

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CHANCERY DIVISION**

**IN THE MATTER OF THE POSSESSION)
AND CONTROL OF THE COMMISSIONER)
OF BANKS AND REAL ESTATE OF) Case No.: 00 CH 05905
INDEPENDENT TRUST CORPORATION)
A/K/A INTRUST, AN ILLINOIS)
CORPORATE FIDUCIARY,)**

**MOTION OF SHARON MATTHIES, DEUTSCH AMERICAN PARTNERS
AND OTHER INDIVIDUAL HOLDERS OF INVESTMENT ACCOUNTS
THROUGH INTRUST FOR PARTIAL RECONSIDERATION OF THIS COURT'S
AUGUST 17, 2000 ORDER AND TO JOIN, IN PART,
THE RECEIVER'S OPPOSITION TO MOTION OF JOSEPH UMBACH**

Movants, Sharon Matthies, Deutsch American Partners and other individual holders of investment accounts through Intrust ("Movants"), by their attorneys, Arnstein & Lehr, pursuant to 735 ILCS §5/2-1203, respectfully request that this Court reconsider a portion of its August 17, 2000 Order and adopt the in its place the proposal set forth herein. In support of their Motion, Movants state as follows:

INTRODUCTION

1. On August 17, 2000, this Court entered its order dealing with, among other matters, the Receiver's recommendation for allocation of the Intrust cash trust fund shortage (the "Order"). Subsumed within the Order were the Court's rulings entered August 2, 2000, which also dealt with such matters.

2. Because of facts and circumstances which have developed in connection with and since the entry of the Order, facts and circumstances Movants believe to be dramatically different from those contemplated by this Court and the parties at the time the Court began ruling on August 2, 2000 and then again on August 17, 2000, Movants seek reconsideration

of certain aspects of the Order and request that the Court enter a revised Order adopting the proposal made herein.

3. Movants believe the alternative proposed herein will produce an allocation less unfair than that currently embodied in the Order and one which will allow this proceeding to conclude far more quickly than the current schedule allows, with a minimum of further activities and at a substantial saving in money, time and effort for all involved, including this Court. In other words, this Motion for Partial Reconsideration is based upon both equitable and practical considerations.

4. Among the main purposes of a motion to reconsider is the bringing to the court's attention of newly discovered evidence. Kaiser v. MEPC American Property, Inc., 164 Ill. App. 3d 978 (1st Dist. 1987). Movants believe the changed facts and circumstances discussed herein are tantamount to newly discovered "evidence" which, therefore, places this motion squarely within the law governing requests for reconsideration.

CHANGED FACTS AND CIRCUMSTANCES

5. This Court consistently has stated that whatever "unfairness" the Intrust account holders believe exists in this matter resulted from the defalcations which caused the shortage in the Intrust cash trust fund and not in these proceedings. Because of that, this Court consistently also has indicated its desire to bring these proceedings to a conclusion as quickly, efficiently and economically as possible.

6. In adopting that portion of the Receiver's recommendation that requested that accounts opened subsequent to April 23, 1999 be excluded from allocation of the shortage, this Court concurred that such exclusion was appropriate because no further transfers from

Intrust to Intercounty Title (“Intercounty”) were made after that date and, therefore, there could be no “risk of loss” of cash transferred by account holders to Intrust after that date.

7. With this Court’s acceptance of the proposition that it was the “risk of loss” which governed — and, indeed, determined — excludability of accounts from allocation of the shortage, the Court also ruled that holders of accounts opened before April 23, 1999 might also be excluded if they could demonstrate that the cash in their accounts was not at “risk of loss.” Indeed, this Court stated that any account holder who wished would be given the opportunity to request exclusion of his/her account(s) from allocation of the shortage so long as the account holder could show (among other potential grounds for exclusion) that substantially all cash he/she placed into the account(s) never was “at risk of being lost” because of the Intercounty defalcation.

8. These decisions by the Court have resulted in more than three thousand account holders filing motions requesting exclusion of their accounts from allocation of the shortage.

