

IN THE SUPREME COURT OF OHIO

06-1174

United Telephone Credit Union, Inc.,

Appellant,

v.

Kenneth A. Roberts, in his official Capacity as
Acting Deputy Superintendent for Credit
Unions, Ohio Department of Commerce,
Division of Financial Institutions, and
American Mutual Share Insurance Corp.,

Appellees.

On Appeal from the
Franklin County Court of Appeals
Tenth Appellate District

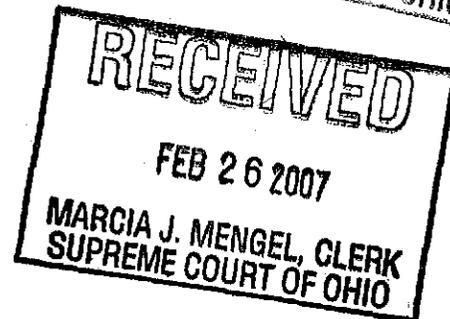
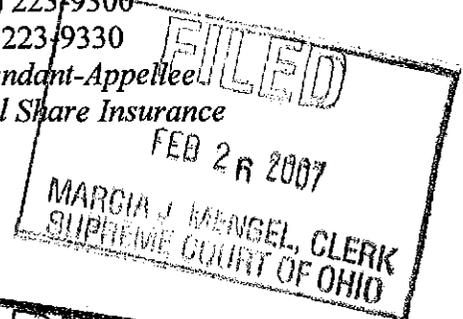
Court of Appeals
Case Nos. 05AP-827 and 05AP-870

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I. INTRODUCTION

All parties agree on one point: Only a credit union can commence an action in its own name under R.C. 1733.361(A)(2). Where the parties disagree is how a credit union whose board of directors has been stripped of its authority, by operation of law, upon the appointment of a conservator can bring a challenge under this statute. The decision of the court of appeals ignores the unique circumstances created by the appointment of a conservator, and employs traditional corporate governance principles and statutes to reach a result which is, under the circumstances, impractical, illogical and unjust. DFI and ASI defend this result and suggest that the obvious inconsistencies it creates can be resolved through creative statutory construction and the “sensible” implication of statutory provisions that the General Assembly clearly did not include, but could have, if it had so chosen. The court of appeals decision is wrong and DFI’s and ASI’s defense of it is untenable. This Court should reverse and reinstate the judgment of the trial court.

II. ARGUMENT

This Court has granted discretionary review of two legal issues in this matter:

1) Whether a credit union may exercise its statutory right to challenge the appointment of a conservator by commencing a civil action authorized by either the sole remaining director or by a former director and member of the credit union; and 2) whether the Court of Appeals’ construction of R.C. 1733.361 renders it unconstitutional. *See 10/4/2006 Case Announcements, 2006-Ohio-5083.* Neither of these issues of law requires for its resolution an inquiry into the disputed “facts” that DFI and ASI have included in their briefs to this Court. Indeed, the “facts” that these parties recite are, for the most part, simply untested regulatory assertions contained in an administrative order, formulated without an evidentiary record developed in a contested hearing. Given the immateriality of these regulatory allegations to the issues before the Court, it

is obvious that the intent in reciting them is to “taint” Mrs. Hughes in the eyes of this Court. For this reason, a brief response is warranted.

DFI and ASI attempt to tell a story of a self-interested, now 83-year old woman exerting improper control over a credit union, and warn that a decision in favor of UTCU here will leave credit unions in conservatorship—and the regulators who place them there—at the mercy of “maverick” and “rogue” directors. *See* Merit Brief of Defendant-Appellee Kenneth A. Roberts at 16, 17 (hereinafter “DFI Br. at ___”). Although neither DFI nor ASI directly label Mrs. Hughes as “rogue” or a “maverick,” each does make repeated reference to an alleged transfer of UTCU-owned Fahey Bank stock by her husband into a brokerage account in her name, implying that she was complicit in the purloining of the credit union’s assets. This was, indeed, a “finding” in DFI’s administrative orders in this matter, but it is a story that has been debunked and repudiated, with the knowledge and approval of DFI, by ASI as conservator and on behalf of UTCU in filings in another court. Almost a year ago, on April 24, 2006, UTCU (through ASI) represented in an Agreed Order that it was the “legal and equitable owner” of the Fahey Bank stock, and that it had never entered into an agreement to transfer that stock to any other person. *Am. Mut. Share Ins. Corp. v. CUMIS Ins. Soc’y, Inc.*, Franklin County Court of Common Pleas, Case No. 05-CVH-02-2054, Agreed Order dated April 25, 2006 at ¶ 3, UTCU Fourth Supp. at 2.¹ In that same Order, Mrs. Hughes disclaimed any legal or equitable interest in the Fahey Bank Stock, and acknowledged that it was owned by UTCU. *Id.* at ¶ 1, UTCU Fourth Supp. at 1. Yet, both DFI and ASI raise this alleged “transfer” throughout their briefs, without ever acknowledging that the stock was not, in fact, transferred and without admitting that Mrs. Hughes has acknowledged UTCU’s ownership, and disclaimed any interest on her part, in a court filing.

