[Cite as *Zurz v. Meyhew*, 2010-Ohio-5273.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

KIMBERLY A. ZURZ, DIRECTOR, OHIO DEPARTMENT OF COMMERCE	:	
Plaintiff-Appellant/ Cross-Appellee	:	C.A. CASE NO. 23834, 23835, 23842
v.	:	T.C. NO. 08CV5911
KIMBERLY MAYHEW, ESQ., ADMINISTRATOR OF THE ESTATE OF ROY G. DILLABAUGH, et al.	:	(Civil appeal from Common Pleas Court)
Defendants-Appellees/ Cross-Appellants	:	

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O P I N I O N

Rendered on the 29th day of October, 2010.

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FROELICH, J.

{¶ 1} This appeal arises out of a lawsuit brought by Kimberly A. Zurz, Director of the Ohio Department of Commerce ("the Director"), in response to a Ponzi scheme committed by Roy A. Dillabaugh, now deceased, who operated as The Dillabaugh Group. It is now undisputed that Dillabaugh made written and oral false statements to approximately 146 investors in the selling of unregistered securities. The Director alleged that, upon Dillabaugh's death, the investors' funds were converted into insurance proceeds of which Dillabaugh's wife, son, and secretary were named beneficiaries.

{¶ 2} The Director appeals from a judgment of the Montgomery County Court of Common Pleas, which held, among other things, that the Director was a creditor under R.C. 3911.10 and, accordingly, she could attempt to recoup from the proceeds of those life insurance policies only the amount of the life insurance premiums paid by Dillabaugh with funds obtained through securities fraud. The Director claims that the trial court erred in finding that she was prohibited from pursuing all of the proceeds of the insurance policies.

{¶ 3} Two beneficiaries of the life insurance policies – Alice Jane Dillabaugh, Roy Dillabaugh's wife ("Mrs. Dillabaugh"), and Mary Johanna Long, secretary of The Dillabaugh Group – cross-appeal. Mrs. Dillabaugh and Ms. Long both claim that the Director could not seek injunctive and other equitable relief against them under sections 1707.26, 1707.261, and 1707.27 of the Ohio Securities Act, because they did not fall within the class of people that R.C. 1707.26 authorized the Director to sue. Mrs. Dillabaugh further asserts that the Director did not meet the requirements for injunctive relief.

{¶ 4} Lorne Lee Dillabaugh, Dillabaugh's son, and Hartford Life and Accident

Insurance Company ("Hartford"), which holds approximately $3 million in undistributed insurance proceeds in its accounts, did not cross-appeal.

{¶ 5} For the following reasons, the trial court's judgment will be reversed in part, affirmed in part, and the matter will be remanded for further proceedings consistent with this opinion.

I

{¶ 6} According to the Director's verified complaint, from August 23, 1984, until April 13, 2001, Dillabaugh was licensed by the Ohio Department of Commerce, Division of Securities ("the Division"), as a securities salesperson.[1] The brokerage firm for which Dillabaugh worked terminated his employment in March 2001, because Dillabaugh sold a certificate of deposit and used the monies for his own personal use. Dillabaugh was not licensed to sell securities after April 13, 2001.

{¶ 7} From 1994 to 2007, Dillabaugh operated an unincorporated business entity, The Dillabaugh Group, which purported to offer investment services. The Dillabaugh Group was never licensed by the Division to sell securities in the State of Ohio, and none of The Dillabaugh Group's securities were registered with the Division. Dillabaugh held himself out as the CEO of The Dillabaugh Group. Roy Dillabaugh died on November 27, 2007.

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[1]Although the Estate of Roy Dillabaugh filed an Answer, the Estate did not contest the Director's motion for summary judgment or argue that Roy Dillabaugh did not violate the Ohio Securities Act. In addition, none of the beneficiaries of Dillabaugh's life insurance policies contests the Director's claims that Dillabaugh committed securities fraud. Accordingly, we consider the Director's allegations regarding Dillabaugh's conduct to be undisputed.

{¶ 8} In January 2008, The Dillabaugh Group's business records were seized as part of an investigation of the sale of securities by Dillabaugh and The Dillabaugh Group. The records revealed that The Dillabaugh Group and/or Dillabaugh sold securities in the forms of "Certificate – Contract of Deposit Notes" or "Promissory Notes" to approximately 146 investors, primarily located in southwest Ohio and Indiana. These investors purchased approximately $12.4 million in securities; the majority of these sales occurred after April 13, 2001.

{¶ 9} Dillabaugh told the investors that their money was invested in legitimate business activities, and promised them that their investments were guaranteed and insured. However, The Dillabaugh Group had no legitimate business activity and none of the funds were invested in any business or commerce. Rather, Dillabaugh operated a "Ponzi scheme," using new investments to pay purported interest on earlier investments.

{¶ 10} The money that The Dillabaugh Group received was deposited into a bank account at Heartland Federal Credit Union, which was jointly held by Dillabaugh and his wife. From that account, Dillabaugh made "interest" payments to investors in order to deceive them into believing their money was legitimately invested. Dillabaugh also made personal expenditures from that account, and he paid the premiums on dozens of life insurance policies for which he was the insured.

