

W. RANDALL ROCK (0023231)
2579 Ashcraft Road
Dayton, Ohio 45414
wrocklaw@aol.com

Counsel for Johanna Long

KIMBERLY MAYHEW
Nolan, Sprowl & Smith
500 Performance Place
109 North Main Street
Dayton, Ohio 45402
kimmayhew@gmail.com

Administrator for Estate of Roy G. Dillabaugh

ROBERT E. DINTAMAN (0069555)
Robert E. Dintaman, Esq., LLC
1370 Ontario Street
Suite 330
Cleveland, Ohio 44113

Counsel for Lorne Dillabaugh

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
STATEMENT OF THE CASE AND FACTS	4
A. Roy Dillabaugh ran a Ponzi scheme and died, but he first poured his victims’ money into life insurance policies to benefit his wife, son, and secretary.	4
B. Dillabaugh left letters admitting his wrongdoing and directing his wife and the others to repay his victims, but they decided to keep the money.	5
C. The Division sued Dillabaugh’s estate and his company, and also named the Recipients, to freeze the disputed funds until a receiver could be appointed.	6
D. The trial court granted a preliminary injunction regarding the insurance proceeds, which it later modified to cover only the lesser amount of the insurance premiums.	7
E. The trial court issued a Final Order granting relief against the estate and the company, and appointing a receiver to exercise statutory powers as to the Recipients as well, but the Final Order did not grant any injunctive relief against the Recipients.	9
F. On appeal and some parties’ cross-appeal of the Final Order, the appeals court held that the Division could not seek relief against the Recipients, and it held that the trial court was premature in addressing the receiver’s powers and R.C. 3911.10.	9
ARGUMENT	11
 <u>Division’s Proposition of Law No. 1:</u>	
<i>An appeals court may review only those issues contained in orders named in a notice of appeal, and an appellant has standing to challenge an order only if it is a party aggrieved by the order.</i>	
A. The Recipients appealed only the Final Order, and neither that Order nor the incorporated Summary Judgment Decision enjoined the recipients or “aggrieved” them in any way.	11
1. The Final Order did not impose any relief upon the Recipients.	12
2. The Summary Judgment Decision did not impose any relief upon the Recipients, as it merely ruled on the Division’s abstract power to seek relief.	15

- B. Neither the original July 2008 Preliminary Injunction nor the November 2009 Modified Preliminary Injunctions were a basis for preserving the issue, both because they were not appealed and because they expired when the Final Order issued.17

Division’s Proposition of Law No. 2:

R.C. 1707.26, by empowering the Division of Securities to seek “such other equitable relief as the facts warrant,” authorizes the Division to seek temporary injunctive relief against any third parties who have received funds that are likely derived from securities fraud, to protect those funds until a receiver is appointed under R.C. 1707.27 and exercises his powers to protect funds.19

CONCLUSION.....24

CERTIFICATE OF SERVICEunnumbered

APPENDIX

Notice of Appeal, Dec. 13, 2010Exhibit 1

Judgment Entry, Second District Court of Appeals, Oct. 29, 2010.....Exhibit 2

Opinion, Second District Court of Appeals, Oct. 29, 2010Exhibit 3

Judgment Entry and Order, Montgomery County Court of Common Pleas,
Dec. 23, 2009Exhibit 4

Summary Judgment Decision, Montgomery County Court of Common Pleas,
Nov. 12, 2009.....Exhibit 5

R.C. 1707.26.....Exhibit 6

R.C. 1707.27Exhibit 7

TABLE OF AUTHORITIES

	Page(s)
FEDERAL CASES	
<i>Commodity Futures Trading Comm'n v. Kimberlynn Creek Ranch, Inc.</i> (4th Cir. 2002), 276 F.3d 187	23
<i>Schramm v. LaHood</i> (6th Cir. 2009), 318 Fed. Appx. 337.....	18
<i>SEC v. Cavanagh</i> (2d Cir. 1998), 155 F.3d 129	3, 22, 23
<i>SEC v. Cherif</i> (7th Cir. 1991) 933 F.2d 403	23
<i>SEC v. Colello</i> (9th Cir. 1998), 139 F.3d 674	23
<i>SEC v. George</i> (6th Cir. 2005), 426 F.3d 786	3, 22, 23
OTHER CASES	
<i>Ahmad v. AK Steel Corp.</i> , 2008-Ohio-4082.....	12
<i>Cleveland Elec. Illum. Co. v. Cleveland</i> (1988), 37 Ohio St. 3d 50	22
<i>Denovchek v. Bd. of Trumbull County Comm'rs</i> (1988), 36 Ohio St. 3d 14	12
<i>Goodman v. Mayhew</i> , 128 Ohio St. 3d 1425, 2011-Ohio-1049.....	10
<i>Holderman v. Columbus Skyline Sec. (In re Columbus Skyline Sec.)</i> (1996), 74 Ohio St. 3d 495	19
<i>Smith v. Leis</i> , 2006-Ohio-6113	12
<i>State Department of Commerce, Div. of Securities v. Buckeye Fin. Corp.</i> (1978), 54 Ohio St. 2d 407	22
<i>State ex rel. Gabriel v. City of Youngstown</i> (1996), 75 Ohio St. 3d 618	11

<i>State ex rel. Stoll v. Logan County Bd. of Elections,</i> 2008-Ohio-333	22
<i>Transamerica Insurance Company v. Nolan (1995),</i> 72 Ohio St. 3d 320	17, 18
<i>United Tel. Co. of Ohio v. Limbach (1994),</i> 71 Ohio St.3d 369	22
<i>Zurz v. Mayhew, Admin'r of Estate of Dillabaugh (2d Dist.),</i> 2010-Ohio-5273	2

STATUTES

R.C. 1707.13	19
R.C. 1707.19	19
R.C. 1707.23	19
R.C. 1707.26	<i>passim</i>
R.C. 1707.27	<i>passim</i>
R.C. 1707.261	6, 19
R.C. 3911.10	7, 8, 9, 10

RULES

Civil Rule 65	7
---------------------	---

INTRODUCTION

This case involves two important issues—a substantive issue and a procedural one—about the government’s power to redress financial fraud. The substantive issue concerns the broad power of the Ohio Division of Securities to protect victims of securities fraud and other securities-law violations —specifically, the power to temporarily freeze not only funds obtained and held fraudulently by wrongdoers, but also such funds conveyed by the wrongdoers to third parties. The threshold procedural issue involves the power of appellate courts to review trial-court orders, a power that requires a live controversy between parties—something that does not exist when, as here, the appealing parties were not affected by the appealed order and thus had no standing to appeal.

The Division of Securities would very much like to ask the Court to reach the substantive question and hold that the agency was empowered to seek the preliminary injunction that was once at issue in the trial court. However, the Division is compelled to acknowledge that the procedural issue here is so clear-cut that it is hard to see any path for the Court to reach the substantive issue. That is so because the relevant Defendants appealed only the *final order, which imposes no relief against them*, so the availability of the preliminary injunction was never before the appeals court. This Court should therefore vacate the decision below as to the part addressing an issue that was never properly before the court.

Both the procedural and substantive issues arose from the Division’s effort to address a scheme that was unquestionably fraudulent. Roy Dillabaugh, now deceased, operated a “Ponzi scheme” in which he sold over \$12 million in unregistered securities to about 146 investors in Ohio and Indiana. Dillabaugh poured his ill-gotten gains into several homes, boats, and luxury vacations, and he bought at least 34 life insurance policies, with his wife, son, and secretary as beneficiaries. He apparently had regrets, however, because when he died, he left behind letters

telling his beneficiaries to use the proceeds to repay his victims, and telling his wife “I am (was) a criminal.” But Mrs. Dillabaugh and the others decided that, as innocent recipients of the ill-gotten gains, they were entitled to keep every penny of the money—\$6.5 million for Mrs. Dillabaugh, and smaller amounts for the other two. So the Division, when it sued Mr. Dillabaugh’s estate and his company, also named the other three (“Recipients”) as defendants, without alleging that they had broken the law, but seeking only to freeze the funds temporarily until a receiver could be named and the whole mess sorted out. In seeking to freeze the funds, the Division invoked R.C. 1707.26, which empowers the Division to sue violators of Ohio’s securities laws, to seek restitution, and to seek “such other equitable relief as the facts warrant.”

But the appeals court wrongly held that the Division could not name the Recipients at all, even for the limited purpose of freezing the fraud proceeds until a receiver could be appointed. See *Zurz v. Mayhew, Admin’r of Estate of Dillabaugh* (2d Dist.), 2010-Ohio-5273 (“App. Op.,” Ex. 3). The court held that R.C. 1707.26 allows the Division to sue only those who violate securities laws, along with violators’ “agents, employees, partners, officers, directors, and shareholders,” all of whom are itemized in the statute. *Id.* at ¶ 49. The court rejected the Division’s reliance on the clause that allows the agency to seek “such other equitable relief as the facts warrant.” That clause, the court said, allows only broader forms of relief against the categories of defendants named in the statute, but does not allow for naming other defendants.

That ruling was wrong. First, the Court should vacate that holding for the simple, indisputable reason that the appeals court had no jurisdiction to reach the issue, because the Recipients did not appeal any of the orders that may have frozen their funds. The Recipients appealed only the *final order* in the case, issued December 23, 2009, which did not impose any injunctive relief on them. Indeed, Alice Jane Dillabaugh admitted, in her brief below, that “It is

the November 18 entry that imposes the present injunction”—that is, the latest version of the preliminary injunction that she objected to. But she failed to acknowledge that she appealed *only the later, December final order*. Because the December final order did not enjoin the Recipients, they had no standing to appeal that order, and no other basis for restraining the funds was before the court (for instance, earlier *preliminary* injunctions or the parties’ informal agreement). That means that the appeals court should have stopped there, as should this Court.

Second, if the Court somehow reaches the substantive issue—but again, the Division sees no path to get there—it should hold that R.C. 1707.26 authorizes the Division to seek temporary relief to preserve funds held by third parties when those funds are traceable to a securities-fraud violation. Such temporary maintenance of the status quo is precisely the type of “other equitable relief” that “the facts warrant” in a case like this.

And to the extent there is any ambiguity, it must be resolved in favor of the General Assembly’s purpose, which would surely be undercut if fraudsters could evade restitution—leaving victims uncompensated—simply by parking their ill-gotten gains with family or third parties before law enforcement closes in. Federal courts have repeatedly held that the federal Securities and Exchange Commission can seek similar relief against innocent recipients—called “relief defendants” or “nominal defendants”—noting that “To hold otherwise ‘would allow almost any defendant to circumvent the SEC’s power to recapture fraud proceeds[] by the simple procedure of giving [the proceeds] to friends and relatives, without even their knowledge.’” *SEC v. George* (6th Cir. 2005), 426 F.3d 786, 798 (quoting *SEC v. Cavanagh* (2d Cir. 1998), 155 F.3d 129, 136). Ohio’s law was not intended to include such a loophole, and the Court should hold that no such loophole exists.

For these and other reasons below, the Court should vacate or reverse the appeals court's holding limiting the Division's remedial power.

STATEMENT OF THE CASE AND FACTS

A. Roy Dillabaugh ran a Ponzi scheme and died, but he first poured his victims' money into life insurance policies to benefit his wife, son, and secretary.

No one disputes that Roy Dillabaugh committed extensive fraud. See App. Op. at ¶ 1. "It is now undisputed that Dillabaugh made written and oral false statements to approximately 146 investors in the selling of unregistered securities." *Id.* This was not Dillabaugh's first time breaking securities laws. Years earlier, in 2001, he was fired by a brokerage firm when he "sold a certificate of deposit and used the monies for his own personal use." *Id.* at ¶ 6. He was no longer licensed to sell securities after 2001, but from "1994 to 2007, he ran an unincorporated business entity, The Dillabaugh Group, which purported to offer investment services." *Id.* He sold illegal, unregistered securities to about 146 "investors," taking over \$12.4 million from them, and telling them falsely that he invested their money in legitimate businesses. *Id.* at ¶ 9. But his "Dillabaugh Group had no legitimate business activity and none of the funds were invested in any business or commerce. Rather, Dillabaugh operated a 'Ponzi scheme,' using new investments to pay purported interest on earlier investments." *Id.* Dillabaugh died in November 2007, and in January 2008, the Division seized The Dillabaugh Group's business records as part of an investigation. *Id.* at ¶¶ 8-9.

Before Dillabaugh died, he spent the "investors'" funds in several ways. Some went to personal expenditures. *Id.* at ¶ 10. Some went to pay earlier investors, to keep up the illusion of legitimate business. *Id.* at ¶ 9. He put some into a personal bank account held jointly with his wife, Alice Jane Dillabaugh. *Id.* at ¶ 10. He and Mrs. Dillabaugh owned several properties, in

Ohio and other States, and six timeshares, including in West Palm Beach, Florida. They also vacationed in numerous locales.

Dillabaugh also purchased at least 34 life insurance policies, with himself as insured, and naming three beneficiaries: Mrs. Dillabaugh, his son Lorne, and his secretary, Mary Johanna Long. *Id.* at ¶ 12. Mrs. Dillabaugh received over \$6.5 million from those policies. *Id.* Lorne received about \$310,000, and Long received over \$100,000. *Id.* (Another \$3 million was held, at the time of the appeal below, by insurer Hartford Life and Accident Insurance Company, which disputed its duty to pay, arguing that Dillabaugh committed suicide and therefore triggered a contractual suicide exclusion. That dispute—which has since been settled—is not at issue in this appeal.)

B. Dillabaugh left letters admitting his wrongdoing and directing his wife and the others to repay his victims, but they decided to keep the money.

Before he died, Dillabaugh wrote letters to “his wife, his son, and Ms. Long to be opened upon his death.” *Id.* at ¶ 11. In the letter to his wife, he admitted that “I am (was) a criminal.” See Instruction Letter from Roy Dillabaugh to Alice Jane Dillabaugh at 3, Supplement (“Supp.”) at S-13 (admitted as Ex. 3 to Alice Jane Dillabaugh Deposition, Supp. at S-1-S-10, S-7, filed with trial court Sept. 25, 2009). In all three letters, Dillabaugh “gave detailed instructions about winding up the investments of The Dillabaugh Group, cashing various life insurance policies, and using the proceeds to repay investors.” App. Op. at ¶ 11. He specified that “[t]hese debts should be paid before anything else.” Letter to Mrs. Dillabaugh at 2, S-12.

Mrs. Dillabaugh explained that the letter, and the revelation of The Dillabaugh Group’s activity and debts, was a shock to her. See Mrs. Dillabaugh Depo. at 30-34, S-6-S-10. She said that it was “like I hit a concrete wall. The breath was knocked out of me. Disbelief.” *Id.* at 32, lines 11-12, S-8.

Mrs. Dillabaugh chose not to pay back her husband's victims, but to instead call a lawyer and keep the money. She acknowledged that "I did not follow these instructions," but said it was because the revelations were so "new" and "foreign" to her. *Id.* at 33, lines 24-25, S-9. So, she said, "after talking it over with my children, I sought counsel." *Id.* at 34, lines 1-2, S-10. Eventually, she decided to keep the \$6.5 million in insurance proceeds, and "the investors have not been paid." App. Op. at ¶ 12.

C. The Division sued Dillabaugh's estate and his company, and also named the Recipients, to freeze the disputed funds until a receiver could be appointed.

In June 2008, the Division sued Dillabaugh's estate and The Dillabaugh Group in the Montgomery County Court of Common Pleas. The Division sued in the name of Kimberly Zurz, then-Director of the Ohio Department of Commerce (of which the Division is a part). The suit alleged that Dillabaugh committed securities fraud and other securities violations, and it sought an injunction under R.C. 1707.26, an order of restitution under R.C. 1707.261, and the appointment of a receiver under R.C. 1707.27. See Second Amended Complaint.

The Division also named, as necessary parties to the action, the three Recipients of the insurance policies—Mrs. Dillabaugh, Lorne Dillabaugh, and Ms. Long—along with Hartford. App. Op. at ¶ 13. The Division did not accuse any of them of committing securities violations; rather, it named them solely to freeze—temporarily, until a receiver could be appointed—the funds that they had received. The Division argued that R.C. 1707.26 authorized such relief under its clause providing for "such other equitable relief as the facts warrant." It urged that the facts warranted a temporary restraint on the insurance proceeds until a receiver could be appointed and could trace funds under his separate power to recover assets that are traceable to securities fraud. Specifically, R.C. 1707.27 authorizes a receiver to seize "all rights, credits, property, and choses in action acquired by" a violator by means of his wrongdoing, along with

“all property with which the property has been mingled, if the property cannot be identified in kind because of the commingling.”

