



# TRIAL BRIEFS

The newsletter of the Illinois State Bar Association's Section on Civil Practice & Procedure

## Common-Law Doctrine trumps Fraudulent Transfer Act in holding decedent self-settlor to irrevocable pledge

By George S. Bellas and A. Patrick Andes

In *Rush University Medical Center v. Sessions*, 2012 IL 112906, the Illinois Supreme Court overturned the first district appellate court's ruling in favor of a self-settled trust denying plaintiff Rush University Medical Center's claim to a \$1.5 million irrevocable pledge made by the settlor before he died, holding the trust was void as to existing and future creditors and Rush was entitled to the funds. The Court also disagreed with the appellate court's conclusion that the common-law doctrine holding self-settled trusts void as to creditors was supplanted by the Illinois Fraudulent Transfer Act. Rather, the Court rea-

soned that, if the Illinois legislature had intended for the Illinois Fraudulent Transfer Act to supplant this common law doctrine, then this would have been expressly stated in the statute. The Court appeared to sidestep the issue of whether it was required to comply with the controlling law provision in the trust document, presumably relying on Illinois public policy and/or well-known federal bankruptcy cases such as *In re Portnoy*<sup>1</sup> and *In re Brooks*.<sup>2</sup>

In 1994, Robert W. Sessions created a spend-

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## The Illinois Supreme Court clarifies appellate jurisdiction during pendency of foreclosure

By Robert Handley

### **EMC Mortgage Corporation v. Kemp, 2012 IL 113409**

According to the Illinois Supreme Court's majority opinion, the issue in this case is whether Appellate Court jurisdiction exists to consider a challenge to an order issued during the pendency of a mortgage foreclosure action. According to the dissenting opinion, the issue is whether the Appellate Court had jurisdiction to consider an *Illinois Supreme Court Rule 304(a)* appeal challenging a judgment of foreclosure and sale in a residential mortgage foreclosure action. The Appellate Court concluded that Appellate Jurisdiction was lacking. The majority Illinois Supreme Court opinion affirmed over the

dissent of Justice Karmeier.

### **Facts**

In 2005, Defendant, Kemp mortgaged her residence in Naperville. The loan was sold to EMC Mortgage in 2006. She defaulted on the loan and EMC Mortgage filed suit to foreclose in Du Page County. Eventually EMC filed a Motion for Summary Judgment. The Motion was granted in April of 2009. The Judgment of Foreclosure and Sale Order was entered on June 2, 2009.

Thereafter, Kemp filed a bankruptcy. The bankruptcy stay was eventually lifted and the judicial sale was set for October 5, 2010. On the

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## Common-law Doctrine trumps Fraudulent Transfer Act in holding decedent self-settlor to irrevocable pledge

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thrift trust for his own benefit, the written instrument specifying he was both the settlor and lifetime beneficiary and that the trust was to be governed by the law of the Cook Islands in the South Pacific. He put both his 99% limited partnership interest in a Colorado limited partnership and his Hinsdale, Illinois property into the trust. The trust also named Sessions as the "Trust Protector," giving him absolute power to remove and replace trustees and to veto their discretionary actions. In 1995, Sessions made an irrevocable \$1.5 million pledge to the plaintiff, Rush University Medical Center, for the erection of a president's house on Rush's Chicago campus. Executed codicils to his will specified any unpaid amount remaining on the pledge would inure to Rush upon Sessions' death. Sessions also stated in a letter to Rush in 1996 that the pledge was binding upon his "estate, heirs, successors and assigns." In reliance, Rush built the building, which thereafter bore Sessions' name.

In early 2005, Sessions was diagnosed with late-stage lung cancer and blamed Rush for not diagnosing his condition earlier, and on March 10, 2005, executed a new will revoking all previous wills and codicils with no provision for payment to Rush. Six weeks later he died. Filing suit first against the estate and then the Trustees, Rush sought to reach the trust funds to satisfy the debt. In the initial proceeding against the estate, Rush was granted summary judgment in its favor, and that decision was upheld by the appellate court. In the later supplemental proceeding against the Trustees, in which the Attorney General filed a joinder with the plaintiff, Rush added a third count charging fraudulence per se based on Sessions' transfer of assets to a self-settled spendthrift trust, and the circuit court entered summary judgment in Rush's favor. The appellate court, however, overturned, accepting the Trustees' argument that the Illinois Fraudulent Transfer Act, which has specific procedures for proving a debtor transfer as fraudulent, supplanted the common law. Rush appealed on Count III and the Illinois Supreme Court granted certiorari.