{¶ 11} Prior to Dillabaugh's death, he left written instructions to his wife, his son, and Ms. Long to be opened upon his death. The letters gave detailed instructions about winding up the investments of The Dillabaugh Group, cashing various life insurance policies, and using the proceeds to repay investors. In the Second Amended Complaint, the

Director made clear that she does not claim that Mrs. Dillabaugh, Lorne Dillabaugh, or Ms. Long violated the Ohio Securities Act.

{¶ 12} Mrs. Dillabaugh has received at least $6.5 million in insurance proceeds as the beneficiary of at least 34 life insurance policies;[2] Lorne Lee Dillabaugh has received approximately $310,000 in life insurance proceeds; and Ms. Long has received more than $100,000. Approximately $3 million in life insurance proceeds for which Mrs. Dillabaugh is the named beneficiary are currently held in Hartford's accounts.[3] The investors have not been paid from the insurance proceeds.[4]

{¶ 13} On June 25, 2008, the Director filed an action pursuant to R.C. 1707.26, 1707.261, and 1707.27 against the Dillabaugh Group and the Estate of Roy G. Dillabaugh, claiming violations of the Ohio Securities Act and seeking the appointment of a receiver, an order of restitution, and a preliminary and permanent injunction. The Director also named Mrs. Dillabaugh, Lorne Lee Dillabaugh, Ms. Long, and Hartford as defendants. The Director claimed that Mrs. Dillabaugh, Lorne Dillabaugh, Ms. Long, and Hartford were necessary parties, because they were "in possession of the proceeds of life insurance policies whose premiums were paid by Roy Dillabaugh from the funds obtained by The Dillabaugh Group's fraudulent sale of unregistered securities to investors." Simultaneous to the filing

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[2] In later filings, the Director indicated that Dillabaugh paid premiums totaling $760,000 on 60 insurance policies with a total worth of approximately $11.6 million.

[3] It appears that those funds are also the subject of federal litigation between Mrs. Dillabaugh and Hartford.

[4] Some of the investors have brought state civil cases, at least one of which is on appeal to this court. *Burcham v. Snook*, Montgomery App. No. 23787.

of the Verified Complaint, the Director requested a temporary restraining order. The court granted the motion, restraining Defendants from violating R.C. Chapter 1707 and from "disposing or dispersing any insurance proceeds in the Defendants' possession" until the court rules on the merits of the Complaint. The court exempted $500,000 of the insurance proceeds held by Mrs. Dillabaugh from the TRO.

{¶ 14} Lorne Dillabaugh and Hartford moved to dismiss the Director's complaint; Mrs. Dillabaugh opposed the Director's request for an injunction and later moved to dismiss the complaint. All argued that the Director lacked the statutory authority to seek an injunction, restitution, or rescission against them because they were not alleged to have committed securities violations. Mrs. Dillabaugh and Lorne Dillabaugh further claimed that the insurance proceeds were protected from the Director's claims by R.C. 3911.10.

{¶ 15} On July 17, 2008, the trial court entered a preliminary injunction, enjoining all defendants from violating the Ohio Securities Act and from disposing and dispersing any insurance proceeds in their possession until the court rules on the complaint. The court further ordered that $500,000 of the insurance proceeds held by Mrs. Dillabaugh was not subject to the injunction, and it required Lorne Dillabaugh to deposit $200,000 of the insurance proceeds into his attorney's escrow account to be held until further order of the court. The court expressly held that Ms. Long was subject to the preliminary injunction.[5]

{¶ 16} The trial court subsequently denied each of the motions to dismiss. In overruling the motions, the court separately noted that the Director had alleged that

[5]Mrs. Dillabaugh appealed from the preliminary injunction order. *Zurz v. The Dillabaugh Group*, Montgomery App. No. 22896. We dismissed that appeal for lack of a final appealable order.

"Defendants" had committed securities violations, and that Hartford, Mrs. Dillabaugh, and Lorne Dillabaugh were each listed as a defendant. The court further stated that the Director was only seeking "the insurance proceeds/premiums that Defendant holds." As to Mrs. Dillabaugh and Lorne Dillabaugh, the court reasoned that R.C. 1707.26 expressly provides that the court may order other equitable relief, and that the facts here may warrant the equitable relief of a constructive trust. The court concluded that Mrs. Dillabaugh and Lorne Dillabaugh were necessary parties since they were the potential constructive trustees.

{¶ 17} In May 2009, Mrs. Dillabaugh moved for partial relief from the preliminary injunction. After consideration of the motion, the court released an additional $100,000 from the injunction's restrictions.

{¶ 18} In September 2009, Lorne Dillabaugh, Mrs. Dillabaugh, Ms. Long, and the Director moved for summary judgment. Similar to the motions to dismiss, Lorne Dillabaugh, Mrs. Dillabaugh, and Ms. Long asserted that, because they did not violate the Ohio Securities Act[6] and were not "agents, employees, partners, officers, directors, or shareholders" of the alleged violator of R.C. Chapter 1707, the Director lacked authority to seek relief against them under R.C. Chapter 1707. Moreover, Mrs. Dillabaugh and Lorne Dillabaugh claimed that the life insurance proceeds were exempt from the claims of all creditors. (Lorne Dillabaugh acknowledged a possible exception to the exemption for the amount paid as premiums.) Mrs. Dillabaugh and Ms. Long further argued that the proceeds were not subject to a constructive trust.

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[6]Subsequent to the decision denying the motions to dismiss, the Director amended her Complaint to clarify that only Roy Dillabaugh and The Dillabaugh Group were alleged to have committed securities violations.

