

IN THE SUPREME COURT OF
THE STATE OF ILLINOIS

BRUCE C. FREIMUTH, TERRY G. BOMMER,)
individually and as Custodian for Joshua C.)
Bommer and Emily E. Bommer, minors, and)
BABARA P. DAVIDSON,)

Plaintiffs,)

v.)

Cause Number _____

PRICEWATERHOUSECOOPERS, LLP, as)
Receiver of Independent Trust Corporation,)
and THE HONORABLE SIDNEY A. JONES, III,)
Circuit Judge,)

Defendants.)

SUGGESTIONS IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE
TO FILE A COMPLAINT SEEKING A WRIT OF MANDAMUS

I

Introduction

Plaintiffs are customers of Independent Trust Corporation, an Illinois corporate fiduciary now in receivership ("Intrust"). They seek leave to file their Complaint For A Writ Of Mandamus in order to secure Defendants' compliance with 205 ILCS 620/6-10(5). That statute provides:

[t]he receiver [of an Illinois corporate fiduciary] shall have the authority, *and it shall be the receiver's duty*, to surrender to the customers of such corporate fiduciary, when requested in writing directed to the receiver by such customers, the assets, private papers and valuables left with the corporate fiduciary for safekeeping, under a custodial or agency agreement, upon satisfactory proof of ownership.

205 ILCS 620/6-10(5)(emphasis supplied).

From the very outset of Intrust's receivership, Defendant PricewaterhouseCoopers, LLP, as Intrust's receiver (the "Receiver"), has attempted to evade its obligations under 205 ILCS 620/6-10(5). Immediately after accepting the appointment as Intrust's receiver, this Defendant invoked the jurisdiction of the Chancery Division of the Circuit Court for Cook County, commencing a proceeding entitled *In the Matter of the Possession and Control of the Commissioner of Banks and Real Estate of Independent Trust Corporation a/k/a Intrust*, Cause No. 00CH05905. Without any notice to Plaintiffs or other similarly situated persons, the Receiver applied for and secured from Defendant, the Honorable Sidney A. Jones, III (the "Trial Court"), an Order of Administration. Appendix Ex. 7. Among other things, the Receiver requested that the order prohibit the *Receiver* – i.e., the very party applying for the order -- from allowing Intrust's customers to withdraw from the Receiver's custody any assets they left in trust with Intrust. The Trial Court obliged the Receiver, and entered the Order of Administration as requested. Appendix, Ex. 7, ¶28.

As the Receivership Proceedings progressed, the motive for this facet of the Administrative Order became clear. Intrust's Receivership was initiated when a regulatory examination revealed that a substantial quantity of cash assets supposedly held for Intrust's customers was missing. The Receiver has now requested the Trial Court's approval of a plan to invade the non-cash assets held for the accounts of Intrust customers, such as Plaintiffs, liquidate a portion of those assets, and apply the proceeds to defray the losses resulting from the theft of \$68.1 million in cash assets held by Intrust for the accounts of other Intrust customers. Appendix, Exhibits 8, 9A and 9B. If the Receiver is required to comply with its statutory obligation to surrender non-cash assets held for the accounts of Intrust's customers

upon written demand, the Receiver's plan to shift the loss resulting from the theft of cash assets from the owners of such cash assets to the owners of non-cash assets will be frustrated.

When the Receiver's plan was announced, Plaintiffs invoked the provisions of 205 ILCS 620/6-10(5) and made written requests for the surrender of the mutual fund shares the Receiver holds for Plaintiffs' accounts. Appendix, Exhibits 11 – 15. They filed objections to the plan with the Trial Court, asking the Trial Court to direct the Receiver to comply with its obligations under the statute. Appendix, Exhibits 18 – 23. The Receiver has not complied with Plaintiffs' requests, and the Trial Court has refused to order the Receiver to perform its statutory obligations. Appendix, Exhibit 27, ¶16.

The Trial Court has now approved the essence of the Receiver's plan. On November 3, 2000, the Trial Court set December 8, 2000 as a target date for completion of the steps necessary to determine what portion of Plaintiffs' assets will be taken from their accounts and applied to defray the losses of other Intrust account holders, and commence the liquidation process. Appendix, Ex. 35, pp. 63 - 65.

