The Impact of Trusts and Escrow Funds on Interstate Commerce

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I. Historical Preface

Trusts have been around since the days of the Roman Empire.[1] There is not a universal definition for what a trust is; however, it is agreed that a trust is an instrument of ownership of property enabling the holding of the estate by one person for the benefit of another.[2] Today, Blacks Law Dictionary defines a trust as, "[t]he right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title; a property interest held by one person (the trustee) at the request of another (the settlor) for the benefit of a third party (the beneficiary)."[3] There are many different types of trusts.[4] Express, contingent, implied, and involuntary, otherwise known as constructive trusts, are just a few examples.[5] This paper is concerned with the impact of implied and constructive trusts on interstate commerce. An implied trust is defined as "[a] trust raised or created by implication of law; a trust im-

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1. David Johnston, The Roman Law of Trusts 9 (1988) ("Trusts are associated with Augustus; they existed before, but their legal sanction was his innovation.").

2. Encyclopaedia Britannica Online, *Property Law*, at 50 (2005), *available at* http://0-search.eb.c-om.pacman.du.edu:80/eb/article?tocld=28528 (last visited Apr. 5, 2005).

3. Black's Law Dictionary (8th ed. 2004).

4. *Id.*

5. *Id.*

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plied or presumed from circumstances."[6] Constructive trusts are defined as "[a] trust imposed by a court on equitable grounds against one who has obtained property by wrongdoing, thereby preventing the wrongful holder from being unjustly enriched."[7]

The idea that has continued until today was that common ownership could be held by an entity, not a person, and administered for the common good of the common owners.[8] Because of this concept, trusts have historically had a very significant - but not always beneficial impact on commerce.[9]

The English kings, always on the lookout for additional revenue, sold to the trusts the sole right to operate various businesses - thus creating monopolies. In 1624 the English Parliament passed the Anti-Monopoly Act.[10] This took away the King's power to sell business monopolies to trusts and, not too many years later, Parliament also took away the King.[11]

American colonies were usually established by charters granted from the Crown.[12] These charters created business monopolies for each colony.[13] The Massachusetts Business Trust law evolved in the early 1900's as the precursor to the modern corporate law.[14] Businesses in Massachusetts began to arrange themselves in the form of trustees controlling the business shares for the benefit of the owners.[15] The ownership was proven by the holding of negotiable shares and the business trustees were elected by those shareholders.[16] While trusts again enjoyed a growth in commerce the farmers were not far behind their urban cousins.

The end of the U.S. Civil War saw the evolution of the Farmers' Benevolent Trusts.[17] These benevolent trusts eventually evolved into coop-

6. BLACK'S LAW DICTIONARY 1681 (4th ed. 1951).

7. BLACK'S LAW DICTIONARY (8th ed. 2004).

8. JOHNSTON, *supra* note 1, at 1.

9. THE ADKISSON ANALYSIS, SELF-SETTLED TRUSTS A/K/A ASSET PROTECTION TRUSTS (2005), *at* http://www.assetprotectiontheory.com/self-settled_trusts.htm (last visited Jan. 30, 2005).

10. John Owen Smith, *Useful Dates in British History for the Local Historian or Genealogist* (2005), *at* http://www.johnowensmith.co.uk/histdate/ (last visited Jan. 30, 2005).

11. *Id.*

12. THE NUMISMATIC GUARANTY CORP., AMERICAN COLONIAL COINAGE (2001), *reprinted in* THE COIN SITE, AMERICAN COLONIAL COINAGE (2004) [hereinafter NUMISMATIC GUARANTY], *at* http://www.coinsite.com/content/articles/Colonials.asp (last visited Jan. 30, 2005).

