

No. 101843

IN THE
SUPREME COURT OF ILLINOIS

CLARENCE P. BANGERT, et al.)	On Petition for Leave to Appeal
)	from the Appellate Court of Illinois,
Plaintiffs-Petitioners,)	First District, No. 04-2614
)	
v.)	There Heard on Appeal from the
)	Circuit Court of Cook County,
)	Law Division, No. 01 L 2252
THE NORTHERN TRUST COMPANY,)	
)	Hon. Barbara J. Disko,
Defendant-Respondent.)	Judge, Presiding

ANSWER TO PETITION FOR LEAVE TO APPEAL

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INTRODUCTION

The most significant feature of plaintiffs' petition for leave to appeal is what it omits. To begin with, the petition ignores the undisputed fact that beginning in September 2000, the creator of the Trust at issue, Outboard Marine Corporation ("OMC"), threatened to sue Northern Trust if it made any lump-sum payments to the plaintiffs. And the petition does not cite *any* facts—there are none—indicating that OMC's threat was a bluff. Given this factual record, there can be no doubt that Northern Trust had a reasonable basis for asking the circuit court whether it should comply with plaintiffs' demands for immediate lump-sum payments. As the First District stated, plaintiffs' arguments to the contrary rest on "nothing more than inferences and conjecture." Pet. App. A19. Indeed, just six weeks after Northern Trust filed its petition for instructions, plaintiffs' counsel told the circuit court that Northern Trust had "properly" asked for instructions on what it should do (C 2307)—the opposite of their current position.

The petition for leave to appeal also completely ignores two paragraphs at the beginning of the Trust Agreement stating explicitly that the Agreement's "purpose[]" was to assure that future payments of supplemental retirement benefits "will not be improperly withheld." C 1275. Because OMC never withheld plaintiffs' benefits, plaintiffs were never entitled to any payments from the Trust. Plaintiffs' view that they had an "unequivocal" right to immediate payments at any time (Pet. 7) is squarely refuted by those paragraphs in the Agreement.

Finally, the petition makes no mention of the fact that the circuit court, in response to Northern Trust's petition for instructions, ordered Northern Trust not to make *any* payments from the Trust. Nor does the petition acknowledge that 14 of the 15 plaintiffs still pursuing this case did not submit an executed Exhibit V affidavit to Northern Trust—an absolute prerequisite to any payment under the Trust Agreement—until *after* issuance of that court order.

In light of these undisputed facts, the Appellate Court’s decision is fully in accord with longstanding Illinois law. No Illinois court has ever held that a trustee breached a fiduciary duty by asking a court for instructions, much less imposed liability when the trustee was faced, as here, with conflicting demands and a threatened lawsuit. Illinois courts have long recognized that a trustee in this situation is entitled to seek judicial guidance on what to do. And the First District correctly held that there is no evidence that Northern Trust lacked a *bona fide* reason to ask for judicial direction here given the irreconcilable demands being made by the plaintiffs and OMC.

STATEMENT OF FACTS

A. OMC’s Trust. Starting in the 1980s, many corporations established trusts to fund the payment of retirement benefits to certain corporate executives if a change in control in corporate management occurred; the trusts are called rabbi trusts, because the IRS first approved the concept when a synagogue established a trust to pay for its rabbi’s retirement benefits. *Bank of America v. Moglia*, 330 F.3d 942, 944 (7th Cir. 2003) (a case involving the same OMC Rabbi Trust at issue here). The essential features of a rabbi trust (including the OMC Trust) are that the trust’s assets belong to the company and remain subject to the claims of the company’s creditors; the amounts are not vested in the beneficiaries; and the beneficiaries typically are not taxed on the trust’s income or contributions to the trust until they receive payments from the trust. *Id.*; C 2475-76.

OMC adopted its original rabbi trust agreement in 1987. The amended 1989 agreement at issue here established a back-up funding source for benefits provided to specified OMC executives under a supplemental employee retirement plan (“SERP”). C 1221, 1274-95. Plaintiffs Charles Strang, OMC’s former Chief Executive Officer, and Thomas Beeler, OMC’s General Counsel at the time, both testified that OMC created its Rabbi Trust to protect the SERP benefits in the event there

was a takeover and the new management ceased paying those benefits.¹ C 1228-29.

The 15 plaintiffs remaining in this case all formerly held high-level OMC jobs; their positions included Chairman of the Board, Chief Executive Officer, Chief Operating Officer, Chief Financial Officer, Treasurer, Controller, General Counsel, and a variety of Presidents and Vice Presidents from both OMC itself and several OMC divisions. C 1217-20. The plaintiffs were not, however, the only persons covered by the Rabbi Trust; approximately 130 other individuals, who did not file suit, were also Trust beneficiaries. C 1224-25.

