

IN THE CIRCUIT COURT OF COOK COUNTY  
COUNTY DEPARTMENT, CHANCERY DIVISION

|                                      |   |                       |
|--------------------------------------|---|-----------------------|
| IN THE MATTER OF THE POSSESSION      | § |                       |
| AND CONTROL OF THE COMMISSIONER      | § |                       |
| OF BANKS AND REAL ESTATE OF          | § | Cause No. 00 CH 05905 |
| INDEPENDENT TRUST CORPORATION        | § | Judge Jones           |
| a/k/a INTRUST, an Illinois corporate | § |                       |
| fiduciary                            | § |                       |

**MEMORANDUM OF LEGAL AUTHORITIES IN SUPPORT  
OF RECEIVER’S RECOMMENDATION REGARDING  
ALLOCATION OF CASH TRUST FUND SHORTAGE**

PricewaterhouseCoopers LLP, as receiver (“Receiver”) for Independent Trust Corporation, a/k/a Intrust (“Intrust”), respectfully submits this Memorandum in support of its Recommendation Regarding Allocation of Cash Trust Fund Shortage (herein, the “Recommendation”).

I. FACTUAL BACKGROUND

A. THE MISAPPROPRIATION OF \$68.1 MILLION

Intrust is an Illinois trust company established in 1984 to service clients who wished to direct their own investments or who wished to use the services of an investment adviser. The number and value of accounts grew steadily, so that by April 2000 Intrust administered (excluding duplicative accounts) trust assets of about \$1.74 billion for the benefit of over 17,000 account holders and beneficiaries. (As explained more fully in the Recommendation, Intrust’s computerized software system recorded some accounts and account balances twice, so that Intrust’s records stated on their face that Intrust managed approximately 20,000 accounts and over \$2 billion in assets.) The account holders held a wide variety of investments in their accounts.

For reasons more fully explained in the Recommendation, Intrust’s computerized software system called Trust Management and Accounting System

(“TMAS”) is not capable of querying accounts to determine whether a cash position existed as of a particular historical date in any given account. The Receiver, however, has conducted a limited analysis of accounts opened without a cash component and determined that within a few months, almost all had some element of cash which went through Intrust’s cash trust bank account. Even so-called “Starker” trusts for Internal Revenue Code Section 1031 like-kind exchanges were no exception, with Intrust serving as trustee to hold cash while a land seller sought a suitable replacement property.

Two of Intrust’s directors owned and controlled another company formerly known as Intercounty Title Company of Illinois (“Intercounty”). Beginning in late 1990, at the direction of the directors, Intrust began to transfer substantial amounts of account holders’ cash to Intercounty. By April 2000, approximately \$68.1 million of account holders’ cash (out of approximately \$1.74 billion in assets under management) was supposedly on deposit at the LaSalle Bank account maintained by Intercounty. The transfers to Intercounty were from Intrust’s cash accounts (held at Cole Taylor Bank for most of the relevant time period), which pooled the cash deposits received from time to time from account holders. Thereby, Intrust cannot specifically identify the \$68.1 million of account holder cash to a particular set of account holders or accounts.

In April 2000, the Commissioner of Banks and Real Estate for the State of Illinois (“Commissioner”) determined that Intrust’s directors and Intercounty, among others, had misrepresented the amounts on deposit at LaSalle National Bank and that the account was essentially empty. This shortage in cash trust funds (“Shortage”), combined with other factors, caused the Commissioner on April 14, 2000, to put Intrust into receivership pursuant to the Illinois Corporate Fiduciary Act. On the same day the Commissioner appointed the Receiver and commenced this case to liquidate Intrust through receivership.

In its Order of Administration entered on April 14, 2000, the Court Ordered the Receiver to conduct an initial investigation of the Shortage and of the non-cash trust fund accounts at Intrust. Preliminary comments with respect to that investigation, and its limitations, are contained in the Recommendation.

