONAL PRACTICE 36 (3d ed. 1982); Rotgin, The Professional Corporation for Lawyers, 52 N.Y. St. B.J. 634 (1980). See Prof. Corp. Handbook (CCH) ¶ 155 (1971). Other significant nontax advantages include centralized management, continuity of life and transferability of shares. Ray, supra; S. RIEMER,
multimillion dollar lawsuits against partnerships and innocent partners for individual partners' misdeeds have heightened professional interest in limited liability.

As applied to professionals, the concept of limited liability has two distinct components: (1) liability for negligence and misconduct while rendering professional services, and (2) liability for ordinary business debts of the PSC and its shareholders, including ordinary tort and contractual liability. Under general partnership

Servicing the Professional Corporation, A Complete Manual and Guide 2-3 (1976). Additionally, for many professionals in PSCs, the need to file estimated tax returns is eliminated, and as a general matter, professionals in PSCs become more aware of the business aspects of practice. Id.

14. Concern over rising legal malpractice premiums and the availability of legal malpractice insurance has recently reached crisis proportions. See McCabe, Lawyer Liability—When the Practitioner Becomes the Target, 22 TRIAL 45 (July 1986) (claims against lawyers have increased over the past five years at an average rate of almost 20% per year); Galante, Insurance Costs Soar: Is There Any Way Out?, Nat'l L.J., Mar. 10, 1986, at 1, col. 1 ("the near future for legal malpractice insurance does not appear bright"); Press & Carroll, Look Who's Getting Sued Now, NEWSWEEK, Aug. 26, 1985, at 58 (legal malpractice cases have tripled since 1980 and average settlements soared from $3,000 in 1982 to $45,000 in 1985; consequently, insurance carriers increased their rates 300 to 550% from 1984 to 1985 and many stopped writing policies altogether so that nearly one fourth of lawyers who wanted insurance could not get it); Keppel, L.A. Legal Community Scrambling To Find A Lead Insurer, L.A. Times, Aug. 19, 1985, pt. 4 at 1, col. 1 (reporting that legal malpractice insurer for the 6,500-member Los Angeles Bar was withdrawing); Galante, Legal Insurance Crisis, Malpractice Rates Zoom, Nat'l L.J., June 23, 1975, at 93 (reporting 50% increase in number of legal malpractice actions filed in last five years and that one of nation's largest carriers increased its rates 50% in last year). Private firms are not the only entities affected by the crisis. See Danner, Businesses Lack Resources For Pro Bono Work, Legal Times, June 28, 1982, at 2, col. 2 (citing need for expensive malpractice insurance as one obstacle to pro bono work by corporations).

15. See, e.g., FSLIC v. Jacoby (Blank, Rome, Comisky & McCauley), No. 86-1894 (S.D. Fla., 1986) ($250 million suit against general counsel of insolvent savings and loan association for alleged participation in wrongful acts of officers and directors, negligent representation in loan transactions and violation of duty to client arising out of numerous conflicts of interest); American Sav. & Loan Ass'n v. Arky, No. 86-01305-Ca-23 (Fla. Cir. Ct. 1986) ($68 million suit by client/investor against law firm and its managing partner's estate for malpractice and breach of fiduciary duty arising out of managing partner's nondisclosure of various conflicts of interest). See also In re Alexander Grant & Co. Litigation, 110 F.R.D. 545 (S.D. Fla. 1986) (securities fraud, RICO, common law fraud and negligence action against individual partners of accounting partnership seeking $115 million before trebling based on Fort Lauderdale partner's wrongful acts).

principles, liability is unlimited: all partners are jointly and severally liable for wrongful acts of a partner committed while acting within the scope of the partnership’s business.\(^{17}\)

The Florida Professional Corporation Act appears to alter these principles with respect to both malpractice liability and liability for ordinary business debts. The Act clearly retains liability for the shareholder who breaches a duty to a client and any other shareholder who was supervising him,\(^{18}\) but the Act apparently shields innocent shareholders from vicarious liability for their fellow shareholders’ malpractice by providing that liability for one’s own acts or those by persons under one’s supervision and control shall be the shareholder’s “only” personal liability.\(^{19}\) As to liability for ordinary business debts, the Act originally was silent\(^{20}\) but has since been amended to provide that the personal liability of a PSC shareholder-employee “shall be no greater in any aspect than that of a shareholder-employee of a corporation organized under [the Florida General Corporation Act].”\(^{21}\) Thus, the plain, unambiguous language of the statute provides for limited liability.

Unfortunately, the clarity of Florida’s statute may not be the end of the matter. Because of the judiciary’s plenary control over attorneys and the practice of law, courts from other jurisdictions have taken great latitude in defining the parameters of attorney shareholder liability despite the language of applicable statutes.\(^{22}\) Although no Florida court has yet ignored the Act’s plain language, the Florida Supreme Court has made it clear that the practice of law through PSCs is subject to the approval and conditions imposed by the court.\(^{23}\)


\(^{18}\) See infra text accompanying notes 53-56.

\(^{19}\) See infra text accompanying notes 57-68.

\(^{20}\) See Buchmann & Bearden, supra note 5, at 12 (“Insofar as personal liability to general creditors, or for any claims arising against the corporation other than as a direct result of misconduct or negligence not connected with the rendition of professional services is concerned, the personal liability of the corporation and of the individuals involved would follow common law principles.”).

\(^{21}\) Ch. 67-590, 1967 Fla. Laws 1725, § 2.

\(^{22}\) See infra notes 107-173 and accompanying text.

\(^{23}\) See In re Florida Bar, 133 So. 2d 554 (Fla. 1961).
In this Article the author examines the corporate concept of limited liability as it applies to Florida PSCs with attorney shareholders. The author first provides a brief historical analysis of the original legislative purpose behind the enactment of professional service corporation statutes. Then he reviews the Florida Act and the state and the federal case law construing the Act. The author next analyzes cases from jurisdictions outside Florida that have attempted to redefine liability limits for professional legal corporations, and assesses the impact these cases may have on Florida law. Finally, the author identifies and discusses important policy issues Florida courts should consider when construing the Act.

I. THE DEVELOPMENT OF THE PROFESSIONAL SERVICE CORPORATION

As the Florida Supreme Court has recognized, PSCs "evolved and were designed primarily for the purpose of allowing various professions, not previously privileged to incorporate, to form organizations that would legitimately qualify for certain tax or retirement advantages available to corporations." Historically, significant tax benefits available to taxpayers who qualified as employees were unavailable to self-employed individuals. These benefits included qualified pension and profit-sharing plans under which employer contributions were deductible, interest earned on plan investments was nontaxable, and deferring income from years of high earnings to retirement years.

For years the American Medical and Bar Associations urged members to support legislation that would provide to the self-employed the same retirement benefits enjoyed by corporate employees. The result of these efforts, the "Self-Employed Individuals Retirement Bill" (the "Keogh" bill), was immediately criticized as "a heavily watered-down version of the original bill introduced

24. Street v. Sugerman, 202 So. 2d 749, 751 (Fla. 1967). See In re Florida Bar, 133 So. 2d at 555 ("The current state legislation typified by Chapter 61-64 [the Florida Act], is an outgrowth of various regulations promulgated by the Internal Revenue Service of the United States Treasury Department."). See also Kurzner v. United States, 413 F.2d 97, 106 (5th Cir. 1969).
26. Id. § 501(a).
28. Buchmann & Bearden, supra note 5, at 3 n.17.
in Congress” that failed to put self-employed individuals on equal footing with corporate employees.30

Because the tax code continued to confer significant tax benefits on “corporations” that were not extended to other entities, the Code’s definition of “corporation,” and the courts’ and Internal Revenue Service’s (IRS) interpretation of that definition, became significant. The Code defines “corporation” to include “associations.”31 In Morrissey v. Commissioner,32 the United States Supreme Court defined an “association” as a business organization lacking a corporate charter but possessing major corporate attributes, such as continuity of life, centralized management, free transferability of interests of ownership, and limited liability.33 Lower courts soon after established that a preponderance of these attributes was sufficient to qualify a business organization as an “association.”34

In the 1950s, considerable controversy developed as to whether the existence of these characteristics was to be determined as a matter of state or federal law. Resolution of this issue was crucial for professionals because state law generally forbade professionals from incorporating.35 In a landmark decision, United States v. Kintner,36 the Ninth Circuit Court of Appeals determined that federal law governs the characterization of an organization for tax purposes.37 The Kintner court held that, although state law prohibited professionals from incorporating, a group of Montana physicians qualified for corporate tax benefits.38 The basis for the court’s holding was the physicians’ agreement that no member would be liable for another’s professional misconduct, and that management would continue in business despite the death or withdrawal of any member.

The victory for professionals in Kintner was cut short in 1960, when the IRS issued opposing regulations. These “Kintner regulations” adopted the Morrissey four part “corporate resemblance”

34. See, e.g., Bert v. Helvering, 92 F.2d 491 (D.C. Cir. 1937).
35. See In re Florida Bar, 133 So. 2d 554 (Fla. 1961) (“Traditionally, the so-called learned professional have not been permitted to practice as corporate entities.”).
36. 216 F.2d 418, 424 (9th Cir. 1954).
38. Kintner, 216 F.2d at 428.
test, but established that the character of the corporate attributes identified in *Morrissey* were to be evaluated under state law.¹⁹ Thus, the "*Kintner regulations*" placed control over the federal tax status of professional organizations in the state legislatures.

