IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC09-938

ATTORNEYS' TITLE INSURANCE FUND, INC., a Florida corporation,

Petitioner,

v.

ORGANIZED TITLE, LLC; JERRY OMOFOMAN; EROMONSELE M. IMOISILI a/k/a MARCEL IMOISILI; M.I. INDUSTRIES USA, INC.; MARILYN L. MALOY; LAW OFFICES OF MARILYN L. MALOY, P.A.; WACHOVIA BANK, N.A.; BANK OF AMERICA, N.A.; and CITIBANK, F.S.B.,

Respondents.

INITIAL BRIEF OF ATTORNEYS' TITLE INSURANCE FUND, INC.

ON REVIEW OF A CERTIFIED QUESTION FROM THE
FOURTH DISTRICT COURT OF APPEAL

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RECORD REFERENCE ABBREVIATIONS USED IN THIS BRIEF

This case arose as an interlocutory appeal to the Fourth District Court of Appeal from an order denying a motion to dissolve a temporary injunction. Consequently, the record on appeal consists only of documents provided to the district court as appendices to the parties' briefs.

The record facts are identified in this brief by reference to the number and page of the parties' respective appendices, as follows:

The symbol "**MII App. __**" will be used to reference the consolidated appendix to the district court brief filed by M.I. Industries USA, Inc.; and

The symbol "**ATIF App. __ at __**" will be used to reference appendices to the district court brief filed by Attorneys' Title Insurance Fund, Inc.

INTRODUCTION

Real estate values throughout Florida, and the economic well-being of Floridians, have been devastated by an untold number of fraudulent real estate schemes and transactions. One such fraudulent scheme had severe economic consequences to the trust account of a member of The Florida Bar, Marilyn Maloy, and to the title underwriter which insured the Florida home buyers and mortgage lenders whose real estate transactions were processed through Ms. Maloy's trust account – Attorneys' Title Insurance Fund, Inc. ("Attorneys' Title").

Attorneys' Title insures real estate titles and closings only through attorneys who are members of The Florida Bar and authorized to act as Attorneys' Title's agents. In 2006, Attorneys' Title uncovered and closed down a fraudulent scheme by which an unlicensed title company was able to withdraw millions of dollars from the real estate trust account of Ms. Maloy. As a result of the fraudulent depletion of Ms. Maloy's trust account, Attorneys' Title was obliged to pay almost $1.8 million to homeowners and mortgage lenders insured under title policies, commitments, and closing protection letters issued by Ms. Maloy in the name of Attorneys' Title.

Attorneys' Title brought suit to stop the fraudulent practices which were depleting Ms. Maloy's trust account, together with motions for a temporary injunction which sought to freeze funds misappropriated from her trust account which had been wired to bank accounts maintained by perpetrators of the fraud. The trial court granted Attorneys' Title's motions, and issued a temporary injunction which stopped the fraud and froze traceable funds withdrawn from Ms.

Maloy's trust account. The injunction was overturned by the Fourth District Court of Appeal, however, on the basis that Attorneys' Title had a legal remedy for money damages under its claim for unjust enrichment. The court then certified to the Court, as a question of great public importance, whether unjust enrichment is a legal claim that precludes the entry of a temporary injunction. *M.I. Industries USA Inc. v. Attorneys' Title Ins. Fund, Inc*., 6 So. 3d 627 (Fla. 4th DCA 2009) ("*Attorneys' Title*"). A copy of the district court's decision is attached as Appendix 1.

The question certified by the district court is narrowly addressed to the authority of trial judges to freeze funds in a bank account which were obtained from fraudulent real estate transactions processed through an attorney's trust account, when a claim for unjust enrichment against the perpetrators has been pled along with the request for injunctive relief. As framed, though, the question invites the Court's consideration of the long-standing contradiction between the liberal pleading allowed by the Rules of Civil Procedure, which allow diverse causes of action to be pled in a single complaint, and a residual effect of the distinction between law and equity which the Court abolished in 1967.

More significantly, the issues raised by the district court's decision bring into play the Court's constitutional authority to regulate attorneys admitted to practice in Florida, inasmuch as the fraudulent transactions in this case were conducted through a trust account that the Court, through its Rules, has required for the processing of client funds. The district court did not take into account the Court's direct role in the preservation and recoupment of escrowed funds held by

Florida attorneys. The funds which were fraudulently withdrawn from Ms. Maloy's regulated account were insured through title insurance issued by Ms. Maloy in her capacity as agent for Attorneys' Title.

Title insurance underwriters stand as the first line of defense against adverse financial risks to Florida's mortgage lenders, and particularly those which sound in fraud. For that reason, the title insurance industry intends to ask the Court for permission to explain its concerns on these issues in an *amicus* brief.

STATEMENT OF THE CASE

Attorneys' Title issues title insurance policies and closing protection letters to home buyers and mortgage lenders throughout Florida,[1] using attorneys licensed to practice law in Florida as its agents.[2] Through the issuance of its title commitments and policies, Attorneys' Title insures the title to real property. Through closing protection letters issued on a form required by the Florida Department of Financial Services,[3] Attorneys' Title also insures real estate closings for both home buyers and mortgage lenders.

Marilyn Maloy was a member of The Florida Bar who served as a title issuing agent for Attorneys' Title. In 2006, Attorneys' Title learned that funds were being disbursed improperly from Ms. Maloy's trust account as part of a

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1 ATIF App. 4 at Exhibit A.

2 ATIF App. 1 at 9 and Exhibit A; ATIF App. 4 at 2 and Exhibit A.

3 Fla. Admin. Code, Rule 69O-186.010.

fraudulent real estate sales scheme engineered by Jerry Omofoman through his solely-owned title company, Organized Title LLC ("Organized Title").[4]

Attorneys' Title filed a complaint, and later an amended complaint against Omofoman, Organized Title, Ms. Maloy, her professional association, and Bank of America, for breach of contract, fraud, unjust enrichment, and injunctive relief.[5] Simultaneously, Attorneys' Title filed an *ex parte* emergency motion for a temporary injunction and the appointment of a receiver.[6] The trial court granted that motion.[7]

Subsequently, Attorneys' Title identified Omofoman's brother, Eromonsele Imoisili ("Marcel") and his solely-owned company, M.I. Industries USA, Inc. ("MI Industries"), as participants in Omofoman's fraudulent schemes, and as recipients of funds fraudulently disbursed from Ms. Maloy's trust account. Supported by an affidavit from former FBI Special Agent Frank Gramlich, Attorneys' Title moved to file a second amended complaint to include claims for unjust enrichment and supplemental injunctive relief against MI Industries, and to name Citibank as the

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4 ATIF App. 4 at 1-6.

