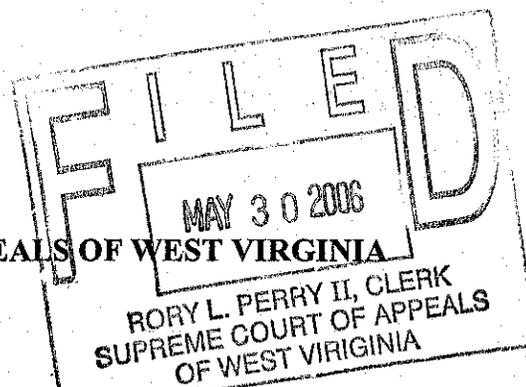


NO. 32972



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA, EX REL. HANLEY C. CLARK,
INSURANCE COMMISSIONER OF THE STATE OF WEST
VIRGINIA,

Applicant,

vs.

BLUE CROSS AND BLUE SHIELD OF WEST
VIRGINIA, INC.,

Respondent,

INTERNATIONAL UNION, UNITED MINE WORKERS OF
AMERICA,

Claimant and Intervenor

v.

RECEIVER OF BLUE CROSS AND BLUE
SHIELD OF WEST VIRGINIA, INC.

REPLY BRIEF OF APPELLANT UNITED MINE WORKERS OF AMERICA

From the Circuit Court of Kanawha County, West Virginia
Civil Action No. 90-C-3825

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ARGUMENT

A. Introduction.

The Receiver attempts to characterize the issue on appeal as a factual dispute in which the Court should give deference to the findings of the Circuit Court. That is simply not the case. There is little if any dispute about the operative facts in this case. The problem is not the facts, but the law applied to those facts and the legal conclusions drawn by the Commissioner and the Circuit Court. Those conclusions of law are subject to *de novo* review. The flaw at the core of those conclusions is the failure to recognize and properly apply the law of trusts where trust funds have been commingled with other funds of the trustee.

Although the facts are largely undisputed, the Receiver's brief misstates the facts on several points:

The Receiver asserts (Appellee's Brief at 2) that upon receipt of the \$1 million trust from the UMWA was "immediately commingled and spent by BCBS in funding its substantial business losses." It was certainly commingled, having been wired directly to the BCBS general account at Kanawha Valley Bank ("KVB") and commingled with funds in that account. However the assertion that it was spent is not true. The transfer took place on April 9, 1986, more than four years before the initiation of liquidation proceedings by the Receiver. Funds exceeding the amount of the trust remained in BCBS accounts for two months, when the proceeds of a \$5.7 million loan from Kanawha Valley Bank were also deposited in the BCBS accounts and commingled with the UMWA trust and other funds. The next day, \$5.5 million of commingled funds including the UMWA trust was invested by BCBS in investment accounts at Shearson, E. F. Hutton, and Prudential Bache. Commingled funds in the Prudential Bache account were eventually used to purchase the treasury

bond which came into the hands of the Receiver. The UMWA trust corpus was commingled, and \$5.5 million of the commingled funds was invested and not spent. To the extent that funds were spent, the law presumes that the trustee spent his own money, not the money held in trust for another.

The preference action (Appellee's Brief at 4-5) which was initiated by the Receiver in 1992 is not involved in this appeal. The Circuit Court correctly granted summary judgment to the UMWA in that case, and that order has not been appealed. It involved different funds, different benefit plans, and different circumstances and was not factually related to the present appeal, although a joint record was prepared because a number of witnesses had knowledge of both matters and testified about both in their depositions.

The Receiver's account of the litigation against the officers and directors of BCBS is also not quite accurate. Shortly after the Receiver was appointed, the UMWA was advised, incorrectly, that UMWA trust had been entirely dissipated by BCBS. Based upon that representation, the UMWA filed a separate action against the directors and officers of BCBS for breach of their fiduciary duty relating to the trust. The Receiver and other parties also filed actions against the directors and officers for damages to the corporation from their acts or omissions. An overall settlement was reached in which the UMWA did receive \$225,000 plus interest, while the balance of the settlement went to the Receiver for the benefit of the estate. The UMWA agrees that there is an offset but disagrees with the Receiver's assertion that the \$225,000 plus interest should be offset from the \$901,902.17 sought in this appeal.¹

¹The value of the UMWA trust was \$1,088,148.13 at the time the Receiver was appointed, including the original trust amount and accrued interest. The proceeds of the treasury bond at issue in this appeal, the only remaining asset subject to the trust at the time the Receiver was appointed, was a treasury bond which was sold for \$901,902.17. Even if the UMWA prevails on this appeal, part of the trust was destroyed by the actions of BCBS and its officers and directors. The settlement

The central issue is whether funds which came into the possession of the receiver at the time of the order placing Blue Cross and Blue Shield of West Virginia ("BCBS") in receivership in were subject to the UMWA trust. If so, they were not property of the estate and are not subject to the claims of BCBS' creditors.