13. *See id.*

14. BLACK'S LAW DICTIONARY (8th ed. 2004).

15. BLACK'S LAW DICTIONARY 1684 (4th ed. 1951). *See also* Hecht v. Malley, 265 U.S. 144 (1924).

16. *Id.*

17. Paul Rhode, *Review of Victoria Saker Woeste's The Farmer's Benevolent Trust: Law and Agricultural Cooperation in Industrial America, 1865-1945*, ECON. HIST. SERVICES (Feb. 15, 2000), *at* http://eh.net/bookreviews/library/0216.shtml (last visited Jan. 20, 2005).

eratives like Sun-Maid Raisins - arguably a monopoly of raisin growers in Fresno.[18] By the 1920's, were Sun-Maid and the farmer cooperatives really beneficial organizations of small, independent producers trying to the modern economy?[19] Or were they merely attempts at monopolization hiding behind clever PR and getting favorable treatment from the government?[20] At least one writer believes the latter.[21] Victoria Saker Woeste makes the argument that the cooperatives were not trying to continue in their small, individual productions that had to adapt to the modern economy to survive, but were instead attempts at monopolies that hid behind their preferential government treatment.[22] The making of the laws and the enforcement of those laws can sometimes be found to be drastically different.

This conflict between the monopolistic trust and the public good, first prohibited in England in the Anti-Monopoly Act of 1624, was also the impetus for concern in the late 1800's.[23] It was dramatically present in the Sherman Anti-Trust Act of 1890.[24] I think it is telling in that the Act, while it was directed at preventing or undoing monopolies, was named "anti-trust." The good guys were described as "trust busters." Modern corporations such as IBM, Microsoft, and AT&T, have fought against the imposition of restrictions based on "anti-trust."[25] WorldCom and Sprint were prevented in 2000 from merging by the European Union under anti-monopoly and anti-trust grounds.[26]

Aside from the friendly image of a benevolent trustee taking care of the young or old who are beneficiaries of individual trusts, there is the third leg of historic trust law. This is the "Public Trust Doctrine." Again, this doctrine originated with the Romans and gained strength in England, and for our purpose we can consider it as a common law doctrine.[27] The essence of this Doctrine involves the legal right of the public to have ac-

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. Anthony D. Becker, *The Sherman Anti-Trust Act of 1890* (2004), *at* http://www.stolaf.edu/-people/becker/antitrust/statutes/sherman.html (last visited Jan. 30, 2005).

24. *Id.*

25. Rachel Konrad, *Is a Breakup an Effective Solution?*, NEWS.COM, Apr. 28, 2000, *at* http://news.com.com/2100-1001-239872.html?legacy=cnet (last visited Jan.30, 2005).

26. James Evans, *WorldCom Plans to Appeal EU's Block of Merger With Sprint*, COMPUTERWORLD, Sept. 14, 2000, *at* http://www.computerworld.com/managementtopics/outsourcing/isptelecom/story-/0,10801,50229,00.html (last visited Jan. 30, 2005).

27. *See generally* UNIVERSITY OF TOLEDO COLLEGE OF LAW, PUBLIC TRUST DOCTRINE, (reviewing the Public Trust Doctrine's definition, historical roots, and current issues in case law) [hereinafter PUBLIC TRUST DOCTRINE], *at* http://law.utoledo.edu/LIGL/public_trust_doctrine.htm (last visited Jan. 30, 2005).

cess to and use of certain lands and waters.[28] The right may be concurrent with private property, as it is in California's prohibition against blocking the public's access to beaches.[29] The legal interests of the public is not absolute, it is determined by balancing the interests of public rights and private property rights.[30]

The definitive U.S. Supreme Court case on the Public Trust Doctrine was the case of *Illinois Central Railroad Company vs. Illinois*.[31] The issue was whether the Illinois legislature could grant the use of nearly the entire waterfront area of Chicago to the Illinois Central Railroad.[32] The Court held that the state of Illinois had title to the land underneath the navigable waters of Lake Michigan and that it held this title in trust for the public's use.[33] However, the Court also held that the state could convey parcels of trust land to private individuals provided the overall effect was to improve the public's ability to exercise its trust rights.[34] Applying this balancing of interests and results, the Court determined the conveyance to the Illinois Central Railroad didn't meet this criteria and was therefore void.[35]