5 ATIF Apps. 1 and 2.

6 ATIF App. 3.

7 ATIF App. 5.

repository of misappropriated trust funds.[8] The court granted Attorneys' Title's motion.[9]

MI Industries moved to dissolve the injunction.[10] After an incomplete initial hearing after which the court ordered a full evidentiary hearing to be held following the completion of discovery,[11] the trial court held an evidentiary hearing on MI Industries' motion to dissolve.[12] In due course, the court entered an order denying the motion to dissolve.[13] The court also entered an order releasing $75,000 to MI Industries so that it could pay its lawyer, and increased Attorneys' Title's injunction bond from $15,000 to $250,000.[14]

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8 ATIF Apps. 6, 7, 9. Attorneys' Title pled no cause of action for fraud, or any other action at law, against MI Industries.

9 ATIF App. 8.

10 ATIF App. 10.

11 ATIF App. 11 at 29.

12 ATIF App. 19. Marcel testified at the hearing, but the court imposed time restraints which prevented Attorneys' Title from being able to call its witnesses, including the former FBI agent/investigator/affiant Frank Gramlich who was in the courtroom. *Id*. at 247.

13 MII App. at 383-85. While the appeal in the district court was pending, MI Industries filed a second motion to dissolve the temporary injunction which was heard by a successor judge after the original trial judge recused himself. Reply Brief, Ex. A. Based on the record of the first evidentiary hearing and MI Industries' submission of an affidavit alleged to contain new evidence, that motion was also denied. Reply Brief, Ex. B.

14 ATIF App. 25.

The defendants appealed the order denying their motion to dissolve,[15] and Attorneys' Title cross-appealed the order releasing $75,000 to MI Industries and increasing its bond. The district court considered the interlocutory appeal without oral argument.

The district court reversed the trial court's order, dissolved the temporary injunction as to MI Industries, and certified as a question of great public importance whether:

> incident to an action at law, may a trial court issue an injunction to freeze assets of a defendant, where the plaintiff has demonstrated: (1) the defendant will transfer, dissipate, or hide his/her assets so as to render a trial judgment unenforceable; (2) a clear legal right to the relief requested; (3) a substantial likelihood of success on the merits; and (4) that a temporary injunction will serve the public interest?

Attorneys' Title, 6 So. 3d at 628. The court held that Attorneys' Title's cross-appeal was moot. *Id.*[16]

The district court duly issued its mandate after the expiration of 15 days, but on Attorneys' Title's motion the court recalled its mandate and ordered Attorneys' Title to maintain the injunction bond pending conclusion of proceedings in this Court. Appendix 2.

Attorneys' Title timely invoked the jurisdiction of the Court, and the Court entered an order setting a schedule for briefing on the merits. Attorneys' Title filed

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15 MI Industries did not appeal the order denying its second motion to dissolve the temporary injunction.

16 Attorneys' Title is not pursuing here the district court's increase of its injunction bond.

a motion for an extension of time to serve its initial brief, noting an inability to obtain consent or not from counsel for MI Industries. The Court entered an order which tolled the time for Attorneys' Title's initial brief, and ordered a response to the extension motion from attorneys who had represented MI Industries in the courts below. MI Industries' appellate counsel in the district court, Charles Franken, filed a response consenting to the requested extension but also moved to withdraw from his representation of MI Industries.

In orders entered on August 6, the Court granted Mr. Franken's motion to withdraw, and extended the due date for Attorneys' Title's brief until September 3.

STATEMENT OF THE FACTS

Through members of The Florida Bar, Attorneys' Title issues title commitments and policies which insure the title to real property, and closing protection letters which insure the closing transaction itself. These letters state that when title insurance is issued in connection with the closing of a real estate transaction, Attorneys' Title will reimburse the purchaser or mortgage lender for actual losses incurred in connection with a closing conducted by one of its attorney agents.[17]

In conjunction with the Court's constitutional responsibility for the admission and discipline of persons licensed to practice law in Florida,[18] the Court

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[17] A copy of Attorneys' Title's closing protection letter is attached as Appendix 3.

[18] Article V, § 15, Fla. Const.

has established rules which govern the trust accounts by which attorneys maintain funds for their clients.[19] A principal, if not the most predominant use of attorney trust accounts, is for the receipt and disbursement of escrowed funds in real estate transactions.

Marilyn Maloy was a licensed Florida attorney who handled real estate transactions, served as a title issuing agent for Attorneys' Title, and maintained a trust account devoted exclusively to the receipt and disbursement of funds derived from real estate transactions.[20] In 2006, Ms. Maloy allowed the misuse of her trust account by Omofoman and Organized Title, an unlicensed title company which was not appointed or approved as an agent for Attorneys' Title, and was not owned or operated by a licensed attorney.

Omofoman and Organized Title used Ms. Maloy and her trust account for numerous transactions involving the purchase and sale of real estate, including the preparation of settlement documents, the issuance of title policies and closing protection letters on behalf of Attorneys' Title, the conduct of the actual closings, and the receipt and disbursements of millions of dollars through her trust account.

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19 Rule 5-1.1, Rules Regulating Trust Accounts. The Court has "repeatedly held that the misuse of client funds held in trust is one of the most serious offenses a lawyer can commit." *The Florida Bar v. Travis*, 765 So. 2d 689, 691 (Fla. 2000).

20 ATIF App. 9. Ms. Maloy's trust account processed real estate transactions of more than $79 million. ATIF App. 19 at 9.

Relying on fraudulent real estate closing documents provided by Organized Title,[21] Ms. Maloy would unwittingly disburse falsely-generated funds from her trust account to Omofoman's co-conspirators, which included his brother Marcel and Marcel's wholly-owned company, MI Industries. Those funds were then funneled back to Omofoman, or used and dissipated by Marcel and MI Industries.