The UMWA has contended from the outset of this case that the \$1 million trust corpus placed with BCBS-WV was not property of the liquidation estate and should be returned to the UMWA. This position was set forth initially in the letter from Marty D. Hudson to Hanley Clark on October 30, 1990, four days after the entry of the liquidation order, in which Hudson stated that "this \$1 million was, has been, and continues to be the assets of the United Mine Workers of America International Union and not that of Blue Cross/Blue Shield of West Virginia . . .," and requested return of the UMWA's funds. (Ex. 54, Hudson Dep. 58:9-59:8).

In filing its claim with the Receiver on July 2, 1991, the UMWA made it clear that its position continued to be that its trust funds were not property of the estate, or that they constituted a secured claim against the estate, and counsel noted that "[w]e reserve the right to assert and litigate this issue through whatever mechanism may be established by the Court for the resolution of such issues . . ."

The UMWA and Blue Cross of Western Pennsylvania filed objections to the Plan of Liquidation on that basis, and in the Receiver's Application to Approve Plan of Liquidation, the Receiver stated:

5. This motion has been discussed with the parties. All parties except Blue Cross of Western Pennsylvania and International Union, United Mine Workers

represents damages sustained for actions which diminished the trust, and the offset should be against the full value of the trust (\$1,088,148.13) rather than only the remaining asset.

("UMW") have agreed to the terms of the Plan of Liquidation. Penn. BCBS and UMW object only to the Plan's lack of recognition of its assertion that certain funds held by BCBS are not funds subject to the liquidation. *In recognition of this objection, the Receiver and the Parties stipulate that the Plan of Liquidation does not constitute an admission or waiver of any arguments of Penn BCBS or UMW, and its adoption will not preclude them from arguing that certain funds held by BCBS are not funds subject to the liquidation.* (Ex. 105, emphasis added).

B. The UMWA Demonstrated That a \$1 Million Treasury Bond Delivered to the Receiver Was the Proceeds of Commingled Funds Including the UMWA Trust Corpus

The Receiver asserts that the UMWA failed to sustain its burden of "clearly proving its asserted trace" and that therefore the Circuit Court's findings were not clearly wrong and should be affirmed. The factual findings set forth in the Receiver's brief at 13-14 (¶¶ A-H) are essentially accurate and establish the operative facts. The difference lies in the application of the law to those facts. The Receiver's information is correct, but she is asking the wrong question.

The position of the Receiver, adopted by the Circuit Court, is that the UMWA must show that the trust corpus constituted the specific funds used to purchase the treasury bond at issue, to the exclusion of any other source. That is simply not the law, as discussed in the UMWA's principal brief at 14-23. The question is not whether the treasury bond can be traced specifically and exclusively to the UMWA trust corpus, but whether it can be traced to *commingled* funds which *included* the UMWA trust.

The standard applied by the Circuit Court would require that whenever trust funds are deposited in an account containing funds from other sources, the trust is destroyed and no trace is possible. The Court held that "it would be impossible to identify which of the millions of dollars transferred in and out of the general account were monies wired to the account by the UMW" and that it was "just as likely" that the monies deposited by the UMWA were consumed by BCBS. That

is obviously true, but beside the point. If a person makes a deposit in an account which contains a balance from other sources and then writes a check on that account, it is impossible to identify the specific source of the funds represented by the check. In this case, the UMWA trust was commingled with other funds the moment it arrived by wire transfer in BCBS's general account.

The Receiver's argument fails to deal with the fact that the UMWA transfer was money held in trust by BCBS, subject to a fiduciary duty, while the proceeds of the building loan and the other funds flowing into the general account from the general revenue stream of BCBS, with which the UMWA funds were commingled, were the property of BCBS. Where a trustee commingles trust money held for another with his own funds, the law provides rules and presumptions which recognize that difference and protect the beneficial owner of the trust. It is well-settled that the trustee cannot destroy the trust by commingling trust funds with his own funds. Henson v. Lamb, 120 W.Va. 553, 199 S.E.2d 356 (1938); Scott, The Law of Trusts (4th Ed), §540. The trust attaches to the entire commingled fund.