The Trial Court has announced that his orders implementing the Receiver's plan will be interlocutory in form, will not be certified for immediate appeal, and will not be stayed by him. Appendix, Ex. 33, pp. 36 - 38. In such circumstances, Plaintiffs' assets may be seized and liquidated, and the proceeds disbursed so as to place them beyond Plaintiffs' practical ability to recover them before the Trial Court's orders can be tested by ordinary appellate review.

As a result of the foregoing, Plaintiffs are threatened with imminent and irreparable harm. Such harm can be readily prevented if this Court grants Plaintiffs' motion and issues its Writ of Mandamus, compelling Defendants to comply with the clear command of 205 ILCS 620/6-10(5). Plaintiffs have no other adequate remedy.

II

Issues Presented

During a hearing held November 3, 2000, the Trial Court announced his conclusion that the facts that give rise to Plaintiffs' Complaint For A Writ of Mandamus are undisputed. Appendix, Ex. 35 pp. 90 - 91. The Receiver previously acknowledged as much. Appendix, Ex. 31, pp. 50-51. The Trial Court recognized that such circumstances presented it with purely legal issues for decision. Appendix, Ex. 35, pp. 80 - 82, 90. If this Court grants Plaintiffs' motion for leave to file their Complaint, therefore, it will be similarly confronted only with legal issues. The issues raised by Plaintiffs' Complaint are:

1. May the Receiver of an Illinois corporate fiduciary properly ignore the express mandate of 205 ILCS 620/6-10(5), and refuse to surrender, upon written demand, assets held in trust for the account of a particular customer of the corporate fiduciary?
2. May a circuit judge supervising the receivership of an Illinois corporate fiduciary, in the interests of "equity" or otherwise, properly prohibit the Receiver of that fiduciary from complying with the express mandate of 205 ILCS 620/6-10(5)?

III

Reasons For Granting Plaintiffs' Motion And Issuing The Writ

Mandamus is a proper (and the only effective) means to enforce the Legislature's clear command in the context of this case. *See, e.g., Pioche Mines Consol., Inc. v. Foley*, 410 F.2d 742 (9th Cir. 1969). Defendants have made clear that they seek to deprive Plaintiffs of their assets in a manner that will escape effective appellate review and intervention until a point when Plaintiffs will have no practical and effective means or source of recovery of the assets Defendants propose to take from them. Enforcement of 205 ILCS 620/6-10(5) through a writ of mandamus is therefore necessary to carry out the Legislature's command that customers'

assets held in trust by a corporate fiduciary be treated as inviolate and that the customers have ready access to all of their trust assets during the course of a corporate fiduciary's receivership proceedings.

The general importance of this case and the issues presented by Plaintiffs' Complaint provide additional reasons for this Court to grant Plaintiffs' motion for leave to file their Complaint. This case presents a question of first impression under the Illinois Corporate Fiduciaries Act, 205 ILCS 620/1-1 *et seq.* (the "ICFA"). The resolution of the issues presented (or absence of any conclusive resolution) will likely affect the decisions of some persons whether to use the services of Illinois corporate fiduciaries.

This case is also of general importance because it directly affects thousands of account holders with assets approaching \$2 billion. The Receiver in this case reportedly holds in trust approximately \$1.74 billion in non-cash assets left with Intrust pursuant to custodial agreements between Intrust and approximately 17,000 account holders. Many of these account holders have, like Plaintiffs, requested that the Receiver surrender the non-cash assets held for their accounts. Over 4,900 Intrust account holders, including Plaintiffs, have (thus far unsuccessfully) objected to the Receiver's and Trial Court's plan to use their non-cash assets to cover the losses of those Intrust account holders who opted to have cash in their Intrust accounts. This Court's resolution of the issues presented will provide guidance to the trial Court, the Receiver, and the Other Intrust account holders concerning the proper disposition of their requests for surrender of their assets.

IV

Factual Background

Each Plaintiff is an individual and the beneficial owner of mutual fund shares owned of record and held in trust for each Plaintiff's separate account by Intrust (the "Assets").

