IN THE SUPREME COURT OF FLORIDA

CASE NO: SC00-2242

On Appeal from the Third District Court of Appeal

Lower Tribunal No: 3D-99-1597

BARRY I. HECHTMAN and BRENDA HECHTMAN,

Petitioners/Appellants,

v.

NATIONS TITLE INSURANCE OF NEW YORK, INC. and COMMONWEALTH LAND TITLE INSURANCE COMPANY,

Respondents/Appellees

ANSWER BRIEF OF APPELLEES

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STATEMENT OF THE CASE AND FACTS

Certain fundamental facts have been either omitted by the Hechtmans or inaccurately stated. Commonwealth Land Title Insurance Company (hereinafter "Commonwealth") is a title insurance underwriter. (R36)[1]. Jorge E. Hernandez was an attorney who, at all times material to the issues between these parties, was in good standing with The Florida Bar. (R127).

As specifically authorized by the statute in question in the present case, Mr. Hernandez was both a practicing attorney and acted as a title insurance agent for various companies. At no time was he licensed as a title insurance agent by the Department of Insurance (hereinafter either "DOI" or "the department"), nor was his law firm, the Law Office of Jorge E. Hernandez, P.A., licensed as a title insurance agency. (R126).

In March and April 1997, the Hechtmans and others asserted claims against Commonwealth for losses allegedly sustained when Hernandez defalcated funds.[2] One of the theories raised by the Hechtmans arose under §627.792, Fla. Stat., which provides for

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[1]Throughout this Answer Brief, the abbreviation "R_" shall refer to pages of the Record, and "BP_" shall indicate citations to the Brief of Petitioners.

[2]Claims submitted by the Hechtmans and others that were bsed upon written title insurance commitments or policies have been paid or resolved. This matter relates only to general funds placed with Mr. Hernandez's P.A. Trust Account without any insurance contract.

liability of title insurers in the event of defalcation by a **licensed title insurance agent.**[3]

On October 15, 1997, Commonwealth filed it Amended Complaint for Declaratory Relief, seeking a declaration that Commonwealth could not be held liable under §627.792 because attorneys in good standing with The Florida Bar are not licensed title insurance agents governed by DOI, but are instead governed by The Florida Bar, and are expressly exempted from §627.792's provisions. (R38). On May 11, 1998, Commonwealth filed its Motion for Partial Summary Judgment regarding this statutory provision. (R116). Subsequently, Nations Title Insurance of New York,

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[3]The full text of the statute is as follows:

> **627.792 Liability of title insurers for defalcation by title insurance agents.–** A title insurer is liable for the defalcation, conversion, or misappropriation by a *licensed title insurance agent* of funds held in trust by the agent pursuant to s. 626.8473. If the agent is licensed by two or more title insurers, any liability shall be borne by the insurer upon which a title insurance binder, commitment, policy, or title guarantee was issued prior to the illegal act. If no binder, commitment, policy, or guarantee was issued, each title insurer represented by the agent at the time of the illegal act shares in the liability in the same proportion that the premium remitted to it by the agent during the 1-year period before the illegal act bears to the total premium remitted to all title insurers by the agent during the same time period.

(Italicized emphasis added).

Inc.(Appellee herein), another title insurance underwriter sued by the Hechtmans, filed its Amended Motion for Partial Summary Judgment, seeking identical relief. (R163). On June 26, 1998, the trial court granted Commonwealth's motion and declared that Commonwealth could not be held accountable under §627.792 for Hernandez' defalcation. (R167). On October 2, 1998, the trial court entered an identical declaratory judgment on Nations Title's Amended Motion for Partial Summary Judgment, and the Hechtmans then voluntarily dismissed their remaining claims against Nations Title in favor of an appeal of this issue. (R263, 268).

The Third District Court of Appeal issued its decision on June 7, 2000, affirming the trial court's grant of summary judgment on the basis that a title insurer is not liable under §627.792 for defalcations of attorney title agents.

> The plain and ordinary meaning of section 627.792 is that title insurers are only liable under its provisions for the defalcation, conversion or misappropriation of their title insurance agents who are duly licensed by the Department of Insurance. The fact that attorney agents have been expressly exempted from the licensure requirement (and hence regulation by the Department of Insurance) evinces a clear legislative intent that title insurers are not to be held liable for attorney agents' thefts under this statute.