¹ Pursuant to Evid. R. 201, the Court may take judicial notice of the Agreed Order.

In fact, Mrs. Hughes is far from the dishonest, embezzling director out to line her own pockets that DFI and ASI portray. Nor is she acting out of some self-interest that causes her motives to be suspect. To the contrary, Mrs. Hughes has nothing of financial value to gain from this challenge; she is funding it from her own resources to ensure that those who invested in the credit union founded by her family members will be protected against unwarranted and peremptory actions of the State. The legal issues she brings before this Court are not determinable based on the supposed “facts” relied upon by the regulator in seizing the credit union. Indeed, by terminating the conservatorship at issue in *this* case, the regulator has effectively insulated those “findings” from effective judicial review, and this Court has no credible record before it supporting the alleged “facts” that DFI and ASI feature so prominently in their briefs. And the very court of appeals opinion now under review is what has allowed DFI to avoid a ruling on the merits of its second conservatorship order. *See UTCU v. O'Donnell*, Franklin County Court of Common Pleas, Case No. 05 CVH-09-10728, Decision dated Feb. 5, 2007 (applying Tenth District’s *Roberts* decision to dismiss UTCU’s challenge to the second conservatorship order, even after having conducted a full evidentiary hearing). UTCU Fourth Supp. at 8-15.

The facts that the Court should keep in mind here are that the Order appointing the conservator was signed by the Acting Deputy Superintendent of Credit Unions (which two courts have held renders the order void); that at the time the conservatorship order was issued, UTCU had been operating under a supervisory agreement for seven months and had only three members on its board of directors;² and that DFI had included in its Supervisory Order a requirement that

² This is another “fact” that DFI and ASI either misrepresent or obfuscate throughout their briefs. ASI, at page 6 of its brief, trumpets the appellate court’s *finding* that a majority of the board of directors did not authorize the filing of the initial challenge to the conservatorship order (UTCU App. at 17, n.4). However, ASI does not point out that the appellate court was wrong in this *finding*, as directors Munteanu and Gould had resigned from the board by the time the conservatorship order was issued. *Compare* Brief of Defendant-Appellee American Mutual

any new member of the board of directors be approved by DFI. These facts frame the issue: How does a credit union proceed with its statutory right to challenge the state's takeover, and do so within thirty days, in an environment in which the State is exercising complete control over the affairs of the organization, and has assumed all corporate power through the operation of law? The answer must be consistent with the statutes and must permit a constitutionally meaningful opportunity for the affected credit union to file such an action. DFI and ASI offer no answer that satisfies both of these criteria.

A. R.C. 1733.361 Does Not Support DFI's And ASI's Illogical Argument That (A)(2) Requires Authorization By A Quorum Of The Credit Union's Board.

DFI's and ASI's argument that a credit union can only bring a challenge under R.C. 1733.361(A)(2) with the formal authorization of a majority of a quorum of the board of directors is neither reasonable nor compelled by any language in the statute. As both acknowledge, the argument necessarily ignores the fact that, by the time a vote is required on whether to proceed with a challenge, the authority of the board has been stripped and vested in the conservator, who can hardly be expected to authorize a challenge to his own authority. R.C. 1733.361(B). So DFI and ASI imply two modifications to the Revised Code. First, they imply a requirement in R.C. 1733.361(A)(2) that for a credit union to avail itself of the right to mount a challenge to a regulatory takeover, it must secure authorization from its board of

(continued...)

Share Insurance Corporation at 13 (hereinafter "ASI Br. at ___") (By February 27, 2003, "there were at least three (3) remaining directors of UTCU—Martin J. Hughes, Jr., Natalie Hughes and Daniel Hughes.") DFI, on the other hand, simply misrepresents the facts when it states that "as it happens, the UTCU board did have enough members to have taken such an action (authorizing a statutory challenge) within the initial 30 days." DFI Br. at 25 (parenthetical added). When the conservatorship order was signed by the Acting Deputy Superintendent on February 24, 2003, UTCU had three directors. Munteanu and Gould had already resigned. Gould Depo. at 65 ("Q. You were out as of February 24, 2003? A. Correct."), ASI Supp. at 48; Munteanu Depo. at 35 ("Q. And in this document dated September, 2002, you were no longer serving as a director? A. Right."), ASI Supp. at 52; DFI Order of Appointment of Conservator dated Sept. 28, 2005 at 3 ("As of February 24, 2003, the date of the 2003 Order, the Credit Union had only three members on its Board: Mr. Hughes . . . , Mrs. Hughes and Daniel P. Hughes"), UTCU Supp. at 40.