9. In order for the Court to consider a request for exclusion, the account holder must append to his or her request all documentation (that is, account statements from Intrust) which demonstrates that substantially all the cash that was in a given account never was “at risk of loss”. Many account holders did not have all the documentation they required and, therefore, they were forced to request such from Intrust, whose staff was reduced dramatically because of the receivership and which became faced with a landslide of such requests. It is doubtful that Intrust was even able to provide the necessary documentation to all those account holders requesting the same before the filing deadline of September 11, 2000. The time and effort Intrust staff have had to expend in satisfying these requests is part of the reason the

Receiver sought authority to charge account holders additional receivership fees.

10. Before this Court considers the requests for exclusion, the Receiver will necessarily have to review them. The Court has set aside an entire week in late September for the hearings on the multitude of requests. The Receiver's review and the Court's consideration of these requests is an indispensable element of the due process to which account holders are entitled in respect of their requests for exclusion from allocation of the Intrust cash trust fund shortage. Such review and consideration, while necessary, also multiplies the costs, time and effort of this receivership.

11. As this Court has been made aware, the funds available to the Receiver for costs and expenses associated with the receivership are exhausted and are in the process of being supplemented by assessments made on all account holders. Given the amount of effort that this exclusion process has already taken and is likely to continue to take over the next several weeks, this newly subsidized fund may be exhausted even before this Court is in a position to rule on the requests in late September (or even later if the week set aside turns out to be insufficient).

12. In its Recommendation, the Receiver projected that, were its initial framework for allocation of the shortage accepted, accounts which were held to be included in the allocation of the shortage would have suffered a reduction in value of approximately 6%. Now, however, because of the possibility that many more accounts will be excluded from the allocation (assuming, of course, that the receivership or this proceeding is not stayed due to lack of funds and that the Court rules on the myriad of requests for exclusion and grants at least some of them), that percentage could rise substantially as to those accounts which ultimately are not excluded.

13. In light of the foregoing changed circumstances, *i. e.*, the receipt of the thousands of requests for exclusion, the greater allotment of time and resources required to determine even in the first instance which accounts will be included in and which will be excluded from the allocation of the shortage and the very real potential that the allocation percentage will be increased significantly over that contemplated by the Receiver, Movants submit the following proposal for the Court's (re-) consideration.

**ALTERNATIVE TO RISK OF LOSS OF CASH
AS A BASIS FOR ALLOCATION OF THE SHORTAGE**

14. It is self-evident that financial transactions carry two fundamental risks: a credit risk; and an insolvency risk. Each of these risks is an inherent element of every financial transaction and each party to the transaction is exposed to and must accept them if the transaction is to proceed.

15. Both Intrust and the individuals placing their accounts with Intrust were exposed to both of these risks *vis-a-vis* each other. Likewise, Intrust and Intercounty each were exposed to both of those risks in their dealings with each other. However, the Intrust account holders never engaged in a transaction with Intercounty and, therefore, even though they assumed those risks *vis-a-vis* Intrust (because they did business with Intrust), they did not assume any such risk with respect to Intercounty. (To use a contract term, in Intrust account holders were not "in privity" with Intercounty.)

16. Thus, the "risk of loss" of cash concept which this Court has adopted as the underlying basis for allocation of the Intrust cash trust fund shortage is misplaced, as it was associated only with the Intrust/Intercounty transaction and not with the Intrust/Intrust account holder relationship. The principles of equity therefore dictate that this "risk of loss" of cash

should not be borne by the Intrust account holders in the context of this proceeding. Rather, the “risk of loss” of cash is a risk which Intrust alone should bear because of its having done business with Intercounty and because it was an inherent characteristic of the Intrust/Intercounty transactions. The cash which was diverted was cash in Intrust accounts supposed to have been held by Intercounty; cash which was an element of the transaction only between Intrust and Intercounty, without regard to the source of that cash (that is, the Intrust account holders).