Hechtman v. Nations Title Ins. of New York, Inc., 25 Fla. L. Weekly 1357 (3rd DCA 2000) (see Appendix A to Appellants' Brief on the Merits at 5-6).[4]

The Hechtmans' request for rehearing *en banc* was denied on September 20, 2000, but the Third District certified to this Court as a matter of great public importance the following question:

> Whether §627.792, Fla. Stat. (1997), which provides that an insurer is liable for the misfeasance of a "licensed title insurance agent" applies to a title insurance agent who is an attorney and is therefore exempt from licensing as a title insurance agent by the Department of Insurance under §626.8417, Fla. Stat. (1997).

On November 6, 2000, this Court deferred the decision on jurisdiction and directed the parties to file their briefs on the merits. For the reasons set forth hereinbelow, Commonwealth believes that the question posed by the Third District is not one of great public importance when viewed in its full appropriate context, and that even if the Court reaches the merits of the question, the answer must be in the negative.

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[4]In issuing its decision, the Third District majority clearly stated its "concern" with the "wisdom" of the legislative enactment, but nevertheless held that where the legislature has used language which is clear and unambiguous, and conveys a clear and definite meaning, a court is not entitled to depart from that meaning, but the statute must be given its plain and obvious meaning.

SUMMARY OF ARGUMENT

The Petitioners' argument is grounded on various fatally flawed premises which are then woven together to create an appearance of dire consequences if the legal conclusions of both the trial court and the Third District are upheld. When these assumptions are viewed in a correct light, the entire fabric of the Petitioners' argument unravels. Among the erroneous assumptions are:

1. Without statutory liability under §627.792, Fla. Stat.,there will be no avenue for recovery by mortgage investors whose funds are misappropriated by attorneys.

2. There is no distinction between attorneys and non-attorney title agents in either the capability for preventive oversight or the array of available remedies.

3. The legislature specifically intended to create a uniform source of statutory liability for all victims of misappropriation regardless of whether it is committed by an attorney or by a title agent licensed by the Department of Insurance.

Each of these assumptions fails, and the correct result is the one reached by the Third District in affirming the trial court's conclusion. The language of §627.792, Fla. Stat., is clear both on its face and when read within the context of the entire statute. There are significant impairments in the ability

of either a title insurer or the Department of Insurance to supervise the escrow accounts of attorneys; indeed, oversight of attorneys is by The Florida Bar as an arm of this Court, and not by the Department of Insurance. Furthermore, the legislature specifically noted during its consideration of §627.792 that it would not apply to attorneys.

Any mortgage lender can protect itself against misappropriation of funds in transit by requesting a closing protection letter before funding a transaction. In so doing, the title insurance carrier is made aware of the pending transaction and is placed on notice of the exposure which it has agreed to accept. Even in the absence of the title insurer's absolute liability under the statute, when a defalcation of escrow funds is committed by an attorney, there are available malpractice and other common law remedies against the lawyer as the active wrongdoer, and where the attorney cannot be reached for those remedies, The Florida Bar provides a client recovery fund which is not available to victims of defalcation by non-lawyers.

When viewed in the complete context of the issues, it is clear that the Third District and the trial court have correctly interpreted §627.792, Fla. Stat., and its statutory remedies are not invoked against lawyers who serve as title agents. This Court should decline to exercise jurisdiction over the issue because it does not truly present an issue of great public

importance. Alternatively, the decision of the Third District should be affirmed on its merits.

ARGUMENT

The Petitioners place great reliance on Judge Schwartz' dissenting opinion in the Third District, and adopt his viewpoint. That view, however, is contrary to the clear legislative intent, regardless of how sharply Judge Schwartz may disagree with it. There is a clear statutory expression of the legislative intent, and as the Third District majority correctly noted, that intent must be honored. Moreover, for reasons which were overlooked in the Third District, the legislature's approach is reasonable, and bears much more than a mere rational relationship to the legitimate governmental objective of the statute.

I.
THE REQUIREMENTS AND METHODS FOR ACQUIRING AUTHORIZATION TO WRITE TITLE INSURANCE ARE DIFFERENT FOR ATTORNEYS THAN FOR NON-ATTORNEY TITLE AGENTS.

