IN THE SUPREME COURT OF FLORIDA

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| STATE OF FLORIDA, by and through GERALD LEWIS as Comptroller and Head of the Department of Banking and Finance,<br><br>Petitioner,<br><br>v.<br><br>BYRON D. BEELER, BEELER DEVELOPMENT COMPANY, PARKVIEW NURSING HOME, INC., and INVESTORS MORTGAGE AND LOAN COMPANY,<br><br>Respondents. | ) | Case No. 71,516 |

DISCRETIONARY REVIEW OF DECISION OF
THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

BRIEF OF PETITIONER ON JURISDICTION

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## STATEMENT OF THE CASE AND FACTS

On February 5, 1987, the Circuit Court in and for Okaloosa County issued a temporary injunction without notice which enjoined the Respondents from continuing to engage in securities and mortgage fraud and other statutory violations, based upon a verified Complaint filed by the Petitioner/Appellee and supported by the affidavits of victims and investigators. After the injunction and an ancillary receivership had been in effect for over 60 days, Respondents filed motions to dissolve the injunction, challenging only the fact that the trial court had dispensed with notice prior to issuance of the injunctive order. Following reasonable notice, on May 12, 1987, the circuit court heard argument on the motions and, since no evidence was either offered or taken at the hearing, reviewed the underlying pleadings filed by the State for legal sufficiency. An attorney's certificate which merely re-recited, as stated in the Complaint, why no efforts had been made to give the Respondents notice was filed prior to the hearing. At the conclusion of the hearing, the trial judge denied the motions to dissolve.

The Respondents took an interlocutory appeal from the order denying the motions to dissolve. By unpublished order issued on July 30, the First District Court of Appeal immediately dissolved the injunction without affording Petitioner any opportunity to obtain review of,

or stay, the order. The First District also ordered that the receivership be immediately and summarily extinguished, and caused all monies and records to be given to the Respondents/Defendants.

By opinion issued seven (7) weeks later, the First District ruled that: 1) an appeal may be taken from the denial of a motion to dissolve which challenges only the propriety of dispensing with notice prior to issuance of an injunction, even though due notice and full hearing was obtained in the trial court as provided by the Florida Rules of Civil Procedure; 2) a temporary injunction may issue without prior notice only if the verified Complaint therefor, and accompanying affidavits, contain specific facts showing that immediate and irreparable injury, loss or damage will with certainty result before the defendants can be heard in opposition; and 3) a temporary injunction may be dissolved based upon the mere omission to file contemporaneously with the Complaint an attorney's certificate re-reciting sworn averments contained in the Complaint.

## SUMMARY OF THE ARGUMENT

The decision of the First District directly and expressly conflicts with decisions of other district courts of appeal and the Supreme Court on the three following questions of law: The appealability of an order denying a motion to dissolve, duly noticed and heard, which challenged solely the propriety of dispensing with notice prior to issuance of an injunction; the standard of proof required to support the issuance of an ex parte injunction, particularly in cases arising under the securities and mortgage brokerage laws; the propriety of dissolving an injunction upon the sole failure to file, contemporaneously with a compliant, an attorney's certificate concerning notice.

## ARGUMENT

I. The First District expressly held that "where the challenge on the motion [to dissolve] was to the lack of notice alone, an appeal may be taken from the order denying the motion to dissolve the injunction." A., p. 10. The decision of the First District expressly and directly conflicts with the decision of the Third District in Belk's Department Store, Miami, Inc. v. Scherman, 117 So.2d 845 (Fla. 3d DCA 1960) wherein it was held that:

> The contention that there was no sufficient showing to dispense with notice... and that the entry of the order for injunction and appointing a receiver without notice and prior hearing was error, is a contention that is not available on this appeal, which is from

> the order denying the motion to dissolve. This is so because the benefit of notice and an opportunity to be heard was secured on the hearing of the matter before the court on the motion to dissolve.
> Id. at 847.

The decision of the First District also expressly and directly conflicts with the decision of the Second District that:

> Although it was error for the chancellor to originally issue the injunction without notice, this error was rendered harmless when a hearing was held on the motion to dissolve. The defendants/appellants had notice and were given an opportunity to be heard on the motion to dissolve; therefore, the defect of lack of notice was cured. DeCarlucci v. Granulite, Inc., 171 So.2d 587, 588 (Fla. 2d DCA 1965).

Following the decisions in Belk's and DeCarlucci, the Third District again expressly held:

> The question of absence of basis to dispense with notice on the application for the temporary injunction cannot be reached on an appeal which is not from the injunctive order but is from an order denying a motion to dissolve it.... Babuschkin v. Royal Standard Corporation, 305 So.2d 253, 254 (Fla. 3d DCA 1975).

The posture of the case sub judice is simply indistinguishable from that in Belk's, DeCarlucci, and Babuschkin. In those cases, the plaintiffs also sought temporary injunctions without notice. Based upon the verified complaint filed in those actions, the trial courts ex parte issued injunctive orders. Subsequently, the affected Defendants moved to dissolve those orders on the basis that the pleadings did not show a sufficient

basis for dispensing with prior notice to the Defendants. The motions were noticed and heard and, as in this case, the Defendants chose not to introduce any evidence.

The First District in the instant case acknowledges that the Respondents' challenge on the notice issue necessarily involved only a review of the sufficiency of the sworn facts in the Complaint and affidavits. Although this is exactly the same scope of review which was before the trial and appellate courts in Belk's, DeCarlucci, and Babuschkin, those decisions precluded any appeal of the notice issue. Accordingly, express and direct conflict, which needs to be resolved by this Court, exists among the districts.

