

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JO ANN HOWARD AND ASSOCIATES,)	
P.C., <i>et al.</i> ,)	
)	
Plaintiffs,)	
v.)	Cause No. 4:09-CV-01252-ERW
)	
J. DOUGLAS CASSITY, <i>et al.</i> ,)	
)	ORAL ARGUMENT REQUESTED
Defendants.)	

**MEMORANDUM IN SUPPORT OF DEFENDANTS NATIONAL CITY BANK,
U.S. BANK, NATIONAL ASSOCIATION, AND BMO HARRIS BANK'S
MOTION FOR PARTIAL SUMMARY JUDGMENT**

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INTRODUCTION

This case arises from the fraudulent, criminal actions of the Cassity family and their employees at NPS, Lincoln, and Memorial. The Cassitys' scheme operated nationwide in the nineteen states in which NPS issued pre-need contracts, and it took various forms across those nineteen states. *See, e.g.*, Third Am. Compl. ("TAC") ¶¶ 100-120, 121-137, 148-162 (D.E. # 916). Plaintiffs' claims against U.S. Bank, National Association ("U.S. Bank"), National City Bank ("National City")¹, and BMO Harris Bank ("BMO") (collectively, the "Missouri Trustees") involve but one aspect of NPS's operation: the trusts established by NPS to satisfy Missouri's statutory requirement that NPS maintain in trust a certain percentage of the funds it received from the sale of pre-need contracts in Missouri.

Plaintiffs claim that the Missouri Trustees breached various duties owed in their capacities as trustees, which, Plaintiffs allege, allowed the Cassitys "to pillage the trust assets." *Id.* ¶ 197. As this Court recently recognized and Plaintiffs confirmed, Plaintiffs' "claims concern alleged breaches of fiduciary duties owed by [the Missouri Trustees] in their management of certain [NPS] pre-need trust accounts, which led to *specific losses* on these accounts." Order, at 14 (D.E. # 1535) (emphasis added); *see also* Pls.' Opp'n to Mot. for Recons., at 2 (D.E. # 1601) ("The Court's description of Plaintiffs' claims, including its citations to Plaintiffs' complaint, is correct because the *crux* of Plaintiffs' claims is not based on Lincoln's solvency.").

Now that discovery has closed, however, Plaintiffs now want to change what they told the Court just four months ago. Plaintiffs' damages expert did not identify *any* "specific losses" to the Missouri Trusts. Instead, his damages opinion asserts that the Missouri Trustees are liable

¹ All references to National City include PNC Bank, N.A. All references to BMO include Southwest Bank and Marshall & Ilsley Trust Company. BMO does not join Part VII of this motion.

for *all* of the losses arising from the insolvencies of NPS and its insurance affiliates (Lincoln and Memorial)—which he calculates to be \$516 million. For example, the State Guaranty Associations (“SGAs”) are seeking to recover from the Missouri Trustees benefits they paid on Lincoln life insurance policies to persons *outside Missouri*, even though those policies were never trust assets. The Texas Health and Life Insurance Guaranty Association goes so far as to claim that the Missouri Trustees should reimburse it for approximately \$94 million it claims to have paid in 2011 to a third party to assume the remaining obligations of Memorial, even though Memorial did not issue any policies to the Missouri Trusts (or anyone else in Missouri) and was not even licensed in Missouri.

There is no basis in Missouri law to hold the Missouri Trustees liable for the nationwide collapse of NPS and its affiliates. Each Missouri Trustee’s duties extended to the assets in the trusts during its tenure and no further. By agreeing to serve as trustees of NPS’s Missouri trusts, the Missouri Trustees did not assume responsibility to protect assets outside the trusts or to guarantee NPS’s, Lincoln’s, and Memorial’s financial health. Under longstanding Missouri trust law, Plaintiffs’ damages, if any, are limited to the losses in the Missouri Trusts that were caused by a breach of duty by a Missouri Trustee. Plaintiffs are improperly seeking to foist the losses that resulted from the Cassitys’ nationwide scheme onto the Missouri Trustees for no reason other than their perceived deep pockets. The Court should enter summary judgment in part and rule that the Plaintiffs’ damages, if any, are limited to losses within the Missouri Trusts.