**B. INTRUST'S ACCOUNTING SYSTEMS AND POLICIES**

The task of allocating the \$68.1 million cash shortage is complicated by the fact that funds were not misappropriated from individual accounts. Account holders' cash funds were totally commingled in the Intrust cash accounts. Moreover, until 1997, Intrust's funds at Intercounty were commingled with Intercounty's own funds and with funds Intercounty held in escrow for others. It is therefore impossible to trace deposits from a specific account into specific transfers to Intercounty, let alone any misappropriations that occurred once the funds were at Intercounty.

Intrust's accounting systems are an additional impediment to tracing the misappropriations of cash. Intrust maintains its client accounts and records on TMAS. As more fully described in the Recommendation, TMAS is not current technology and contains limitations in its ability to display information, to recreate historic transactions and balances, and to answer specific inquiries about existing accounts.

Moreover, approximately 10% of Intrust's accounts were closed every year. Because of TMAS's limitations, however, it is difficult to identify the population of accounts at any given date and impractical to identify the value of accounts, either individually or collectively, as of any historic date.

Even if TMAS could provide specific historical information about accounts, that information would require extensive analysis to ensure completeness and accuracy of cut-off at any date. Unfortunately, Intrust's accounting policies and internal controls, or lack thereof, would make such a reconstructed balance of questionable

reliability. To attempt to recreate reliable account balances at even one specific date, let alone dozens of dates, would require an enormous time and expense.

In short, because of the number of transfers to and from Intercounty, the length of time that transfers had gone back and forth, the commingled nature of Intrust's and Intercounty's bank accounts, the huge number of account holders, the cash component that at one time or another existed in virtually all accounts, and the system limitations of TMAS, all as more fully described in the Recommendation, it is impossible to identify the account holders or the amounts of any particular account that make up this \$68.1 million.

C. THE RECEIVER'S RECOMMENDATION

As a result of these considerations and others set forth in the Recommendation, the Receiver's proposed allocation uses current (April 2000) account balances as a baseline from which to make the allocation decision. The Receiver recommends allocating the loss to those accounts at Intrust on April 14, 2000, that also existed in April 1999, when the last transfer of account holder funds to Intercounty took place. The Receiver recommends allocating the cash shortage as a percentage of the April 2000 account balances in such accounts. Illinois land trusts, which are *sui generis* and never contained cash, and certain other account types are excluded for the reasons set forth in the Recommendation. In the Recommendation, the Receiver asks for authority to implement this Recommendation (or any other allocation formula the Court deems appropriate).

The Recommendation also asks the Court to authorize the Receiver to take a number of steps to implement its Recommendation. Among other things, it asks the Court to permit it to issue corrected account statements reflecting the allocation of the Shortage. In the case of accounts with insufficient cash to cover the allocation, the Receiver contemplates permitting account holders to have a period of time to contribute cash to the

Intrust cash account or to liquidate securities or other assets in their accounts to meet their allocated share of the Shortage. If account holders do not take timely action, then the Receiver contemplates liquidating or taking other actions to monetize trust assets with the proceeds of these sales or other actions also deposited in the Intrust cash account.

II. LEGAL STANDARD

A. AUTHORITY OF THE COURT TO DIRECT THE ALLOCATION OF THE CASH SHORTAGE

The Corporate Fiduciary Act provides authority for these recommended actions. First, it gives comprehensive power to the Receiver to “do such things and take such steps from time to time under the direction and approval of the Commissioner as may reasonably appear to be necessary to conserve the corporate fiduciary’s assets and secure the best interest of the creditors of the corporate fiduciary.” 205 ILL. COMP. STAT. 620/6-10 (West 1998). Likewise, the Corporate Fiduciary Act vests “exclusive jurisdiction” in this Court to enforce its provisions and to determine any issue that the Commissioner or the Receiver brings before it. 205 ILL. COMP. STAT. 620/6-1 (West 1998). The Recommendation indicates the exhaustive care that the Receiver has taken in considering various alternatives for dealing with the Shortage. Given the desire of account holders to access their accounts and the importance of settling account statements promptly, when the prospects are still uncertain that there will be assets recovered to cover the Shortage, the Receiver’s proposal to charge accounts for their respective share of the Shortage reasonably balances the need for prompt action, the Receiver’s need for effective measures to implement its decision, and any legitimate concerns of account holders to minimize tax or accounting issues that may arise from this implementation.

