Nos. A-10-1336 and A10-1505

State of Minnesota
In Supreme Court

Fannie Mae,

Appellant,

v.

Andrew C. Grossman,

Respondents,

Heather Apartments Limited Partnership
d/b/a Vantage Lakes Apartments, Andrew C. Grossman,
The Home Depot Supply, Inc., Complete Pest Control, Inc.,
A Touch of Class Painting and Remodeling Company, LLC,
Sotelo Co., LLC, Wilmar Industries, a Division of Interline Brands, Inc.,
K & K Quality Roofing & Construction, and Sonshine Services, L.L.C.,

Defendants.

BRIEF OF *AMICUS CURIAE*
MINNESOTA BANKERS ASSOCIATION IN
SUPPORT OF APPELLANT FANNIE MAE

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INTRODUCTION AND PRELIMINARY STATEMENT

The Minnesota Bankers Association (MBA) is pleased to provide this Amicus Curiae Brief in support of the Appellant, Fannie Mae.[1] The MBA is filing this Brief pursuant to its previously filed Notice and Request for Leave to Participate as Amicus Curiae, and the Court's order, dated August 18, 2011, granting that request.

The MBA is a trade association representing the commercial banking industry in the State of Minnesota. The MBA was founded in 1889 and represents approximately 393 state and national banks located throughout the state. Its membership includes banks of all sizes, from independent community banks to large regional banks.

The legal issues in this case have broad implications for Minnesota's banking industry and its judgment creditors in general. The MBA is in full agreement with the analysis and conclusions in Appellant Fannie Mae's Brief. However, the arguments in this Brief will focus on the practical effect that the decision in this case will ultimately have on lenders. It is critical to the banking industry and to any credit relationship that the lender have realistic and predictable

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[1] This brief was not authored, in whole or in part, by counsel for any party in this action. No party other than the amicus curiae and its members made a monetary contribution to the preparation or submission of this brief.

means to enforce judgments, including those judgments obtained against debtors who happen to be trust beneficiaries. The Court of Appeal's decision in this case leaves judgment creditors without any realistic way to reach the admittedly solvent, but opportunistic, beneficiary debtor's assets. [2]

STATEMENT OF ISSUES

This brief focuses on the first of two issues as stated in Appellant Fannie Mae's Brief, page 1:

1. May a court enjoin the beneficiary of a spendthrift trust from transferring or disposing of proceeds he receives or may receive from the trust, where the injunction does not affect either the trust itself or the trust assets?

   The trial court held that it had such authority under Minn.Stat. § 575.05.

   The Court of Appeals reversed, holding that the district court lacked the authority to issue such an injunction before the beneficiary actually

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[2] Those issues outside the scope of the record are raised in the interests of fulfilling the role of Amicus Curiae by informing the Court "as to facts or situations which may have escaped consideration or to remind the court of legal matters which may have escaped its notice." Blue Earth County Pork Producers, Inc. v. County of Blue Earth, 558 N.W.2d 25, 30 (Minn. Ct. App. 1997), Cummings v. Koehnen, 568 N.W.2d 418, 424 (Minn. 1997).

received proceeds from the trust. Fannie Mae v. Heather Apts. Ltd. P'shp, 799 N.W.2d 638, 642 (Minn.App. 2011).

Most apposite authorities:

In re Trust Created by Moulton, 233 Minn. 286, 300-303, 46 N.W.2d 667, 674-76 (1951).

In re Trust Created Under Agreement with McLaughlin, 361 N.W.2d 43, 46 (Minn. 1985).

Morrison v. Doyle, 582 N.W.2d 237 (Minn. 1999).

Minn.Stat. § 575.05

STATEMENT OF FACTS

The MBA respectfully incorporates by reference the Statement of Facts set forth in the Appellant, Fannie Mae's, Brief.

ARGUMENT

I. GIVEN THE PREVALENCE AND EASE OF ELECTRONIC FUND TRANSFERS, JUDGMENT CREDITORS MUST BE ABLE TO OBTAIN ANTICIPATORY ORDERS; THEY CANNOT WAIT UNTIL THE BENEFICIARY DEBTOR "ACTUALLY RECEIVES THE PROCEEDS."

In this case, knowing full well that there was an eight million dollar judgment entered against him, the beneficiary debtor admitted that he transferred assets valued at more than eight million dollars to a Cook Island Trust. Appellant's Appendix, 30-33. Yet, the Court of Appeals held that "a district court may not, *before proceeds of a spendthrift trust are received by the beneficiary*, determine what the beneficiary may or may not do with the proceeds." Fannie Mae v. Grossman, 799 N.W.2d 638, 642 (Minn.App. 2011) (emphasis added).

Banks cannot extend credit if they have no practical means of enforcing their judgments. In 1930, this Court stated that the proceeds of a spendthrift trust are subject to the claims of a beneficiary's creditors *once the proceeds "come into the hands*" of the beneficiary. First Nat'l Bank of Canby v. Olufson, 181 Minn. 289, 294, 232 N.W.337, 339 (1930) (emphasis added); see also Erickson v. Erickson , 197 Minn. 71, 77 – 79, 266 N.W. 161, 163-64 (1936) (proceeds may not be reached by creditors until the beneficiary actually receives the proceeds); In re Trust Created by Moulton, 233 Minn. 286, 300-303, 46 N.W.2d 667, 674-76 (1951) (proceeds of spendthrift trust are inviolable until actually received by the beneficiary).