Many of Plaintiffs’ claims fail as a matter of law for separate reasons. *First*, under the plain language of the governing trust agreements, only NPS—not any individual pre-need purchaser or funeral home—is the trust beneficiary. Only NPS can sue to recover damages to the trusts caused by the trustees’ alleged breach of fiduciary duty. As a result, the SGAs, which

purport to assert claims against the Missouri Trustees “relating to” insurance policies assigned to them by individual purchasers or funeral homes, have no viable claim.

Even if *some* individual purchasers or funeral homes were trust beneficiaries and had a right to recover against the Missouri Trustees for breach of fiduciary duty, the SGAs’ claims fail for independent reasons. For one, the SGAs attempt to recover for payments made on life insurance policies issued outside Missouri to individuals to whom the Missouri Trustees did not owe any duties. For another, because Missouri purchasers and funeral homes had no rights under the life insurance policies issued to the Trusts, even assuming *arguendo* they had rights as trust beneficiaries, they have no claims “relating to” those policies to assign to the SGAs.

Second, under basic trust law, NPS cannot recover damages for actions that NPS, the trust beneficiary, authorized the trustees to take. The undisputed evidence establishes that NPS, acting through its management, authorized and benefitted from the very practices and transactions that Plaintiffs now claim to have breached the Missouri Trustees’ duties. Having approved specific actions taken by the Missouri Trustees, NPS (acting through its Special Deputy Receiver (“SDR”)) cannot now recover against the Missouri Trustees for those actions.

Third, the Missouri Trustees are not liable for the investment advisor’s admitted decision to invest trust assets in Lincoln life insurance policies. Under Missouri law and the trust agreements, the Missouri Trustees “shall be relieved of all liability” for any investment decisions made by an independent, qualified investment advisor. Whether Missouri law required the investment advisor to be independent of the trustee or of the pre-need seller, the undisputed evidence shows that the investment advisor, Wulf Bates & Murphy (“WBM”), was independent of both the Missouri Trustees and NPS. Accordingly, as a matter of law, the Missouri Trustees can have no liability for WBM’s decision to invest trust assets in Lincoln policies.

Fourth, Plaintiffs seek to hold the Missouri Trustees liable for conduct—their own or that of predecessor trustees—that preceded their trusteeships. Trust law is clear, however, that a trustee’s duties come into existence only when it assumes a trusteeship. Moreover, the governing trust agreements expressly state that the Missouri Trustees cannot be held liable for the acts of predecessor trustees.

Fifth, Plaintiffs cannot establish that the Missouri Trustees caused or are responsible for Plaintiffs’ claimed damages of \$516 million or alternative allocated amounts. With respect to these claimed damages, the only evidence is the speculative, self-contradictory opinion of Plaintiffs’ damages expert, Dr. Jonathan Arnold. Because his opinion is inadmissible, Plaintiffs’ damages claims necessarily fail.

Finally, the SDR purports to assert claims related to the Mount Washington and CSA Trusts even though other entities, not NPS, were the beneficiaries of these trusts. The SDR lacks standing to act for the beneficiaries of these trusts and thus cannot bring actions on their behalf.

In sum, basic principles of trust law and the governing trust agreements foreclose many of Plaintiffs’ claims against the Missouri Trustees. There is no basis in the law or the undisputed facts to permit Plaintiffs to present at trial a claim that the Missouri Trustees, notwithstanding their limited role and responsibilities, are responsible for the collapse of NPS, Lincoln, and Memorial. The Missouri Trustees urge this Court to grant summary judgment on the issues set forth in this Motion.

STATEMENT OF FACTS

The Cassity family perpetrated “a multi-million dollar, nationwide scheme arising from the sale of ‘pre-need’ funeral services and merchandise” that involved the systematic looting of cash from the Cassity family’s businesses and pre-need trusts established in certain states. TAC ¶¶ 1–2, 7. NPS, the centerpiece of this scheme, marketed pre-need funeral contracts in nineteen

states over a nearly thirty-year period. *See* TAC ¶¶ 2–3; Statement of Uncontroverted Material Facts (“SOF”) ¶ 153. The pre-need funeral contract was a three-party contract between NPS, the funeral home that would provide the funeral goods and services, and the individual purchaser of funeral goods and services. *See, e.g.*, Exs. 63-65.