Organized Title was wholly owned and operated by Omofoman, a Nigerian immigrant who was a convicted felon.[22] Marcel allowed Omofoman and his wholly-owned company, Organized Title, to handle all of the real estate closings for MI Industries in 2006, despite the fact he knew that neither Omofoman nor Organized Title had a license to do business as a real estate closing or title agent in Florida.[23] Based on fraudulent real estate transactions formulated and closed by Omofoman through Organized Title, and with the knowing participation of his brother Marcel, over $5 million dollars was wired directly from Ms. Maloy's trust account into an MI Industries' account maintained at Citibank.[24]

In deposition testimony, Marcel acknowledged that every closing in which MI Industries participated was tainted by some manner of real estate or mortgage

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21 ATIF App. 7. Among other things, Organized Title had a pattern and practice of failing to record deeds and mortgages, and failing to pay off prior mortgages.

22 ATIF App. 17 at 16-17, 26-28; ATIF App. 19 at 33.

23 ATIF App. 19 at 34, 39, 53, 112-13, 140-41, 147, 176, 179.

24 ATIF App. 7 at 3; ATIF App. 11 at 21. Fifteen of the fraudulent real estate and mortgage transactions which took place in 2006, involving over $5 million in trust funds, are identified in ATIF App 23.

fraud. He testified that MI Industries held substantial funds in Citibank accounts which had been wired directly into those accounts from Ms. Maloy's trust account, and that most, if not all, of the closings involving MI Industries were insured by Attorneys' Title through closing protection letters.[25]

Omofoman's and Marcel's fraudulent real estate transactions significantly depleted Ms. Maloy's trust account, to the point that it had insufficient funds to pay home sellers and mortgage lenders on closings insured by Attorneys' Title under closing protection letters.[26] Pursuant to its contractual obligations, Attorneys' Title paid out nearly $1.8 million in losses to those real estate sellers and mortgage lenders.[27]

In response to an emergency *ex parte* motion filed by Attorneys' Title in January 2007, a temporary injunction was entered by the trial court which prevented further real estate transactions by Organized Title, and barred further withdrawals from Ms. Maloy's trust account.[28] A subsequent injunctive order froze over $500,000 of funds which had been misappropriated from her trust account and remained in an MI Industries' bank account maintained at Citibank.[29]

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25 *E.g.*, ATIF App. 17 at 48-49, 114; ATIF App. 18 at 236-41, 245-46; ATIF App. 19 at 53-55, 58-59, 84, 89, 92-93.

26 ATIF App. at 19 at 232, indicating that Ms. Maloy's trust account was short well over $1.5 million when it was closed down in 2007.

27 ATIF App. 19 at 10, 21, 185-87.

28 ATIF Apps. 5, 8.

29 ATIF App. 11 at 4, 28.

That freeze order is the subject of the district court's certified question. The only parties before the Court at this stage of the proceeding are Attorneys' Title and MI Industries.[30]

I. The types of fraudulent transactions used by Organized Title, Omofoman, and Marcel through Ms. Maloy's trust account.

Omofoman and Marcel utilized several different types of fraudulent schemes to effect the improper transfer of funds from Ms. Maloy's trust account. These included fraudulent loan applications, straw buyers, inflated appraisals, and falsified HUD-1 Settlement Statements to induce mortgage lenders to loan millions of dollars.

Record evidence established that over $5 million was run through Ms. Maloy's trust account fraudulently, with transactions that generated more than $1.4 million in trust funds for MI Industries.[31] Between January and June 2007 alone, $165,000 of those funds were transferred directly to Omofoman by Marcel.[32] Each of these transactions was insured by Attorneys' Title under closing protection

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30 Ms. Maloy and her professional association have been dismissed from the lawsuit. Other defendants in the trial court were not subject to the temporary injunction which was the subject of the appeal in the district court. Organized Title LLC was not involved in the district court appeal, but was designated as an appellee by the district court pursuant to Rule 9.020(g)(2), Fla. R. App. P.

31 ATIF App. 23.

32 ATIF App. 19 at 217-26. Marcel testified that $50,000 of these funds were a "loan" (*id*. at 218), but he admitted that none of the money was ever repaid. *Id*. at 226.

letters. The following are examples of the transactions established by Attorneys' Title in the trial court.

A. 4158 Southwest 195th Terrace in Miramar.

In March 2006, a transaction was created by which Marcel purported to sell his home to Adanfoh Okojie,[33] a Baltimore resident who was a long-time friend of Marcel's from Nigeria.[34] The HUD-1 Settlement Statement prepared by Omofoman and Organized Title for the closing showed a purchase price of $1.1 million, to be funded with a cash payment from Mr. Okojie of $324,270.76[35] and a mortgage loan from Metrocities Mortgage LLC for $770,000.[36] Mr. Okojie did not pay $324, 270 at the closing, however,[37] and the $770,000 in funds disbursed at the closing from Metrocities were not used to purchase the 195th Terrace property.

Rather, Marcel continued to live in the 195th Terrace property as his residence after the purported "sale." Mr. Okojie never moved to Florida or into the 195th Terrace residence.[38] Marcel used the $770,000 received from Metrocities to

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33 ATIF App. 18 at 236.

34 *Id.* at. 237.

35 ATIF App. 19 at 54-55.

36 *Id.* at 90.

37 *Id.* at 54. Marcel testified that Mr. Okojie did eventually pay him about three hundred thousand dollars – more than a year after the subject transaction. ATIF App. 19 at 129-30.

38 In his deposition, Marcel claimed to be renting the property from Mr. Okojie, contrary to the sworn representations made to the lender. ATIF App. 18 at 236-40.

start MI Industries.[39] He also made monthly mortgage payments to Metrocities, purportedly on behalf of Mr. Okojie.[40] Marcel admitted under oath that the whole reason for the purported "sale" was because he had bad credit and could not refinance the home in his name.[41]

B. "Flip" transactions with condominium units in Symphony Towers in Ft. Lauderdale.

An illegal land "flip" is the purchase of real property from an intermediary buyer who immediately re-sells the property to a third party at a substantially inflated price, using the loan proceeds acquired from an institutional mortgage lender based on fraudulent appraisals and purchase/sale contracts. Two of the flip transactions identified by Attorneys' Title in the trial court involved condominium units in Symphony Towers, located at 600 West Las Olas Boulevard in Ft. Lauderdale.

(1) Symphony Towers Unit 1001S.

In August 2006, a closing was run through Ms. Maloy's trust account by Omofoman in which Organized Title purported to purchase Symphony Towers Unit 1001S from the Perez Family Revocable Trust for $420,000.[42] Marcel's bank records reveal that $360,000 was wired from MI Industries to Organized Title for

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39 *Id.* at 241-42.