17. The risk Intrust’s account holders should sustain — and which is the proper framework within which the equities of this proceeding must be viewed — is not the risk of loss of cash but the risk of Intrust’s insolvency. It is Intrust’s insolvency, not the mere theft of cash from Intercounty which caused the insolvency, which requires revaluation of the assets in the Intrust accounts.

18. When one views the risk to which Intrust’s account holders were exposed as an element of their doing business with Intrust — the risk of Intrust’s insolvency as distinguished from the risk of loss of cash because of Intercounty’s actions — it becomes clear that the rationale of “risk of loss of cash” does not squarely apply to these facts, whereas the “risk of Intrust’s insolvency” does.

19. From the perspective of the risk of Intrust’s insolvency, it is clear and indisputable that the accounts of all account holders whose accounts were in existence on the date of the commencement of the receivership, April 14, 2000, were exposed to this risk of insolvency, without regard even to the nature of the assets held in those accounts.

Accordingly, all Intrust account holders as of that date should bear the burden of the allocation of Intrust's cash trust fund shortage, without exclusions. The cash trust fund was but one of the different types of assets of Intrust's account holders.

20. Because of Intrust's insolvency, each and every Intrust account holder will be unable to receive the full value of his or her assets. Because, as indicated, all Intrust account holders were exposed to this risk of Intrust's insolvency, there can be no "exceptions" to this rule. Therefore, it is appropriate (indeed, not only is it appropriate, it is the only truly equitable allocation of the shortage) that every Intrust account holder's account be subject to allocation of the Intrust cash trust fund shortage.

21. In a sense, this Court already has recognized the equities of this proposal and has based an earlier ruling on them, *i.e.*, the decision to subject all accounts — without exception or exclusion (even including accounts which were automatically excluded from the allocation because they were not opened until after April 23, 1999) — to the Receiver's request to charge accounts to obtain additional operating funds for the receivership.

22. The receivership is a function exclusively of Intrust's insolvency. Even though Intrust's insolvency was caused by actions of Intercounty, still it is Intrust's insolvency which precipitated the receivership and which gave to the Commissioner of the Office of Banks and Real Estate the authority to institute the receivership pursuant to the Corporate Fiduciary Act.

**ADVANTAGES OF USING RISK OF INSOLVENCY
AS BASIS FOR ALLOCATION OF THE SHORTAGE**

23. Equity, efficiency and economy are the hallmarks of what this Court always has sought to implement in connection with the Intrust receivership. There are few who would disagree that, at present, those objectives are becoming more and more elusive.

24. The proposal presented here, if accepted by this Court, will bring the proceedings before this Court to a prompt resolution, would spare everyone involved the lengthy hearings which are planned for the various types of requests for exclusion and, therefore, inevitably result in far less cost to all interested parties.

25. In its Opposition to the Motion of Joseph Umbach, at pages 5 and 6 thereof, the Receiver sets forth the practical difficulties the Receiver and the Court face in verifying the allegations set forth in the extraordinary number of requests for exclusion. Acceptance of the proposal set forth herein would eliminate these difficulties without running afoul of the account holders' rights of due process.

26. Furthermore, bringing these proceedings to an expeditious resolution also will facilitate sale of Intrust's remaining assets. Many have recognized that the longer these proceedings go on, the more difficult it will be to sell Intrust.

27. The proposal presented here, if accepted by this Court, also will produce an allocation of the Intrust cash trust fund shortage less unfair than that which presently is pending, to say nothing of the potentially huge percentage which would be borne by each included account holder's account if additional accounts are excluded from the allocation.

28. Movants' are informed and believe that the percentage allocation which would

apply if the proposal presented here were adopted and there were no excluded accounts would be less than 5% of the value of each account. This is lower than any percentage proposed or considered to date. When viewed in the context of the risk of insolvency to which Intrust's account holders were exposed, the merits of this proposal become evident both from an equitable as well as a practical standpoint.

CONCLUSION

29. For the reasons set forth herein, Movants respectfully request this Court reconsider its Order of August 17, 2000 and revise it consistent with the proposal set forth herein.

FOR THE MOVANTS:

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Dated this 11th day of September, 2000