

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

FILED
U.S. DISTRICT COURT
INDIANAPOLIS DIVISION
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SOUTHERN DISTRICT
OF INDIANA
LAURA A. BRIGGS
CLERK

Case No. IP00-1862-C-D/F

JAMES A. KNAUER as the Court Appointed)
Receiver for HEARTLAND)
FINANCIAL SERVICES, INC., and JMS)
INVESTMENT GROUP, LLC,)

Plaintiff,)

v.)

VALERIE CORK, RICHARD M. PAYNE,)
DANIEL G. DANKER, KENNETH R. PAYNE)
A/K/A DORIS PAYNE, WAYNE GAINEZ)
BENJAMIN STEINBERG, GARY MAY,)
BRADLEY BYTHEWAY,)
JOHN DOE # 1, JANE DOE # 1,)
JOHN DOE # 2, JANE DOE # 2,)
JOHN DOE # 3, and JANE DOE # 3,)

Defendants.)

MEMORANDUM IN SUPPORT OF MOTION
FOR PREJUDGMENT POSSESSION

Plaintiff, James A. Knauer, as the Court-Appointed Receiver for Heartland Financial Services, Inc., and JMS Investment Group, LLC (the "Receiver"), by counsel, submits the following Memorandum of Law in support of Motion for Prejudgment Order of Possession:

I. Factual Background

On August 21, 2000, the United States District Court for the Southern District of Indiana entered Orders appointing James A. Knauer as Receiver for Heartland Financial Services, Inc. and JMS Investments Group, LLC. Copies are attached as Exhibits "A" and "B". On September 15, 2000, the Receiver and Payne entered into an Agreed Stipulation allowing the Receiver to take possession and sell all personal property, boats, motorcycles, and vehicles titled to Kenneth R. Payne

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and Doris Payne. A copy is attached as Exhibit "C". On December 1, 2000, the Receiver filed a complaint under the above captioned case alleging certain fraudulent conveyances of Heartland Financial Services, Inc. and JMS Investments Group, LLC's property by and through Kenneth R. Payne.

Included in the complaint is a 1995 Cadillac with a VIN of 1G6KD52B3SU274090, hereinafter (the "1995 Cadillac"), which is titled in the name of the late Doris Payne. Kenneth R. Payne caused the vehicle to be titled in her name. A copy of the Official Indiana Title and Lien Record is attached as Exhibit "D". The car was abandoned at the Detroit International Airport and was subsequently impounded by the Wayne County Police on September 22, 2000 and is currently held in custody at the Wayne County Metro Impound Lot. As of December 27, 2000, storage fees for the 1995 Cadillac are \$1,060.00 and accrue at the rate of \$10.00 per day. The 1995 Cadillac is depreciating and is at risk of having its titled assigned to a new owner.

II. Plaintiff Will Likely Succeed on the Merits

Plaintiff seeks a finding that each Defendant in possession of each item of tangible personal property described in the complaint be ordered and directed to surrender such property to the Receiver. This portion of Plaintiff's complaint is essentially an action for replevin. A replevin action is a remedy designed to allow one to quickly recover property which has been wrongfully held or detained. State Exchange Bank of Culver v. Teague, 495 N.E.2d 262, 266 (Ind.App. 1986).

Indiana law will apply even though the 1995 Cadillac is presently detained in Michigan. Although there are no Indiana cases that directly address the choice of law issue in replevin

actions, in Autocephalous Greek-Orthodox Church of Cypres v. Goldberg and Feldman Fine Arts, Inc., the United States Court of Appeals for the Seventh Circuit looked to the choice of law principles Indiana generally applies to tort cases for guidance. Autocephalous Greek-Orthodox Church of Cypres v. Goldberg and Feldman Fine Arts, Inc., 917 F.2d 278, 286 (7th Cir.1990). In that case, the court applied the traditional *lex loci delicti commissi* rule as modified by the Indiana Supreme Court in Hubbard Manufacturing Co. Inc., v. Greeson, 515 N.E.2d 1071 (Ind. 1987). Under the traditional rule, the court chose the law of the state in which occurred “the last event necessary to make an actor liable.”

The modification to the traditional rule is applicable when the place of the tort bears little connection to the legal action and the traditional rule should be applied only when the place of the tort is also the place with the most significant contacts. Autocephalous Greek-Orthodox Church of Cypres, 917 F.2d at 286, citing Hubbard Manufacturing Co., Inc. at 1073-74. In fact, the Indiana Supreme court in Hubbard states that “choice-of-law rules are fundamentally judge-made and designed to ensure the appropriate substantive law applies” and that in cases where the place of the tort is significant and has the most contacts, the traditional rule serves well. Hubard Manufacturing Co., Inc. at 1073. The current rule in Indiana is that the traditional *lex loci delicti commissi rule* will be applied only where the place of the tort has a significant contact to the legal action. Consolidated Rail Corporation v. Allied Corporation, 882 F.2d 254, 256 (7th Cir.1989).