In some states, including Missouri, NPS deposited part of the proceeds from sales of pre-need funeral contracts into trusts. *See* TAC ¶ 185. The trusts typically purchased life insurance policies from Lincoln, an NPS affiliate. *Id.* ¶ 228.75. In other states, NPS was not required to place funds in trust. Instead, when a consumer bought a pre-need contract, he or she applied for a life insurance policy from Lincoln or Memorial, another NPS affiliate. *See id.* ¶ 101.

Plaintiffs allege that NPS and its affiliates were “alter egos” of one another and the members of the Cassity family, as well as other individuals associated with or employed by NPS (collectively, “the Cassitys”). *Id.* ¶¶ 223-228. According to Plaintiffs, the Cassitys developed a “multi-state scheme to accumulate massive amounts of cash through the receipt of proceeds from the sale of pre-need funeral contracts.” *Id.* ¶ 91. This scheme had various components in different states. In states where consumers directly purchased life insurance, NPS employees falsified insurance applications to misrepresent the amount paid by the consumers so that NPS could pocket the difference. *Id.* ¶¶ 100-102, 106-110. In both trust states and states where the consumer directly purchased insurance, NPS, acting through its president Randy Sutton, took loans from Lincoln against insurance policies that NPS did not own. *Id.* ¶¶ 121-137.

In Missouri, Mark Twain Bank, Mercantile Trust Company, Allegiant Trust Company, and Marshall & Ilsley Trust Company served as trustees of five pre-need trusts established to hold the proceeds of NPS’s pre-need contract sales in Missouri. *See* TAC ¶¶ 70, 73, 75-76, 169.²

² Marshall & Ilsley (“M&I”), a predecessor in interest to BMO, also served as trustee in Iowa.

These trustees are predecessors in interest to the Missouri Trustees. Although the duration of each trustee's tenure varies on a trust-by-trust basis, *see* SOF ¶¶ 1-21, generally Mark Twain and Mercantile served as trustee between 1989 and 1998, Allegiant between 1998 and 2004, and Marshall & Ilsley between 2005 and 2006.

Under the trust agreements that governed the Missouri Trusts, the Missouri Trustees had limited duties and powers. *See generally* Exs. 1-4. For example, the trust agreements state that the trustee is accountable “*only* for the funds paid over to it by the Seller.” SOF ¶ 39; Exs. 1-4, ¶ 4.1 (emphasis added). The trust agreements permitted NPS to select an investment advisor to direct the investment of trust assets. SOF ¶ 31; Exs. 1-4, ¶ 2.2. In 1988, NPS selected Wulf, Bates & Murphy (“WBM”) as the investment advisor for the Missouri Trusts. SOF ¶ 114; Ex. 29; *see also* Exs. 82, 83. WBM served continuously as investment advisor for the Missouri Trusts until 2008. SOF ¶ 133. Once WBM was selected, the institutional trustee had no authority or discretion over investment decisions. *See* Exs. 1-4, ¶ 2.2. Pursuant to WBM's investment decision and direction, trust assets were used to purchase from Lincoln individual life insurance policies on the lives of pre-need contract purchasers.³ *See* SOF ¶¶ 134-135. The trusts were the owners and, virtually always, the beneficiaries of these policies. *See* SOF ¶¶ 70-71. WBM also directed a number of other investments. *See, e.g.*, SOF ¶ 99. NPS, through its officers, typically approved these investments. *See* SOF ¶¶ 90-107.

In summer 2007, regulators outside Missouri began investigating NPS, Lincoln, and Memorial and uncovered the Cassitys' fraudulent scheme. TAC ¶ 16. In October 2007, the Texas Department of Insurance (“TDI”) placed Lincoln and Memorial under confidential supervision. *Id.* NPS, Lincoln, and Memorial were ultimately determined to be insolvent. Ex.

³ The Missouri Trusts did not hold any insurance policies issued by Memorial, which was only licensed to do business in Texas. *See* SOF ¶¶ 170-171.