Once a non-lawyer becomes licensed by the Department of Insurance, the procedural requirements and oversight by DOI are materially different than for attorney agents. Indeed, a review of the entire statutory scheme reveals that it was actually created for the very purpose of regulating non-lawyers.

A "title insurance agent" is defined as

> . . . a person *appointed*[5] in writing by a title insurer to issue and countersign binders, commitments, policies of title insurance, or guarantees of title in its behalf.

§626.841(1), Fla. Stat. (emphasis added). Before one can be appointed by a title insurer, however, a valid title insurance agent's license must be issued to that person by DOI. §626.8417, Fla. Stat. The statute sets forth specific requirements for licensure by DOI, which requirements are materially different from the requirements of this Court for admission to The Florida Bar. The minimal requirements for licensing as a title insurance agent include (but by no means are limited to) the following:

1. The applicant for a license must be at least 18 years of age, §626.8414(1)(a), Fla. Stat., whereas candidates for admission to The Florida Bar must be somewhat older.[6]

2. The applicant must be a bona fide resident of Florida, §626.8414(1)(b),Fla. Stat., whereas attorneys are not required to

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[5]The Petitioners devote much attention to the notion that the statute's use of the term "license" is synonymous with "appointed." (BP 12, 19-20). As is discussed in greater detail below, those terms are noticeably distinct.

[6]It is highly unlikely that anyone can qualify for admission to The Florida Bar at an age as young as 18, given the requirement that one attain the degree of bachelor of laws or juris doctor prior to being admitted to sit for the bar examination. *Bar Admission Rules 2-11.1*.

be Florida residents either at the time of admission to the bar or at any other time.

3. An application must be filed on DOI's printed forms, §626.8417(2),Fla. Stat., and the department must determine whether the applicant is trustworthy and competent, §626.8417(3), Fla. Stat., including any additional information requested pursuant to §626.8423, Fla. Stat., and has completed a 40 hour classroom course (or had 12 months experience). §626.8417(3)(a), Fla. Stat. Applicants for admission to practice law must pass a background investigation which is much more rigorous (see *Bar Admission Rules 3-10 et seq.*), under specific guidelines which disqualify anyone who has committed any "unlawful conduct"; "academic misconduct"; "misconduct in employment"; "financial irresponsibility"; "neglect of professional obligations"; or "any other conduct which reflects adversely upon the character or fitness of the applicant." *Bar Admission Rules, §3-11.*

Thus, the requirements for admission to The Florida Bar are much more demanding than for becoming a licensed title insurance agent through DOI, and the title insurers should be entitled to reasonably believe that, generally speaking, attorney agents are more mature, experi-enced and ethically reliable than the minimum qualifications for licensure by DOI, and that their scrutiny is not as acutely needed for attorney agents as it is for DOI licensed title agents.

Once DOI issues a title insurance agent's license to an individual, the licensee is permitted to sell title insurance only when employed directly by a title insurance company or by a title insurance agency which is first licensed by DOI pursuant to §626.8418, Fla. Stat., and is then appointed by a title insurance company pursuant to §626.8419, Fla. Stat. Specific requirements for receipt and use of a title insurance agency license include:

1. An application on DOI forms which includes certain specified information and any other data required by the department.

2. Deposit with DOI securities with a market value of not less than $35,000 or a surety bond in that amount, payable to any damaged title insurer, to secure the performance by the agency of its duties and responsibilities to each underwriter for which it is appointed. Such deposit or bond must remain in place and unimpaired for as long as the agency is doing business in the state and for one year thereafter. §626.8418(2), Fla. Stat.

3. Once licensed, a title insurance agency must obtain a fidelity bond in an amount not less than $50,000 for **each** title insurer appointing it, §626.8419(1)(a), Fla. Stat., and must also carry errors and omissions insurance in an amount not less than $250,000 per claim, with a limitation on the aggregate deductible against the claim. §626.8418(1)(b), Fla. Stat.

Thus, it clearly appears that the legislature has not only created a statutory scheme which permits licensing of individuals with minimum qualifications far below those for admission to The Florida Bar, but also imposes on the Department of Insurance a responsibility for oversight, supervision and holding of security against defalcations by such individuals. (See also §§626.8427; 626.843; 626.8433; 626.8437; 626.844; 626.8443; 626.8447 re: additional supervision and oversight duties and authority of DOI). The statutory scheme, taken as a whole, does not simply impose on the title insurers strict liability for defalcations of its licensed agents; it also provides to title insurers the assistance of the department in the licensing, bonding, monitoring and reporting of suspensions, revocations or non-renewals of appointments by other title insurers. The legislature has clearly stated that attorneys are exempted from all of these statutory demands (§626.8417(4), Fla. Stat.), and has not imposed on title insurers the strict liability which applies with regard to "licensed title insurance agents."