The state legislatures responded quickly to the *Kintner* regulations by enacting professional service corporation statutes. In 1961, the Florida Professional Service Corporation Act enabled professionals to practice as corporations or as associations with corporate characteristics.⁴⁰

The IRS responded to the state law developments by enacting regulations in 1965 that "rather incredibly, isolate[d] professional groups and state[d] in no uncertain terms that they cannot be corporations for federal tax purposes."⁴¹ Courts criticized the new standard as arbitrary and discriminatory "legislation" by an administrative agency,⁴² and the regulations were invalidated in every federal circuit in which they were litigated.⁴³ The IRS acquiesced in a Technical Information Release and conceded that groups of professionals organized under most states' professional corporation laws generally would be treated as corporations for tax purposes.⁴⁴ Eventually, all fifty states enacted statutes authorizing the creation of PSCs or professional associations.⁴⁵

II. THE FLORIDA PROFESSIONAL SERVICE CORPORATION ACT

Compared to the professional service corporation statutes of many states,⁴⁶ the Florida Act is fairly detailed with respect to shareholder liability. Section 621.07 of the Act currently provides as follows:

Nothing contained in this act shall be interpreted to abolish, repeal, modify, restrict, or limit the law now in effect in this state applicable to the professional relationship and liabilities between the person furnishing the professional services and the person re-

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⁴⁰. Ch. 61-64, 1961 Fla. Laws 93.
⁴¹. *Kurzner*, 413 F.2d at 106 (discussing Treas. Reg. § 301.7701-2(a) (1965)).
⁴². See, e.g., id. at 106.
⁴³. See Kurzner v. United States, 413 F.2d 97 (5th Cir. 1969); O'Neill v. United States, 410 F.2d 888 (6th Cir. 1969); United States v. Empey, 406 F.2d 157 (10th Cir. 1969).
⁴⁵. For a general listing of state statutes, see MODEL BUSINESS CORP. ACT ANNOTATED at 1928 (1984).
⁴⁶. For a survey of the PSC statutes of all states, see Note, Shareholder Liability in Professional Legal Corporation: A Survey of the States, 47 U. PITT. L. REV. 817 (1986).
ceiving such professional service and to the standards for professional conduct; provided, however, that any officer, agent, or employee of a corporation organized under this act shall be personally liable and accountable only for negligent or wrongful acts or misconduct committed by him, or by any person under his direct supervision and control, while rendering professional service on behalf of the corporation to the person for whom such professional services were being rendered; and provided further that the personal liability of shareholders of a corporation organized under this act, in their capacity as shareholders of such corporation, shall be no greater in any aspect than that of a shareholder-employee of a corporation organized under [the Florida General Corporation Act]. The corporation shall be liable up to the full value of its property for any negligent or wrongful acts or misconduct committed by any of its officers, agents, or employees while they are engaged on behalf of the corporation in the rendering of professional services.47

No reported Florida decision has yet construed section 621.07 in a suit against a shareholder for breach of a duty to a client or for an ordinary business debt. This lack of definitive judicial precedent, however, does not create uncertainty as to shareholder liability. First, the statute is unambiguous and, under general rules of statutory construction, the plain and ordinary meaning of the statutory language defines the scope of liability. Second, several cases have discussed the concept of limited liability in contexts other than suits against shareholders, and these cases consistently indicate that the Act provides limited liability.

A. Statutory Construction

Section 621.07 has two basic components. First, it contains a general “savings clause” that purports to preserve the law governing liabilities of professionals to their clients. Second, it contains detailed limited liability provisions that create numerous exceptions to the general savings clause. Together, the savings clause and detailed liability provisions set forth an unambiguous schedule of limited liability.


Section 621.07 begins rather ominously, providing in its first sentence that “[n]othing contained in this act shall be interpreted to abolish, repeal, modify, restrict, or limit the law now in effect in this state applicable to the professional relationship and liabilities between the person furnishing the professional services and the person receiving such professional service.” 48 In isolation, a savings clause such as this could reasonably be read to preserve general partnership principles of unlimited liability, as unlimited liability was part of the law applicable to professional relationships when the Act was enacted. 49 Courts have reached this very conclusion in at least three states with professional corporation statutes that do not detail the extent of shareholder liability but rather address liability only in a savings clause. 50

A statute, however, must be read as a whole; a court may not focus on language in isolation so as to render a clear statute ambiguous. 51 Unlike statutes in other states that define shareholder liability solely through a savings clause, 52 the Florida Act precisely defines the scope of shareholder liability elsewhere. Thus, if these detailed provisions are clear, the general savings clause should not render section 621.07 ambiguous, and the detailed limited liability provisions should control.

48. *Id.*

49. One commentator has made this argument with respect to the Pennsylvania statute, which contains a savings clause similar to that in the Florida Act. *See Note, supra* note 46, at 836.


51. *United States v. Alexander, 602 F.2d 1228, 1231 (5th Cir. 1979) (particular clause or phrase of statute cannot be read in isolation but must be construed as part of statutory whole); Topeka Inn Management v. Pate, 414 So. 2d 1184 (Fla. 1st DCA 1982) (entire statute, not just isolated phrases and words, must be considered in determining legislative intent and effect must be given to every part of the statute as a whole).*

2. The Detailed Liability Provisions

The detailed liability provisions of section 621.07 set out four separate aspects of liability: (1) the liability of the active wrongdoer and his supervisors for breach of duty to a client; (2) the liability of shareholders other than the active wrongdoer and the wrongdoer's supervisors for breach of duty to a client; (3) shareholder liability for the ordinary business debts of the PSC; and (4) the liability of the PSC itself.

Perhaps the clearest aspect of section 621.07 is the retention of personal liability for the shareholder who breaches a duty to a client and for the active wrongdoer's direct supervisor. The Act provides that:

[A]ny officer, agent, or employee of a corporation organized under this act shall be personally liable and accountable only for negligent or wrongful acts or misconduct committed by him, or by any person under his direct supervision and control, while rendering professional service on behalf of the corporation to the person for whom such professional services were being rendered . . . .

Since the word "only" follows "personally liable and accountable," this clause does more than define the liability of active wrongdoers and their supervisors for breach of a professional duty to a client. Whatever additional ramifications the word "only" may have, the clause, at the very least, is clear in one respect: any shareholder of a PSC who breaches a duty to a client while rendering professional services to the client renders himself and his direct supervisor personally liable for any damage to the client.

This result is entirely consistent with the purpose behind the Act. State legislatures nationwide recognized the PSC as a legitimate business entity so that professionals could take advantage of certain efficiencies and benefits of the corporate form, but they did not intend to shield professionals from liability for their personal acts of professional negligence or misconduct. As observed by the Florida Supreme Court, "[t]he privilege of incorporation was most

54. The word "only" affects the vicarious liability of innocent shareholders for acts of professional misconduct, and may eliminate the personal liability of any shareholder for acts other than professional misconduct. See infra text accompanying notes 69-77.
55. Even under general principles of corporate law, an individual is personally liable for his own torts, and his status as shareholder or employee does not change this rule. Seavey, HANDBOOK OF THE LAW OF AGENCY § 129 (1964). E.g., In re Fields, 44 B.R. 322 (Bkrtcy. Fla. 1984). See Vantage View, Inc. v. Bali E. Dev. Corp., 421 So. 2d 728, 735 (Fla. 4th DCA
definitely not created or extended [to professionals] in order that those availing themselves of the benefits could be cloaked with an immunity inimical to legal order and public interest."\(^{66}\) Thus, the Act retains personal liability for shareholders and their supervisors for breach of a duty to a client.

While the Act clearly retains personal liability for active wrongdoers and their supervisors, the Act is equally clear in eliminating vicarious liability of innocent shareholders for their fellow shareholders' breach of duty to clients. Section 621.07 states, with respect to acts of professional misconduct, that a shareholder "shall be personally liable . . . only for . . . acts or misconduct committed by him, or by any person under his direct supervision and control . . ."\(^{67}\) Thus, whether section 621.07 shields innocent shareholders from vicarious liability for acts of professional misconduct depends upon construction of the word "only."

The word "only" is a restrictive word and a word of limitation.\(^{58}\) Courts have had little trouble in ascertaining the plain meaning of the word "only" and typically have construed it in accordance with the prevailing dictionary definitions to mean "exclusively," "alone in its class," "solely," "singly," "merely," "without others of the same class or kind," "this and no other," "without anything more," or "in no otherwise."\(^{59}\) There being no disagreement as to the meaning of "only," the confusion faced by courts in construing statutes containing the word stems not from the word's meaning, but from its placement in the clause or sentence.\(^{60}\)


56. Street v. Sugerman, 202 So. 2d 749, 751 (Fla. 1967). It should be emphasized, however, that merely because a professional incorporated for tax reasons was not a sufficient justification for disregarding the corporate form. See Kline v. Kline, 104 Mich. App. 700, 305 N.W.2d 297 (1981) (court erred in disregarding professional corporation in garnishment proceeding brought by single shareholder's former wife: court "will not hold that the purpose of incorporating to enjoy federal tax benefits is such a purpose as will entitle a court to automatically disregard the corporate fiction").


60. See, e.g., Second Nat'l Bank v. New Bank, 215 Va. 132, 134, 210 S.E.2d 136, 138 (1974) (use of word "only" within statute providing that Commonwealth, any party in interest, or any party aggrieved by any final finding, decision settling substantive law, order, or
"Only" can modify a verb, adjective, preposition, phrase, clause, another adverb, or a sentence. Consequently, given the length and complexity of many statutory provisions, careful placement of the word "only" is important to clarify which word or group of words is being limited or restricted. As a rule of statutory construction, courts strive to interpret "only" as restricting "the word [or words] to which it naturally belongs." Ascertaining an adverb's "natural" reference necessarily requires resort to grammatical rules. The usage panel for the American Heritage Dictionary suggests that, as a general rule, optimum clarity in placement of the word "only" is achieved by "having 'only' adjoin the word or group of words it actually limits."

In section 621.07, the word "only" adjoins the words "shall be personally liable and accountable." Thus, applying the foregoing grammatical rule, the word "only," as used in section 621.07, modifies "personally liable and accountable," thereby restricting the range of personal liability to the types of actions enumerated in the statute. Under the plain and ordinary meaning of the statutory language, therefore, a shareholder has personal liability for the following acts and no others: acts of professional misconduct he commits himself, or such acts committed by another professional under his direct supervision and control.

This conclusion is also supported by the history of section 621.07. As originally enacted, the Act contained the identical savings clause it contains today, but the detailed personal liability provisions of section 621.07 were not quite as precise as the current provisions. The original personal liability provisions stated that:

Any officer, shareholder, agent or employee of a corporation organized under this Act shall remain personally and fully liable and accountable for any negligent or wrongful acts or misconduct committed by him, or by any person under his direct supervision and control, while rendering professional service on behalf of the corporation to the person for whom such professional services were being rendered.

judgment of corporation commission shall have, of right, an appeal to Supreme Court only, relates to court to which appeals may be taken and not to action which an aggrieved party may take).

