DA 3-6-98 017

IN THE SUPREME COURT OF FLORIDA

CASE NO.: 91,712

FIFTH DISTRICT COURT OF APPEAL
CASE NOS.: 96-02661 and 96-02979
NINTH JUDICIAL CIRCUIT CASE NO. CI 95-6890

DEPARTMENT OF LEGAL AFFAIRS,

Petitioner,

vs.

BRADENTON GROUP, INC., et al.,

Respondents.

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BRADENTON GROUP, INC., et al.,

Petitioners,

vs.

DEPARTMENT OF LEGAL AFFAIRS,

Respondent.

_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

Respectfully submitted,

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STATEMENT OF THE CASE

1. **Nature of the case.** This civil RICO case, asserting that the Respondents engaged in a pattern of racketeering activity by conducting illegal lotteries, is brought under FLA. STAT. ch. 895, which is known as the Florida RICO (Racketeer Influenced and Corrupt Organizations) Act. The State's Amended Complaint contains five counts asserting violations of FLA. STAT. § 895.03, (App. 1 at 34-39), which are based on 54 predicate acts of conducting illegal lotteries in violation of FLA. STAT. § 849.09. (App. 1 at 11-34).

The State seeks relief which includes temporary and permanent injunctions prohibiting the Defendants from conducting unauthorized bingo games and operating illegal lotteries and from disposing of, transferring, relocating, concealing, dissipating, or otherwise altering the status or nature of various assets without prior approval of the Court. (App. 1 at 40). The State also seeks the forfeiture of real and personal property which was used in the course of, intended for use in the course of, derived from or realized through conduct in violation of the Florida RICO Act.

Respondents Bradenton Group, Inc., Eight Hundred, Inc., and Pondella Hall for Hire, Inc., are Florida corporations which conducted a large-scale, commercial bingo operation comprised of 15 bingo halls in Orange, Osceola, Sarasota, Lee, Manatee, Polk,

Highlands, Hillsborough, Pinellas, Pasco, Marion and Charlotte counties. (App. 1 at 11-34).

The State has alleged that these corporate Defendants do not qualify as "worthy organizations"[a] and that the bingo games they conducted do not qualify as "authorized bingo" under FLA. STAT. § 849.0931. Therefore, the State alleges, Respondents are engaged in conducting illegal lotteries in violation of FLA. STAT. § 849.09. (App. 1 at para. 27). Conducting an illegal lottery is a RICO predicate, included by FLA. STAT. § 895.02(1)(a)(32) in the definition of racketeering activity.

The conduct at issue is *not* minor, technical violations of the bingo statute, as Respondents would have this Court believe. Rather, Respondents conducted a multi-million dollar commercial bingo operation in total disregard for the laws enacted to prevent illegal gambling in this State. Respondents' seven-day-per-week bingo halls -- in effect, "mini-casinos" -- made vast amounts of money in comparison to the relative crumbs they doled out to the charities. After prize payouts, the commercial bingo hall operators

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[a] The State is using the term "worthy organization" as shorthand for the statutory language which defines a "charitable, nonprofit, or veterans' organization" as "an organization which has qualified for exemption from federal income tax as an exempt organization under the provisions of s. 501(c) of the Internal Revenue Code of 1954 or s. 528 of the Internal Revenue Code of 1986, as amended; which is engaged in charitable, civic, community, benevolent, religious, or scholastic works or other similar activities; and which has been in existence and active for a period of 3 years or more." *See* FLA. STAT. § 849.0931(1)(c).

typically received $1,000 to $2,000 per day from the bingo receipts at each hall while the charity or charities in whose name the bingo games were conducted received $100 to $200. In a seven-day-per-week operation, this amounts to $365,000 to $730,000 per year for the commercial operator and only $36,500 to $73,000 for all of the charities involved.[b]

These profits were generated by diverting bingo proceeds from the charities by charging inflated costs for rent and bingo supplies, and by charging the charities for a variety of other items which were not "articles designed for and essential to the operation, conduct, and playing of bingo."[c] As testimony and documentary evidence presented to the trial court showed:

■ At the Highlands County hall, charities were charged $300 in rent per session. With 16 sessions a week, the rent charges produced $250,000 per year. (App. 4 at 31-32). At the Pinellas County hall, charities were charged $580 per session for rent, including insurance and a fixed charge for utilities. (App. 4 at 115-117, 138). With 14 sessions a week, these charges produced

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[b] *See* Report No. 1 of the Twelfth Statewide Grand Jury Regarding the Operation of Commercial Bingo Halls, Supreme Court Case No. 83,964 (Oct. 25, 1995).

[c] FLA. STAT. § 849.0931(2)(a) requires that the "entire proceeds derived from the conduct of [bingo] games, less actual business expenses for articles designed for and essential to the operation, conduct, and playing of bingo," must be donated to charitable, civic, community, benevolent, religious, or scholastic works or other similar activities.

$422,249 per year. At the Polk County hall, charities were charged $400 in rent, plus additional charges which included janitorial services, insurance, utilities and maintenance. (App. 5[d] at 2-3). The rent charges alone produced $438,000 a year. (App. 5 at 3).

■ Charities were charged 75¢ per cup for coffee given to bingo players who had received a ticket when they purchased a pack of pre-numbered bingo cards. (App. 4 at 110-111). During a New Year's Eve party at the Pinellas County hall, the charity was charged $322 for "breakfast." (App. 6 at 3). A former snack bar operator testified that the charities were charged $2.00 each for players' meals, although the meals actually cost about 70¢. (App. 4 at 89).

■ Charities were also charged for "shop points" given to players when they purchased cards. These points could be accumulated and then redeemed for novelty items. The charity which happened to be sponsoring bingo at the time the accumulated points were redeemed was charged for the expense of the novelty item. (App. 4 at 99, 111-112; *see also* App. 5 at 6, 8).

■ The price of bingo paper was inflated so that the commercial operators could make a profit. (App. 4 at 112-12; *see also* App. 6 at 3).

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[d] The Affidavit of Deputy Sheriff William T. Young, Jr., Deputy Sheriff Theresa Bernard and Police Office David Doty was formally accepted into evidence by the trial court at the first hearing on a motion to dissolve the injunction. (App. 4 at 144).

These charges to the charities usually totaled more than the proceeds from each session's bingo games; nevertheless, the charity in whose name the games were conducted was given a "donation." (App. 4 at 88, 110, 115-16; *see also* App. 6 at 1). Even when the proceeds from a bingo session exceeded the charges to the charity, the accummulated shortfall from previous sessions was applied so that the charity rarely, if ever, received more than the standard "donation." (App. 4 at 88-89, 110, 115-16, 139; *see also* App. 6 at 4).

An example of how the costs were charged to the charity was presented to the trial court in the form of a "tally sheet" and accompanying documents from a bingo session conducted at Northtowne Bingo in Lakeland. (App. 6; see also App. 5 at 2-3).[e] The "Bingo Daily Cash/Expense Summary," a report required by Polk County ordinance, shows that costs of $1144 were charged to the charity, and that the charity received nothing from that $4606 taken in during that bingo session. (App. 6 at 1). The cash receipts show a total of $1577 was collected by the commercial operator from the charity, including $433 "added to rent to pay back loan to purchase party supplies." (App. 6 at 2, 4). Charges to the charity included another $501 for decorations and party supplies, $322 for breakfast, and $464.75 for bingo paper. (App. 6 at 3).

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[e] The "Bingo Daily Cash/Expense Summary" and related documents were formally accepted into evidence by the trial court on May 7, 1996.

Proceeds from bingo games were also used to pay the "volunteers" who conducted the bingo games. (App. 4 at 75-76, 80, 102; App. 2, Exhibit A[f] at paras. 14, 19, 20, 60, 62). A former employee testified that she had personally put bingo proceeds into the tip boxes from which the "volunteers" were paid, and that she had seen other employees do the same. (App. 4 at 76; *see also* App. 2, Exhibit A at para. 14). The "volunteers" worked for the hall management, which hired them, scheduled their hours and directed them in their duties. (App. 4 at 77, 79-80, 86, 104, 131-32). No matter which charity was listed as sponsoring a particular bingo session, the same "volunteers" worked the games. (App. 4 at 90; App. 5 at 5).