40 ATIF App. 19 at 60, 84, 89, 92-93.

41 *Id*. at 54-66, 87-93.

42 *Id*. at 112.

the closing, and Marcel testified that the balance of $60,000 was due from Omofoman.[43] Omofoman, however, never supplied the requisite $60,000, and he never became the record owner of this property.[44]

Subsequently, Symphony Towers Unit 1001S was allegedly sold to Marcel by Omofoman for $640,000, using $544,000 in mortgage loan proceeds received from Washington Mutual Bank.[45] Although the HUD-1 Settlement Statement reflects that $512,862.10 was to be paid to Omofoman as the "seller," it was Marcel, the purported "buyer," who received these funds from Ms. Maloy's trust account. Washington Mutual was never told of this deception.[46]

(2) Symphony Towers Unit 716N.

On August 28, 2006, Omofoman used MI Industries and Marcel in a straw-man transaction to "flip" Symphony Towers Unit 716N based on fraudulent mortgage loan applications.[47] MI Industries purchased Symphony Unit 716N from its actual owner for $445,422.66, all of which was to be supplied in cash on the closing date.[48] Three days later, MI Industries allegedly sold this unit for $635,000 to an employee of Omofoman's, Amy Gendleman, who had obtained mortgage loans for $508,000 and $127,000 from BrooksAmerica Mortgage Corporation,

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43 ATIF App. 18 at 36-40.

44 ATIF App. 7 at 2.

45 ATIF App. 20 at 1.

46 ATIF App. 19 at 117-22.

47 ATIF App. 18 at 154-218.

48 *Id.* at 165-67.

based on mortgage loan applications which falsely represented that she earned a salary of $12,900 per month and had liquid assets of over $100,000.[49]

The $445,000 needed by Marcel and Omofoman to close the original purchase from its true owner came from the two mortgage loans from BrooksAmerica, and the remaining balance of approximately $200,000 which came in Ms. Maloy's trust account from BrooksAmerica was divided between MI Industries and Omofoman.[50]

C. Other fraudulent transactions.

Marcel also engaged in so-called "equity participations" by which he loaned significant sums of money to various individuals in exchange for just a quitclaim deed, and received from Ms. Maloy's trust account (sometimes on the same day) the loan proceeds plus a so-called "commission" which would range from $25,000 to $456,000.[51] These transactions, facilitated through "straw" buyers,[52] did not comply with the laws which govern mortgage loans and land sale contracts, and violated Florida' usury laws.

II. The record evidence supporting the elements for injunctive relief.

The evidence before the trial court when the temporary injunction was entered included hundreds of pages of real estate and financial records, and sworn

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49 *Id.* at 231-35.

50 *Id.* at 165-67, 187, 193-213.

51 ATIF App. 19 at 94-99, 150-53; ATIF App. 23.

52 ATIF App. 19 at 135, 177.

testimony, relating to just the year 2006. At the time, Attorneys' Title's investigation had just begun, and it did not know how much in trust funds had been misappropriated by MI Industries, or the extent of the title and closing problems which had been created for insured home owners and mortgage lenders whose transactions had been illicitly closed by Omofoman and Organized Title.[53]

When it moved to stop the fraudulent use of Ms. Maloy's trust account, Attorneys' Title had no measurable or definitive way to know the extent of the harm that was being caused by the fraudulent practices it had uncovered. It did establish, however, that in 2006 alone the misuse of Ms. Maloy's trust account involved over $1.4 million in improper disbursements which had been wired directly from Ms. Maloy's trust account to MI Industries' account at Citibank,[54] and that Ms. Maloy's trust account had a shortage of nearly $1.8 million when it was closed down in 2007.[55] Attorneys' Title also established that it had insured all of MI Industries' 2006 real estate closing transactions through title insurance commitments, policies, or closing protection letters issued by Ms. Maloy, that all of the "commissions" which MI Industries derived from these transactions had come directly from Ms. Maloy's trust account,[56] that the proceeds of the fraudulent transactions were being used by Marcel, Omofoman, and MI Industries for

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53 At the time Attorneys' Title sought a temporary injunction, defendants had not produced any documents in response to discovery requests.

54 ATIF App. 23.

55 ATIF App. 19 at 232.

56 ATIF App. 19 at 145, 176; ATIF App. 23.

personal real estate purchases and luxury items, and that those activities were ongoing.[57]

SUMMARY OF ARGUMENT

Attorneys' Title's claim of unjust enrichment is not an action at law for which money damages would provide an adequate remedy. That count of Attorneys' Title's Second Amended Complaint sought the restoration of escrowed funds fraudulently withdrawn from an attorney's trust account. The general principle that injunctions will not issue to freeze a defendant's assets during the pendency of a lawsuit applies only when there is an action at law seeking money damages.

Based on equitable principles, and the Court's jurisdiction over attorney trust accounts to protect the public, funds proved to have been procured by fraud from an attorney's trust account which can be traced directly into a bank account maintained by the perpetrator of the fraud are, and should be, considered impressed with a trust. The trial court properly froze MI Industries' bank account at Citicorp. It erred, however, in releasing $75,000 in that account to MI Industries.

When it sought injunctive relief, Attorneys' Title established with record evidence the prerequisite elements of irreparable harm, a clear legal right to the relief requested, a substantial likelihood of success on the merits, and an inadequate remedy at law. It also established that an injunction would serve the

[57] ATIF App. 21; ATIF App. 22 at 3; ATIF App. 19 at 197-203.

public interest, and that MI Industries would transfer, dissipate, or hide its assets so as to render any judgment against it unenforceable if injunctive relief were not granted.

In *Weinstein v. Aisenberg*, 758 So. 2d 705, 707 (Fla. 4th DCA), *dismissed*, 767 So. 2d 453 (Fla. 2000), the Fourth District certified a question like the one in this case based on a concurring opinion by Judge Gross which raised the question of whether the fourteenth century rule which separated the law courts from the courts of equity should any longer be used to deny equitable relief because an action at law has been pled. Both *Weinstein* and this case involved a plaintiff who was able to establish the elements for injunctive relief, and to demonstrate the likelihood that assets of the defendant would be dissipated or hidden so as to make a judgment unenforceable. Here, the Fourth District has again used Judge Gross' concurrence in *Weinstein* as a predicate for its certified question. The Court may want to use this occasion to address that vestige of prior pleading practice, and to modernize the law by allowing Florida's trial courts to grant injunctive relief to effect justice between the parties even when a plaintiff has pled an action at law along with a claim for injunctive relief.

