ORIGINAL

IN THE

Supreme Court of Florida

Case No.: SC09-938

ATTORNEYS' TITLE INSURANCE FUND, INC.,

Petitioner,

vs.

M.I. INDUSTRIES USA, INC. and EROMONSELE M. IMOISILI,

Respondents.

BRIEF *AMICI CURIAE* OF STEWART TITLE GUARANTY COMPANY, OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY, FIDELITY NATIONAL TITLE INSURANCE COMPANY, LAWYERS TITLE INSURANCE CORPORATION, COMMONWEALTH LAND TITLE INSURANCE COMPANY, CHICAGO TITLE INSURANCE COMPANY, AND TICOR TITLE INSURANCE COMPANY OF FLORIDA IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae submitting this brief, Stewart Title Guaranty Company, Old Republic National Title Insurance Company, Fidelity National Title Insurance Company, Lawyers Title Insurance Corporation, Commonwealth Land Title Insurance Company, Chicago Title Insurance Company, and Ticor Title Insurance Company of Florida are title insurance underwriters that do substantial business in the State of Florida through independent title insurance issuing agents. Both attorneys and non-attorneys serve as Amici's independent title insurance issuing agents.

In recent years, Amici have seen a sharp increase in thefts of trust funds and participation in mortgage fraud by title agents. These activities have exposed Amici to substantial statutory and closing protection letter liability. Amici have vigorously pursued agents who engage in such wrongdoing using, among other remedies, causes of action for unjust enrichment and associated prayers for injunctive relief.

It is all too common that title agents work together with other participants in trust fund theft and mortgage fraud schemes. Many of those mortgage fraud schemes involve the misdirection or misappropriation of trust funds. Accordingly, Amici have used actions for unjust enrichment and prayers for injunctive relief to trace, freeze, and, if possible, restore stolen trust funds to their rightful owners.

The perpetrators of mortgage fraud are, by and large, adaptable, creative, and astute to the legal environment in which they operate. Thus, the nature of these frauds often changes, and can rapidly adapt to take advantage of any gap in the remedies available to thwart them. If the decision stands, it would incent conspirators to structure their schemes in order to avoid injunctive relief, and would make it more difficult for Amici to play their part in helping to redress mortgage fraud and trust fund theft in Florida.

SUMMARY OF THE ARGUMENT

The Fourth District's decision undermines Amici's efforts to enjoin the increasing incidence of fraudulently misdirected and misappropriated trust funds, which trust funds are regularly utilized in the vast number of real estate transactions in Florida. That in turn has serious ramifications for Florida and its citizens.

Every year in Florida, hundreds of thousands of residential real estate transactions, valued in the tens of billions of dollars, are closed by title agents. The title insurance policies that these agents issue on behalf of underwriters like Amici protect lenders and buyers against losses caused by defects in their respective interests in land. In this way, title insurance serves an integral function in Florida's real estate economy.

Title agents also work with their underwriters to search and examine title and to engage in curative work. And, in many instances, title agents also act as escrow and closing agents, accepting large sums of money from lenders and borrowers and disbursing those sums at closing to sellers, service providers, mortgagees (to clear liens), and others who are entitled to the funds.

These funds are trust funds. By statute, these funds are never the property of title agents, but are held in trust for those who are entitled to them. And, although the closing agent function is typically outside the scope of a title agent's contractual agency agreement with an underwriter, other contracts and statutes often make underwriters like Amici liable when title agents misdirect or misappropriate these trust funds.

Fraudsters and schemers are inevitably drawn to markets through which so much cash flows. Because closing agents earn relatively little as service providers in real estate transactions and yet hold the keys to all the other participants' funds, they fall prey all too often to the temptation to commit, assist in, or turn a blind eye to fraud.

Real estate fraud is a major problem in Florida, exacerbated by the staggering variety of frauds, and by how quickly new frauds evolve. Often these fraudulent schemes involve the misdirection or misappropriation of trust funds. Keeping up with the fraudsters requires vigilance and sophisticated forensic

accounting methods to trace the monies involved. It also requires a judicial system that provides the necessary tools for quickly securing, and ultimately recouping, fraudulent funds, once tracked and located.