D. The trial court granted a preliminary injunction regarding the insurance proceeds, which it later modified to cover only the lesser amount of the insurance premiums.

The trial court granted injunctive relief against the Recipients in several different stages. It immediately granted a temporary restraining order on June 25, 2008, basing it on R.C. 1707.26 and Civil Rule 65. See TRO of June 25, 2008; App. Op. at ¶ 13. The court exempted \$500,000 of the insurance proceeds from the restraint. Three weeks later, it granted a preliminary injunction on the same basis, enjoining the Recipients from “disposing or dispersing any insurance proceeds,” with the same \$500,000 exemption for Mrs. Dillabaugh. The order was made effective “until the Court rules on Plaintiff’s Verified Complaint for Permanent Injunction, Appointment of a Receiver, and Order of Restitution.” See Preliminary Injunction of July 17, 2008 (“July 2008 Preliminary Injunction”); App. Op. at ¶ 15. The Recipients tried to appeal the preliminary injunction, but the appeals court rejected the appeal for lack of a final appealable order. See App. Op. at ¶ 15 n.5 (noting dismissal of earlier appeal).

The parties then litigated another issue not directly part of this appeal, but forming the background for it: whether Mrs. Dillabaugh (and Lorne) could shield the insurance proceeds from the Division or an eventual receiver by invoking R.C. 3911.10. That statute generally exempts, from creditors, any life insurance proceeds received by an insured’s spouse or children. Mrs. Dillabaugh claimed that the Division counts as a “creditor,” triggering the statutory shield for such proceeds. The Division argued that it, as a regulator, is not a “creditor” and does not trigger the shield statute. The parties filed various papers, culminating in summary judgment motions, over the insurance-shield issue and the issue of whether R.C. 1707.26 allows the Division to seek any relief against the Recipients.

In November 2009, the trial court issued several separate orders. On November 12, 2009, the court issued a summary judgment decision granting in part and denying in part various parties' motions. See Summary Judgment Decision, Nov. 12, 2009 ("SJ Decision") (Ex. 5). The court denied the Division's motion for summary judgment against Dillabaugh's estate and company. *Id.* at 5. It agreed with the Division that R.C. 1707.26 authorized seeking relief against the Recipients. *Id.* at 7. It agreed with the Recipients, though, that R.C. 3911.10 shielded insurance proceeds from both the Division and any ultimate receiver, but the court said that the statute would not shield the amounts paid as premiums to buy the insurance. *Id.* at 8-9. It did not, however, enter any relief against the Recipients in the Summary Judgment Decision.

Separately, the trial court issued two orders in November 2009 that modified the scope of the July 2008 Preliminary Injunctions, so that only the lesser amounts of the insurance premiums, but not the full amounts of the insurance proceeds, were restrained as to Mrs. Dillabaugh and Lorne. App. Op. at ¶ 21. On November 18, the court issued an Entry Granting Defendant Alice Jane Dillabaugh's Motion for Immediate Partial Dissolution of Preliminary Injunction ("Modified Preliminary Injunction"). As a result, only about \$565,000 was restrained, not the earlier amount of about \$6.5 million. On November 23, the court issued a similar entry as to Lorne, lowering the enjoined amount as to him from \$200,000 to about \$56,000. Entry Granting Defendant Lorne Dillabaugh's Motion for Immediate Partial Dissolution of Preliminary Injunction (also "Modified Preliminary Injunction"). Before the court issued a final order, the Division sought to stay the Modified Preliminary Injunctions, thus keeping in effect the fuller July 2008 Preliminary Injunction, and the trial court granted such a stay in December, but it later vacated that stay in January 2010.

E. The trial court issued a Final Order granting relief against the estate and the company, and appointing a receiver to exercise statutory powers as to the Recipients as well, but the Final Order did not grant any injunctive relief against the Recipients.

The trial court issued its Final Order on December 23, 2009. See Judgment Entry and Order, Dec. 23, 2009 (“Final Order”) (Ex. 4). The Final Order found that Dillabaugh had committed securities fraud and several other securities violations, *id.* at 2; it ordered injunctive relief against the estate and The Dillabaugh Group, *id.* at 4; and it ordered restitution from those two defendants on behalf of all investors, *id.* The court also appointed a receiver to sue and collect on behalf of those aggrieved investors. *Id.* The court further stated, in the Final Order, that the receiver would be able to pursue only the amounts of the insurance premiums, not insurance proceeds, from Mrs. Dillabaugh and Lorne, based on its earlier opinion regarding R.C. 3911.10. *Id.* at 7-8.

The Final Order stated no form of relief in the Division’s favor against the Recipients; the sole references to the Recipients concerned the receiver’s future scope of action against them. See *id.* The Final Order expressly incorporated by reference the Summary Judgment Decision, but it did not mention or incorporate the July 2008 Preliminary Injunction or the Modified Preliminary Injunctions. *Id.* at 2.

F. On appeal and some parties’ cross-appeal of the Final Order, the appeals court held that the Division could not seek relief against the Recipients, and it held that the trial court was premature in addressing the receiver’s powers and R.C. 3911.10.

The Division appealed, and two Recipients, Mrs. Dillabaugh and Long, cross-appealed. All parties’ notices cited only the Final Order; no one cited the November orders. See Notices of Appeal of Division, S-43, Mrs. Dillabaugh, S-38, and Long, S-41. Lorne Dillabaugh and Hartford did not appeal. (Because Lorne Dillabaugh did not appeal to the Second District, the Second District excluded him from its ruling, App. Op. at ¶ 73, so he is not a party here.)

The appeals court held that R.C. 1707.26 did not allow the Division to seek any relief, even temporarily, against the Recipients. App. Op. at ¶ 49. It reasoned that the only suable defendants were those itemized in the statute, namely, those who violate the securities law, along with violators' "agents, employees, partners, officers, directors, and shareholders." *Id.* It held that the Division could not rely upon the clause providing for "such other equitable relief as the facts warrant." *Id.* at ¶ 39. It reasoned that the "other equitable relief" clause allowed only for other forms of relief as against the itemized defendants; it did not allow for suing other defendants. *Id.* The court also held that all aspects of the order concerning the receiver's powers were premature. *Id.* at ¶ 72. It said that the trial court was empowered only to appoint a receiver, not to address the powers that the receiver could exercise once the receiver filed his own suit. *Id.* The appeals court therefore held that the issue of R.C. 3911.10 was premature. *Id.*

This Court granted review of the appeals court's decision. *Goodman v. Mayhew*, 128 Ohio St. 3d 1425; 2011-Ohio-1049.

ARGUMENT

The Division urges the Court to vacate the relevant part of the decision below, because the appeals court never had jurisdiction to consider the validity of the preliminary injunctions, which were not appealed by any party. Mrs. Dillabaugh and Ms. Long appealed only the final order, which they had no standing to appeal, because that order imposed no relief against them.

If the Court somehow reaches the substantive issue regarding the Division's power to seek the temporary relief it sought here, it should hold that the Division does have such power, as any other reading would create a massive loophole for wrongdoers to hide their ill-gotten gains from the Division and ultimately from defrauded victims.

Division's Proposition of Law No. 1:

An appeals court may review only those issues contained in orders named in a notice of appeal, and an appellant has standing to challenge an order only if it is a party aggrieved by the order.

The appeals court never had before it a live controversy regarding the Division's power to seek temporary relief against the Recipients under R.C. 1707.26. That conclusion flows from the straightforward application of well-settled law to the record here. As detailed below, neither the law, nor the characterization of the relevant orders, is fairly disputable. The appeals court's error was plain.

A. The Recipients appealed only the Final Order, and neither that Order nor the incorporated Summary Judgment Decision enjoined the recipients or "aggrieved" them in any way.

The legal rules that apply here are well-settled, and viewed from any angle, the appeals court never had the substantive issue before it. The jurisdictional flaw is best resolved as a lack of appellate standing, and more broadly, it also amounts to lack of a controversy.

First, a party has standing to appeal only if it is the "party aggrieved by the final order appealed from." *State ex rel. Gabriel v. City of Youngstown* (1996), 75 Ohio St. 3d 618, 619. A

party lacks appellate standing when the party “is not prejudiced by the” appealed order. *Denovchek v. Bd. of Trumbull County Comm’rs* (1988), 36 Ohio St. 3d 14, 17. Without appellate standing, no valid appeal even exists, and the case stops there.

Second, even if a party can show standing to appeal an *order*, to get a valid appeal started, it must also show that the *issue* it seeks to raise is rooted in a live controversy. A court “will not indulge in advisory opinions.” *Smith v. Leis*, 2006-Ohio-6113, ¶ 16; see also *Ahmad v. AK Steel Corp.*, 2008-Ohio-4082, ¶3 (O’Connor, J., concurring) (“A hallmark of judicial restraint is to rule only on those cases that present an actual controversy.”). Here, the Recipients’ challenge to the Final Order fails both tests, as it had no standing to appeal the Final Order at all, and the Final Order did not create or maintain any controversy regarding the earlier preliminary injunctions.

Notably, no one disputes that the Final Order was the only order named in Mrs. Dillabaugh’s Notice of Appeal and in Ms. Long’s (and in the Division’s). See Notices of Appeal of Mrs. Dillabaugh, S-38, Long, S-41, and the Division, S-43. Thus, the Final Order is the only order that is subject to the appellate-standing test and the live-controversy test. However, as explained below, the Final Order did incorporate by reference the Summary Judgment Decision, so that Decision is also at issue. But no other order is.¹

1. The Final Order did not impose any relief upon the Recipients.

The Final Order did not “aggrieve” the Recipients, nor did it create a controversy as to the Division’s power to seek relief against them, because it did not impose any injunctive relief upon them or affect them in any way. Although the Recipients, who appealed to the Second District,

¹ Mrs. Dillabaugh’s civil docketing statement seems to separate the Summary Judgment Decision from the Final Order, as on that form she checked the “no” box in answer to the question “does this appeal involve summary judgment?” Nevertheless, because the Final Order incorporates the Summary Judgment Decision, the Division does not challenge consideration of that Decision.

bear the burden to show such an effect in order to establish standing, the Division here shows the absence of any such effect. A careful page-by-page review of the Final Order demonstrates the absence of anything that could have created a live controversy as to the Division's power to seek temporary relief against the Recipients under R.C. 1707.26.

On page one, the trial court noted that the Division "requests a restraining order" against the Recipients regarding insurance proceeds, but it did not state that it was imposing such an order. See Final Order at 1. On page two, the court reiterated its holdings from the Summary Judgment Decision (discussed further below), and it incorporated that Decision by reference, but it did not add any relief. See *id.* at 2. In the final full paragraph of page two, the court found that Roy Dillabaugh and the Dillabaugh Group committed several securities fraud violations. *Id.*

In the next section, in a paragraph straddling pages two and three, the trial court made several findings regarding the *receiver's* future power to pursue the funds held by the Recipients, but that passage does not even mention the Division. *Id.* at 2-3. Further, the receiver's power, which is granted under R.C. 1707.27, is separate from the Division's power under R.C. 1707.26. Moreover, only the Division had sought relief at that point; the receiver's role was still in the future. For that reason, the appeals court held—and the Division does not contest—that all issues regarding the receiver's powers were not yet ripe. See App. Op. at ¶ 65. Specifically, the court noted that "the receiver has not pursued an action against Mrs. Dillabaugh and Lorne Dillabaugh," so "the trial court should not have rendered any ruling" on any issues regarding the receiver's powers. *Id.* "Stated simply, such issues were not ripe for determination by the trial court." *Id.* Thus, the appeals court's discussion of the receiver's future powers, although connected to the Recipients, did not create any controversy regarding the Division's power to seek relief earlier.

Next, in a paragraph on pages three to four, the trial court rejected the Recipients' attempt, through a motion for judgment notwithstanding the verdict, to revisit the issues from the Summary Judgment Decision regarding the Division's power to seek relief against the Recipients. *Id.* at 3-4. While that may superficially seem to involve the substantive issue, the passage does not impose any relief, injunctive or otherwise. It merely rejects the Recipients' request to rule conclusively against the Division's power; it does apply the Division's power. (The Division returns to this issue below, in discussing the Summary Judgment Decision itself.)

Finally, in several paragraphs on pages four through nine, the trial court empowered the *receiver* to act in various ways and to seek relief against the Recipients as well as against Roy Dillabaugh's Estate and the Dillabaugh Company. As noted above, no issues regarding the receiver created any controversy regarding the Division's power to seek temporary relief. In addition, most of the discussion empowering the receiver did not concern the Recipients. They were mentioned only in the paragraph straddling pages seven and eight, which authorized the receiver to pursue the Recipients. *Id.* at 7-8.

In sum, *nothing* in the Final Order imposed any relief upon the Recipients, so they had nothing to appeal, and certainly not anything against the Division. Moreover, the purported relief regarding the receiver's power against the Recipients did not create appellate standing either, because, as the appeals court found, all issues regarding a receiver's possible *future* acts were unripe. In the alternative, even if that purported relief created standing for the Recipients to appeal the Final Order regarding the receiver's power, nothing about that separate dispute created a live controversy regarding the Division's power. That leaves the Summary Judgment Decision, which was incorporated into the Final Order, as the only remaining basis for standing. As explained below, that Decision did not create a live controversy either.

2. The Summary Judgment Decision did not impose any relief upon the Recipients, as it merely ruled on the Division's abstract power to seek relief.

The Final Order's incorporation of the Summary Judgment Decision, which had been issued November 12, 2009, did not create appellate standing or a live controversy. That Decision, although addressing the Division's power to sue the Recipients, did not impose any injunctive relief against them. It did reject the Recipients' attempts to *lift fully* the temporary relief that was then pending against them, which the Preliminary Injunction had imposed. The Recipients had argued that the Division's purported lack of power meant that the Recipients had to be dismissed fully from the case, that is, that the claims against them had to be dismissed.

The trial court's Summary Judgment Decision, in refusing to dismiss the Division's claims, was like any order denying a motion for summary judgment or denying a motion to dismiss. It did not let the Defendants go, but it did nothing to them, either. And to the extent it left in place the *preliminary relief*, it was simply not a final order, let alone one that aggrieved the Recipients. See App. Op. at ¶ 15 n.5 (noting that earlier attempt to appeal the preliminary injunctions had been dismissed for lack of a final appealable order).

The key passage in the Summary Judgment Decision, at pages seven to eight, makes plain that the Decision did not impose relief upon the Recipients. The trial court stated, as an abstract legal principle, that R.C. 1707.26, read together with R.C. 1707.27, authorizes the Division to seek relief against the Recipients. SJ Decision at 7. The court accordingly "granted" summary judgment to the Division on that issue, and it denied it to the Recipients. But again, because the Summary Judgment Decision nowhere *imposed* such relief, its grant of summary judgment in the Division's favor was essentially academic. Its denial of summary judgment to the Recipients, by contrast, had a concrete result, as the court thereby refused to dismiss the Division's complaint

against the Recipients. But again, denying a requested dismissal is not the same as imposing relief.

In addition, the Summary Judgment Decision did not incorporate by reference, or otherwise restate, the then-pending July 2008 Preliminary Injunction against the Recipients. Further, the November 2009 Modified Preliminary Injunctions had not yet been issued as of the date of the Summary Judgment Decision. The Summary Judgment Decision was issued November 12, and the Modified Preliminary Injunctions were separately issued November 18 (as to Mrs. Dillabaugh) and November 23 (as to Lorne Dillabaugh, who also did not appeal to the Second District anyway). So it cannot be said that the Preliminary Injunction was folded into the Summary Judgment Decision, and thus into the Final Order by a second tier of incorporation.

Finally, not only do the orders themselves prove the point, but the main Recipient, Mrs. Dillabaugh, essentially conceded the point below. In her main brief in the Second District, she explained that “[a]t every stage of the litigation in the trial court, Ms. Dillabaugh challenged the Director’s [Division’s] authority under the Securities Act to proceed against her,” and she noted her earlier, failed attempts to prevail on that theory, such as her motion to dismiss and other orders that were not appealed (and were not appealable). See Mrs. Dillabaugh Brief at 17. She concluded the paragraph by asserting broadly that “[i]n its final Judgment Entry [that is, the Final Order], the trial court found that R.C. 1707.26 authorized the imposition of an injunction over money in the possession of Mrs. Dillabaugh, *and imposed that injunction.*” *Id.* (emphasis added).

But her citation for that assertion, in footnote 35, did not cite any page of the Final Order, or any language from the Order, that purportedly imposed an injunction; to the contrary, it admitted otherwise. She cited “Dec. 23 Order; Nov. 18 Entry Granting Motion for Immediate

Partial Dissolution of Injunction.” Then, she clarified that “It is the November 18 entry that imposes the present injunction”—that is, she identified the November 2009 Modified Preliminary Injunction as the sole order raising the disputed issue. However, she failed to appreciate the implication of this concession, as she had appealed only the *Final Order*.