65. Ch. 61-64, § 7, 1961 Fla. Laws 93.
In 1967, section 621.07 was amended to its current form to provide personal liability “only” for the enumerated acts of professional misconduct and to provide further that liability of PSC shareholders shall be “no greater in any aspect than that of a shareholder-employee of a [general business corporation].”

Arguably, the original version of section 621.07 limited a shareholder’s liability to breaches of client-related duties committed by him or someone under his direct supervision and control. The point is moot, however, since, as one commentator noted, “[t]he 1967 amendments [to section 621.07] clarify beyond all doubt that such a limitation [of liability] does exist.” Thus, the Act’s elimination of innocent shareholders’ liability for professional negligence or misconduct they neither supervised nor participated in seems undeniable.

“Ordinary business debts” of the PSC encompass all claims against the PSC or its shareholders for acts other than professional negligence or misconduct, ranging from ordinary tort liability for a “slip and fall” to contractual liability for breach of a lease agreement. At least one, and arguably two, clauses in the detailed liability provisions of section 621.07 limit shareholder liability for ordinary business debts. Either clause independently provides such a limitation of liability; together, their effect is indisputable.

67. See Buchmann & Bearden, supra, note 5, at 5 (the 1961 Act “seems to impose the personal liability on the one rendering the services to the person receiving them, with no carry over to the other shareholders”); Jacobs, Florida’s Professional Service Corporation Act, 42 F.L.A. B.J. 149, 155 (1968) (“As it was originally passed, the Florida Professional Corporation Act provided by implication such a limitation of liability”). But see Kurzner v. United States, 413 F.2d 97, 107 (5th Cir. 1969) (“the scope of the personal liability imposed by [original] section [621.07] was unclear”). Interestingly, the New York statute, which contains language virtually identical to that of original section 621.07, has been construed to provide limited liability. See We’re Assocs. Co. v. Cohen, Stracher & Bloom, 65 N.Y.2d 148, 480 N.E.2d 357, 490 N.Y.S.2d 743 (N.Y. 1985) (absent showing of abuse of corporate form of doing business, shareholders of professional service corporation may not be held personally liable for an ordinary business debt of the corporation). Unlike original section 621.07, however, the New York statute does not contain a general savings clause. See McKinney’s Bus. Corp. L. § 1505(a). Arguably, therefore, the New York decisions would not be persuasive in construing former section 621.07 of the Florida Act, since the less precise language of detailed liability provisions contained in the the original section 621.07 might not have been clear enough to resolve all ambiguities created by the general savings clause. Cf. Note, supra note 46, at 836 (analyzing the Pennsylvania statute which, like Florida’s, contains a general savings clause).

68. Jacobs, supra note 67, at 155. See also Kurzner v. United States, 413 F.2d 97, 107-08 (5th Cir. 1969).
The first of these clauses that arguably eliminates liability for ordinary business debts is the same clause that clearly limits liability for acts of professional misconduct: a shareholder “shall be personally liable and accountable only” for professional misconduct “committed by him, or by any person under his direct supervision and control, while rendering professional service on behalf of the [PSC] to the person for whom such professional services were being rendered.” There are at least two possible interpretations of this clause. First, it could be interpreted to provide that a shareholder will be personally liable for professional misconduct only when he or someone he is supervising commits such misconduct. Under this reading, the clause merely states the circumstances under which a shareholder is personally liable for a particular type of wrong—professional misconduct—and has no impact on liability for ordinary business debts.

Alternatively, the clause could be interpreted to provide that a shareholder shall have no personal liability for claims of any kind other than claims against him for acts of professional misconduct that he or someone he supervised committed. Under this reading, the clause is not merely a limitation on a specific type of claim but rather is a limitation on the full range of potential claims against shareholders, including both claims for professional misconduct and for ordinary business debts.

Of these two possible interpretations, a reading that eliminates personal liability for ordinary business debts seems more reasonable. The purpose behind the Act’s detailed liability provisions was to comply with IRS guidelines on “corporateness” so as to make professionals eligible for tax advantages conferred on corporations. Under the IRS guidelines, limited liability, one of the indicia of “corporateness,” did not exist unless under state law71 PSC shareholders’ personal liability was “no greater in any aspect than that of shareholder-employees of an ordinary business corporation.”72 Because shareholders of ordinary business corporations are not personally liable for ordinary business debts,73 it seems logical to

70. FLA. STAT. § 621.07 (1985) (emphasis added).
71. “Corporateness” was determined by state, not federal law. See Kurzner v. United States, 413 F.2d 97, 104, 106 (5th Cir. 1969); In re Florida Bar, 133 So. 2d 554, 556 (Fla. 1961).
73. As a general rule, a creditor of the corporation must look to the entity alone for satisfaction of a debt. See Riley v. Fatt, 47 So. 2d 769 (Fla. 1950). This rule applies whether the debt is based upon contractual or tort liability. See Vantage View, Inc. v. Bali E. Dev. Corp., 421 So. 2d 728, 735 (Fla. 4th DCA 1982) (“purpose of corporate law... is to insulate
conclude that a clause providing for shareholders’ “only” personal liability would eliminate liability for ordinary business debts.footnote{74}

For ordinary business debts, the effect of the clause providing for shareholders’ “only” personal liability is academic, in light of the clause immediately following it. That clause, which tracks the language of the IRS guidelines,footnote{76} provides that “the personal liability of shareholders of a corporation organized under this act, in their capacity as shareholders of such corporation, shall be no greater in any aspect than that of a shareholder-employee of a corporation organized under [the Florida General Corporation Act].”footnote{76}

Since shareholders of ordinary business corporations are not personally liable for ordinary business debts, if the first clause providing for a shareholder’s “only” personal liability is construed to eliminate liability for ordinary business debts, the second clause is merely redundant. If the first clause is not so construed, the second clause most assuredly provides such a limitation on liability. Thus, either way, section 621.07 provides for limited liability with respect to ordinary business debts.footnote{77}

The final aspect of liability covered by section 621.07 concerns the liability of the PSC itself. The statute provides that “[t]he corporation shall be liable up to the full value of its property for any negligent or wrongful acts or misconduct committed by any of its officers, agents, or employees while they are engaged on behalf of the corporation in the rendering of professional services.”footnote{78} This clause merely recites well established corporate principles of entity liability and has no impact on personal liability of shareholders. As such, the detailed liability provisions discussed earlier remain unambiguous in limiting personal liability of shareholders. Because

an investor ... from personal liability for the torts of a separate corporate entity”). See also Westerman v. Polygard, Inc., 395 So. 2d 641, 642 (Fla. 2d DCA 1981) (debtors who never did any business with creditor individually but only in corporate capacity, were not individually liable). However, personal liability will attach where the shareholder is an active wrongdoer, Vantage View, 421 So. 2d at 735; where the shareholder personally guarantees the debt, see infra note 141; or where circumstances justify piercing the corporate veil. See generally Reininger, The Corporate Veil in Florida—Armor or Lace?, 54 FLA. B.J. 202 (1980).

footnote{74} This conclusion is bolstered by the fact that the clause as it now reads is far clearer than the original version contained in the 1981 Act. The New York Court of Appeals, in construing its own PSC provisions on limited liability, interpreted language virtually identical to that contained in the original version of the Florida Act so as to eliminate personal liability for ordinary business debts. See We’re Assoc. Co. v. Cohen, Stracher & Bloom, 65 N.Y.2d 148, 480 N.E.2d 357, 490 N.Y.S.2d 743 (1985).


footnote{76} FLA. STAT. § 621.07 (1985).

footnote{77} This conclusion is buttressed by section 621.13.

footnote{78} FLA. STAT. § 621.07 (1985).
section 621.07 is unambiguous, the plain, ordinary meaning of the words used should control to provide for limited personal liability of PSC shareholders.79

B. Judicial Interpretation

An additional and reliable indicium of a statute’s clarity is consistent judicial interpretation of the language employed by the legislature.80 Both state and federal courts have consistently construed section 621.07 to confer limited liability.

1. State Court Decisions

Soon after the Act became effective, the Florida Bar filed an original petition in the Florida Supreme Court requesting approval of amendments to the Integration Rule and Code of Ethics to enable members of the bar to practice law through PSCs. The court considered the petition in In re Florida Bar81 and announced the rules under which attorneys could establish PSCs for the practice of law. The court first explained that, notwithstanding the legislature’s power to permit “professionals” to establish PSCs, the Act was not self-executing as applied to attorneys:

[T]he responsibility which the Constitution imposes upon us to supervise admissions to the practice of law and the discipline of those admitted, necessarily requires an examination by this Court into any proposal that directly affects these two constitutional functions. Enabling action by this Court is therefore an essential condition precedent to authorize members of The Florida Bar to qualify under and engage in the practice of their profession pursuant to The 1961 Act.82

The court thus made clear that the Act in no way diminished the court’s control over attorneys and the practice of law.

79. Department of Legal Affairs v. Sanford-Orlando Kennel Club, Inc., 434 So. 2d 879 (Fla. 1983) (where statutory language is unambiguous, the court need look no further than statute itself); Carson v. Miller, 370 So. 2d 10 (Fla. 1979) (unambiguous statutory language must be accorded its plain meaning); State v. Egan, 287 So. 2d 1 (Fla. 1973) (where legislative intent as evidenced by statute is plain and unambiguous, then there is no necessity for any construction or interpretation of the statute and effect need only be given to the plain meaning of its terms).
80. Rickard v. Auto Publisher, Inc., 735 F.2d 450, 455 (11th Cir. 1984). See also Maine v. Thiboutot, 448 U.S. 1, 6 n.4 (1980).
81. 133 So. 2d 554 (Fla. 1961).
82. Id. at 555.
The court then examined the reasons why the Florida Legislature enacted the Professional Service Corporation Act. Well aware of the legislature’s desire to make professionals eligible for tax benefits available to corporations or entities with certain corporate attributes, the court observed that the Act was “a frank and forthright effort to adapt certain business and professional relationships to the requirements of the Internal Revenue Service in order that the members of such businesses or professions may be placed on an equal footing with other taxpayers.” This analysis of purpose was not merely historical background. The court explicitly stated that it would be guided by the Act’s purpose in any future interpretation of the Rules it prescribed for the practice of law through PSCs.