Proceeds from bingo games also were used to create pools for random drawings for cash and other prizes, including trips to Las Vegas. (App. 4 at 83-84; App. 2, Exhibit A at paras. 15, 21, 55). After a New Year's Eve party at the Pinellas County hall, the charity was charged more than $900 for party decorations and party supplies. (App. 6 at 3, 4).

At times, bingo games were conducted on behalf of organizations which did not qualify under the bingo statute for authority to conduct bingo games. (App. 2, Exhibit A at paras. 21,

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[f] Investigator Schuchman's affidavit, in addition to providing the basis for the issuance of the injunction, was formally accepted into evidence by the trial court at the first hearing on a motion to dissolve the injunction. (App. 4 at 147).

30, 49, 53, 56, 68, 73, 77). On occasion, bingo games were conducted without any sponsoring charity at all. (App. 4 at 85; App. 2, Exhibit A at para. 15).

Based on the testimony and documentary evidence presented, the trial court made determinations that:

- "Defendants ... were associated, and continue to be associated, with an enterprise consisting of those named Defendants, and they conducted or participated in this enterprise through the 54 incidents of setting up, promoting or conducting a lottery for money or for anything of value, or aiding or assisting in the setting up, promoting or conducting of a lottery or lottery drawing, by writing, printing or in any other manner whatsoever, or by having an interest in or connection with a lottery or a lottery drawing, in violation of Section 849.09(1)(a) or (d), Florida Statutes." (App. 3 at para. 1).

- "These acts were interrelated and not isolated acts, so as to form a pattern of racketeering activity. Plaintiff has made a sufficient showing that these Defendants violated the Florida RICO (Racketeer Influenced and Corrupt Organization) Act ..." (App. 3 at para. 2).

- "There is sufficient evidence to support Plaintiff's contention that Defendants ... used, acquired or maintained the following assets in the course of and with the proceeds of the RICO

Act violations, so as to render them subject to forfeiture to the State ..." (App. 3 at para. 3).

2. **Course of Proceedings.** The State's Complaint was filed November 6, 1995. An Amended Complaint (App. 1) was filed November 21, 1995, correcting several irregularities in the naming of specific defendants in particular predicate acts.

An Order Granting Temporary Injunction and Other Preliminary Relief (App. 3) was entered November 6, 1995. That order expressly states: "Because Plaintiff is a public agency proceeding in the public interest, no bond shall be required ..." *See* App. 3 at para. 9.

Multiple evidentiary hearings were held on motions to dissolve filed by various Defendants. On November 21, 1995, the trial court held an evidentiary hearing on a motion to dissolve filed by Defendants Neway Rental & Leasing, Janet Feliciano and Frank Feliciano. This hearing lasted more than four hours. The motion to dissolve was denied. On December 29, 1995, an evidentiary hearing was held on Respondents' motion to dissolve. That motion also was denied.

On September 19, 1996, Respondents Bradenton Group, Inc., Eight Hundred, Inc., and Pondella Hall for Hire, Inc., filed a notice of appeal of the court's denial of their motion to dissolve the injunction. (R. 1).

On October 14, 1996, while the appeal was still pending, the trial court entered an order requiring the State to post an injunction bond of $1.4 million. (App. 12) This order was based upon the unsworn telephonic statement of an officer of the Respondent corporations. (App. 11).

The State subsequently appealed that order (R. 2-5), and the two appeals were consolidated on February 13, 1997. (R. 25).

3. **Disposition in the Lower Tribunal.** On October 3, 1997, the Fifth District Court of Appeal rendered its opinion in the consolidated appeals. *Bradenton Group, Inc., v. Department of Legal Affairs*, 701 So.2d 1170 (Fla. 5th DCA 1997). The appellate court affirmed the trial court's order denying the motion to dissolve the injunction, ruling that the State's complaint and affidavit sufficiently allege that the defendants, as persons not authorized to conduct bingo under Florida law, set up, promoted, or conducted a lottery in violation of FLA. STAT. § 849.09. *Id.* at 1179. Nevertheless, the court certified this question:

> WHETHER A BINGO GAME, CONDUCTED BY AN ORGANIZATION NOT AUTHORIZED UNDER SECTION 849.0931, FLORIDA STATUTES, OR CONDUCTED BY AN AUTHORIZED ORGANIZATION IN VIOLATION OF SECTIONS 849.0931(5)-(12), FLORIDA STATUTES, CONSTITUTES A "LOTTERY" AS THAT TERM IS USED IN SECTION 849.09, FLORIDA STATUTES, AND, THUS, IS RACKETEERING ACTIVITY WHICH IS SUBJECT TO FLORIDA RICO.

Id. at 1179.

The Fifth District Court of Appeal also affirmed the trial court's order requiring the State to post an injunction bond,

holding that a trial court may adjust a bond requirement upon a demonstration that such would be equitable under the circumstances. *Id.* at 1180. Noting that the broad injunction requested and obtained by the State would severely damage the Defendants if its entry was improper, the court concluded that requiring the State to post an injunction bond in a civil RICO case was not an abuse of discretion, despite the State's contention that such a requirement would force the State to choose between placing at risk vast sums of public money or declining to file suit against offenders who have amassed large amounts of criminal proceeds. *Id.* at 1180.

SUMMARY OF ARGUMENT

The gravamen of the State's case is the conduct of illegal lotteries, not minor bingo violations. The game of bingo entails a prize, an award by chance, and a consideration and, therefore, constitutes a lottery. For more than 50 years, the Florida courts have consistently held that bingo is gambling and an illegal lottery. A limited exception to Florida's general prohibition against gambling exists for bingo games conducted by "worthy organizations" in compliance with FLA. STAT. § 849.0931. No provision of Florida law permits for-profit corporations to conduct commercial bingo operations.

Bingo games conducted by organizations which are not expressly authorized to do so by FLA. STAT. § 849.0931 do not qualify for the exception from the gambling laws. Therefore, a bingo operator who does not meet the threshold requirement of FLA. STAT. § 849.0931 -- by qualifiying as a "worthy organization" -- is conducting an illegal lottery.

Conducting an illegal lottery is a RICO predicate, included by FLA. STAT. § 895.02(1)(a)(32) in the definition of racketeering activity.

By basing its decision to require an injunction bond on unsworn, conclusory, self-serving and uncorroborated testimony which did not conclusively refute the detailed evidence previously presented by the State, the trial court abused its discretion. The

unprecedented order requiring the State to post an injunction bond also ignores a long line of precedent[9] establishing the distinctive standards applied when the government seeks an injunction pursuant to a statutory enforcement scheme.

Requiring the State to post an injunction bond places a chilling effect on law enforcement and impedes the State's ability to fulfill its traditional role of safeguarding the public interest. No principled reason exists for the prospect that millions of taxpayer dollars might have to be posted to maintain actions against large-scale criminal enterprises which have caused great harm to the citizens of Florida.

Further, the trial court had no authority to modify the injunction beause of Respondents' then-pending appeal of the injunction.

In addition, the State should not be held accountable for losses caused by Respondents' own actions. Respondents nominated a receiver who had, unbeknownst to the trial court, previously worked for the Defendants as their accountant and who later had to be removed by the court because of his apparent involvement in activities which violated the injunction. The State respectfully

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[9] The injunction bond issue in this case illuminates a conflict between *Banco Industrial de Venezuela, C.A. v. Mederos Suarez*, 541 So.2d 1324 (3d DCA 1989), and *Finkelstein v. Southeast Bank, N.A.*, 490 So.2d 976 (Fla. 4th DCA 1986).

submits that Respondents' own actions provide no basis for requiring the State to post an injunction bond.

Finally, imposition of an injunction bond is particularly inappropriate in a case brought under the Florida RICO Act, which was enacted "to provide new criminal and civil remedies and procedures ..." Requiring the State to post a bond in order to maintain an injunction which restrains further racketeering activity and preserves illegal proceeds places a disproportionate burden on the State's exercise of its police power which could potentially nullify the effectiveness of the new remedies and procedures which the Legislature provided to law enforcement.