The Court should thus end the case here, and it should vacate the decision below, at least to the extent that it discussed the Division’s power to seek relief against the Recipients. Nevertheless, out of an abundance of caution, the Division explains below why the preliminary injunctions cannot be the basis of a live controversy.

B. Neither the original July 2008 Preliminary Injunction nor the November 2009 Modified Preliminary Injunctions were a basis for preserving the issue, both because they were not appealed and because they expired when the Final Order issued.

Only the July 2008 Preliminary Injunction and the November 2009 Modified Preliminary Injunctions actually imposed injunctive relief upon the Recipients. (Initially, the TRO did as well, but it was quickly replaced by the July 2008 Preliminary Injunction.). The July 2008 Preliminary Injunction barred all three Recipients from disposing of any of the life insurance proceeds they had received. The November 2009 Modified Preliminary Injunctions reduced the injunctive scope, as to Mrs. Dillabaugh and Lorne, to the amounts of the premiums that Roy Dillabaugh had paid, as opposed to the full proceeds. But those injunctions could not form the basis for appellate review of the Division’s power to seek those injunctions, for several reasons.

First—and conclusive on its own—the Recipients did not appeal those orders, as they appealed *only* the Final Order. An appeal of one order does not allow a party to challenge other, un-appealed orders. The Second District’s review was limited to the scope of the order that the appellants named in their notices of appeal. See *Transamerica Insurance Company v. Nolan* (1995), 72 Ohio St. 3d 320, 324 (declining to review order not in notice of appeal). In *Transamerica*, the Court refused to review a trial court order that had not been named in the

notice of appeal, explaining that “the notice of appeal does not refer to the” order in question, so the issue in that order “was not properly preserved.” *Id.* Federal courts likewise refuse to review orders not named in a notice of appeal, even where the parties briefed the issues and the where the appellee did not object. See, e.g., *Schramm v. LaHood* (6th Cir. 2009), 318 Fed. Appx. 337, 341-44. In *Schramm*, the court explained that “Schramm’s failure to designate the March 25, 2008 order in his notice of appeal filed in Case No. 3:04cv7782 compels us to conclude that we lack jurisdiction over the district court’s order of that date. *Id.* at 343

Second, as noted above, the Final Order did *not incorporate those preliminary orders*. Nor did the Summary Judgment Decision incorporate those orders; indeed, the Modified Preliminary Injunctions were not issued until *after* the Summary Judgment Decision, so the Summary Judgment Decision could not have incorporated them. Thus, the Final Order’s incorporation of the Summary Judgment Decision does not somehow extend to reach those injunctions.

Third, even if the Recipients had named the Preliminary Injunctions in their notices of appeal, it would not have mattered, as those injunctions were moot on their own terms. The July 2008 Preliminary Injunction said that it would expire when a final decision was reached, so the mere issuance of the Final Order triggered that expiration—but that Final Order put no substitute injunction against the Recipients in place. And even if the preliminary orders somehow survived mootness, they were not final appealable orders on their own, and the mere passage of time did not change the result that the appeals court had properly reached in rejecting the first premature appeal. App. Op. at ¶ 15 n.5.

Consequently, the entire discussion of the Division’s power to enjoin the Recipients under R.C. 1707.26 was never based on a live dispute, and the Court should vacate the decision below—or, more specifically, the portion of the decision addressing that issue—on that basis.

While the Division would like to reach the substantive issue to clarify its power to seek relief for victims, it acknowledges the jurisdictional flaws. While courts should not reach non-live issues even in routine contract cases, they especially should not drastically limit agency power or the scope of statutes—creating novel precedent with broad effect—without the benefit of a live controversy. This Court should vacate the decision below and remind courts not to reach issues without proper jurisdiction.

Division’s Proposition of Law No. 2:

R.C. 1707.26, by empowering the Division of Securities to seek “such other equitable relief as the facts warrant,” authorizes the Division to seek temporary injunctive relief against any third parties who have received funds that are likely derived from securities fraud, to protect those funds until a receiver is appointed under R.C. 1707.27 and exercises his powers to protect funds.

As explained above, the Court should not reach this issue, but if it does, it should hold that the Division’s power includes seeking the relief that it sought here, to protect funds temporarily regardless of the identity of the person holding the funds.

First, the specific issue here must be viewed in the context of Ohio’s securities-fraud laws generally. The General Assembly, in making the Division responsible for regulating the securities industry in Ohio, ensured that the statutes are “drafted broadly to protect the investing public.” *See Holderman v. Columbus Skyline Sec. (In re Columbus Skyline Sec.)* (1996), 74 Ohio St. 3d 495, 498. Thus, the Court has long noted that the provisions “must be liberally construed.” *Id.*

The Division is empowered to investigate suspected securities violations, to issue cease and desist orders, to refer matters to criminal prosecution, and more. See R.C. 1707.19, 1707.23, and 1707.13. It may ask a court for an injunction, for restitution for securities victims, and to appoint a receiver on behalf of those securities victims. R.C. 1707.26, 1707.261, and 1707.27. A receiver, once appointed, may pursue the proceeds of securities crimes wherever they are.

Second, against that backdrop, R.C. 1707.26 authorizes the Division to seek relief against non-violating “relief defendants” such as the Recipients, especially when read in pari materia with R.C. 1707.27’s grant of broad power to a receiver. The first statute provides:

Whenever it appears to the division of securities, upon complaint or otherwise, that any person has engaged in, is engaging in, or is about to engage in, any deceptive, fraudulent, or manipulative act, practice, or transaction, in violation of sections 1707.01 to 1707.45 of the Revised Code, the director of commerce may apply to a court of common pleas of any county in this state for, and upon proof of any of such offenses such court shall *grant an injunction restraining such person and its agents, employees, partners, officers, directors, and shareholders* from continuing, engaging in, or doing any acts in furtherance of, such acts, practices, or transactions, *and may order such other equitable relief as the facts warrant.*

R.C. 1707.26 (emphasis added). The second statute, R.C. 1707.27, empowers a receiver, once appointed, to act in several ways to recover funds for the victims of fraud. The first statute alone is enough to support the Division’s power, because the open-ended phrase “such other equitable relief as the facts warrant” means what it says: whatever relief is warranted by the facts. When the facts show that a violator parked the ill-gotten gains with a third party, the facts warrant equitable relief to freeze those funds to maintain the status quo temporarily until the merits are reached or a receiver is named. The appeals court’s contrary reading—that the breadth of relief is limited by the named categories of defendants in the previous clause—would be plausible if not for the fact that the loophole it creates is massive and cannot be the statute’s intent.

Moreover, R.C. 1707.26 must be read together with R.C. 1707.27, as the trial court properly noted. That statutory combination—from the Division’s power to seek relief under R.C. 1707.26 and the receiver’s power to recover funds under R.C. 1707.27—is meant to provide a seamless web of protection, and does not contemplate a huge loophole between the two steps. Any slice of time could allow for funds to escape, and that danger is of course heightened once a suit is filed and those holding the funds are on notice. The appeals court’s view allows time for

mischief between the Division's request for a receiver, and the actual appointment of a receiver, as well as between the appointment and the receiver's own filing of a request for relief.

Thus, the appeals court got it wrong when it pointed to the receiver's power as a reason *not* to allow the Division a complementary power. The appeals court said that its decision should not create a great danger of funds escaping justice, because, it said, it saw "no reason why there would necessarily be a significant delay between the filing of the Director's action against the violators and the trial court's subsequent order of an injunction against the violators and the appointment of a receiver." App. Op. at ¶ 53. The appeals court said that at "that juncture, the receiver could promptly pursue any claims against third parties who hold proceeds of the securities fraud and could seek an injunction, if necessary, against those parties." *Id.* But as this case shows, sometimes a receiver is not named immediately. More important, in the modern world, funds move around the globe at the press of a button, so there need not be a "significant delay" to create a problem. *Any* delay is dangerous, and that is why the Division seeks only the room to achieve *temporary* relief until a receiver can take the baton.

Indeed, that is why the trial court did not rely solely on R.C. 1707.26—although the "such other equitable relief" language should suffice—but it instead read R.C. 1707.26 *in pari materia* with R.C. 1707.27, the statute empowering a receiver. The trial court reasoned that it was acting partly on the Division's behalf, and partly on behalf of the incoming receiver—that is, it was protecting the receiver's power by keeping the status quo long enough for him or her to review the books and act.

Surely the General Assembly did not intend such a loophole, and that means that any ambiguity in the "such other equitable relief" clause should be resolved in a manner that serves the General Assembly's intent and to avoid absurd results, as well as the need to read related

statutes together and to give effect to every word in a statute. See *Cleveland Elec. Illum. Co. v. Cleveland* (1988), 37 Ohio St. 3d 50, syllabus ¶ 3 (noting duty “to give effect to the words used, not to delete words used or to insert words not used”); *State ex rel. Stoll v. Logan County Bd. of Elections*, 2008-Ohio-333, ¶ 37 (noting “duty to construe statutes to avoid unreasonable or absurd result”); *United Tel. Co. of Ohio v. Limbach* (1994), 71 Ohio St.3d 369, 372 (applying *in pari materia* canon and reading related statutes together).

The appeals court’s reliance on *State Department of Commerce, Div. of Securities v. Buckeye Fin. Corp.* (1978), 54 Ohio St. 2d 407 is misplaced. In *Buckeye Finance*, the Court rejected an attempt to read the then-effective version of R.C. 1707.26 to allow the Division to seek a form of relief that was not authorized by the statute—namely, rescission and restitution to victims of fraud—and was specifically reserved by *another* statute for victims, not the Division, to seek. Here, by contrast, the Division does not seek to claim a power that belongs to another actor. To the contrary, to the extent that the “other actor” here is the receiver, the Division seeks to *support* his role by preserving the status quo until he takes the baton.

Finally, the federal courts have routinely held that the analogous federal securities law allows the U.S. Securities and Exchange Commission to seek similar relief against non-violating “relief defendants” or “nominal defendants” in order to preserve, and ultimately recover, the proceeds of fraud. As the Sixth Circuit explained, “Federal courts may order equitable relief against [such] a person who is not accused of wrongdoing in a securities enforcement action where that person: (1) has received ill-gotten funds; and (2) does not have a legitimate claim to those funds.” *George*, 426 F.3d at 798 (quoting *Cavanagh*, 155 F.3d at 136). The reason is simple: “To hold otherwise ‘would allow almost any defendant to circumvent the SEC’s power to recapture fraud proceeds[] by the simple procedure of giving [the proceeds] to friends and

relatives, without even their knowledge.” *George*, 426 F.3d at 798 (quoting *Cavanagh*, 155 F.3d at 136). See also *SEC v. Cherif* (7th Cir. 1991) 933 F.2d 403, 414 (holding that SEC may pursue relief against non-violating “relief defendants”); *SEC v. Colello* (9th Cir. 1998), 139 F.3d 674, 677 (same); *Commodity Futures Trading Comm’n v. Kimberlynn Creek Ranch, Inc.* (4th Cir. 2002), 276 F.3d 187, 192 (applying same principle to commodity trade regulatory power).

The federal courts invoked a different analysis to reach the same point the Division urges, but the result is the same. The leading federal case said that the federal statute alone did not give the SEC the authority at issue, but that the SEC could invoke a common-law practice of allowing nominal defendants when necessary to secure funds or property that are the subject of equitable action. See *Cherif*, 933 F.2d at 414. The Division urges the Court to read its power as part of the statute at issue, but the more important point is the federal court’s recognition that enforcement would be undercut dramatically without power to reach re-directed funds.

Indeed, the facts of *George* are strikingly similar to those here: the violator there bought his then-girlfriend, and later wife, a car and expensive jewelry. *George*, 426 F.3d at 798. Here, Roy Dillabaugh had similarly funded a comfortable lifestyle for his wife, with multiple homes and luxury vacations. And he used the life insurance policies as the vehicle for converting his ill-gotten gains into millions of dollars to his wife. Despite his attempt to make amends posthumously, she wants to keep it all, and the Second District’s holding not only said that the Division could not address that, but its holding would block any future Division efforts to freeze funds transferred to the wrongdoer’s family and friends, making it more likely that such funds will never be available for restitution to victims. The Second District’s approach, notably, is not limited to cases involving insurance or deceased violators. It would allow any violator to simply give money to others to insulate the funds and prevent repayment to victims.

In sum, R.C. 1707.26 authorizes the Division to preserve funds held by third parties, until a receiver may pursue remedies under R.C. 1707.27. Such temporary maintenance of the status quo is precisely the type of “other equitable relief” that “the facts warrant” in a case like this.

CONCLUSION

For the above reasons, the Court should vacate, for lack of appellate jurisdiction below, the portion of the decision below concerning the Division’s power to seek relief against non-violators who hold funds derived from securities fraud. In the alternative, if the Court reaches the substantive issue, it should hold that the Division does have such power.

Respectfully submitted,

MICHAEL DEWINE
Ohio Attorney General



ALEXANDRA T. SCHIMMER* (0075732)
Solicitor General

**Counsel of Record*

STEPHEN P. CARNEY (0063460)
Deputy Solicitor

CHERYL R. HAWKINSON (0055429)

DENNIS P. SMITH, JR. (0082556)
Assistant Attorneys General

30 East Broad Street, 17th Floor
Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

alexandra.schimmer@ohioattorneygeneral.gov

Counsel for Plaintiff-Appellant
David Goodman, Director, Ohio
Department of Commerce

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief of Plaintiff-Appellant David Goodman, Director, Ohio Department of Commerce was served by U.S. mail this 26th day of May, 2010 upon the following counsel:

Ralph W. Kohnen
Eric Combs
Taft Stettinius & Hollister LLP
425 Walnut Street, Suite 1800
Cincinnati, Ohio 45202-3957

Counsel for Alice Jane Dillabaugh

W. Randall Rock
2579 Ashcraft Road
Dayton, Ohio 45414

Counsel for Johanna Long

Robert E. Dintaman
Robert E. Dintaman, Esq., LLC
1370 Ontario Street
Suite 330
Cleveland, Ohio 44113

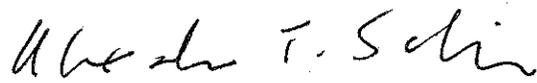
Counsel for Lorne Dillabaugh

Jeffrey Sharkey
Lindsey M. Potrafke
Faruki, Ireland & Cox
500 Courthouse Plaza
10 N. Ludlow Street
Dayton, Ohio 45402

Counsel for Hartford Life & Accident Insurance
Company

Kimberly Mayhew
Nolan, Sprowl & Smith
500 Performance Place
109 North Main Street
Dayton, Ohio 45402

Administrator for Estate of Roy G. Dillabaugh



Alexandra T. Schimmer
Solicitor General

APPENDIX

ORIGINAL

In the
Supreme Court of Ohio

10-2159

KIMBERLY A. ZURZ, DIRECTOR,
OHIO DEPARTMENT OF COMMERCE,

Plaintiff-Appellant,

v.

KIMBERLY MAYHEW, ESQ.,
ADMINISTRATOR FOR THE ESTATE
OF ROY DILLABAUGH,

ALICE JANE DILLABAUGH,

LORNE DILLABAUGH,

and

JOHANNA LONG,

Defendants-Appellees.

Case No.