ARGUMENT

The district court has certified as a generic question of great public importance whether a plea of unjust enrichment provides an adequate legal remedy of money damages, so that a trial court may not grant injunctive relief to freeze assets of a defendant even though the other elements for a temporary injunction

have been satisfied. The question as framed is not well-suited to this case, however.

Here, an injunction entered by the trial court froze a sum of money transferred directly into the defendant's bank account *from an attorney's trust fund*. The source of the funds in the defendant's bank account brings into play the Court's constitutional role with respect to members of The Florida Bar, and the Court's consistent exercise of its authority to protect or obtain reimbursement of client funds which have come into the hands of such attorneys. The district court did not relate its decision to the unique situation which exists in this case. Moreover, the Fourth District is out of step with the other district courts of appeal as to whether unjust enrichment is an action at law. It is not, as Attorneys' Title will demonstrate in the first section of the Argument.

Attorneys' Title will then demonstrate that the district court was also mistaken when it invoked the principle that it is improper to enter an injunction to prevent a party from using its assets prior to the conclusion of a legal action. Even if that principle is sound when a plaintiff has pled an action at law for which damages provide an adequate remedy, it is completely out of place in the context of this case. Attorneys' Title will complete its showing of entitlement to relief by demonstrating that it provided a solid record basis for the trial court's entry of a temporary injunction freezing MI Industries' funds in a Citibank account.

Lastly, Attorneys' Title will suggest that the Court should accept the district court's invitation to consider the broad question certified here and previously in *Weinstein*, based on the suggestion in Judge's Gross' concurring opinion in

Weinstein, that it is now time to eliminate the vestige of an antiquated pleading practice which is no longer relevant in the twenty-first century.

I. The district court erred in vacating a temporary injunction which met all the requirements for injunctive relief.

The broad question posed by the district court is whether unjust enrichment is a legal remedy which prevents injunctive relief to freeze a defendant's bank account because it provides an adequate remedy at law through money damages. MI Industries' Citibank account held over $500,000 of funds.

The district court acknowledged that injunctive relief would have been available to freeze these funds if they had still been held in Ms. Maloy's trust account. *Attorneys' Title*, 6 So. 3d at 629. The court balked at allowing the freeze to continue into the Citibank account, however, even though the record established that the funds had been wire transferred directly from Ms. Maloy's trust account into the Citibank account maintained by MI Industries.

The court gave as the reasons for its decision that Attorneys' Title had "expressly sought damages in its complaint" by pleading unjust enrichment, thereby defeating the requirement of "no adequate remedy," and that as a general proposition it is improper to enter an injunction to prevent a party from using or disposing of its assets during litigation. *Attorneys' Title*, 6 So. 3d at 628. On rehearing, though, the court acknowledged that "the current definition of the 'no adequate remedy of law' can result in an injustice in a case *such as this one*." *Id*. (emphasis added). That observation is at the heart of this case.

The district court's certified question in reality involves three different questions. The first is whether it was proper to vacate the injunction in this case on the basis of Fourth District precedent that unjust enrichment is an action at law. The short answer to that question is "no," because the Fourth District is alone among the district courts in holding that unjust enrichment is an action at law. The recoupment of attorney trust funds is not a claim for money damages. The Court should apply the principle acknowledged by the other district courts that a claim for unjust enrichment is merely an equitable proceeding to determine fairness between the parties.

The second question is whether an injunction which freezes assets necessarily implicates the general principle that injunctive relief will not be granted to prevent a party from using or disposing of assets during litigation. The short answer to that question is also "no." That principle is properly applied when an injunctive freeze is sought prematurely in conjunction with an action at law seeking money damages, but it is not properly applied in a case which does not involve an action at law.

A third question presented in this case is whether it any longer makes sense to foreclose injunctive relief merely because a plaintiff has alternatively pled a legal cause of action which may result in money damages. That question was previously certified to the Court by the Fourth District in *Weinstein*, where the alternative legal action was conversion rather than unjust enrichment, but a dismissal precluded the Court from considering that issue. The certification here, which was again predicated on the thoughtful analysis of that issue by Judge Gross

in his concurring opinion in *Weinstein*,[58] suggests that the answer to that question should also be "no." The Court may reach this question because it is not bound by the district court's formulation of the certified question. *E.g.*, *McNeil v. Canty*, 12 So. 3d 215 (Fla. 2009).

A. Unjust enrichment is not an action at law which seeks money damages.

In its Second Amended Complaint, Attorneys' Title's pled only two counts against Marcel and MI Industries: one asserting unjust enrichment, and the other requesting injunctive relief. The former alleged that MI Industries (and other defendants) "had wrongfully obtained trust/escrow monies that do not belong to them, and that in fairness and equity should be returned to [Attorneys' Title]."[59] It further alleged that that MI Industries (and other defendants) "will be unjustly enriched, at the expense of [Attorneys' Title] and other innocent third-parties, if they are not required to return the monies that do not rightfully belong to them,"[60] and that Attorneys' Title "has no adequate remedy at law."[61]

These allegations relating to unjust enrichment are *not* a claim for money damages. They seek recoupment of escrowed funds from an attorney's trust account to which MI Industries is not rightfully entitled, and as to which equity

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58 *Attorneys' Title*, 6 So. 3d at 629, referencing *Weinstein*, 758 So. 2d at 707-12.

59 ATIF App. 6B at ¶ 48.

60 *Id*. at ¶ 50.

61 *Id*. at ¶ 52.

requires restoration to Attorneys' Title and other innocent third parties. The district court's determination that this count for unjust enrichment was an action at law, and as such precluded injunctive relief, was based on its prior decision in *Commerce Partnership 8098 Ltd. Partnership v. Equity Contracting Co., Inc.*, 695 So. 2d 383 (Fla. 4th DCA 1997).[62]

That case, however, did not involve a trust situation, let alone one that is regulated by the Court. Attorneys' Title will demonstrate that *Commerce Partnership* does not provide a sound basis for the court's decision. First, though, Attorneys' Title will show that the Fourth District court is out of step with the other district courts in Florida with respect to whether unjust enrichment is an action at law, and that *all* of the other district courts have treated unjust enrichment as being a claim which is simply equitable in nature.