B. DUTIES OF THE RECEIVER

The Corporate Fiduciary Act vests the Receiver with certain powers, duties and responsibilities listed in 205 ILL. COMP. STAT. 620/6-10 (West 1998).<sup>1</sup> The Act also incorporates by reference The Illinois Trusts and Trustees Act, 760 ILL. COMP. STAT. 5/1-5/21 (West 1998). The Receiver is also subject to the fiduciary duties that Intrust was to follow in acting as trustee. These duties include the duties of loyalty and impartiality to the beneficiaries, the duty to exercise due care and follow trust terms in executing the trust, the duty to control and preserve assets, and the duty to account to the beneficiaries.

C. LEGAL BASIS FOR RECOMMENDED ALLOCATION

There are two general approaches to allocating a misappropriation from commingled trust funds. The first is a “first in, first out” principle where a presumption is made that the first funds deposited to the commingled account were the first embezzled. The second approach, and the one increasingly adopted in many jurisdictions, is to allocate the loss in proportion to the size of accounts at the time of the loss. See J.F. Ghent, Annotation, Distribution of Funds Where Funds of More Than One Trust Have Been Commingled by Trustee and Balance is Insufficient to Satisfy All Trust Claims, 17 A.L.R. 3d 937 (1968).

1. ***First Method: First in Time Allocation.*** The first of these two methods could be described as timing-determinate. It has been described as “first in, first out,” 17 A.L.R.3d 937, at § 2, but as it has been applied (or misapplied), it could be described as “first in, first embezzled” or “last deposited, first paid.”

(a) ***Origin of the Rule.*** This method has become known as the “Rule in Clayton’s Case” after its source, an English Chancery precedent of the Napoleonic era,

---

<sup>1</sup> Several accountholders have filed motions to authorize the distribution of accounts maintained by the Receiver, purportedly to enforce compliance with 205 ILL. COMP. STAT. 620/6-10(5) (West 1998). These motions have been stayed. In fact, 205 ILL. COMP. STAT.

part of a series of cases under Devanes v. Noble & Co., 1 Mer. 572 (Ch. 1816) that has come to be known as (and will be described herein as) “Clayton’s Case.” The lengthy and repetitive opinion often digresses, but its key conclusion, followed in other cases, was “[p]resumably, it is the sum first paid in, that is first drawn out.” Id. at 608.

The real issue in Clayton’s Case was how to allocate withdrawals made by Clayton against various deposits made by Clayton to determine the amount still owed to Clayton. Id. at 586. Thus, Clayton’s Case bears on the allocation of offsetting transactions against each other over time, and is not relevant to the allocation of a shortage among multiple claimants at all. As noted by one leading commentator on trust law, the Rule in Clayton’s Case has been applied outside of its original purposes:

This leading case really has no direct bearing on the problem of withdrawals from an account containing two or more trust funds, but the court’s view expressed [in Clayton’s Case] has been taken over into the trust field and applied there.

George G. Bogert, TRUSTS AND TRUSTEES §927 (rev. 2d ed. 1995).

(b) *Evolution of the Rule.* Nevertheless, the so-called Rule in Clayton’s Case has been transformed in some American jurisdictions to mean that the most recently deposited funds are to be repaid in full until the available funds are exhausted, so that the entire loss falls upon the account holders who made the earliest deposits. An early example is Empire State Sur. Co. v. Carroll County, 194 F. 593 (8<sup>th</sup> Cir. [Ia.] 1912), which referred to and applied a “settled rule” creating a “legal presumption” that multiple beneficiaries or accountholders are “equitably entitled to any allowable preference in the inverse order of the times of their respective payments into the fund,” and “the rules that deposits of equal trust rank are presumed to be drawn out in the order they are paid in, and that allowable references in the remaining balance must be given in inverse order to their

---

620/6-10(13) (West 1998) explicitly provides the Receiver with a reasonable time to conduct its review.

payment to the trustee... .” Id. at 605, 607. Curiously, the Empire State opinion never cites Clayton’s Case or any other authority for what it describes as a “settled rule,” a “legal presumption,” and as “rules.” Id. That is significant, as Empire State appears to be the “germ” that spawned the interpretation of the Rule in Clayton’s Case that depositors must be given a preference to the extent of their deposits in inverse chronological order.