In this case, Defendant Kenneth R. Payne improperly purchased the 1995 Cadillac with Heartland Financial Services, Inc., and JMS Investment Group, LLC funds in Indiana, fraudulently conveyed it in Indiana, titled it in Indiana and used it in Indiana. As a result, the traditional *lex loci delicti commissi* rule as applied to torts should be applied to Plaintiff’s

replevin action making Indiana's substantive law regarding replevin applicable and proper in this case.

In Indiana, to recover property under a theory of replevin, the plaintiff must establish three elements: (1) its title or right to possession; (2) that the property is unlawfully detained; and (3) that the defendant wrongfully holds possession. Autocephalous Greek-Orthodox Church of Cypres v. Goldberg and Feldman Fine Arts, Inc., 917 F.2d 278, 290 (7th Cir.1990). These three elements are met. The 1995 Cadillac was purchased with Heartland Financial Services, Inc. and JMS Investments Group, LLC assets by Kenneth R. Payne. As a result, the 1995 Cadillac is rightfully owned by Heartland Financial Services, Inc. and JMS Investments Group, LLC. Further, the Order appointing Plaintiff as Receiver for Heartland Financial Services, Inc. and JMS Investments Group, LLC entitles Plaintiff to possession of the 1995 Cadillac. Further, Kenneth R. Payne caused the 1995 Cadillac to be titled in the Name of Doris Payne, now deceased. The sole purpose of the transfer was to conceal the 1995 Cadillac from Kenneth R. Payne's as well as Heartland Financial Services, Inc. and JMS Investments Group, LLC's creditors. The result of Kenneth R. Payne's action as to the 1995 Cadillac is that the car was and still is unlawfully detained from its rightful owners.

III. Conclusion

The 1995 Cadillac is property of Heartland Financial Services, Inc. and JMS Investments Group, LLC and Plaintiff has the right to possession. Indiana law governing replevin actions is applicable. The evidence supports the three requirements necessary to establish a cause of action

for replevin. As a result, Plaintiff will likely succeed on the merits. For the foregoing reasons, Plaintiff should be granted prejudgment possession of the 1995 Cadillac.

Respectfully Submitted,

KROGER, GARDIS & REGAS, LLP

By. 

William Bock, III, Atty. # 14777-49
Samuel D. Hodson, Atty. # 10842-41
Attorneys for Receiver, James A. Knauer

William Bock, III
Samuel D. Hodson,
Attorneys for Receiver
Kroger, Gardis & Regas, L.L.P.
111 Monument Circle, Suite 900
P.O. Box 44941
Indianapolis, Indiana 46244-0941

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing has been served upon the following parties by placing a copy of the same in the United States Mail, first class postage pre-paid, on this 12 day of December, 2000:

Paul A. Montoya
United States Securities and Exchange Commission
500 West Madison Street
Suite 1400
Chicago, Illinois 60661


Kara M. Washington
United States Securities and Exchange Commission
500 West Madison Street
Suite 1400
Chicago, Illinois 60661

Jeannette L. Lewis
United States Securities and Exchange Commission
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Indianapolis, Indiana 46204

Dexter B. Johnson
Mallon & Johnson, P.C.
19 S. LaSalle Street
Suite 1202
Chicago, Illinois 60603

Dennis Zahn
Symmes, Voyles, Zahn, Paul & Hogan
700 Jefferson Plaza
One Virginia Avenue
Indianapolis, Indiana 46204



Samuel D. Hodson, Esq.

EXHIBIT "A"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

UNITED STATES SECURITIES
AND EXCHANGE COMMISSION,

Plaintiff,

v.

KENNETH R. PAYNE, JOHANN M. SMITH,
DANIEL G. DANKER, CONSTANCE
BROOKS-KIEFER, HEARTLAND
FINANCIAL SERVICES, INC., and
JMS INVESTMENT GROUP, LLC.

Defendants.

Civil Action No.
IP00-1265 C

Judge J.D. Tinder

AGREED ORDER APPOINTING RECEIVER
FOR HEARTLAND FINANCIAL SERVICES, INC.

The Plaintiff, Securities and Exchange Commission (Commission) and
Defendants, Kenneth R. Payne (Payne) and Heartland Financial Services, Inc.
(Heartland), agree and stipulate as follows:

1. That the Court appoint a Receiver for the benefit of investors to marshal, conserve, protect, hold funds, operate and, with the approval of the Court, dispose of any wasting assets, wherever those assets may be found, of Heartland.
2. The Commission, Payne and Heartland submit for the Court's consideration as Receiver the following attorneys and consent to the appointment of any of them as Receiver over Heartland: Douglass G. Boshkoff, James A. Knauer, James M. Carr, Stephen W. Terry and Edmund M. Mahern. Copies of their qualifications are attached as

Exhibit A. Accordingly, the Court appoints James A. Krause as Receiver over Heartland in this matter.