ARGUMENT

I. A BINGO GAME CONDUCTED BY AN ORGANIZATION NOT AUTHORIZED UNDER FLA. STAT. § 849.0931 CONSTITUTES AN ILLEGAL LOTTERY AND, THUS, IS RACKETEERING ACTIVITY WHICH IS SUBJECT TO THE FLORIDA RICO ACT

A. Bingo entails a prize, an award by chance, and a consideration and, therefore, constitutes a lottery

A lottery has three elements: a prize, an award by chance, and a consideration. *Horner v. United States*, 147 U.S. 449, 458 (1893); *Little River Theater Corp. v. State ex rel. Hodge*, 135 Fla. 854, 868, 185 So. 855, 861 (1939); *Blackburn v. Ippolito*, 156 So.2d 550, 551 (Fla. 2d DCA 1963); *see also* Op. Att'y Gen. 58-128 (game entitled "scunk" but played in the same manner as bingo); Op. Att'y Gen 57-363 (bingo game sponsored by theater); Op. Att'y Gen. 57-310 (football game winner guessing contest); Op. Att'y Gen. 57-170 (drawing for free motel accommodations).

Bingo contains these three elements and, therefore, constitutes a lottery. The players buy pre-numbered cards, and the payment of money for the cards constitutes consideration. Numbers are drawn at random until one of the players announces that he or she has matched enough numbers on his or her card to complete the winning pattern. At that point, the player calls out "bingo" and is declared the winner of a predetermined cash sum of money. This, of course, is a prize. The prizes are awarded by chance, as there is

no skill involved. A player cannot win until the announced numbers turn out to form a winning pattern on a pre-numbered purchased card. *See* FLA. STAT. § 849.0931(1)(a) (defining "bingo game").

Bingo has been uniformly recognized as gambling and as a form of lottery by the Florida courts for more than 50 years. *Creash v. State*, 131 Fla. 111, 179 So. 149, 152-53 (Fla. 1938). In *Carroll v. State*, 361 So.2d 144 (Fla. 1978), the defendant bingo operators were convicted of conducting illegal lotteries. In *Perlman v. State*, 269 So.2d 385 (Fla. 4th DCA 1972), the court addressed a bingo operation similar to that operated by Respondents in the case at bar. The *Perlman* court observed that the bingo operation was conducted through a corporate entity which had rental arrangements with charitable organizations "for the purpose of promoting and conducting the bingo with an aura of legality." *Id.* at 388. The sole officer of the corporation was convicted of maintaining a gambling house. *Id.* at 386; *see also Madar v. State*, 376 So.2d 446 (Fla. 4th DCA 1979).

Florida's Attorneys General have issued a lengthy series of opinions[1] which uniformly state that bingo is a lottery. As long

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[1] The official opinions of the Attorney General, while not legally binding upon the courts, are entitled to great weight in construing the law of Florida. *Beverly v. Division of Beverage of Department of Business Regulation*, 282 So.2d 657, 660 (Fla. 1st DCA 1973); *Richey v. Town of Indian River Shores*, 337 So.2d 410, 414 (Fla. 4th DCA 1976). The *Beverly* court, in adopting the Attorney General's construction of a statute, observed that the fact that two different Attorneys General reached the same

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ago as 1949, Attorney General Ervin stated that bingo is a lottery. Op. Att'y Gen. 49-519. At issue in that opinion was a bingo game operated by a restaurant and liquor store which required the winner of the bingo game to answer three questions to claim the prize. The Attorney General concluded that the game would be a lottery if the award of the prize was made by chance and advised the county solicitor that local authorities must assess the type of questions to make a factual determination as to whether the element of chance was present. *Id.*; *see also* Op. Att'y Gen. 58-128 (game entitled "scunk" but played in the same manner as bingo is a lottery if question which must be answered by winner is such that element of chance predominates). In a 1997 opinion, Attorney General Butterworth stated that the bingo statute "constitutes a limited exception from the general prohibition against gambling in this state by authorizing charitable or nonprofit organizations to conduct bingo games, subject to the conditions and limitations contained therein." Op. Att'y Gen. 97-60; *see also* Op. Att'y Gen. 96-17 ("The effect of section 849.0931, Florida Statutes, is merely to eliminate bingo from the gambling chapter when played within the limits of the statute"); Op. Att'y Gen. 95-21 (charity offering

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conclusion with respect to the same issue "lends considerable persuasive influence to their opinions and weighs heavily in favor of our conclusion herein." *Beverly*, 282 So.2d at 660.

more than three jackpots per bingo session would violate the three-jackpot limit set forth in FLA. STAT. § 849.0931(5) and, therefore, "would appear to be in violation of Florida's laws against lotteries"); Op. Att'y Gen. 95-68 (municipality cannot conduct bingo game, which is a form of lottery and which constitutes gambling within the scope of Chapter 849); Op. Att'y Gen. 94-101 (bingo is a form of gambling); Op. Att'y Gen. 92-91 (the playing of a game where a player buys one or more numbers and if the player bingos on that number, he or she wins not only the regular bingo money but also additional money, constitutes a form of lottery or gambling not authorized by § 849.0931); Op. Att'y Gen. 88-41 (local chapters of national organizations may not conduct bingo unless local chapter qualifies under criteria in bingo statute); Op. Att'y Gen. 61-5 (Chamber of Commerce warned that proposed bingo game would be a lottery if consideration present); Op. Att'y Gen. 57-363 (bingo game sponsored by theater would be lottery); Op. Att'y Gen. 56-272 (bingo played by private club was lottery); Op. Att'y Gen. 53-86 (community center could not sponsor bingo because a lottery).

In *Bradenton Group*, the Fifth District Court of Appeal, after reviewing the history and development of bingo law in Florida, correctly concluded that bingo is a lottery[2] and that the

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[2] The *Bradenton Group* court determined that bingo is a lottery under the current Florida constitution. *Bradenton Group*, 701 So. 2d at 1179 (citing *Greater Loretta Improvement Ass'n v. State ex rel. Boone*, 234 So. 2d 665 (Fla. 1970)). The lottery

(continued...)

defendants, as persons not authorized to conduct bingo under Florida law, set up, promoted, or conducted a lottery in violation of FLA. STAT. § 849.09. *Id.* at 1179.

B. Only "authorized bingo" is immune from the effect of Florida's general prohibition against gambling

The bingo statute[3] creates a limited exception which removes bingo from the entire chapter of the Florida Statutes dealing with gambling, *provided that* the bingo is conducted by "worthy organizations" within certain statutorily defined limits. As the Fifth District Court of Appeal observed, "[u]nder the plain

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provision of the 1968 Constitution excludes "parimutuel pools authorized by law as of the effective date of this constitution." FLA. CONST. art. X, § 7. The *Greater Loretta* court concluded that "parimutuel pools is a term ... [which] certainly includes bingo by definition." *Greater Loretta*, 234 So. 2d at 671. The court also relied on the doctrine of contemporaneous enactment in determining that the makers of the 1968 Constitution intended to include bingo among the legally operating lotteries excepted from the constitutional provision against lotteries. *Id.* at 671-72.

In tracing the history and development of bingo law in Florida, the *Bradenton Group* court noted that the word "lottery" in the 1885 Constitution had been interpreted as encompassing only state-authorized lotteries. *Id.* at 1177 (citing *Greater Loretta*, 234 So. 2d at 668). Such lotteries were used by many states, including Florida, to raise money in the first decades of this country's history. *Greater Loretta*, 234 So. 2d at 668.

Further, the *Bradenton Group* court stated that the term "lottery" as used in Florida Statutes apparently should be read in the same way as it is read in the Constitution because the lottery statute is supposed to effectuate the constitutional provision. *Id.* at 1179 (citing *Jarrell v. State*, 135 Fla. 736, 185 So. 873 (1939); *Hardison v. Coleman*, 121 Fla. 892, 164 So. 520 (1935)).

[3] Originally enacted in 1967 as FLA. STAT. § 849.093, the bingo statute was rewritten in 1992 and renumbered as FLA. STAT. § 849.0931.

language of the statute, only organizations meeting the criteria of [the bingo statute] are authorized to conduct bingo and are correspondingly exempt from prosecution under the remaining portions of chapter 849." *Bradenton Group*, 701 So. 2d at 1175.