Another early example is In re A. Bolognesi & Co., 254 F. 770 (2d Cir. [NY] 1918). The Bolognesi opinion cited Empire State, as authority for the premise that beneficiaries or account holders are entitled to preferences “in the inverse order of [their] respective payments into the fund,” and further remarked that this was “the rule of In re Hallett, supplementing Clayton’s Case.” Bolognesi, 254 F. at 773 (citations omitted). Neither In re Hallett’s Estate, 28 W.R. 732 (1880), nor Clayton’s Case actually set forth such a rule, however. Hallett’s Estate, if anything, describes an interpretation of Clayton’s Case consistent with the description in subsection (a) above, such that the Rule in Clayton’s Case is applicable to determining the net result of a series of offsetting transfers by a trustee or custodian (such as withdrawals and deposits) and, in contrast to the interpretation used in Empire State and Bolognesi, is not a rule for establishing a priority or preference between or among equally innocent beneficiaries or account holders. Hallett’s Estate, 28 W.R. at 742-43. The disconnection between the rules and presumptions as set forth in Empire State and Bolognesi and the authorities they rely on suggest that these cases may be the origin of an interpretation that fundamentally *misapplied* the so-called Rule in Clayton’s Case but, in doing so, started an American case law trend. This memorandum will refer to that interpretation as the “Empire State Interpretation” of the Rule in Clayton’s Case.

Although Judge Learned Hand criticized the Empire State Interpretation in his opinion In re Walter J. Schmidt & Co., 298 F. 314, 316 (S.D.N.Y. 1923), he found that

he was obligated to follow it due to the Second Circuit's previous ruling in Bolognesi. Judge Hand's criticisms are discussed below in more detail.

(c) ***Rule Applied in Illinois.*** A form of the Rule in Clayton's Case was first adopted in Illinois in People v. Tallmadge, 328 Ill. 210, 221-22, 159 N.E. 319, 324 (1927). Here, the court allocated losses among different account holders by allocating the remaining funds according to the reverse chronological order of their deposits. The opinion further suggests that account holders suffering some loss who made withdrawals before the bank was closed would need to have those withdrawals taken into account before any claim of loss could be considered. The precedent of Tallmadge was followed in a number of Illinois cases, beginning with Sanders v. Merchants' State Bank of Centralia, 349 Ill. 547, 558, 182 N.E. 897, 901 (1932) ("[p]resumably it is the sum first paid in that is first drawn out; the first item on the debit side that is discharged by the first item on the credit side") and Harrison v. Ault, 359 Ill. 75, 80, 194 N.E. 235, 237 (1934) ("[t]he rule established in this state... is that withdrawals are charged against the funds first deposited").

A leading Illinois case applying the Rule in Clayton's Case involved facts much closer to those of the Intrust case. In Lewis v. West Side Trust & Sav. Bank, 376 Ill. 23, 32 N.E. 2d 907 (1941), the accountant for the receiver of a failed bank applied the "first in, first out" rule to allocate deposits and other set-offs against withdrawals and thereby determined the ultimate losses for checking and savings accounts. Id. at 33, 32 N.E. 2d at 913. Like Tallmadge, Sanders, and Harrison, the Lewis opinion applied the Rule in Clayton's Case to allocate offsetting payments against each other to determine the net amount and date of origination of the net amount owed. Lewis also suggests that it may be appropriate to allocate losses across a population based upon final balances after the closing of the institution. Id. The Lewis opinion was very similar on this point to Hillmer

v. Chicago Bank of Commerce, 375 Ill. 266, 280, 31 N.E. 2d 309, 316 (1940). See also Heine v. Degen, 362 Ill. 357, 373, 199 N.E. 832, 840 (1935) (approving the Rule in Clayton’s Case as a method of allocating offsetting transactions in chronological sequence).