Appendix, Exs. 11 – 15. Prior to entrusting any assets to Intrust's custody, each Plaintiff entered into a written custodial agreement with Intrust. Appendix, Exs. 2 – 6. Pursuant to those custodial agreements, Intrust agreed to invest Plaintiffs' assets only as directed by Plaintiffs' investment advisor. *Id.* Intrust was not insured under the FDIC, SIPC or any other depository insurance funds. Exhibit 8, paragraph 20.

Upon Intrust's collection of funds deposited to any of Plaintiffs' accounts, the investment advisor instructed Intrust to purchase shares of one or more specific mutual funds. Intrust purchased the mutual fund shares for Plaintiffs' accounts as instructed by the investment advisor. Consequently, none of the Plaintiffs' accounts maintained with Intrust holds any material amount of cash. Appendix, Exs. 11 - 15. This circumstance exists by design, and not by happenstance. The strategy followed by Plaintiffs' investment advisor was to have its customers' funds fully invested in mutual fund shares at all times.

Prior to being placed in receivership, Intrust operated a cash management program in which customers could allow Intrust to invest their funds in what were supposed to be short term, highly liquid investments selected by Intrust. Customers who opted to participate in this program were promised that they would receive interest income on the funds invested in this manner by Intrust. One of the ways in which Intrust "invested" funds deposited in its cash management program was to deliver funds to an "escrow" account Intrust maintained with a related entity, Intercounty Title Company ("Intercounty"). The funds deposited in the Intercounty "escrow" account were credited with interest by Intercounty.

Earlier this year, an examination of Intrust by the Office of Banks and Real Estate revealed a significant shortage of trust *cash* assets. Pursuant to the ICFA, the Commissioner of Banks and Real Estate took possession and control of Intrust. Appendix, Ex. 7. Defendant PricewaterhouseCoopers, LLP was appointed to serve as Intrust's Receiver. It continues to hold that office. Consequently, Plaintiffs' Assets are now held by the Receiver and in trust for Plaintiffs' accounts.

Upon its appointment, the Receiver applied, without notice to Plaintiffs for entry of the Receiver's proposed Order of Administration, thereby commencing the Receivership Proceedings. The Trial Court entered the proposed Order of Administration, which provided, among other things, that:

Pending completion of the Receiver's initial investigation into the Preclosing Trust Assets and further order of the Court, the Receiver shall not make any disbursements, transfers, or permit withdrawals from, or trades or sales of, the Preclosing Trust Assets and proceeds derived therefrom, unless directed to by the Commissioner or his authorized agent.

Appendix, Ex. 7, ¶28.

On July 12, 2000, the Receiver issued a Report on its Initial Investigation into the Preclosing Trust Assets. Appendix, Ex. 9A. Therein, the Receiver disclosed that Intrust holds all of the non-cash trust assets it was supposed to be holding for the accounts of Intrust's customers, (*Id.* at ¶ 20) but had approximately \$68.1 million less in cash trust assets than it was supposed to be holding for its customers. *Id.* at ¶ 9. The shortage was traced to an "escrow" account Intrust supposedly maintained with Intercounty Title Company ("Intercounty").

Appendix, Ex. 8, ¶¶11-18. Certain of Intrust's customers' funds were transferred to the "escrow" account on particular dates, as the Receiver detailed in a document now included as Exhibit 10 to the Appendix. The Receiver has filed a separate Complaint in the Circuit Court

of Cook County alleging that Intrust's customers' funds were stolen by Intercounty officers and agents while the funds were on deposit at Intercounty. The Trial Court approved the Receiver's Report on its Initial Investigation at a hearing held July 28, 2000. Appendix, Ex. 16, at pp. 19 - 20.

Prior to the July 28, 2000 hearing, each Plaintiff demanded in writing that the Receiver surrender their non-cash Assets pursuant to 205 ILCS 620/6-10(5). Appendix, Exs. 11 - 15. Plaintiffs make no claim for immediate surrender of the *de minimis* cash portion, if any, of their accounts, but limit their demand to the non-cash assets which clearly escaped the scheme of theft perpetrated upon those whose cash assets were "invested" at Intercounty.

Although the terms of 205 ILCS 620/6-10(5) give the Receiver no discretion to refuse Plaintiffs' written demands for the surrender the Assets, the Receiver failed to comply with Plaintiffs' demands. Following that failure, Plaintiffs requested that the Trial Court order the Receiver to comply with Plaintiffs' demands. Appendix Exs. 18 - 24.