Today, electronic banking, and more specifically, a consumer's ability to direct electronic fund transfers from virtually anywhere, means that the proceeds of a trust are routinely distributed without ever "coming into the hands" of, or "actually being received" by, the beneficiary. The trustee has control and discretion to transfer the funds and if that transfer is electronic, discretion is exercised and the transfer initiated unbeknownst to any creditor. Within seconds, the procedures for the originator's bank, the recipient's bank and any intermediary banks are set in motion and the distribution is made.

Of course, the actual recipient of the distribution as an electronic fund transfer may not ever be the beneficiary debtor. Still, the beneficiary debtor easily has control over and the ability to direct the funds. Identifying the point at which the beneficiary debtor has the "funds in their hands" is impossible. A judgment creditor would not know that the distribution occurred, that the beneficiary received funds, when the funds were wired or where they were directed. The reality of electronic banking requires that the Court revisit the point at which a judgment creditor may "reach" or influence the disposition of funds within the beneficiary's control. It must be at a different point than that first enunciated 90 years ago.

By itself, electronic banking has an enormously detrimental impact on a creditor's ability to pinpoint a beneficiary's actual or constructive receipt of funds. At the disposal of an opportunistic debtor, the technology renders a judgment

almost meaningless. For these reasons, a judgment creditor should have the ability to request, and the district court have the authority to grant, an anticipatory order that prohibits transfer or interference with the funds. In this case, the district court's order does not direct the conduct or limit the activity of anyone other than the beneficiary. An anticipatory order is the only practical method for influencing disposition of the funds and the only way to "reach" them at all.

II. THE CREDIT RELATIONSHIP IS BASED ON THE COURT'S AUTHORITY TO ENFORCE ITS JUDGMENTS; BANKS RELY ON CONSISTENT APPLICATION OF THE STATUTES GOVERNING CREDITORS' RIGHTS.

Banks rely on the judicial system to enforce existing laws and regulations that govern the credit relationship. Lenders make credit decisions and price loans based on their predicted ability to recover collateral and enforce judgments. A critical part of that decision making process is a bank's knowledge that the courts are available to enforce not just the terms of the loan contract, but also to enforce creditor's rights when and if they must collect on their judgments.

In this case, the lender sued the borrower and obtained a judgment. Armed with its judgment, the lender then proceeded under Minnesota statutes to docket the judgment in Hennepin County so that it could be enforced. At its expense, the lender, a judgment creditor, also used the procedures in place to assist a creditor in identifying assets. Because the debtor admitted that he had already transferred over eight million dollars worth of assets offshore, the district court entered an

order under Minn.Stat. § 575.05 that prospectively enjoined him from transferring or disposing of any interest in money, property, or other assets "that he has received, is due to receive, or will receive" as a result of the death of his father. Appellant's Brief, p. 12. The Court of Appeals did not analyze the statute's language, but held that Minn.Stat. § 575.05 did not authorize "orders affecting proceeds of a spendthrift trust that may be distributed to a beneficiary in the future." Fannie Mae v. Grossman, 799 N.W.2d 638, 642 (Minn.App. 2011).

The statute provides:

> The judge may order any of the judgment debtor's property in the hands of the judgment debtor or of any other person, or due to the judgment debtor, not exempt from execution, to be applied toward the satisfaction of the judgment. . . . *The judge may [also] forbid a transfer or other disposition thereof, or any interference therewith,* until further order therein (emphasis added).

Minn.Stat. § 575.05 (2010).

If a borrower defaults on a loan, the lender's decision to pursue a judgment is based in large part on whether the lender will be able to reach the debtor's assets, including property that is due a debtor. In Minnesota, after reading the language of Minn.Stat. § 575.05, the lender reasonably relies on a court's ability to prohibit a beneficiary debtor from transferring or otherwise diverting funds "in the hand of any other person" or due them. In this case, the district court's order applied only to funds when and if the beneficiary debtor received them.

The source of the funds should not impair the district court's authority to enter a prospective order. If banks are faced with additional hurdles before they are able to recover their judgments, based on the source of the funds that the debtor may receive or has received, they will need to implement additional procedures at every stage of the credit relationship. If that is necessary, banks will pass those costs on to all banking consumers.

It is not necessary for the courts to create a safe haven for beneficiary debtors who are due to receive, but may never actually receive, funds from a spendthrift trust. Absent the power to enjoin the debtor, the judgment creditor is without any practical means of enforcing the judgment. Unless the debtor feels morally obligated to satisfy the judgment against him, there is no incentive to "actually receive" the distribution, though he controls the funds and may direct them overseas. Insulating the funds in that manner cannot be traced to the settlor's intent.

CONCLUSION

The MBA respectfully requests that the Court reverse the Court of Appeal's decision. The district court's order pursuant to Minnesota Stat. § 575.05, enjoining the debtor from interfering with or transferring funds that he may receive as a distribution from a spendthrift trust was authorized by the statute and consistent with Minnesota case law on its spendthrift trust doctrine. As a practical

matter, the prospective order was also necessary if the judgment creditor is to have any hope of collecting its judgment.

Respectfully Submitted,

Dated this 26th day of September, 2011.

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FORM AND LENGTH CERTIFICATION

This brief was drafted using Word 2007. The font is Times New Roman, proportional 13-point font, which includes serifs. The word count of this brief is 1,895.

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