On Appeal from the
Montgomery County
Court of Appeals,
Second Appellate District

Court of Appeals
Case Nos. CA 23834, 23835, 23842

FILED
DEC 13 2010
CLERK OF COURT
SUPREME COURT OF OHIO

**NOTICE OF APPEAL OF PLAINTIFF-APPELLANT KIMBERLY ZURZ,
DIRECTOR, OHIO DEPARTMENT OF COMMERCE**

RALPH W. KOHNEN (0034418)
ERIC COMBS (0067201)
Taft Stettinius & Hollister LLP
425 Walnut Street, Suite 1800
Cincinnati, Ohio 45202-3957
kohnen@taftlaw.com

Counsel for Alice Jane Dillabaugh

JEFFREY SHARKEY (0067892)
LINDSEY M. POTRAFKE (0082879)
Faruki, Ireland & Cox
500 Courthouse Plaza
10 N. Ludlow Street
Dayton, Ohio 45402
jsharkey@ficlaw.com

Counsel for Hartford Life & Accident Insurance
Company

RICHARD CORDRAY (0038034)
Ohio Attorney General

ALEXANDRA T. SCHIMMER* (0075732)
Chief Deputy Solicitor General
**Counsel of Record*

STEPHEN P. CARNEY (0063460)
Deputy Solicitor

CHERYL R. HAWKINSON (0055429)

DENNIS P. SMITH, JR. (0082556)

Assistant Attorneys General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

alexandra.schimmer@ohioattorneygeneral.gov

Counsel for Plaintiff-Appellant
Kimberly Zurz, Director, Ohio Department
of Commerce

EXHIBIT 1

W. RANDALL ROCK (0023231)
2579 Ashcraft Road
Dayton, Ohio 45414
wrocklaw@aol.com

Counsel for Johanna Long

KIMBERLY MAYHEW
Nolan, Sprowl & Smith
500 Performance Place
109 North Main Street
Dayton, Ohio 45402
kimmayhew@gmail.com

Administrator for Estate of Roy G. Dillabaugh

ROBERT E. DINTAMAN (0069555)
Robert E. Dintaman, Esq., LLC
1370 Ontario Street
Suite 330
Cleveland, Ohio 44113

Counsel for Lorne Dillabaugh

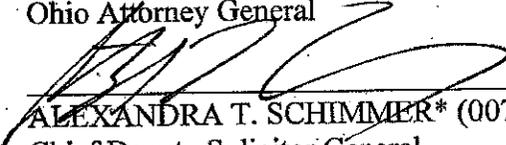
**NOTICE OF APPEAL OF PLAINTIFF-APPELLANT KIMBERLY ZURZ,
DIRECTOR, OHIO DEPARTMENT OF COMMERCE**

Plaintiff-Appellant Kimberly Zurz, Director, Ohio Department of Commerce gives notice of her discretionary appeal to this Court, pursuant to Ohio Supreme Court Rule II, Section 1(A)(3), from a decision of the Montgomery County Court of Appeals, Second Appellate District, journalized in Case Nos. CA 23834, 23835, 23842 on October 29, 2010. Date-stamped copies of the Second District's Judgment Entry and Opinion are attached as Exhibits 1 and 2, respectively, to the Appellant's Memorandum in Support of Jurisdiction.

For the reasons set forth in the accompanying Memorandum in Support of Jurisdiction, this case is one of public and great general interest.

Respectfully submitted,

RICHARD CORDRAY
Ohio Attorney General


ALEXANDRA T. SCHIMMER* (0075732)
Chief Deputy Solicitor General

**Counsel of Record*

STEPHEN P. CARNEY (0063460)

Deputy Solicitor

CHERYL R. HAWKINSON (0055429)

DENNIS P. SMITH, JR. (0082556)

Assistant Attorneys General

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

alexandra.schimmer@ohioattorneygeneral.gov

Counsel for Plaintiff-Appellant

Kimberly Zurz, Director, Ohio Department
of Commerce

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice of Appeal of Plaintiff-Appellant Kimberly Zurz, Director, Ohio Department of Commerce was served by U.S. mail this 13th day of December, 2010 upon the following counsel:

Ralph W. Kohnen
Eric Combs
Taft Stettinius & Hollister LLP
425 Walnut Street, Suite 1800
Cincinnati, Ohio 45202-3957

Counsel for Alice Jane Dillabaugh

W. Randall Rock
2579 Ashcraft Road
Dayton, Ohio 45414

Counsel for Johanna Long

Robert E. Dintaman
Robert E. Dintaman, Esq., LLC
1370 Ontario Street
Suite 330
Cleveland, Ohio 44113

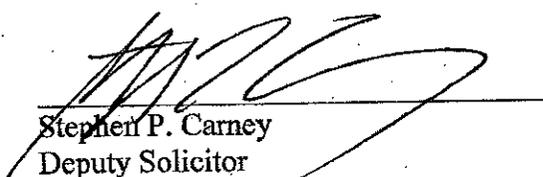
Counsel for Lorne Dillabaugh

Jeffrey Sharkey
Lindsey M. Potrafke
Faruki, Ireland & Cox
500 Courthouse Plaza
10 N. Ludlow Street
Dayton, Ohio 45402

Counsel for Hartford Life & Accident Insurance
Company

Kimberly Mayhew
Nolan, Sprowl & Smith
500 Performance Place
109 North Main Street
Dayton, Ohio 45402

Administrator for Estate of Roy G. Dillabaugh



Stephen P. Carney
Deputy Solicitor



FILED
COURT OF APPEALS
2010 OCT 29 AM 10:19

CLERK OF COURTS
MONTGOMERY CO. OHIO
36

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

KIMBERLY A. ZURZ, DIRECTOR,
OHIO DEPARTMENT OF COMMERCE

Ⓚ

Plaintiff-Appellant/
Cross-Appellee

C.A. CASE NO. 23834, 23835,
23842

v.

T.C. NO. 08CV5911

KIMBERLY MAYHEW, ESQ.,
ADMINISTRATOR OF THE ESTATE
OF ROY G. DILLABAUGH, et al.

FINAL ENTRY

Defendants-Appellees/
Cross-Appellants

.....

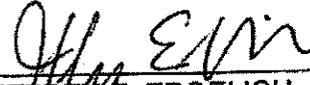
Pursuant to the opinion of this court rendered on the 29th day of
October, 2010, the judgment of the trial court is reversed in part, affirmed in part, and
remanded for further proceedings consistent with this court's opinion. Further, our mandate
reversing the injunctions on the respective portions of the life insurance proceeds held by
Mrs. Dillabaugh and Ms. Long that remain subject to injunction shall take effect 30 days after
the date of this entry.

Costs to be paid by plaintiff-appellant/cross-appellee.


MARK E. DONOVAN, Presiding Judge



MIKE FAIN, Judge



JEFFREY E. FROELICH, Judge

Copies mailed to:

Cheryl R. Hawkinson
Dennis P. Smith
Assistant Attorneys General
30 East Broad Street, 26th Floor
Columbus, Ohio 43215

Ralph W. Kohnen
Eric K. Combs
425 Walnut Street, Suite 1800
Cincinnati, Ohio 45202

Robert E. Dintaman, Jr.
1370 Ontario Street
Suite 330
Cleveland, Ohio 44113

W. Randall Rock
137 N. Main Street
Suite 302
Dayton, Ohio 45402

Hon. Timothy N. O'Connell
Common Pleas Court
41 N. Perry Street
Dayton, Ohio 45422



FILED
COURT OF APPEALS

2010 OCT 29 AM 8:11

CHERYL A. CRUSH
CLERK OF COURTS
MONTGOMERY CO. OHIO
36

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

KIMBERLY A. ZURZ, DIRECTOR,
OHIO DEPARTMENT OF COMMERCE :

Plaintiff-Appellant/
Cross-Appellee :

C.A. CASE NO. 23834, 23835,
23842

v. :

T.C. NO. 08CV5911

KIMBERLY MAYHEW, ESQ.,
ADMINISTRATOR OF THE ESTATE
OF ROY G. DILLABAUGH, et al. :

(Civil appeal from
Common Pleas Court)

Defendants-Appellees/
Cross-Appellants :

.....
OPINION

Rendered on the 29th day of October, 2010.

.....
CHERYL R. HAWKINSON, Atty. Reg. No. 0055429 and DENNIS P. SMITH, Atty. Reg. No. 0082556, Assistant Attorneys General, 30 East Broad Street, 26th Floor, Columbus, Ohio 43215

Attorneys for Plaintiff-Appellant/Cross-Appellee

RALPH W. KOHNEN, Atty. Reg. No. 0034418 and ERIC K. COMBS, Atty. Reg. No. 0067201, 425 Walnut Street, Suite 1800, Cincinnati, Ohio 45202

Attorneys for Defendant-Appellee/Cross-Appellant Alice Jane Dillabaugh

ROBERT E. DINTAMAN, JR., Atty. Reg. No. 0069555, 1370 Ontario Street, Suite 330, Cleveland, Ohio 44113

Attorney for Defendant-Appellee Lorne Lee Dillabaugh

W. RANDALL ROCK, Atty. Reg. No. 0023231, 137 N. Main Street, Suite 302, Dayton, Ohio
45402

Attorney for Defendant-Appellee/Cross-Appellant Mary Johanna Long

.....
FROELICH, J.

This appeal arises out of a lawsuit brought by Kimberly A. Zurz, Director of the Ohio Department of Commerce ("the Director"), in response to a Ponzi scheme committed by Roy A. Dillabaugh, now deceased, who operated as The Dillabaugh Group. It is now undisputed that Dillabaugh made written and oral false statements to approximately 146 investors in the selling of unregistered securities. The Director alleged that, upon Dillabaugh's death, the investors' funds were converted into insurance proceeds of which Dillabaugh's wife, son, and secretary were named beneficiaries.

The Director appeals from a judgment of the Montgomery County Court of Common Pleas, which held, among other things, that the Director was a creditor under R.C. 3911.10 and, accordingly, she could attempt to recoup from the proceeds of those life insurance policies only the amount of the life insurance premiums paid by Dillabaugh with funds obtained through securities fraud. The Director claims that the trial court erred in finding that she was prohibited from pursuing all of the proceeds of the insurance policies.

Two beneficiaries of the life insurance policies – Alice Jane Dillabaugh, Roy Dillabaugh's wife ("Mrs. Dillabaugh"), and Mary Johanna Long, secretary of The Dillabaugh Group – cross-appeal. Mrs. Dillabaugh and Ms. Long both claim that the Director could not seek injunctive and other equitable relief against them under sections 1707.26, 1707.261, and 1707.27 of the Ohio Securities Act, because they did not fall within the class of people that R.C. 1707.26 authorized the Director to sue. Mrs. Dillabaugh further asserts

that the Director did not meet the requirements for injunctive relief.

Lorne Lee Dillabaugh, Dillabaugh's son, and Hartford Life and Accident Insurance Company ("Hartford"), which holds approximately \$3 million in undistributed insurance proceeds in its accounts, did not cross-appeal.

For the following reasons, the trial court's judgment will be reversed in part, affirmed in part, and the matter will be remanded for further proceedings consistent with this opinion.

I.

According to the Director's verified complaint, from August 23, 1984, until April 13, 2001, Dillabaugh was licensed by the Ohio Department of Commerce, Division of Securities ("the Division"), as a securities salesperson.¹ The brokerage firm for which Dillabaugh worked terminated his employment in March 2001, because Dillabaugh sold a certificate of deposit and used the monies for his own personal use. Dillabaugh was not licensed to sell securities after April 13, 2001.

From 1994 to 2007, Dillabaugh operated an unincorporated business entity, The Dillabaugh Group, which purported to offer investment services. The Dillabaugh Group was never licensed by the Division to sell securities in the State of Ohio, and none of The Dillabaugh Group's securities were registered with the Division. Dillabaugh held himself out as the CEO of The Dillabaugh Group. Roy Dillabaugh died on November 27, 2007.

¹Although the Estate of Roy Dillabaugh filed an Answer, the Estate did not contest the Director's motion for summary judgment or argue that Roy Dillabaugh did not violate the Ohio Securities Act. In addition, none of the beneficiaries of Dillabaugh's life insurance policies contests the Director's claims that Dillabaugh committed securities fraud. Accordingly, we consider the Director's allegations regarding Dillabaugh's conduct to be undisputed.

In January 2008, The Dillabaugh Group's business records were seized as part of an investigation of the sale of securities by Dillabaugh and The Dillabaugh Group. The records revealed that The Dillabaugh Group and/or Dillabaugh sold securities in the forms of "Certificate – Contract of Deposit Notes" or "Promissory Notes" to approximately 146 investors, primarily located in southwest Ohio and Indiana. These investors purchased approximately \$12.4 million in securities; the majority of these sales occurred after April 13, 2001.

Dillabaugh told the investors that their money was invested in legitimate business activities, and promised them that their investments were guaranteed and insured. However, The Dillabaugh Group had no legitimate business activity and none of the funds were invested in any business or commerce. Rather, Dillabaugh operated a "Ponzi scheme," using new investments to pay purported interest on earlier investments.

The money that The Dillabaugh Group received was deposited into a bank account at Heartland Federal Credit Union, which was jointly held by Dillabaugh and his wife. From that account, Dillabaugh made "interest" payments to investors in order to deceive them into believing their money was legitimately invested. Dillabaugh also made personal expenditures from that account, and he paid the premiums on dozens of life insurance policies for which he was the insured.

Prior to Dillabaugh's death, he left written instructions to his wife, his son, and Ms. Long to be opened upon his death. The letters gave detailed instructions about winding up the investments of The Dillabaugh Group, cashing various life insurance policies, and using the proceeds to repay investors. In the Second Amended Complaint, the Director made clear that she does not claim that Mrs. Dillabaugh, Lorne Dillabaugh, or Ms. Long

violated the Ohio Securities Act.

Mrs. Dillabaugh has received at least \$6.5 million in insurance proceeds as the beneficiary of at least 34 life insurance policies;² Lorne Lee Dillabaugh has received approximately \$310,000 in life insurance proceeds; and Ms. Long has received more than \$100,000. Approximately \$3 million in life insurance proceeds for which Mrs. Dillabaugh is the named beneficiary are currently held in Hartford's accounts.³ The investors have not been paid from the insurance proceeds.⁴

On June 25, 2008, the Director filed an action pursuant to R.C. 1707.26, 1707.261, and 1707.27 against the Dillabaugh Group and the Estate of Roy G. Dillabaugh, claiming violations of the Ohio Securities Act and seeking the appointment of a receiver, an order of restitution, and a preliminary and permanent injunction. The Director also named Mrs. Dillabaugh, Lorne Lee Dillabaugh, Ms. Long, and Hartford as defendants. The Director claimed that Mrs. Dillabaugh, Lorne Dillabaugh, Ms. Long, and Hartford were necessary parties, because they were "in possession of the proceeds of life insurance policies whose premiums were paid by Roy Dillabaugh from the funds obtained by The Dillabaugh Group's fraudulent sale of unregistered securities to investors." Simultaneous to the filing of the Verified Complaint, the Director requested a temporary restraining order. The court granted the motion, restraining Defendants from violating R.C. Chapter 1707 and from

²In later filings, the Director indicated that Dillabaugh paid premiums totaling \$760,000 on 60 insurance policies with a total worth of approximately \$11.6 million.

³It appears that those funds are also the subject of federal litigation between Mrs. Dillabaugh and Hartford.

⁴Some of the investors have brought state civil cases, at least one of which is on appeal to this court. *Burcham v. Snook*, Montgomery App. No. 23787.

"disposing or dispersing any insurance proceeds in the Defendants' possession" until the court rules on the merits of the Complaint. The court exempted \$500,000 of the insurance proceeds held by Mrs. Dillabaugh from the TRO.

Lorne Dillabaugh and Hartford moved to dismiss the Director's complaint; Mrs. Dillabaugh opposed the Director's request for an injunction and later moved to dismiss the complaint. All argued that the Director lacked the statutory authority to seek an injunction, restitution, or rescission against them because they were not alleged to have committed securities violations. Mrs. Dillabaugh and Lorne Dillabaugh further claimed that the insurance proceeds were protected from the Director's claims by R.C. 3911.10.

On July 17, 2008, the trial court entered a preliminary injunction, enjoining all defendants from violating the Ohio Securities Act and from disposing and dispersing any insurance proceeds in their possession until the court rules on the complaint. The court further ordered that \$500,000 of the insurance proceeds held by Mrs. Dillabaugh was not subject to the injunction, and it required Lorne Dillabaugh to deposit \$200,000 of the insurance proceeds into his attorney's escrow account to be held until further order of the court. The court expressly held that Ms. Long was subject to the preliminary injunction.⁵

The trial court subsequently denied each of the motions to dismiss. In overruling the motions, the court separately noted that the Director had alleged that "Defendants" had committed securities violations, and that Hartford, Mrs. Dillabaugh, and Lorne Dillabaugh were each listed as a defendant. The court further stated that the Director was only seeking "the insurance proceeds/premiums that Defendant holds." As to Mrs. Dillabaugh

⁵Mrs. Dillabaugh appealed from the preliminary injunction order. *Zurz v. The Dillabaugh Group*, Montgomery App. No. 22896. We dismissed that appeal for lack of a final appealable order.

and Lorne Dillabaugh, the court reasoned that R.C. 1707.26 expressly provides that the court may order other equitable relief, and that the facts here may warrant the equitable relief of a constructive trust. The court concluded that Mrs. Dillabaugh and Lorne Dillabaugh were necessary parties since they were the potential constructive trustees.

In May 2009, Mrs. Dillabaugh moved for partial relief from the preliminary injunction. After consideration of the motion, the court released an additional \$100,000 from the injunction's restrictions.