2. ***Second Method: Proportionate Allocation.*** The other common method for allocating a loss among accounts is to attribute the loss among a population of accounts in proportion to those accounts’ respective sizes at the time of the loss. This proportionate method is sometimes referred to as “pro rata” allocation. In Andrew v. State Bank of New Hampton, 217 N.W. 250 (Iowa 1928), the Iowa Supreme Court expressly considered but declined to apply what it referred to as the “federal rule” that would allow “the preference in the inverse order of the times of the respective payments or deposits into the funds,” choosing prorating or proportional allocation on the basis of state law precedents. Id. at 255. In First State Bank v. Therrell, 138 So. 733 (Fla. 1932), dealing with multiple account holders of a trust company in receivership, the court found it impossible to trace specific assets or allocate based on any chronological sequence, and chose to allocate on a proportional basis:

It is certain that the commingled fund represents an inextricable compound that no alchemist would dare the attempt to unscramble. Under such circumstances, all preferred claimants should bear the losses and participate in the distribution of the total assets on a pro rata basis [citations omitted].

Id. at 738. In Gibbs v. Gerberich, 203 N.E.2d 851 (Ohio Ct. App. 1964), the court expressly considered and rejected the application of the Rule in Clayton’s Case, and chose to allocate on a pro rata basis, following the then current version of Austin Wakeman Scott’s treatise cited below.

3. *Authorities Critiquing the Rule in Clayton's Case and Favoring Proportionate Allocation.* The manner in which the Rule in Clayton's Case has been applied, in the fashion of the Empire State Interpretation, to allocate funds remaining on hand against deposits in the reverse chronological order in which such deposits were made has been sharply criticized. In In re Walter J. Schmidt & Co., 298 F. at 316, Judge Learned Hand does just this (although on rehearing, Judge Hand found that Bolognesi was controlling):

The rule in Clayton's Case is to allocate the payments upon an account. Some rule had to be adopted, and though any presumption of intent was a fiction, priority in time was the most natural basis of allocation. It has no relevancy whatever to a case like this. Here two people are jointly interested in a fund held for them by a common trustee. There is no reason in law or justice why his depredations upon the fund should not be borne equally between them. To throw all the loss upon one, through the mere chance of his being earlier in time, is irrational and arbitrary, and is equally a fiction as the rule in Clayton's Case, *supra*. When the law adopts a fiction, it is, or at least it should be, for some purpose of justice. To adopt it here is to apportion a common misfortune through a test which has no relation whatever to the justice of the case.

Id. at 316.

Professor Austin Wakeman Scott recommended against applying a rule such as the Empire State Interpretation of the Rule in Clayton's Case as "arbitrary and unfair," and suggests that proportionate allocation of a loss (once all offsets have been accounted for) would be "the better view."

In these cases it was held that as between the claimants the rule in Clayton's Case is applicable, and that the withdrawals are to be considered as having been made in the same order in which the deposits were made. . . . The result is so clearly arbitrary and unfair that one must suspect the soundness of the reasons upon which it is based; and indeed, the only basis turns out to be the application of presumptions based on fictions. Judge Learned Hand recognized this, although he felt bound by authority to apply the rule in Clayton's Case.

Austin W. Scott, THE LAW OF TRUSTS §519 (4<sup>th</sup> ed. 1997).

Professor George Bogert was likewise critical of the Rule in Clayton's Case applied in the manner of the Empire State Interpretation: "There is no room for the presumption to the effect that the trustee will do his duty and make withdrawals in an honest manner. The withdrawal for a personal purpose of the trustee cannot be lawful, and the withdrawal for an ambiguous or undesignated purpose must be treated as of like import," while Clayton's Rule requires the fiction that the first funds deposited were intended to be stolen. Bogert, *supra*, § 927.