In an interlocutory order entered August 17, 2000, the Trial Court rejected Plaintiffs' request for the surrender of their trust assets. Appendix, Ex. 27, ¶16. The Trial Court has adopted the Receiver's position that it will not authorize the release of account holder's assets prior to resolution of issues arising from the Receiver's allocation recommendation. *See, e.g.*, Appendix, Ex. 36, pp. 522 - 528.

In addition to denying Plaintiffs' requests to enforce their demand for surrender of the Assets, the Trial Court's August 17, 2000 Order includes a finding that there is a deficiency in the trust assets of Intrust of approximately \$68.1. It directs that the shortage be "allocated" among all Intrust accounts in proportion to their values as of April 30, 2000. Once the allocation process is complete, the Receiver is to collect the "allocated" cash shortage by

liquidating non-cash trust assets held by the Receiver for the accounts of persons such as Plaintiffs. The proceeds of that liquidation will then be distributed among Intrust account holders whose assets were invested in cash, which distribution would eliminate most of the theft losses these account holders would otherwise sustain.

The Trial Court established a motion procedure for account holders to seek exclusion of their accounts from the “allocation.” Appendix, Exs. 25, 27. Plaintiffs’ accounts all fell within one or more categories of accounts that the Court indicated it would consider excluding from the “allocation” of the cash shortage. Plaintiffs’ Davidson and Bommer, as well as approximately 4900 other Intrust account holders, moved to exclude their accounts from the allocation process. Davidson’s motion, which the Receiver designated as an exemplar motion, is included in the Appendix as Exhibit 26.

In support of their motions, Plaintiffs showed that they had no cash assets at the time Intrust wired cash to Intercounty. Plaintiffs’ funds, therefore, could not have been among the funds transferred to Intercounty. Appendix, Ex. 26.

Plaintiffs’ and other account holders’ motions for exclusion from the allocation process were taken up at a series of hearings held between September 25 and November 8, 2000. The Receiver presented no evidence that any of Plaintiffs’ Assets were stolen. Instead, the Receiver speculated that during the brief time that Plaintiffs’ money was not invested in mutual funds, thieves working at Intrust might have stolen some of Plaintiffs’ money, then replaced it with money stolen from other account holders with whose money Plaintiffs’ money was briefly commingled. See Appendix, Ex. 16 pp. 104-11; Appendix Ex. 31, pp. 44 -50. The Receiver, however, presented no evidence that this actually occurred, *id.*, and earlier in the Receivership Proceedings admitted that it cannot offer such proof. See Appendix, Ex. 16 pp. 270-76.

The Receiver's only proof of the dates of the thefts is the list of dates that funds were transferred to Intercounty. See Appendix, Ex. 16 pp. 270-76. Plaintiffs' funds could not have been among the funds transferred to Intercounty because at the times of the transfers, Intrust held no cash on behalf of Plaintiffs. Plaintiffs' assets, to the extent they were in Intrust's custody at the times of the transfers, were fully invested in mutual fund shares, all of which are fully accounted for. See Appendix, Ex. 17. When the Receiver's evidence is combined with Plaintiffs' evidence, the record compels the conclusion that none of Plaintiffs' assets were stolen.

Plaintiffs' evidence is undisputed because the Receiver's conjecture does not create a fact dispute. Based on this record, the Trial Court has made a finding that there are no disputed facts. See Appendix, Ex. 35 pp. 89 – 91. Viewed in this light, Plaintiffs present this Court with a purely legal question, based upon undisputed facts.

Upon hearing Plaintiffs' and other parties' motions for exclusion, however, the Trial Court determined to limit exclusions from the "allocation" to assets deposited in Intrust accounts after April 23, 1999 and the appreciation thereon. The Trial Court has set December 8, 2000 as the target date by which to implement against Plaintiffs' (and other similarly situated account holders') Assets the allocation process outlined in its August 17, 2000 Order.

Appendix, Ex. 35, pp. 63 – 65.