In September 2009, Lorne Dillabaugh, Mrs. Dillabaugh, Ms. Long, and the Director moved for summary judgment. Similar to the motions to dismiss, Lorne Dillabaugh, Mrs. Dillabaugh, and Ms. Long asserted that, because they did not violate the Ohio Securities Act⁶ and were not "agents, employees, partners, officers, directors, or shareholders" of the alleged violator of R.C. Chapter 1707, the Director lacked authority to seek relief against them under R.C. Chapter 1707. Moreover, Mrs. Dillabaugh and Lorne Dillabaugh claimed that the life insurance proceeds were exempt from the claims of all creditors. (Lorne Dillabaugh acknowledged a possible exception to the exemption for the amount paid as premiums.) Mrs. Dillabaugh and Ms. Long further argued that the proceeds were not subject to a constructive trust.

The Director's motion asserted that she was entitled to judgment against The Dillabaugh Group and Dillabaugh's Estate on her Ohio Securities Act claims. As for the "necessary parties," the Director asserted that the plain language of R.C. 1707.26 permitted the insurance proceeds to be subject to a restraining order and that the proceeds

⁶Subsequent to the decision denying the motions to dismiss, the Director amended her Complaint to clarify that only Roy Dillabaugh and The Dillabaugh Group were alleged to have committed securities violations.

are not protected by R.C. 3911.10 or R.C. 3923.19. The Director stated: "These statutes do not apply in this case because Dillabaugh created a constructive trust when he defrauded investors and purchased the insurance policies with the investor's monies subject to this action." The Director further noted that R.C. 3911.10 did not apply to Ms. Long, because she was not a spouse, child, or dependent of the decedent (i.e., Dillabaugh). The Dillabaugh Group and the Estate of Dillabaugh did not oppose the Director's motion, but Lorne Dillabaugh, Mrs. Dillabaugh, and Ms. Long argued that the Director failed to show that Dillabaugh or The Dillabaugh Group engaged in deceptive, fraudulent, or manipulative acts, practices or transactions by selling unregistered securities and/or made material misrepresentations and omissions to investors.

On November 12, 2009, the trial court overruled in part and granted in part the motions for summary judgment. The court found that genuine issues of material fact precluded summary judgment on the Director's claims against Dillabaugh's Estate and The Dillabaugh Group. The trial court agreed with the Director that "the General Assembly intended 'other equitable relief as the facts warrant' [under R.C. 1707.26] to include an order restraining third parties from disposing or dispersing the proceeds of securities violations." As to R.C. 3911.10, the court found that the Director was a "creditor" under the statute and, consequently, the Director "may only seek recovery, if at all, against the insurance premiums paid, not the entire amount of the policy." The court found that genuine issues of material fact existed as to whether a constructive trust should be established.

In light of the trial court's decision, Mrs. Dillabaugh and Lorne Dillabaugh moved for an immediate partial dissolution of the preliminary injunction, releasing all amounts except

those amounts claimed to have been paid as premiums.⁷ The court granted the motions.

The remaining matters came before the court on November 17, 2009, at which time counsel presented several agreements among the parties. Counsel for Dillabaugh's Estate and The Dillabaugh Group did not appear; the remaining parties asked the court to enter judgment against the Estate and The Dillabaugh Group on the Ohio Securities Act claims. The court entered judgment against the Estate and The Dillabaugh Group, as requested, and stated that it would order an injunction, restitution, and the appointment of a receiver as to those parties. Lorne Dillabaugh and Ms. Long made oral motions for judgment notwithstanding the verdict in order to preserve the issue of whether the Director could restrain third-parties who have monies from securities fraud; the court orally overruled the motion. Ms. Long orally requested that an additional \$20,000 be released from the injunction against her to help her pay attorney fees; the court granted this motion.

On December 23, 2009, the trial court entered a written judgment entry, incorporating its November 12 summary judgment decision. In that entry, the court found that Roy Dillabaugh and The Dillabaugh Group knowingly engaged in fraudulent acts, as defined by R.C. 1707.01. The court found that, even if Dillabaugh and The Dillabaugh Group had created a constructive trust over the insurance proceeds held by the other defendants, a receiver would not be permitted to pursue the life insurance proceeds held by Lorne Dillabaugh and Mrs. Dillabaugh in excess of the amount of premiums, under R.C. 3911.10. The court held that R.C. 3911.10 did not apply to the insurance proceeds held by Long or by Hartford. The court permanently enjoined the Estate of Dillabaugh and The

⁷The alleged amount of premiums paid on the respective insurance policies were: Lorne Dillabaugh - \$55,753.28; Ms. Long - \$139,458.14; and Mrs. Dillabaugh - \$564,788.58.

Dillabaugh Group from further violations of the Ohio Securities Act, ordered the Estate and The Dillabaugh Group to make restitution, and appointed Robert Hanseman as a receiver "to take possession of all assets, properties, books and records of Roy G. Dillabaugh and The Dillabaugh Group, *** to manage and operate said business entities and wind up the affairs of Roy G. Dillabaugh and The Dillabaugh Group and to perform all other duties as directed by this Court as authorized in R.C. 1707.27. ****"

The Director appeals from the trial court's December 23, 2009, judgment. Mrs. Dillabaugh and Ms. Long cross-appeal. We will begin our analysis with the cross-appeals by Mrs. Dillabaugh and Ms. Long.

II.

Mrs. Dillabaugh's cross-assignment of error states:

"THE TRIAL COURT ERRED IN ENTERING AN INJUNCTION AGAINST MS. DILLABAUGH."

Ms. Long's cross-assignments of error state:

"1. THE TRIAL COURT ERRED IN FINDING THAT R.C. 1707.26 AUTHORIZES THE ISSUANCE OF AN INJUNCTION AGAINST APPELLEE/CROSS-APPELLANT, MARY JOHANNA LONG, ENJOINING THE DISPERSING OR DISPOSING OF LIFE INSURANCE POLICY PROCEEDS WHICH SHE RECEIVED AS A BENEFICIARY UPON THE DEATH OF ROY DILLABAUGH.

"2. THE TRIAL COURT ERRED IN FINDING THAT THE REMEDY OF RESTITUTION OR RECISION, AS AFFORDED IN R.C. 1707.261, AND THE APPOINTMENT OF A RECEIVER, AS AFFORDED IN R.C. 1707.27, ARE AVAILABLE TO APPELLANT/CROSS-APPELLEE, DIRECTOR, OHIO DEPARTMENT OF

COMMERCE, AS AGAINST APPELLEE/CROSS-APPELLANT, MARY JOHANNA LONG.

"3. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF APPELLANT/CROSS-APPELLEE, DIRECTOR, OHIO DEPARTMENT OF COMMERCE AS AGAINST APPELLEE/CROSS-APPELLANT, MARY JOHANNA LONG, AND ERRED FURTHER IN OVERRULING APPELLEE/CROSS-APPELLANT'S MOTION FOR SUMMARY JUDGMENT."

Mrs. Dillabaugh and Ms. Long claim that the trial court erred in imposing remedies provided under the Ohio Securities Act against them, because those provisions only provide remedies against violators of the Act. The parties agree that neither Mrs. Dillabaugh nor Ms. Long engaged in securities fraud. Therefore, the central question raised by the cross-appeals is the extent of the Director's authority to seek injunctive relief, restitution, and other equitable remedies against non-violators of the Act, specifically those who hold funds allegedly obtained by securities fraud.

"The Ohio Securities Act, generally referred to as Ohio Blue Sky Law, was adopted on July 22, 1929 to prevent the fraudulent exploitation of the investing public through the sale of securities." *Perrysberg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, ¶19, quoting *In re Columbus Skyline Securities, Inc.* (1996), 74 Ohio St.3d 495, 498. As recognized by the Supreme Court of Ohio, "[m]any of the enacted statutes are remedial in nature, and have been drafted broadly to protect the investing public from its own imprudence as well as the chicanery of unscrupulous securities dealers." *In re Columbus Skyline Securities*, 74 Ohio St.3d at 498, citing *Bronaugh v. R. & E. Dredging Co.* (1968), 16 Ohio St.2d 35. "In order to further the intended purpose of the Act, its securities anti-fraud provisions must be liberally construed." *Id.*

R.C. 1707.26 authorizes the Director of Commerce to bring actions for violations of the Ohio Securities Act.⁵ *Peltier v. Spaghetti Tree, Inc.* (1983), 6 Ohio St.3d 194, 196, fn.

5. That statute reads:

"Whenever it appears to the division of securities, upon complaint or otherwise, that any person has engaged in, is engaging in, or is about to engage in, any deceptive, fraudulent, or manipulative act, practice, or transaction, in violation of sections 1707.01 to 1707.45 of the Revised Code, the director of commerce may apply to a court of common pleas of any county in this state for, and upon proof of any of such offenses such court shall grant an injunction restraining such person and its agents, employees, partners, officers, directors, and shareholders from continuing, engaging in, or doing any acts in furtherance of, such acts, practices, or transactions, and may order such other equitable relief as the facts warrant." (Emphasis added.) R.C. 1707.26.

If the common pleas court grants the injunction, the Director may ask the court to order the defendant or defendants that are subject to the injunction to make restitution or rescission to any purchaser or holder of securities damaged by the defendant's or defendants' violation of the Ohio Securities Act. R.C. 1707.261(A). The common pleas court may order the requested restitution or rescission if it is "satisfied with the sufficiency of the director's request for restitution or rescission *** and with the sufficiency of the proof of a substantial violation of any provision of [the Act] or of the use of any act, practice, or transaction declared to be illegal or prohibited or defined as fraudulent by those sections or rules adopted under those sections by the division of securities, to the material prejudice

⁵The Director may also pursue administrative proceedings under R.C. 1707.23.

of a purchaser or holder of securities." R.C. 1707.261(B). Recovery by the injured purchaser or holder of securities is limited to the person's purchase price for the fraudulent securities. R.C. 1707.261(D).

The Director may further ask the court to appoint a receiver for a violator of the Ohio Securities Act. R.C. 1707.27. A receiver appointed in accordance with R.C. 1707.27 is empowered "to sue for, collect, receive, and take into the receiver's possession all the books, records, and papers of the person [violator] and all rights, credits, property, and choses in action acquired by the person by means of any such act, practice, or transaction, and also all property with which the property has been mingled, if the property cannot be identified in kind because of the commingling, and with power to sell, convey, and assign the property, and to hold and dispose of the proceeds under the direction of the court of common pleas." *Id.* The decision whether to appoint a receiver is a matter left to the trial court's sound discretion. *Page v. AEI Group, Inc.* (Apr. 30, 1991), Franklin App. No. 90AP-151.

The Director asserts that the plain language of R.C. 1707.26 permits the insurance proceeds to be subject to a restraining order. She contends that the portion of R.C. 1707.26 which permits the court to "order such other equitable relief as the facts warrant" is not limited to the violator and the violator's "agents, employees, partners, officers, directors, and shareholders." As stated by the Director, "[t]he second clause makes no reference to the first clause, and cannot be interpreted as qualifying or otherwise limiting the first clause of R.C. 1707.26." She argues that any other reading renders the second clause ("such other equitable relief") mere surplusage. That is, the Director can obtain an injunction by R.C. 1707.26, can obtain rescission and restitution by R.C. 1707.261, and can

seek the appointment of a receiver with broad powers to sue by R.C. 1707.27; therefore, the second clause must grant the Director the authority to seek other equitable relief *from others* "as the facts warrant."

We disagree with the Director's expansive reading of R.C. 1707.26. The remedial provisions set forth in R.C. 1707.26, R.C. 1707.261, and R.C. 1707.27, authorize the Director to file an action against violators and to seek certain remedies (rescission and restitution) against those violators for damages caused by the securities violations. The first clause of R.C. 1707.26 *requires* the common pleas court ("the court shall grant") to impose an injunction against persons upon proof by the Director that such person "has engaged in, is engaging in, or is about to engage in, any deceptive, fraudulent, or manipulative act, practice, or transaction, in violation of sections 1707.01 to 1707.45 of the Revised Code." The second clause *permits* the common pleas court to order "such other equitable relief as the facts warrant."

However, there is no implication in R.C. 1707.26 that "such other equitable relief" includes bringing suit against third parties for equitable relief. R.C. 1707.26 authorizes suit against violators. The second clause merely adds that, in addition to the mandatory injunction, the court "may order" additional relief against those violators.

Such a reading of R.C. 1707.26 is consistent with the rule of *eiusdem generis*, which means "of the same kind or species." Under that rule, "where in a statute terms are first used which are confined to a particular class of objects having well-known and definite features and characteristics, and then afterward a term having perhaps a broader signification is conjoined, such latter term is, as indicative of legislative intent, to be considered as embracing only things of similar character as those comprehended by the

preceding limited and confined terms.” *State v. Aspell* (1967), 10 Ohio St.2d 1, paragraph two of the syllabus. See, also, *State v. Collier*, Montgomery App. No. 22686, 2010-Ohio-4039, ¶20, and *State v. Maxwell* (Apr. 13, 1988), Medina App. No. 1646, both quoting *Aspell*. R.C. 1707.26 refers to an injunction, which must be imposed if the Director satisfies its burden under that statute, and “such other equitable relief,” which is discretionary. To construe “such other equitable relief” as encompassing the authority to sue third-parties who hold assets procured by securities fraud would extend the meaning of “such other equitable relief” beyond the statute’s preceding reference to one type of equitable relief, an injunction. In addition, the first clause of R.C. 1707.26 specifically states that the injunction must be imposed against “such persons” (i.e. violators) and other specifically identified persons; if the legislature had intended injunctive relief to be available against additional parties, the General Assembly could have (1) chosen not to limit the first clause to “such persons” and the list of persons that follow or (2) provided that the court could order “such other equitable relief as the facts warrant” against such persons or any other person.

We are further guided by the Supreme Court of Ohio’s decision in *State, Dept. of Commerce, Division of Securities v. Buckeye Finance Corp.* (1978), 54 Ohio St.2d 407, which addressed the scope of “such other equitable relief” in R.C. 1707.26. In *Buckeye Finance*, the Director and the defendants agreed to a consent order under which Buckeye would be liquidated according to express terms under the court’s supervision. The Director subsequently moved to file an amended complaint, seeking an order that would hold the individual defendants (who were all alleged to be violators of the Ohio Securities Act) personally liable to pay money to all purchasers of the debentures which had allegedly

been sold illegally; establish a "plan of rescission" to allow all debenture holders to recover the purchase price, plus interest, from the individual defendants; and require the individual defendants to put the full amount of the purchase price of the debentures, plus interest, in escrow. The individual defendants argued that there was no authority for the Director to seek that form of relief. (*Buckeye Finance* was decided prior to the enactment of R.C. 1707.261, which expressly authorized the Director to seek restitution and rescission.) The Director asserted that the claimed relief was authorized by the phrase, "may order such other relief as the facts warrant," contained in that version of R.C. 1707.26. The trial court denied the Director's motion.

On appeal, the Supreme Court held that the Director, as an administrative agent of the State, did not have statutory authority under R.C. 1707.26 to sue for rescission and restitution on behalf of purchasers of securities. The court explained that "[i]t would be unreasonable to infer such authority from the general language of R.C. 1707.26, when, in other sections of the code, the General Assembly has taken pains to create similar causes of action in purchasers of securities explicitly, rather than by implication."

Although *Buckeye Financial's* specific holding has limited applicability today because of the enactment of R.C. 1707.261, it demonstrates the restrictive interpretation given to the phrase, "may order such other equitable relief as the facts warrant." Because restitution and rescission were remedies expressly available to private plaintiffs, the Supreme Court excluded those remedies from "such other relief" (even against alleged violators), thereby indicating that "such other relief" modifies the type of relief as opposed to the individuals against whom the "other relief" may be sought. Given this reading of "such other relief as the facts warrant," we decline to read "such other equitable relief as

the facts warrant" to include the authority to sue third parties who are not violators of the Ohio Securities Act.

The Director further argues that, without the authority to restrain ill-gotten gains, wherever they may be, the ability of the receiver (appointed under R.C. 1707.27) to take all assets derived from the securities violations would be circumvented. First, whether this is true (and, as discussed below, we render no such advisory opinion), the authority granted to an executive agency of the State is always a policy decision of the legislature.

Moreover, as recognized by the Director, "the Ohio Securities Act provides investors with their own separate civil remedy for securities violations. R.C. 1707.43. This civil remedy permits recovery against a broader class of people than the people against whom rescission or restitution can be ordered under R.C. 1707.261." (Director's App. Brf., p.8, n.6.) Specifically, R.C. 1707.43 provides:

"(A) Subject to divisions (B) and (C) of this section, every sale or contract for sale made in violation of Chapter 1707. of the Revised Code, is voidable at the election of the purchaser. The person making such sale or contract for sale, and every person that has participated in or aided the seller in any way in making such sale or contract for sale, are jointly and severally liable to the purchaser, in an action at law in any court of competent jurisdiction, upon tender to the seller in person or in open court of the securities sold or of the contract made, for the full amount paid by the purchaser and for all taxable court costs, unless the court determines that the violation did not materially affect the protection contemplated by the violated provision." R.C. 1707.43(A).