The threshold question for compliance with FLA. STAT. § 849.0931 is whether a bingo game operator is a "worthy organization" -- a three-year-old non-profit organization or a veterans' organization engaged in charitable, civic, community, benevolent, religious, scholastic, or other similar activities. *See* FLA. STAT. § 849.0931(1)(c). In *Madar v. State*, 376 So.2d 446 (Fla. 4th DCA 1979), the court recognized that the status of the defendant as within the class of "worthy organizations" is a threshold question for the application of the bingo statute. *Id.* at 448. A bingo game operator who is not a "worthy organization" may not have the benefit of the bingo statutory exception. *Id.* at 448. This threshold question also was recognized in *Perlman v. State*, 269 So.2d 385, 387 (Fla. 4th DCA 1972), wherein the court concluded that the bingo statute "removes bingo from the entire chapter (Chapter 849) dealing with gambling, provided the bingo is conducted by organizations not for profit ..." *Id.* at 387. The *Perlman* court also found that effect of the bingo statute is to "eliminate bingo from the gambling chapter *when played within the*

limits of the statute." Id. at 387 (emphasis in original), stating:

> Bingo *per se* is not removed by Section 849.093 from the purview of Section 849.01. Only when bingo is conducted by (a) qualified operators and (b) within certain statutory limitations, is the operation legal and immune from the effect of Ch. 849.

Id. at 388. The defendants' argument that bingo was no longer considered to be gambling because of the enactment of the bingo statute was rejected by the court as "without merit." *Id.* at 388.

In *Paskind v. State ex rel. Salcines*, 390 So.2d 1198 (Fla. 2d DCA 1980), the court stated that the bingo statute "excepts bingo games from the operation of section 849.09, which generally proscribes lotteries, but the playing of bingo games for money or any other thing of value is permitted only if conducted in conformity with section 849.093." *Id.* at 1199; *see also North Bay Village Lions Foundation, Inc. v. City of Miami Beach*, 338 So.2d 236, 237 (Fla. 3d DCA 1976) (bingo operation was not within the exception to the general prohibition against gambling).

The Florida courts have repeatedly approved the convictions of bingo game operators for violations of gambling laws. For example, in *Carroll v. State*, 361 So.2d 144 (Fla. 1978), the defendants were convicted of violating the lottery laws. The defendants did not challenge the application of the lottery statute to bingo. Rather, they contended that the bingo statute was unconstitutional, asserting that the exclusionary privileges granted to "worthy organizations" constituted class legislation that is

discriminatory, arbitrary, and without any reasonable relationship to the police power of the state. *Id.* at 145. The court upheld the constitutionality of the bingo statute, rejected the defendants' argument and affirmed their convictions. *Id.* at 147. In *Madar*, the defendant was convicted of the felony of keeping a gambling house. The defendant -- like the Respondents in the case at bar -- argued that he should have been charged only with the misdemeanor of engaging in an improper bingo game. However, the court held that he was properly charged with the felony offense of keeping a gambling house.[4] *Madar*, 376 So. 2d at 448; *see also Perlman*, 269 So.2d at 386 (defendants convicted of maintaining a gambling house).

The language of the bingo statute itself also indicates that it establishes an exception from the general prohibition against gambling in this state for "worthy organizations" conducting bingo games. That statute provides: "None of the provisions of this chapter shall be construed to prohibit or prevent charitable, nonprofit, or veterans' organizations engaged in charitable, civic, community, benevolent, religious, or scholastic works or other similar endeavors ... from conducting bingo games, provided the

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[4] The same conduct can, of course, violate several statutes. "It is not unusual for a course of criminal conduct to violate laws that overlap in their penalties." *Madar*, 376 So.2d at 447 (quoting *Fayerweather v. State*, 332 So.2d 21, 22 (Fla. 1976)). The State's option of pursuing either separate misdemeanor convictions or a felony conviction for a entire course of criminal conduct does not render the RICO Act unconstitutional. *Vickery v. State*, 539 So.2d 499, 500-01 (Fla. 1st DCA 1989).

entire proceeds derived from the conduct of such games, less actual business expenses for articles designed for and essential to the operation, conduct and playing of bingo, are donated by such organizations to the endeavors mentioned above ...." FLA. STAT. § 849.0931(2)(a).

The principles of statutory construction also lead to the conclusion that only "authorized bingo" is immune from the effect of Florida's general prohibition against gambling. The exception for "authorized bingo" is set forth in FLA. STAT. § 849.09(3), which states: "The provisions of this section do not apply to bingo as provided for in s. 849.0931," which authorizes the playing of bingo under the circumstances set forth therein.[5]

A statute should be construed so as to give a meaning to every word and phrase in it. *Stein v. Biscayne Kennel Club, Inc.*, 145

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[5] Respondents have previously argued that FLA. STAT. § 849.09(3) prohibits the State from alleging a violation of the lottery law. Although FLA. STAT. § 849.09(3) expressly applies only to violations of paragraphs (e), (f), (g), (i) and (k) of FLA. STAT. § 849.09(1), Respondents have argued that it applies to *all* of FLA. STAT. § 849.09(1). In the case at bar, the predicate acts alleged are violations of paragraphs (a) and (d), which are addressed in FLA. STAT. § 849.09(2) -- a provision containing no exclusion of bingo games. The State respectfully submits that the only reasonable interpretation of the placement of the exclusion in FLA. STAT. § 849.09(3) is that it applies to the paragraphs referenced there. If the Legislature had intended to exclude all violations of the lottery law, the reference to bingo games would have been placed in the general exclusion at the end of FLA. STAT. § 849.09(1) which excludes nationally advertised contests.

Nevertheless, this argument misses the mark. Whether it applies to certain sections or to the entire statute, FLA. STAT. § 849.09(3) provides an exception *only* for bingo as provided for in FLA. STAT. § 849.0931.

Fla. 306, 199 So.364, 365 (Fla. 1940); *Terrinoni v. Westward Ho!*, 418 So.2d 1143, 1146 (Fla. 1st DCA 1982); *Vocelle v. Knight Brothers Paper Co.*, 118 So.2d 664, 667 (Fla. 1st DCA 1960). If the Legislature had intended to exclude all bingo from the lottery statute, it could have said simply: "The provisions of this section do not apply to bingo." Meaning must be given to the Legislature's clear and unambiguous words -- "as provided for in s. 849.0931" -- which would be unnecessary and superfluous if the Legislature had intended to exclude *all* bingo games.

FLA. STAT. § 849.09(3) must be read as creating an exception *only* for bingo as provided for in FLA. STAT. § 849.0931. It is a general principle of statutory construction that where a statute directs how a thing is to be done, it is, in effect, a prohibition against it being done in any other manner. *Thayer v. State*, 335 So.2d 815, 817 (Fla. 1976). Express exceptions made in a statute give rise to a strong inference that no other exceptions were intended. *Dobbs v. Sea Isle Hotel*, 56 So.2d 341, 342 (Fla. 1952); *State Road Department v. Levato*, 192 So.2d 35, 39 (Fla. 4th DCA 1966), *cert. dism'd*, 199 So.2d 714 (Fla. 1967); *Biddle v. State Beverage Department*, 187 So.2d 65, 67 (Fla. 4th DCA 1966), *cert. dism'd*, 194 So.2d 623 (Fla. 1966); *Williams v. American Surety*

Company of New York, 99 So.2d 877, 880 (Fla. 2d DCA 1958). As the *Dobbs* court stated:

> We have oft-times held that the rule *expressio unius est exclusio alterius* is applicable in connection with statutory construction .... The legislature made one exception to the precise language of the statute of limitations. We apprehend that had the legislature intended to establish other exceptions it would have done so clearly and unequivocally .... We cannot write into the law any other exception ...

Dobbs, 56 So.2d at 342.

In his most recent opinion on bingo, the Attorney General stated that FLA. STAT. § 849.0931 "constitutes a limited exception from the general prohibition against gambling in this state by authorizing charitable or non-profit corporations to conduct bingo games, subject to the conditions and limitations contained therein." Op. Att'y Gen. 97-60; *see also* Op. Att'y Gen. 95-69. In a variety of circumstances, Attorney General Butterworth has concluded that bingo games which do not comply with the bingo statute constitute illegal gambling. *See* Op. Att'y Gen. 95-21 (offering more than three jackpots per session "would appear to be in violation of Florida's laws against lotteries"); Op. Att'y Gen. 95-68 (municipality, which is not authorized to conduct bingo, would be engaging in gambling if it conducted bingo games); Op. Att'y Gen. 95-17 (bingo statute removes bingo from the scope of the gambling chapter "provided the bingo is played within certain statutorily defined limits"); Op. Att'y Gen. 94-101 (game where

player buys one or more numbers and wins not only the regular bingo prize money but also additional money if he or she bingos on a purchased number constitutes a lottery).

