

8th Circ. Sets Up Do-Over In Massive Trust Malfeasance Suit

By **Cara Salvatore**

Law360, New York (December 19, 2017, 7:06 PM EST) -- An Eighth Circuit panel has refused to reconsider its opinion bouncing a jury verdict over a massive Ponzi-like scheme involving funeral prepayments back to a trial court, moving the case closer to a thorough revisiting of the question of how much of the original \$390 million verdict — already reduced once — is still legally defensible.

The court denied the rehearing bid in a one-sentence order Friday: “The petition for rehearing by the panel is denied.”

The case arises out of the failure of the National Prearranged Services Inc., which sold funeral-prepayment contracts and, at least theoretically, deposited customers' prepayments into a trust that bought life insurance policies. On a beneficiary's death, the life insurance would pay out into the trust.

But both NPS and the two life insurance companies it worked with — Lincoln Memorial Life Insurance Co. and Memorial Service Life Insurance Co. — were connected to a St. Louis father and son who were convicted on charges linked to siphoning off hundreds of millions of dollars for themselves, leaving the trusts without enough money to pay funeral costs when beneficiaries died.

The receiver for all three companies then went after Allegiant Bank — and successor-in-interest PNC Bank — for a dereliction of its core duty of protecting the money residing in the trusts.

The scheme took place in multiple states, but in Missouri, the fraud often happened in transactions in which Lincoln would send NPS money as loans, backed by the life insurance policies that were themselves acting as collateral for NPS prepaid contracts, according to court papers. The Missouri wrinkle becomes important because in the Eighth Circuit's decision this summer, it decided that the verdict wrongly redressed damages that happened outside Missouri. It also said claims should have been tried to a judge.

Jo Ann Howard & Associates, the receiver for NPS and the two life insurance companies, did not dispute the location restriction in its rehearing bid, but asked the Eighth Circuit to delete one clause limiting damage recovery.

The original opinion said that the receiver could not recover damages “to the Missouri trusts after Allegiant's trusteeship.” But JAH said that Allegiant's trusteeship failure caused ongoing damage to the Missouri trusts even after Allegiant's trusteeship ended.

“The words suggest that PNC might not be liable for Missouri trust damages resulting from the breaches of trust Allegiant committed during its trusteeship, if those damages resulted after Allegiant's tenure. This issue was never briefed, and such a limitation on recoverable trust damages is unfounded in trust law,” JAH said in the rehearing petition.

“The panel expressed its intention not to tie the trial judge's hands in fashioning appropriate equitable remedies” when it gets the case back — but then accidentally went against that intention, JAH suggested, by preventing recovery of some damages traceable straight to Allegiant.

The losses attributable to Allegiant and occurring in Missouri were only about \$66 million, the Eighth Circuit said in its August opinion.

JAH lawyer Dan Reilly had told the jury in opening arguments in 2015, “More than a thousand times in that six years the people [who] stole the money sent a wire transfer to [Allegiant], said, 'Give us the money; we need some money out of the trusts.' Sometimes it was a thousand dollars. ... Sometimes it was a million dollars. Sometimes it was more than a million dollars. And this trust department, more than a thousand times, instead of saying, 'What do you need this money for, where are you sending this money, who's getting this money,' never asked those questions ... every single time while they were the trustee, when those crooks asked for the money, they gave it to them.”

Only two defendants ultimately went to trial. The jury awarded \$390 million against PNC, including some \$35.5 million in punitive damages. It also awarded \$100 million against the other defendant, Forever Enterprises Inc.

Forever owned Memorial, which owned Lincoln. Forever also owned Forever Network, an owner of many cemeteries and funeral services companies, according to the indictment against Doug Cassity. Memorial, Lincoln and NPS were the three Cassity-linked companies that were placed in receivership by a Texas state court.

The district judge scrapped part of the jury award against PNC Bank in late 2015, changing it to \$289,437,000. JAH told the Eighth Circuit the reduction was done to account for settlements that had been reached and paid out by co-defendants, notably U.S. Bank. But JAH says U.S. Bank’s payout for liability in the years 1989 to 1998 shouldn’t have affected PNC’s liability for other years, especially when, as here, plaintiffs “remain undercompensated.” Allegiant Bank was the trustee of NPS’ Missouri trusts from August 1998 to May 2004.

NPS organizer James Douglas “Doug” Cassity pled guilty in 2013; he and six others went to prison for defrauding more than 97,000 customers in at least 16 states, according to the FBI.

The Eighth Circuit said the trust claims should have been tried by a judge, not a jury, and said, “We do not dictate that the case be retried in its entirety. The district court is familiar with the evidence and may proceed based on the existing trial record as it sees fit, with receipt of additional evidence as the court deems appropriate.

U.S. Circuit Judges Colloton, Melloy and Shepherd sat on the panel for the Eighth Circuit.

PNC is represented by Stephen Raber, J. Andrew Keyes and Amy Saharia of Williams & Connolly LLP and James Bennett and Caitlin O’Connell of Dowd Bennett LLP.

The plaintiffs are represented by Daniel Reilly, Larry Pozner, Clare Pennington, Robert Kelly and Michael Robertson of Reilly Pozner LLP, Eric Magnuson of Robins Kaplan LLP, and Sean Connelly of Zonies Law LLC.

The case is Jo Ann Howard and Associates PC et al. v. National City Bank et al., case numbers 15-3872 and 15-3878, in the U.S. Court of Appeals for the Eighth Circuit.

— Additional reporting by Steven Trader and Brandon Lowrey. Editing by Dipti Coorg.