12, ¶ 1.2.4. The three companies were put into receivership in Texas and the federal government began a criminal investigation that resulted in the conviction of six individuals. TAC ¶ 17.

In the Texas receivership proceeding, a Special Deputy Receiver (“SDR”) was appointed for NPS, Lincoln, and Memorial. Because the Cassitys “so systematically drained the assets of NPS, Lincoln, and Memorial,” the NPS, Lincoln, and Memorial estates did not have sufficient assets to pay creditor claims. *Id.* ¶ 18. Following receivership, the SDR and a number of State Guaranty Associations (“SGAs”) jointly developed a plan to provide coverage for Lincoln and Memorial policies. *Id.* ¶ 19. Under the terms of the Liquidation Plan approved by the Texas court, the SGAs pay benefits on Lincoln and Memorial policies directly to the funeral homes providing services, even when a Missouri Trust was the policy owner and beneficiary. SOF ¶ 65; Ex. 12, ¶¶ 5.4.8. When the SGAs pay benefits under a policy, they receive an assignment only of claims “relating to” the insurance policies from the person receiving the benefits. SOF ¶¶ 63-64; Ex. 12, ¶¶ 9.1, 9.2.

The SDR and the SGAs assert claims against the Missouri Trustees in this case for breach of fiduciary duty and negligence.⁴ *See* TAC ¶¶ 394–409.1. These overlapping claims are premised on alleged breaches of duties that the Missouri Trustees owed in their capacities as trustees. *See id.* ¶¶ 400, 408. Plaintiffs allege that, as a result of the asserted breaches of duty, the Cassitys “manipulate[d] trust assets and siphon[ed] millions of dollars from the NPS pre-need trusts.” *Id.* ¶¶ 399, 407. This Court ruled that Plaintiffs’ “claims concern alleged breaches of fiduciary duties owed by [the Missouri Trustees] in their management of certain [NPS] pre-need trust accounts, which led to *specific losses* on these accounts.” Order at 14 (D.E. # 1535)

⁴ Plaintiffs style their negligence claim as “Negligence and Gross Negligence.” TAC at 176. However, Missouri courts do not recognize degrees of negligence. *Warner v. Sw. Bell Tel. Co.*, 428 S.W.2d 596, 603 (Mo. 1968).

(emphasis added). Plaintiffs' damages expert, however, did not identify the trust assets that Plaintiffs claim were improperly "siphon[ed]" from the trusts or quantify specific losses to the trusts. Instead, without examining when and why NPS, Lincoln, and Memorial became insolvent, he asserts that each Missouri Trustee is liable for all unpaid obligations and other losses arising from the insolvencies of NPS, Lincoln, and Memorial in 2008.

ARGUMENT

I. Summary Judgment Standard.

Summary judgment shall be granted "when the evidence viewed in the light most favorable to the nonmoving party presents no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *EEOC v. Audrain Health Care, Inc.*, 756 F.3d 1083, 1086 (8th Cir. 2014) (quotation marks omitted); *see also* Fed. R. Civ. P. 56(a). "The nonmovant must do more than simply show that there is some metaphysical doubt as to the material facts, and must come forward with specific facts showing that there is a genuine issue for trial." *Audrain Health Care*, 756 F.3d at 1086 (quotation marks omitted). Summary judgment may be granted on "part" of a claim. Fed. R. Civ. P. 56(a).

II. The Missouri Trustees' Liability (If Any) Is Limited to the Losses Suffered by the Missouri Trusts.

As discussed in the following Parts, Plaintiffs' claims against the Missouri Trustees are fatally flawed in many respects. Even assuming, however, that Plaintiffs have viable claims against the Missouri Trustees, there is a gaping mismatch between Plaintiffs' claims and the damages they seek. As a matter of fundamental trust law, a trustee that breaches its fiduciary duties is liable to the beneficiary for the amount required to restore the value of the trust property to what it should have been absent the breach. As this Court has recognized:

The TAC's claims concern alleged breaches of fiduciary duties owed by officers and directors of National City in their management of certain Lincoln