FLA. STAT. ch. 849 contains a liberal construction provision. FLA. STAT. § 849.46. A statute entitled to a liberal construction must be construed so as to suppress the evil and advance the remedy intended by the Legislature. *Florida Industrial Comm'n v. Growers Equipment Co.*, 12 So.2d 889, 893 (Fla. 1943) ("... construed so as to alleviate the contaminating influences to the body politic ...").

The beneficial end contemplated by the Legislature when it enacted the current version of the bingo statute was to foreclose any efforts to conduct the game in a manner that would undermine charitable endeavors and harm the public. *See* Preamble, 1992 Fla. Laws ch. 92-280 ("Whereas, violations of the criminal laws regulating the conduct of bingo undermine charitable endeavors and harm the public ...").

In the case at bar, the Respondents clearly are not "worthy organizations." Rather, they are commercial bingo operators who made huge profits from conducting bingo games. "When the bingo exception is read as a whole, it is clear that the legislature never intended the bingo exception to include the operation of a large-scale, commercial bingo operation ..." *Paskind v. State*, 390 So.2d 1198, 1200 (Fla. 2d DCA 1980); *see also State v. South County*

Jewish Federation, 491 So.2d 1183, 1186 (Fla. 4th DCA 1986); Op. Att'y Gen. 95-69 (for-profit corporation may not operate bingo); Op. Att'y Gen. 88-41 (bingo permissible only where proceeds used for charitable purposes). Preventing the operation of for-profit bingo halls was the purpose of the Legislature in amending the bingo statute in 1984 to define the organizations qualified to conduct bingo games. *See* STAFF REPORTS OF CS/HB 210 OF COMMITTEE ON REGULATED INDUSTRIES AND LICENSING (1984). The Legislature's intention in enacting the bingo statute clearly was to permit bingo games only where the proceeds are used for charitable purposes.

The Florida courts have approved bingo as an exception to the laws banning gambling based upon a determination that it is in furtherance of charitable activity. As the *Carroll* court stated:

> The general thrust of the classification allowing non-profit and veterans' organizations to conduct bingo and guest games, is that in addition to providing a source of recreation, relaxation, and social intercourse, the proceeds are donated to charitable, civic, community, benevolent, religious, scholastic, or other similar endeavors. This is for the general welfare and removes bingo profits from the purview of organized gambling.

Carroll, 361 So.2d at 147. Respondents' construction of Chapter 849 would defeat the purpose the bingo statute was intended to serve by allowing profit seekers to reap the benefits from supposedly charitable bingo operations.

In summary, the State respectfully submits that the *only* bingo games that are permitted in Florida are those that are conducted in

compliance with FLA. STAT. § 849.0931 and that, therefore, qualify as "authorized bingo" under that statute. Bingo is permitted only when a "worthy organization" uses the proceeds for charitable purposes, and a for-profit corporation which conducts bingo games violates Florida's gambling laws.

The State respectfully urges this Court to answer the certified question by holding that bingo conducted by an organization not authorized under FLA. STAT. § 849.0931 constitutes a "lottery" as that term is used in FLA. STAT. § 849.09 and, thus, is racketeering activity which is subject to the Florida RICO Act.

II. REQUIRING THE STATE TO POST AN INJUNCTION BOND IN THE CIRCUMSTANCES OF THIS CASE IS NOT A SOUND EXERCISE OF JUDICIAL DISCRETION

By basing its decision to require an injunction bond on unsworn, conclusory, self-serving[6] and uncorroborated statements which did not conclusively refute the abundant and detailed evidence previously presented by the State, the trial court abused its discretion.

The $1.4 million bond amount represents lost profits, but the Respondents are not "worthy organizations" entitled to receive proceeds from bingo games.[7] The trial court had previously received

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[6] The witness, John Henning, is a corporate officer of Respondents Bradenton Group, Inc., and Eight Hundred, Inc. (App. 11 at 23).

[7] Even "worthy organizations" can use bingo proceeds only for "charitable, civic, community, benevolent, religious, or

(continued...)

considerable evidence of how bingo proceeds were diverted from the charities at the Pinellas County bingo hall through inflated rents and charges that were not actual business expenses. (App. 4, 5, 6). In support of the Motion for Order Requiring Injunction Bond, John Henning stated that Respondents had lost about $90,000 in "rental profits" at that hall. (App. 11 at 33). However, Mr. Henning was unable to identify the tenants who would have paid the rent, if there was more than one tenant, or even if any of the Defendants would have paid rent. The State respectfully submits that his vague statements do not provide a sufficient basis for imposing an injunction bond, particularly when viewed in light of evidence previously presented to the trial court. For example, the State had previously demonstrated that Respondent Bradenton Group and Defendant Neway Rental & Leasing d/b/a Northtowne Bingo were sub-lessors who received 3¢ per head for each bingo player. (App. 5 at 3)[8]

Mr. Henning also stated that Respondents had lost $400,000 in rent from the canteens in the bingo halls. Again, he was unable to identify the canteen operators or even say whether any of them were

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scholastic works or other similar activities." *See* FLA. STAT. § 849.0931(2)(a).

[8]Bingo may be held on property leased by a charity only if the "lease or rental agreement does not provide for the payment of a percentage of the proceeds generated at such premises to the lessor or any other party ..." FLA. STAT. § 849.0931(11)(c).

Defendants in this case. (App. 4 at 32.). In concontrast, the State hae previously presented abundant evidence of how the canteens were used to divert funds from the charities. *See* Statement of the Case at p. x-xi above. In addition, the State had previously presented evidence that Respondent Eight Hundred, Inc., had operated the snack bars (App. 2, Exhibit A, at paras. 16, 34; App. 4 at 91). Again, the State respectfully submits that his vague statements do not provide a sufficient basis for imposing an injunction bond.

The trial court's unprecedented action ignores circumstances of this case and a vast body of evidence which it previously received. The court's action also ignores a long line of precedent establishing the distinctive standards which are applied when the government seeks an injunction pursuant to a statutory enforcement scheme, and places a formidable obstacle to the State's efforts to eliminate large-scale criminal enterprises.

The State does not contend that a trial court does not have discretion to require bond in appropriate circumstances. However, it has been unable to find *any* reported decisions in which the State was required to post an injunction bond. However, in *Sunshine News Co. v. State*, 121 So. 2d 705 (Fla. 3d DCA 1960), the court held that there was no error in denying the news company's application to require the state to post bond as a condition to the issuance of an injunction against the distribution and sale of a magazine prior to a determination of obscenity. *See also Lieberman*

v. Marshall, 239 So. 2d 120 (Fla. 1970) (upholding court's authority to issue injunction without requiring bond when injunction is sought by a public agency).

In the case at bar, the trial court's abrupt reversal of course -- by issuing an order that undermines its owm determination that the Respondents engaged in a pattern of racketeering activity that harmed the general public -- should not be viewed as the exercise of sound judicial discretion.[9] The ramifications of the trial court's ruling, both in this case and to law enforcement in general, are overwhelming. If this ruling is allowed to stand, it could disarm the State in its efforts to enforce the laws by weakening many of the weapons the Legislature has placed in its arsenal. At greatest risk is the State's ability to eliminate far-reaching, ongoing criminal enterprises which cause great harm to the citizens of Florida. Such enterprises, by their very nature, tend to accumulate large amounts of illegal proceeds and enjoining the disposal of those assets would require substantial injunction bonds. Citizens who already have been wronged by the criminal activities of these enterprises would be harmed again if untold millions of their limited tax dollars had to be posted as bonds for the State to pursue the remedies which the Legislature has

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[9] In Florida, it is firmly established that the trial court's discretionary power is not unbridled but is limited to the impartial exercise of a sound judicial discretion. *Mangus v. Porter*, 276 So.2d 250, 252 (Fla. 3d DCA 1973).

determined are necessary to the public. In the wake of this decision, the State would be forced to choose between two very unpalatable options: declining to file suit against the very offenders who have amassed the largest amounts of criminal proceeds, thereby turning a deaf ear to citizens who rightfully demand protection from criminal activity, or diverting millions from other valuable government endeavors. Neither choice serves the best interest of the citizens of Florida. Therefore, the State respectfully urges this Court to find that the trial court abused its discretion in imposing an injunction bond and to reverse its ruling.