II. The decision of the First District that a temporary injunction may issue without prior notice to the defendants only if it is certain that irreparable harm will occur during the time required to give notice directly and expressly conflicts with the decision of the Florida Supreme Court in Dixie Music Company v. Pike, 135 Fla. 671, 185 So. 441 (Fla. 1938). The First District acknowledges that the crux of Petitioner's verified Complaint is "that if notice had been given appellants prior to the granting of the injunction, appellants would have destroyed or absconded with funds or records, making it impossible to grant relief." A., p. 11. Further, the First District decision expressly references an affidavit

of a financial specialist for the Petitioner which "states that 'it appears' that investor funds have been misappropriated" by the Respondents. A., p.12 The lower court ruled nevertheless that notice should have been given because the Complaint and supporting affidavits did not show that giving notice would definitely, and with certainty, cause the loss of property and records or result in additional fraudulent securities and mortgage transactions. The court, in reaching this decision, focused on the form of the allegations, specifically use of the terms "would likely result," "may," and "appears" in the Complaint. Id. at 11, 12.

This ruling of the First District directly and expressly conflicts with the holding in Dixie Music Co. that:

> [I]f all of the allegations relating to the necessity of proceeding without notice, when taken together, manifestly make it appear to the judge that the apprehended acts will be committed, precipitating the injury sought to be avoided, the form of the allegation will not be fatal to the cause, since this is a proceeding in equity, where substantitive rights can be dealt with more readily than at law.
> Id. at 447.

Similarly, the Supreme Court held in Godwin v. Phifer, 51 Fla. 441, 41 So. 597 (Fla. 1906) that ex parte issuance of an injunction is justified based upon facts "from which the court can determine for itself whether giving the notice will, or is likely, [to accelerate or precipitate

the injury complained of]." Id. at 600 (emphasis added).

Accordingly, the ruling of the First District that ex parte issuance of injunctive orders is justified only if it is unequivocally shown, and technically pleaded, "that irreparable damage will be sustained if notice is given," A., p. 11, expressly and directly conflicts with the decisions of the Florida Supreme Court that injunctions are subject to dissolution on appeal only if based upon a complaint wanting in equity. See, Dixie Music Co. at 447. Contrary to the decision of the First District an injunctive action is essentially an equitable matter, not a technical legal action to be subjected to precise parsing.

The strict and unyielding evidentiary standard established by the decision of the First District also conflicts with the decision of this Court in McElfresh vs. State, 9 So.2d 277 (Fla. 1942), which holds that the securities statute must be given a broad and liberal interpretation to effectuate the purpose of protecting the public against fraud. Indeed, the determination of the lower court that a trial judge, even though presented with evidence of an ongoing, systematic scheme to defraud the public in securities and mortgage transactions, cannot immediately enjoin these activities unless presented with absolutely unequivocal proof that the defendants will commit additional illegal acts during the notice period not only directly conflicts with broad and liberal

interpretation afforded these laws under the McElfresh decision but also totally ignores the public interest served by the securities and mortgage brokerage statutes.

III. The decision of the First District that an injunction may be dissolved for the failure to file, contemporaneously with the Complaint, an attorney's certificate re-reciting sworn averments contained in the Complaint concerning notice expressly and directly conflicts with the decisions of all other districts. The attorney's certificate was filed and considered at the time that the Respondents' motions to dissolve were heard and determined by the trial court. The First District ruled, however, that the certificate could not be considered, and its initial omission rendered the injunctive order deficient, even though the certificate contained the same allegations set forth in the Complaint and previously considered by trial court.

This ruling directly and expressly conflicts with the decision of the Second District in DeCarlucci, supra, the decision of the Third District in City Gas Company of Florida v. Ro-Mont South Green Condominium "R", Inc., 350 So.2d 790 (Fla. 3rd DCA 1977) and the decision of the Fourth District in Zuckerman v. Professional Writers of Florida, Inc., 398 So.2d 870 (Fla. 4th DCA 1981) which held that:

> [R]eview of an order denying a motion to dissolve an injunction is based...on the

> record as it was at the time the motion to dissolve came on for hearing. Id. at 872.

The First District's ruling also directly and expressly conflicts with the decision of the Fifth District in Torok v. Blue Skies Mobile Home Owners Association, Inc., 467 So.2d 474 (Fla. 5th DCA 1985). The Torok decision held that an injunction is subject to dissolution only if the plaintiff has substantially failed to comply with Fla. R. Civ. P. 1.610, or the like. In the Torok case, an injunction was issued ex parte, even though no affidavits supported the complaint, the pleadings were not verified, no attorney's certificate was ever filed, and the court order failed to show the date and time of entry, failed to define the injury, and failed to give reasons why it was entered without notice. The injunction in Torok was quashed "[b]ecause of [this] substantial failure to comply with Florida Rules of Civil Procedure 1.610." Id. at 474, 475.

In the instant cause, the Complaint was verified, numerous supporting affidavits buttressed those sworn allegations, an attorney's certificate was filed and the court's order was fully and properly executed. The First District found the injunctive order deficient, however, merely on the basis that the attorney's certificate was not attached to the Complaint at the time of filing. Again, clear express and direct conflict exists between districts, which this Court needs to resolve.

## CONCLUSION

Based on the above-stated facts, arguments and authorities, demonstrating express and direct conflict with decisions of the Florida Supreme Court and various of the District Courts of Appeal, Petitioner respectfully requests that the Court exercise its discretionary jurisdiction to review the instant decision of the First District Court of Appeal.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. Mail this 17th day of December, 1987 to Matthew W. Burns, Esq., P.O. Box 1226, Destin, Florida 32541, James W. Middleton, Esq., 216 Hospital Drive, Ft. Walton Beach, Florida 32548, and John G. Pierce, Esq., 800 N. Ferncreek Ave., Orlando, Florida 32803.

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