Accordingly, as recognized in *Buckeye Financial*, the General Assembly has expressly granted rights to private aggrieved individuals (i.e., a remedy against those who

participated or aided in the sale of unregistered securities) which it has not granted to the Director as part of the State's enforcement powers. In such circumstances, we cannot reasonably infer that the legislature intended to provide those same rights to the Director.

Finally, as stated above, R.C. 1707.27 provides that a receiver appointed by the court, upon application by the Director, has the authority "to sue for, collect, receive, and take into the receiver's possession" all of the books, records, and papers of the Securities Act violator; all rights, credits, property, and choses in action acquired by means of any such violation; and also all property with which the property has been mingled. (Emphasis added.) The receiver can further "sell, convey, and assign the property," and "hold and dispose of the proceeds" under the court's direction. Thus, as stated by the Director, "[t]he restitution is to be determined by the receiver and the receiver has the authority to marshal the assets under the direction of the court." (Director's App. Brf, p. 6) The Director does not.

Accordingly, we conclude that the Director's right to pursue an injunction under R.C. 1707.26 is limited to actions against "any person [who] has engaged in, is engaging in, or is about to engage in, any deceptive, fraudulent, or manipulative act, practice, or transaction, in violation of sections 1707.01 to 1707.45 of the Revised Code" and that person's "agents, employees, partners, officers, directors, and shareholders;" the court's authority to order "such other equitable relief as the facts warrant" is also limited to those specified persons. Moreover, R.C. 1707.261 allows the court to order restitution and rescission only against "the defendant or defendants that are subject to the injunction." R.C. 1707.261.

Indeed, we believe that Director accurately described its authority under R.C.

1707.26, 1707.261, and 1707.27 when it stated to the trial court:

"R.C. 1707.26 allows the Director of Commerce, upon proof of violations of the Ohio Securities Act, to petition the court for an injunction or other equitable relief. Upon the granting of such injunction or other equitable relief, R.C. 1707.261 allows the Director to ask the court to order the rescission or restitution of all securities sold in violation of the Ohio Securities Act. Once this order is issued, a receiver appointed pursuant to R.C. 1707.27 may then sue for, collect, and distribute the funds to the investors.

**** Under R.C. 1707.27, the receiver has the ability to sue, collect, receive, and take possession of all property, including co-mingled property and disperse the proceeds under the direction of the court. The amount of restitution owed to each investor is determined by the receiver under the direction of the court. The order of restitution would only state that the investors were entitled to restitution not to exceed the amount of the investor's investment. The order would not state that Mrs. Dillabaugh or The Hartford Life & Accident Insurance Company, for example, owed an amount certain. *Instead, the receiver would bring an action as appropriate that would include full discovery, and a decision on the merits of each individual claim or defense.*" (Emphasis added.) (Doc. # 9)

Such a reading of R.C. 1707.26 does not "circumvent" the ability of the receiver to take all assets derived from the securities violations, as the Director suggests. Because the Director need not establish the merits of the individual claims as part of its suit under R.C. 1707.26, we see no reason why there would necessarily be a significant delay between the filing of the Director's action against the violators and the trial court's subsequent order of an injunction against the violators and the appointment of a receiver. At that juncture, the receiver could promptly pursue any claims against third parties who

hold proceeds of the securities fraud and could seek an injunction, if necessary, against those parties.

Accordingly, the trial court erred in imposing an injunction against Mrs. Dillabaugh and Ms. Long as requested by the Director. Such a request was the province of a receiver appointed under R.C. 1707.27.

The cross-assignments of error are sustained.

III.

The Director raises three assignments of error. They state:

"THE LOWER COURT ERRED IN FINDING APPELLANT/CROSS-APPELLEE, A STATE REGULATOR OF SECURITIES, A CREDITOR UNDER R.C. 3911.10."

"THE LOWER COURT ERRED IN FINDING THAT R.C. 3911.10 PROHIBITED APPELLANT/CROSS-APPELLEE FROM OBTAINING FROM THE ESTATE OF ROY G. DILLABAUGH THE PROCEEDS OF INSURANCE POLICIES PURCHASED BY ROY G. DILLABAUGH ON HIMSELF WITH STOLEN INVESTOR MONIES."

"THE LOWER COURT ERRED IN FINDING THAT THE APPLICATION OF R.C. 3911.10 COULD NOT BE OVERCOME BY THE CREATION OF A CONSTRUCTIVE TRUST."

R.C. 3911.10 provides:

"All contracts of life or endowment insurance or annuities upon the life of any person, or any interest therein, which may hereafter mature and which have been taken out for the benefit of, or made payable by change of beneficiary, transfer, or assignment to, the spouse or children, or any persons dependent upon such person, or an institution or entity described in division (B)(1) of section 3911.09 of the Revised Code, or any

creditor, or to a trustee for the benefit of such spouse, children, dependent persons, institution or entity, or creditor, shall be held, together with the proceeds or avails of such contracts, subject to a change of beneficiary if desired, free from all claims of the creditors of such insured person or annuitant. Subject to the statute of limitations, the amount of any premium upon such contracts, endowments, or annuities, paid in fraud of creditors, with interest thereon, shall inure to their benefit from the proceeds of the contracts, but the company issuing any such contract is discharged of all liability thereon by the payment of its proceeds in accordance with its terms, unless, before such payment, written notice is given to it by a creditor, specifying the amount of the claim and the premiums which the creditor alleges have been fraudulently paid.”

To qualify for protection under R.C. 3911.10, the contract must be the proper type of insurance policy or annuity on the life of insured/annuitant, and the beneficiary must fall within one of several categories of people, including the spouse, children, and dependents of the insured or annuitant. If R.C. 3911.10 applies, the proceeds of the contract will be protected from “all claims” of the insured’s or annuitant’s “creditors.” *In re Schramm* (B.A.P. C.A.6, 2010), 431 B.R. 397, 402. R.C. 3911.10, however, exempts from its protection the amount of any premium on the contract which was “paid in fraud of creditors,” with interest. Such premiums “shall inure to [the creditors] benefit” from the proceeds of the life insurance or annuity.

The parties dispute whether the Director, not the receiver appointed by the trial court, is a “creditor” under R.C. 3911.10. The dispute is framed as such because the Director sought to enjoin all of the proceeds of the life insurance policies as part of its request for a preliminary injunction (which was to continue until an injunction against the

Estate of Roy Dillabaugh and The Dillabaugh Group was ordered and a receiver could be appointed). Accordingly, at the time that the parties raised whether all of the proceeds of the life insurance policies could be enjoined, it was the Director, not the receiver, who was seeking the injunction. The trial court, faced with that issue in the motions for summary judgment, determined that the Director could pursue a preliminary injunction against "the necessary parties," but that the injunction was limited, with respect to Mrs. Dillabaugh and Lorne Dillabaugh, to the amount of premiums paid, consistent with R.C. 3911.10. In doing so, the Court concluded that the Director was acting as a "creditor."

Because we have concluded that the Director lacked the authority to sue third-parties, such as Mrs. Dillabaugh and Ms. Long, under R.C. 1707.26, the Director necessarily lacked the authority to seek a temporary restraining order and a preliminary injunction against them to prevent them from disposing of the proceeds of the insurance policy. Accordingly, with respect to those parties, the question of whether the Director was a "creditor" under R.C. 3911.10 is moot.⁹

In its judgment entry, the trial court applied its decision regarding *the Director's* ability to seek a preliminary injunction against Mrs. Dillabaugh, Lorne Dillabaugh, Ms. Long, and Hartford *to the Receiver*. The trial court ordered, in part:

**** [A] Receiver appointed pursuant to R.C. 1707.27 would not be permitted to pursue the life insurance proceeds held by Alice Jane Dillabaugh and Lorne Dillabaugh (in

⁹With respect to Ms. Long and Hartford, the Director argued that the trial court erred in holding that the life insurance proceeds held by them were protected by R.C. 3911.10. We note that the trial court held the opposite, i.e., that R.C. 3911.10 did not apply to protect the proceeds held by Ms. Long and Hartford. Accordingly, the Director's assignment of error with respect to these proceeds could be overruled on that basis, as well.

excess of the amount of the premiums) under R.C. 3911.10. Thus, pursuant to R.C. 3911.10 the maximum amount of those proceeds the Receiver appointed by this Court will be permitted to pursue as part of the receivership estate is the amount paid in premiums for the insurance policies for which Defendants Alice Jane Dillbaugh and Lorne Dillbaugh are the named [beneficiaries]. *** The Court makes no findings at this time with respect to whether the receivership estate does or should include any specific amounts of the insurance proceeds, only that the Receiver may not seek proceeds from Alice Jane Dillbaugh and Lorne Dillbaugh in an amount in excess of the premiums paid on those policies. The Receiver will be required to establish its right to recover such proceeds as it is permitted to pursue by whatever means it deems appropriate, including but not limited to an action to recover such proceeds.

**** Therefore, it is ORDERED and ADJUDGED that Kimberly Mayhew, in her capacity as administrator of the Estate of Roy G. Dillbaugh, and The Dillbaugh Group are permanently enjoined from further violations of the Ohio Securities Act; that a Receiver is hereby appointed who will serve pursuant to the jurisdiction of this Court and will have all the powers, authority, and responsibilities granted by R.C. 1707.27; and that an Order of Restitution is hereby issued against Kimberly Mayhew, in her capacity as administrator of the Estate of Roy G. Dillbaugh, and the Dillbaugh Group in an amount to be determined by Receiver appointed by this Court.

"The Court hereby appoints Robert G. Hanseman [handwritten] as Receiver, and orders the Receiver to take possession of all assets, properties, books and records of Roy G. Dillbaugh and The Dillbaugh Group, and grants the Receiver exclusive authority to manage and operate said business entities and wind up the affairs of Roy G. Dillbaugh

and The Dillabaugh Group and to perform all other duties as directed by this Court as authorized in R.C. 1707.27. ***

"The Receiver is authorized to trace the investors' monies, and collect all assets, including but not limited to, any monies of Roy G. Dillabaugh and The Dillabaugh Group or the investors consistent with Ohio law. ***

"It is further ORDER and ADJUDGED that, pursuant to R.C. 1707.26 and 1707.27, that the Receiver is authorized to pursue collection of the insurance proceeds in the possession of Defendants Alice Jane Dillabaugh and Lorne Dillabaugh up to the amount of premiums paid on the policies from which those proceeds were paid in the amounts of \$564,788.58 and \$55,753.28. However, the amount authorized in regard to Alice Jane Dillabaugh may be adjusted upon application to the Court by the Receiver. ****

The trial court's order implicitly found that, like the Director, the receiver was also a creditor under R.C. 3911.10. However, unlike the Director, the Receiver is an appointee of the court. *Tonti v. Tonti* (Ohio App. Nov. 2, 1951), 118 N.E.2d 200, 202 ("the receiver is merely the administrative arm of the court who takes charge of the assets of the partnership for the purpose of conserving them to the ends of equity and for the benefit of creditors generally"), citing *Coe v. Columbus P. & I. R. Co.* (1859), 10 Ohio St. 372, and *Merchants' Nat. Bank of Louisville v. McLeod* (1882), 38 Ohio St. 174. Although the purpose of the receiver is to marshal and preserve assets until they can be equitably distributed, the receiver's position is not identical to that of the Director, and the trial court erred in conflating the two.

At this juncture, the receiver has not pursued an action against Mrs. Dillabaugh and Lorne Dillabaugh. Consequently, the trial court should not have rendered any ruling on

whether the Receiver's ability to recover all of the proceeds of the life insurance policies held by them was limited by R.C. 3911.10. Similarly, the trial court should not have determined, in the absence of an action by the receiver, whether the receiver could recover the full amount of the life insurance proceeds under a constructive trust theory. Stated simply, such issues were not ripe for determination by the trial court.

We note that Lorne Dillabaugh and Hartford did not file cross-appeals to challenge the Director's statutory authority to seek an injunction against them. Under App.R. 3(C), a notice of cross appeal must be filed by a party "who intends to defend a judgment or order against an appeal taken by an appellant *and who also seeks to change the judgment or order* ***." (Emphasis added.) In the absence of notices of cross-appeal by these parties, this Court lacks jurisdiction to reverse the imposition of the injunctions against them. *Yates v. Kanani*, Montgomery App. No. 23492, 2010-Ohio-2631, ¶32. Accordingly, we will not disturb the trial court's injunctions against them.

Nevertheless, we overrule the Director's assignments of error with respect to Lorne Dillabaugh and Hartford. Having determined that the Director lacks the authority to pursue its claims against them, we will not determine the extent of its authority on the assumption that she could have raised those claims. If the receiver wishes to pursue all of the proceeds of the life insurance policies held by Mrs. Dillabaugh and Lorne Dillabaugh, he may attempt to do so in his own action, and the trial court may address the applicability of R.C. 3911.10, if raised, at that time.

The Director's assignments of error are overruled.

IV.

The trial court's judgment will be reversed to the extent that it (1) imposed an

injunction on the life insurance proceeds held by Mrs. Dillabaugh and Ms. Long, and (2) ordered that, pursuant to R.C. 3911.10, the receiver could recover no more than the amount of premiums paid for the life insurance policies held by Mrs. Dillabaugh and Lorne Dillabaugh. Because the issue of the receiver's ability to recover all of the proceeds from the life insurance policies held by Mrs. Dillabaugh and Lorne Dillabaugh was not properly before the trial court, we state no opinion on the applicability of R.C. 3911.10.

Since Lorne Dillabaugh and Hartford did not cross-appeal to challenge the Director's statutory authority to seek an injunction against them, the trial court's injunctions against them are affirmed.¹⁰

The matter will be remanded to the trial court for further proceedings consistent with this opinion.

As discussed above, this appellate record does not reflect the status of any actions taken by the receiver in state or federal litigation. Our mandate reversing the injunctions on the respective portions of the life insurance proceeds held by Mrs. Dillabaugh and Ms. Long that remain subject to injunction shall take effect 30 days after the date of this Opinion.

.....
DONOVAN, P.J. and FAIN, J., concur.

¹⁰Our holding is not meant to limit these defendants' ability to seek relief from judgment upon remand to the trial court.

Copies mailed to:

**Cheryl R. Hawkinson
Dennis P. Smith
Ralph W. Kohnen
Eric K. Combs
Robert E. Dintaman, Jr.
W. Randall Rock
Hon. Timothy N. O'Connell**

FILED
COURT OF COMMON PLEAS
09 DEC 23 AM 11:13



U.S.A.
CLEAN OF COURTS
MONTGOMERY CO. OHIO
12

**IN THE COURT OF COMMON PLEAS
MONTGOMERY COUNTY, OHIO**

KIMBERLY A. ZURZ, DIRECTOR
OHIO DEPARTMENT OF
COMMERCE,

Plaintiff,

v.

KIMBERLY MAYHEW, ESQ.,
ADMINISTRATOR FOR THE ESTATE
OF ROY G. DILLABAUGH, et al.,

Defendants.

CASE NO. 2008 CV 05911

JUDGE TIMOTHY N. O'CONNELL

JUDGMENT ENTRY AND ORDER

This matter is before the Court upon Plaintiff's second amended verified complaint for an injunction, order of restitution, and appointment of a receiver, pursuant to R.C. 1707.26, 1707.261, and 1707.27, against Kimberly Mayhew in her capacity as administrator of the Estate of Roy Dillabaugh and the Dillabaugh Group for violations of the Ohio Securities Act, Ohio Revised Code Chapter 1707. Plaintiff also requests a restraining order against insurance premiums and insurance proceeds, paid or payable upon the death of Roy G. Dillabaugh, currently held by Defendants Alice Jane Dillabaugh, Lorne Dillabaugh, Mary Johanna Long, and Hartford Life and Accident Insurance Company until such time that the Court appointed

EXHIBIT 4

Receiver could complete a full accounting of the Estate of Roy G. Dillabaugh and the Dillabaugh Group.

Plaintiff and Defendants Alice Jane Dillabaugh, Lorne Dillabaugh, and Mary Johanna Long filed motions for summary judgment. Defendant Kimberly Mayhew in her capacity as administrator of the Estate of Roy Dillabaugh and the Dillabaugh Group did not file a motion for summary judgment or respond to Plaintiff's motion for summary judgment. Defendant Hartford Life and Accident Insurance Company does not contest the issuance of an order that it not pay insurance proceeds to Alice Jane Dillabaugh, pending further order of this Court. The Decision, Order, and Entry overruling in part and granting in part Defendants' Lorne Lee Dillabaugh's Motion for Summary Judgment, overruling in part and granting in part Alice Jane Dillabaugh's Motion for Summary Judgment, overruling Mary Johanna Long's Motion for Summary Judgment, overruling in part and granting in part Plaintiffs Motion for Summary Judgment filed November 12, 2009 is attached and incorporated herein.