A. Imposing an injunction bond places a chilling effect on law enforcement efforts and impedes the State's ability to safeguard the public interest

Requiring the State to post an injunction bond places a chilling effect on law enforcement efforts to enforce the laws of Florida and erects a formidable obstacle to actions against the largest criminal enterprises, which cause the greatest harm to the public. If this ruling is allowed to stand, the Florida RICO Act -- and other similar laws, such as the civil theft statute, which contains identical provisions -- would be placed in cold storage. Faced with the possibility that millions of taxpayer dollars would have to be posted to maintain these actions, law enforcement would be greatly restricted in the number of actions it could pursue. The civil remedies which have proven so effective in crippling far-

reaching and ongoing criminal enterprises and in deterring criminal activity would be used far less often.

Imposing bond impedes the State's ability to fulfill its traditional role of safeguarding the public interest by enforcing the laws of Florida. In this case, the State's effort to eliminate a large-scale commercial bingo operation, which was diverting vast sums of money from charitable endeavors, clearly constitutes action taken in the public interest. *See* Preamble, 1992 Fla. Laws ch. 92-280 ("Whereas, violations of the criminal laws regulating the conduct of bingo undermine charitable endeavors and harm the public ..."); *see also, e.g., United States v. Cappetto*, 502 F.2d 1351, 1358-59 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975) (recognizing injury to the public which Congress found to be inherent in the conduct made unlawful by the federal RICO act). A court should consider the impact that a bond requirement will have on the protection of the public interest. *Waterfront Comm'n of New York Harbor v. Construction and Marine Equipment Co.*, 928 F. Supp. 1388, 1405 (D.N.J. 1996); *see also Temple University v. White*, 941 F.2d 201, 219 (3d Cir. 1991), *cert. denied sub nom. Snider v. Temple University*, 502 U.S. 103 (1992).

In general, the imposition of an injunction bond deters rash applications for interlocutory orders by prompting a plaintiff to think carefully beforehand. But the State, in the exercise of its police power, is, of course, driven by entirely different

motivations than a private plaintiff.[10] When a private litigant motivated by the prospect of recovering treble damages files suit and seeks an injunction, requiring a bond is an appropriate safeguard of the public interest in the fair and evenhanded administration of justice. But when the State, motivated by its own duty to safeguard the public interest, seeks an injunction to halt continuing criminal activity and prevent the disposal of illegal proceeds, requiring a large bond is a disservice to the public interest.

Therefore, the State respectfully submits that no principled reason exists why its efforts to enforce the laws and protect the public interest should be chilled by the prospect that millions of taxpayer dollars might have to be posted to maintain actions against racketeers who have caused great harm to the citizens of Florida.

B. Respondents' own actions should not provide a basis for requiring the state to post an injunction bond

The good-faith representations of the parties is one of the bases upon which a court should rely in making a decision as to an injunction bond. *Parker Tampa Two, Inc. v. Somerset Development Corp.*, 544 So.2d 1018, 1021 (Fla. 1989); *Cushman & Wakefield, Inc. v. Cozart*, 561 So.2d 368, 370 (Fla. 2d DCA 1990). In the case at

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[10] This difference was recognized by the Legislature was it enacted FLA. STAT. § 895.05(7), the subsection which creates a different class of action for cases in which the State itself is a victim.

bar, Defendants have repeatedly misstated the facts, mischaracterized the law, and engaged in delaying tactics. The State respectfully submits that Defendants' misconduct provides no basis for requiring the State to post an injunction bond.

In addition, the appointment of a receiver can minimize the potential harm to defendants who are subject to an injunction. *See, e.g., Little Earth of United Tribes, Inc. v. U.S. Dep't of Housing and Urban Development*, 584 F. Supp. 1301, 1303-04 (D. Minn. 1983). Because of the diminished risk of injury to the defendants, the *Little Earth* court did not require an injunction bond. Id. at 1304.

In the case at bar, nearly all the harm complained of by Respondents -- except, of course, the restraint on their continued illegal operations and the resulting continued production of criminal proceeds -- could have been minimized by the appointment of an unbiased receiver. However, Respondents nominated a receiver who had, unbeknownst to the trial court, previously worked for the Defendants as their accountant and who later had to be removed by the court because of his apparent involvement in activities which violated the injunction. *See* App. 8, 9, 10. And even when the receiver was in place, he didn't act to protect Defendants' assets. The State is unable to explain -- and should not be held accountable for -- the receiver's failure to take appropriate steps to protect the Defendants' assets. Furthermore, Respondents have opposed the appointment of a replacement receiver. *See* App. 13.

In addition, Mr. Henning stated that $600,000 was lost due to the foreclosure of the mortgage on the Pinellas County bingo hall. (App. 11 at 29). In addition to Mr. Henning's contradictory statements, acknowledging the existence of a mortgage yet claiming that Respondents lost the etire value of the property, the trial court had previously received received evidence of a mortgage. (App. 2, Exhibit A, at para. 11). The trial court also had received evidence that the down payment of $200,000 on the purchase of the bingo hall was made from proceeds of criminal activity. (App. 2, Exhibit A, at paras. 11-13).

Another segment of the purported "losses" was a result of the failure of another corporation to make payments pursuant to a sale of three bingo which occurred prior to the entry of the injunction. (App. 11 at 30). No action taken by the State at any time prohibited this other corporation from fulfilling the terms of its contract with Respondents. Therefore, the State respectfully submits that basing an injunction bond on this circumstance constitutes an abuse of discretion.

In addition, from the inception of this litigation, the trial court invited a proposal for a legal bingo operation so that the charities could continue to receive benefits. (*See, e.g.*, App. 4 at 178). Respondents and the other Defendants never even attempted to present any such proposal. To the contrary, they tried to re-open

the Pinellas County bingo hall without seeking court approval. (App. 8).

In the face of Respondents' actions, both before and after the entry of the injunction at issue, the State respectfully submits that it should not be required to post a bond in order to maintain an injunction which prohibits further racketeering activity and preserves the illegal proceeds of prior criminal activity.

C. The trial court did not have jurisdiction to modify the injunction after Defendants filed an appeal

Because the original injunction expressly stated that no bond would be required because Plaintiff is a public agency proceeding in the public interest, the order requiring the State to post a bond clearly constitutes a modification of the injunction. The State respectfully submits that the Fifth District Court of Appeal's statement that the order requiring the bond is not a modification of the injunction defies common sense. *See Bradenton Group*, 701 So. 2d at 1180.

Prior to the entry of the order requiring the State to post a bond, the Respondents had filed a notice of their appeal of the trial court's denial of their motion to dissolve the injunction. (R. 1). Therefore, the trial court had no authority to modify the injunction.

The *Bradenton Group* court acknowledged the general rule that once an appeal has been perfected, the trial court is prohibited from "altering the order or acting in any manner with respect to

its appealed order as might frustrate the efforts of the appellate court or render moot its labors." *Id.* at 1180. Other Florida courts have applied this rule to hold that a trial judge cannot enter a subsequent order changing the effect of an order which has been appealed. For example, in *Burke v. Burke*, 336 So.2d 1237 (Fla. 4th DCA 1976), the trial judge entered an order which purported to relieve and discharge the appellant from an order which had been appealed. "This order was ineffectual because once a notice of appeal has been filed, the lower court is without jurisdiction to alter the order appealed from." *Id.* at 1238. In *Liberman v. Rhyne*, 248 So.2d 242 (Fla. 3d DCA), *cert. denied*, 252 So.2d 798 (Fla. 1971), the court addressed an order amending an earlier order which had been appealed. *Id.* at 242. "The trial court has no authority after a notice of appeal has been filed to change the status of a case ... The trial court ... may not take any action affecting the subject matter of the appeal." *Id.* at 244; *see also Fulton v. Poston Bridge & Iron, Inc.*, 122 So.2d 240 (Fla. 3d DCA 1960); *Ward v. Gibson*, 340 So.2d 481, 482 (Fla. 3d DCA 1976); *Strauser v. Strauser*, 303 So.2d 663, 664 (Fla. 4th DCA 1974); *Mandrachia v. Ravenswood Marine, Inc.*, 118 So.2d 817, 821 (Fla. 2d DCA 1960).