directors, acting in compliance with R.C. 1733.15(A) and .17. As construed by the court of appeals, “[t]he plain language of the statutes mandate that an action brought on behalf of a credit union may be initiated only by a board of directors made up of no fewer than five members.” Court of Appeals Opinion, UTCU App. at 12. Here, it is clear that UTCU did not have sufficient directors at the time the conservatorship order was issued to satisfy this implied requirement.

The second implied modification that DFI and ASI proffer is to R.C. 1733.361(B). Under this statute, the conservator “[s]hall have and exercise, in the name and on behalf of the credit union, *all the rights, powers, and authority* of the officers, directors, and members of the credit union” upon his appointment. R.C. 1733.361(B) (emphasis added). As has been pointed out before, this statute is wholly inconsistent with any requirement that the board of directors do anything after the appointment of the conservator because, through the clear language of this statute, those directors have no authority at that point. DFI and ASI, however, are undaunted by the clear language of the statute, and propose that “[t]he perfectly sensible reading is that the board of directors reserves this right (to file a challenge) during a conservatorship, though only for the 30 days the statute specifies.” DFI Br. at 25 (parenthetical added); *see also* ASI Br. at 19. Thus, DFI and ASI depend for the success of their argument on these implied “overlays” or “reconciliations” of the statutory scheme. UTCU’s position requires no such effort.

When one looks at the structure and chronology of events that R.C. 1733.361 controls, one sees that UTCU’s interpretation of those provisions is the most rational. In the vast majority of instances, R.C. 1733.361 comes into play when the Superintendent has a credit union that has been under some form of supervision or other “watch,” which is what happened in this case. Predictably during that period, some directors will either be the subject of removal efforts by the regulator, or will step down to avoid the risk, taint and stress of governing a struggling entity. The General Assembly clearly recognized this possibility when, in R.C. 1733.361(A)(3), it

allowed a majority of the directors in office on the date of a conservator's appointment to consent to the appointment on behalf of the credit union. There is no requirement that there be five directors at that point, or that there be a quorum. This act—the final act of a board surrendering its company to the State—can be accomplished by the majority of the directors left standing. And then, they are done. Their power is stripped and given to the conservator, and there is no provision for their continued participation in the affairs of the credit union. As DFI points out, if only one director remains, that director can consent to turn the credit union over to the State. DFI Br. at 17.

And yet, DFI is adamant that such a single director cannot, once a conservator has been appointed, authorize a challenge to a regulatory takeover to which the credit union did not consent. In support, DFI argues, first, that subsection (A)(2) does not expressly vest that power in something less than a majority of a quorum of a fully constituted board and, second, the result would be “dangerous.” *See* DFI Br. at 18. To the second point first, the arrogance of the State that would argue in favor of making it more difficult to challenge the government's seizure of property is evidence enough that it is not the State and its regulatory officials that need protection against precipitous and misguided action. It is the private citizens and their property interests that the General Assembly sought to protect in R.C. 1733.361(A)(2), and how to ensure that the recourse is “real” is the central issue in this case.

As to the first point, clearly (A)(2) does not have the same “last man standing” language that (A)(3) includes. But, the reason for that is found in R.C. 1733.361(B), which vests all of the power of the credit union, its directors, and members in the conservator. A rational reading of the statute, unembellished by the gloss of implication placed upon it by DFI, suggests that the General Assembly did not make any provision for board action with less than a standard sized board because it had already, chronologically at least, divested the board of all authority. Thus,

the issue that this Court accepted for review is really the unanswered but critical issue: Who can authorize the credit union to act when the board, the officers, and the members have no power?

B. Relevant Authority Confirms That There Exist Situations In Which, When A Corporation Cannot Act Through Its Board, Courts Nonetheless Recognize The Validity And Necessity Of The Corporation's Acts.