Amici vigilantly pursue their own agents and others who engage in such wrongdoing. They have traditionally relied upon unjust enrichment, among other causes of action, as a principal basis for enjoining the dissipation of trust funds that have been misdirected or misappropriated in a real estate fraud. In this case, the Fourth District has hindered an underwriter's efforts to stop the perpetrators of serial mortgage fraud from absconding with misappropriated trust funds. By ruling that unjust enrichment is a legal cause of action that cannot serve as a basis for an injunction in these circumstances, the Fourth District has made it more difficult to freeze misdirected and misappropriated trust funds that have been directly traced from a trust account into a specific account held by a fraudster, so that they can be returned by a court to those who are, in equity, entitled to them.

That is an anomalous ruling for two reasons, and bad public policy for a third. First, the Fourth District is the only district that treats unjust enrichment as a legal, rather than equitable, cause of action. Second, the Fourth District creates a jurisprudentially imprudent distinction between the historically intertwined causes of action for unjust enrichment, equitable subrogation, and constructive trust. The same equitable principles animate all three of these causes of action. Third, the

ruling serves to encourage accelerated transferring and commingling of trust funds by fraudsters. There is little question that the movement of trust funds still left in an attorney agent's trust account could be enjoined. Yet, the Fourth District effectively would prohibit an injunction from reaching those same trust funds when they have already been moved and are directly traced to another account, even though in equity those trust funds never become the rightful property of the fraudsters and should remain impressed with a trust.

For all of these reasons, the Fourth District's decision should be quashed.

ARGUMENT

I. Title Underwriters And Title Agents Play An Integral Role In Maintaining Stability In Florida Real Estate Transactions.

The Florida Department of Revenue reports that, in the most recent year for which data are available (Sale Year 2008), there were 124,750 qualifying residential real estate transactions in Florida, valued at $31,272,572,454. Garth Grumme, *Florida Department of Revenue Public Records Response* (Aug. 10, 2009) (A2).[1] Just a few years before that (Sale Year 2005), the numbers were even more staggering: 373,576 transactions valued at $91,104,791,819. *Id.*

Because interests in real property are often among buyers' and lenders' most significant investments, buyers and lenders usually obtain title insurance. Title

[1] An appendix is filed with this brief. The appendix will be referenced in the format (A1), indicating the first tab of the appendix. The Fourth District decision on review is included in the Appendix at tab one (A1).

insurance is a unique form of insurance that was created in the United States. Quintin Johnstone, *Title Insurance,* 66 Yale L.J. 492, 492 (1957). Unlike casualty insurance, which insures against future events that are either uncertain to occur (like accident or fire insurance) or certain to occur but uncertain in time (like life insurance), title insurance insures against past events that could create defects in title. The title insurer examines the existing public record and related materials, may perform title curative work prior to (or after) closing, and, for a one-time premium, insures a snapshot of record title as it existed at closing. *See generally id.* at 493-98.

Unlike any other form of insurance, the underwriting process that leads to the issuance of title insurance is intended to reduce or eliminate the risk insured against. In fact, the issuance of "casualty title insurance" (i.e., insuring against a known risk, or in disregard of whether a risk exists, rather than ensuring that all reasonably determinable risks have been eliminated or do not exist) is statutorily prohibited. *See* § 627.784, Fla. Stat. (2009).

In addition, title agents often act as escrow and closing agents, holding borrower's deposits and cash-to-close, as well as lenders' mortgage loan proceeds, and then disbursing them at closing. By statute, those funds never become the property of the agent, but are held in trust for those who are entitled to them:

> (1) A title insurance agent may engage in business as an escrow agent as to funds received from others to be

> subsequently disbursed by the title insurance agent in connection with real estate closing transactions involving the issuance of title insurance. . . .
>
> (2) All funds received by a title insurance agent as described in subsection (1) shall be trust funds received in a fiduciary capacity by the title insurance agent and shall be the property of the person or persons entitled thereto.