B. The Trust's Provisions. OMC's Rabbi Trust Agreement stated that its purpose was "to assure that the future payment of [retirement] obligations will not be improperly withheld" if there is a change of control at OMC. C 1275. See also *id.* ("for purposes of assuring that payment of obligations with respect to the * * * [SERP] Plans will not be improperly withheld, the Company desires to deposit with the Trustee * * *"). OMC had to fund the Trust when a change of control was imminent; once funded, Northern Trust held the Trust corpus until OMC "withheld" SERP payments and a beneficiary sent Northern Trust a signed written notice, "in a form substantially similar to that attached hereto as Exhibit V, to pay all or a portion of the amounts allocated to such [person]." C 1275, 1277, 1284. The written notice is known as an Exhibit V affidavit. As the IRS required, the Agreement stated that "the Trust Corpus is and shall remain at all times subject to the claims of [OMC's] general creditors," and had to be turned over to a bankruptcy trustee if OMC filed for bankruptcy. C 1284-85.

¹ The Appellate Court did not decide whether the OMC Trust was a rabbi trust (Pet. App. A15), holding that regardless of the nature of the Trust Agreement, plaintiffs have no legal or factual basis for their claims. In the trial court, the only evidence on the point was that OMC had indeed created a rabbi trust. C 1228-30, 1339, 1370, 2238, 2301, 2310, 2444, 2448-49, 2474-76. Federal litigation involving the OMC Trust determined that it was a rabbi trust. *In re Outboard Marine Corp.*, 278 B.R. 778, 785 (N.D. Ill. 2002), *aff'd*, *Moglia*, 330 F.3d at 945. In this Court, plaintiffs admit that the OMC Trust was formed as a "tax-deferred 'rabbi trust.'" Pet. 2.

The Trust Agreement provided that the bank was exonerated from liability if it obeyed a court order not to make payments from the Trust. The Agreement stated that if “the payment, assignment, transfer, conveyance or delivery” of “all or any part of the Trust Corpus” was

stayed or enjoined by any court order, or * * * any order, judgment or decree shall be made or entered by a court affecting such property or any part thereof, then * * * the Trustee is authorized, in its sole discretion, to rely upon and comply with any such order, writ, judgment or decree, and it shall not be liable to the Company * * * or any Executive and/or Participant by reason of such compliance.

C 1286-87.

C. 1997. In 1997, OMC was sold and the plaintiffs formed the Ex-Officers’ Group to try to “preserv[e]” their SERP benefits, which they feared “would not be honored with the change of control” at OMC and might be “cut off.” C 1115, 1233-34. The plaintiffs’ group was led by a Steering Committee composed of four of the plaintiffs (Maurice, Strang, Beeler, and Winett); in 1997, the group hired a lawyer, Michael Hannafan, to protect the ex-officers’ interests. C 1233-36. OMC continued to pay the SERP benefits after the sale of the company. C 1232-33.

The plaintiffs have testified that they believed in 1997 that they were entitled to receive their entire lifetime SERP benefits in a lump sum from the Rabbi Trust “at any time” by submitting an Exhibit V affidavit. C 1230, 1237-39, 2170. Nevertheless, the plaintiffs all testified that they never paid any taxes on any unpaid benefits, either when the Rabbi Trust was funded in 1997 or thereafter. C 1222, 1230-31.

D. The November 2000 Court Order. In early September 2000, plaintiffs’ counsel suggested in a letter to OMC and Northern Trust that some members of the Ex-Officers’ Group might submit Exhibit V affidavits and assert a right to receive benefits from the Trust. C 1402. On September 8, 2000, OMC’s General Counsel responded with a letter to Northern Trust:

OMC wants you to be aware that, in its view, none of the beneficiaries of the Trust

Agreement are entitled to current lump sum payments of benefits under any of the underlying plans and arrangements funded under the trust.

Accordingly, OMC would object strenuously to the payment of any amounts out of the trust to any beneficiary purporting to claim entitlement to a lump sum payment and would pursue any legal remedy it may have in the event of such erroneous and unauthorized payment.

Id. After Northern Trust's Eva Bernacki saw this letter from OMC, she was "concerned that OMC might take legal action against the Northern if any of the lump sum or present value payments were made to the participants under the plan, if requested by them." C 1240. Several weeks later, OMC reiterated its position that the beneficiaries were "not entitled" to immediate lump-sum payments and that OMC "would only pay monthly amounts." C 1241. Toward the end of October 2000, Northern Trust sent a letter to the lawyers for OMC and the plaintiffs, which noted that "[t]he conflicting positions of Mr. Hannafan's clients and OMC with respect to the proper interpretation of the payment and other provisions of the Trust place the Trustee in the untenable position of facing irreconcilable demands from OMC and its former employees." C 1403.