II.
THE LEGISLATURE'S CLEARLY EXPRESSED INTENT IS THAT ATTORNEY TITLE AGENTS NOT BE INCLUDED WITHIN THE STRICT LIABILITY PROVISIONS OF §627.792.

As is noted above, the plain language of §626.8417 unambiguously provides that:

> (1) A person may not act as a title insurance agent as defined in s. 626.841

> until a valid title insurance agent's license has been issued to that person by the department.
>
> * * *
>
> (4)(a) Title insurers or **attorneys duly admitted to practice law in this state and in good standing with The Florida Bar are exempt from the provisions of this *chapter*** with regard to title insurance licensing and appointment requirements.

(emphasis added). This exemption is not arbitrary, but instead reflects the deeply rooted Constitutional mandate that this Court regulate and discipline attorneys. *Florida Constitution, Art. V, §15*. The constitutional mandate has also been statutorily codified as *§454.021, Fla. Stat.*[7]

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[7] *Florida Constitution, Art. V, §15* recites that

> **Section 15. Attorneys; admission and discipline.–**The supreme court shall have ***exclusive jurisdiction*** to regulate the admission of persons to the practice of law ***and the discipline of persons admitted.***

(Italicized emphasis added). The statutory confirmation of this concept provides as follows:

> **454.021 Attorneys; admission to practice law; Supreme Court to govern and regulate.–**
>
> (1) Admissions of attorneys and counselors to practice law in the state is hereby declared to be a judicial function.
>
> (2) ***The Supreme Court of Florida***, being the highest court of said state, ***is*** the proper court ***to govern and regulate*** admissions of attorneys and counselors to practice law in said state.

(Italicized emphasis added).

Furthermore, the plain language of the statutory exclusion is bolstered by its history. The framers of the statute recognized that licensed attorneys are governed by the judicial system, rather than the Department of Insurance, and that further regulation and oversight would therefore be inappropriate. The following discussion occurred during the debate of Senate Bill 520, which evolved into the subject statute:

> Senator Scott: Mr. Chairman?
>
> Chair: Yes, Senator Scott?
>
> Senator Scott: It my understanding that this [Senate Bill No. 520] does not apply to attorneys who issue title insurance.
>
> Audience: [Fla. Land Title speaker]: No, sir, it doesn't, Senator. ***It specifically excludes attorneys, since they're regulated by the Supreme Court, we don't think they need any more regulation.***
>
> Senator Scott: Thank you.
>
> Chair: Okay. Senator Thomas moves the Bill. Anybody want to vote against it? Show the Bill recorded favorably by all members of the committee present . . . .

(emphasis added). *Certified Transcript of Record of Excerpts from the Florida Senate, Senate Commerce Committee, Senate Bill*

520, April 17, 1985. (R132-33). How could the legislative intent be any clearer?

The First District has recently agreed that the legislative intent is clear and unambiguous. In *Department of Insurance v. Keys Title and Abstract Company, Inc.*, 741 So.2d 599 (Fla. 1st DCA 1999), the court held that the legislature had a rational basis for limiting the statute's applicability to non-attorney title agents. *Keys Title* challenged the constitutionality of §627.782(e), arguing that a reporting requirement contained in that section of the statute violated constitutional guarantees of equal protection by placing additional burdens upon non-lawyer title insurance agents. As the Hechtmans argue in the present case, *Keys Title* asserted that attorneys should also be subject to the statutory requirements. The First District disagreed, concluding that the legislature had a valid basis for exempting lawyers from the operation of the statute.

> [L]awyers who are members in good standing with The Florida Bar are exempt from the licensure requirements of Chapter 626. Because lawyers are not "licensees" of the Department of Insurance, they are not subject to the Department's reporting requirements.
>
> * * *
>
> The authority to regulate attorneys is reserved for the Florida Supreme Court under Article 5, Section 15 of the Florida Constitution. In contrast, the class of non-lawyer insurance agents consists entirely of persons who are selling title insurance, and

> all of them are subject to discipline by the Department of Insurance.

