IN THE SUPREME COURT OF FLORIDA

CASE NUMBER 74,566

STANFORD P. BIRNHOLZ, individually and as trustee of the STANFORD P. BIRNHOLZ, P.A. PENSION PLAN,

Appellant,

vs.

THE 44 WALL STREET FUND, INC.,

Appellee.

CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE, STATE OF FLORIDA, EX REL. GERALD LEWIS, COMPTROLLER OF FLORIDA.

FLORIDA DEPARTMENT OF BANKING AND FINANCE

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STATEMENT OF THE CASE

The following question was certified to this Court by the Eleventh Circuit United States Court of Appeals in Birnholz v. The 44 Wall Street Fund, Inc., 880 F.2d 335 (11th Cir. 1989):

> WHETHER AN ISSUER THAT PROPERLY OBTAINED AN EXEMPTION FROM STATE REGISTRATION PURSUANT TO § 517.061(19), FLA. STAT. (1978 SUPP.), BUT FAILED, AFTER 36-CONSECUTIVE-MONTHS OF SELLING ITS SHARES IN FLORIDA, TO FORWARD THE $750.00 FEE PROVIDED FOR IN THE AMENDED STATUTE § 517.061(19)(b), FLA. STAT. (1979), SUBSTANTIALLY COMPLIED WITH THE EXEMPTION REQUIREMENTS THEREBY AVOIDING LIABILITY TO INVESTORS UNDER § 517.211 FOR THE SALE OF UNREGISTERED SECURITIES IN VIOLATION OF § 517.07.

SUMMARY OF ARGUMENT

Speaking with authority derived from his role as the principal regulator of Florida's securities industry, the Florida Comptroller urges this court to adopt the position that an issuer of securities under the former § 517.061(19)(b), Fla. Stat. (1979), must comply with Rule 3E-500.09, F.A.C., in order to be exempt from mandatory registration of such securities. Appellee's failure to comply with that rule caused the exempt status of its securities to expire on October 8, 1980. Any sales after that date constitute transactions in violation of § 517.07, Fla. Stat., and thereby making the Appellee liable to investors under § 517.211, Fla. Stat. To hold otherwise would offend legislative policy to liberally construe Florida's securities laws in order to provide maximum protection to investors and enforce strict standards of conduct for securities issuers.

ARGUMENT AND CITATIONS OF AUTHORITY

THE QUESTION CERTIFIED TO THIS COURT SHOULD BE ANSWERED IN THE NEGATIVE IN ORDER NOT TO FRUSTRATE THE STATE'S POLICY OF STRICT ENFORCEMENT OF ITS LAWS PROTECTING SECURITIES INVESTORS.

By the terms of Section 20.12(1), Florida Statutes, the Comptroller of Florida is head of the Florida Department of Banking and Finance ("the Department") and in this capacity is directed by the Legislature to administer and enforce the Florida Securities and Investor Protection Act, Chapter 517, Florida Statutes. The Comptroller is, therefore, the ranking state officer required to implement state policy on the regulation of securities transactions. This brief is submitted on behalf of the State of Florida to assist the Court to discern these policies.

When the 11th Circuit United States Court of Appeals certified this case to the Supreme Court of Florida, it invited this Court to review the entire case and not just the question certified. The 11th Circuit Court of Appeals broke the case at hand down to three salient issues and decided two of them as follows:

1) The amended statute was retroactive, thereby requiring the fund to take steps to maintain its exemption status for its securities issue, and

2) The amended statue only required the payment of $750 for each additional 36-month period, but did not require the filing of any further documentation.

The third issue is the question which they have certified to this Court, namely, whether failure to pay the statutory fee for renewal of previously exempt securities would spoil that exemption. Realizing that this Court may not agree with one or both of their findings on the first two issues, the 11 Circuit specifically stated that the "particular phrasing of the question" should not "limit the Supreme Court of Florida in its consideration of the issues posed by the entire case." Birnholz v. The 44 Wall Street Fund, 880 F.2d 335, 342 (11th Cir. 1989).