While it is true, as the Circuit Court indicated, that there is no way to determine specifically which funds were spent and which were transferred to the Prudential Bache investment account and eventually used to purchase the treasury bond at issue, the law presumes that the BCBS spent its own money and preserved that which it held in trust. See Appellant's Brief at 14-23.

The commingled funds, which included the KVB loan, the UMWA trust, and other funds of BCBS, were not immediately spent, but rather were invested in the three brokerage accounts. Over the next four years, the Hutton and Shearson accounts were eventually liquidated. However, it is undisputed that commingled funds that came from the Kanawha Valley Bank Accounts were transferred to the Prudential Bache account and were later used to purchase a \$1 million Treasury

which came into the hands of the Receiver. That bond can be traced back to the commingled funds in the KVB accounts which were subject to the UWMA trust.

The Receiver contends that there "is no witness who testified that the monies could be directly traced." However, the appropriate question is "can the bond be traced to commingled funds that included the UMWA trust?" Both the Appellant's expert, Larry Pack, and the Receiver's expert, Dixie Kellmeyer, agree that it can. The law presumes that it is the trust corpus, or what is left of it, and the application of the law governing commingled trust funds is not "conjecture and speculation" but applying the rules of law to the undisputed facts.

Larry Pack, a certified public accountant, reviewed the records of the various bank accounts and investment accounts and prepared a report summarizing his findings:

In our opinion, there was in excess [of] \$1 million dollars contained in the investment portfolio of Blue Cross and Blue Shield of West Virginia as of October 1990, which can be traced to the \$1 million deposit and other funds with which the \$1 million was commingled.

The \$1 million was transferred from the United Mine Workers of America, International Union to Blue Cross and Blue Shield of West Virginia, Inc.'s main operating account 076-931-5 at Kanawha Valley Bank on April 9, 1986 and commingled with other funds. There were various transfers between the operating account and Kanawha Valley Bank's investment account 33275 from April 9, 1986 to June 10, 1986. All transfers into investment account 33275 came from the operating account 076-931-5, and all transfers from account 33275 were to the operating account. During this time, there was always in excess of \$1 million in the two accounts (Exhibit A). On June 10, 1986 another \$5.5 million from a building loan is transferred into the Kanawha Valley Bank accounts and commingled with the UMWA Funds (Exhibit A). Thereafter, on June 11, 1986 \$2 million was transferred from Kanawha Valley Bank to both the E. F. Hutton and Shearson investment accounts and \$1.5 million was transferred to Prudential Bache (Exhibit B). In October 1987 assets at Prudential were transferred to Shearson account 716-03000.

The \$1.5 million transferred to Prudential Bache was invested in the Prudential Government Securities account, and remained in that account until October 30, 1987,

when it was transferred to Shearson account 716-03000 (Exhibit C). There were transfers of U. S. Treasury Securities of \$2 million to account 716-03600 on October 29, 1987 from account 716-0300. On December 9, 1987 \$1 million of the U. S. Treasuries was transferred from account 716-03600 to account 716-03000. The final \$1 million U. S. Treasury was transferred from account to account 716-03600 to account 716-03000 on May 23, 1988. On July 16, 1990 Blue Cross and Blue Shield of West Virginia obtain a margin loan from Shearson and repaid One Valley Bank for the building loan which was collateralized by U. S. Treasury Securities kept in Shearson account 716-03000. The U. S. Treasury Securities were then transferred to account 716-01104 (Exhibit C).

On October 26, 1990, the Circuit Court of Kanawha County entered an order of liquidation of Blue Cross and Blue Shield of West Virginia. The U. S. Treasury Securities were sold and the margin loan at Shearson was repaid. Shearson then transferred \$1,035,592.56 to the Receiver (Exhibit C).

Exhibit 120.

Pack also affirmed that finding in his deposition:

Q. You've indicated in your report that it's your opinion assets in excess of \$1 million that were traceable to those commingled funds were in the possession of Blue Cross and Blue Shield at the time the Receiver took over?

A. Yes.

Q. That's what you mean when you say that they're traceable to the original commingled fund that included the deposit from the funds transmitted to Blue Cross by the United Mine Workers in April of 1986?