{¶ 19} The Director's motion asserted that she was entitled to judgment against The Dillabaugh Group and Dillabaugh's Estate on her Ohio Securities Act claims. As for the "necessary parties," the Director asserted that the plain language of R.C. 1707.26 permitted the insurance proceeds to be subject to a restraining order and that the proceeds are not protected by R.C. 3911.10 or R.C. 3923.19. The Director stated: "These statutes do not apply in this case because Dillabaugh created a constructive trust when he defrauded investors and purchased the insurance policies with the investor's monies subject to this action." The Director further noted that R.C. 3911.10 did not apply to Ms. Long, because she was not a spouse, child, or dependent of the decedent (i.e., Dillabaugh). The Dillabaugh Group and the Estate of Dillabaugh did not oppose the Director's motion, but Lorne Dillabaugh, Mrs. Dillabaugh, and Ms. Long argued that the Director failed to show that Dillabaugh or The Dillabaugh Group engaged in deceptive, fraudulent, or manipulative acts, practices or transactions by selling unregistered securities and/or made material misrepresentations and omissions to investors.

{¶ 20} On November 12, 2009, the trial court overruled in part and granted in part the motions for summary judgment. The court found that genuine issues of material fact precluded summary judgment on the Director's claims against Dillabaugh's Estate and The Dillabaugh Group. The trial court agreed with the Director that "the General Assembly intended 'other equitable relief as the facts warrant' [under R.C. 1707.26] to include an order restraining third parties from disposing or dispersing the proceeds of securities violations." As to R.C. 3911.10, the court found that the Director was a "creditor" under the statute and, consequently, the Director "may only seek recovery, if at all, against the insurance premiums

paid, not the entire amount of the policy." The court found that genuine issues of material fact existed as to whether a constructive trust should be established.

{¶ 21} In light of the trial court's decision, Mrs. Dillabaugh and Lorne Dillabaugh moved for an immediate partial dissolution of the preliminary injunction, releasing all amounts except those amounts claimed to have been paid as premiums.[7] The court granted the motions.

{¶ 22} The remaining matters came before the court on November 17, 2009, at which time counsel presented several agreements among the parties. Counsel for Dillabaugh's Estate and The Dillabaugh Group did not appear; the remaining parties asked the court to enter judgment against the Estate and The Dillabaugh Group on the Ohio Securities Act claims. The court entered judgment against the Estate and The Dillabaugh Group, as requested, and stated that it would order an injunction, restitution, and the appointment of a receiver as to those parties. Lorne Dillabaugh and Ms. Long made oral motions for judgment notwithstanding the verdict in order to preserve the issue of whether the Director could restrain third-parties who have monies from securities fraud; the court orally overruled the motion. Ms. Long orally requested that an additional $20,000 be released from the injunction against her to help her pay attorney fees; the court granted this motion.

{¶ 23} On December 23, 2009, the trial court entered a written judgment entry, incorporating its November 12 summary judgment decision. In that entry, the court found

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[7] The alleged amount of premiums paid on the respective insurance policies were: Lorne Dillabaugh - $55,753.28; Ms. Long - $139,458.14; and Mrs. Dillabaugh - $564,788.58.

that Roy Dillabaugh and The Dillabaugh Group knowingly engaged in fraudulent acts, as defined by R.C. 1707.01. The court found that, even if Dillabaugh and The Dillabaugh Group had created a constructive trust over the insurance proceeds held by the other defendants, a receiver would not be permitted to pursue the life insurance proceeds held by Lorne Dillabaugh and Mrs. Dillabaugh in excess of the amount of premiums, under R.C. 3911.10. The court held that R.C. 3911.10 did not apply to the insurance proceeds held by Long or by Hartford. The court permanently enjoined the Estate of Dillabaugh and The Dillabaugh Group from further violations of the Ohio Securities Act, ordered the Estate and The Dillabaugh Group to make restitution, and appointed Robert Hanseman as a receiver "to take possession of all assets, properties, books and records of Roy G. Dillabaugh and The Dillabaugh Group, *** to manage and operate said business entities and wind up the affairs of Roy G. Dillabaugh and The Dillabaugh Group and to perform all other duties as directed by this Court as authorized in R.C. 1707.27. ***"

{¶ 24} The Director appeals from the trial court's December 23, 2009, judgment. Mrs. Dillabaugh and Ms. Long cross-appeal. We will begin our analysis with the cross-appeals by Mrs. Dillabaugh and Ms. Long.

II

{¶ 25} Mrs. Dillabaugh's cross-assignment of error states:

{¶ 26} "THE TRIAL COURT ERRED IN ENTERING AN INJUNCTION AGAINST MS. DILLABAUGH."

{¶ 27} Ms. Long's cross-assignments of error state:

{¶ 28} "1. THE TRIAL COURT ERRED IN FINDING THAT R.C. 1707.26

AUTHORIZES THE ISSUANCE OF AN INJUNCTION AGAINST APPELLEE/CROSS-APPELLANT, MARY JOHANNA LONG, ENJOINING THE DISPERSING OR DISPOSING OF LIFE INSURANCE POLICY PROCEEDS WHICH SHE RECEIVED AS A BENEFICIARY UPON THE DEATH OF ROY DILLABAUGH.