On Friday, November 3, 2000, plaintiff James Maurice submitted his executed Exhibit V affidavit to Northern Trust, requesting payment of all of his SERP benefits in a lump sum by 5:00 p.m. on Monday, November 6. C 1325-27. On November 6, Northern Trust filed a petition for trust construction. C 66. The bank alleged that Maurice "has made a demand on the Northern, as Trustee, for payment under the Trust," while OMC "has informed the Northern that it disputes Maurice's right (and the right of any of the other Participants) to payment from the Trust." C 67. Accordingly, Northern Trust asked the court for a "construction of the Trust provisions bearing on the rights of the Participants (including Maurice) and OMC with respect to payments" and for "instructions to the Northern, as Trustee, with respect to any such payments." *Id.* Moreover, because Maurice was seeking immediate payment, Northern Trust requested "an emergency order directing that until such

time as the rights of the parties with respect to payment are resolved, * * * the Northern is under no obligation to, and shall not, make such payment.” C 68.

Plaintiffs’ counsel—the same lawyer hired by the Steering Committee in 1997—later told Judge Durkin that Northern Trust had “properly” asked the court “what should we do,” given the conflicting positions of OMC and his clients concerning whether the latter were entitled to immediate lump-sum payments of their benefits. C 2307. Mr. Hannafan cited case law holding that trustees “properly * * * ask[ed] the Court for instructions concerning the construction of a trust, and in fact that is exactly the kind of action the Northern Trust filed here. They are asking your Honor for the construction of the Trust.” *Id.*

One week after Northern Trust filed its petition, Judge Durkin granted Northern Trust’s request for emergency relief. On November 13, 2000, the court ordered that Northern Trust

is not obligated to, and is directed not to, (1) draw on the letter of credit relating to the Trust that is at issue in this matter for the purpose of making payments to Respondent Maurice or any other persons submitting affidavits pursuant to the Trust seeking payments, or (2) make such payments in any other manner from the Trust, until further order of this Court.

C 88. The bank followed this order (C 2387), which was never appealed.

E. Subsequent Events. During the week between Northern Trust’s filing the petition for instructions and Judge Durkin’s order, no other members of the Ex-Officers’ Group submitted executed Exhibit V affidavits to Northern Trust. On November 16—three days after the court’s order—13 other plaintiffs in this case sent Northern Trust their signed affidavits and demanded payment of their benefits in lump sums, notwithstanding the court order. C 1243, 1339-40, 1357-69. Another plaintiff submitted his signed affidavit to the bank on December 5. C 1243, 1370-72. On December 22, 2000, OMC filed for bankruptcy. C 1221. Pursuant to the Trust Agreement and an order from the bankruptcy court, Northern Trust later transferred the corpus of the Trust to OMC’s

bankruptcy trustee. C 1226, 1285-86.

While all of this was occurring, OMC was paying monthly SERP benefits to the plaintiffs entitled to them and continued to do so until the bankruptcy court ordered the termination of SERP payments in February 2001. C 1232-33. Two plaintiffs (Jensen and Koster), were not entitled to any payments because they were too young to be eligible for retirement benefits. C 1232, 2211, 2213.

F. This Suit. In February 2001, after OMC filed for bankruptcy and the Bankruptcy Code's automatic stay took effect, the plaintiffs filed the present litigation against Northern Trust. C 3. Plaintiffs are seeking to recover from Northern Trust the full amount of the lifetime supplemental retirement benefits that OMC did not pay, a total of about \$8.5 million for 15 plaintiffs. Pet. 2. In August 2004, the trial court granted summary judgment in favor of Northern Trust. C 2800-06.

In a unanimous decision, the First District affirmed. The court held, first, that Northern Trust "cannot be held accountable for losses that occurred after and as a direct result of the circuit court's order" of November 13, 2000, which "barred it from making any payments under the trust until further order of the court." Pet. App. A10. "[I]t is well established that a party cannot be held liable for abiding by a court order." *Id.* at A11. As a result, the First District ruled, "Northern Trust cannot be held accountable for the failure to make lump-sum payments to those plaintiffs who waited to file their affidavits seeking such payments until after the circuit court entered the injunction." *Id.*

In addition, the court ruled that there "is a well-settled right of a trustee" to seek judicial "directions as to his own conduct" whenever "there is any *bona fide* doubt" as to either the construction of the trust document or "the particular course which he ought to pursue." *Id.* at A12. Noting that plaintiffs "offer[ed] no cases in support of their argument * * * that Northern Trust had no *bona fide* reason to seek those instructions" (*id.* at A16), the First District concluded that the plaintiffs also lacked evidentiary support for their theory: "Plaintiffs have offered nothing more than

inferences and conjecture to support their argument.” *Id.* at A19. The court explained that “it is undeniable that (1) OMC and plaintiffs disagreed as to the propriety of lump-sum payments under the terms of the trust and (2) OMC threatened Northern Trust with a lawsuit should it grant plaintiffs’ demands for those payments.” *Id.* at A17. Furthermore, there was no evidence “that Northern Trust held the opinion that plaintiffs had an unqualified right to lump-sum payments.” *Id.* at A18. Given the absence of evidence to support the plaintiffs’ theory, the “conflicting opinions of plaintiffs and OMC,” OMC’s “threat to sue” if Northern Trust made any payments, and the “well-settled right of a trustee to seek judicial instruction,” the Appellate Court concluded that Northern Trust’s “decision to seek judicial instruction was proper.” *Id.* at A19.