Several Restatements and a Uniform Act have also adopted the proportional allocation method. RESTATEMENT OF RESTITUTION § 213 (1962) (followed in *Gibbs*, 203 N.E. 2d at 856); RESTATEMENT (SECOND) OF TRUSTS § 202 (1957); UNIF. TRUSTS ACT § 15, 7B U.L.A. 786 (1985).

III. THE RECOMMENDED ALLOCATION IS BOTH EQUITABLE AND CONSISTENT WITH ILLINOIS LAW

The Receiver has designed a method of allocation that is tailored to Intrust's unique and complex situation. The recommended method is primarily a proportionate allocation, but is consistent with the most important policy behind the Rule in Clayton's Case.

The Recommendation is consistent with the equitable principles underpinning Clayton's Rule. First, those accounts not yet opened by the time of the last unauthorized withdrawal are excluded from the allocation of the Shortage.<sup>2</sup> Second, the

---

<sup>2</sup> As described in the Receiver's Recommendation, the Receiver's proposed allocation method chooses a single month, April 1999, as the month to determine the population of accounts over which the Shortage will be allocated, and balances based on April 2000 data as the basis for allocating the Shortage to each account. April 1999 was chosen as the month for determining the population because it is the last month in which there was a transfer from Intrust to the Intercounty account where the Shortage occurred. April 2000 was chosen as the month for measuring the size of accounts, because the data for April

Receiver's allocation method treats all reciprocal transfers that came out of the Intercounty account back to Intrust's cash accounts as applied against prior withdrawals, in chronological order. This serves to cancel out older withdrawals that are the hardest to allocate accurately and reduces the distortions caused by account holders leaving Intrust entirely or making substantial withdrawals. As the most recent transfer from the Intercounty account back to the Intrust account occurred before the date of the last transfer to the Intercounty account, and the Receiver proposes to allocate as of the latter date, all transfers back to Intrust are offset against prior transfers to Intercounty, and the purposes of the Rule in Clayton's Case as originally intended are satisfied by the Receiver's proposed allocation method. Thus, the allocation method recommended by the Receiver is consistent with Cohen v. North Ave. State Bank, 291 Ill. App. 558, 10 N.E. 2d 823 (1937), in which the court applied the Rule in Clayton's Case to cancel out the offsetting deposits and withdrawals in chronological order, but then used a proportionate method to allocate the ultimate loss.

At the same time, the Receiver's method avoids the tremendous cost, delay, and inequities that would result from using the inaccurate older data, and attempting to allocate the Shortage to accounts based on balances for each account on the date of each unauthorized withdrawal going back to December of 1990 (or even each month-end since that time). Instead, the Receiver's method uses a proportionate method to allocate each portion of the Shortage across a population of still-existing accounts that were also in existence at the date of the final transfer from Intrust to Intercounty Title, using each account's April 30, 2000 balance. For reasons explained in the Recommendation, the Receiver has determined it to be impossible to obtain accurate mid-month balances for so

---

2000 represent the best approximation available to the Receiver of account balances at the time the receivership commenced.

many accounts within any reasonable amount of time, and that even end-of-month balances would be increasingly inaccurate as one goes further back in time.

The Receiver does not recommend allocating the loss only to cash. Because there was no method or system for deciding when cash would be transferred to Intercounty as opposed to other institutions, there is no equitable justification to allocate the Shortage to only those accounts whose cash was traced to the Intercounty escrow account, even if such a determination were possible. To the contrary, those account holders whose cash was transferred to Intercounty are as innocent as those account holders whose cash was transferred to another institution. Second, there is no equitable justification to allocate the Shortage to only those accounts with cash holdings. The fact that an account had cash in April 2000 has no bearing on the cash balance of that account at any other point in time.<sup>3</sup>

#### IV. ACTIONS TO BE TAKEN BY RECEIVER TO MITIGATE SHORTAGE

Although a cash trust fund shortage currently exists which must be allocated among Intrust account holders, the Receiver intends to take appropriate actions in an effort to reduce the shortage and the ultimate loss that may be suffered by account holders.

