

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)	Cause No. 00CH05905
INDEPENDENT TRUST CORPORATION)	
a/k/a INTRUST, an Illinois corporate)	Judge Sidney A. Jones III
fiduciary)	
)	

**RECEIVER’S RESPONSE TO CERTAIN ACCOUNT HOLDERS’
MOTION FOR PARTIAL RECONSIDERATION OF AUGUST 17 ORDER**

On September 12, 2000, certain account holders (the “Account Holders”) asked this Court to reconsider those parts of its orders of August 2, 2000 and August 17, 2000 that: (1) permit Intrust account holders to file motions to exclude their accounts from the allocation of the cash trust fund shortage (“Shortage”); and (2) establish certain categories of accounts that are automatically excluded from the allocation. The Receiver agrees with the Account Holders that the Court should rescind the process of allowing motions for exclusion. The Receiver disagrees with the Account Holders, however, in so far as they suggest that logic or equity compels that the allocation of the Shortage be applied across all accounts. The Receiver has already established in its Recommendation Regarding Allocation of the Cash Trust Fund Shortage (“Allocation Recommendation”) that this Court can balance fairness and practicality to exclude a limited set of accounts from the allocation.

**I. THE COURT SHOULD RESCIND THE PROCESS FOR HEARINGS ON
MOTIONS FOR EXCLUSION FROM ALLOCATION.**

The Receiver agrees with the Account Holders that the practical problems associated with

considering the motions for exclusion overwhelm any fairness or equity that might theoretically be achieved from the resolution of those motions.¹ As of September 11, 2000, over 4,100 motions had been filed. Some of these motions cover multiple accounts, and the Receiver therefore anticipates that the motions could involve exclusion requests covering more than 4,500 accounts (out of a total of 17,500). As the Receiver has previously stated, resolution of these motions by the Receiver will be time-consuming and expensive. (See Receiver's Opposition to Motion of Joseph Umbach, 5-7). For example, several hundred of the exclusion motions claim that their assets were never at risk because Independent Trust Corporation ("Intrust") never transferred cash from the commingled money market fund to Intercounty Title Company of Illinois ("Intercounty") between the time of the account holder's initial investment at Intrust and Intrust's subsequent purchase of securities or other assets from a third party. The Receiver estimates that it will take, on average and without considering the time or expense of preparing pleadings and going to court, at least two hours per account for its personnel, the Intrust personnel, and the Receiver's lawyers to research these factual assertions.

The courtroom process for assessing all of the exclusion motions is equally daunting. The Receiver is advised that the Clerk's office has encountered significant obstacles in cataloging and filing the various motions. While the Court has set aside time in the last week of September for hearing a

¹ Normally in administering insolvency proceedings, courts of equity must distribute the assets of the insolvent estate among the creditors and other stakeholders fairly based on their legal rights. Courts of equity, however, are entitled to consider practical realities and to disregard even established legal rights if determination of those rights will become so expensive, time-consuming, and impractical as to work an injustice to stakeholders generally. See, e.g., *Chemical Bank New York Trust Co. v. Kheel*, 369 F.2d 847 (1966) (in a case under the Bankruptcy Act, court determined that time and expense of distinguishing separate assets and liabilities of related debtors would be so great that it is more equitable to disregard corporate forms and to treat all related debtors as one consolidated debtor).

series of so-called “exemplar” motions, decisions on those exemplars will not spare the Receiver from reviewing all the other motions and presumably responding to them, nor will it spare this Court from having to consider claims by other moving parties that they have distinguishing circumstances or additional theories that should cause this Court to rule in their favor. Indeed, to the extent that the Court rules in favor of account holders on any or all of the “exemplar” motions, that ruling will simply set the stage for the next wave of hearings to consider the claims by account holders that their particular facts put their case within the ambit of any favorable ruling on the exemplar motion. As noted above, that evaluation process will be time-consuming and costly, especially when one considers the additional incremental court time that the Receiver and the Court will have to invest in pleadings and court appearances to consider those individualized factual claims.

Moreover, if all of the exclusion motions are granted, the allocation will potentially saddle the remaining account holders – some of whom may have accounts that fit within the exclusion categories but failed to file motions – with an allocation in excess of 11%.² Such an allocation amount would be disproportionately high when compared to the risk of maintaining accounts at Intrust (which was essentially equal for all account holders). Indeed, it would have the effect of unfairly penalizing account holders who did not fall within the exclusion categories created by the Court or who simply chose not

² On a preliminary basis, the Receiver calculated the impact on the allocation of the shortage if the first 3,054 exclusion motions received were granted. Exclusion of these accounts would reduce the value of the allocatable amount by approximately \$446 million. After taking into account the number of illiquid assets remaining, the Receiver determined on a preliminary basis that the allocation percentage would be approximately 10.5%. Given that at least an additional 1,100 motions have been filed, it is quite possible that, if all of these motions were granted, the ultimate allocation percentage could be significantly higher.

to hire counsel to represent them in this matter.