REASONS FOR DENYING THE PETITION

I. There Is No Dispute That The Appellate Court Correctly Held That Liability Cannot Be Imposed For Following A Court Order.

It is undisputed that Northern Trust could not make *any* payments from the Rabbi Trust unless the beneficiary first submitted an executed Exhibit V affidavit. C 1225-26, 1284. It is also undisputed that 14 of the 15 plaintiffs in this case did not submit Exhibit V affidavits until *after* the circuit court order of November 13, 2000, which “directed” Northern Trust “not to” make payments from the Rabbi Trust to anyone “until further order of this Court.”² C 88, 1243.

Given the unambiguous terms of the November 13 order, the First District was undoubtedly correct in holding that Northern Trust “cannot be held accountable for losses that occurred after and as a direct result of the circuit court’s order” (Pet. App. A10), both because the Trust Agreement stated that Northern Trust will not be liable for complying with a court order preventing payments

² The statement that each plaintiff submitted an Exhibit V affidavit “[b]etween November 3 and December 5, 2000” (Pet. 5) is misleading. Only one plaintiff—Maurice on November 3—submitted his Exhibit V affidavit before the November 13, 2000 court order barred Northern Trust from making any payments from the Rabbi Trust. C 1242-43.

from the Trust and because “it is well established that a party cannot be held liable for abiding by a court order.” *Id.* at A10-A11. Plaintiffs do not argue otherwise. They do not challenge the Appellate Court’s holding that “Northern Trust cannot be held accountable for the failure to make lump-sum payments to those plaintiffs who waited to file their affidavits seeking such payments until after the circuit court entered the injunction.” *Id.* at A11.

The claim of James Maurice, the only plaintiff who submitted an Exhibit V affidavit before the November 13 court order, is no better. Maurice submitted his executed affidavit on Friday, November 3, 2000, and Northern Trust filed its petition for instructions the next business day, Monday, November 6. When the court ordered Northern Trust not to pay benefits to any beneficiary, including Maurice (C 88), the bank was obligated to obey. The plaintiffs have never cited, and we are not aware of, any case in which a trustee was ever held liable for breach of fiduciary duty where, as here, (1) the trustee asked a court for instructions the very next business day after an actual controversy arose; (2) the court instructed the trustee what to do; and (3) the trustee followed the court’s directions. Under these circumstances, there is no basis for Maurice’s claim.

II. No Illinois Court Has Ever Held That A Trustee Can Be Liable For Breach Of Fiduciary Duty Because It Asked A Court For Instructions.

It is undisputed that OMC threatened to sue Northern Trust if it made any payments from the Rabbi Trust. Pet. App. A17. And plaintiffs have conceded that Northern Trust, after receiving OMC’s threatening letter in September 2000, “was concerned that OMC might take legal action against Northern” if any payments were made from the Rabbi Trust. Pl. App. Ct. Br. 25. In this Court, plaintiffs do not mention that OMC threatened to sue Northern Trust; they now prefer to state euphemistically that OMC “object[ed]” to payments. Pet. 1, 8, 11. But there is no doubt that plaintiffs’ position is that Northern Trust should be held liable because it dared ask a court for

instructions after OMC threatened Northern Trust and plaintiffs insisted on immediate payments.

As the First District recognized, it is “well-settled” that “[w]herever there is any *bona fide* doubt as to the true meaning and intent of the provisions of the instrument creating the trust or as to the particular course which he ought to pursue, the trustee is always entitled to maintain a suit * * * and obtain a judicial construction of the instrument and directions as to his own conduct.” Pet. App. A12 (quoting *Warner v. Mettler*, 260 Ill. 416, 420 (1913)). See also *id.* at A12-A15 (citing additional authorities). A trustee is entitled to ask a court for instructions because “[a] trustee cannot be expected to incur the least risk in the distribution of the trust fund. * * * So where the equities are not perfectly clear the trustee may decline to act without the sanction of the court.” *Warner*, 260 Ill. at 419 (emphasis added) (quoting 2 PERRY ON TRUSTS § 928). In particular, it is well settled that a trustee is entitled to file a petition for instructions when, as here, there are conflicting demands concerning whether payments should be made from the trust. See cases cited at Pet. App. A12, A17; *First Nat’l Bank v. Edgeworth*, 94 Ill. App. 3d 873, 875, 882 (1st Dist. 1981); 3 A. Scott & W. Fratcher, THE LAW OF TRUSTS § 226, at 425 (4th ed. 1988).