The statutory transfer of corporate authority to the conservator effected by R.C. 1733.361(B) is, obviously, an unusual circumstance requiring thoughtful consideration of its consequences. In its principal brief, UTCU cited a number of Ohio and federal decisions that dealt directly with similar instances of divestment and disabling of a corporate board, or dealt with analogous situations in which a board lacked legal power to act, but courts allowed and recognized necessary corporate action nonetheless. *See Franklin Savings Ass'n v. Office of Thrift Supervision* (D. Kan. 1990), 740 F. Supp. 1531, 1533-34 (construing the FIRREA as allowing the association to be named as a plaintiff while allowing those who previously controlled and operated the corporation to prosecute the action); *Inland Empire Ins. Co. v. Freed* (10th Cir. 1956), 239 F.2d 289, 291-92 (allowing former directors to challenge a receivership, which operates as a legal disability on the corporation); *Nottingdale Homeowners Ass'n v. Darby* (Jul. 14, 1986), 12th Dist. No. 85-09-054, 1986 WL 7908 at *2-3 (permitting an improperly elected board of trustees to initiate an enforcement action in the condominium association's name to enforce payment of fees); *Ross v. Roston Elevator Co.* (Mar. 13, 1975), 8th Dist. No. 33572, 1975 WL 182488, at *5 (permitting a single director to hire an attorney to defend the corporation against a lawsuit where board approval was impossible because the only other director objected).

DFI incorrectly states that *Franklin Savings* and *Inland Empire* "explicitly reject" that a former director "can assert the interest of a corporation under a conservatorship or a receivership . . ." DFI Br. at 14. To the contrary, *Franklin Savings* explicitly found that a

statute analogous to R.C. 1733.361(A)(2) had “the clear intent and purpose . . . to allow the association to be named as a plaintiff and to allow those who controlled and operated the association prior to the conservatorship to prosecute the action.” *Franklin Savings*, 740 F. Supp. at 1533-34. The court defined that group to include “pre-conservatorship officers and directors and the principal shareholder.” *Id.* Similarly, in *Inland Empire*, the court permitted the former directors of the company in receivership to participate because it recognized the legal disability attending the appointment of a receiver. 239 F.2d at 291-92. In *Inland Empire*, there was no statutory provision empowering the corporation to bring a challenge and the directors were the only persons before the court purporting to represent the pre-receivership corporation’s interests.

Similarly, in *Nottingdale* and *Ross*, the courts permitted the respective corporation to file or defend against a legal action on behalf of the corporation in circumstances where board authorization was not valid or, like here, was impossible to obtain. DFI and ASI have made no attempt to distinguish the legal reasoning of these cases. Instead, they simply recite the facts of those cases and baldly assert that because the facts differ from this case, they do not apply. Every case will have different facts, particularly from this one. The instances in which the State strips a corporation’s board of directors of its authority to act are rare. But, the reasoning of both *Nottingdale* and *Ross* supports UTCU’s position that someone must be permitted to direct and authorize a corporation to take necessary actions, even when the corporation lacks valid board authority. Mrs. Hughes, as one of the persons responsible for the governance of the credit union before the regulatory seizure, and a person willing to risk her own funds in seeking to protect the credit union through this statutory challenge, is such a “someone” here.

DFI and ASI have not provided any relevant authority to the contrary. None of their cited authority provides any guidance on how a credit union should bring a challenge under R.C. 1733.361(A)(2) in light of the transfer of corporate authority to the conservator. DFI and

ASI have not and cannot support their illogical assertion that a credit union—legally disabled by the imposition of a conservator—must still act through its now-powerless board of directors to protect itself. Instead, their cited authority relates to several undisputed, but irrelevant, concepts.

For example, DFI and ASI both rely upon *Wadsworth v. Davis* (1862), 13 Ohio St. 123, in which this Court came to the unsurprising conclusion that a corporation’s board of directors has the power to settle a lawsuit on behalf of the corporation. *See id.* at 131 (“[I]t would be strange if they had not the power to compromise and settle a suit which they had improvidently brought.”). No one disputes that a board of directors of a corporation, under ordinary circumstances, has the authority to file (and settle) a lawsuit. That likely explains why *Wadsworth* is essentially untouched after a century and a half. But that is not the issue presented here, because these are not ordinary circumstances.

Additionally, ASI cites several shareholder derivative actions that were dismissed because the shareholder had not satisfied the specific criteria for bringing such a suit. *See Drage v. Procter & Gamble* (1997), 119 Ohio App. 3d 19, 24-26; *Doe v. Malkov*, 2002-Ohio-7358, 2002 WL 31928645, at ¶¶ 21-29. No one disputes that the circumstances under which shareholders can circumvent the corporation’s officers and directors are limited. This case does not purport to be a derivative action; it is an action expressly created by the General Assembly with the intention that it could be filed and pursued by the credit union, against the State agency that has seized control of its affairs. DFI and ASI offer no logical interpretation of the statutes that both respects the structure and integrity of the statutory scheme and, at the same time, provides a meaningful opportunity to be heard—the hallmark of due process.