A. Yes.

(Pack Dep. 80:9-81:20).

The Receiver's expert, Dixie Kellmeyer also agreed that the treasury bond could be traced to the commingled fund which included the UMWA trust:

Q. And the 1.5 million that was transferred to Prudential Bache can be traced to the Kanawha Valley Bank general account, can't it, to the commingled funds that were in that account?

A. Yes.

Q. And that 1.5 million was commingled with either generally with the assets in the Prudential Bache account or with the specific asset in the government securities fund in that account with other funds in that particular asset?

A. Yes.

Q. And those commingled funds were used to purchase the treasury bond?

A. Yes.

* * *

Q. The treasury bond that was ultimately sold in 1990 can be traced back to the Prudential Bache account and to the commingled funds in that account, which included both funds that were in the Prudential Bache account and the \$1.5 million that came in from the general account at Kanawha Valley Bank?

A. Yes.

(Kellmeyer Dep. 30:22-32:2).

It is not the position of the UMWA that any funds held by BCBS when the liquidation order was entered is subject to the lien. A case in point is the sinking fund referred to in the Circuit Court's order which was unilaterally established by BCBS to accumulate funds to repay the UMWA the amount of the trust. The funds accumulated in that sinking fund were liquidated by the Receiver and placed in the general receivership account. The UMWA has never made any claim that it was entitled to those funds, and considers the sinking fund irrelevant to this litigation. The funds deposited in the sinking fund apparently came from the current revenues of BCBS in the months prior to the liquidation order, and have no connection to the original trust. Neither has the UMWA asserted any claim to the other assets of BCBS, except for the treasury bond which can be traced to the funds commingled with the UMWA trust.

C. West Virginia Code §33-24-27 Does Not Preclude the UMWA From Recovering Its Trust Property.

The Receiver continues to assert that West Virginia §33-24-27 effectively operates to convert property held in trust by BCBS to property of the estate because tracing the trust property is an “equitable remedy” allegedly prohibited by the statute. The provision relied upon by the Receiver was within a paragraph of a statute which specifically dealt with the order of distribution of *claims* against the estate, and simply prohibits the use of “equitable remedies” to rearrange the claim priorities or to elevate a creditor to a higher priority. This dispute is not about the priority of claims but whether the property subject to the UMWA trust is the property of the UMWA or of the estate. The Receiver does not acquire better rights to such property than BCBS possessed. As this Court has held in the similar context of bankruptcies,

The rights of a trustee in bankruptcy generally are not greater than those of the bankrupt, and he takes the bankrupt's property in cases unaffected by fraud, not as a bona fide purchaser, but in the same capacity and condition that bankrupt himself held it, and subject to all the equities impressed upon it in the hands of bankrupt, except in cases of a conveyance or incumbrance of property void as against the trustee by some positive provision of Bankruptcy Act.

Custard v. McNary, 85 W.Va. 516, 102 S.E. 216, syl. 1 (1920)

There is ample authority that property held in trust is not property of the trustee's estate. Henson v. Lamb, 120 W.Va. 553, 199 S.E. 356 (1938); Williams v. S. M. Smith Insurance Agency, 75 W.Va. 494, 84 S.E. 235 (1915); Sullivan v. Madeleine Smokeless Coal Company, 115 W.Va. 115, 175 S.E. 521 (1934). *See also*, additional cases cited in Appellant's Brief at 25-26.

The cases cited by the Receiver in support of her argument are clearly inapplicable. Washburn v. Dyson, 537 N.E.2d 775 (Ill. 1989) involved shareholders of the insurance company, whose claims were classified in the lowest statutory priority, were seeking the imposition of a

constructive trust to elevate their claims ahead of other creditors. The court declined to do so. The case did not involve an actual trust where the equitable or legal title to property was at issue, or an issue of whether particular property was or was not property of the estate. The case of Northwestern National Ins. Co. v. Kezer, 812 P.2d 688 (Colo. Ct. App. 1990) is similar, with a creditor of the estate seeking to enhance its status with an "equitable lien" not recognized in the statutory priorities.

The statutes involved in both cases involved the priority of claims against the estate of the insolvent insurer, not whether property held in trust by the insolvent company can be considered property of the estate subject to distribution to the trustee's creditors.