{¶ 29} "2. THE TRIAL COURT ERRED IN FINDING THAT THE REMEDY OF RESTITUTION OR RECISION, AS AFFORDED IN R.C. 1707.261, AND THE APPOINTMENT OF A RECEIVER, AS AFFORDED IN R.C. 1707.27, ARE AVAILABLE TO APPELLANT/CROSS-APPELLEE, DIRECTOR, OHIO DEPARTMENT OF COMMERCE, AS AGAINST APPELLEE/CROSS-APPELLANT, MARY JOHANNA LONG.

{¶ 30} "3. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF APPELLANT/CROSS-APPELLEE, DIRECTOR, OHIO DEPARTMENT OF COMMERCE AS AGAINST APPELLEE/CROSS-APPELLANT, MARY JOHANNA LONG, AND ERRED FURTHER IN OVERRULING APPELLEE/CROSS-APPELLANT'S MOTION FOR SUMMARY JUDGMENT."

{¶ 31} Mrs. Dillabaugh and Ms. Long claim that the trial court erred in imposing remedies provided under the Ohio Securities Act against them, because those provisions only provide remedies against violators of the Act. The parties agree that neither Mrs. Dillabaugh nor Ms. Long engaged in securities fraud. Therefore, the central question raised by the cross-appeals is the extent of the Director's authority to seek injunctive relief, restitution, and other equitable remedies against non-violators of the Act, specifically those who hold funds allegedly obtained by securities fraud.

{¶ 32} "The Ohio Securities Act, generally referred to as Ohio Blue Sky Law, was adopted on July 22, 1929 to prevent the fraudulent exploitation of the investing public through the sale of securities." *Perrysberg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, ¶9, quoting *In re Columbus Skyline Securities, Inc.* (1996), 74 Ohio St.3d 495, 498. As recognized by the Supreme Court of Ohio, "[m]any of the enacted statutes are remedial in nature, and have been drafted broadly to protect the investing public from its own imprudence as well as the chicanery of unscrupulous securities dealers." *In re Columbus Skyline Securities*, 74 Ohio St.3d at 498, citing *Bronaugh v. R. & E. Dredging Co.* (1968), 16 Ohio St.2d 35. "In order to further the intended purpose of the Act, its securities anti-fraud provisions must be liberally construed." Id.

{¶ 33} R.C. 1707.26 authorizes the Director of Commerce to bring actions for violations of the Ohio Securities Act.[8] *Peltier v. Spaghetti Tree, Inc.* (1983), 6 Ohio St.3d 194, 196, fn. 5. That statute reads:

{¶ 34} "Whenever it appears to the division of securities, upon complaint or otherwise, that any person has engaged in, is engaging in, or is about to engage in, any deceptive, fraudulent, or manipulative act, practice, or transaction, in violation of sections 1707.01 to 1707.45 of the Revised Code, the director of commerce may apply to a court of common pleas of any county in this state for, and upon proof of any of such offenses such court *shall grant an injunction restraining such person and its agents, employees, partners, officers, directors, and shareholders* from continuing, engaging in, or doing any acts in

[8]The Director may also pursue administrative proceedings under R.C. 1707.23.

furtherance of, such acts, practices, or transactions, *and may order such other equitable relief as the facts warrant*." (Emphasis added.) R.C. 1707.26.

{¶ 35} If the common pleas court grants the injunction, the Director may ask the court to order the defendant or defendants that are subject to the injunction to make restitution or rescission to any purchaser or holder of securities damaged by the defendant's or defendants' violation of the Ohio Securities Act. R.C. 1707.261(A). The common pleas court may order the requested restitution or rescission if it is "satisfied with the sufficiency of the director's request for restitution or rescission *** and with the sufficiency of the proof of a substantial violation of any provision of [the Act] or of the use of any act, practice, or transaction declared to be illegal or prohibited or defined as fraudulent by those sections or rules adopted under those sections by the division of securities, to the material prejudice of a purchaser or holder of securities." R.C. 1707.261(B). Recovery by the injured purchaser or holder of securities is limited to the person's purchase price for the fraudulent securities. R.C. 1707.261(D).

{¶ 36} The Director may further ask the court to appoint a receiver for a violator of the Ohio Securities Act. R.C. 1707.27. A receiver appointed in accordance with R.C. 1707.27 is empowered "to sue for, collect, receive, and take into the receiver's possession all the books, records, and papers of the person [violator] and all rights, credits, property, and choses in action acquired by the person by means of any such act, practice, or transaction, and also all property with which the property has been mingled, if the property cannot be identified in kind because of the commingling, and with power to sell, convey, and assign the property, and to hold and dispose of the proceeds under the direction of the court of

common pleas." Id. The decision whether to appoint a receiver is a matter left to the trial court's sound discretion. *Page v. AEI Group, Inc.* (Apr. 30, 1991), Franklin App. No. 90AP-151.

{¶ 37} The Director asserts that the plain language of R.C. 1707.26 permits the insurance proceeds to be subject to a restraining order. She contends that the portion of R.C. 1707.26 which permits the court to "order such other equitable relief as the facts warrant" is not limited to the violator and the violator's "agents, employees, partners, officers, directors, and shareholders." As stated by the Director, "[t]he second clause makes no reference to the first clause, and cannot be interpreted as qualifying or otherwise limiting the first clause of R.C. 1707.26." She argues that any other reading renders the second clause ("such other equitable relief") mere surplusage. That is, the Director can obtain an injunction by R.C. 1707.26, can obtain rescission and restitution by R.C. 1707.261, and can seek the appointment of a receiver with broad powers to sue by R.C. 1707.27; therefore, the second clause must grant the Director the authority to seek other equitable relief *from others* "as the facts warrant."