Having acknowledged the importance of tax benefits to PSCs, the court examined whether the Act actually conferred the required corporate attributes so as to make professionals eligible for those benefits. As to limited liability, the court was initially slightly ambiguous. Stressing the “highly personal obligation of the lawyer to his client,” the court stated that “[in addition to the individual liability and responsibility of the stockholder, the corporate entity will be liable for the misprisions of its members to the extent of the corporate assets.” The ambiguity stems from the court’s emphasis on the personal liability of the wrongdoer and of the PSC, rather than on the innocent shareholder’s insulation from liability. By emphasizing who was, rather than who was not, liable for a shareholder’s malpractice, the court’s definition of shareholder liability was less precise than it might have been had the court affirmatively stated that innocent shareholders enjoy limited liability.

The context, however, clarifies any ambiguity created by the court’s emphasis. Earlier in the same paragraph, the court said that the “corporate entity as a method of doing business will not be permitted to protect the unfaithful or the unethical.” Thus, “individual liability and responsibility” attaches to the “unethical or unfaithful” shareholder, not to innocent shareholders who neither supervised nor participated in the wrongful conduct. Such

83. *Id.* at 556.
84. *Id.* (emphasis added).
85. *Id.*
86. Presumably “individual” liability means personal liability. See, e.g., Mann v. Price, 434 So. 2d 943, 945 (Fla. 2d DCA 1983) (finding “individual liability” in former shareholder’s suit against attorney shareholders of professional association).
a construction is consistent with the scope of liability for breach of duty to a client as defined by the plain language of the statute.

Unlike the description of malpractice liability, the court's discussion of liability for ordinary business debts was clear. The court declared that "[t]here will be liability for corporate debts to the limit of corporate assets." Thus, the court appears to have construed section 621.07 as eliminating shareholders' personal liability for the PSC's ordinary business debts.

Although the court confirmed that PSC shareholders enjoy limited liability, the court was speaking in the abstract. The case involved an original petition in which the court issued rules of practice; it did not actually involve a suit against a shareholder either for malpractice or for recovery of a business debt. Therefore, while the court's language was strong, it cannot be considered a dispositive interpretation of the statute. This is especially true in light of the fact that the court's interpretation clearly was influenced by the Act's purpose of creating tax equality between professionals and ordinary business corporations. Now that the Tax Code has been revised to confer many tax benefits on professionals with or without the PSC infrastructure, it is conceivable that, if confronted with a case involving a suit against a shareholder, the court would at least reconsider if not revise, its interpretation.

The impact an actual controversy involving a suit against a shareholder could have on the court's interpretation is made apparent in Street v. Sugerman. In Sugerman, a nonprofessional judgment creditor obtained a judgment against two attorneys in their individual capacities. The attorneys owned 90% of the stock in a PSC but the judgment was not against the PSC. The creditor executed on the judgment and levied upon the attorneys' stock in the corporation. The attorneys sought to permanently enjoin the sale of the stock, relying on the provisions of the Act prohibiting a shareholder of a PSC from selling or transferring his shares to any-

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87. *In re Florida Bar*, 133 So. 2d at 557.
88. *Cf.* Birt v. St. Mary Mercy Hosp., Inc., 175 Ind. App. 32, 42, 370 N.E.2d 379, 385 (Ind. App. 1977) (in promulgating rules governing the practice of law through PSCs, Indiana Supreme Court was not bound to the specific terms of the statute; thus, supreme court's opinion in rulemaking capacity was not controlling in subsequent case involving purely a question of statutory construction).
89. *In re Florida Bar*, 133 So. 2d at 556.
90. 202 So. 2d 749 (Fla. 1967).
one who is ineligible to be a shareholder. The attorneys argued that because only licensed attorneys are eligible to be shareholders in a legal PSC, the forced sale of the stock would contravene the Act's provisions on limited transferability of stock. The trial court agreed and granted the injunction.

The appellate court reversed, holding that the Act's limitation on the voluntary transfer of shares did not preclude execution and forced sale by law for a judgment creditor. The supreme court affirmed and, in language that could be applied to the concept of limited liability, articulated the policy behind its affirmance:

We noted in the case of In re The Florida Bar, [citation omitted], that professional service corporations evolved and were designed primarily for the purpose of allowing various professions, not previously privileged to incorporate, to form organizations that would legitimately qualify for certain tax or retirement advantages available to corporations. The privilege of incorporation was most definitely not created or extended in order that those availing themselves of the benefits could be cloaked with an immunity inimical to legal order and public interest.

To the extent that a limitation of personal liability could be construed as "inimical to the legal order and public interest," the court may be willing to employ this reasoning to cut back on the scope of the "immunity" in an appropriate case.

The Sugerman decision, however, may not be as detrimental to limited personal liability as it appears. For tax purposes, one of the indicia of corporateness identified by the IRS was free transferability of interests of ownership. Logically, the fewer restrictions placed on the transfer of shares, the greater the likelihood that the corporate characteristic of free transferability will be found. Thus, the Act's restrictions on transfer of shares to nonprofessionals was an exception to the legislature's attempt to confer this corporate characteristic on PSCs. By construing that restriction narrowly to permit the transfer of shares through a judicial sale, the Sugerman

91. See Fla. Stat. § 621.11 (1985) ("No shareholder of a corporation organized under this act may sell or transfer his shares in such corporation except to another individual who is eligible to be a shareholder of such corporation").
93. Sugerman v. Street, 198 So. 2d 57 (Fla. 3d DCA 1967), aff'd, 202 So. 2d 749 (Fla. 1967).
94. Sugerman, 202 So. 2d at 751.
95. Id.
court actually furthered the purpose of the Act to imbue PSCs with the corporate attributes deemed essential by the IRS. Thus, *Sugerman* could be construed as attaching paramount importance to the Act's purpose of establishing these corporate attributes. As such, *Sugerman* would support a plain reading of section 621.07 to find limited liability, just as it rejected a strained reading of the Act which placed undue restrictions on the transfer of shares.

2. Federal Tax Decisions

The Florida Supreme Court in *In re Florida Bar* cautioned that although the Act was designed to confer corporate attributes on professional associations, it could not be assumed that every entity formed pursuant to the Act would "gain the stamp of approval of the taxing authorities."97 True to the court's warnings, the IRS did in fact challenge corporate tax benefits claimed by shareholders of certain entities formed under the Act. In the two decisions discussed below, the courts rejected the IRS' challenge and, in the process, left no doubt that the Act provides for limited liability.

In *Smith v. United States*,98 a taxpayer sought a refund of income taxes, claiming that the taxes had been collected erroneously. The taxpayer was a shareholder in a professional medical association that had continuously engaged in the practice of medicine since the year the Act became effective. Relying on the original regulations it promulgated in 1960 and the more restrictive regulations promulgated in 1965, the IRS taxed the association as a partnership, determining that the association lacked sufficient corporate characteristics to qualify for corporate tax benefits.

The taxpayer challenged the IRS' determination in the Federal District Court for the Southern District of Florida, and the court found for the taxpayer. The court first declared the restrictive 1965 regulations invalid,99 and proceeded to analyze the nature of the association under the indicia of corporateness identified by the IRS in its 1960 regulations and by the Supreme Court in *Morrissey v. Commissioner*:100 limited liability, centralized management, continuity of life, and transferability of ownership interests. Applying these criteria, the *Smith* court concluded that the association possessed sufficient corporate characteristics to qualify for corporate

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97. *In re Florida Bar*, 133 So. 2d at 557.
99. *Id.* at 1020-22.
100. 296 U.S. 344 (1935).
tax benefits. In so doing, the court analyzed each of the Morrissey criteria, and, in particular, examined the scope of liability for shareholders of PSCs formed under the Act:

The stockholders of the Professional Association, by virtue of the provisions of § 621.13, Florida Statutes, F.S.A., have sharply limited liability. Their liability differs from the liability of a stockholder in any other corporation only in that each is personally liable for negligent or wrongful acts performed by him or by any employee under his direct supervision or control.¹⁰¹

A similar situation arose in Kurzner v. United States,¹⁰² which involved another suit for refund of taxes paid by a physician who was a shareholder in a PSC formed under the Act. As in Smith, the government determined that the entity lacked the requisite corporate characteristics to qualify for corporate tax benefits. The trial court, in an opinion adopted almost verbatim from the Smith case,¹⁰³ rejected the Commissioner's position. The trial court based its holding in part upon its finding that the Act conferred significant corporate attributes, including limited liability.¹⁰⁴ The government appealed, and in an extensive opinion the Court of Appeals for the Fifth Circuit affirmed.¹⁰⁵

The appellate court elaborated on the trial court's finding that the Act conferred limited liability, explaining in particular the import of the 1967 amendments to section 621.07:

[A]s a corporation, a professional service corporation "permits the limitation of liability of participants to the property embarked in the undertaking." However, in a seeming excess of caution, section 621.07 of the [original] act made clear that the shareholder-professionals would not be immune from liability for their own conduct: Any officer, shareholder, agent or employee of a corporation organized under this Act shall remain personally and fully liable and accountable for any negligent or wrongful acts or misconduct committed by him, or by any person under his direct su-

¹⁰¹ Smith, 301 F. Supp. at 1022. Section 621.13 defines the interrelationship between Chapter 607, Florida's General Corporation Act, and Chapter 621: Chapter 607 is applicable to a corporation organized pursuant to Chapter 621, except to the extent that provisions of 621 conflict with those of 607, and in such case, provisions of 621 shall take precedence.
¹⁰² 413 F.2d 97 (5th Cir. 1969).
¹⁰⁴ Kurzner, 286 F. Supp. at 845.
¹⁰⁵ Kurzner v. United States, 413 F.2d 97 (5th Cir. 1969).
pervision and control, while rendering professional service on behalf of the corporation to the person for whom such professional services were being rendered. Since the scope of the personal liability imposed by this section was unclear, the Florida legislature in 1967 added a clarifying proviso:

"[T]he personal liability of shareholders of a corporation organized under this act, in their capacity as shareholders of such corporation, shall be no greater in any aspect than that of a shareholder-employee of a corporation organized under [the general corporation laws] chapter 608." Thus personal liability is limited in a professional corporation to the same extent as in any other corporation. Although a shareholder-employee must necessarily be responsible for his misconduct, the corporate form nonetheless shields the shareholder from a considerable amount of contractual and tort liability.106

Kurzner is the most recent case construing section 621.07 to confer limited liability upon PSC shareholders. Decided in 1969, it is also the only case to discuss limited liability since the adoption of the 1967 amendments to section 621.07. If anything, the statute has become more clear with respect to limited liability since the passage of these amendments. Thus, when viewed in light of the courts' prior decisions in Smith, Sugerman, and In re Florida Bar, a consistent theme has developed in both the state and federal decisions construing the Act's liability provisions. This consistent judicial interpretation confirms the clarity of section 621.07 and supports a finding of limited liability based upon the plain meaning of the statutory language.