In contrast to those cases, it is well established in both West Virginia law and general bankruptcy law and trust law that property held in trust by the debtor for other parties is simply not part of the trustee's estate, and if trust property is identified the beneficial owner of the trust is entitled to the return of the trust property, and has a right to its own property superior to any claim of the trustee's creditors. The context of the provision relied upon by the Receiver makes it clear it is directed to claims and claim priorities, and does not authorize the Receiver to distribute property held in trust for another party by a trustee to the trustee's creditors.

D. The Receiver Is Not Entitled to Assert the Rights of a Secured Creditor Against Trust Property

The Receiver's argument that she has the rights of a secured creditor with respect to the UMWA trust was not adopted by the Circuit Court, and is therefore not properly a part of this appeal. In any event, the Receiver's argument on this point is without merit. The Receiver argues that the UMWA cannot trace its trust property to the treasury bond ultimately sold by the Receiver because

it was used as collateral on the Kanawha Valley Bank loan by being deposited in a Shearson account established for that purpose, and was later transferred, along with other treasury bonds, to a separate account held as security for the margin loan obtained from Shearson which was used to pay off the KVB loan. The Receiver asserts that "the trace was cut off because a secured creditor has the status of a bona fide purchaser for value."

There are several problems with this argument. First, the issue here is the rights of the owner of the trust property as against the Receiver, not KVB or Shearson, the secured parties. The KVB loan was paid off by a margin loan from Shearson without resort to the collateral. Although Shearson did repay itself the balance on the margin loan from the proceeds of the sale of the bonds, the balance paid to the Receiver exceeded the sale price of the bond to which the UMWA trust attached. Whether or not Shearson's claim under the margin loan would have prevailed over the UMWA's right to the bond is essentially a moot point if the proceeds of the sale were sufficient to satisfy both claims.² The law presumes that the proceeds of the collateral kept by Shearson was the property of BCBS-WV, rather than the trust property. The fact that Shearson might have had a superior claim to the bond doesn't change the status or enhance the position of the Receiver or the general creditors.

Even if we assume for the purpose of argument that Shearson had a valid security interest in the treasury bonds in question superior to the UMWA's trust and that the proceeds from the UMWA bond went to Shearson rather than the Receiver, it would not affect the relative rights of the UMWA

²There is no evidence in the record as to whether or not KVB or Shearson had notice of the existence of the UMWA trust. The bond in question was not placed in a collateral account until October, 1987. The fact that there was a UMWA trust was reported on numerous financial documents prepared by BCBS-WV, including the investment reports.

and the Receiver. Where trust property is wrongfully pledged as collateral by a trustee, to a creditor who has the status of a bona fide purchaser without notice, and the trust property is sold to pay the secured creditor, the law places the owner of the trust property in the shoes of the secured creditor.

Section 202, Comment g of the Restatement of Trust, 2d, states the rule as follows:

g. Discharging trustee's individual obligation. Where the trustee wrongfully uses trust funds in discharging an obligation owed by the trustee individually to a third person, the beneficiary is entitled to be subrogated to the rights which the obligee had before the obligation was discharged. A court of equity will afford relief to the beneficiary by putting him in the position occupied by the obligee before the obligation was discharged. If the obligation was a secured obligation, the beneficiary is entitled to the security interest held by the obligee. If the obligation was of such a character that the obligee was entitled to priority over other creditors of the trustee, the beneficiary is entitled to a similar priority . . .

Accordingly, even if it is assumed that Shearson liquidated the UMWA's trust property to satisfy its secured claim, the UMWA would be entitled to the security interest of Shearson with respect to the proceeds of the sale, and would be entitled to the balance of the proceeds of the sale of the treasury bond after the satisfaction of the debt to Shearson. The result is the same--the right of the UMWA to the proceeds of the sale of the bond, either as a secured creditor or as the owner of the trust property, is superior to the right of the Receiver.

E. The Expiration of the Trust Agreement Did Not Affect the Rights of the UMWA to Its Trust

The Receiver's argument that when the trust expired, the "UMWA left the money with BCBS as an investment thereby establishing a debtor/creditor relationship" is nonsense. The Circuit Court made no such finding. As the Receiver acknowledges, when the trust expired the Statute of Uses, (W. Va. Code §36-1-17) acted to vest both legal and equitable title to property subject to the trust in the beneficiary of the trust, the UMWA. The expiration of the term of the express trust does not

relieve the trustee of its obligation to preserve and return the trust corpus. If anything it enhances that obligation because the trustee no longer has any legally cognizable right to the property, either legal or equitable. There is no evidence of any further agreement between the parties that converted the trust property into a loan or other debtor creditor relationship. BCBS was simply in possession of property to which the UMWA held both legal and equitable title, and failed or refused to return it to the UMWA when it had a clear legal duty to do so. The Receiver acquired the same rights to the property subject to the trust that BCBS possessed: none.