§ 626.8473, Fla. Stat. (2009).

While the title agent's role as escrow and closing agent is outside the scope of its agency for title underwriters like Amici, *see, e.g., Sommers v. Smith and Berman, P.A.*, 637 So. 2d 60 (Fla. 4th DCA 1994), underwriters can nevertheless be liable for misdirection or misappropriation of trust funds by title agents by virtue of Florida's defalcation statute or the underwriter's closing protection letters.

The defalcation statute makes underwriters liable "for the defalcation, conversion, or misappropriation by a licensed title insurance agent or agency of funds held in trust by the agency pursuant to s. 626.8473." § 627.792, Fla. Stat. (2009). Closing protection letters are written contracts of indemnity, offered on a required form promulgated by the Office of Insurance Regulation, by which underwriters agree to reimburse lenders and their borrowers for actual losses arising out of specified kinds of fraudulent conduct by title agents. *See* Fla. Admin. Code R. 69O-186.010.

Accordingly, underwriters and title agents serve an important public function by facilitating smooth real estate transactions across Florida. Recently,

however, the smoothly-functioning real estate market has been disrupted by a surge in nefarious activities within the marketplace. Amici have seen a sharp increase in mortgage fraud, often involving the misdirection or misappropriation of trust funds by title agents and fraudsters.

The trend Amici have observed in Florida is borne out by recent studies, such as a Federal Bureau of Investigation report noting that "[m]ortgage fraud continued to be an escalating problem in the United States during 2008." *See* Fed. Bureau of Investigation, *2008 Mortgage Fraud Report (2008)*, http://www.fbi.gov/publications/fraud/mortgage_fraud08.htm (last visited Sept. 2, 2009) ("FBI Report") (A3).[2]

Florida is the epicenter of this growing problem. The Mortgage Asset Research Institute has ranked Florida either #1 or #2 for incidence of mortgage fraud for the past three years. *See* Denise James, Jennifer Butts, & Michelle Donahue, Mortgage Asset Research Institute, *Eleventh Periodic Mortgage Fraud Case Report To: Mortgage Bankers Association* 3 (2009) (A4).

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[2] The FBI defines mortgage fraud as follows: "Mortgage fraud is a material misstatement, misrepresentation, or omissions relied upon by an underwriter or lender to fund, purchase, or insure a loan. Mortgage loan fraud is divided into two categories: fraud for property and fraud for profit. . . ." *Id.* "Fraud for profit, however, often involves multiple loans and elaborate schemes perpetrated to gain illicit proceeds from property sales. Gross misrepresentations concerning appraisals and loan documents are common in fraud for profit schemes and participants are frequently paid for their participation." *Id.*

In line with the growing mortgage fraud problem, Amici have witnessed the methods of creative fraudsters grow in number, sophistication, and variation. The FBI notes that "[p]rominent schemes include builder bail-out, short sale, foreclosure rescue, credit enhancement, loan modification, illegal property flipping, seller assistance, bust-out, debt elimination, mortgage backed securities, real estate investment, multiple loan, assignment fee, air loan, asset rental, backwards application, reverse mortgage fraud, and equity skimming." *See* FBI Report.

Mortgage fraud and the trust fund defalcations that so often accompany it have had devastating consequences for underwriters like Amici. Just in the last year, underwriter National Title Insurance Company was forced into liquidation by the Office of Insurance Regulation and is currently in receivership. And, in large part due to $60 million in defalcations, the nation's largest attorney-agent-based underwriter, Florida's own Attorneys' Title Insurance Fund (Petitioner in this case), has been forced to cease issuing new title policies. *See* Terry Sheridan, *Title Insurance: Established Title Companies Forced Out of Business*, Daily Business Review (August 7, 2009) (A5). Moreover, mortgage fraud and trust fund defalcations also effect similar untoward consequences for all Floridians, by way of higher premiums.

II. Title Insurers Need Effective Injunctive Remedies To Freeze And Restore Fraudulently Misdirected And Misappropriated Trust Funds In Order To Combat The Increasing And Varied Ways Such Frauds Are Carried Out.