V

Argument

A. This Court Has Exclusive Jurisdiction
To Provide Plaintiff With The Remedy of Mandamus

This is an original action for a writ of *mandamus*. Accordingly, this Court has exclusive jurisdiction of the matter pursuant Supreme Court Rule 381 and to Article VI, section 4(a) of the Illinois Constitution.

B. Mandamus Is The Proper Remedy For The
Receiver's And Trial Court's Refusal To Abide By
And Enforce 205 ILCS 620/6-10(5)

Plaintiffs have discovered no Illinois case in which a corporate fiduciary's Receiver refused to comply with its obligation, under 205 ILCS 620/6-10(5), to surrender trust assets to the owner upon written demand, much less one like this case, where the supervising court has refused to enforce Plaintiffs' statutory right to the surrender of Plaintiffs' Assets. Thus, insofar as Plaintiffs are aware, the specific question of whether mandamus is the appropriate remedy for such refusals is an issue of first impression in this State. Elsewhere, however, it has been recognized that mandamus is the proper remedy for a receiver's refusal to deliver trust assets to the rightful owner upon demand where the supervising court refuses to order the delivery of the assets. *Pioche Mines Consol., Inc. v. Foley*, 410 F.2d 742 (9th Cir. 1969).

**Mandamus is an extraordinary remedy to enforce, as a matter of right, "the performance of official duties by a public officer where no exercise of discretion on his part is involved." *Noyola v. Board of Ed. Of the City of Chicago*, 688 N.E.2d 81, 86 (Ill. 1997).
Issuance of a writ of mandamus is appropriate where the Plaintiff shows "facts which establish**

a clear right to the relief requested, a clear duty of the respondent to act, and clear authority in the respondent to comply with the writ.” *Id.*

C. Plaintiff’s Complaint Alleges Undisputed
Facts Entitling Plaintiffs To The Relief Requested
Against Both Defendants

Plaintiffs’ verified Complaint clearly alleges facts that establish Plaintiffs’ right to the immediate surrender of the Assets. Plaintiffs allege that the Receiver, as Intrust’s successor, holds identifiable assets in trust for the benefit of each Plaintiff. Plaintiffs further allege that the Assets consist of mutual fund shares directly traceable to purchases made by Intrust at the direction of Plaintiffs’ investment advisor, using funds provided to Intrust by Plaintiffs for that specific purpose. The Complaint describes the written demands made upon the Receiver for surrender of the Assets, the failure of the Receiver to surrender the Assets, and the Trial Court’s refusal to enforce Plaintiffs’ requests for surrender of their Assets. The Trial Court has already made a finding, in the course of a hearing held November 3, 2000, that there is no dispute concerning the facts giving rise to Plaintiffs’ Complaint for a Writ of Mandamus. Appendix, Ex. 35, pp. 89 - 91.

In this case, 205 ILCS 620/6-10(5) provides the clear right to the relief requested and the clear duty and authority of the Receiver to comply:

The receiver for a corporate fiduciary, under the direction of the Commissioner, shall have the power and authority and is charged with the duties and responsibilities as follows:

* * *

(5) The receiver *shall* have authority, and *it shall be the receiver's duty*, to surrender to the customers of such corporate fiduciary, when requested in writing directed to the receiver by such customers, the assets, private papers and valuables left with the corporate fiduciary for safekeeping, under a custodial or agency agreement, upon satisfactory proof of ownership.

(emphasis supplied).

The Writ should be addressed jointly to the Receiver and the Trial Court, because the Receiver is subject to the authority of the Trial Court. 205 ILCS 620/6-4. The Trial Court has prohibited the Receiver from complying with the Receiver's obligations under 205 ILCS 620/6-10(5). Thus, in addition to directing the Receiver to comply with its statutory obligation by surrendering the Assets to Plaintiffs, Plaintiffs respectfully request that this Court direct the Trial Court to vacate ¶28 of the April 14, 2000 Order of Administration, insofar as that Order may be construed to prohibit the Receiver's surrender of Plaintiffs' Assets. Issuance of the Writ of Mandamus to both Defendants will assure that there are no further obstacles to the Receiver's discharge of its statutory duties.