This Court should respond to the Federal Court's invitation by rejecting, as wholly inconsistent with Florida law, the determination that anything less than full compliance with the applicable rules of the Department qualifies the Appellee to sell securities in Florida without registration. The purpose of Chapter 517 is the protection of investors in securities offerings and other investment transactions. See Nichols v. Yandre, 9 So.2d 157 (Fla. 1942); McElfresh v. State, 9 So.2d 277 (Fla. 1942); State by Knott v. Minge, 160 So.670 (Fla. 1935); Rudd v. State, 386 So.2d 1216 (Fla. 5th DCA 1980); O'Neill v. State, 366 So.2d 699 (Fla. 4th DCA 1976); Edwards v. Trulis, 212 So.2d 893 (Fla. 1st DCA 1968) and Leithauser v. Harrison, 168 So.2d 95 (Fla. 2nd DCA 1964). The applicable provision of the statute at the heart of this case is § 517.061 (19)(b) (1979):

(b) The person filing a notice of intention shall at the time of filing pay the department a nonreturnable fee of 0.1 percent of the aggregate sales price of the securities offered or to be offered in this state, but not less than $20 or more than $750. The fee required by this paragraph shall be paid to the department for each 36-consecutive-month period in which the securities are offered and sold. The 36-consecutive-month period shall commence upon receipt by the department of the notice of intention to sell. (e.s.)

Neither party disputes the requirement of the fee payment for every 36-consecutive-month period. The Department has interpreted the emphasized sentence of subsection (b) to mean that, along with the renewal fee, an issuer must also submit a complete "notice of intention to sell." Rule 33-500.09, F.A.C., as applicable at the relevant time, provides:

(1) Notices of Intention to Sell pursuant to Section 517.061(19), F.S., shall be filed on the forms prescribed by the Department and shall include:

(a) one (1) copy of the cover page of the initial registration statement as filed with the United States Securities and Exchange Commission, unless effective with the S.E.C. upon filing with this Department;

(b) An irrevocable written consent to service as required by Section 517.101, F.S.;

(c) payment of the statutory fee as required by Section 517.061(19)(b), F.S.

(2) Exhibits which are required by the Notice of Intention to Sell form may not be incorporated by reference to previous filings.

(3) In addition to the requirements of subsection (1) of this rule, prior to the confirmation by the Department of a claim of exemption by the notifier pursuant to Section 517.061(19), F.S., the notifier shall provide the Department one (1) copy of the final definitive prospectus as per the effective

registration with the United States Securities and Exchange Commission.

(4) Should the applicant wish confirmation that the application has been received, the acknowledgement section of the Notification application should be completed and a self-addressed stamped envelope should accompany the application.

(5) All securities permits current in effect which do not bear a termination date will be required to re-file in accordance with Section 517.061(19) in order to continue its registration after September 1, 1979.

(6) Requests for amendments to Notifications may be made by filing a copy of the first page of the Notification form reflecting the additional amount of securities to be sold in this state and an additional filing fee if required by Section 517.061(19)(d). The Division shall not amend certificates for sales made in violation of Chapter 517, F.S.

(7) Where securities are sold in excess of the amount registered the Issuer may elect to rescind the sales of unregistered securities on the forms prescribed by the Department. If no rescission offer is made by the issuer, the Department may issue a cease and desist order pursuant to Section 517.211, F.S.

(8) The Forms prescribed for use in connection with Notices of Intention to Sell are as follows:

(a)	DOS-S-3-79	Notice of Intention to Sell
(b)	DOS-S-5-79	Consent to Service of Process
(c)	DOS-S-6-78	Corporate Resolution
(d)	DOS-S-9-79	Notification of Exemption Certificate (DOS use only)

Specific Authority 517.03, F.S. Law Implemented 517.061(19), 517.211, 120.53(1)(b), F.S., History - New.

Under section (1) of this rule, the statutory fee is <u>one component</u> of a Notice of Intent to Sell. The 11th Circuit agreed with The Fund's reading of the statute, reasoning that

the "plain meaning" of the statute made reference to the applicable administrative rule unnecessary, and so determined that only payment of the fee was necessary for renewal. Birnholz 880 F.2d. 335, 340 (11th Cir. 1989). The Department's construction of the statute which it administers, however, is entitled to great weight. See P.W. Ventures, Inc. v. Nichols, 533 So.2d 281 (Fla. 1988); Public Employees Relations Commission v. Dade County Police Benevolent Association, 467 So.2d 987 (Fla. 1985); Depart. of Insurance v. Southeast Volusia Hospital District, 438 So.2d 815 (Fla. 1983); State ex rel. Biscayne Kennel Club v. Board of Business Regulation, 276 So.2d 823 (Fla. 1973); Reedy Creek Improvement District v. Department of Environmental Regulation, 486 So.2d 642 (Fla. 1st DCA 1986); Depart. of Professional Regulation v. Durrani, 455 So.2d 515 (Fla. 1st DCA 1984). As this Court has previously decided "agency rules and regulations, duly promulgated under the authority of law, have the effect of law." State v. Jenkins, 469 So.2d 733, 734 (Fla. 1985). In this instance, the Department had adopted Rule 3E-500.09 pursuant to the specific rulemaking grant of authority in § 517.03, (1979) and therefore should be considered the authoritative construction of the statutory exemption from registration.