The remaining matters came to be heard before this Court on November 17, 2009. Based on the uncontested allegations substantiated to the Court, the Court finds that Roy G. Dillabaugh and the Dillabaugh Group knowingly sold securities, as defined by R.C. 1707.01, that were not properly registered in the State of Ohio in violation of R.C. 1707.44(C)(1); that Roy G. Dillabaugh and the Dillabaugh Group knowingly made false oral and written misrepresentations for the purpose of selling securities in violation of R.C. 1707.44(B)(4); and that Roy G. Dillabaugh and the Dillabaugh Group knowingly engaged in fraudulent acts, as defined by R.C. 1707.01, in the selling of securities in violation of R.C. 1707.44(G).

The Court further finds that even if Roy G. Dillabaugh and the Dillabaugh Group created a constructive trust over the insurance proceeds held by Defendants, a Receiver appointed

pursuant to R.C. 1707.27 would not be permitted to pursue the life insurance proceeds held by Alice Jane Dillabaugh and Lorne Dillabaugh (in excess of the amount of the premiums) under R.C. 3911.10. Thus, pursuant to R.C. 3911.10 the maximum amount of those proceeds the Receiver appointed by this Court will be permitted to pursue as part of the receivership estate is the amount paid in premiums for the insurance policies for which Defendants Alice Jane Dillabaugh and Lorne Dillabaugh are the named. R.C. 3911.10 does not apply to the insurance proceeds paid to or held by Defendants Mary Johanna Long or Hartford Life and Accident Insurance Company. The receivership estate is entitled to pursue collection of the entire proceeds of Defendant Mary Johanna Long; however, the receivership estate shall not be entitled to collect any insurance premiums or proceeds held by Hartford Life and Accident Insurance Company unless a court of competent jurisdiction finds that those premiums or proceeds are owed to the Receivership estate and payment is ordered by this Court. The Court makes no findings at this time with respect to whether the receivership estate does or should include any specific amounts of the insurance proceeds, only that the Receiver may not seek proceeds from Alice Jane Dillabaugh and Lorne Dillabaugh in an amount in excess of the premiums paid on those policies. The Receiver will be required to establish its right to recover such proceeds as it is permitted to pursue by whatever means it deems appropriate, including but not limited to an action to recover such proceeds.

Following the Court's announcement of its verdict consistent with the rulings above, Defendants Alice Jane Dillabaugh, Lorne Dillabaugh and Mary Johann Long, through counsel, requested that the Court enter judgment in their favor notwithstanding that verdict. The basis for their motion was the same as the basis for their respective motions for summary judgment. Specifically, the moving Defendants argued that Chapter 1707 of the Ohio Revised Code does

not authorize Plaintiff to pursue, or this Court to entertain, this action and the remedies Plaintiffs seek against the moving Defendants in light of Plaintiffs' admission that the Plaintiff has not made an accusation that moving Defendants violated Chapter 1707. It was further clarified to this Court by moving Defendants that the request was not related to the verdict related to Kimberly Mayhew or the Dillabaugh Group. Having considered the moving Defendants' request, this Court denies the moving Defendants motion for judgment notwithstanding the verdict for the same reasons identified in this Court's Decision, Order and Entry dated November 12, 2009.

Therefore, it is ORDERED and ADJUDGED that Kimberly Mayhew, in her capacity as administrator of the Estate of Roy G. Dillabaugh, and The Dillabaugh Group are permanently enjoined from further violations of the Ohio Securities Act; that a Receiver is hereby appointed who will serve pursuant to the jurisdiction of this Court and will have all the powers, authority, and responsibilities granted by R.C. 1707.27; and that an Order of Restitution is hereby issued against Kimberly Mayhew, in her capacity as administrator of the Estate of Roy G. Dillabaugh, and the Dillabaugh Group in an amount to be determined by Receiver appointed by this Court.

The Court hereby appoints *Robert G. Hanseman*
Robert Hanseman as Receiver, and orders the Receiver to take possession of all assets, properties, books and records of Roy G. Dillabaugh and The Dillabaugh Group, and grants the Receiver exclusive authority to manage and operate said business entities and wind up the affairs of Roy G. Dillabaugh and The Dillabaugh Group and to perform all other duties as directed by this Court and as authorized in R.C. 1707.27. Fees and expenses of the Receiver shall be paid by the Receivership estate and then by the Defendants Roy G. Dillabaugh and The Dillabaugh Group. The Receiver shall submit monthly statements of

inventories and reports to the Court. The Receiver shall file a schedule of assets and distribution for approval by the Court.

The Receiver is authorized to trace the investors' monies, and collect all assets, including but not limited to, any monies of Roy G. Dillabaugh and The Dillabaugh Group or the investors consistent with Ohio law.

IT IS FURTHER ORDERED that the Receiver shall have and possess all powers and rights of an equity receiver to administer and manage the Receiver Estate in a commercially reasonable manner, with the intent to maximize the value of the Receiver Estate, including, but not limited to the power and authority:

- (1) to take custody, control and possession of all records, assets, finds, personal property, vehicles, bank accounts, brokerage accounts, real property premises and other materials of any kind in the possession of or under the direct or indirect control of the Receiver Estate or the Receivership Entities and, until further order of this Court;
- (2) to manage, control operate and maintain the Receiver Estate, to use income, earnings, rents and profits of the Receiver Estate, with full power to sue for, collect, recover, receive and take into possession all goods, chattels, rights, credits, movables, effects, lands, books and records of accounts and other documents, data and materials;
- (3) to conduct the business operations of the Receivership Entities, including the purchase and/or sale of real or personal property or inventory, the continuation and termination of any contract,

employment arrangement and all other aspects of any active business operation;

- (4) to make such ordinary and necessary payments, distributions, and disbursements as he deems advisable or proper for the marshaling, maintenance or preservation of the Receivership Estate pursuant to this Court's orders;
- (5) to hypothecate or dispose of the assets of the Receiver Estate;
- (6) to contact and negotiate with any creditors for the purpose of compromising or settling any claim, including the surrender of assets to secured creditors;
- (7) to have control of, receive and collect any and all sums of money due or owing whether the same are now due or shall hereafter become due and payable, and incur such expenses and make such disbursements as are necessary and proper for the collection, preservation, maintenance, administration and operation of the Receiver Estate;
- (8) to institute, defend, compromise or adjust such actions or proceedings in state or federal courts now pending and hereafter instituted, as may in his discretion be advisable or proper for the protection and administration of the Receivership Estate;
- (9) to prepare any and all tax returns and related documents regarding the assets and operation of the Receiver Estate;

- (10) to abandon any asset that, in the exercise of his reasonable business judgment, will not provide benefit or value to the Receiver Estate;
- (11) to investigate any matters he deems appropriate in connection with discovering additional information as it relates to the activities of the Receiver Estate;
- (12) to make a determination of restitution for each investor in proportionate share to each investment as approved by this Court;
- (13) authorized to establish and maintain one or more bank accounts in the Receivership's name for its operations as Receiver in this matter at any federally insured bank as reasonably needed to engage in business operations;
- (14) shall keep a true and accurate account of any and all receipts and disbursements which the Receiver shall receive or make as Receiver in the course of the performance of his duties, and shall report the same regularly to the Court; and
- (15) to take such other action as may be approved by this Court.

It is further ORDERED and ADJUDGED that, pursuant to R.C. 1707.26 and 1707.27, that the Receiver is authorized to pursue collection of the insurance proceeds in the possession of Defendants Alice Jane Dillabaugh and Lorne Dillabaugh up to the amount of premiums paid on the policies from which those proceeds were paid in the amounts of \$564,788.58 and \$55,753.28. However, the amount authorized in regard to Alice Jane Dillabaugh may be adjusted upon application to the Court by the Receiver. The Receiver is further authorized to pursue collection of the insurance proceeds in the possession of Defendant Mary Johanna Long. Hartford is

restrained dispersing life insurance premiums and/or proceeds to Alice Jane Dillabaugh until further order of this Court. It is further Ordered that Defendant Alice Jane Dillabaugh is restrained from dispersing or disposing of any asset (excluding the amount of insurance proceeds over and above the amount restrained by the injunction put in place by this Court) valued in excess of five thousand dollars (\$5,000.00), except as set forth herein, unless approved by this Court.

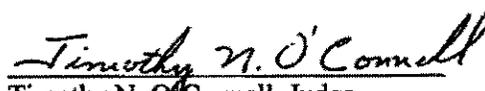
IT IS FURTHER ORDERED that absent express permission and leave by this Court, all creditors and other persons seeking money damages or other relief from the Receiver Estate and all others acting on behalf of any such creditors and other persons, including sheriffs, marshals, and all officers and deputies, and their respective attorneys, servants, agents and employees, are, until further order of this Court, hereby stayed. Further, all persons having notice of this Order, including creditors and others seeking money damages or other relief from the Receiver Estate, and all others acting on behalf of any such creditors and other persons, including sheriffs, marshals, and all officers and deputies, and their respective attorneys, servants, agents and employees, are restrained from doing anything to interfere with the Receiver's performance of his duties and the administration of the Receiver Estate. Accordingly, all such persons are enjoined from filing or prosecuting any actions or proceedings which involve the Receiver or which affect the Receivership Estate, including any proceeding initiated pursuant to the United States Bankruptcy Code, except with the prior permission of this Court. Moreover, any such actions that are so authorized shall be filed in this Court. Hartford is granted permission to maintain and prosecute the action captioned *Hartford Life and Accident Insurance Co. v. Alice Jane Dillabaugh, et al.* (Case No. 3:09CV293), pending in the United States District Court for the Southern District of Ohio Western Division (Dayton).

The Receiver is also hereby authorized to employ such employees, accountants, consultants, attorneys and other professionals, including employees of his own professional firm, as are necessary and proper for the administration of the Receiver Estate and the performance of his duties as set forth herein. The Receiver shall seek and obtain the approval of this Court prior to disbursement of professional fees and expenses to himself, his firm or his counsel, by presentation of a written application therefore.

IT IS FURTHER ORDERED that Plaintiff shall not be directly or indirectly responsible for the payment of the Receiver's fees or expenses incurred by the Receiver and that the Receiver shall retain possession of all records and shall dispose or store all records on further order of the Court from funds payable out of the Receivership Estate.

IT IS FURTHER ORDERED that except for an act of gross negligence or intentional misconduct, the Receiver and all persons engaged or employed by him shall not be liable for any loss or damage incurred by any person or entity by reason of any act performed or omitted to be performed by the Receiver or those engaged or employed by him in connection with the discharge of their duties and responsibilities in connection with the receivership.

This Order disposes of all of the claims for relief stated by Plaintiff in their entirety. Therefore, this is a final appealable order.


Timothy N. O'Connell, Judge

APPROVED TO FORM:

Cheryl R. Hawkinson
~~Cheryl R. Hawkinson~~

Cheryl R. Hawkinson (0055429)
Dennis P. Smith (0082556)
Assistant Attorneys General
30 East Broad Street, 26th Floor
Columbus, Ohio 43215-3428
Telephone: (614) 466-2980 Fax: (614) 728-9470
Cheryl.Hawkinson@ohioattorneygeneral.gov
Dennis.Smith@ohioattorneygeneral.gov
Counsel for Kimberly A. Zurz, Director
Ohio Department of Commerce

Kimberly Mayhew
~~Kimberly Mayhew~~

Kimberly Mayhew, Esq.
Nolan, Sprowl & Smith
500 Performance Place
109 North Main Street
Dayton, Ohio 45402
kimmayhew@gmail.com
Administrator of Estate of Roy G.
Dillabaugh

Ralph W. Kohnen
~~Ralph W. Kohnen~~

Ralph W. Kohnen, Esq.
Eric K. Combs, Esq.
Taft Stettinius & Hollister LLP
425 Walnut Street, Suite 1800
Cincinnati, Ohio 45202-3957
kohnen@taftlaw.com; combs@taftlaw.com
Counsel for Alice Jane Dillabaugh

Gregory H. Melick
~~Gregory H. Melick~~

Gregory H. Melick, Esq.
Luper Neidenthal & Logan
1200 LeVeque Tower
50 W. Broad Street
Columbus, Ohio 43215-3374
gmelick@lnlattorneys.com
Counsel for Lorne Dillabaugh

Jeffrey Sharkey
~~Jeffrey Sharkey~~

Jeffrey Sharkey, Esq.
Faruki, Ireland & Cox
500 Courthouse Plaza
10 N. Ludlow Street
Dayton, Ohio 45402
jsharkey@ficlaw.com
Counsel for Hartford Life & Accident
Insurance Company

W. Randall Rock
~~W. Randall Rock~~

W. Randall Rock, Esq.
34 N. Main Street, Suite 811
Dayton, Ohio 45402
wrocklaw@aol.com
Counsel for Johanna Long

Case: 2008 CV 05911
NOV 12 2009
Dist: COGENSPOC

FILED
2009 NOV 12 A 8:48

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

KIMBERLY A ZURZ DIRECTOR,

CASE NO.: 2008 CV 05911

Plaintiff(s),

JUDGE TIMOTHY N. O'CONNELL

-vs-

DILLABAUGH GROUP et al.,

**DECISION, ORDER AND ENTRY
OVERRULING IN PART AND
GRANTING IN PART DEFENDANT
LORNE LEE DILLABAUGH'S
MOTION FOR SUMMARY
JUDGMENT; OVERRULING IN
PART AND GRANTING IN PART
ALICE JANE DILLABAUGH'S
MOTION FOR SUMMARY
JUDGMENT; OVERRULING MARY
JOHANNA LONG'S MOTION FOR
SUMMARY JUDGMENT;
OVERRULING IN PART AND
GRANTING IN PART PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT**

Defendant(s).

This matter is before the Court on Defendant Lorne Lee Dillabaugh's ("Lorne") *Motion for Summary Judgment* filed on September 24, 2009. Plaintiff Kimberly Zurz, Director of Ohio Department of Commerce, ("Plaintiff") filed a *Memorandum Contra to Defendant Lorne Lee Dillabaugh's Motion for Summary Judgment* on October 9, 2009. Defendant Alice Jane Dillabaugh ("Alice") filed a *Motion for Summary Judgment* on September 25, 2009. Plaintiff filed a *Memorandum Contra to Defendant Alice Jane Dillabaugh's Motion for Summary Judgment* on October 9, 2009. Alice filed a *Reply in Support of Motion for Summary Judgment* on October 20, 2009. Defendant Mary Johanna Long ("Long") filed a *Motion for Summary Judgment* on

September 25, 2009. Plaintiff filed a *Memorandum Contra* to Defendant Mary Johanna Long's *Motion for Summary Judgment* on October 9, 2009. Plaintiff filed a *Motion for Summary Judgment* on September 25, 2009. Lorne filed a *Memorandum Contra* to Plaintiff's *Motion for Summary Judgment* on October 9, 2009. Defendant Hartford Life and Accident Insurance Co. ("Hartford") filed a *Memorandum in Response to Plaintiff's Motion for Summary Judgment* on October 13, 2009. Alice filed a *Memorandum in Opposition to Plaintiff's Motion for Summary Judgment* on October 15, 2009. Plaintiff filed a *Reply* on October 16, 2009. Oral arguments were held on the above motions on November 6, 2009. Trial is set for the week of November 16, 2009.

I. SUMMARY JUDGMENT STANDARD

Summary Judgment is appropriate where: (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made.¹

"The burden of showing that no genuine issue exists as to any material fact falls upon the moving party in requesting a summary judgment."² Ohio Civil Rule 56(C) places a duty upon the trial court to consider all appropriate materials before ruling on a motion for summary judgment and to view the facts in the light most favorable to the non-moving party.³

The moving party cannot discharge its initial burden simply by making a conclusory assertion that the non-moving party has no evidence to prove its case. Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ. R. 56(C) which

¹ *Temple v. Wean United, Inc.* (1977) 50 Ohio St.2d 317, 327; *see also*, Ohio R. Civ. P. 56(C).