3. The Receiver shall have the following powers and duties to fulfill his obligations:
 - A. Oversee the operations of Heartland.
 - B. Use reasonable efforts to determine the nature, location, and value of all assets and property owned by or in possession of Heartland.
 - C. Use reasonable efforts to determine the identity of all investors, amounts invested by investors, and payouts to investors in Heartland or persons who invested through Heartland, and communicate, as necessary, with the investors.
 - D. Engage and employ necessary professionals (Retained Personnel), with the approval of the Court, as the Receiver deems necessary to assist in his duties.
 - E. Take such action as necessary and appropriate to prevent the dissipation or concealment of any funds and assets or for the preservation of any such funds and assets of Heartland.
 - F. The Receiver shall have the authority to issue subpoenas to compel testimony of persons or production of records in a manner consistent with the Federal Rules of Civil Procedure and the Rules of the Court concerning any subject matter relating to the identification, preservation, collection or liquidation of assets of Heartland, and;
 - G. The Receiver may bring such legal actions based on law or equity in any state or federal court as he deems necessary or appropriate in discharging

his duties as Receiver.

4. In accordance with Local Rule 66.1(b), the Receiver shall file an inventory and appraisal of all property and assets in his possession or in the possession of others who hold possession as his agent, and in a separate schedule, an inventory of the property and assets of the estate not reduced to possession by him but claimed and held by others within sixty (60) days of his appointment as Receiver.
5. In accordance with Local Rule 66.1(c), within thirty (30) days after the filing of the inventory, and at regular intervals of three (3) months thereafter until discharged, the Receiver shall file reports of his acts and transactions in his official capacity as Receiver.
6. The Receiver and Retained Personnel are entitled to reasonable compensation and expense reimbursement from Heartland and related companies', including JMS Investment Group, Inc. (JMS) and Lincoln Fidelity Escrow Fund, LLC (Lincoln), assets. Such compensation shall be in amounts commensurate with the services performed by the Receiver and Retained Personnel and shall be subject to the approval of the Court. The Receiver and Retained Personnel shall apply to the Court for such compensation and expense reimbursement monthly and such amounts shall be paid from the Heartland, JMS and Lincoln funds and assets frozen by the Court's Order Preserving Funds and Other Assets and Order to Financial Institutions Freezing Accounts of Defendants, dated August 10, 2000.
7. The Receiver shall not be required to post bond or give an undertaking of any type in connection with his fiduciary duties and obligations in this matter unless and until this Court so orders.

8. The Receiver and Retained Personnel are entitled to rely on all outstanding rules of law and Court orders and shall not be liable to anyone for their own good faith compliance with any order, rule, law, judgment, or decree. In no event shall the Receiver or Retained Personnel be liable to anyone for their good faith compliance with their duties and responsibilities as Receiver or Retained Personnel, nor shall the Receiver or Retained Personnel be liable to anyone for any actions taken or omitted by them except upon a finding by the Court that they acted or failed to act as a result of misfeasance, bad faith, gross negligence, or in reckless disregard of their duties.
9. The Receiver shall establish a bank account or accounts to deposit Heartland, JMS and Lincoln frozen funds and any other funds recovered by the Receiver. The Receiver shall use such funds for any legitimate purpose consistent with the Receiver's powers and duties and this Order, including paying fees and expenses of the Receiver and Retained Personnel, as approved by the Court.
10. Payne and Heartland and its employees, are required to assist the Receiver in fulfilling his duties and obligations. As such, they must respond promptly and truthfully to all requests for information and documents from the Receiver. However, this requirement does not impinge on the Defendants' rights to assert any applicable privilege.
11. All investors, creditors, and other persons, and all others acting on behalf of any such investor, creditor or other persons, including sheriffs, marshals, other officers, deputies, servants, agents, employees and attorneys, are stayed from:

- A. Commencing, prosecuting, continuing or enforcing any suit or proceeding against Heartland property, except that such actions may be filed to toll any statutes of limitations;
- B. Using self-help or executing or issuing or causing the execution or issuance of any court attachment, subpoena, replevin, execution, or other process for the purpose of impounding or taking possession of or interfering with or creating or enforcing a lien upon any property owned by or in the possession of Heartland or the Receiver, where ever situated;
- C. Attempting to modify, cancel, terminate, call, extinguish, revoke or accelerate (the due date), of any lease, loan, mortgage, indebtedness, security agreement or other agreement with Heartland; and
- D. Doing any act to interfere with the taking control, possession, or management, by the Receiver, of Heartland property and assets and assets owned, controlled, or in the possession of the Receiver, or to in any way interfere with or harass the Receiver, or to interfere in any manner with the exclusive jurisdiction of this Court over Heartland property.