Finally, until this Court determines which accounts will be included in the allocation and which will be excluded, no allocation and collection of the Shortage can be made, and no “unfreezing” of accounts can begin. As soon as a final determination is made as to the accounts to be included, the Receiver is ready to begin the process of allocating and collecting the Shortage (pursuant to the Court’s September 12, 2000 Order). However, this process is anticipated to take at least 90 days. If a determination as to which accounts are to be included in the allocation is delayed pending resolution of the several thousand exclusion motions filed to date, it ensures that account holders’ free access to accounts will be delayed for many additional months.

In light of these costs and delays, the exclusion process is not equity but its opposite. Accordingly, the Receiver believes that this Court should rescind those portions of its prior orders that held that the Court would consider motions for exclusion from allocation of the Shortage.

II. THE COURT SHOULD ADOPT THE RECOMMENDATION PROPOSED BY THE RECEIVER ON JUNE 23 AND PERMIT LIMITED EXCLUSIONS FROM THE ALLOCATION.

The Account Holders propose that all accounts, including land trusts, bookkeeping accounts, and accounts opened after April 23, 1999, be subject to a pro rata allocation of the Shortage. The Receiver believes that the Account Holders’ proposal – that the Shortage be allocated against *all* accounts – unnecessarily sacrifices fairness in the search for simplicity. The Receiver, therefore, suggests that the Court adopt the Receiver’s original recommendation filed on June 23, 2000, which strikes a balance of fairness with practicality. The Receiver refers the Court to papers the Receiver has already filed and to arguments the Court has already heard for a description of the reasoning that led to

the Receiver's recommendation. (See Memorandum of Legal Authorities in Support of Receiver's Recommendation Regarding Allocation of Cash Trust Fund Shortage; Receiver's Response to Objections to Its Recommendation Regarding Allocation of Cash Trust Fund Shortage).

The Account Holders' proposal unnecessarily sacrifices fairness, because the reasoning behind that proposal is incomplete. Even if one accepts the provocative argument that account holders at Intrust were exposed only to an Intrust insolvency risk and not an Intercounty credit risk, that premise does not lead to, let alone compel, the conclusion that all accounts must share ratably in the allocation of the Shortage. It establishes only that all account holders must be subject to the Intrust insolvency process, *e.g.*, meaning that their accounts should be frozen while the Court determines an appropriate allocation of the Shortage and facilitates the selection of a successor trustee. Furthermore, the Account Holders' proposal ignores the equitable reasons – addressed in the Receiver's Allocation Recommendation – that support excluding accounts opened after or with a zero balance on April 23, 1999 from the allocation.³

The Account Holders also fail to follow their own logic. They posit two kinds of risk – insolvency and credit – and then assert that account holders at Intrust never “assumed” any risk with respect to Intercounty. Whether or not account holders “assumed” an Intercounty risk in the sense of

³ The Receiver originally proposed that accounts open as of April 23, 1999, but not funded until after that date, be excluded from the allocation *if* those account holders provided the Receiver with a written request, including documentation to support their claim. (See Receiver's Proposed Order Allocating Cash Trust Fund Shortage (dated 7/28/00), ¶ 4) Approximately 100 account holders have filed motions for exclusion on this basis. The Receiver believes that, assuming these accounts were in fact zero balance on April 23, 1999, they should be excluded from the allocation, consistent with the Receiver's original proposal.

knowing of Intrust's dealings with Intercounty, account holders bore the risk that trust assets that they put under Intrust's control could be diverted (i.e., therefore assuming a "risk of loss"). That kind of risk, however, differed somewhat depending on the type of account. There was no risk, theoretical or real, that land trusts could be deposited at Intercounty, because the nature of land trusts – a unique form of real estate instrument – prevented their deposit with or conversion by Intercounty. Likewise, bookkeeping accounts never put any assets under Intrust's control, and therefore these accounts never "assumed" a diversion risk to Intercounty. The Account Holders' proposal obliterates the tangible, practical distinctions between the risks assumed by these accounts and the risk assumed by the typical account holder that let Intrust take title to account assets.

Finally, the Account Holders' proposal is impracticable. As noted above, the Account Holders would include land trusts in the allocation. Those accounts contain illiquid assets and are typically valued on Intrust's books at \$1. It was for these reasons that the Receiver originally proposed that those accounts be excluded from the allocation.

Accordingly, the Receiver submits that the Court not follow the Account Holders' proposal, but instead allocate the shortage pursuant to the Receiver's Allocation Recommendation.

III. CONCLUSION

The Receiver requests that the Court grant the Account Holders' motion so far as it asks this Court to reconsider and rescind those parts of prior orders that contemplate consideration of motions for exclusion from the allocation, but not grant the Account Holders' request for an allocation against all accounts. The Receiver believes the more equitable way to allocate the Shortage is to follow the allocation recommendation submitted to this Court by the Receiver.

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Respectfully submitted,

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