Two examples of this balancing process include tidewaters and navigable waters, since the Doctrine was critical to fishing and travel.[36] Recent cases still wrestle with this balancing test.[37] One example is a South Carolina case that held that thirty-six docks did not violate the Public Trust Doctrine because the docks would not substantially impair the marine life, water quality, or public access.[38] Another example is the case of *Phillips Petroleum Company v. Mississippi* where the Supreme Court reaffirmed that states have "received ownership of all lands under waters subject to the ebb and flow of the tide" through the use of the public trust doctrine.[39] This enables states to control fishing,[40] needed space for urban expansion,[41] and harvesting of shellfish along its tidelands.[42] The commercial, monopolistic history of trusts, the application of the balancing of

28. *Id.*
29. *Id.*
30. *Id.*
31. Ill. Cent. R. Co. vs. Illinois, 146 U.S. 387 (1892).
32. *Id.* at 452.
33. *Id.*
34. *Id.* at 453, 455-56.
35. *Id.* at 463-64.
36. *Id.* at 457 (quoting Stockton v. Baltimore & N.Y.R. Co., 32 F. 9, 19-20 (C.C.D.N.J. 1887)).
37. *See generally* Public Trust Doctrine, *supra* note 29.
38. Sierra Club v. Kiawah Resorts Assoc., 456 S.E.2d 397, 399 (S.C. 1995).
39. Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 476 (1988).
40. *Id.* (citing Smith v. Maryland, 59 U.S. 71, 74-75 (1855)).
41. *Phillips Petroleum Co.*, 484 U.S at 476 (citing Hardin v. Jordan, 140 U.S. 371, 381-82 (1891) & Den v. Ass'n of the Jersey Co., 56 U.S. 426, 432 (1853)).

interests in the Public Trust Doctrine, and the constructive or implied trusts each have a part in the concern that the misuse of trusts and escrows could adversely affect the rights of commercial creditors and secured parties. This is the main focus of this paper.

II. Recent Change of Regulatory Authority

On January 1, 1996, the Interstate Commerce Commission Termination Act ("ICCTA") was triggered and the Interstate Commerce Commission ("ICC") ceased to exist.[43] In the ICC's stead, the Surface Transportation Board ("STB") within the Department of Transportation ("DOT") became the successor regulators of interstate commerce.[44] The ICCTA "transferred the motor carrier regulatory functions of the Interstate Commerce Commission ("ICC") to the Department of Transportation ("DOT") and the Surface Transportation Board ("STB")."[45] Since the implementation of the ICCTA, there has been a growing question of just what the impact of escrow funds and trust accounts, initially have been on the commerce of United States transportation.

Recent decisions by the Federal courts have applied trust principals to the recovery for the creditors of funds claimed to be trust or escrow funds.[46] The ownership of these assets is essential to the determination of which property is in the bankrupt's estate.[47] The question of this paper is whether judicial holdings in a number of cases have caused a permutation among the common trust and escrow instruments, potentially impairing secured interests of lenders and other secured creditors, and enabling the creation of some new instruments that impair the rights of general creditors. For instance, the courts have not required an absolute separation of trust monies from the general funds of the debtor.[48] Meaning that if the creditors are able to access the debtors accounts they may also be able to gain access to the trusts. At least one court has applied trust fund concepts when a Bank seized general debtor accounts to secure payment of a line of credit.[49] This may allow future judgments to be awarded in favor of the creditors and allow them access to all general accounts held by the

42. *Phillips Petroleum Co.*, 484 U.S at 476 (citing McCready v. Virginia, 94 U.S. 391, 397 (1876)).

43. ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995).

44. *Id.* at § 701.

45. Owner-Operator Indep. Drivers Ass'n v. New Prime, Inc., 339 F.3d 1001, 1006 (8th Cir. 2003) (citing 49 U.S.C. § 13501 (2005)).