In *Ala v. Chesser*, 5 So. 3d 715 (Fla. 1st DCA 2009), the First District was faced with a claim of unjust enrichment in a real estate transaction by the defendant's receipt of a deed for which he paid no value. Holding that a claim for unjust enrichment "seeks restitution from a party allegedly unjustly enriched" (5 So. 3d at 718), the court held that "[r]emedying unjust enrichment is affording equitable relief." *Id*. at 719-20. The court's explanation of unjust enrichment aptly describes this case, where Attorneys' Title is seeking restitution from MI Industries based on its unjust enrichment with the funds of homeowners and mortgage lenders which were paid into an attorney's trust account.

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62 *Attorneys' Title*, 6 So. 3d at 629.

The Second District reached the same result in *Brace v. Comfort*, 2 So. 3d 1007, 1011 (Fla. 2d DCA 2008), where the complaint alleged unjust enrichment by the defendant's acquisition of real property for $198,000 which was worth $450,000. The court reversed a dismissal of this claim under the statute of frauds on the ground that this was "an equitable claim" for obtaining property of greater value at a lesser cost at the plaintiff's expense. *Id.* at 1011.

A similar characterization of unjust enrichment was made by the Fifth District in *Williams v. Stanford*, 977 So. 2d 722, 730 (Fla. 1st DCA 2008), where the court observed in approving a minority shareholder's count for a constructive trust that such a trust is an equitable remedy which "restores property to its rightful owner and prevents unjust enrichment." Also pertinent to this case is the Fifth District's decision in *Williams v. Bear Stearns & Co.*, 725 So. 2d 397 (Fla. 5th DCA 1998), *review denied*, 737 So. 2d 550 (Fla. 1999), which involved multiple claims brought by the receiver of an insolvent life insurance company against the company's investment portfolio manager. The court rejected the defendant's assertion that an unjust enrichment claim should be dismissed because the receiver had adequate legal remedies, quoting a federal district court ruling that this general rule "does not apply to claims for unjust enrichment" because it is only on a showing of an express contract that an unjust enrichment count fails. *Id.* at 400.

Consistently with these cases, the Third District has also recognized the equitable nature of unjust enrichment. It determined, however, that such a claim could not be pursued when the plaintiff had also pled a cause of action for breach of contract. In *Bowleg v. Bowe*, 502 So. 2d 71 (Fla. 3d DCA 1987), the court held

that the plaintiff could not pursue a claim for unjust enrichment which accompanied counts for breach of contract because "unjust enrichment is equitable in nature and is, therefore, not available where there is an adequate legal remedy" in the form of an action on a contract. *Id.* at 72.

The district court's denial of injunctive relief for Attorneys' Title based on the notion that unjust enrichment is an action at law constitutes a departure from the other district courts with respect to the nature of unjust enrichment. The district court's decision is in any event not supportable in this case, inasmuch as its reliance on its prior decision in *Commerce Partnership* was misplaced. The issue in that case had nothing to do with either real estate transactions or trust principles, and the facts which led to the court's analysis in that case do not correspond at all to the situation presented in this case.

The issue in *Commerce Partnership* was whether a subcontractor, who had not been paid by the contractor for work done on an office building, could recover damages from the owner of the building. The court held that it was error for the trial court to reject the owner's evidence that it had paid the full contract price to the contractor, since that evidence would establish whether or not the owner had been enriched unjustly. 695 So. 2d at 390. In reaching that obvious, common sense conclusion, the court discussed the notion that unjust enrichment is in reality an implied contract which the Florida courts consider "an action at law under the common law" (*id.*), and opined that implied contract actions "are part of the law of assumpsit, which was an action at law under the common law." *Id.*

The district court's reliance on *Commerce Partnership,* which considered unjust enrichment in its historical context as a claim of implied contract, was a poor precedent for the court to apply in this case. The court should have been guided by decisions from the other district courts which squarely addressed trust relationships in the context of real property transactions, and applied the acknowledged principle that a count for unjust enrichment is nothing more than a plea for "fairness" between the parties where one party has been unjustly enriched with something to which in equity it is not entitled.[63] Indeed, the district court should have been guided by its own decision in *I.C. Systems, Inc. v. Oliff,* 824 So. 2d 286, 287 (Fla. 4th DCA 2002), where it said:

> Here, injunctive relief is sought not to guarantee the existence of a fund from which to satisfy a money judgment once it is obtained, but rather to diminish the effect of the ongoing violations, to *stop the bleeding* so to speak, and thereby diminish the damages which are incapable of reasonable ascertainment and which are, by definition, irreparable.

A proper analysis of unjust enrichment in this case starts from the fact that Attorneys' Title was able to trace trust funds obtained by fraud into a specific bank account maintained by MI Industries. Unjust enrichment was sought as a matter of equity to restore escrowed funds which did not rightfully belong to MI Industries, by pursuing traceable trust funds into a second depository account. As a matter of

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63 After identifying the common law roots of unjust enrichment, the district court in *Weinstein* recognized that the term "unjust enrichment" has also been used by the courts in Florida as a quality of "fairness" rather than a reference to the equity side of the court. 695 So. 2d at 390.

simple fairness between MI Industries and Attorneys' Title, which stands in the shoes of the innocent lenders and homeowners who deposited money into Ms. Maloy trust account, the balance of equities obviously lies with Attorneys' Title.

Significantly in this case uniquely, the weighing of equities tips the scale of justice far more favorably toward Attorneys' Title in light of the fact that the escrowed funds in this case were not just in *any* trust fund. The funds in MI Industries' Citibank account came directly by wire transfer from a trust account regulated by the Court for the protection of the public. Thus, overlaying the equitable balance which already favors Attorneys' Title over MI Industries is the Court's constitutional vigilance over public funds which come into the hands of Florida attorneys.

The Court has repeatedly expressed its solicitude for funds improperly withdrawn from attorney trust accounts by ordering a return of those funds to the rightful owner. A prime example is *The Florida Bar v. Cimbler*, 840 So. 2d 955 (Fla. 2002), which has obvious similarities to this case. Mr. Cimbler was an attorney who failed to properly disburse funds put into his trust account for a real estate closing, and failed to reimburse a client who had deposited money in Mr. Cimbler's trust account for a suit seeking specific performance of the client's failed real estate purchase. Mr. Cimbler belatedly reimbursed the attorney who provided title insurance for the real estate closing and had to expend his own money to perfect the closing, but he never repaid $8,000 to the client who had deposited funds in Mr. Cimbler's trust account. The Court suspended Mr. Cimbler

for one year, and "thereafter until he makes restitution to [the client] in the amount of $8,000." *Id.* at 961.