{¶ 38} We disagree with the Director's expansive reading of R.C. 1707.26. The remedial provisions set forth in R.C. 1707.26, R.C. 1707.261, and R.C. 1707.27, authorize the Director to file an action against violators and to seek certain remedies (rescission and restitution) against those violators for damages caused by the securities violations. The first clause of R.C. 1707.26 *requires* the common pleas court ("the court shall grant") to impose an injunction against persons upon proof by the Director that such person "has engaged in, is engaging in, or is about to engage in, any deceptive, fraudulent, or manipulative act, practice,

or transaction, in violation of sections 1707.01 to 1707.45 of the Revised Code." The second clause *permits* the common pleas court to order "such other equitable relief as the facts warrant."

{¶ 39} However, there is no implication in R.C. 1707.26 that "such other equitable relief" includes bringing suit against third parties for equitable relief. R.C. 1707.26 authorizes suit against violators. The second clause merely adds that, in addition to the mandatory injunction, the court "may order" additional relief against those violators.

{¶ 40} Such a reading of R.C. 1707.26 is consistent with the rule of ejusdem generis, which means "of the same kind or species." Under that rule, "where in a statute terms are first used which are confined to a particular class of objects having well-known and definite features and characteristics, and then afterward a term having perhaps a broader signification is conjoined, such latter term is, as indicative of legislative intent, to be considered as embracing only things of similar character as those comprehended by the preceding limited and confined terms." *State v. Aspell* (1967), 10 Ohio St.2d 1, paragraph two of the syllabus. See, also, *State v. Collier*, Montgomery App. No. 22686, 2010-Ohio-4039, ¶20, and *State v. Maxwell* (Apr. 13, 1988), Medina App. No. 1646, both quoting *Aspell*. R.C. 1707.26 refers to an injunction, which must be imposed if the Director satisfies its burden under that statute, and "such other equitable relief," which is discretionary. To construe "such other equitable relief" as encompassing the authority to sue third-parties who hold assets procured by securities fraud would extend the meaning of "such other equitable relief" beyond the statute's preceding reference to one type of equitable relief, an injunction. In addition, the first clause of R.C. 1707.26 specifically states that the injunction must be imposed against

"such persons" (i.e. violators) and other specifically identified persons; if the legislature had intended injunctive relief to be available against additional parties, the General Assembly could have (1) chosen not to limit the first clause to "such persons" and the list of persons that follow or (2) provided that the court could order "such other equitable relief as the facts warrant" against such persons or any other person.

{¶ 41} We are further guided by the Supreme Court of Ohio's decision in *State, Dept. of Commerce, Division of Securities v. Buckeye Finance Corp.* (1978), 54 Ohio St.2d 407, which addressed the scope of "such other equitable relief" in R.C. 1707.26. In *Buckeye Finance*, the Director and the defendants agreed to a consent order under which Buckeye would be liquidated according to express terms under the court's supervision. The Director subsequently moved to file an amended complaint, seeking an order that would hold the individual defendants (who were all alleged to be violators of the Ohio Securities Act) personally liable to pay money to all purchasers of the debentures which had allegedly been sold illegally; establish a "plan of rescission" to allow all debenture holders to recover the purchase price, plus interest, from the individual defendants; and require the individual defendants to put the full amount of the purchase price of the debentures, plus interest, in escrow. The individual defendants argued that there was no authority for the Director to seek that form of relief. (*Buckeye Finance* was decided prior to the enactment of R.C. 1707.261, which expressly authorized the Director to seek restitution and rescission.) The Director asserted that the claimed relief was authorized by the phrase, "may order such other relief as the facts warrant," contained in that version of R.C. 1707.26. The trial court denied the Director's motion.

{¶ 42} On appeal, the Supreme Court held that the Director, as an administrative agent of the State, did not have statutory authority under R.C. 1707.26 to sue for rescission and restitution on behalf of purchasers of securities. The court explained that "[i]t would be unreasonable to infer such authority from the general language of R.C. 1707.26, when, in other sections of the code, the General Assembly has taken pains to create similar causes of action in purchasers of securities explicitly, rather than by implication."

{¶ 43} Although *Buckeye Financial*'s specific holding has limited applicability today because of the enactment of R.C. 1707.261, it demonstrates the restrictive interpretation given to the phrase, "may order such other equitable relief as the facts warrant." Because restitution and rescission were remedies expressly available to private plaintiffs, the Supreme Court excluded those remedies from "such other relief" (even against alleged violators), thereby indicating that "such other relief" modifies the type of relief as opposed to the individuals against whom the "other relief" may be sought. Given this reading of "such other relief as the facts warrant," we decline to read "such other equitable relief as the facts warrant" to include the authority to sue third parties who are not violators of the Ohio Securities Act.

{¶ 44} The Director further argues that, without the authority to restrain ill-gotten gains, wherever they may be, the ability of the receiver (appointed under R.C. 1707.27) to take all assets derived from the securities violations would be circumvented. First, whether this is true (and, as discussed below, we render no such advisory opinion), the authority granted to an executive agency of the State is always a policy decision of the legislature.