46. *See, e.g., id.* at 1009 (quoting 49 C.F.R. § 376.2(l) and applying the regulations governing escrow funds).

47. *In re* Penn Cent. Transp. Co., 486 F.2d 519, 521 (3d Cir. 1973).

48. Slodov v. United States, 436 U.S. 238, 243 (1978).

49. Gen. Cas. Co. of Wis. v. Mid-Continent Agencies, Inc., 485 N.W.2d 147, 150 (Minn. Ct. App. 1992).

debtor, further limiting the protection of the debtor. Most of the litigation regarding trust accounts or escrow fund and transportation companies have been at times of declared bankruptcy.[50] Historically this has been railroads, but other forms of interstate commerce such as motor vehicle and the airline industries are effected as well.[51]

III. Interline Railroad Compensation Agreements

The railroads move two products: freight and passengers. The railroads are required under Section 1(4) of the Interstate Commerce Act, "to participate in the interstate transportation of freight and passengers. In addition it requires that the carriers 'establish reasonable through routes with other such carriers, and just and reasonable rates, fares, [and] charges . . . applicable thereto.'"[52] To meet the growing market for freight, with the growth of international trade and interstate transmissions of goods, "[t]he railroads have created a system of accounting and periodic settlement of accounts to facilitate this manner of operation."[53] The railroads have come to depend on interline agreements as the country has became more and more integrated with international and interstate commerce.[54] Interline shipping occurs when:

> a shipper or receiver pays one railroad for services of carriage for the entire shipment, although the shipment may travel over many different railroads; a railroad car may travel over the lines of many different railroads, and be used by each of them, before it again returns to the possession of the owning railroad; and a shipper whose freight may have been damaged in shipment by one of several carriers may apply to any of them for payment of his claim.[55]

"No interline carrier has the option to refuse participation therein."[56] Interline railroad accounts work when freight or passenger charges are collected by either the beginning or destination carriers.[57] Congress has not passed a statute governing how railroads are to act in this situation.[58] Instead, the interline financial accounts are set out by the

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50. *See Penn Cent.*, 486 F.2d at 521.

51. *See infra* section VI.

52. *Penn Cent.*, 486 F.2d at 531 (Adams, J., concurring) (questioning the majority's "heavy reliance" on trust law & quoting 49 U.S.C. § 1(4) (1973)).

53. *Penn Cent.*, 486 F.2d at 521 (quoting *In re* Penn Cent. Transp. Co., 340 F. Supp. 857, 859 (E.D. Pa. 1972)).

54. *See Penn Cent.*, 486 F.2d at 521 (quoting *In re* Penn Cent. Transp. Co., 340 F. Supp. at 858).

55. *Penn Cent.*, 486 F.2d at 521 (quoting *In re* Penn Cent. Transp. Co., 340 F. Supp. at 859).

56. *In re* Ann Arbor R.R. Co., 623 F.2d 480, 482 (6th Cir. 1980) (citing S. Ry. Co. v. Flournoy, 301 F.2d 847, 854 (4th Cir. 1962)).

57. *Penn Cent.*, 486 F.2d at 523.

58. *See id.* at 521.

Association of American Railroads ("AAR").[59] Under the AAR, where a shipper may normally have to pay each railroad carrier for each separate leg of the transport, the shipper is only responsible to the beginning or terminating carrier.[60] Those collected funds are then held in a general account by the collecting carriers to await disbursement and settlement.[61] All of these daily transactions that occur between the railroads are then settled at the end of every month with no interest being paid on the collected monies.[62] "AAR rules require that the statements be rendered only once each month and give the carriers 18 days to prepare the abstract of the interline freight accounts after the end of the month in which the waybill is received."[63] Destination railroads are responsible for settling all the movements of the interline freight.[64] "The destination carrier must include in the monthly accounting all charges for which the destination carrier has received a waybill, whether or not the shipper paid. The waybill is issued by the originating carrier and prescribes the movement of the shipment and charges."[65] The accounts are divided into two types: freight and passenger accounts; and the accounts that include railroad car repairs, switching accounts, overcharges, per diem accounts, and damage accounts.[66]