III. JUDICIAL ACTIVISM OUTSIDE FLORIDA

Courts in several jurisdictions outside Florida have been strongly influenced by public policy in determining attorney shareholders' personal liability in professional legal corporations.107 Although not always explicitly set forth, the chief policy considerations motivat-

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106. Id. at 107-08.
ing these courts appear to be the special nature of the relationship both between a lawyer and his client, and between a lawyer and the other members of his law firm. In effect, these courts have established a different set of rules for limited liability of PSCs with attorney shareholders, allowing all professions except the legal profession to enjoy limited liability. While these different rules stem from the same policy considerations, courts have offered several justifications for different treatment for lawyers. These reasons, sometimes adopted by the same court in a single opinion, fall into two general classifications: overly broad attempts to abrogate limited liability for attorneys, and specific attempts to expand attorneys' personal liability.

A. Overbroad Attempts to Abrogate Limited Liability for Attorneys

Some justifications offered by courts for eliminating limited liability for professional legal corporations have implications reaching far beyond the personal liability of attorneys. Though clearly motivated by policies related to the legal profession, some courts have based their holdings, at least in part, on reasoning that could be extended to all professionals in PSCs or even to nonprofessionals engaged in business through closely held corporations.

1. Shareholder Participation in Management

In deciding that attorneys are not entitled to limited liability, some courts have focused on the PSC shareholder's closeness to the management of the corporation. In South High Development, Ltd. v. Weiner, Lippe & Cromley Co., the Ohio Supreme Court held that attorney shareholders are not entitled to limited liability because they are too involved in the operation of the corporation. This is based on the idea that participation in management is too close to the operation of the business for limited liability to apply.


111. 4 Ohio St. 3d 1, 445 N.E.2d 1106 (1983).
Court relied heavily on this factor to impose personal liability on attorneys for a legal PSC's ordinary business debts. In *South High*, a PSC with attorney shareholders breached a lease for office space. Even though the PSC was the only signatory to the lease, the landlord attempted to impose personal liability upon the PSC’s attorney shareholders. The landlord relied on the Ohio Supreme Court Rules for Government of the Bar, which permitted attorneys to form PSCs only on the condition that each attorney remain personally liable for all claims against the PSC.\(^{112}\)

Although the Ohio professional corporation statute contains no specific provisions on shareholder liability, it does provide that the Ohio General Corporation Law "applies to professional associations."\(^{113}\) The limited liability provisions of this law are contained in the Ohio Constitution, which states that "in no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her."\(^{114}\) Because limited liability for Ohio corporations is a constitutional mandate, the defendants in *South High* argued that the constitutional provisions overrode the supreme court’s rule requiring attorneys to assume personal liability.\(^{115}\)

Relying on its own rule, the Ohio Supreme Court rejected the defendants’ argument and imposed personal liability on the attorney shareholders. In reaching this result, the court acknowledged that if the constitutional provisions limiting liability applied to PSCs, the constitution would supercede the court’s rule imposing personal liability on attorney shareholders.\(^{116}\) The court avoided this conflict, however, by holding that the constitutionally limited liability provisions applied only to private corporations, not to PSCs. The court based its holding on a difference it discerned between PSCs and ordinary business corporations:

>[A] private corporation’s sole purpose is to accumulate capital so that the owners, those contributing capital, may get a return on their capital. Thus, it may reasonably be concluded that the rationale behind the constitutional protection for shareholders applies only toward private corporations and not professional ones.

112. The rule is set forth in full infra at text accompanying note 139.
114. *Ohio Const.* art. XIII, § 3.
115. *South High*, 4 Ohio St. 3d at 2, 445 N.E.2d at 1107.
116. *Id.* at 2, 445 N.E.2d at 1108 ("the limited liability... provided by the Constitution for shareholders of private corporations may not be varied by the General Assembly or by this court").
The shareholders of a professional corporation, whether legal, medical, or other, will be the professionals who actually practice the profession. However, the shareholders of a private corporation will in most instances not be employees of the corporation. Therefore, there is a logical need for shareholders of private corporations to be insulated from corporate debts since they will have no practical participation in the management of the corporation. The shareholders of the professional corporation will have direct contact with the running of the corporation, so limited liability is not necessary for them.117

The distinction between private and professional corporations noted in South High is flawed for at least two fundamental reasons. First, the notion that PSC shareholders will have "direct contact with the running of the corporation" ignores the management structure of large firms. A recent survey revealed that the nation's 250 largest law firms all had 100 or more lawyers.118 Of these 250 firms, eleven had over 400 attorneys, twenty-eight had over 300, and ninety-one had 200 or more.119 Management in such firms is most certainly left to a committee, and any suggestions that all shareholders are active in daily management activities are pure fantasy.120

A second and perhaps more fundamental flaw in the South High court's reasoning is that such reasoning could be extended to eliminate limited liability for shareholders of small closely held corporations. As stated by one critic of the South High decision:

A closely held corporation is normally characterized as a business corporation whose shareholders are also employees, directors, officers, and managers. If, however, participation in management is the deciding factor, then the shareholders of a regular business corporation should also lose their limited liability in certain circumstances. It is doubtful that the Ohio court desired to announce such a broad rule for both professional corporations and closely-held business corporations, but its reasoning fits both entities.121

117. Id. at 3, 445 N.E. 2d at 1108.
118. Nat'l L.J., Sept. 22, 1986, at s7. Four Florida firms were among the nation's largest 250.
119. Id.
120. See Paas, supra note 16, at 380 ("The assumption that all shareholders of a professional corporation are active in management is contrary to fact.").
121. Id. at 380. See also Note, supra note 46, at 832.
Thus, the court’s attempt to predicate personal liability of attorney shareholders on their alleged participation in management is based on an artificial distinction between private and professional corporations which has no basis in law or fact.

Unlike Ohio, Florida has not enacted a rule imposing personal liability on attorney shareholders. Nonetheless, the South High case is significant because it is a clear example of the courts’ willingness to adopt tortured readings, even of constitutional provisions, in order to impose personal liability on attorneys. Thus, a Florida court conceivably could engage in similar mental gymnastics to circumvent the clear language of the Florida statute and impose partnership liability on attorney shareholders.122 For these reasons, Florida courts should reject the “participation in management” argument and resist any temptation to so encroach upon limited liability of PSCs with attorney shareholders.123

2. Ancillary Rendition of Professional Services

Many statutes, including the Florida Act, impose personal liability for wrongful acts committed “while rendering professional services.”124 One court has interpreted this language broadly to expand attorney shareholders’ personal liability. In Infosearch, Inc. v. Horowitz,125 a New York trial court construing such language in the New York statute126 determined that an attorney shareholder was personally liable for an ordinary business debt of the PSC.

The court first noted the strong public policy reasons supporting personal liability for attorney shareholders of PSCs, stating that it would be “contrary to public policy” to “shield lawyers from the payment of just debt.”127 The court explained that “[w]hen one

125. 117 Misc. 2d 774, 459 N.Y.S.2d 348 (1982).
126. The New York statute provided as follows: “Each shareholder, employee or agent of a professional service corporation shall be personally and fully liable and accountable for any negligent or wrongful act or misconduct committed by him or by any person under his direct supervision and control while rendering professional services on behalf of such corporation.” We’re Assocs., 65 N.Y.2d at 151, 480 N.E.2d at 359, 490 N.Y.S.2d at 745 (citing McKinney’s Bus. Corp. L. § 1505(a)).
127. Infosearch, 117 Misc. 2d at 774-75, 459 N.Y.S.2d at 349. This decision has been criticized as taking an erroneous view of “just debt.” Note, supra note 46, at 828 (“the Infosearch rationale has no logical or statutory support for classifying an ordinary business
extends credit to a law firm, one expects that his debt is secured by the legal and moral obligation of the members of that firm, notwithstanding that it is a professional corporation." The Court then announced a rule that could be applied to all PSCs, whether comprised of lawyers or not:

[T]he statutory qualification "while rendering professional services on behalf of such corporation" may be construed to apply to debts incurred ancillary to the rendering of professional services, and . . . this is a reasonable construction. The only limited liability of partners that would then remain in professional corporation [sic] would be that based on the private, as distinguished from corporate acts of the de facto partners. Thus, partner A would not be liable for partner B's private debts.

Although in a later case the New York Court of Appeals rejected the "ancillary services" argument adopted in Infosearch, the argument is somewhat attractive. Undeniably, "there are certain ordinary business debts that are integral to the rendition of professional services," such as the purchase of law books or charges for continuing legal education courses. Thus, failure to pay such debts conceivably could be construed as an act within the personal liability reach of a statute which imposes personal liability on shareholders for wrongful acts committed "while rendering professional services on behalf of [the] corporation." The underscored language makes clear that the Act provides for personal liability only when the shareholder breaches a duty to a client, not when he breaches a duty to a third person providing some service or commodity that is ancillary to

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128. *Id.*
129. *Id.* at 350.
131. See Note, supra note 46, at 832.
132. *Id.* (citing Infosearch, 117 Misc. 2d at 776, 459 N.Y.S.2d at 350).
133. FLA. STAT. § 621.07 (1985) (emphasis added).
the shareholder's rendering of professional services to the client. Thus, the "ancillary services" argument is not viable in Florida.

B. Lawyers—Specific Attempts to Expand Personal Liability

Despite their potentially broad ramifications, both the "participation in management" and "ancillary services" arguments were employed to reach relatively narrow results: to impose personal liability on attorney shareholders of PSCs. In addition to these arguments, courts have taken more direct and, perhaps, more intellectually honest approaches to reach the same result. The direct approaches involve one form or another of the judiciary's supervisory power over attorneys and the practice of law.