741 So.2d at 601. The court also observed that the department cannot sanction attorneys for conduct that would be inconsistent with Chapter 626.

The Petitioners assert that despite the clear language of the statute, the legislature really intended to hold title insurers strictly liable for defalcations by all title insurance agents regardless of whether or not they are licensed by the department. That argument necessarily presumes, however, that the use of the word "licensed" is mere surplusage. Statutory language cannot, however, be assumed to be superfluous.[8] The statute must be construed so as to give meaning to all its words and phrases. *Terrinoni v. Westward Ho!,* 418 So. 1143, 1146 (Fla. 1st DCA 1982). Indeed,

> A maxim that carries as much weight as the presumption of an enactment's constitutionality cautions us that operative language may not be regarded as surplusage. . . . A court is not a super-legislature that second guesses what a legislature really meant to say; the legislated language speaks for itself.

City of Pompano Beach v. Capalbo, 455 So. 2d 468, 469 (Fla. 4th DCA 1984). In the present case, the legislature specifically

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[8]Statutory language is also not a mere "inconsequential choice of words" as suggested by Judge Schwartz in his dissent. (*Hechtman v. Nations Title at 12*). Indeed, as is noted above at page 14, the legislature specifically discussed and considered the fact that this legislation would not apply to attorneys.

chose the phrase "licensed title insurance agent" within §627.792, and that language speaks for itself. The imposition of vicarious liability for defalcations by licensed title insurance agents does not extend to attorney agents who are not licensed by the Department of Insurance, and neither the Petitioners nor any court should treat that language as mere surplusage or otherwise second guess what the legislature really meant to say.[9]

It is undisputed that at the time of the defalcation, Hernandez was a member in good standing of The Florida Bar. (R127). Therefore, the trial court and the Third District correctly interpreted and applied §627.792, Fla. Stat., when concluding that Commonwealth and other title insurers cannot be held accountable under that statutory provision for the attorney's defalcation.

[9]The Department of Insurance apparently agrees that this is the legislature's plain language. In *Keys Title, supra.*, the Department of Insurance argued that in adopting premium rates for title insurance as required by §627.782, Fla. Stat., the department has given due consideration to the risk of liability for defalcation by licensed title insurance agents only (see §627.782(2)(d), Fla. Stat.), and has not included in the premium rates any recognition of the exposure for defalcation of attorney agents where no title insurer has been identified in a particular transaction.

III.
THE STATUTORY SCHEME OF §627.792 IS NOT THE ONLY AVENUE FOR RECOVERY BY VICTIMS OF DEFALCATION.

The Petitioners have argued, and the Third District apparently fears, that unless the statutory strict liability of §627.792, Fla. Stat., is imposed on attorney title insurance agents, victims of their defalcations will have no basis for recovery of their losses. That dire result is simply not the case.

Fiduciary Duty of Attorney

First, by virtue of the attorney/client relationship, attorneys have a fiduciary duty to their clients and others to whom they have responsibility. Thus, where a mortgage lender or a purchaser of real estate entrusts escrow money to an attorney, the lawyer already has an absolute duty to properly maintain those funds in a trust account, and to release the funds only pursuant to the proper instructions of the party(ies) for whom the funds are held. Failure to abide by that responsibility exposes the attorney and the law firm to a variety of potential tort and contract claims.

Client Security Fund

The likelihood of recovering on such claims is much higher than it would be against many non-attorneys. Most attorneys have malpractice coverage which will respond to professional liability

claims, and many attorneys can also be reached personally for all or a substantial portion of any award granted against them. A claim can also be made against the Clients' Security Fund of The Florida Bar by any victim of misappropriation, embezzlement or other wrongful taking or conversion by a member of The Florida Bar in connection with (1) the practice of law, (2) any fiduciary capacity customary to the practice of law, or (3) as an escrow agent. Rules Regulating The Florida Bar, Rules 1-8.4 and 7-1 et seq.[10]

Audit Issues

From a policy standpoint, it is more equitable that the Clients' Recovery Fund be responsible for helping to make whole those who have been mistreated by attorneys than to visit the loss on title insurers who were in no way involved in the transaction from which the claim arises. The Florida Bar imposes specific requirements on attorneys regarding the handling of and accounting for trust accounts[11]. The Florida Bar has the

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[10]While the Clients' Security Fund does not provide for recovery of such losses as a matter of right, it does provide an avenue through which victims can seek recovery of their losses without having to file and prosecute any lawsuit. The fund thus presents the opportunity for a speedy remedy from a source dedicated to that purpose, without the cost, delay, aggravation and uncertainty of litigation.