D. There Is No Valid Basis For The Receiver's
Failure To Comply With Its Statutory Obligation
To Surrender The Assets To Plaintiffs

The Receiver did not respond directly to any Plaintiff's demand for surrender of their Assets.¹ It did, however, document its opposition to this type of demand in papers filed in the Receivership Proceedings, as well as in arguments made in a series of hearings conducted by the Trial Court between July 28, 2000 and November 3, 2000. The Receiver's refusal to comply with the mandate of 205 ILCS 620/6-10(5) is rooted in its belief that Plaintiffs' Assets can (and in this case should) be invaded by the Receiver and applied to benefit those account holders whose Intrust accounts were supposed to hold cash at the time of the Receiver's appointment.

¹ Upon delivery of Plaintiffs' demands, Intrust's employees contacted Plaintiffs' investment advisor and informed the advisor that it could liquidate the mutual fund shares, but could not surrender the proceeds as requested. Intrust was instructed that the two parts of the Plaintiffs' directives were not to be separately executed.

The Trial Court's comments from the bench during these hearings make clear that it shares the Receiver's belief in the propriety of invading Plaintiffs' Assets held in trust by the Receiver for the benefit of other Intrust account holders. According to the Trial Court's analysis, the mere "fact" that Plaintiffs' Assets were purchased using funds deposited in a commingled Intrust account from which Intrust from time-to-time stole funds is sufficient to place Plaintiffs and their all of their Assets in the same status as other Intrust customers and their cash assets left on deposit with Intrust in an interest bearing account when Intrust was placed in Receivership. Appendix, Ex. 31, pp. 52-53. Evaluation of the uncontroverted facts of this case and the controlling principles of Illinois law shows, however, that the Receiver's and the Trial Court's beliefs concerning the power and justification for invading Plaintiffs' Assets for the benefit of other persons are incorrect as a matter of law.

1. The Receiver Holds Assets Identifiable As Belonging To Plaintiffs.

Although Intrust's actual cash holdings cannot be reconciled with the credit balances of cash reflected in Intrust's customers' accounts, the Receiver concedes that all of the non-cash trust assets left in Intrust's custody, including Plaintiffs' Assets, are fully accounted for.

Appendix, Exs. 8, 9A. There is no evidence that at any of the brief periods of time during which Intrust held collected cash funds for any Plaintiffs' accounts, the aggregate amount of cash actually held by Intrust dropped below the amount Intrust was holding in trust for Plaintiffs subject to Plaintiffs' investment instructions. See Appendix, Ex. 31, pp. 28-30, 34, 35-36, 50-51. Consequently, Defendants and this Court should presume that the non-cash assets held by the Receiver represent only the proceeds of the assets entrusted to Intrust to purchase those assets. *Cf. American Surety Co. v. Jackson*, 24 F.2d 768 (9th Cir. 1928) (where a trust deposit has been shown to be placed in a common fund, and the fund does not at any time fall

below the amount of the trust fund, the burden is on the Receiver to show that withdrawn funds were actually trust funds that were then dissipated or lost).

This presumption is certainly consistent with the logical conclusion to be drawn from the known, undisputed facts of this matter. It is undisputed that Plaintiffs deposited money with Intrust and the same amount of money was transmitted, a short time later, to an investment company designated by Plaintiffs' investment advisor. The investment company accepted the funds and exchanged them for shares in a designated mutual fund. None of the Intercounty transfers occurred during the short times that Intrust had possession of any of Plaintiffs' collected funds. See, Appendix Exhibit 17, which compares the dates Plaintiffs had cash on deposit, pending Intrust executing Plaintiffs' investment instructions, with the dates of Intrust's transfers to Intercounty. From these facts, it is apparent that Plaintiffs' assets were never at risk, and the money that was stolen via the Intrust/Intercounty transfers was not Plaintiffs' money.

Consequently, the Assets already identified as belonging to Plaintiffs on the books of Intrust truly belong to Plaintiffs. As such, 205 ILCS 620/6-10(5) requires that they be delivered to their rightful owners – Plaintiffs – upon request.

2. Subjective Concepts of Fairness or Equity Cannot Justify Non-Compliance With The Legislature's Command Embodied In 205 ILCS 620/6-10(5).