{¶ 45} Moreover, as recognized by the Director, "the Ohio Securities Act provides

investors with their own separate civil remedy for securities violations. R.C. 1707.43. This civil remedy permits recovery against a broader class of people than the people against whom rescission or restitution can be ordered under R.C. 1707.261." (Director's App. Brf., p.8, n.6.) Specifically, R.C. 1707.43 provides:

{¶ 46} "(A) Subject to divisions (B) and (C) of this section, every sale or contract for sale made in violation of Chapter 1707. of the Revised Code, is voidable at the election of the purchaser. The person making such sale or contract for sale, and every person that has participated in or aided the seller in any way in making such sale or contract for sale, are jointly and severally liable to the purchaser, in an action at law in any court of competent jurisdiction, upon tender to the seller in person or in open court of the securities sold or of the contract made, for the full amount paid by the purchaser and for all taxable court costs, unless the court determines that the violation did not materially affect the protection contemplated by the violated provision." R.C. 1707.43(A).

{¶ 47} Accordingly, as recognized in *Buckeye Financial*, the General Assembly has expressly granted rights to private aggrieved individuals (i.e., a remedy against those who participated or aided in the sale of unregistered securities) which it has not granted to the Director as part of the State's enforcement powers. In such circumstances, we cannot reasonably infer that the legislature intended to provide those same rights to the Director.

{¶ 48} Finally, as stated above, R.C. 1707.27 provides that *a receiver* appointed by the court, upon application by the Director, has the authority "*to sue for*, collect, receive, and take into the receiver's possession" all of the books, records, and papers of the Securities Act violator; all rights, credits, property, and choses in action acquired by means of any such

violation; and also all property with which the property has been mingled. (Emphasis added.) The receiver can further "sell, convey, and assign the property," and "hold and dispose of the proceeds" under the court's direction. Thus, as stated by the Director, "[t]he restitution is to be determined by the receiver and the receiver has the authority to marshal the assets under the direction of the court." (Director's App. Brf, p. 6) The Director does not.

{¶ 49} Accordingly, we conclude that the Director's right to pursue an injunction under R.C. 1707.26 is limited to actions against "any person [who] has engaged in, is engaging in, or is about to engage in, any deceptive, fraudulent, or manipulative act, practice, or transaction, in violation of sections 1707.01 to 1707.45 of the Revised Code" and that person's "agents, employees, partners, officers, directors, and shareholders;" the court's authority to order "such other equitable relief as the facts warrant" is also limited to those specified persons. Moreover, R.C. 1707.261 allows the court to order restitution and rescission only against "the defendant or defendants that are subject to the injunction." R.C. 1707.261.

{¶ 50} Indeed, we believe that Director accurately described its authority under R.C. 1707.26, 1707.261, and 1707.27 when it stated to the trial court:

{¶ 51} "R.C. 1707.26 allows the Director of Commerce, upon proof of violations of the Ohio Securities Act, to petition the court for an injunction or other equitable relief. Upon the granting of such injunction or other equitable relief, R.C. 1707.261 allows the Director to ask the court to order the rescission or restitution of all securities sold in violation of the Ohio Securities Act. Once this order is issued, a receiver appointed

pursuant to R.C. 1707.27 may then sue for, collect, and distribute the funds to the investors.

{¶ 52} "*** Under R.C. 1707.27, the receiver has the ability to sue, collect, receive, and take possession of all property, including co-mingled property and disperse the proceeds under the direction of the court. The amount of restitution owed to each investor is determined by the receiver under the direction of the court. The order of restitution would only state that the investors were entitled to restitution not to exceed the amount of the investor's investment. The order would not state that Mrs. Dillabaugh or The Hartford Life & Accident Insurance Company, for example, owed an amount certain. *Instead, the receiver would bring an action as appropriate that would include full discovery, and a decision on the merits of each individual claim or defense.*" (Emphasis added.) (Doc. # 9)

{¶ 53} Such a reading of R.C. 1707.26 does not "circumvent" the ability of the receiver to take all assets derived from the securities violations, as the Director suggests. Because the Director need not establish the merits of the individual claims as part of its suit under R.C. 1707.26, we see no reason why there would necessarily be a significant delay between the filing of the Director's action against the violators and the trial court's subsequent order of an injunction against the violators and the appointment of a receiver. At that juncture, the receiver could promptly pursue any claims against third parties who hold proceeds of the securities fraud and could seek an injunction, if necessary, against those parties.

{¶ 54} Accordingly, the trial court erred in imposing an injunction against Mrs. Dillabaugh and Ms. Long as requested by the Director. Such a request was the province of a receiver appointed under R.C. 1707.27.

{¶ 55} The cross-assignments of error are sustained.

III

{¶ 56} The Director raises three assignments of error. They state:

{¶ 57} "THE LOWER COURT ERRED IN FINDING APPELLANT/CROSS-APPELLEE, A STATE REGULATOR OF SECURITIES, A CREDITOR UNDER R.C. 3911.10."

{¶ 58} "THE LOWER COURT ERRED IN FINDING THAT R.C. 3911.10 PROHIBITED APPELLANT/CROSS-APPELLEE FROM OBTAINING FROM THE ESTATE OF ROY G. DILLABAUGH THE PROCEEDS OF INSURANCE POLICIES PURCHASED BY ROY G. DILLABAUGH ON HIMSELF WITH STOLEN INVESTOR MONIES."