Many of the mortgage fraud schemes recently identified by the FBI, as well as by The National Association of Realtors, involve the misdirection or misappropriation of trust funds. Though the variety of these schemes is mind-boggling, their basic operation is often like this: fraudsters use inflated appraisals, falsified loan applications from "straw buyers," a ginned-up set of closing documents, or a series of orchestrated "flips" of a property to induce a lender to make a mortgage loan for far more than the property is worth. Rather than distribute the loan proceeds according to the settlement statement that the lender sees and approves, the closing agent distributes payoffs and kickbacks to service providers who helped with the scheme, and the rest of the proceeds of the fraudulently-induced loan to the fraudsters.

Variations on this general theme have been dubbed "single" and "double-sided flip transactions," "silent seconds," "nominee loans," "fictitious or stolen identity," "equity skimming," "foreclosure rescue," and "air loans." *See* The National Association of Realtors, *Impact of Mortgage Fraud on Florida* (A6). In these cases, a court acting in equity can restore the fraudulently-misdirected loan proceeds to their rightful owner, but almost always the fraudulent transactions have closed and the funds have left the trust account before the fraudulent mortgage

scheme is discovered, meaning the trust funds must be traced and frozen in order to empower the trial court to do equity.

In addition to these various mortgage fraud schemes, Amici also confront outright thefts of trust funds by title agents and conspiring fraudsters. In these cases, the thefts are almost always discovered after the proceeds have been transferred out of the agent's trust account.

In the cases of both complex mortgage fraud schemes and outright theft, Amici have vigorously pursued agents and others who have taken trust funds. This effort often requires the use of sophisticated forensic accounting methods and takes time. If the funds can be traced, an injunction can play a key role in keeping the proceeds from disappearing, so that the underwriter can unwind these fraudulent deals and return the stolen funds to their rightful owners.

For example, when Amicus Commonwealth recently discovered over $8 million in trust funds missing from the trust account of its agent, Gulf Coast Title Closings & Escrow Services, Inc., Commonwealth sought and obtained an injunction that allowed a court-appointed receiver to (i) freeze over $1.5 million in funds remaining in the agent's trust account; and (ii) work with Commonwealth to give those funds back to their rightful owners. *See* Receiver's Report filed January 30, 2006 in *Commonwealth Land Title Ins. Co. v. Gulf Coast Title Closings and Escrow Services, Inc.*, Case No. 06-362-CI-19 (Fla. 6th Cir. Ct.) (A7). Gulf

Coast's principals have since been charged with 25 felony counts in connection with this defalcation. *See* Information filed September 11, 2007 in *State of Florida v. John Wehlau and Cheryl Wehlau*, Case No. CRC07-19786CFANO (Fla. 6th Cir. Ct.) (A8); *see also* Jeff Testerman, *Lavish Life Over, Pair Face Prison*, St. Petersburg Times (Sept. 14, 2007).[3]

In order to be effective, these civil injunctions must often reach beyond the agent's trust account to freeze funds in the accounts of those working together with the agent. For example, in *Commonwealth v. Fenway Title, Inc.*, a title agent's trust account turned up millions of dollars short after the agent had closed more than 60 condominium unit sales without paying off prior mortgages. After an evidentiary hearing, the trial court entered an injunction freezing both the agent's trust funds in its trust account and those funds, impressed with a trust, in any account to which they could be directly traced. *See Commonwealth Land Title Ins. Co. v. Fenway Title and Escrow, Inc.*, Case No. CACE 07-28096-03 (Fla. 17th Cir. Ct. Nov. 19, 2007) (Temporary Injunction Order) (A9). Using this well-crafted injunction, a court-appointed receiver was able to quickly trace over $6 million in trust funds to the account of a Michigan attorney who had represented the developer of the condominium. *See* Receiver's Motion filed March 5, 2009 in *Commonwealth Land Title Ins. Co. v. Fenway Title and Escrow, Inc.*, Case No.