Not only is it “eminently proper for the trustee ‘to apply to a court of equity for its aid and direction’” in executing a trust, *Warner*, 260 Ill. at 420 (quoting *Whitman v. Fisher*, 74 Ill. 147, 157 (1874)), but “a trustee should *never* be the subject of criticism on account of his application to the chancellor for advice in the discharge of his delicate duties,” *White v. Glover*, 59 Ill. 459, 462 (1871) (emphasis added). Courts “will assist the trustees and *protect them* in the due performance of the trust whenever they seek the aid and direction of the court as to the establishment, the management or the execution of [the trust].” *Warner*, 260 Ill. at 420 (emphasis added). Accordingly, a trustee can “escape liability by submitting the matter to the court for its instructions.” 3 A. Scott & W. Fratcher, THE LAW OF TRUSTS § 201, at 221 (4th ed. 1988). A trustee doing that “will be protected

by the decree of any court having jurisdiction.” 2 PERRY ON TRUSTS § 928, at 1576 (7th ed. 1929).

Plaintiffs cite no case in which any court, let alone an Illinois court, has ever held that a trustee breached a fiduciary duty by asking a court for instructions. As far as we know, there is no such case—certainly not in Illinois.³ Nor are we aware of any case imposing liability on a trustee for seeking judicial guidance when the trustee is being assailed on two sides with irreconcilable demands concerning the trust’s assets. As a result, the theory on which plaintiffs’ case rests—that a trustee can breach a fiduciary duty by asking a court for guidance—must be rejected. Imposing liability in these circumstances would eviscerate the principle that a trustee is “always entitled to * * * obtain a judicial construction of the instrument and directions as to his own conduct” whenever there is “the least risk in the distribution of the trust fund.” *Warner*, 260 Ill. at 419, 420.⁴

Besides advocating a position that is barren of legal support, plaintiffs make the wholly unwarranted charge that Northern Trust engaged in “delaying tactics by seeking judicial intervention.” Pet. 11. Northern Trust did not delay at all; it filed its petition for instructions the next business day after receiving the first Exhibit V affidavit, and the court issued its order prohibiting any payments a week after that. If anyone delayed, it was the plaintiffs: they considered submitting Exhibit V affidavits in December 1999 (Pet. 4), but waited nearly a year to do so; and

³ The Appellate Court cited an abstract decision, *Nairn v. Stemmler*, 17 Ill. App. 3d 1060 (4th Dist. 1974), for the proposition that “it is *plausible* that a trustee could breach its fiduciary duty by filing a petition for instructions” (Pet. App. A16) (emphasis added), but there was no claim in that case that the trustee breached a fiduciary duty by seeking instructions.

⁴ Even if seeking direction from a court could somehow be a breach of fiduciary duty, plaintiffs have not suffered any damages. Under the Trust Agreement, the corpus of the Trust “remain[ed] at all times subject to the claims of the general creditors of the Company.” C 1284. Any payments from the Trust to the plaintiffs in November and December 2000, when they submitted their Exhibit V affidavits, would have been well within the 90-day bankruptcy preference period (OMC filed for bankruptcy on December 22, 2000). Payments made at that time thus would have been recovered by the bankruptcy trustee as preferences. 11 U.S.C. § 547(b).

they elected not to appeal the November 13, 2000 injunction.

III. The Appellate Court Correctly Held That There Is No Evidence That Northern Trust Lacked A *Bona Fide* Reason For Seeking Judicial Instructions.

In addition to the fact that filing a petition for instructions cannot constitute a breach of fiduciary duty, there is not a shred of evidence to support plaintiffs' claim that Northern Trust "could not have had a 'bona fide doubt' when it filed its Petition for Instructions" because it supposedly knew that plaintiffs were "entitled to be paid," but "resist[ed] Plaintiffs at every turn" in order to "protect" OMC. Pet. 10-11. As the First District said, "[p]laintiffs have offered nothing more than inferences and conjecture to support their argument." Pet. App. A19. This Court does not generally review an Appellate Court's reading of the record. In any event, the First District's ruling is plainly correct. Indeed, Northern Trust did not agree with OMC's position; rather, it asked the court to decide which side was correct, OMC or the plaintiffs.

It is well settled that a party must present material nonspeculative evidence to defeat summary judgment—"[l]iability may not be based on imagination, speculation, or mere conjecture." *Tiffin v. Great A. & P. Tea Co.*, 18 Ill. 2d 48, 60 (1959); accord *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 152 (1999); *Wiegman v. Hitch-Inn Post*, 308 Ill. App. 3d 789, 795-96 (2d Dist. 1999) (Thomas, J.); *Vuletich v. Alivotvodic*, 73 Ill. App. 3d 927, 931-33 (1st Dist. 1979). Conjecture is all the plaintiffs have. There is no evidence at all that Northern Trust lacked a *bona fide* reason to ask for instructions in the wake of OMC's threat to sue it. Plaintiffs' vague references to "the cozy customer relationship between Northern and OMC" and "other facts supporting an inference of collusion" (Pet. 8) must be disregarded entirely; plaintiffs cite no supporting evidence for those conclusory assertions, because there is no such evidence.