C. 1701.13(H) Prohibits DFI And ASI From Challenging UTCU's Authority To Commence This Action.

Not only does DFI's and ASI's asserted construction of R.C. 1733.361(A)(2) fail for lack of legal or logical support, their entire challenge to UTCU's authority to commence this action is barred by R.C. 1701.13(H). DFI and ASI attempt to avoid this bar by claiming that they are challenging UTCU's internal conduct in authorizing this action through Mrs. Hughes, rather than challenging UTCU's corporate authority to file a lawsuit. This is a distinction without a difference. The result is the same: DFI and ASI are challenging UTCU's *authority to bring this action* at the direction of Mrs. Hughes.

DFI and ASI rely on the Official Comment to § 3.04 of the Model Business Corporation Act as support for this alleged distinction.³ Yet, they make no attempt to support their reading of the Official Comment with relevant caselaw. In fact, they ignore a case, cited by UTCU, that is directly on point. In that case, arising in Arkansas (a state that, unlike Ohio, *has* adopted § 3.04), the state's highest court barred the precise type of challenge that DFI and ASI seek to raise here. In *Marcum v. Wengert* (2001), 344 Ark. 153, the court denied the defendants' challenge to the corporation's power or authority to bring suit against them, arguing that a single, former board member lacked standing to prosecute an action on behalf of the corporation. The court applied § 3.04 and found that "only specific people are able to challenge the corporation's acts, and the [defendants] do not occupy any of those positions." *Id.* at 167.

This same reasoning applies here. Neither DFI nor ASI "occupy" any of the permitted "positions" under R.C. 1701.13(H) which would allow them to challenge UTCU's authority to bring this case. As a result, their challenge must fail.

³ The relevance of the Official Comment is questionable given that Ohio has not specifically adopted this provision of the Model Business Corporation Act, although the language is similar to R.C. 1701.13(H), and Ohio has certainly not adopted, nor has any court in Ohio relied upon, the Official Comment to § 3.04. *See* 40 Fletcher Cyclopedia of the Law of Corporations § 3439.20 (2006) (listing the states that have adopted the Model Business Corporation Act).

D. Requiring Board Action To Commence This Challenge Will Deny UTCU Due Process.

DFI and ASI concede that due process requires that a credit union have the opportunity to challenge a conservatorship. *See* DFI Br. at 25-26; ASI Br. at 26. Yet, the inevitable consequence of the court of appeals' ruling is that UTCU and other similarly situated credit unions will not be able to effectively exercise this right. Such a result denies UTCU due process of law in this case, and will operate to deny UTCU and other like credit unions due process in future proceedings.

In an attempt to deflect the inevitability of this conclusion, DFI contends that "the UTCU board did have enough members to have taken such an action within the initial 30 days," DFI Br. at 25, and therefore due process was not violated. But on February 24, 2003, when the conservatorship was initiated, board members Kathryn Munteanu and Shannon Gould had resigned, leaving only three members on the board of directors when the conservatorship was initiated. ASI Supp. at 48, 54 (testimony of Munteanu and Gould confirming that both had resigned prior to February 24, 2003); *see also* n.2 *supra*. UTCU clearly could not have filed suit under the standard dictated by the court of appeals, requiring a majority of a quorum of a fully constituted board of directors with a minimum of five (5) members. *See* Court of Appeals Opinion, UTCU App. at 12.

As a fallback position, DFI and ASI argue that, even if UTCU could not have secured valid board authorization immediately upon the issuance of the conservatorship order, Mrs. Hughes could have regenerated the board to a full complement and, once regenerated, the board could have authorized the commencement of a civil action on behalf of UTCU. This flawed argument fails for three reasons.

First, like DFI's and ASI's prior argument, it ignores R.C. 1733.361(B), which strips the credit union and its officers, directors and members of their previously held "rights, powers and authority." They rely upon R.C. 1733.17, which defines a quorum for a meeting of directors as "a majority of the entire authorized number of directors . . . except that a majority of the directors in office constitute a quorum for filling a vacancy on the board." As with their earlier reliance on this provision, DFI's and ASI's reliance here is misplaced. Under R.C. 1733.361(B), neither the credit union nor its board of directors retains any corporate powers that could be exercised by the board, whether through a quorum or otherwise. The fact that a lesser number is required to fill a vacancy does not change this result. While Mrs. Hughes as the sole remaining director fulfills that lesser definition of a quorum, this does not mean that Mrs. Hughes had the *power* to fill any vacancies at all given R.C. 1733.361(B)'s transfer of all corporate power to the conservator.