[3] http://www.sptimes.com/2007/09/14/Northpinellas/Lavish_life_over__pai.shtml (last visited Sept. 8, 2009).

CACE 07-28096-03 (Fla. 17th Cir. Ct.) (A10). As a result, the funds were returned, disbursed to those who were entitled to them, and the title defects in the condominium units were cleared. *See id.*

Similarly, the trial court in this case found sufficient evidence to warrant an injunction. The Fourth District never questioned those findings. Instead, although acknowledging that Attorneys' Title "has demonstrated" a clear legal right to relief, a substantial likelihood of success, and a public benefit, the Fourth District nevertheless held that, as a matter of law, unjust enrichment was a legal cause of action and could not support an injunction because money damages would provide an adequate remedy at law. *See M.I. Industries USA Inc. v. Attorneys' Title Ins. Fund, Inc.*, 6 So. 3d 627, 629 (Fla. 4th DCA 2009) (A1).

That holding ignores that these discrete types of injunctions are fundamentally different from the injunctions prohibited by the long-standing rule recognizing the adequacy of a money damages judgment as a legal remedy. An injunction against dissipation of misdirected or misappropriated trust funds merely freezes in place funds that never legitimately became the property of the fraudster. Indeed, in order to quash the Fourth District's decision below, this Court need not re-consider the rule prohibiting injunctions designed to prevent the dissipation of a defendant's own funds in anticipation of a forthcoming judgment for money damages.

III. The Fourth District's Decision Creates Uncertainty In Florida Law, Undermines Efforts To Protect Those Entitled To Trust Funds, and Encourages Fraudulent Commingling.

The Fourth District erroneously concluded that a cause of action for unjust enrichment is an action at law and that it could not support the injunction entered by the trial court. *See M.I. Industries*, 6 So. 3d at 629. In doing so, the court produced an anomalous decision in two different respects and created bad public policy in a third. This Court should quash that decision to promote certainty in the law among the districts, to encourage efforts to protect those entitled to trust funds, and to discourage fraudulent commingling.

A. The Fourth District's Decision Is Anomalous Because Unjust Enrichment Is An Equitable Cause Of Action In Four Of The Five District Courts Of Appeal.

The Fourth District stands alone in treating unjust enrichment as a legal, rather than equitable, cause of action. As explained in the initial brief filed by Attorneys' Title Insurance Fund, Inc., the First, Second, Third, and Fifth Districts treat unjust enrichment as an equitable cause of action.[4] *See* In. Br. at 23-24.

That being the case, in the other four appellate districts an injunction to freeze mortgage-fraud proceeds directly traced from a trust account would be

[4] It is striking that even the Fourth District does not uniformly treat unjust enrichment as a legal cause of action. *See Ocean Communications, Inc. v. Bubeck*, 956 So. 2d 1222, 1225 (Fla. 4th DCA 2007) ("Defendants correctly state that a plaintiff cannot pursue an equitable theory, such as unjust enrichment or quantum meruit, to prove entitlement to relief if an express contract exists.").

properly based upon unjust enrichment. Only in the Fourth District does such an injunction get reversed on this ground. Such an incongruity should be fixed by this Court.

B. The Fourth District's Decision Is Anomalous Because It Arbitrarily Distinguishes Between The Remedies Of Unjust Enrichment, Constructive Trust, And Equitable Subrogation.

The Fourth District's decision also sets up an arbitrary distinction between unjust enrichment, as a purported action at law, and equitable subrogation and constructive trust, as equitable actions. This elevates form over substance. Indeed, proof of these causes of action involves the weighing of the same types of equitable factors, as all three are rooted in the same equitable principles.

Historically, the three causes of action have been used to serve the same equitable purposes and, in fact, have been treated as complementary and sometimes overlapping remedies. *See Williams v. Stanford*, 977 So. 2d 722, 730 (Fla. 1st DCA 2008) ("A constructive trust is an equitable remedy available in cases dealing with breaches of fiduciary duty; such an instrument restores property to its rightful owner and prevents unjust enrichment" (emphasis supplied)); *Twin City Fire Ins. Co. v. Jones*, 918 So. 2d 403, 404-05 (Fla. 5th DCA 2006) ("This rule serves the purpose of equitable subrogation, which is to prevent unjust enrichment by assuring that the person responsible for the debt ultimately answers for its discharge" (emphasis supplied)).