The UMWA did not "leave the money with BCBS as an investment" and never agreed to the delay in its return when BCBS officials sought an agreement with respect to the "sinking fund" it established.

In the absence of anything in the record to support any claim that there was some new arrangement after the trust expired, the Receiver now attempts to argue that there was never a trust to begin with, notwithstanding the plain language of the agreements. The only evidence offered in support of that proposition was the testimony of Mark Sengewalt that BCBS carried it on the books as a "corp. obligation" or "an indebtedness to UMW" and that BCBS paid only a fixed interest rate. The manner in which it may have been recorded on the books does not change the nature of the obligations created by the trust documents. However, even that argument is factually wrong.

In fact, the parties clearly understood that the arrangement was a trust, and the documents are consistent with that understanding. Numerous documents in the record, including both internal BCBS-WV documents and correspondence with the UMWA and others, contain references to the \$1 million consistent with the parties' understanding that the agreement of April 7, 1986 and its successors created a trust. (Ex. 5 ["this trust amount"], Ex. 8 ["the \$1,000,000 corpus," "\$1,000,000

original corpus"], Ex. 9 ["\$1,000,000 held in trust"], Ex. 12 ["interest earned on the UMWA trust"], Ex. 13 ["the annual 1 Mil. Trust Agreement"], Ex. 15 ["Balance of \$1,000,000 held in trust plus accrued interest"], Ex. 18 ["the body of the Trust (\$1,000,000)"], Ex. 22 ["interest due on the \$1,000,000 trust"], Ex. 23 ["interest due on the \$1,000,000 trust"], Ex. 24 ["Trust Agreement," "the trust"], Ex. 32 ["UMWA Trust," "the \$1,000,000 UMWA Trust"], UMWA investment reports - Ex. 32 (attachment) ["UMWA Trust"], Ex. 34 ["the interest on the trust fund"], Ex. 36 ["funds we hold for United Mine Workers of America"], Ex. 37 ["interest earned by the Trust Agreement"], Ex. 58 [references in letters reporting interest income: "the trust" (8/6/86), "the \$1,000,000 we have been holding in trust for you since May 1986" (12/26/86, 3/13/87, 4/21/87), "the \$1,000,000 held in trust" (5/7/87, 6/14/88, 8/12/88, 9/20/88, 11/15/88, 6/29/89, 10/15/89, 12/7/89, 1/15/90, 2/20/90, 3/6/90, 4/18/90), "the \$1,000,000 held in trust for your organization" (7/22/87, 8/31/87, 9/11/87, 10/22/87, 11/30/87, 1/19/88, 1/26/88, 3/4/88, 3/10/88), "the \$1,000,000 trust" (8/10/90, 9/13/90), "interest on trust" (5/15/90 printout and ledger sheet)], Ex. 95-96 [investment report - "UMWA Trust"]).

The monthly investment reports of BCBS-WV from May 1987 through August 1990, reflected as an encumbrance on the investment portfolio the "UMWA Trust" in the amount of \$1 million. (Ex. 119, 95, 96, Britton Dep. 193:9-196:23).

Contrary to the Receiver's assertion that the arrangement was a loan at a fixed interest rate, documents prepared by BCBS-WV contemporaneously with the expiration of the initial one-year period of the trust establish that the understanding of the parties was that the UMWA would be entitled to all interest earned by the investment of the trust corpus, not a fixed rate of interest, subject to BCBS-WV's limited right to look to the interest in the event of a shortfall in premium

income. A memorandum from Gary Lavender to Mark Sengewalt dated April 27, 1987 (Ex. 8) states that:

... Since the investment period as set forth in Item A has now ended, the group wishes to receive all interest earned since April 9, 1986 held by the Plan up to the Treasury bill rate plus 1%. Funds in excess of the one-year Treasury bill plus 1% are to be held by the Plan to offset runoff liability.

The \$1,000,000 corpus and the interest in excess of one-year Treasury bill rate plus 1% shall remain with the Plan as a new corpus for a twelve month investment period beginning April 9, 1987.