A spendthrift trust, typically established to curtail the spending of undisciplined beneficiaries, has the advantage of preventing creditors of the beneficiaries from attaching

the trust funds. However, under the Restatement (Third) of Trusts and the majority common-law rule followed by nearly all states, a spendthrift trust set up by the settlor for his own benefit ("self-settled") is void against current and future creditors. Restatement (Third) of Trusts § 58 cmt. b (2003).

The Court ruled that, under longstanding legislative principles, common-law rights and remedies "remain in full force in this state unless expressly repealed" or modified by the legislature. Even if a conflict exists, there must be an "irreconcilable repugnancy" between the statute and common law such that both cannot be applied. Because such an express derogation of common law does not exist in the Illinois Fraudulent Transfer Act, the Court reversed the appellate court's ruling and held in favor of Rush. Interestingly, although the settlor's freedom to designate controlling law is an integral part of trust law, the Court seemed to bypass the issue of whether it must apply the law of the Cook Islands pursuant to Sessions' designation of the Cook Islands as controlling law. The Court appeared to follow the line of well-known bankruptcy cases such as *Portnoy* in assuming that Session's offshore choice of law was merely a ruse to bar creditors. Far from bankrupt, however, the trust assets were worth \$18.9 million at the time of Sessions' death. ■

The authors are with the firm of Bellas & Wachowski in Park Ridge

1. 217 B.R. 98 (Bankr. D. Conn. 1998)
2. 201 B.R. 685 (Bankr. S.D.N.Y. 1996).



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## The Illinois Supreme Court clarifies appellate jurisdiction during pendency of foreclosure

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date of the sale, Kemp filed an Emergency Motion to Vacate the Judgment under 735 ILCS 5/2-1401, arguing that the Judgment should be vacated and the case should be dismissed pursuant to 735 ILCS 5/2-619. Although a 45-day stay of the sale was granted, the Trial Court denied the Motion to Vacate and the Motion to Dismiss. The Trial Court's Order denying the Motions included *Illinois Supreme Court Rule 304(a)* language.

Thereafter, Kemp filed a Motion to Reconsider. On November 16, 2010, the Court denied that Motion and again added *Illinois Supreme Court Rule 304(a)* language to the Order. Kemp then filed her Notice of Appeal seeking review of the Court's Orders of October 5, 2010, denying her Motions and November 16, 2010, denying her Motion to Reconsider. After the case was fully briefed, the Appellate Court for the 2nd District dismissed Kemp's Appeal for lack of jurisdiction.

### Analysis

#### Majority Opinion

The Illinois Supreme Court began its analysis by reviewing *Ill. Const. 1970, art. VI, § 6* which provides that Appeals "from final judgments of a Circuit Court are a matter of right to the Appellate Court." The Court further noted that the Constitution grants the Illinois Supreme Court the right to "provide by rule for appeals to the Appellate Court from other than final judgments." Therefore it was concluded that, without an applicable rule, Appellate Courts are without jurisdiction to review judgments, orders, or decrees which are not final.

The Court then went on to reiterate the proposition that a Judgment of Foreclosure and Sale is not a final and appealable order. Until the Court enters an Order approving the sale, all of the issues between the parties have not been resolved. Therefore, in the Trial Court, a *Section 2-1401* Motion to Vacate was improper because there was no final or appealable order yet entered in the case.

The Court also found a second problem with Kemp's Appeal. The Court stated the "while a judgment of foreclosure is a final order, without *Rule 304(a)* language added to it, the judgment is not appealable" (*citations omitted*). Therefore, the Judgment itself was not appealable. Kemp did not seek to make the judgment of foreclosure appealable by

adding the *Rule 304(a)* language.

Although Kemp conceded the foregoing, she still contended that the Trial Court's *304(a)* language granted Appellate Jurisdiction on those two Orders. She also argued that the Court's Order was void and that a Petition to Vacate a void Order may be made at any time.

The majority found both of those contentions "meritless". The majority held that the inclusion of the special finding in Trial Court's Order cannot confer Appellate Court Jurisdiction if the Order is in fact not final. Also, although as a general rule a void Order can be attacked at any time by a person affected by it, that fact alone does not confer Appellate Jurisdiction on a reviewing court, if such jurisdiction is otherwise absent. The proposition that a void Order can be attacked at any time merely allows a party the ability to always raise the issue but only where the Appellate Court Jurisdiction exists. If there is no Supreme Court Rule that permits the Appeal, the Appellate Court has no jurisdictional basis to consider even a void Order.