As for plaintiffs' other assertions of bad faith, none of the facts they point to constitute

evidence that Northern Trust acted in bad faith in asking the court for instructions:

1. As noted earlier, plaintiffs admitted in the Appellate Court that OMC “threatened to sue Northern” and that the bank was “concerned that OMC might take legal action against Northern if any of the lump sum payments were made to the participants if requested.” Pl. App. Ct. Br. 25. Plaintiffs have never cited any evidence—there is none—indicating that OMC was bluffing or that OMC did not really mean what it said. To the contrary, the undisputed facts confirm that there was a sharp dispute between the beneficiaries and the settlor—exactly the type of situation in which, as already discussed, trustees have long been permitted to seek instructions from a court.

2. It is simply not true that Eva Bernacki’s testimony shows that she agreed that plaintiffs “were entitled to lump sum payments * * * upon demand.” Pet. 6. The Appellate Court correctly noted that Bernacki’s “deposition does not show in any way that Northern Trust held the opinion that plaintiffs had an unqualified right to lump-sum payments.” Pet. App. A18. Bernacki testified consistently that she was unsure whether the plaintiffs were entitled to be paid from the Rabbi Trust when Northern Trust received the first Exhibit V affidavit; she consulted with Northern Trust’s legal department on that interpretation question, and Northern Trust then sought guidance from the court—whose order it followed. C 2358, 2382-87, 2535, 2541-42, 2592-93.

Bernacki’s testimony that the term “‘lump sum’ * * * means ‘present value’” (Pet. 6) proves nothing—she was “simply stating [an] economic principle.” Pet. App. A18. The trust interpretation question that prompted the conflicting demands made by OMC and the plaintiffs in the fall of 2000 was whether the plaintiffs were entitled to lump-sum benefit payments from the Trust at a time when OMC was continuing to send the plaintiffs their monthly benefit payments on a regular basis. Whether the words “lump sum” and “present value” mean the same thing has no bearing on that question. The fact that the words “lump sum” appear in a Schedule attached to the Trust Agreement

(Pet. 7) is similarly irrelevant: it has nothing to do with whether the plaintiffs could receive all of their SERP payments when they were still receiving their monthly retirement benefits from OMC right on schedule.

3. Bernacki's statement in her March 24, 2000 letter to James Maurice that "Northern's relationship is with the corporation rather than with the individual plan participants" (Pet. App. A36) meant nothing more than that Northern Trust's prior dealings had been with OMC, which "created the trust" (C 2340), rather than with individual beneficiaries. Bernacki never said that Northern Trust's "only responsibility was to * * * OMC." Pet. 4. On the contrary, she testified unequivocally that the bank had "a fiduciary relationship to the beneficiaries of the trust to carry out the terms of the trust." C 2523. In any event, Bernacki's letter has no bearing on whether OMC was bluffing when it threatened to sue Northern Trust six months later.

4. Bernacki was undoubtedly correct in saying, in the same letter, that Northern Trust was "unable to answer [Maurice's] questions" because they required "legal interpretation of the Trust document" and answering them "would constitute the practice of law," which the bank was "prohibited" from doing by law. C 2240. Most significantly, Maurice's inquiry about whether lump sum, annual, or monthly benefits would be paid if an Exhibit V affidavit were submitted (C 2238) is a question that requires legal skills—indeed, "a judicial interpretation of the trust agreement" (Pet. App. A19)—including analysis of all of the Agreement's provisions and pertinent tax law. The task is especially delicate because if plaintiffs' interpretation of the Rabbi Trust were accepted, it would have profound tax consequences to them: as explained below (at 17-18), it would mean that plaintiffs and the other 130 or so beneficiaries who were not part of the Ex-Officers' Group all were obligated to pay taxes on the full lump sums in 1997, when OMC funded the Trust, and that all of them grossly understated their taxable incomes that year, since none of them paid any taxes

attributable to the Rabbi Trust. C 1230-31. Many of Maurice’s other queries about the Trust—including the possible submission of Exhibit V affidavits by persons not on the list of beneficiaries; the adequacy of the Trust’s funding; how to amend or correct purported errors in the Trust documents; and what would happen if various hypothetical events occurred (C 2238)—either required legal skill to answer or were topics on which OMC, as the creator of the Trust, had the pertinent information, not Northern Trust. C 2344-45. And at the time of Maurice’s letter, the plaintiffs had had their own attorney for nearly three years; they hired him in 1997; he had a copy of the Rabbi Trust Agreement; and he is the one the plaintiffs relied on to advise them on how to protect their benefits under the Rabbi Trust—which obviously involved the giving of legal advice. C 1233-36, 1240.