Second, even if Mrs. Hughes had the authority to fill a vacancy on the board, the supervisory requirements imposed by law (and by DFI) would have thwarted any effort to do so within the thirty day period for filing an action under R.C. 1733.361(A)(2). Under Ohio Administrative Code section 1301:9-1-03(B)(3), "[c]redit unions operating under a supervisory agreement . . ., shall notify the superintendent in writing, by certified mail, at least fifteen days prior to the date any change in the position of director . . . takes place." In addition, the newly appointed director "shall not assume a position and related duties until *after* the superintendent *has approved* such change in writing." OAC 1301:9-1-03(B)(3) (emphasis added). This administrative provision does not discuss a credit union in conservatorship, in all likelihood, because a credit union in conservatorship no longer has the power to fill any board vacancies. Yet even if the credit union retained this power in conservatorship, at a minimum, its exercise

would have to be subject to the same restrictions that applied while under supervision, a lesser degree of regulatory scrutiny.⁴

Applying this fifteen day notification and approval process to this case, it would have been impossible for a single director like Mrs. Hughes to fill enough vacancies to constitute a quorum, let alone to fill a five-member board (as required by the court of appeals) in the thirty day period available for commencing a challenge. According to DFI and ASI, Mrs. Hughes could appoint one board member. Once that person was approved by DFI, those two could then appoint another board member, and so on. Given the fifteen-day notice requirement, it would be impossible for Mrs. Hughes to fill even a quorum of three within thirty days, even if one assumes that DFI would give its approval immediately and unquestioningly.

Moreover, the requirement that DFI approve all new directors before the new director can “assume a position and related duties” gives DFI unchecked power to prevent the filling of vacancies and effectively hands DFI the means to avoid judicial review entirely. DFI suggests that “[i]f a credit union board instead believed state regulators were somehow blocking its attempt to regenerate the board according to R.C. 1733.17, it might consider whether it has some legal avenue.” DFI Br. at 26. This suggestion is completely disingenuous. DFI argues here that UTCU could not commence this action because it did not have the necessary authorization from a quorum of the board—an impossibility where Mrs. Hughes is the sole remaining director. If UTCU cannot even commence the very action that the statute creates as a challenge to the

⁴ In fact, the supervisory agreement under which UTCU operated prior to the creation of the conservatorship included this exact requirement. *See* Order Appointing Conservator dated Feb. 24, 2003, UTCU Supp. at 3. It defies reason to argue that upon UTCU moving from the less restrictive supervisory agreement to the complete transfer of all corporate power that occurred upon the appointment of ASI as conservator, UTCU somehow gained the unrestricted authority to appoint new board members. Furthermore, DFI’s incorporation of and reliance upon the supervisory agreement in the second conservatorship order issued in 2005 demonstrates that DFI believes that the supervisory agreement was still in effect, at least until the issuance of that new conservatorship order. *See* Order Appointing Conservator dated Sept. 28, 2005, UTCU Supp. at 38-45. Thus, during the entire time leading up to when this action was refiled, DFI had the authority to both require fifteen day prior notice of any change in board members, and to approve, or deny approval, for any proposed board member.

conservatorship, what type of legal action could UTCU file? Who, precisely, does DFI suggest “consider” the alternatives? And does DFI seriously suggest that it would not contest even more vigorously than this one a lawsuit claiming that DFI was actively interfering with UTCU in the exercise of its statutory rights? All parties to this matter, and by now this Court, know better.

Finally, the recent history of UTCU’s regulatory journey confirms the unacceptable consequences of the court of appeals’ ruling. As detailed previously, once the trial court ruled that the order appointing a conservator, signed by Roberts, the Acting Deputy Superintendent, was invalid, and after a second court came to the same conclusion, DFI terminated the first conservatorship and immediately replaced it with another, pursuant to an order signed by the Superintendent. A statutory challenge to that second conservatorship was filed by UTCU, at Mrs. Hughes’s direction. DFI again moved for dismissal of UTCU’s challenge because no quorum of UTCU’s board had authorized the filing of that action. *UTCU v. O’Donnell*, Franklin County Court of Common Pleas, Case No. 05 CVH-09-10728, Decision dated Feb. 5, 2007 at 4, UTCU Fourth Supp. at 11. The trial court, while noting that it “is aware of the unfortunate consequences of a *Roberts*-based reasoning with respect to UTCU’s ability to challenge the [second] Conservatorship Order,” found that it “must abide by the findings of the Tenth District Court of Appeals with respect to Mrs. Hughes’s ability to authorize legal action on behalf of UTCU.” *Id.* at 6-7, UTCU Fourth Supp. at 13-14. Accordingly, the trial court granted DFI’s motion to dismiss. As a result, DFI has evaded any judicial review of its second conservatorship order, in violation of UTCU’s due process rights.