In sympathy for those whose assets were stolen, the Receiver proposes to "allocate" the \$68.1 million cash shortage to every currently open Intrust account that was opened on or before April 23, 1999 and had a positive balance in the account as of that date. The allocation is to be made in proportion to the combined values of the cash and non-cash assets (if any) held for the affected accounts as of April 30, 2000.

The Receiver and Trial Court characterize their plan to invade the accounts of the holders of non-cash assets to defray the theft losses of those holding cash assets as a matter of “equity.” Such an invasion of trust assets is not doing equity, but treats the non-cash accounts as involuntary insurance for the cash accounts, for which no insurance premium was ever paid. The Receiver makes no attempt to disguise its motivation and analysis, when it states at paragraph 20 of its June 23, 2000 Recommendation, Exhibit 8:

Intrust was not insured under FDIC, SIPC or any other depository insurance funds. Accordingly, there is no outside depository insurance to which account holders may look for recovery of the Shortage. Since there is no depository insurance, the Shortage must be allocated to the account holders.

The fact that there is no insurance for the losses of those customers whose accounts were supposedly invested by Intrust in cash assets, but were actually invested in the Intercounty “escrow” account, is no basis to invade the Plaintiffs’ non-cash assets. This is a leap unjustified by Illinois law or any conventional notion of equity.

The clear mandate of 205 ILCS 620/6-10(5) compels the Receiver to surrender to Plaintiffs their Assets, without permitting the Receiver, under the banner of “equity”, to force Plaintiffs and other similarly situated account holders to share the burden of the cash account holders’ losses. Equity, of course, follows the law, but the converse is not necessarily true. 205 ILCS 620/6-10(5)’s express requirement that the Receiver surrender trust assets upon the owner’s demand cannot be supplanted by the Receiver’s or the Trial Court’s efforts to apply “equitable principles.” *In re Liquidation of Coronet Ins. Co.*, 298 Ill. App. 3d 411, 417-18, 698 N.E.2d 598, 602 (1st Dist. 1998).

In *Coronet*, the court held that the application of so-called equitable remedies in contradiction to those plainly set forth within a statutory scheme is precluded. *Id.* (citing *In re Liquidation of Security Casualty Co.*, 127 Ill.2d 434, 447-48, 537 N.E.2d 775 (1989)). Here,

permitting the Receiver and the Trial Court to persist in denying Plaintiffs custody of their Assets in the name of “equity” would clearly contradict the express requirement contained in 205 ILCS 620/6-10(5) that the Assets be surrendered upon Plaintiffs’ written request.

3. The Intrust Cash Shortage Was A Risk Assumed By Account holders Who Were Participating In The Intrust Cash Management Program.

One of the ways in which Intrust “invested” funds deposited in its cash management program was to deliver funds to an “escrow” account Intrust maintained with a related entity, Intercounty Title Company (“Intercounty”). The funds deposited in the Intercounty “escrow” account were credited with interest by Intercounty. When the Receiver was appointed on April 14, 2000, the Intercounty “escrow” account was supposed to hold approximately \$68.1 million. In reality, there were no funds available at Intercounty to pay the \$68.1million balance in Intrust’s “escrow” account with Intercounty. Appendix, Exs. 8, 9A, 9B. Consequently, instead of holding \$105 million in cash for the participants in the Intrust cash management program, Intrust actually held only about \$37 million in cash when the Receiver was appointed. No accounts at Intrust were insured against theft.

Every Intrust customer, of course, had the option to have their funds invested in the manner they chose. Had an Intrust customer picked a stock subsequently found to have had an inflated value as a result of the issuer’s insiders having looted the company, no one would claim that other Intrust customers who had made more fortunate investment decisions were required to liquidate their holdings to defray the other customer’s losses. There is no legal reason to distinguish these circumstances from the situation now confronting Defendants and Intrust’s customers.