The practice of law encompasses a wide variety of activities that “‘require[] the use of * * * legal knowledge or skill,’” *King v. First Capital Fin. Servs.*, 215 Ill. 2d 1, 17 (2005), such as determining “the legal effect” of a document, *People ex rel. Illinois State Bar Ass’n v. People’s Stock Yards State Bank*, 344 Ill. 462, 475-76, 478 (1931). A corporation is not permitted to practice law or “render or furnish legal services or advice.” 705 ILCS 220/1. Plaintiffs have never explained why legal skill was not required to answer Maurice’s questions about the Rabbi Trust Agreement—in particular, the questions about whether the beneficiaries were free to receive payments from the Trust whenever they wanted although OMC was still paying their benefits. Not surprisingly, plaintiffs have never cited any authority for the proposition that a party who declines to engage in the unauthorized practice of law is guilty of bad faith or breach of fiduciary duty.

Regardless of what Northern Trust did or did not do in response to Maurice’s questions in March 2000, nothing prevented plaintiffs—who remained “quite confident” what the Trust Agreement meant (C 1240)—from submitting Exhibit V affidavits whenever they pleased. Northern

Trust's advice was not a prerequisite to submitting an affidavit; if plaintiffs wanted to submit affidavits in the summer of 2000, they had only to fill them out, sign them, and send them in. For the same reason, it does not matter that Bernacki did not respond to Maurice's inquiry for two months. Pet. 4. After receiving Bernacki's March 24, 2000 letter, plaintiffs waited nearly eight more months to begin filing their affidavits. Even after a meeting on September 28, 2000, in which OMC's general counsel reiterated to Maurice and plaintiffs' counsel that OMC objected to lump sum payments (C 1241), Maurice waited an additional five weeks (C 1325-27), and fourteen other plaintiffs waited at least seven more weeks (C 1339-40), to submit their Exhibit V affidavits.

5. Plaintiffs contend that the Rabbi Trust had an "unequivocal directive" that a beneficiary was entitled to lump sum retirement benefits "upon demand." Pet. 7. Although the First District resolved the case without reaching this issue, plaintiffs' argument is obviously wrong.

First, § 4.02 of the Agreement, on which plaintiffs rely, was silent on whether payment of SERP benefits under the Rabbi Trust was proper when OMC was still paying those benefits on schedule, as it was in the fall of 2000. To answer that question, one must look elsewhere in the Trust Agreement—in particular, to two paragraphs at the beginning of the Agreement, which stated that the Trust was designed "to assure that the future payment of said obligations *will not be improperly withheld* in the event that a change in control of the Company should occur." C 1275 (emphasis added). It is uncontested that OMC never "withheld" plaintiffs' SERP benefits. Under a long line of cases, the Trust Agreement's clear statement of intent plays an important role in construing the document, and plaintiffs never argued otherwise on appeal. See *First Nat'l Bank v. Canton Council*, 85 Ill. 2d 507, 515 (1981) ("In ascertaining intent, consideration is not limited to the language of a particular phrase, sentence, or clause. The language must be considered in light of the entire instrument"); *Martindell v. Lake Shore Nat'l Bank*, 15 Ill. 2d 272, 283 (1958) (courts must "giv[e]

meaning and effect to every provision thereof, if possible, since it will be presumed that everything in the contract was inserted deliberately and for a purpose”); *Guhl v. Guhl*, 376 Ill. 100, 110 (1941) (holding that a contract’s introductory recital provisions show the parties’ intent); *McCoy v. Fahrney*, 182 Ill. 60, 64 (1899) (construing a trust deed in light of the “whereas” clause at the beginning of the document because it was “necessary to an explanation of the deed and its operation and the reason for executing it”).⁵ Plaintiffs have never explained how their payment-on-demand position can be squared with the Agreement’s explicit intent that the Trust was designed to be used only when SERP benefits were “improperly withheld.”

Second, plaintiffs’ interpretation of the Trust Agreement is inconsistent with the Agreement’s goal of tax deferral and the plaintiffs’ own conduct. An essential feature of trusts like the one OMC adopted is that the employer’s contributions to the trust and the trust’s income are not currently taxable to the beneficiary *if* there are substantial restrictions on the beneficiary’s ability to control receipt of the funds; but the amounts are immediately taxable to the beneficiary when funds are actually distributed *or* if there are no longer substantial restrictions on the beneficiary’s ability to draw on the funds. C 2475-76; 26 C.F.R. § 1.451-2(a); *MacGregor v. Bd. of Trustees*, 263 Ill. App. 3d 439, 441 (4th Dist. 1994); *Moglia*, 330 F.3d at 944-45; *Goodman v. RTC*, 7 F.3d 1123, 1125, 1127 (4th Cir. 1993).