² *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

³ *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356.

affirmatively demonstrates that the non-moving party has no evidence to support the non-moving party's claims.⁴

After adequate time for discovery and upon a motion for summary judgment which satisfies the test of *Dresher* and *Harless*, supra, an entry of summary judgment is appropriate if the party against whom summary judgment is sought fails to make a showing on an element to that party's case and on which that party will bear the burden of proof at trial.⁵ In opposing a summary judgment motion, the non-moving party may not rest upon the mere allegations or denials of its pleadings, but must set forth specific facts showing that there is a genuine issue for trial.⁶ In showing that there is genuine issue for trial, only disputes over material facts, facts that may affect the outcome of the suit, may preclude summary judgment.⁷

Summary judgment must be denied where a genuine issue of material fact exists, where competing inferences may be drawn from undisputed underlying evidence, or where the facts present are uncertain or indefinite.⁸ All doubts and conflicts in the evidence must be construed most strongly in favor of the party against whom summary judgment is sought.⁹

When the court considers evidence with regard to summary judgment, "it should not attempt to usurp the jury's role of assessing credibility, weighing the evidence, or drawing inferences."¹⁰ The court's function is to consider the evidence to support the non-moving party's position that a

⁴ *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293.

⁵ *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 324, Ohio St.3d 356, 360.

⁶ *Reynoldsburg Motor Sales v. Columbus* (1972), 32 Ohio App.2d 271, 274.

⁷ *Anderson v. Liberty Lobby* (1986), 477 U.S. 242, 248.

⁸ *Duke v. Sanymetal Products Co., Inc.* (1972), 31 Ohio App.2d 78.

⁹ *Morris v. Ohio Casualty Ins. Co.* (1988), 35 Ohio St.3d 48.

¹⁰ *Anderson*, supra at 242.

jury could reasonably find in its favor.¹¹ If this evidence is sufficient, then a genuine issue of material fact remains to be resolved by the jury. It is with this standard of review that the motion for summary judgment must be considered.

II. LAW AND ANALYSIS

A. Plaintiff's Motion for Summary Judgment

Plaintiff has moved for summary judgment as to all Defendants.

1. Plaintiff's motion as to Defendant Kimberly Mayhew, in her capacity as Administrator of the Estate of Roy Dillabaugh, and the Dillabaugh Group

Plaintiff moves for summary judgment against Defendant Kimberly Mayhew, in her capacity as Administrator of the Estate of Roy Dillabaugh, and the Dillabaugh Group. Plaintiff asserts that said parties engaged in deceptive, fraudulent, or manipulative acts, practices or transactions by selling unregistered securities and making material misrepresentations and omissions to investors. Plaintiff asserts that she is entitled to an injunction under O.R.C. 1707.26 against them and restitution under O.R.C. 1707.261. Further, Plaintiff claims she is entitled to the appointment of a receiver under O.R.C. 1707.27. No memorandum in opposition were filed by Kimberly Mayhew, in her capacity as Administrator of the Estate of Roy Dillabaugh, or the Dillabaugh Group.

Lorne, Alice and Long argue that Plaintiff has failed to show that Roy Dillabaugh or the Dillabaugh Group engaged in deceptive, fraudulent, or manipulative acts, practices or transactions by selling unregistered securities and/or made material misrepresentations and omissions to investors.

After a review of the arguments and evidence presented, the Court finds that Plaintiff has not met her burden under Civil Rule 56 as to the motion for summary judgment against Kimberly Mayhew, in her capacity as Administrator of the Estate of Roy Dillabaugh, and the Dillabaugh

¹¹ *Paul v. Uniroyal Plastics Co.* (1988), 62 Ohio App.3d 277, 282.

Group. Assuming arguendo that Plaintiff had met her burden under Civil Rule 56, the Court finds that a dispute of fact exists as to the claims by Plaintiff against Kimberly Mayhew, in her capacity as Administrator of the Estate of Roy Dillabaugh, and the Dillabaugh Group, and summary judgment is not appropriate. Based on this, Plaintiff's *Motion for Summary Judgment* against Kimberly Mayhew, in her capacity as Administrator of the Estate of Roy Dillabaugh, and the Dillabaugh Group is OVERRULED.

2. Plaintiff's motion as to Alice Jane Dillabaugh, Lorne Lee Dillabaugh and Mary Johanna Long

Plaintiff argues that she can bring her claims against Alice, Lorne and Long under O.R.C. 1707.26. Plaintiff asserts that the phrase "other equitable relief" in O.R.C. 1707.26 allows an injunction under the facts before the Court. Plaintiff only seeks an injunction against Alice, Lorne and Long. Plaintiff does not claim that Alice, Lorne, or Long committed any securities violations. Plaintiff argues the "other equitable relief" clause is a separate clause in the statute. Plaintiff argues that O.R.C. 1707.27 allows a receiver to seize commingled proceeds of securities crimes. She asserts that Lorne and Alice's interpretation of O.R.C. 1707.26 and O.R.C. 3911.10 would create a gross inequity of allowing Defendants to benefit at the expense of defrauded investors. Plaintiff argues that O.R.C. 1707.26 contains two distinct clauses, and the second clause allows the action against Lorne, Long and Alice. Plaintiff argues that the phrase "other equitable relief as the facts warrant" is not a qualifying phrase but a distinct phrase. Plaintiff also claims that she does not need to trace the funds, that the receiver does this under O.R.C. 1707.27. Plaintiff also argues that the proceeds from the life insurance policies are not protected by O.R.C. 3911.10 or 3923.19 because Roy Dillabaugh created a constructive trust when he defrauded the investors and bought the insurance policies with the investor's money. Plaintiff argues that the constructive trust should be established for all of the funds of the life insurance policies, not just the premiums paid because to do otherwise would allow the fraud to be done to the innocent investors while Roy Dillabaugh used the money to live a lavish lifestyle. Plaintiff argues that she is not a creditor under O.R.C. 3911.10,

but a regulatory agency enforcing its statutes. Because the monies of the insurance policies were obtained by fraud, Alice, Long and Lorne do not have a legitimate claim to the funds.

Lorne argues that there is no basis in Ohio law to establish a constructive trust or injunction for the monies held by him. Plaintiff cites to cases out of Wisconsin, Mississippi and Oklahoma, not Ohio to support her argument that O.R.C. 1707.26 allows for an injunction against innocent parties. Lorne received \$316,994.93 under the life insurance policy, and the premiums for said policy were \$55,753.28. Lorne argues that a constructive trust cannot be used to circumvent valid legislative enactments like O.R.C. 3911.10. Based on O.R.C. 3911.10, only the premiums can be sought by Plaintiff. Plaintiff's remedy is with the General Assembly, not this Court. Lorne asserts that Plaintiff's claim for restitution exists against the estate of Roy Dillabaugh, not against Lorne as an innocent party. Further, Lorne is entitled to the protection of O.R.C. 3911.10 even though he is no longer a dependent, based upon the plain reading of the statute.

Alice argues that she was the named beneficiary of several insurance policies purchased by Roy Dillabaugh. Alice has not violated the Ohio Securities Act, this is not disputed. Nothing in O.R.C. 1707.26 allows for an injunction against Alice. Alice argues that the phrase "and may order such other equitable relief as the facts warrant" in O.R.C. 1707.26 does not allow Plaintiff to sue Alice. She asserts that this phrase only applies to those who have committed a securities violation, or their agent. If the general assembly meant for the phrase to apply to anyone, they would have used "or" to begin the phrase, not "and". Further, Alice argues that a constructive trust should not be granted because there has been no tracing by Plaintiff of the money used to buy the policies, and whether said money was investor money is in dispute. She argues that a constructive trust cannot be established when the assets have not been traced to establish that they were the fraudulently obtained monies. Further, the constructive trust cannot be used to circumvent O.R.C. 3911.10, as argued by Lorne. Alice argues that the insurance proceeds are not subject to suits by creditors

under O.R.C. 3911.10. Alice asserts that Plaintiff is a creditor subject to this limitation. Plaintiff can only obtain the premiums, if at all, under the statute.

Long argues that Plaintiff cannot maintain this action against her under O.R.C. 1707.26 because she did not commit any securities violations. Further, Long is not an agent of the Dillabaugh Group or Roy Dillabaugh because said groups ceased to exist when Roy died. There is nothing left to restrain because there are no ongoing violations. Further, the phrase "other equitable relief" does not apply because the legislature used the word "and" not "or" before the phrase. The phrase applies to those that have violated or are violating the securities act.

The Court finds Plaintiff's argument persuasive that the suit can be maintained under O.R.C. 1707.26 against Alice, Lorne and Long. "Reading R.C. 1707.26 together with the rest of the Ohio Securities Act, especially R.C. 1707.27, it is clear that the General Assembly intended 'other equitable relief as the facts warrant' to include an order restraining third parties from disposing or dispersing the proceeds of securities violations. R.C. 1707.27 authorizes the receiver all rights, credits, property and choses in action acquired by the person who violated R.C. Chapter 1707, including the right to pursue all property that has been mingled. The receiver has the power to sell, convey, assign the property and dispose of these proceeds under the direction of the Court, which has authority to make orders as justice and equity require. When reading these two statutes together, there is no question that the Court has the authority to restrain the insurance proceeds under R.C. 1707.26. Without this authority, the ability of the receiver to take all property, including insurance proceeds, would be circumvented. As R.C. 1707.26 and R.C. 1707.27 relate to the same subject matter, they must be construed together."¹

Plaintiff's *Motion for Summary Judgment* is GRANTED as to the argument that O.R.C. 1707.26 allows Plaintiff to bring a claim for an injunction against Alice, Lorne and Long. Alice, Lorne and Long's *Motions for Summary Judgment* are OVERRULED as to this argument.

¹ Plaintiff's *Memorandum Contra to Defendant Alice Jane Dillabaugh's Motion for Summary Judgment* pg. 8.

3. O.R.C. 3911.10

Plaintiff argues that O.R.C. 3911.10 is inapplicable to the facts before the Court, that Plaintiff can pursue the entire amount of the insurance proceeds, not just the premiums. Plaintiff argues she is not a creditor, as defined by the statute. Alice, Lorne and Long argue to the contrary.

After reviewing the arguments of the parties and the evidence presented, the Court finds that O.R.C. 3911.10 is applicable to the claims by Plaintiff against Alice, Lorne and Long. The Court finds that Plaintiff is a "creditor" under the Statute. Based on O.R.C. 3911.10, Plaintiff may only seek recovery, if at all, against the insurance premiums paid, not the entire amount of the policy. Plaintiff's *Motion for Summary Judgment* is OVERRULED as to this argument. Lorne, Alice and Long's *Motions for Summary Judgment* are GRANTED as to this argument.

4. Constructive trust

Based on the evidence presented, the Court finds that a dispute of fact exists as to whether a constructive trust should be established. Plaintiff's, Alice's, and Lorne's *Motions for Summary Judgment* are OVERRULED as to this argument.

B. Alice Jane Dillabaugh's *Motion for Summary Judgment*

Alice argues that O.R.C. 1707.26 does not allow for an injunction against her because she did not commit any securities violations. As previously argued, Alice asserts that the "other equitable relief" phrase in the statute does not allow for an injunction against her. Finally, Alice argues that O.R.C. 3911.10 applies to the claims by Plaintiff, and Plaintiff can only seek the premiums paid on the insurance policies.

Plaintiff argues to the contrary.

As previously found in section A, Alice's *Motion for Summary Judgment* is OVERRULED as to the argument that O.R.C. 1707.26 does not allow the Plaintiff to seek an injunction against Alice. Alice's *Motion for Summary Judgment* is GRANTED as to the argument that O.R.C.

3911.10 applies and Plaintiff can only seek to recover the premiums paid on the insurance policies. Alice's *Motion for Summary Judgment* is OVERRULED as to the constructive trust argument.

C. Lorne Lee Dillabaugh's *Motion for Summary Judgment*

Lorne argues that O.R.C. 1707.26 does not allow Plaintiff to seek an injunction against him because he did not commit any securities violations. As previously argued, Lorne asserts that the "other equitable relief" phrase in the statute does not allow for an injunction against him. Finally, Lorne argues that O.R.C. 3911.10 applies to the claims by Plaintiff, and Plaintiff can only seek the premiums paid on the insurance policies.

Plaintiff argues to the contrary.

As previously found in section A, Lorne's *Motion for Summary Judgment* is OVERRULED as to the argument that O.R.C. 1707.26 does not allow the Plaintiff to seek an injunction against Lorne. Lorne's *Motion for Summary Judgment* is GRANTED as to the argument that O.R.C. 3911.10 applies, and Plaintiff can only seek to recover the premiums paid on the insurance policies. Lorne's *Motion for Summary Judgment* is OVERRULED as to the constructive trust argument.

D. Mary Johanna Long's *Motion for Summary Judgment*

Long argues that O.R.C. 1707.26 does not allow for an injunction against her because she did not commit any securities violations. As previously argued, Long asserts that the "other equitable relief" phrase in the statute does not allow for an injunction against her.

Plaintiff argues to the contrary.

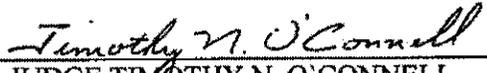
As previously found in section A, Long's *Motion for Summary Judgment* is OVERRULED as to the argument that O.R.C. 1707.26 does not allow the Plaintiff to seek an injunction against Long.

III. CONCLUSION

After duly considering the above matter, Plaintiff's *Motion for Summary Judgment* is hereby GRANTED in part and OVERRULED in part, as outlined in this Decision. Mary Johanna Long's *Motion for Summary Judgment* is hereby OVERRULED, as outlined in this Decision. Lorne Lee

Dillabaugh's *Motion for Summary Judgment* is GRANTED in part and OVERRULED in part, as outlined in this Decision. Alice Jane Dillabaugh's *Motion for Summary Judgment* is GRANTED in part and OVERRULED in part as outlined in this Decision.

SO ORDERED:



JUDGE TIMOTHY N. O'CONNELL

Copies of this Order were sent today by ordinary mail to all persons listed below.

CHERYL R HAWKINSON/DENNIS SMITH
ASSISTANT ATTORNEYS GENERAL
30 EAST BROAD STREET 26TH FLOOR
COLUMBUS, OH 43215-3428
(614)-466-2980
Attorney for Plaintiff(s)

KIMBERYL H MAYHEW
ATTORNEY(S) AT LAW
500 PERFORMANCE PLACE
109 N MAIN ST
DAYTON, OH 45402
(937)-228-7104
Attorney for Defendant(s)

W. RANDALL ROCK
ATTORNEY(S) AT LAW
34 N. MAIN STREET, STE. 811
DAYTON, OH 45402
(937)-224-7625
Attorney for Defendant(s)

GREGORY H MELICK
ATTORNEY(S) AT LAW
1200 LeVeque Tower
50 W. Broad St.
Columbus, Ohio 43215-3374
Attorney for Defendant(s)

JEFFREY S SHARKEY
ATTORNEY(S) AT LAW

500 COURTHOUSE PLAZA, SW
10 NORTH LUDLOW STREET
DAYTON, OH 45402
(937)-227-3747
Attorney for Defendant(s)

RALPH KOHNEN/ERIC COMBS
ATTORNEY(S) AT LAW
425 WALNUT ST., SUITE 1800
CINCINNATI, OHIO 45202-3957
Attorneys for Defendant(s)

Sherri Peterson, Bailiff (937) 225-4416

File copy

1707.26 Injunction against violations.

Whenever it appears to the division of securities, upon complaint or otherwise, that any person has engaged in, is engaging in, or is about to engage in, any deceptive, fraudulent, or manipulative act, practice, or transaction, in violation of sections 1707.01 to 1707.45 of the Revised Code, the director of commerce may apply to a court of common pleas of any county in this state for, and upon proof of any of such offenses such court shall grant an Injunction restraining such person and its agents, employees, partners, officers, directors, and shareholders from continuing, engaging in, or doing any acts in furtherance of, such acts, practices, or transactions, and may order such other equitable relief as the facts warrant.

Effective Date: 11-19-1982

EXHIBIT 6

1707.27 Appointment of receiver.

If the court of common pleas is satisfied with the sufficiency of the application for a receivership, and of the sufficiency of the proof of substantial violation of sections 1707.01 to 1707.45 of the Revised Code, or of the use of any act, practice, or transaction declared to be illegal or prohibited, or defined as fraudulent by those sections or rules adopted under those sections by the division of securities, to the material prejudice of a purchaser or holder of securities, or client of an investment adviser or investment adviser representative, the court may appoint a receiver, for any person so violating sections 1707.01 to 1707.45 of the Revised Code or rules adopted under those sections by the division, with power to sue for, collect, receive, and take into the receiver's possession all the books, records, and papers of the person and all rights, credits, property, and choses in action acquired by the person by means of any such act, practice, or transaction, and also all property with which the property has been mingled, if the property cannot be identified in kind because of the commingling, and with power to sell, convey, and assign the property, and to hold and dispose of the proceeds under the direction of the court of common pleas. The court shall have jurisdiction of all questions arising in the proceedings and may make orders and decrees therein as justice and equity require.

Effective Date: 03-18-1999

EXHIBIT 7