For example, on behalf of Intrust, the Receiver filed suit on June 1, 2000, against certain companies and persons that the Receiver believes are responsible for the loss, including Intercounty and former directors and officers of Intrust and Intercounty. The case, styled Indep. Trust Corp. v. Capriotti et al., Case No. CH 8720, has been transferred to the receivership court for hearing and disposition. Such suit seeks the recovery of approximately \$68 million in trust funds, plus interest and other damages, based on breach of contract, breach of fiduciary duty, fraud, conversion, and other causes

of action. The Receiver is also investigating and, if appropriate, will consider bringing suit against additional parties that may be responsible for all or part of the trust fund shortage.

Intrust also maintained certain insurance policies (such as fidelity bonds and director and officer insurance), and claims will be pursued against such policies if appropriate.

The Receiver is also actively attempting to sell Intrust's business to a financially responsible successor trustee for account holders, for a fair and reasonable sale price. If such sale efforts are successful, proceeds of sale may be available to assist in reducing the Shortage. The Receiver anticipates that resolution of allocation issues will facilitate a sale, and that failure to promptly resolve the allocation issue may complicate and delay any purchaser's willingness to buy all or substantially all of Intrust's business.

At this time, it is not possible to predict the amount or timing of recoveries by the Receiver from such claims, causes of action, and possible sale, or how much the cash trust fund shortage would be reduced by such recoveries.

To facilitate payment from these recoveries to account holders that are allocated the shortage, the Receiver is actively considering the issuance of Receivership Certificates. Such Receivership Certificates would be in the face amount of the Shortage allocated to a particular account and would be issued to accounts and account holders that are allocated the shortage. Such Receivership Certificates would be treated as an account asset and would be payable by the Intrust estate. Under the direction of the Court, the Receiver would make payment on the Receivership Certificates from the net proceeds of recoveries on claims and causes of action against responsible persons, claims against

---

<sup>3</sup> In addition, an allocation of the Shortage against only cash may cause other inequities because there may not be sufficient cash to absorb the Shortage after excluding the cash of

insurance policies, the sale of Intrust's business, and such other sources as may be appropriate. Receivership certificates are frequently used in receivership cases to evidence obligations by the receivership estate. See, e.g., Midlantic Nat'l Bank/North v. Fed. Reserve Bank of New York, 814 F. Supp. 1195 (S.D.N.Y. 1993) (acknowledging FDIC's use of a receivership certificate to acknowledge debt owed by an insolvent bank). Their use in Illinois receiverships reaches back almost 100 years. See McCarthy v. Crawford, 238 Ill. 38 (1908). At the present time, it is not possible to predict the amount or sources of payments, if any, that might be received by account holders through any such Receivership Certificates or the particular characteristics of the Receivership Certificates. The Receiver anticipates that it will seek court authority as to the issuance, characteristics and terms of any such certificates.

#### V. CONCLUSION AND PRAYER FOR RELIEF

For the reasons stated herein and in the Receiver's Recommendation, the Receiver asks the Court (i) to approve an allocation of the Shortage as proposed in the Recommendation or, in the alternative, to authorize and direct the Receiver to allocate the Shortage on some other basis as the Court finds to be appropriate, (ii) to authorize the Receiver to implement such an allocation with such means as the Receiver may reasonably determine and to issue such orders in aid of implementation as the Receiver may reasonably request, and (iii) to grant all other just and proper relief.

---

accounts that must be excluded, for various reasons described in the Recommendation.

DATED: June 23, 2000

Respectfully submitted,

---

Jamie H.M. Sprayregen  
Joseph U. Schorer  
S Jonathan Silverman  
Michael D. Whitty  
Domingo P. Such, III  
KIRKLAND & ELLIS (90443)  
200 East Randolph Drive  
Chicago, Illinois 60601

I:\Intrust\Analysis of \$70 million gap\000622.PWC-Intrust Draft Brief Supporting Allocation.doc