Plaintiffs contend that OMC’s Trust provided that all of their lifetime SERP benefits were theirs for the asking, available to them at any time since 1997, regardless of whether OMC was still paying plaintiffs their monthly benefits. Pet. 2-3. They have even insisted that plaintiffs Koster and

⁵ Accord, *e.g.*, *Cress v. Recreation Servs.*, 341 Ill. App. 3d 149, 170 (2d Dist. 2003) (a contract’s introductory recital provisions were “an aid to construing an obligation elsewhere in the contract”); *First Bank & Trust v. Village of Orland Hills*, 338 Ill. App. 3d 35, 44, 48 (1st Dist. 2003) (considering “[r]ecitals to a contract” because they “provide explanations of those circumstances surrounding the execution of the contract” and “reflect the intent of the parties”).

Jensen were entitled to all of their lifetime retirement benefits even though they were much too young in 2000, the year they submitted their affidavits, to be eligible for any retirement benefits; Koster was then 49, and Jensen was 50. C 1232, 1688-89, 1789-90, 2211, 2213.

If the Trust worked as plaintiffs now say it did, their ability to receive funds from the Trust was *never* subject to *any* limitation—much less the “substantial limitations or restrictions” required, 26 C.F.R. § 1.451-2(a)—and thus the *entire* amount was taxable to plaintiffs when the Trust was funded in 1997, regardless of whether they had received *any* money. *Id.*; *Moglia*, 330 F.3d at 944. Plaintiffs have never disputed that this is the necessary consequence of their interpretation of the Trust.⁶ Thus, plaintiffs posit that OMC voluntarily adopted a plan for its top executives that did not *defer* taxes—a key goal of the Trust—but instead *accelerated* massive tax liabilities before the beneficiaries received a dime from the Trust. Illinois courts have long rejected proposed constructions of contracts that would have irrational or illogical results. See, e.g., *Chicago Title & Trust v. Telco Capital*, 292 Ill. App. 3d 553, 557 (1st Dist. 1997); *Foxfield Realty v. Kubala*, 287 Ill. App. 3d 519, 524, 526 (2d Dist. 1997); *Kokinis v. Kotrich*, 74 Ill. App. 3d 224, 229 (1st Dist. 1979), *aff’d*, 81 Ill. 2d 151 (1980); *Vournazos v. Vournazos*, 71 Ill. App. 3d 672, 677 (1st Dist. 1979). What is more, the plaintiffs’ current interpretation is belied by their own conduct: they never paid taxes on the lump-sum amounts, as they would have been obligated to do in 1997 if they were entitled to payments from the Trust whenever they liked. C 1222, 1230-31.

At bottom, plaintiffs’ position boils down to this: in the face of OMC’s threatened lawsuit, Northern Trust should have ignored the interpretative issues just outlined; adopted a view of the

⁶ Plaintiffs cite Judge Disko’s reference to lump-sum payments under Schedule III of the Trust (Pet. 6), but ignore her conclusion that “[i]n order for Plaintiffs to retain the tax benefits allowable under this rabbi trust, they would be restricted from receiving a lump sum payment of their SERP” on demand, because the tax laws require “‘substantial limitations on the beneficiaries’ access to the trust assets.’” Pet. App. A28-A29.

Agreement that would mean that all of the Trust's nearly 150 beneficiaries had grossly misstated their tax liabilities since 1997; and simply written checks to the plaintiffs rather than sought instructions from a court. Plaintiffs cite no case in which a court has required a trustee to take that kind of risky action in similar circumstances.

* * *

Plaintiffs' counsel was right when he told Judge Durkin in December 2000 that Northern Trust acted "properly" in "asking the Court for instructions." C 2307. There is simply no evidence that Northern Trust lacked a *bona fide* basis in filing a petition for instructions when OMC and the plaintiffs had made conflicting demands on Northern Trust, and OMC threatened to sue the bank.

CONCLUSION

The petition for leave to appeal should be denied.

January 24, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE AND PROOF OF MAILING

James C. Schroeder, counsel for respondent, hereby certifies that on January 24, 2006 he caused three copies of the foregoing Answer to Petition for Leave to Appeal to be served by U.S.

Mail on:

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I further certify pursuant to Ill. S. Ct. Rules 12(b)(3) and 373 that on January 24, 2006, an original and 20 copies of the foregoing Answer to Petition for Leave to Appeal were deposited in the U.S. Mail at 71 South Wacker Drive, Chicago, IL before 5:00 p.m., in a first-class postage prepaid envelope addressed to:

Juleann Hornyak
Clerk of the Court
Illinois Supreme Court
Supreme Court Building
Springfield, Illinois 62706

James C. Schroeder