The trial court's imposition of an injunction bond clearly affected the subject matter of the Respondents' appeal. In effect, it required the State to post a bond in excess of $1 million in order to avoid the very same thing that the Respondents sought to

accomplish in their appeal -- the dissolution of the injunction. By paving the way for the dissolution of the injunction, the trial court allowed the Respondents to accomplish indirectly what they had not yet been able to accomplish directly[11] -- and would have, without the State's own appeal, rendered moot the labors of the appellate court. Therefore, the State respectfully submits that the trial court's authority with regard to the injunction had been terminated so that the court could not proceed to modify the injunction by requiring a bond.

D. Imposition of an injunction bond is particularly inappropriate in a case brought under the Florida RICO Act

The Florida RICO Act was enacted "to provide new criminal and civil remedies and procedures ..." 1977 Fla. Laws ch. 77-334 at 1399. The State respectfully submits that the Fifth District Court of Appeal, by requiring the State to post a bond in order to maintain an injunction which restrains further racketeering activity and preserves illegal proceeds, places a disproportionate burden on the State's exercise of its police power which could potentially nullify the effectiveness of the new remedies and procedures which the Legislature provided to law enforcement.

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[11] The law has never permitted one to do indirectly what he cannot do directly. *See, e.g., Clermont-Minneola Country Club, Inc. v. Loblaw*, 106 Fla. 122, 143 So. 129 (1932); *Johns v. Bowden*, 68 Fla. 32, 66 So. 155 (1914).

Long lines of precedent establish that RICO injunctions are different from common-law injunctions, and that a different standard applies when the government seeks an injunction pursuant to a statutory enforcement scheme. Therefore, a principled basis exists for treating RICO injunctions in a distinct manner to effectuate the Legislature's express intention to provide new procedures.

The common-law requirements for injunctive relief do not apply to a RICO case brought by the State. Indeed, even a private party seeking a preliminary injunction under the Florida RICO Act need not meet the common-law requirements for injunctive relief. *Banco Industrial de Venezuela, C.A. v. Mederos Suarez*, 541 So.2d 1324, 1326 (3d DCA 1989).[12] The court read the "plain language" of FLA. STAT. § 895.05(6) to require the bank -- a private party -- to show only an immediate danger of significant loss or harm to obtain a temporary injunction. *Id.* at 1326.[13] To support its construction of

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[12] In a case brought by private parties *against* state officials, *Atchison, Topeka & Santa Fe Railway Co. v. Lennen*, 640 F.2d 255 (10th Cir. 1981), the court held that "[w]here an injunction is authorized by statute it is unnecessary for plaintiff to plead and prove the existence of the usual equitable grounds, irreparable injury and absence of an adequate remedy at law. It is enough if the requirements of the statute are satisfied." *Id.* at 260 (quoting *Shadid v. Fleming*, 160 F.2d 752, 753 (10th Cir. 1947) (citations omitted)).

[13] The bank also was ordered to post a bond, as FLA. STAT. § 895.05(6) explicitly requires in cases brought by private litigants. *Mederos Suarez*, 541 So.2d at 1326. In contrast, the provision which authorizes the Department of Legal Affairs to

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the RICO Act, the court pointed to its enabling clauses, which contain "clear legislative findings" that the highly sophisticated and diverse patterns of organized crime in Florida make it "necessary to provide *new* criminal and civil remedies and procedures ..." *Id.* at 1326 (quoting 1977 Fla. Laws ch. 77-334 at 1399 (emphasis supplied by *Mederos Suarez* court)). As the court observed, "It is highly unlikely that the Florida legislature drafted and passed the RICO Act with nothing more in mind than merely codifying the common law regarding preliminary injunctions." *Id.* at 1326.

The *Mederos Suarez* court criticized an earlier decision, *Finkelstein v. Southeast Bank, N.A.*, 490 So.2d 976 (Fla. 4th DCA 1986), in which the court applied the common-law requirements for an injunction to a private-party RICO action, despite the clear language of FLA. STAT. § 895.05(6). *Finkelstein*, 490 So.2d at 980-81.[14] "With due deference to our sister court, however, in our view

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institute an action, FLA. STAT. § 895.05(5), contains no specific language authorizing the court to require the State to post an injunction bond. Therefore, the State respectfully submits that the Florida RICO Act does not authorize the action taken by the trial court.

[14] The *Finkelstein* court relied on several Florida cases which can be easily distinguished because they involve traditional actions at law. For example, in *Acquafredda v. Messina*, 408 So.2d 828 (Fla. 5th DCA 1982), the assignee of a promissory note filed an action at law for damages -- which is *not* a cause of action upon which an injunction can issue. The court held that no temporary injunction may be issued where the
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insufficient weight was given to the substantial differences between the federal and Florida RICO statutes." *Mederos Suarez*, 541 So. 2d at 1326. The *Mederos Suarez* court held that the RICO Act, not the common law, sets the standard for obtaining a preliminary injunction. *Id.* at 1326. In *Federal Deposit Insurance Co. v. Antonio*, 843 F.2d 1311 (10th Cir. 1988), the court upheld a preliminary injunction issued under the Colorado Organized Crime Control Act, which contains language identical to that of the Florida RICO Act. The court read the private-party provision as permitting an injunction to issue upon a showing that the defendant appeared to be transferring most of his assets to relatives and others -- a showing of immediate danger of significant loss or danger. *Id.* at 1313. Because the court upheld the lower court's authority to issue the injunction under the Colorado statute, it did not even consider the injunction's validity under traditional equitable doctrines. *Id.* at 1314.

The State respectfully submits that the *Mederos Suarez* court's construction of the Florida RICO Act is solidly founded in the law and that, therefore, this Court should also hold that a party seeking a preliminary injunction under the Florida RICO Act need not meet the common-law requirements for injunctive relief.

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complaint upon which it is based sets out no ground for equitable relief. *Id.* at 829. In contrast, a case brought under the Florida RICO Act *does* assert a cause of action upon which an injunction may issue. *See* FLA. STAT. § 895.05(1), (5).

The Florida courts have recognized that a different standard applies when the government seeks an injunction pursuant to a statutory enforcement scheme. *Times Publishing Co. v. Williams*, 222 So. 2d 470, 476 (Fla. 2d DCA 1969); *see also Harvey v. Wittenberg*, 384 So. 2d 940, 941 (Fla. 3d DCA 1980); *see also United States v. Sene X Eleemosynary Corp.*, 479 F. Supp. 970, 981 (S.D. Fla. 1979). As the *Times Publishing* court stated:

> "[A] provision granting jurisdiction to the circuit courts to issue injunctions ... is the equivalent of a legislative declaration that a violation of the statutory mandate constitutes an irreparable public injury ..."

Times Publishing, 222 So.2d at 476; *see also Harvey*, 384 So. 2d at 941. A mere showing that the statute has been or is clearly about to be violated fully satisfies the requisite of an irreparable injury. *Times Publishing*, 222 So.2d at 476.

In RICO cases, the federal courts[15] have held that the government need show no irreparable injury other than the injury to the public which Congress found to be inherent in the conduct of racketeering activity. *United States v. Cappetto*, 502 F.2d 1351, 1358-59 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975). The

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[15] The Florida RICO Act is modeled after the federal act and, therefore, Florida courts should look to federal courts for guidance in interpreting and applying the state act and should accord great weight to federal decisions. *See, e.g., O'Malley v. St. Thomas University, Inc.*, 599 So.2d 999, 1000 (Fla. 3d DCA 1992); *see also Moorehead v. State*, 383 So. 2d 629, 631 (Fla. 1990) (the Florida Legislature "incorporated the federal case law" by clarifying the definition of "pattern of racketeering activity").

Cappetto court found it "obvious that Congress did not intend to require a showing of inadequacy of the remedy at law." *Id.* at 1359. The federal courts also have recognized that RICO creates different classes of actions. "As a matter of policy, government actions and private actions are of course very different." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 741 F.2d 482, 497 (2d Cir. 1984), *rev'd on other grounds*, 475 U.S. 479 (1985). The court pointed to the exercise of prosecutorial discretion in a government-initiated case as one justification for applying different standards when the government is seeking to enforce the laws. *Id.* at 497.