The Court's determination to protect the public through restitution of misused trust account funds in *Cimbler,* as it has evidenced in other bar disciplinary cases, warrants a determination here that traceable funds fraudulently withdrawn from an attorney's trust account, when found intact in the depository to which they were transferred, effectively remain impressed with a trust for the benefit of innocence mortgage lenders and home owners whose funds were plundered. Further, the mantle of "trust" should cloak the title insurance underwriter which assumed the responsibility to make whole the innocent parties to the real estate closing and suffered the financial loss engendered by the misuse of trust account funds.

The use of injunctive relief to prevent the dissipation of "trust" assets, of course, is well-established. *See, e.g., Gruder v. Gruder*, 433 So. 2d 23, 24 (Fla. 4th DCA), *review denied,* 438 So. 2d 832 (Fla. 1983) (enjoining a trustee from removing, concealing, or misspending the corpus of a trust of which he was a trustee). Similarly, injunctive relief has been approved to freeze bank accounts which hold money in trust. For example, in *Georgia Banking Co. v. GMC Lending & Mortgage Services Corp*., 923 So. 2d 1224, 1225 (Fla. 3d DCA 2006), the court approved a temporary injunction which froze banks accounts of GMC which held residential mortgage loan payments in trust for the bank. The court rejected GMC's contention that the bank had an adequate remedy at law in the form of its breach of contract claim, pointing out that the bank "has claimed the existence of

specific, identifiable trust funds which GMC has refused to turn over. Injunctive relief is appropriate to prevent dissipation of the funds in such circumstances." *Id.*

The same principle was applied in *Castillo v. De Castillo*, 701 So. 2d 1198, 1199 (Fla. 3d DCA 1997), where the court declared the appropriateness of injunctive relief "to protect *pendente lite* what is asserted to be the *res* of a trust implied by operation of law." The court found a trust situation to be "clearly distinguishable" from cases which hold that pretrial injunctions are not available to preserve funds for execution on an eventual judgment where there is also an action for money damages. *Id.*

Those principles, combined with the Court's oversight of public funds in attorneys' trust accounts, provide a compelling reason for the Court to apply the equitable principle of unjust enrichment to funds fraudulently withdrawn from Ms. Maloy's trust account which ended up in MI Industries' account at Citibank.

B. Not every injunction is designed to prevent a party from disposing of assets during litigation.

The district court noted in passing that it is improper to enter an injunction which prevents a party from using or disposing of its assets prior to the conclusion of a legal action, citing to *Briceno v. Bryden Investments., Ltd.*, 973 So. 2d 614, 616-17 (Fla. 3d DCA 2008). That principle has no application in this case.

In *Briceno*, the court affirmed the denial of a motion to enjoin the accrual of interest on the *res* of a constructive trust. The issue in that case was whether a temporary injunction could be granted to prevent a pay-out of the interest earned on a $2 million deposit held in the registry of the court as a constructive trust. One

party claimed that the interest was part of the trust *res* so that injunctive relief was available to maintain the *status quo*, while the other contended the interest was not a part of the trust corpus. The court held that it was *not* part of the trust *res*, and went on to say that an injunction cannot be entered to prevent a party from using his assets prior to the conclusion of the legal action. *Id.* at 616.

In reaching that conclusion, the court followed a line of cases which involved actions at law for damages. As Attorneys' Title has demonstrated, though, there is no action at law for damages in this case. The only object of its motion for a temporary injunction was the restoration of funds taken from the clients who had deposited them in Ms. Maloy's trust account. Thus, while the principle that injunctions may not be used to prevent a defendant's use of assets *pendent lite* is sound, it applies only when an action at law is available to provide an adequate legal remedy. It does *not* apply when there is no such alternative claim.

C. Attorneys' Title fully met the evidentiary requirements for injunctive relief.

The district court did not expressly say in its opinion that Attorneys' Title had established the elements for injunctive relief with record evidence, but its certified question is predicated on the assumption that it did. That assumption was warranted, and is fully supported by the record.

The first element essential for a temporary injunction is irreparable harm. *E.g., Weinstein v. Aisenberg*, 758 So. 2d 705, 707 (Fla. 4th DCA), *dismissed*, 767 So. 2d 453 (Fla. 2000). An injury is irreparable when there is no accurate standard

by which to measure the loss. *E.g., JonJuan Salon, Inc. v. Acosta*, 922 So. 2d 1081, 1084 (Fla. 4th DCA 2006).

At the time it sought injunctive relief, Attorneys' Title knew that there had been massive fraud in the operation of Ms. Maloy's trust account, that it was ongoing, that title and closing policies had been written on behalf of Attorneys' Title, and that home owners and mortgage lenders whose funds had passed through her account were facing adverse financial consequences. As the insurer of titles and closings, Attorneys' Title knew that it would be called upon to pay out significant sums on claims, but it had no way of knowing the extent of its liability under policies issued in its name, or the amount of the shortfall in Ms. Maloy's trust account.

In its Statement of the Facts here, Attorneys' Title identified the competent and substantial evidence which demonstrated that its damages were not measurable by any accurate standard when it moved to stop the ongoing fraud and to freeze traceable funds withdrawn from Ms. Maloy's trust account. That evidence more than satisfied the "irreparable harm" prong of the test for injunctive relief.

The evidence adduced by Attorneys' Title also established the second element for injunctive relief – a "clear legal right" to the relief being requested. *Weinstein,* 758 So. 2d at 707. As the insurer of transactions which proved to have been fraudulent, Attorneys' Title was directly affected by the outcome of the lawsuit, and had a direct stake in asking the court to preserve the *status quo* and prevent further dissipation of the funds held in Ms. Maloy's trust account. *E.g., Hayes v. Guardianship of Thompson*, 952 So. 2d 498, 505 (Fla. 2006).