#### Dissenting Opinion

The Dissent, however, would have reversed the Appellate Court. Justice Karmeier began his analysis by noting that whether an Appellate Court has jurisdiction is a *de novo* question of law. He went on to agree that a Judgment of Foreclosure and Sale is not a final Order because it does not dispose of all of the issues between the parties and does not terminate the litigation and it is the Order confirming the sale, not the Judgment of Foreclosure that is the final appealable Order.

However, contrary to the majority, he believes that the Illinois Supreme Court Rules do permit a review in this instance. Because the Trial Judge made a finding under *Supreme Court Rule 304(a)* that there was not just reason for delaying either enforcement or appeal or both, and made such a finding twice, the Appellate Court should not have invoked "various technical obstacles to preclude the use of *304(a)* findings."

He went on to note at an interlocutory order may be reviewed, modified, or vacated at any time before a final judgment. Therefore, as long as the Judgment of Foreclosure was "interlocutory" Kemp had the right to ask that the Judgment of Foreclosure and Sale

be set aside. Any procedural problems attendant to her motion were not raised by EMC's counsel or noted by the Trial Court. The clear objective of her Motion was to have the Court reconsider and reject its prior ruling on the Foreclosure Judgment. Therefore, the Dissent would treat both motions as Motions to Reconsider the Judgment of Foreclosure and not be as hyper-technical in its analysis of the *2-1401* title of the Motion.

The Dissent also noted that an Appeal from an Order disposing of a Motion to Reconsider which contains *Rule 304(a)* language has always been treated as having been intended to cover the original Judgment (*citations omitted*). Finally, the Dissent noted that when the case is remanded to the Trial Court, Kemp will be free to file another Motion to Reconsider the Judgment of Foreclosure and Sale. If it is properly denominated as such, she may again request the Trial Court make the appropriate findings under *304(a)*. Therefore, if that occurs, any procedural problems perceived by the majority would be eliminated and she would be free to proceed with her Appeal to the Appellate Court and much time would have been wasted.

### Conclusion

There are several "take aways" from this Opinion. Here are a few. Even though the majority found that a "judgment of foreclosure is a final Order," without *Supreme Court Rule 304(a)* language, it is not appealable. Even though a void Order can be attacked at any time, that fact does not confer Appellate Jurisdiction. A *Section 2-1401* Motion to Vacate is improper when seeking to vacate an order that is not final and appealable.

This opinion provides an excellent refresher course on the appealability of interlocutory Orders generally, and of Orders in Foreclosure cases particularly. In this climate where Homeowners often raise technical issues that result in delays in foreclosure proceedings in order to remain in their residences rent-free as long as they can, appeals may be becoming more prevalent. Thus a thorough understanding of the finality of orders is essential. ■

Mr. Handley is with the firm of BURKE & HANDLEY, in Downers Grove, Illinois.

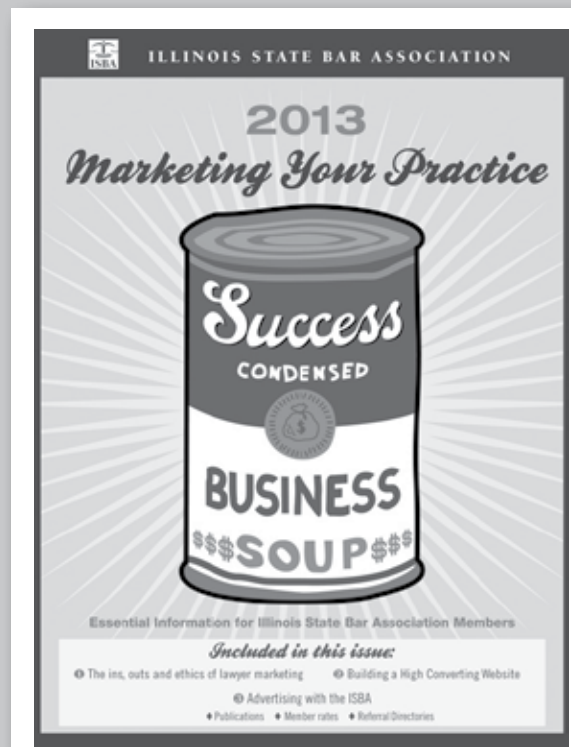


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**Friday, 4/5/13 - Chicago, ISBA Regional Office**—Privacy & Security: Online Marketing and Other Hot Topics. Presented by the ISBA Antitrust & Unfair Competition Section. Half day AM.