Long-standing precedent in the federal courts also supports the State's construction of the RICO statute as establishing separate and distinct classes of proceedings, with different requirements and applications. In *Hecht Co. v. Bowles*, 321 U.S. 321 (1944), an action by the administrator of the Office of Price Administration for an injunction to restrain defendant from violating the Emergency Price Control Act, the Supreme Court stated: "the standards of the public interest not the requirements of private litigation measure the propriety and need for injunctive relief ..." *Id.* at 331; *see also Securities and Exchange Comm'n v. Management Dynamics, Inc.*, 515 F.2d 801, 808 (2d Cir. 1975). In *Management Dynamics*, the court held that the SEC was not required to prove irreparable injury and the inadequacy of other remedies. *Id.* at 808. If such proof were required, the court observed,

effective enforcement of the securities law would be jeopardized. *Id.* at 809. "The appellants' crucial error on this score is their assumption that SEC enforcement actions seeking injunctions are governed by criteria identical to those which apply in private injunction suits." *Id.* at 808. The court noted that the SEC appeared "not as an ordinary litigant, but as a statutory guardian charged with safeguarding the public interest ..." *Id.* at 808. In *Navel Orange Administrative Committee v. Exeter Orange Co.*, 722 F.2d 449 (9th Cir. 1983), the court stated: "When the government is seeking compliance pursuant to a statutory enforcement scheme, irreparable injury from a denial of enforcement is presumed." *Id.* at 453. In *American Fruit Growers v. United States*, 105 F.2d 722 (9th Cir. 1939), the appellant contended that no facts were pleaded which showed irreparable injury or that the government had no adequate remedy at law. The court held that allegations of such facts were unnecessary because Congress had authorized an injunction upon a showing of statutory violation alone. *Id.* at 725. In *Waterfront Comm'n of New York Harbor v. Construction and Marine Equipment Co.*, 928 F. Supp. 1388 (D.N.J. 1996), the court distinguished cases involving private parties because it was addressing the showing required of "an entity created by law and invested with the responsibility to fulfill the purpose of its statute by regularizing the waterfront labor supply and thus combatting crime." *Id.* at 1388-89. The court echoed the *Cappetto*

court's belief that Congress did not intend such a plaintiff to make a showing of irreparable injury other than that injury to the public which Congress found inherent in the conduct made unlawful ..." *Id.* at 1389. In *Rosa v. Resolution Trust Corp.*, 938 F.2d 383 (3d Cir.), *cert. denied*, 502 U.S. 981 (1991), the court also drew the distinction between government and private parties, stating, "We agree ... that to obtain monetary relief on a preliminary injunction, a *private* litigant must establish irreparable harm." *Id.* at 400 (emphasis added). In *Government of Virgin Islands, Dep't of Conservation and Cultural Affairs v. Virgin Islands Paving, Inc.*, 714 F.2d 283 (3d Cir. 1983), the court found that "[n]umerous cases support the Government of the Virgin Islands' assertion that when a statute contains, either explicitly or implicitly, a finding that violations will harm the public, the courts may grant preliminary equitable relief on a showing of a statutory violation without requiring any additional showing of irreparable harm." *Id.* at 286.[16]

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[16] The rule that different standards apply to the government has been consistently applied under many other statutes: the Civil Aeronautics Act of 1938 (*Civil Aeronautics Board v. Modern Air Transport, Inc.*, 81 F. Supp. 803, 806 (S.D.N.Y. 1949), *aff'd*, 179 F.2d 622 (2d Cir. 1950)); the Commodity Exchange Act (*Commodity Futures Trading Comm'n v. Hunt*, 591 F.2d 1211, 1220 (7th Cir. 1979), *cert. denied*, 442 U.S. 921 (1980); the Emergency Price Control Act of 1942 (*Shadid v. Fleming*, 160 F.2d 752, 753 (10th Cir. 1947); *Henderson v. Burd*, 133 F.2d 515, 517 (2nd Cir. 1943)); the Interstate Commerce Act (*Texas & P. Ry. Co. v. Gulf, C. & S. F. Ry. Co.*, 270 U.S. 266, 273-74 (1926); *Long Island Railroad Co. v. New York Central R. Co.*, 185 F. Supp. 673, 677

(continued...)

All these judicial decisions form the backdrop for FLA. STAT. § 895.05(5) and its provision for injunctive relief in cases brought by the State. The Legislature is presumed to have been aware of existing laws pertinent to pertinent to the legislation it enacts[17] and to have been familiar with previous interpretations of specific statutory language.[18] It also is presumed to have drawn the statute[19] with those cases in mind. *Times Publishing*, 222 So.2d at 473.

(...continued)
(E.D.N.Y.), *aff'd*, 281 F.2d 379 (2nd Cir. 1960)); the Labor Management Relations Act (*Davis v. Huttig Sash and Door Co.*, 288 F. Supp. 82 (W.D. Okla. 1968); *Wirtz v. Harper Buffing Machine Co.*, 280 F. Supp. 376 (D. Conn. 1968)); the Postal Act (*United States Postal Service v. Beamish*, 466 F.2d 804, 806 (3rd Cir. 1972)); and the Securities Act of 1933 and Securities Exchange Act of 1934 (*Securities and Exchange Comm'n v. Torr*, 87 F.2d 446 (2nd Cir. 1937); *Securities and Exchange Comm'n v. R. J. Allen and Associates, Inc.*, 386 F. Supp. 866, 875 (S.D. Fla. 1974); *Securities and Exchange Comm'n v. Bennett and Co.*, 207 F. Supp. 919, 923 (D. N.J. 1962); *Securities and Exchange Comm'n v. J. & B. Industries, Inc.*, 388 F. Supp. 1082, 1084 (D. Mass. 1974); *Securities and Exchange Comm'n v. General Refractories Co.*, 400 F. Supp. 1248, 1254 (D.D.C. 1975)).

[17] In construing statutes, the Supreme Court has found it "always appropriate to assume that our elected representatives ... know the law ...." *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979); *see also Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988).

[18] "Congress is deemed to know the ... judicial gloss given to certain language and thus adopts the existing interpretation unless it affirmatively acts to change the meaning." *Florida National Guard v. Federal Labor Relations Authority*, 699 F.2d 1082, 1087 (11th Cir.), *cert. denied*, 464 U.S. 1007 (1983); *see also Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978).

[19] The Florida RICO Act was originally enacted in 1977. *See* 1977 Fla. Laws ch. 334.

This Court should therefore presume that when the Legislature enacted the Florida RICO Act in 1977, it was well aware that different standards would -- and should -- be applied in proceedings instituted by the State. *See Bonanno*, 879 F.2d at 25. The creation of different classes of RICO actions is properly viewed as a deliberate and knowledgeable legislative decision.

For all these reasons, the State respectfully urges this Court to find imposition of an injunction bond in a case brought by the State under the Florida RICO Act is inappropriate, particularly when the Defendants have offered only unsworn, self-serving and uncorroborated statements which fall far short of rebutting the body of evidence presented by the State to support an injunction which restrains further racketeering activity and preserves illegal proceeds which are likely to be dissipated or removed from the reach of the court if the injunction were not maintained.

CONCLUSION

For all these reasons, Petitioner, DEPARTMENT OF LEGAL AFFAIRS, respectfully requests this Court to answer the certified question by holding that bingo conducted by an organization not authorized under FLA. STAT. § 849.0931 constitutes a "lottery" as that term is used in FLA. STAT. § 849.09 and, thus, is racketeering activity which is subject to the Florida RICO Act. In addition, Petitioner respectfully requests this Court to hold that the imposition of an injunction bond under the circumstances of this case was not a sound exercise of judicial discretion.

Respectfully submitted,

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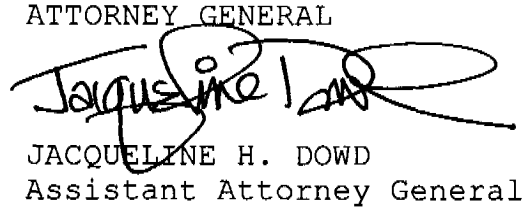
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by U.S. Mail this 27th day of January, 1998, to: THOMAS F. EGAN, ESQUIRE, 204 Park Lake Street, Orlando FL 32803; EDDIE A. SUAREZ, ESQUIRE, 606 Madison Street, Suite 2001, Tampa FL 33602; LOU KWALL, ESQUIRE, 133 North Fort Harrison, Clearwater FL 34615; JAMES M. RUSS, ESQUIRE, 18 West Pine Street, Orlando FL 32801-2697; PAUL OLSON, ESQUIRE, 1776 Ringling Boulevard, Sarasota FL 34236-6836; and STEVEN G. MASON, ESQUIRE, 1643 Hillcrest Street, Orlando FL 32803.

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