[11]The legislature has also included requirements and restrictions on the handling of funds held in trust by title insurance agents who are subject to the act, and authorizes DOI to promulgate additional rules. §626.8473, Fla. Stat. Without the exemption in §626.817(4), attorneys would find themselves in

authority to monitor and audit attorneys' trust accounts, and to use this Court's authority to sanction violators. Title insurance carriers do not have the ability to effectively audit or otherwise examine the propriety of an attorney's trust accounts which include moneys not related to their own transactions. As a result, the title insurance carriers are not in a position to effectively monitor or control the activities of appointed attorney agents under the circumstances of the statutory provision at issue herein, i.e., when a particular title insurer is not a participant in the transaction, and therefore has no knowledge of it or ability to control it.

Closing Protection Letters

The parties to a transaction do, however, have the ability to protect themselves from the outset of the transaction. There are three critical documents which are customarily utilized in the title insurance industry: a closing protection letter ("CPL"), a commitment for title insurance, and the title insurance policy itself. Where a party to a transaction is truly drawing comfort from the fact that one or more title insurers have authorized a particular attorney to write title insurance commitments or policies, that party can request a CPL, which is specifically intended to protect funds in transit through an

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the impossible position of operating under separate and potentially conflicting regulations for trust accounting.

escrow account. The specific language of a CPL is set by Regulation 4-186.010, rather than being subject to negotiation on a case by case basis. (A sample form of CPL is attached hereto as Appendix 1)[12]. In many instances, the CPL is included as part of a commitment for mortgagee title insurance. (See Appendix 2). Thus, rather than waiting until after the defalcation has occurred and then seeking to hold one or more title insurers proportionately accountable for a loss in which they had no notice and played no part, a party placing funds in escrow can obtain a CPL at the time the funds are delivered, thereby identifying a specific title insurer and placing that insurer on notice of the transaction.[13]

In his dissent, Judge Schwartz states his concern with a statutory remedy which does not lie against those who should be regarded as more trustworthy because of their status as attorneys. That outlook misses the point. While it is true that the attorney's status as a member of The Florida Bar may engender the confidence of his clients and others who entrust to him custody over their funds, it must also be noted that (1) not all

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[12]As is noted by the Petitioners, this Court can take judicial notice of facts that are not subject to dispute because they are capable of accurate and determination through unquestioned sources. (BP at 14, fn. 2).

[13]Indeed, it may be that the availability of this simple procedure is the reason there is not a single reported case (other than the present one) interpreting or applying §627.792, Fla. Stat.

attorney trust transactions involve the use of title insurance, (2) The Florida Bar (an arm of this Court) is in a better position to monitor attorney trust accounts than would be a title insurer, and (3) in any event, those who utilize the attorney as their escrow agent have a greater right to ask for and receive an accounting of the status of their funds at any time than does a title insurer which is not connected to the transaction.[14] As a result, there is no actual basis for the dire fears expressed by Judge Schwartz and advanced by the Petitioners.

IV.
THE STATUTE CREATES NO DENIAL OF EQUAL PROTECTION BECAUSE THE LEGISLATURE HAD A RATIONAL BASIS FOR THE STATUTORY SCHEME, WHICH PROPERLY ADDRESSES A LEGITIMATE GOVERNMENTAL OBJECTIVE.

The Petitioners urge that §627.792 is constitutionally impermissible because it violates the Equal Protection Clause by exempting title insurers from liability for defalcations by their attorney title agents, while imposing such liability as to agents licensed by DOI. (BP 23-27). This argument is based on an erroneous premise, and is without merit. Indeed, as is discussed at pages 15-17 above, the First District has already heard and rejected this line of reasoning. *Department of Insurance v. Keys*

[14]It should be remembered that the issue in the present case is whether title insurers can be held liable under §627.792, Fla. Stat., where no title insurer has been identified in the transaction.

Title and Abstract Company, Inc., 741 So.2d 599 (Fla. 1st DCA 1999).