{¶ 59} "THE LOWER COURT ERRED IN FINDING THAT THE APPLICATION OF R.C. 3911.10 COULD NOT BE OVERCOME BY THE CREATION OF A CONSTRUCTIVE TRUST."

{¶ 60} R.C. 3911.10 provides:

{¶ 61} "All contracts of life or endowment insurance or annuities upon the life of any person, or any interest therein, which may hereafter mature and which have been taken out for the benefit of, or made payable by change of beneficiary, transfer, or assignment to, the spouse or children, or any persons dependent upon such person, or an institution or entity described in division (B)(1) of section 3911.09 of the Revised Code, or any creditor, or to a trustee for the benefit of such spouse, children, dependent persons, institution or entity, or creditor, shall be held, together with the proceeds or avails of such contracts, subject to a

change of beneficiary if desired, free from all claims of the creditors of such insured person or annuitant. Subject to the statute of limitations, the amount of any premium upon such contracts, endowments, or annuities, paid in fraud of creditors, with interest thereon, shall inure to their benefit from the proceeds of the contracts, but the company issuing any such contract is discharged of all liability thereon by the payment of its proceeds in accordance with its terms, unless, before such payment, written notice is given to it by a creditor, specifying the amount of the claim and the premiums which the creditor alleges have been fraudulently paid."

{¶ 62} To qualify for protection under R.C. 3911.10, the contract must be the proper type of insurance policy or annuity on the life of insured/annuitant, and the beneficiary must fall within one of several categories of people, including the spouse, children, and dependents of the insured or annuitant. If R.C. 3911.10 applies, the proceeds of the contract will be protected from "all claims" of the insured's or annuitant's "creditors." *In re Schramm* (B.A.P. C.A.6, 2010), 431 B.R. 397, 402. R.C. 3911.10, however, exempts from its protection the amount of any premium on the contract which was "paid in fraud of creditors," with interest. Such premiums "shall inure to [the creditors'] benefit" from the proceeds of the life insurance or annuity.

{¶ 63} The parties dispute whether the Director, not the receiver appointed by the trial court, is a "creditor" under R.C. 3911.10. The dispute is framed as such because the Director sought to enjoin all of the proceeds of the life insurance policies as part of its request for a preliminary injunction (which was to continue until an injunction against the Estate of Roy Dillabaugh and The Dillabaugh Group was ordered and a receiver could be

appointed). Accordingly, at the time that the parties raised whether all of the proceeds of the life insurance policies could be enjoined, it was the Director, not the receiver, who was seeking the injunction. The trial court, faced with that issue in the motions for summary judgment, determined that the Director could pursue a preliminary injunction against "the necessary parties," but that the injunction was limited, with respect to Mrs. Dillabaugh and Lorne Dillabaugh, to the amount of premiums paid, consistent with R.C. 3911.10. In doing so, the Court concluded that the Director was acting as a "creditor."

{¶ 64} Because we have concluded that the Director lacked the authority to sue third-parties, such as Mrs. Dillabaugh and Ms. Long, under R.C. 1707.26, the Director necessarily lacked the authority to seek a temporary restraining order and a preliminary injunction against them to prevent them from disposing of the proceeds of the insurance policy. Accordingly, with respect to those parties, the question of whether the Director was a "creditor" under R.C. 3911.10 is moot.[9]

{¶ 65} In its judgment entry, the trial court applied its decision regarding *the Director's* ability to seek a preliminary injunction against Mrs. Dillabaugh, Lorne Dillabaugh, Ms. Long, and Hartford *to the Receiver*. The trial court ordered, in part:.

{¶ 66} "*** [A] Receiver appointed pursuant to R.C. 1707.27 would not be permitted to pursue the life insurance proceeds held by Alice Jane Dillabaugh and Lorne

[9]With respect to Ms. Long and Hartford, the Director argued that the trial court erred in holding that the life insurance proceeds held by them were protected by R.C. 3911.10. We note that the trial court held the opposite, i.e., that R.C. 3911.10 did not apply to protect the proceeds held by Ms. Long and Hartford. Accordingly, the Director's assignment of error with respect to these proceeds could be overruled on that basis, as well.

Dillabaugh (in excess of the amount of the premiums) under R.C. 3911.10. Thus, pursuant to R.C. 3911.10 the maximum amount of those proceeds the Receiver appointed by this Court will be permitted to pursue as part of the receivership estate is the amount paid in premiums for the insurance policies for which Defendants Alice Jane Dillbaugh and Lorne Dillabaugh are the named [beneficiaries]. *** The Court makes no findings at this time with respect to whether the receivership estate does or should include any specific amounts of the insurance proceeds, only that the Receiver may not seek proceeds from Alice Jane Dillabaugh and Lorne Dillabaugh in an amount in excess of the premiums paid on those policies. The Receiver will be required to establish its right to recover such proceeds as it is permitted to pursue by whatever means it deems appropriate, including but not limited to an action to recover such proceeds.

{¶ 67} "*** Therefore, it is ORDERED and ADJUDGED that Kimberly Mayhew, in her capacity as administrator of the Estate of Roy G. Dillabaugh, and The Dillabaugh Group are pemanently enjoined from further violations of the Ohio Securities Act; that a Receiver is hereby appointed who will serve pursuant to the jurisdiction of this Court and will have all the powers, authority, and responsibilities granted by R.C. 1707.27; and that an Order of Restitution is hereby issued against Kimberly Mayhew, in her capacity as administrator of the Estate of Roy G. Dillabaugh, and the Dillabaugh Group in an amount to be determined by Receiver appointed by this Court.