In fact, at times prior to this case, the Fourth District has also treated the causes of action as overlapping. *See Southtrust Bank v. Riverside National Bank of Florida*, 792 So. 2d 1222, 1226 (Fla. 4th DCA 2001) (en banc) (the doctrine of equitable subrogation "is founded on established principles of equity to prevent an unjust forfeiture, on the one hand, and a windfall amounting to unjust enrichment, on the other" (citation omitted)); *Zanakis v. Zanakis*, 629 So. 2d 181, 183 (Fla. 4th DCA 1993) (a constructive trust "is 'constructed' by equity to prevent an unjust enrichment of one person at the expense of another as a result of fraud, undue influence, abuse of confidence or mistake in the transaction that originates the problem.").

Confusion ensues from treating these causes of action differently, with no concomitant public benefit. Such an incongruity should not be approved by this Court.

C. The Fourth District's Decision Makes Bad Public Policy Because It Imprudently Distinguishes Between Proceeds Of Fraudulent Transactions Identified While Still In Trust Accounts And Those Same, Directly Traceable Proceeds Of Fraudulent Transactions That Have Been Commingled.

As also explained in the initial brief, the law allows for injunctive relief to prevent dissipation of funds held in trust. *See* In. Br. at 28-29. In fact, the Fourth District acknowledged that its decision may have been different if the proceeds of the fraudulent activity had been identified before they were transferred out of the

trust account. *See M.I. Industries*, 6 So. 3d at 629 ("injunctive relief is appropriate to protect what is asserted to be the res of a trust during the pendency of litigation. . . . If the enjoined money remained specifically identifiable in the member-agent's attorney's trust account, then the injunction may have been proper."). But it decided that, once commingled, those same directly traceable funds could no longer be enjoined.

By refusing to enforce an injunction aimed at those same fraudulent proceeds even though they can be directly traced from the trust fund to the wrongdoer's account, the Fourth District actually incents fraudsters to hurry up and commingle assets and thereby avoid an injunction preserving the assets. It also facilitates the dissipation of funds that properly belong to others. Those who steal trust funds should not be encouraged to quickly commingle the fruits of their fraudulent activity in order to insulate those funds from their rightful owners.

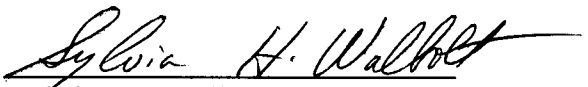
In the end, a quashal in this case is appropriate under longstanding equity jurisprudence in Florida. In all events, however, equity should provide a remedy to combat the increasing incidence of fraudulently misdirected and misappropriated trust funds. *See generally* 1 S. Symons, *Pomeroy's Equity Jurisprudence* § 67, p. 89 (5th ed. 1941) (the "American system of equity is preserved and maintained . . . to render the national jurisprudence as a whole

adequate to the social needs. . . . [I]t possesses an inherent capacity of expansion, so as to keep abreast of each succeeding generation and age.")

CONCLUSION

This Court should clarify that unjust enrichment is not an action at law. Then, substituting "unjust enrichment claim" for "action at law" in a rephrased certified question, the Court should answer in the affirmative and quash the decision of the Fourth District.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing brief *amici curiae* and accompanying one-volume appendix were furnished by Federal Express this 11th day of September, 2009 to the Clerk of the Court (original and seven copies) and to:

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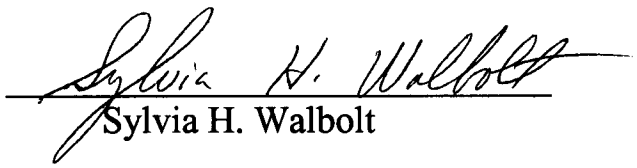

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