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**Friday, 4/12/13 – Rockford, NIU**—Practicing in Juvenile Court: What to Expect, What to Do, and How to Help Your Clients. Presented by the Child Law Section. 8:45 – 5:00.

**Monday, 4/15/13 – Live Studio Webcast (Tape in CLASSROOM C)**—Managing E-Discovery When Resources Are Limited. Presented by the Federal Civil Practice Section and

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**Tuesday, 4/16/13 – Teleseminar**—Structuring Preferred Stock and Preferred Returns in Business and Real Estate Transactions. Presented by the Illinois State Bar Association. 12-1.

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**Thursday, 4/18/13 - Chicago, Loyola University Chicago School of Law**—Civilty and Professionalism in 2013. Presented by the ISBA Bench and Bar Section. 9-4:30.

**Thursday, 4/18/13 – Teleseminar**—Religious Accommodation in Workplace. Presented by the Illinois State Bar Association. 12-1.

**Friday, 4/19/13 - Chicago, ISBA Regional Office**—Emerging Healthcare Delivery Models. Presented by the ISBA Health Care Section. 8:30-12:45pm.

**Friday, 4/19/13 – Live WEBCAST**—Emerging Healthcare Delivery Models. Presented by the ISBA Health Care Section. 8:30-12:45pm.

**Friday, 4/19/13 - Lombard, Lindner Conference Center**—What Real Estate Attorneys Should Know: Residential and Small Business Leases and Estate Planning and Administration. Presented by the ISBA Real Estate Law Section. 9-4:15

**Friday, 4/19/13 – Monmouth, Monmouth College, Stockdale Center Highlander Room**—UCC Security Interests: Creating, Perfecting and Liquidating. Presented by the ISBA Commercial Banking, Collections

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**Thursday, 4/25/13 – Webcast. SOLUTIONS IN CORRECTIONS: USING EVIDENCE-BASED KNOWLEDGE**—Presented by the ISBA Standing Committee on Corrections and Sentencing, Co-Sponsored by the ISBA Criminal Justice Section; State's Attorneys Appellate Prosecutor; Illinois Public Defender Association; and the Illinois State University Criminal Justice Sciences Department. (Webcast Replay of program originally recorded on October 26, 2012). Noon – 2:00 (or what it edits down to). Moderator: Judge Mark Scheuring

**Thursday, 4/25/13 - Chicago, ISBA Regional Office**—Basic Estate Planning Bootcamp. Presented by the ISBA Trust and Estates Section. All Day.

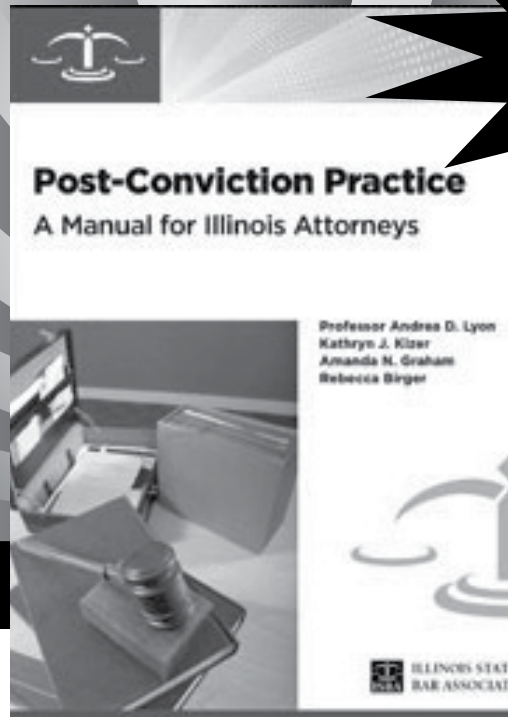
**Friday, 4/26/13 - Chicago, ISBA Regional Office**—Civil Practice and Procedure Update - 2013. Presented by the ISBA Civil Practice and Procedure Section. All Day.

**Friday, 4/26/13 – Collinsville, Gateway Center**—Navigating the Residential Foreclosure Maze - 2013. Presented by the General Practice, Solo & Small Firm Section. All Day.

**Tuesday, 4/30/13 – Live Webcast (Room C for Big Panel of 4)**—Arbitration Under the Federal Arbitration Act: A Primer. Presented by the Federal Civil Practice Section. Noon – 2:00 pm.

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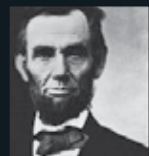
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