Since the statute was obviously open to differing interpretations, it becomes necessary to choose one version over another. In making that decision there are two more points

which should dictate a preference for the Department's position. The first is that while there may be different possible determinations of the meaning of a statute, the Department's interpretation "need not be the sole. . . or even the most desirable one: it need only be within the range of possible interpretation." Durrani at 517. Second, In order to maintain a workable administrative licensing procedure, it is necessary that the Department's position be given priority in the hierarchy of preferred interpretations.

Appellee's argument that it has "substantially complied" with the requirements of the statute is contradictory within itself. Positing that the statute only required the fee to be paid for renewal, Appellee then argues that, even though it had not paid the fee, it had nevertheless "substantially complied" with the statute. How can one substantially comply with a statutory exemption procedure when that party has undisputedly not performed the exclusive act they claim is required? A statute should be strictly constructed "against a party claiming a statutory exemption." Pal-Ma1 Water Magmt. Dist. v. Board of County Commissioners of Martin County, 384 So.2d 232, 233 (Fla. 4th DCA 1980). To allow violators of § 517.07 to escape liability under § 517.211 based on alleged "substantial compliance" would undermine rights of investors, legislative intent, public policy and invite, by analogy, technical defenses to future Department actions to enforce Florida's securities laws.

This court has specifically rejected a similar "good faith" defense in a criminal prosecution for the sale of unregistered securities. The legislative intent and judicial interpretation on this question could not be more clear. In 1935, The Florida Legislature specifically repealed a statutory "good faith" defense for securities violations. State V. Houghtaling, 181 So.2d 636 (Fla. 1965). Securities regulation in Florida must be precise in order to protect its citizens against the unscrupulous issuers and dealers who would prey on investors if partial compliance was a sufficient defense.

Appellees have argued that since they "substantially complied" and because there is no evidence to show that Appellants' losses were caused by the Appellee's failure to maintain, its exemption, it would be unfair to penalize its illegal sales of unregistered securities. This is analogous to the issue was settled by this Court's in E.F. Hutton & Co., Inc. v. Rousseff, 537 So.2d 978 (Fla. 1989). There, this Court held "that proof of causation is not required in a civil securities proceeding under sections 517.211 and 517.301, Florida Statutes." Id. at 981. Along with other previous decisions, this Court has consistently and clearly ruled that the enforcement of Florida's securities laws requires strict compliance to protect investors and maintain the integrity of the capital market.

CONCLUSION

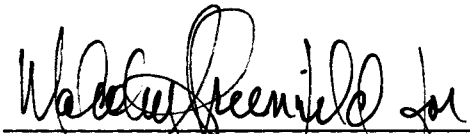
The State of Florida, through its senior official charged to regulate securities transactions in the state, commends to

this Honorable Court the argument advanced by the Appellant Birnholz as reflecting the correct application of Florida law to the question certified to this Court by the federal judiciary. It is the State's conclusion, therefore, that Florida law requires an issuer of securities to completely and thoroughly comply with the requirements of Chapter 517 to maintain an exempt status for its issues and that a properly promulgated departmental rule shall control in the determination of that statute's constructive meaning. The Court is strongly urged to answer the certified question in the negative.

Respectfully submitted,

FLORIDA DEPARTMENT OF BANKING
AND FINANCE

WILLIAM G. REEVES
General Counsel



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY copies of this Brief were provided by U.S. Mail *to* Barry D. Hunter, Paul, Landy, Beiley & Harper, P.A., 200 S.E. 1st Street, Penthouse, Miami, Florida 33131 and Herbert A. Warren, P.A., 1401 Brickell Avenue, Suite 801, Miami, Florida 33131, this 15th day of September 1989.

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