E. UTCU’s Challenge Is Timely Under Ohio’s Savings Statute.

This Court should not consider the merits of DFI’s new alternative argument for affirming the erroneous decision of the court of appeals. This appeal was granted to review only two propositions of law pursuant to Ohio Supreme Court Practice Rule III (6). *See 10/4/2006*

Case Announcements, 2006-Ohio-5083 (accepting appeal on Propositions of Law I and II). This Court did not grant jurisdiction on the issue of whether or not the savings clause applies to R.C. 1733.361(A)(2).

If the Court chooses to address this additional issue, however, the Court should reject the contention that the savings statute does not apply to actions brought under R.C. 1733.361(A)(2), and affirm the trial court's decision on that issue. DFI contends that this Court can only affirm the court of appeals decision on this basis, not reverse it. But, it cites no authority for that assertion, *see* DFI Br. at 27-29, n. 5, and, because the issue is a purely legal question, this Court has plenary authority to decide it. If it chooses to consider the issue at all, it may decide the issue whether it results in affirmance or reversal. *See FirstEnergy Corp. v. Pub. Util. Comm'n of Ohio* (2002), 95 Ohio St. 3d 401, 404 ("This court has complete and independent power of review as to questions of law.").

No disputed facts are relevant to this determination. DFI does not dispute that UTCU refiled this action within one year of the dismissal without prejudice of the first action. DFI Br. at 27-28. Thus, if the savings statute applies, UTCU's action was timely.

1. The plain language of R.C 2305.19 and R.C. 1733.361 supports the application of the savings statute here.

R.C. 2305.19 is very broad and applies to "any action." On several occasions, this Court has broadly construed R.C 2305.19. *See, e.g., Cero Realty Corp. v. Am. Mfrs. Mut. Ins. Co.* (1960), 171 Ohio St. 82, 85 (Ohio's savings statute "should be given a liberal construction to permit the decision of cases upon their merits rather than upon mere technicalities of procedure."). This Court recently reaffirmed this construction noting that R.C. 2305.19 is "a broad statute of general application." *See Allen v. McBride* (2004), 105 Ohio St. 3d 21, 2004-Ohio-7112, ¶ 27 (applying the savings statute to will contests because there is "nothing within

[R.C. 2305.19] that could even remotely be read to proscribe its application to will-contest actions.”). Like the statute in *Allen*, nothing in R.C. 2305.19 can be read to prohibit its application to R.C. 1733.361.

Second, nothing in 1733.361(A)(2) prohibits the application of the savings statute to conservatorship challenges. See *Reese v. Ohio State Univ. Hosps.*, (1983) 6 Ohio St. 3d 162, 163 (applying R.C. 2305.19 to 2743.01 because “[t]here is nothing in [R.C. 2743.01] prohibiting the refiling of an action which was originally commenced within the time prescribed.”). When a statute does not explicitly “prohibit[] the refiling of an action which was originally commenced within the time prescribed,” R.C. 2305.19 does not conflict with the statute of limitations, but rather, “fills [a] void.” *Id.* This Court recognized in *Reese* that a statutory time limitation and the savings clause do not conflict because a statute of limitations and the savings clause are applied at different times. *Id.* (explaining that the savings clause applies only after the statute of limitations has run and, therefore, “the two cannot be applied at the same time since each is dependent upon different circumstances.”).

Like the statute in *Reese*, once a challenge to a conservatorship is filed within the thirty day time period, R.C. 1733.361(A)(2) has been satisfied on its face and later developments are beyond the statute’s scope. Because R.C. 1733.361(A)(2) and R.C. 2305.19 are compatible, there is no need to apply one in preference over the other. The savings statute applies only after a timely action was filed within the thirty day limitation of R.C. 1733.361, the party has failed other than on the merits, and the thirty days has expired.

2. Application of the savings statute to conservatorship challenges does not frustrate the purpose of R.C. 1733.361.

DFI attempts to avoid this logical application of the savings statute by arguing that the General Assembly could not possibly have intended the savings statute to apply here. See DFI

Br. at 28. For this argument, DFI relies on R.C. 1733.361(A)(2)'s thirty day filing deadline. *See id.* But, this Court has applied the savings statute in other contexts where the initial filing period is "short" and has expressly rejected the notion that a short filing period indicates a legislative intent not to apply the savings statute. *Allen*, 2004-Ohio-7112, at ¶ 23 (applying the savings statute to a will-contest statute with a three-month filing deadline); *see also Lewis v. Connor* (1985), 21 Ohio St. 3d 1, 4 (applying the savings statute to an Industrial Commission appeal that must be filed within 60 days of the Commission's decision).