IT IS ORDERED.

John Daniel Tinder
Honorable John D. Tinder
United States District Judge

Dated: August 21, 2000.

The undersigned parties consent to the entry of the Agreed Order Appointing a Receiver
For Heartland Financial Services, Inc:

Counsel for Securities & Exchange
Commission

Kara M. Washington
Kara Washington
Securities & Exch. Comm.
500 W. Madison St., Suite 1400
Chicago, IL 60661
(312) 353-5479

Kenneth R. Payne 227-49
Kenneth R. Payne
Attorney for Kenneth Payne
and Heartland Financial Services
Kenneth R. Payne, individually
and on behalf of Heartland
Financial Services, Inc.

EXHIBIT "B"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

UNITED STATES SECURITIES
AND EXCHANGE COMMISSION,

Plaintiff,

v.

KENNETH R. PAYNE, JOHANN M. SMITH,
DANIEL G. DANKER, CONSTANCE
BROOKS-KIEFER, HEARTLAND
FINANCIAL SERVICES, INC., and
JMS INVESTMENT GROUP, LLC.

Defendants.

Civil Action No.
IP00-1265 C

Judge J.D. Tinder

**AGREED ORDER APPOINTING RECEIVER
FOR JMS INVESTMENT GROUP, LLC.**

The Plaintiff, Securities and Exchange Commission (Commission) and Defendants, Johann M. Smith (Smith) and JMS Investment Group, LLC (JMS), agree and stipulate as follows:

1. That the Court appoint a Receiver for the benefit of investors to marshal, conserve, protect, hold funds, operate and, with the approval of the Court, dispose of any wasting assets, wherever those assets may be found, of JMS, including all assets and bank accounts of Lincoln Fidelity Escrow Fund, LLC (Lincoln), an affiliated company of JMS.
2. The Commission, Smith and JMS submit for the Court's consideration as Receiver the following attorneys and consent to the appointment of any of them as Receiver over JMS: Douglass G. Boshkoff, James A. Knauer, James M. Carr, Stephen W.

Terry and Edmund M. Mahern. Copies of their qualifications are attached as Exhibit A. Accordingly, the Court appoints James A. Knauer as Receiver over JMS in this matter.

3. The Receiver shall have the following powers and duties to fulfill his obligations:
 - A. Oversee the operations of JMS.
 - B. Use reasonable efforts to determine the nature, location, and value of all assets and property owned by or in possession of JMS.
 - C. Use reasonable efforts to determine the identity of all investors, amounts invested by investors, and payouts to investors in JMS or persons who invested through JMS, and communicate, as necessary, with the investors.
 - D. Engage and employ necessary professionals (Retained Personnel), with the approval of the Court, as the Receiver deems necessary to assist in his duties.
 - E. Take such action as necessary and appropriate to prevent the dissipation or concealment of any funds and assets or for the preservation of any such funds and assets of JMS.
 - F. The Receiver shall have the authority to issue subpoenas to compel testimony of persons or production of records in a manner consistent with the Federal Rules of Civil Procedure and the Rules of the Court concerning any subject matter relating to the identification, preservation, collection or liquidation of assets of JMS, and;

G. The Receiver may bring such legal actions based on law or equity in any state or federal court as he deems necessary or appropriate in discharging his duties as Receiver.

4. In accordance with Local Rule 66.1(b), the Receiver shall file an inventory and appraisal of all property and assets in his possession or in the possession of others who hold possession as his agent, and in a separate schedule, an inventory of the property and assets of the estate not reduced to possession by him but claimed and held by others within sixty (60) days of his appointment as Receiver.

5. In accordance with Local Rule 66.1(c), within thirty (30) days after the filing of the inventory, and at regular intervals of three (3) months thereafter until discharged, the Receiver shall file reports of his acts and transactions in his official capacity as Receiver.

6. The Receiver and Retained Personnel are entitled to reasonable compensation and expense reimbursement from JMS and related companies', including Lincoln and Heartland Financial Services, Inc. (Heartland), assets. Such compensation shall be in amounts commensurate with the services performed by the Receiver and Retained Personnel and shall be subject to the approval of the Court. The Receiver and Retained Personnel shall apply to the Court for such compensation and expense reimbursement monthly and such amounts shall be paid from the JMS, Lincoln and Heartland funds and assets frozen by the Court's Order Preserving Funds and Other Assets and Order to Financial Institutions Freezing Accounts of Defendants, dated August 10, 2000.

7. The Receiver shall not be required to post bond or give an undertaking of any type in connection with his fiduciary duties and obligations in this matter unless and until this Court so orders.