1. Elimination of Limited Liability through Formal Rulemaking Procedures

In Formal Opinion 303, the American Bar Association (ABA) Committee on Professional Ethics concluded that lawyers could, without violating the Canon of Ethics, practice law as PSCs, provided "appropriate safeguards are observed." With respect to limited liability, the Opinion requires the "following safeguards: 1. The lawyer or lawyers rendering the legal services to the client must be personally responsible to the client. 2. Restrictions on liability as to other lawyers in the organization must be made apparent to the client."

In In re Florida Bar, the Florida Supreme Court basically adopted the position of the Committee. The rules announced in that decision imposed no greater "safeguards" with respect to limited liability than those set forth in Formal Opinion 303. There-

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135. Id. at 667.
136. Id. at 663.
137. 133 So. 2d 554 (1961). Other state courts have taken different positions. See In re Bar Ass'n, 516 P.2d 1267 (Haw. 1973) (court required joint and several liability of attorneys in PSCs, expressly rejecting bar association's proposed rule providing limited liability of incorporated attorneys); In re Rhode Island Bar Ass'n, 106 R.I. 752, 263 A.2d 692 (R.I. 1970) (approving limited liability for attorneys in PSCs only if attorneys carry mandatory malpractice insurance). See generally Note, supra note 107, at 305-06.
138. The rules as originally enacted in 1961 are set forth in In re Florida Bar, 133 So. 2d at 554. The most recent version of the rules contained in Articles II, X and XV of the 1986 Integration Rules of the Florida Bar, were very similar to the original rules. Article II provided generally that:

Professional service corporations organized under The Professional Service Corporation Act are not prohibited by this article from engaging in the practice of law, so long as such corporation and all of its shareholders, officers, directors, agents
and employees who are members of The Florida Bar comply with the applicable provisions of the Integration Rule and By-Laws of The Florida Bar. 1986 Int. R. Fla. Bar, Art. II § 7 (repealed). More detailed provisions were contained in Article XV:

1. Professional service corporations organized under Florida Statutes chapter 608 pursuant to Florida Statutes chapter 621 to practice law pursuant to the provisions of The Professional Service Corporation Act are authorized to engage in the practice of law in Florida but only while all shareholders of such corporation are active members of the Florida Bar in good standing and only while such corporation and all of its shareholders, officers, directors, agents and employees comply with the provisions of The Professional Service Corporation Act and the applicable provisions of the Integration Rule and By-Laws of The Florida Bar.

2. No professional service corporation may engage in the practice of law except through officers, agents or employees who are active members of The Florida Bar in good standing.

3. No person shall serve as a director of a professional service corporation engaged in the practice of law except an active member of the Florida Bar in good standing. No person shall be elected or shall serve as an executive officer of any such corporation except a person who is a shareholder in such corporation. For this purpose the term "executive officer" shall not include the secretary of a professional service corporation having only one shareholder.

4. A lawyer who, while acting as a shareholder, officer, director, agent or employee of a professional service corporation engaged in the practice of law, violates or sanctions the violation of the provisions of The Professional Service Corporation Act or the Integration Rule or By-Laws of The Florida Bar specifically relating thereto shall be subject to disciplinary action.

Id. Art. XV (repealed). Article XV was added to the Integration Rule in 1961, In re Florida Bar, 133 So. 2d at 557-58, and was amended to the version quoted above in 1975. See In re Florida Bar, 317 So. 2d 65 (Fla. 1970). Finally, Article X of the 1986 Integration Rules also impacted PSCs with attorney shareholders. Article X was the Code of Professional Responsibility as adopted by the Supreme Court in 1970. See In re Integration Rule of Fla. Bar, 235 So. 2d 723, 724 (Fla. 1970). As relevant to the subject of limited liability of attorneys, the Code provided as follows:

EC 6-6. A lawyer should not seek, by contract or other means, to limit his individual liability to his client for his malpractice. A lawyer who handles the affairs of his client properly has no need to attempt to limit his liability for his professional activities and one who does not handle the affairs of his client properly should not be permitted to do so. A lawyer who is a stockholder in or is associated with a professional legal corporation may, however, limit his liability for malpractice of his associates in the corporation, but only to the extent permitted by law.

DR 6-102. Limiting Liability to Client
(A) A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice.


Effective January 1, 1987, the 1986 Integration Rules were superseded by the Rules Regulating the Florida Bar. See Rules Regulating the Florida Bar, 494 So. 2d 977 (Fla. 1986). The new rules omit the provisions pertaining to professional service corporations. Thus, there are no current regulations authorizing lawyers to practice in PSCs. Arguably, in light of the supreme court's statement that the PSC Act is not self-executing as to attorneys, see In re Florida Bar, 133 So. 2d 554, 555 (Fla. 1986), attorneys may no longer practice law through PSCs. It seems doubtful that the court intended to effect such a sweeping change
personal liability of the person providing professional services. Because the Florida Act imposes such liability, the statute’s liability provisions are consistent with the supreme court’s enabling rules in Florida.

Other state supreme courts have imposed liability-related safeguards in addition to those recommended by the ABA Committee and adopted by the Florida Supreme Court. For example, in Ohio, the Supreme Court Rules for the Government of the Bar provide as follows: “The participation by an individual as a shareholder of a legal professional association shall be on the condition that such individual shall, and by such participation does, guarantee the financial responsibility of the association for its breach of any duty, whether or not arising from the attorney-client relationship.”

Relying on its plenary power over the bar, the Ohio Supreme Court in South High interpreted this rule to impose personal liability on all attorney shareholders for the PSC’s ordinary business debt.

Similarly, by order of the supreme court, Indiana imposed personal liability upon attorney shareholders of PSCs:

Incorporation by two or more lawyers associated in the practice shall not modify any law applicable to the relationship between the person or persons furnishing professional services and the person receiving such service, including . . . the liability of each for all, arising out of the professional services offered by one lawyer associated with others in the same corporation, as existed in a partnership for the practice of law.

The Indiana Supreme Court held that this rule has no application to medical PSCs because it was promulgated under that court’s constitutional authority to regulate the practice of law.

sub silencio, and the omissions are probably an oversight. To clarify matters, the court should correct the omission as soon as possible.

The new rules do, however, address a lawyer’s ability to limit liability for personal malpractice. These rules have been changed considerably from the former provisions of the Code of Professional Responsibility. See infra notes 147-150 and accompanying text.

142. Birt v. St. Mary Mercy Hospital, Inc., 175 Ind. App. 32, 42, 370 N.E.2d 379, 385 (Ind. Ct. App. 1977); see also South High, 4 Ohio St. 3d at 5, 445 N.E.2d at 1109:
Since Rule III [imposing personal liability on attorneys] is a rule promulgated under the constitutional authority for the conduct of the bar, any law that is in-
The Florida Supreme Court likewise possesses the constitutional authority to regulate the practice of law, and the court in In re Florida Bar affirmed the existence of this power. Furthermore, the court unequivocally stated that the practice of law through PSCs was entirely subject to the conditions imposed thereon by the rules of the court. Therefore, the possibility remains that the court could, by rule, increase attorneys’ personal liability. In light of the Florida Supreme Court’s decision in In re Florida Bar, the Ohio and Indiana decisions suggest that such an increase would control.

Although the supreme court may have the power to adopt rules reducing the statutory grant of limited liability to attorneys, the recently adopted Florida Rules of Professional Conduct suggest that the Florida Supreme Court is unlikely to do so. Before the Rules became effective in January 1987, Florida operated under the Code of Professional Responsibility, which prohibited lawyers from attempting to limit their liability for their personal malpractice under any circumstances. The new rule, however, provides consistent therewith must fall. To the extent that [the Ohio PSC act] is construed to provide limited liability to a shareholder of a legal professional association, it is inconsistent with Section 4, Gov. R. III, and is superseded by such rule.


143. FLA. CONST. art. V, § 15. The court also has certain inherent powers, if not limited by the Constitution. See Petition of Florida State Bar Ass’n, 199 So. 57, 145 Fla. 223 (1940) (listing inherent power to regulate admission to bar).

144. In re Florida Bar, 133 So. 2d at 555.

145. Id. at 558 (revising Canon 33, Rule B, “Ethics Governing Attorneys”) (“The formation and use of a professional service corporation for the practice of law pursuant to the provisions of The Professional Service Corporation Act shall be permissible, subject always to compliance with such rules, regulations and requirements as may from time to time be promulgated by the Supreme Court of Florida”).

146. But see Paas, supra note 16, at 383-89 (criticizing courts’ disregard of clear statutory language on basis of separation of powers analysis).

147. See Rules Regulating the Florida Bar, 494 So. 2d 977 (Fla. 1986).

that "[a] lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement." Thus, under Florida Supreme Court rules, the trend is to expand lawyer's opportunities to limit their liability.

2. Imposition of Personal Liability by Judicial Fiat

In addition to the state supreme courts that have promulgated administrative rules on attorney shareholder liability, at least one court has announced a similar rule in an actual controversy involving a suit against an attorney shareholder. In *First Bank & Trust Co. v. Zagoria*, the Georgia Supreme Court considered whether an innocent shareholder in a legal PSC could be held personally liable for another shareholder's breach of duty while rendering professional services. *Zagoria* involved consolidated cases in which a lender and real estate broker sued both Stoner and Zagoria, the sole shareholders of a legal PSC, to recover on dishonored checks. While acting as the closing attorney in separate transactions, Zagoria issued the checks drawn on the PSC's escrow account. Zagoria then withdrew funds from the account so as to cause the checks to be dishonored. Stoner did not participate in the closings or take part in any of the withdrawals.