CONCLUSION

For the foregoing reasons, Defendants National City, U.S. Bank, and BMO Harris respectfully request that the Court grant summary judgment in part and hold the following:

1. The liability of each Missouri Trustee, if any, is limited to (a) loss in value of the trust property attributable to the trustee's breach of duty, (b) profit inuring to the trustee from such breach, or (c) loss of profit to the trust that would otherwise have accrued but for such breach. Accordingly, the Missouri Trustees are entitled to judgment as a matter of law on Plaintiffs' claims for the following categories of damages:
 - a. payments made or the actuarial value of future payments on Lincoln or Memorial policies;
 - b. the \$94.5 million that TLHGA claims to have paid a third party to assume the Memorial obligations;
 - c. NPS's purported growth payment liability under contracts with funeral homes;
 - d. amounts owed or projected to be owed on orphan contracts;
 - e. the amount owed by NPS to California purchasers;
 - f. the SGAs' administrative expenses; and
 - g. the SDR's administrative expenses. *See pp. 8-15, supra.*
2. The Missouri Trustees are entitled to judgment as a matter of law on the claims asserted by the SGAs on the following grounds:
 - a. Because pre-need purchasers and funeral homes are not trust beneficiaries, the SGAs were not assigned any claims against the Missouri Trustees, and the SGAs' claims against the Missouri Trustees are therefore dismissed. *See pp. 17-23, supra.*
 - b. Because pre-need purchasers and funeral homes outside Missouri were not trust beneficiaries, the SGAs cannot recover from the Missouri Trustees any payments made on policies that were not held in the Missouri Trusts. *See pp. 23-24, supra.*
 - c. Because pre-need purchasers and funeral homes inside Missouri did not have any rights under the Lincoln life insurance policies issued to the Missouri Trusts, they have no claims "relating to" those policies to assign to the SGAs. And, even if they did, the SGAs' claim fails for failure to prove damages. *See pp. 24-30, supra.*

- d. The SGAs are not entitled to recover their administrative expenses from the Missouri Trustees. *See* p. 30, *supra*.
3. The Missouri Trustees are entitled to judgment as a matter of law on the SDR's claims for damages arising from any transfer of funds from the trusts to NPS because NPS received such funds. *See* pp. 31-35, 38-41, *supra*.
4. The Missouri Trustees are entitled to judgment as a matter of law on the SDR's claims for damages arising from the following actions and practices because they were authorized by NPS:
 - a. the Missouri Trustees not taking custody of life insurance policies;
 - b. the Missouri Trustees transferring funds from the trusts pursuant to investment directions from WBM and/or transfer directions from NPS;
 - c. the Missouri Trustees permitting investments in Lincoln life insurance policies, assets purchased from Forever Enterprises above market value, debentures and promissory notes, distributions to affiliates, and the Caymus Fund;
 - d. the Missouri Trustees failing to prevent policy loans; and
 - e. the Missouri Trustees offsetting funds paid into the Trusts with death benefits paid out of the Trusts. *See* pp. 31-41, *supra*.
5. The Missouri Trustees are entitled to judgment as a matter of law on Plaintiffs' claim that they breached duties by purchasing Lincoln life insurance. The Missouri Trustees have no liability for WBM's decision to purchase Lincoln life insurance policies as trust assets. *See* pp. 41-47, *supra*.
6. The Missouri Trustees are entitled to judgment as a matter of law on Plaintiffs' claims that they are liable for:
 - a. Alleged negligence in accepting the trusteeships. *See* pp. 47-49, *supra*.
 - b. Alleged breaches of duty by predecessor trustees. *See* p. 50, *supra*.
7. National City and U.S. Bank are entitled to judgment as a matter of law on Plaintiffs' claims that they are liable either for all \$516 million in claimed damages or the *pro rata* damages figures calculated by Dr. Arnold. *See* pp. 51-52, *supra*.
8. The Missouri Trustees are entitled to judgment as a matter of law on Plaintiffs' claims for losses to the Mt. Washington and CSA Trusts because the SDR lacks standing to assert claims on behalf of the grantors or beneficiaries of these trusts. *See* pp. 52-53, *supra*.