Similarly, R.C. 1733.361(A)(2)'s direction to the trial court that a challenge be given "calendar priority" and "expeditiously proceed" does not express a legislative intent against application of the savings statute. The savings statute only provides one year to refile an action. This one year period does not significantly delay the conservatorship process. *See Allen*, 2004-Ohio-7112, at ¶ 23 (recognizing that applying the savings statute to will contests did not slow the administration of the estate significantly more than does the right to appeal various rulings of the probate court). And, during that one year time period, the state may continue with its plans for the credit union and may even take action that would moot a challenge, such as liquidation of the credit union. *See R.C. 1733.361(D)*. The risk falls on the challenger who chooses to dismiss a timely filed action and subsequently refile. Consequently, there is no basis to preclude the application of the savings statute here.

3. A conservatorship challenge is an original action, not an administrative appeal.

Finally, DFI mischaracterizes UTCU's challenge as an administrative appeal rather than an original action. DFI Br. at 30-31. DFI cites no authority for this characterization. Indeed, no Ohio court has classified an original action as an administrative appeal for purposes of limiting the savings statute. To the contrary, the Ohio Supreme Court has only moved in the opposite

direction and applied the savings statute to certain administrative appeals. *See Lewis*, 21 Ohio St. 3d at 4 (applying the savings statute to Industrial Commission appeals). In attempting to misclassify a conservatorship challenge as an administrative appeal, appellees rely on *Schmieg v. Ohio State Department of Human Services*, (Dec. 19, 2000), 10th Dist. No. 00AP-561, 2000 Ohio App. Lexis 5949, and *Woodward v. Ohio Department of Mental Retardation & Developmental Disabilities*, (10th Dist. 2005), 160 Ohio App. 3d 246, 2005-Ohio-1514. However, these cases support the application of the savings statute here.

The *Schmieg* court declined to extend *Lewis* to ODHS appeals, because, unlike an Industrial Commission appeal, the ODHS proceeding is “similar in all pertinent respects to an appeal.” 2000 Ohio App. Lexis 5949 at *5. The court explained that the savings statute applies to an Industrial Commission appeal because it is “commenced with the filing of a complaint served in accordance with the civil rules, and the matters raised are subject to *de novo* review.” *Id.* at *4. Relying on *Schmieg*, the *Woodward* court similarly determined that an appeal from the State Personnel Board of Review was also “more akin to an appeal” than the Industrial Commission appeal in *Lewis* because it was not “procedurally initiated by the filing of a complaint in common pleas court.” 2005-Ohio 1514 at ¶ 12.

All the pertinent characteristics of an original action exist here. To challenge a conservatorship order, a credit union must file a complaint in the court of common pleas in Franklin county, to commence an original civil action as required by R.C. 1733.361(A)(2). The Ohio Rules of Civil Procedure apply, and the matter proceeds like any other civil action. *See Schmieg*, 2000 Ohio App. Lexis 5949 at *5 (explaining that the savings statute applies to an Industrial Commission appeal because the proceeding is “akin to a civil action”). Because the issuance of a conservatorship order is a unilateral action, not the result of an administrative hearing process, the court rules on all factual and legal issues in the first instance, in a manner

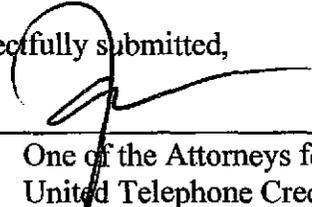
akin to the de novo review identified as a characteristic of an original action, rather than an administrative appeal. *See id.* (identifying de novo review as a factor supporting the application of the savings statute). Additionally, here, ASI joined this action as an additional party (*see* DFI Br. at 8), a factor noted by the *Schmieg* court as a characteristic “not common to a typical administrative appeal.” *Schmieg*, 2000 Ohio App. Lexis 5949 at *5 All of these factors demonstrate that a conservatorship challenge is not only labeled as an original action but also *functions* as an original action in all pertinent respects.

In sum, the language of both the savings statute and R.C. 1733.361(A)(2) support the application of the savings statute here, this Court’s precedent confirms this conclusion, and DFI’s attempts to avoid the application of the savings statute should be rejected.

III. CONCLUSION

For the foregoing reasons, this Court should reject DFI's and ASI's arguments and the erroneous court of appeals decision upon which they are based. Instead, this Court should allow UTCU's challenge under R.C. 1733.361(A)(2) to proceed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Reply Brief of Appellant United Telephone Credit Union, Inc. was served via ordinary U.S. mail, postage prepaid, upon the following on this 26th day of February, 2007:

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