The lender and real estate agent sued the PSC and both Stoner and Zagoria individually. The trial court entered summary judgment in favor of Stoner and the court of appeals affirmed, explaining that personal liability attached only to the attorney shareholder who rendered the professional services out of which the claim arose. On appeal, the Georgia Supreme Court reversed and held that a lawyer, whether a partner in a partnership or a share-

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Cohen v. Surrey, Karasik & Morse, 427 F. Supp. 363, 379 (D.D.C. 1977) (a freely negotiated release between lawyers and clients, who were also lawyers, held not to be unethical because there had been no malpractice by lawyer); Donnelly v. Ayer, 183 Cal. App. 3d 978, 228 Cal. Rptr. 764 (Cal. Ct. App. 1986) (a release voluntarily and willingly signed by the client, who received $1,000.00 cash and other consideration, in settlement of threatened malpractice action did not violate DR 6-102).

149. Fla. Rules of Prof. Resp. 4-1.8(h).

150. The 1987 changes to the Florida Rules of Professional Conduct present an interesting and, indeed, ironic possibility with respect to innocent partners' liability for their partners' malpractice. Under the new rule, a lawyer could conceivably limit his own personal liability, yet leave his innocent partners fully exposed to the client's claim for the negligent partner's malpractice. Though unlikely, the absurdity of such a result points out the reasonableness of construing the Florida Act to provide limited liability.


holder in a PSC, is liable "not only for his own professional misdeeds but also for those of the other members of the firm."\(^{153}\)

The court acknowledged that a corporation is a legal entity separate from its shareholders, and that shareholders are generally insulated from personal liability for corporate debts. The court observed, however, that no clear legal authority had yet delineated whether and to what extent limited liability applied to PSCs organized for the practice of law. Apparently influenced by the various state supreme courts that had issued administrative rules governing legal PSCs,\(^{154}\) the Zagoria court concluded that it was not only entitled but compelled to articulate special rules for liability of attorneys:

> We do not view this case as one in which we need to interpret the statute providing for the creation and operation of professional corporations. We rather view this case as one which calls for the exercise of this court's authority to regulate the practice of law. This court has the authority and in fact the duty to regulate the practice of law . . . . The legislature has the clear right to enact technical rules for the creation and operation of professional corporations, but . . . the influence of the statute upon the professional corporation cannot extend to the regulation of the law practice so as to impose a limitation of liability for acts of malpractice or obligations incurred because of a breach of a duty to a client. The professional nature of the law practice and its obligations to the public interest require that each lawyer be civilly responsible for his professional acts. A lawyer's relationship to his client is a very special one. So also is the relationship between a lawyer and the other members of his or her firm a special one. When a client engages the services of a lawyer the client has the right to expect the fidelity of other members of the firm. It is inappropriate for the lawyer to be able to play hide-and-seek in the shadows and folds of the corporate veil and thus escape the responsibilities of professionalism.\(^{155}\)

The Zagoria holding is actually not as broad as some of the personal liability rules adopted by other state supreme courts acting in their administrative rulemaking capacity.\(^{156}\) Unlike the Ohio Su-

\(^{153}\) Zagoria, 250 Ga. at 847, 302 S.E.2d at 676.
\(^{154}\) Id. at 845, 302 S.E.2d at 675 (citing Petition of Bar Ass'n, 55 Haw. 121, 516 P.2d 1267 (1973); In re Rhode Island Bar Ass'n, 106 R.I. 752, 263 A.2d 692 (1970); In re Florida Bar, 133 So. 2d 554 (Fla. 1961)).
\(^{155}\) Zagoria, 250 Ga. at 846, 302 S.E.2d at 675.
\(^{156}\) See supra notes 139-142 and accompanying text.
preme Court, for example, the Zagoria court did not impose liability on attorney shareholders for ordinary business debts.\textsuperscript{157} Only with respect to claims arising out of rendition of professional services did the court “make no distinction between partnerships and professional corporations.”\textsuperscript{158}

The Zagoria decision is remarkable not so much for the rule announced, but because of the circumstances under which the court enunciated the rule. Before Zagoria, state supreme courts had definitely expanded the scope of attorney shareholders’ personal liability, but these courts had always done so by promulgating rules in original proceedings and by construing those rules after they were adopted.\textsuperscript{159} Therefore, in these states, the supreme court laid down the law before any actual controversy arose and before attorneys acted on the mistaken assumption that they were shielded from personal liability. Zagoria demonstrates that, without notice, a state supreme court could impose personal liability on attorney shareholders after the fact.\textsuperscript{160}

Furthermore, the significance of the Zagoria decision is in no way diminished by the fact that the Georgia Professional Service Corporation Act contains more ambiguous liability provisions than does the Florida Act.\textsuperscript{161} The Zagoria court made clear that it did not consider the issue of attorneys’ liability to be a matter of statutory construction.\textsuperscript{162} Presumably, the court would have reached the same conclusion regardless of the clarity and detail of the statutory language. For these reasons, Zagoria is the most significant display of judicial activism in this field.

Fortunately, the only Florida case to consider policy arguments similar to those embraced by the Zagoria court suggests that Florida courts are unlikely to rewrite or disregard the Florida Act’s clear provisions. Like the Sugerman decision, Corlett, Killian,

\begin{itemize}
\item \textsuperscript{157} Zagoria, 250 Ga. at 846, 302 S.E.2d at 675.
\item \textsuperscript{158} Id. at 847, 302 S.E.2d at 676.
\item \textsuperscript{159} See, e.g., South High Dev., Ltd. v. Weiner, Lippe & Cromley Co., 4 Ohio St. 3d 1, 445 N.E.2d 1106 (1983).
\item \textsuperscript{162} Zagoria, 250 Ga. at 846, 302 S.E.2d at 675 (“We do not view this case as one in which we need to interpret the statute providing for the creation and operation of professional corporations. We rather view this case as one which calls for the exercise of this court’s authority to regulate the practice of law.”). In this respect, Zagoria differs significantly from the cases cited supra in note 160.
\end{itemize}
Hardeman, McIntosh and Levi v. Merritt, involved a controversy over the Act's provision governing free transferability of interests of ownership. In Merritt, several minority shareholders of a PSC engaged in the practice of law terminated their employment with the PSC and sought redemption of their shares. Although neither the articles of incorporation nor any separate shareholder agreement required such redemption, the trial court ordered the PSC to redeem the shares, relying generally on the Florida General Corporation Act and the PSC Act.

On appeal, the Third District Court of Appeal concluded that the Florida Statutes did not require redemption of shares in the absence of an agreement or redemption provision in the corporate documents. The minority shareholders argued that the court was nonetheless empowered to order redemption because of the "extraordinary" situation presented by a PSC engaged in the practice of law. The court rejected this argument and held that the PSC was under no legal obligation to redeem the shares.

The court first observed that it was not at leisure to disregard the corporate form of a PSC, even if the shareholders were attorneys, stating that "there is no occasion for treating this law firm as a partnership." The court then expressly rejected any contention that "ethical considerations unique to lawyers" should persuade the court to "engraft judicially a redemption requirement upon [the Act]." In rejecting these policy arguments, the court made two crucial points.

First, the court stated that judicial intervention is an inappropriate substitute for the individual shareholder's foresight and business acumen. The court recognized that, absent a redemption requirement, a professional who resigns from the PSC could be left with unmarketable shares. This unfortunate possibility, however, did not compel judicial intervention; rather, it presented a compelling reason for the parties to enter into an advance agreement.

163. 478 So. 2d 828 (Fla. 3d DCA 1985).
164. FLA. STAT. § 621.11 (1985).
165. Merritt, 478 So. 2d at 831.
166. Id. at 832.
167. Id. at 833.
168. Id. at 834.
169. Id. ("Where an employee who purchases such shares for valuable consideration either lacks the foresight or the bargaining power to insist upon a redemption agreement in the event of his resignation, it is not incumbent upon the courts to protect him from his own improvidence or lack of strength.").
Second, the court clearly distinguished between professional conduct of attorneys which calls for disciplinary action and conduct that compels a court to decide an actual controversy on grounds of public policy. The court reaffirmed that "while a law firm practicing as a professional service corporation is governed by corporate law, its lawyers are nonetheless governed by the ethical standards contained in the Code of Professional Responsibility." 170

However, the court made clear that simply because an attorney's conduct may "justify action by the Florida Bar" did not mean that the court should rewrite the statutory provisions governing PSCs. 171

Both of these points made in Merritt would be entirely persuasive in refuting any attempt to invoke similar policy considerations in a case involving limited liability. Just as redemption can be provided for by advance agreement, so can any third party, including a client, dealing with a PSC comprised of attorneys, insist upon the shareholders' personal guarantee of the PSC's debts before engaging the firm's services. 172 Likewise, the fact that an attorney may engage in unethical conduct does not justify abrogation of Florida's clear limited liability provisions, especially where those provisions protect only innocent shareholders, not "the unethical or unfaithful" ones. Thus, the principles enunciated in Merritt are readily applicable to the concept of limited liability. Indeed, because the Act is even more clear with respect to limited liability than it is regarding redemption, 173 these principles may apply with even greater force in a case involving limited liability. Thus, when confronted with policy arguments based upon the uniqueness of the legal profession, Florida courts should reject Zagoria and, instead, adhere to the judicial restraint demonstrated in Merritt.

170. Id. at 833.
171. Id. at 834.
172. See generally In re Florida Bar, 133 So. 2d 554, 556 (Fla. 1961); We're Assocs. v. Cohen, Stracher & Bloom, P.C., 65 N.Y.2d 148, 153, 480 N.E.2d 357, 360, 490 N.Y.S.2d 743, 746 (1985); Paas, supra note 16, at 378 ("Creditors are aware that the best way to hold shareholders liable for the business debts of a corporation is to require that the shareholders act as guarantors. Matters do not change when the debtor is a professional corporation.").
173. The relative clarity of the Act's limited liability provisions is perhaps best demonstrated by the Merritt decision itself, which devoted three pages of discussion to redemption, 478 So. 2d 828, 829-31 (Fla. 3d DCA 1985), but succinctly stated the parameters of shareholders' liability in one footnote. Id. at 835 n.14.
IV. PUBLIC POLICY CONSIDERATIONS

Even if a Florida court were persuaded by Zagoria, important countervailing policy considerations exist which at least neutralize, if not outweigh, the policy arguments embraced by the Zagoria court. Before any conclusions can be reached about limited liability for attorney shareholders of PSCs, the practicality of lawyers' traditional "partnership" liability must be assessed in the context of the modern legal profession. Judgments against partnerships and innocent partners for the acts of individual partners may have been appropriate in the past, when partnerships were generally small, their composition relatively enduring, and their clients unlikely to allege malpractice. Modern changes in lawyers, law firms and the attitudes of clients, however, raise serious doubts as to the propriety and fairness of insisting on unlimited liability of lawyers for acts in which they took no part.