Those Intrust customers who opted to leave their cash on deposit with Intrust to be invested by Intrust in its discretion assumed the risk that Intrust might poorly, or even

dishonestly, use that money. Intrust's standard custodial agreement disclosed that the funds would be invested in uninsured instruments. Appendix, Exs. 2 – 6. Intrust itself was not an insured depository institution. Appendix, Ex. 8, p. 8 ¶ 20. Those Intrust customers who insisted, as did Plaintiffs, that their collected funds be invested in mutual fund shares per their investment advisor's instructions, avoided the risk of an uninsured, cash account. No Intrust customer agreed to insure any other Intrust customer against the risk that the other customer's assets would be depleted, whether through theft, depreciation, or otherwise. But the essential consequence of the Receiver's plan approved by the Court is to make each Intrust account holder an insurer of all other account holders. There is no proper basis for the Receiver or the Trial Court to impose on Plaintiffs, after the fact, the consequences of a risk they chose to avoid.

4. Common Law Principles of Property Law Dictate That Plaintiffs' Assets Must Be Returned To Them.

The common law of the State of Illinois requires the same result as the express command of 205 ILCS 620/6-10(5) because of the special character ascribed to assets Plaintiffs placed in trust with a corporate fiduciary. In *People ex rel. Russell v. Farmers State & Savings Bank of Grant Park*, 338 Ill. 134, 170 N.E. 235, (1930), the Illinois Supreme Court held that there are two types of bank deposits, special and general. In the case of general deposits, legal and equitable title to the deposited funds passes to the bank upon delivery of the funds to the bank, and the depositor becomes a general creditor of the bank. Deposits are "special" and impressed with a trust when, among other things, the bank accepted the money pursuant to an express trust agreement or with the agreement that the deposits are to be used for a specific purpose. *Id.* 338 Ill. at 137, 170 N.E., at 237-38; *see also John L. Walker Co. v. Alden*, 6 F.Supp. 262, 264-65 (E.D. Ill. 1934).

The cash accounts have the character of general deposits. The customers who opted to participate in Intrust's cash management program deposited the funds with Intrust at interest. They did not select the specific investments to be made with their funds. This makes them general creditors of Intrust with respect to the funds so deposited and held by Intrust. *People ex rel. Russell v. Farmers State & Savings Bank of Grant Park*, 338 Ill. 134, 137, 170 N.E. 235, 237 - 238 (1930); *McNulta v. West Chicago Park Comm'rs*, 99 F. 900, 905 (7th Cir. 1900) ("A deposit on which interest must be paid cannot be special or in trust, and, in case of the failure of the bank, must, for the purposes of payment, be on the same footing with other deposits or unsecured deposits.").

Plaintiffs' Assets were purchased with special deposits, because their money was tendered to Intrust with specific instructions that were apparently carried out to the letter. Once it is established that assets are part of a trust fund, the beneficiary, or *cestui que trust*, stands in a relationship to the bank/trustee that is different from the position of a general creditor. As the Illinois Supreme Court put the proposition:

The true owner of a fund wrongfully withheld by another has the right to have it restored, *not as a debt due and owing, but because it is the property of the former. A change or alteration in the nature or character of the fund does not affect the relation existing between the parties.*

People ex rel. Nelson v. The Peoples State Bank of Maywood, 354 Ill. 519, 533 188 N.E.

853, 859 (Ill. 1933)(emphasis supplied). Thus, Plaintiffs' Assets have a significantly different status from that of the assets of those Intrust customers who deposited and left cash in Intrust's hands at interest.

Plaintiffs are owners of the Assets – i.e., the non-cash property purchased with their funds, at their direction, and held for their accounts pursuant to express custodial agreements. As general creditors of Intrust, the cash account holders have no special

claim to any particular property held in trust by Intrust. The Receiver would be wrong to appropriate for the benefit of these general creditors of Intrust Plaintiffs' Assets to which neither those Intrust customers, Intrust nor the Receiver have any rightful claim of ownership (beyond bare legal title, as custodian for Plaintiffs).

Conclusion

As the authorities cited above make clear, Plaintiffs are entitled to the immediate return of their Assets, free from any call to defray the losses of other Intrust account holders. The Receiver, conversely, has no right whatsoever to use or retain custody of Plaintiffs' Assets, and is obliged, pursuant to 205 ILCS 620/6-10(5), to surrender the Assets to Plaintiffs. Plaintiffs respectfully request that this Court authorize Plaintiffs to file their Complaint for a Writ of Mandamus, ordering the Trial Court and the Receiver to take such actions as are necessary to return to Plaintiffs all non-cash assets now held by the Receiver for Plaintiffs' accounts.

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