{¶ 68} "The Court hereby appoints Robert G. Hanseman [handwritten] as Receiver, and orders the Receiver to take possession of all assets, properties, books and records of Roy G. Dillabaugh and The Dillabaugh Group, and grants the Receiver exclusive authority to

manage and operate said business entities and wind up the affairs of Roy G. Dillabaugh and The Dillabaugh Group and to perform all other duties as directed by this Court as authorized in R.C. 1707.27. ***

{¶ 69} "The Receiver is authorized to trace the investors' monies, and collect all assets, including but not limited to, any monies of Roy G. Dillabaugh and The Dillabaugh Group or the investors consistent with Ohio law. ***

{¶ 70} "It is further ORDER and ADJUDGED that, pursuant to R.C. 1707.26 and 1707.27, that the Receiver is authorized to pursue collection of the insurance proceeds in the possession of Defendants Alice Jane Dillabaugh and Lorne Dillabaugh up to the amount of premiums paid on the policies from which those proceeds were paid in the amounts of $564,788.58 and $55,753.28. However, the amount authorized in regard to Alice Jane Dillabaugh may be adjusted upon application to the Court by the Receiver. ***"

{¶ 71} The trial court's order implicitly found that, like the Director, the receiver was also a creditor under R.C. 3911.10. However, unlike the Director, the Receiver is an appointee of the court. *Tonti v. Tonti* (Ohio App. Nov. 2, 1951), 118 N.E.2d 200, 202 ("the receiver is merely the administrative arm of the court who takes charge of the assets of the partnership for the purpose of conserving them to the ends of equity and for the benefit of creditors generally"), citing *Coe v. Columbus P. & I. R. Co.* (1859), 10 Ohio St. 372, and *Merchants' Nat. Bank of Louisville v. McLeod* (1882), 38 Ohio St. 174. Although the purpose of the receiver is to marshal and preserve assets until they can be equitably distributed, the receiver's position is not identical to that of the Director, and the trial court erred in conflating the two.

{¶ 72} At this juncture, the receiver has not pursued an action against Mrs. Dillabaugh and Lorne Dillabaugh. Consequently, the trial court should not have rendered any ruling on whether the Receiver's ability to recover all of the proceeds of the life insurance policies held by them was limited by R.C. 3911.10. Similarly, the trial court should not have determined, in the absence of an action by the receiver, whether the receiver could recover the full amount of the life insurance proceeds under a constructive trust theory. Stated simply, such issues were not ripe for determination by the trial court.

{¶ 73} We note that Lorne Dillabaugh and Hartford did not file cross-appeals to challenge the Director's statutory authority to seek an injunction against them. Under App.R. 3(C), a notice of cross appeal must be filed by a party "who intends to defend a judgment or order against an appeal taken by an appellant *and who also seeks to change the judgment or order* ***." (Emphasis added.) In the absence of notices of cross-appeal by these parties, this Court lacks jurisdiction to reverse the imposition of the injunctions against them. *Yates v. Kanani*, Montgomery App. No. 23492, 2010-Ohio-2631, ¶32. Accordingly, we will not disturb the trial court's injunctions against them.

{¶ 74} Nevertheless, we overrule the Director's assignments of error with respect to Lorne Dillabaugh and Hartford. Having determined that the Director lacks the authority to pursue its claims against them, we will not determine the extent of its authority on the assumption that she could have raised those claims. If the receiver wishes to pursue all of the proceeds of the life insurance policies held by Mrs. Dillabaugh and Lorne Dillabaugh, he may attempt to do so in his own action, and the trial court may address the applicability of R.C. 3911.10, if raised, at that time.

{¶ 75} The Director's assignments of error are overruled.

IV

{¶ 76} The trial court's judgment will be reversed to the extent that it (1) imposed an injunction on the life insurance proceeds held by Mrs. Dillabaugh and Ms. Long, and (2) ordered that, pursuant to R.C. 3911.10, the receiver could recover no more than the amount of premiums paid for the life insurance policies held by Mrs. Dillabaugh and Lorne Dillabaugh. Because the issue of the receiver's ability to recover all of the proceeds from the life insurance policies held by Mrs. Dillabaugh and Lorne Dillabaugh was not properly before the trial court, we state no opinion on the applicability of R.C. 3911.10.

{¶ 77} Since Lorne Dillabaugh and Hartford did not cross-appeal to challenge the Director's statutory authority to seek an injunction against them, the trial court's injunctions against them are affirmed.[10]

{¶ 78} The matter will be remanded to the trial court for further proceedings consistent with this opinion.

{¶ 79} As discussed above, this appellate record does not reflect the status of any actions taken by the receiver in state or federal litigation. Our mandate reversing the injunctions on the respective portions of the life insurance proceeds held by Mrs. Dillabaugh and Ms. Long that remain subject to injunction shall take effect 30 days after the date of this Opinion.

. . . . . .

[10]Our holding is not meant to limit these defendants' ability to seek relief from judgment upon remand to the trial court.

DONOVAN, P.J. and FAIN, J., concur.

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