First, the increasing size of law firms makes it increasingly unrealistic to expect lawyers to be personally accountable even for the fraudulent acts of their partners. As discussed earlier, the size of many of today's law firms makes it impossible for each partner to be directly involved in all of the firm's managerial decisions, let alone the wrongful acts of an individual partner. Indeed, partners quite frequently do not even practice in the same city, or even the same state as some of their partners.\(^{174}\)

Not only is the size of law firms increasing, but lawyers' mobility is also on the rise. Mergers,\(^ {175}\) acquisitions of branch offices,\(^ {176}\) firm "reorganizations"\(^ {177}\) and "lateral entry"\(^ {178}\) of partners are common phenomena in today's legal world. While a firm should not be excused for negligent hiring, liability without fault seems incompati-

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175. 60 Percent of Midsize Firms Weigh Mergers, Manhattan Law, May 11, 1987, at 1, col. 4 ("survey of all firms in Manhattan of 35-75 lawyers has revealed that 60 percent—31 of 51—have had serious merger talks . . . in the last six months").

176. See Steel Hector to absorb Botos & Oliver, MIAMI REVIEW, March 23, 1987, at 3 (Miami-based law firm of Steel, Hector & Davis establishes its third office in Palm Beach County by acquiring the Boca Raton law firm of Botos & Oliver).

177. See Emmrick & Pollock, Retrenching at Rosenman, AMERICAN LAWYER, March 1987, at 79.

ble with the rapid and sometimes dramatic personnel changes in today’s law firms.

Finally, the range of activities in which lawyers engage is continually broadening. The presence of practicing attorneys in the business world is significant, and their role in complex deals and transactions is difficult to define.\textsuperscript{179} This complexity makes it more difficult for partners to know about, let alone control or direct, all of the activities of their partners, and demonstrates the need for limited liability in today’s law firms.

For example, some of the partners in one of the nation’s largest law firms, Blank, Rome, Comiskey & McCauley,\textsuperscript{180} allegedly were instrumental in the formation, management, and growth of Sunrise Savings & Loan Association of Florida. Sunrise, once one of the firm’s largest clients, became insolvent, and the Federal Savings and Loan Insurance Corporation (FSLIC) brought civil suit in Florida against all of Blank, Rome’s partners, individually and as general partners.\textsuperscript{181}

The FSLIC alleges that two Blank, Rome partners, Foxman and Gitomer, were Chairmen of the Board of Sunrise and officers of Sunrise’s wholly-owned mortgage corporations.\textsuperscript{182} Allegedly, Foxman, Gitomer, and other Blank, Rome attorneys aided and abetted Sunrise officers and directors by violating Federal Home Loan Bank Board (FHLBB) regulations and breaching their fiduciary duties to Sunrise shareholders; knowingly closing loans on terms not authorized by the Sunrise Board Loan Committee, or without proper documentation; and breaching their duties to their client by representing both the borrower and Sunrise in the same transactions and through numerous other conflicts of interest.\textsuperscript{183} The FSLIC seeks over $250 million in damages, disgorgement of all legal fees paid to Blank, Rome by Sunrise, and an award of costs and attorneys’ fees.


\textsuperscript{181} FSLIC v. Jacoby (Blank, Rome, Comisky & McCauley), No. 86-1894 (S.D. Fla. 1986).

\textsuperscript{182} \textit{Id.} Complaint ¶ 277.

\textsuperscript{183} \textit{Id.} ¶ 60. For example, Foxmon allegedly was also a member of the Board of Directors of Crusader Savings & Loan Association of Pennsylvania and presented various transactions to Sunrise on behalf of Crusader for Crusader’s benefit. \textit{Id.} ¶ 61.
The Blank, Rome case underscores the potentially dramatic consequences of unlimited liability in today’s legal profession. Not only are Blank, Rome partners from the firm’s Philadelphia, Miami, and West Palm Beach offices personally liable for acts, in which many, if not most, played no part, but so too are partners from the firm’s New York and Washington offices, even though these offices are not even mentioned in the substantive allegations of the FSLIC’s complaint. Lawsuits of such breadth and magnitude could devastate law firms of any size or stature, creating a crisis for the firm’s lawyers and clients alike. Incidentally, both the West Palm Beach and Miami offices of Blank, Rome have closed since Sunrise became insolvent.

Furthermore, a large judgment, like the one sought in the Blank, Rome case, is an entirely realistic possibility. In fact, at least one plaintiff has won a lawsuit of this type and magnitude in Florida. Recently, in Tew v. Alexander Grant & Co.,\textsuperscript{184} the trustee in bankruptcy for E.S.M. Government Securities, Inc., sued a national accounting firm and each of its partners in the United States District Court for the Southern District of Florida. The plaintiff alleged negligence and breach of contract for failure of the accounting firm’s audits to disclose a coverup of losses by E.S.M., which resulted in staggering losses to investors. The coverup was orchestrated by Jose Gomez, the managing partner of the accounting firm’s Fort Lauderdale office, and by certain E.S.M. officers and directors. The trustee alleged vicarious liability on the part of the partnership and other individual partners, based on the acts of Gomez.

At the trial, Judge Gonzalez instructed the jury on partnership liability as follows:

A partnership is an association of two or more persons to carry on a business for profit. A partnership is responsible for all damages suffered by others as a result of the negligence or wrongful acts, including fraud, of any of its partners. In addition, each partner is responsible for all damages suffered by others as a result of the negligence or wrongful acts of any of his or her partners regardless of whether he or she was involved with or participated in the activities that caused the damage.\textsuperscript{185}

\textsuperscript{184} 85-6219-Civ-Gonzalez (S.D. Fla. 1985).

The jury returned a judgment against the partnership in the amount of $70.9 million.\(^{186}\)

The fact that *Alexander Grant* involved an accounting firm rather than a law firm does not diminish the decision's impact on the legal profession. The case points out the dangers of the partnership form given the dynamics of modern law firms. The case also demonstrates the need to make limited liability available to attorneys, for without limited liability, the risks of large firm practice are extraordinary.\(^{187}\)

Not only is the magnitude of suits against attorneys increasing, but the number of suits against attorneys is also on the rise, particularly malpractice suits. This increase has affected lawyers in firms of all sizes and has created a malpractice “insurance crisis” in the legal community. Emphasizing that “[t]he insurance crisis is real,” the President and President-Elect of the Florida Bar described the problem in a recent letter to all Florida Bar members as follows: “Florida lawyers are facing increasingly higher premiums for professional liability insurance. Policies that are being written have lower policy limits and higher deductible amounts. Some lawyers have been unable to buy coverage at any price.”\(^{188}\)

Left unchecked, this crisis can have a deleterious effect on the quality and availability of legal services. Lawyers who are unable to obtain malpractice insurance and wish to continue to practice law are left few practical alternatives other than to be very selective about the cases they handle and the clients they serve. This forced selectivity runs counter to “the objective of the Bar to make legal services fully available.”\(^{189}\) Even worse than the effect on pay-

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186. See 18 SEC. REG. & L. REP. 1690 (Nov. 21, 1986). Under a pretrial agreement approved by the court, Alexander Grant will have to pay only about half of this amount, or $36 million. *Id.*


188. Letter from Joseph J. Reiter, President, and Ray Ferrero, Jr., President-Elect, The Florida Bar, to all Florida Bar Members, October 31, 1986.

189. EC 2-26, Article X, 1986 Integration Rule of Florida (repealed). Although the new Rules Regulating the Florida Bar do not retain this precise Ethical Consideration, it should not be assumed that the Florida Bar has rejected the worthy policy reflected in former EC 2-26. See Bammac, Inc. v. Grady, 500 So. 2d 274, 280 (Fla. 1st DCA 1986) (referring to another Code provision, the court stated: “That the exact language of these soon-to-be-discarded ‘ethical considerations’ cannot be found in the comparatively arid passages of the
ing clients, however, is the inevitable decrease in the number of lawyers and businesses willing to provide legal services to indigent clients. Indeed, expensive malpractice insurance is already a major obstacle to pro bono work by corporations.\textsuperscript{190}

Although partnership liability is not the reason for the insurance crisis, the overall problem is urgent enough to require action on all available fronts. Permitting lawyers, like all other professionals who practice in PSCs, to eliminate their liability for acts of malpractice in which they played no part, could reduce their exposure to malpractice claims. This reduction is one small measure that can be taken toward alleviating the insurance crisis. Because the plain language of the Florida Act confers limited liability on all professionals practicing in PSCs, Florida courts should seize the opportunity to help remedy this crisis.

V. CONCLUSION

The Florida Act’s limited liability provisions are unambiguous and their plain meaning should control. Accordingly, while shareholders are liable for their own professional misdeeds or those committed by someone under their supervision,\textsuperscript{191} no personal liability attaches to innocent shareholders. Furthermore, because PSC shareholders’ liability is no greater than that of a shareholder in an ordinary business corporation, no personal liability for ordinary business debts of the PSC exists.

Although courts outside Florida have, for reasons of public policy, developed special rules imposing personal liability on attorneys, such judicial activism is not justifiable in Florida. First, because Florida’s limited liability provisions are so clear, a great deal more “activism” on the part of Florida courts is required to reach the same results as, for example, the courts in Ohio and Georgia have reached. However, fundamentally, the reasoning of those courts engaging in such activism is, for the most part, faulty. These courts have ignored important policy considerations favoring limited liability for attorneys and have simply failed to articulate a

\textsuperscript{190} Businesses Lack Resources for Pro Bono Work, Legal Times, at 2, col. 2 (June 28, 1982) (citing expensive malpractice insurance as one obstacle to pro bono work by corporations).

\textsuperscript{191} Interestingly, the recently adopted Rules Regulating the Florida Bar also place responsibility on supervising attorneys for ethical violations. Fla. Bar Rules of Prof. Resp. 4-5.1.
compelling justification for treating lawyers differently than other professionals. Absent such a compelling justification, Florida courts should adhere to the clear legislatively prescribed limitations on personal liability.