According to the Petitioners, the legislative intent in creating §627.792 was "to provide an avenue of recovery to victims of trust fund thefts by title agents against their principals, where the common law provided none." (BP 24). Elsewhere, the Petitioners refer to the "presumed intent of the legislature" as being the creation of a general liability without regard to whether the agent is or is not licensed by the Department of Insurance. (BP 23). As is noted above, on page 14, the clear legislative intent as specifically expressed at the time the committee unanimously reported the bill was that attorneys would not be included in this statutory scheme.

The "intended beneficiaries of this statute" are <u>not</u> all purchasers of title policies in Florida. (BP 24). The statute is clearly intended to create a remedy for parties to real estate transactions who entrust their funds to non-attorney licensed title agents whose business practices and trust accounts are not subject to regulation and scrutiny by The Florida Bar, and for whom there is no clients' recovery fund in addition to whatever other sources of recovery may exist.

It is not accurate to state generally that title insurers are "in the best position to monitor their agents' activities" (BP 24) where those agents are attorneys, rather than "licensed

agents" as covered by the statute. A title insurance agency's books, records and escrow accounts can be monitored and audited by any title insurer appointing that title agency. In the case of an attorney agent, however, the attorney/client privilege often interferes and prevents the title insurer from the access to files and trust accounts it would need in order to undertake full responsibility for the integrity of the attorney. To a great extent, until a problem becomes known to them, the title insurers are left to place their trust in this Court and The Florida Bar to monitor and sanction attorneys whose trust account practices are below standard.[15]

It is also incorrect that there is no rational basis for the statutory provision as enacted by the legislature, on a theory that those who purchase title insurance through attorneys will have "no right of recourse for their agents' defalcations against the title insurers." (BP 26). The issue has little or nothing to do with the issuance of title insurance, but relates more specifically to funds in transit from a mortgage lender to its

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[15]In his dissent, Judge Schwartz comments that the statute should protect clients who have dealt with attorneys because "if anything, [attorneys] should be regarded as more trustworthy than others because they are members of the Florida Bar." *Hechtman v. Nations Title at 8*. (See also BP 25). That heightened level of trust emanates from this Court having certified the attorney as competent and of good moral character, after a thorough investigation by the Florida Board of Bar Examiners. Indeed, to a certain extent, the title insurance underwriters are among those who rely on this Court and The Florida Bar to monitor the attorney's character and compliance with ethical standards.

borrower.[16] Any lender who wishes to protect itself against the risk of defalcation on the part of the title closing attorney agent can do so through a closing protection letter, which is routinely provided upon request or as part of a commitment for title insurance. There is simply no denial of equal protection in §627.792.

CONCLUSION

The legislature made a conscious and deliberate choice to exclude attorney title agents from the operation of §627.792, recognizing that this Court, through The Florida Bar, regulates the licensing, supervision and sanctioning of attorneys and their trust accounts. Furthermore, even in the absence of the strict liability provisions of §627.792, victims of attorney defalcation will have available remedies in the form of claims against the attorney, malpractice claims against the law firm and through The Florida Bar Clients' Security Fund as well as full contractual protection letters. Therefore, the question presented by the Third District is not one of great public importance, and this Court should decline to exercise jurisdiction in this matter.

Should the Court decide to entertain the issue, the certified question should be answered in the negative because the

[16]The problem which arose in the present case is that the Hechtmans' loan proceeds were allegedly wrongfully taken by Mr. Hernandez, not that he was paid for title insurance policies which were not issued.

legislative intent is extraordinarily clear that attorneys were specifically to be excluded from the operation of DOI licensure and regulation.

The majority decision in the Third District, affirming the findings and conclusions of the trial court, should be upheld.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We hereby certify that a true and correct copy of the foregoing was furnished by mail this 2ND day of February 2001 to: James S. Telepman, Esq., Cohen, Norris, Scherer, Weinberger & Wolmer, 712 U.S. Highway One, Suite 400, North Palm Beach, Florida 33408; Thomas Manick, Esq., Manick Rosenberg & Contreras LLP, Alhambra International Center, 255 Alhambra Circle, Suite 425, Coral Gables, Florida 33134; and Hendrik G. Milne, Esq., Aballi Milne Kalil & Garrigo, P.A., 2250 SunTrust International Center, One S.E. Third Avenue, Miami, Florida 33131.

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APPENDIX