Attorneys' Title also met the third requirement for injunctive relief; namely, a substantial likelihood of success on the merits of the lawsuit. That element was established by the deposition and hearing testimony of Marcel,[64] and by the financial records of Ms. Maloy's trust account.[65] Marcel's testimony and his own documents also established that if injunctive relief had not been granted, MI Industries would have transferred, dissipated, or hidden its assets so as to render a trial judgment unenforceable.[66]

Finally, Attorneys' Title demonstrated with record evidence that a temporary injunction entered by the trial court would significantly serve the public interest by preventing Omofoman, Organized Title, Marcel, and MI Industries from continuing to commit real estate and mortgage fraud by diverting to themselves trust funds which belonged to home owners and mortgage lenders. *E.g., M & E Distributors, Inc. v. Worley,* 840 So. 2d 457, 459 (Fla. 4th DCA 2003); *AT & T Wireless Servs. of Fla., Inc. v. WCI Communities, Inc.,* 932 So. 2d 251, 257 (Fla. 4th DCA 2005); *Adoption Hot Line, Inc. v. State of Florida*, 385 So. 2d 682, 684 (Fla. 3d DCA 1980).

When presented with a motion for a temporary injunction, a trial court has wide discretion to grant or to deny the motion. *E.g., Weinstein*, 758 So. 2d at 706; *Vargas v. Vargas,* 771 So. 2d 594, 595 (Fla. 3d DCA 2000). The trial judge in this

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64 ATIF Apps. 17, 18, 19.

65 *E.g.*, ATIF App. 23.

66 ATIF Apps. 13, 17, 18, 19.

case indicated that he fully understood the issues presented by Attorneys' Title's motion for a temporary injunction, saying: "I've heard everything and I'm fairly sophisticated in these types of things so you don't need to educate me on real estate, trusts funds, closings, MAI appraisals – appraisals, etcetera."[67]

The district court reviewed the temporary injunction granted by the trial judge to determine if there had been an abuse of discretion. *E.g., Keystone Creations, Inc. v. City of Delray Beach*, 890 So. 2d 1119, 1124 (Fla. 4th DCA 2004). The district court acknowledged that the trial court had not abused its discretion when it framed the certified question as one arising from a decision in which Attorneys' Title "has demonstrated" a clear legal right, a substantial likelihood of success on the merits, and a public benefit. *Attorneys' Title*, 6 So. 3d at 628.

The trial court correctly granted injunctive relief for Attorneys' Title by freezing MI Industries' Citibank account. The court erred, however, in ordering the release of $75,000 from that account so that MI Industries could pay attorneys' fees. There was no lawful basis for allowing MI Industries to use trust funds obtained by fraud from home owners and mortgage lenders for *any* purpose, let alone to be used to defend against Attorneys' Title's attempt to recover those funds. In addition to ordering reinstatement of the trial court's injunction, the Court is requested to direct MI Industries to repay the $75,000 which the trial court allowed it withdraw from the frozen Citibank account.

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[67] ATIF App. 19 at 231.

II. Injunctive relief to freeze misappropriated trust assets should not be foreclosed by the joinder of an action at law.

The current pleading requirements in Florida allow the joinder of multiple causes of action in one lawsuit, whether considered to be actions at law or in equity. Rule 1.040 of the Florida Rules of Civil Procedure provides: "There shall be one form of action to be known as 'civil action.'"

In his concurring opinion in *Weinstein*,[68] Judge Gross articulated persuasive reasons for abolishing as an anomalous vestige of history the distinction between law and equity which is used to foreclose injunctive relief when an action at law has been pled. His arguments persuaded the full panel in *Weinstein* to certify its decision (involving a count for conversion) as a question of great public importance. The question was not answered, however, because the petition for review was dismissed. *Aisenberg v. Weinstein*, 767 So. 2d 453 (Fla. 2000). Consequently, the adverse effects of bringing a complaint which alleges an action at law along with a request for injunctive relief remain a continuing legal conundrum.

The district court has again certified the conflict between current pleading authorizations and abolition of the law and equity sides of the court, using the same formulation that was made in *Weinstein* -- except for the replacement of a count for "conversion" with a count for "unjust enrichment." This case presents an opportunity for the Court to address the issue raised by Judge Gross in his

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[68] 758 So. 2d at 707.

Weinstein concurrence, or as he put it, to reexamine the principles that had their beginnings in the fourteenth century, and to enable trial judges in the modern era to fashion remedies that do justice between the parties to a lawsuit. 758 So. 2d at 707.

Judge Gross reprised the fourteenth century distinction between the law courts and the courts of equity, and observed that over the years since the Court abolished that distinction the courts were nonetheless trapped in doctrines which prevented the courts from considering the more desirable goals of logic and justice. *Id*. at 709-10. He then found persuasive the notion that a preliminary injunction should be available to a plaintiff in an action at law who can demonstrate that the defendant will dissipate or hide assets, and effectively make any judgment an inadequate remedy. *Id*. at 710.

Judge Gross argued for a "workable legal framework for ruling on the issuance of a temporary injunction that balances the interests of the defendant with those of the plaintiff and the public." *Id*. at 711. He concluded, with a nod to Justice Holmes' observation of how revolting it is to have a rule based on nothing more than blind imitation of the past, that Florida regrettably remains tied to "a rule of law firmly rooted in history, but for which the original justification has evaporated." *Id.*

The Court is commended to Judge Gross' concurring opinion in *Weinstein*, and respectfully invited to bring an archaic fourteenth century anachronism into the twenty-first century.

CONCLUSION

The district court certified as a question of great public importance whether a trial may issue an injunction to freeze assets incident to an action at law when all of the elements for injunctive relief are established. Inasmuch as the question is abstract and not tied to the facts of this case, the Court is requested to reframe the question as may be necessary to respond as follows:

1. Under the Court's constitutional responsibility to regulate attorneys for the protection of the public, a claim for unjust enrichment brought to recover assets improperly withdrawn from an attorney's trust account is an equitable proceeding and not an action at law.

2. Upon establishing the necessary elements for injunctive relief, including a showing that the defendant will transfer, dissipate, or hide assets so as to make a judgment unenforceable, a trial court may issue an injunction to freeze identifiable assets of a defendant which have been derived from improper withdrawals from an attorney's trust account.

On these bases, the Court should reverse the decision of the district court, restore the temporary injunction entered by the trial court, and direct MI Industries to return the $75,000 withdrawn from its Citibank account.

The Court may also take advantage of this opportunity to eliminate the articulated distinctions between law and equity which presently preclude trial courts from using injunctive tools to prevent a defendant from dissipating or hiding misappropriated assets in order to render a judgment unenforceable.

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I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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