A letter from John W. Britton, Jr. to John Banovic dated May 7, 1987, (Ex. 9), summarizes the portion of the interest earned which is being paid to the UMWA, and notes that:

... After our total return on short term investments in available, the difference between the interest paid and our actual return will be credited to your account per your agreement with Mr. Lavender.

These documents establish that only part of the interest income derived from investment of the UMWA trust corpus was being returned, and that both parties contemplated that the balance of the actual interest earned was to be credited to the UMWA. (Ex. 8, 9, Lavender 37:12-43:2).

F. The UMWA Trust Was Not Destroyed by the Dissipation of a Portion of the Trust Corpus.

Finally, the Receiver argues that unless the fund into which the trust went "has never been reduced below the sum claimed" the entire trust is destroyed, a sort of "exploding bubble" theory of the law of trusts and commingled trust assets. The Receiver apparently contends that if the trustee improperly spent \$1 of the trust corpus and reduced the account containing funds subject to the trust to \$999,999, the trust was destroyed completely. This proposition was neither adopted by the Circuit Court nor even advanced by the Receiver below. It is also utterly without merit. The Receiver's argument takes words from several decisions out of context in attempting to distinguish the facts of

this case from universally accepted principles of trust law. Section 202 Comment i of the Restatement 2d of Trusts states the rule quite clearly: if the trustee dissipates part of the trust, the trust remains as to the balance "and can be enforced against any part of the funds remaining on deposit and against any funds which are withdrawn, so long as they can be traced." In order to avoid the plain language of the Restatement, the Receiver is forced to add a corollary to the exploding bubble theory: the Restatement rule only applies where there is a "single account." However the Restatement plainly contemplates that the trust can be enforced against "any funds which are withdrawn" if they can be traced. If they are withdrawn from the single account and have not been dissipated, then there obviously must be a second account or asset to which the funds withdrawn from the single account have been moved, and the single account exception no longer involves a single account.

The rule is clearly stated in Scott, The Law of Trusts (4th Ed.) §517:

Where a person who is a conscious wrongdoer mingles money of the claimant with money of his own and thereafter withdraws and dissipates a part of the mingled fund, the claimant is entitled to enforce an equitable lien upon the part of the fund that remains. Where the wrongdoer is insolvent, the claimant is entitled to priority over the general creditors of the wrongdoer in collecting his claim out of the balance of the fund. If the balance is equal to or greater than the amount of his claim, he will obtain full satisfaction. If the balance is less than the amount of his claim, he is entitled to the whole of the balance, and for the remainder of his claim he can come in as a general creditor of the wrongdoer.

In fact, the sole asset subject to the trust remaining in the hands of BCBS at the time of the liquidation order was the treasury bond originally purchased with commingled funds in the Prudential Bache account, and the value of that asset (\$901,902.17) was less than the value of the UMWA trust (\$1,088,148.13, including accrued interest). To that extent, a part of the trust was

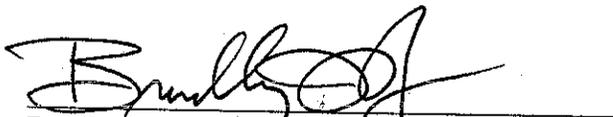
destroyed by the actions of BCBS and its directors and officers, and with respect to that portion of the trust the UMWA would have only a general claim against the BCBS estate, but for the fact that it obtained damages for that loss from the insurer of the BCBS directors and officers.³

The Receiver's contention that the fact that part of the trust corpus was lost due to the malfeasance of BCBS destroys the UMWA's right to recover the remaining balance, even though assets which came into the hands of the Receiver can be traced to the trust corpus, finds no support in the law of trusts or the cases previously decided by this Court.

CONCLUSION

The UMWA was entitled to the return of property subject to its trust. The decision of the Circuit Court of Kanawha County should be reversed, and the Receiver should be required to pay over to the UMWA the value of the treasury bond with accrued interest, subject to an offset of the recovery in the directors and officers litigation against the original amount of the UMWA trust (\$1,088,148.13).

UNITED MINE WORKERS OF AMERICA,
Appellant, by Counsel



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³See Appellant's Brief at 6 and fn. 3.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply Brief of the Appellant United Mine Workers of America was served on all parties in this matter by mailing a true copy thereof to their counsel of record in this matter, on May 26, 2006, as follows:

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