These funds that are held and then settled at the end of the month are deemed to be constructive trusts.[67] "A constructive trust arises by operation of law where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it."[68] Also, "[t]he parties' manifestation of intention ultimately controls whether or not a trust relationship exists, but failure to expressly designate the relationship as one of trust does not necessarily negate its existence."[69] As such, these accounts are not to be deemed to be part of the holding company's estate during bankruptcy and are not permitted to be claimed by general creditors.[70] "[I]nterline carriers were granted a superior status vis-a-vis other creditors so as to promote and maintain an adequate, economical and

59. *Id.* at 521 n.1.
60. *Id.* at 523.
61. *Id.*
62. *Penn Cent.*, 486 F.2d at 523.
63. *Id.* at 525.
64. *Id.* at 523.
65. *Id.*
66. *Penn Cent.*, 486 F.2d at 521.
67. *Id.* at 524.
68. Mo. Pac. R.R. Co. v. Escanaba & Lake Superior R.R., Co. 702 F. Supp. 630, 633 (W.D. Mich. 1988).
69. *Penn Cent.*, 486 F.2d at 524 (citing United States v. Orsinger, 428 F.2d 1105, 1112 (D.C. Cir. 1970)).
70. Begier v. Internal Revenue Serv., 496 U.S. 53, 63-64 (1990).

efficient national transportation system, a policy established in the Interstate Commerce Act."[71] These trusts protect the loss to the other carriers in the event of the collecting carrier going bankrupt so that they in fact create/solve the secured interest disputes instead of impairing them.[72] The commingling of funds are found to be temporary and do not create a debtor-creditor relationship, therefore under bankruptcy law, there is no supported contention that one railroad may retain the funds of another.[73] "Because the debtor does not own an equitable interest in property he holds in trust for another, that interest is not 'property of the estate.' Nor is such an equitable interest 'property of the debtor' for purposes of [Bankruptcy Code section] 547(b)."[74]

> Among the powers of a Chapter 7 trustee is the power under § 547(b) n1 to avoid certain payments made by the debtor that would "enable a creditor to receive payment of a greater percentage of his claim against the debtor than he would have received if the transfer had not been made and he had participated in the distribution of the assets of the bankrupt estate."[75]

Numerous courts have found that interline accounts are trust accounts and do not belong to the bankrupt party.[76] "First, the Court agrees with the Seventh Circuit that there is no federal statutory basis for holding the outstanding interline revenues are trust funds. As to the second consideration, the Court notes there are strong reasons for uniform regulation of interstate commerce by rail. . . ."[77] The uniformity required of the interline railroad system is such that "[t]o make this system dependant upon the application of the various laws of the various states would not only place it in serious jeopardy, but also would virtually assure its destruction."[78] As the court in *In re Ann Arbor Railroad Company* said:

> We find no logic in the contention that one bankrupt railroad may retain funds belonging to another interline railroad, whether or not in bankruptcy, which the collecting carrier was required to pay under the established practice and procedure required by the Interstate Commerce Commission, the Regional Rail Reorganization Act, and the rules of the Association of American Railroads.[79]

Later support of the *Ann Arbor Railroad* case came in the *Missouri*

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71. *Mo. Pac. R.R., Co.*, 702 F. Supp. at 632.
72. *See Penn Cent.*, 486 F.2d at 533.
73. *Mo. Pac. R.R., Co.*, 702 F. Supp. at 632.
74. *Begier*, 496 U.S. at 59.
75. *Id.* at 56-57.
76. *See Mo. Pac. R.R. Co.*, 702 F. Supp. at 633-34; *In re Ann Arbor R.R. Co.*, 623 F.2d at 482; *Penn Cent.*, 486 F.2d at 529-30; *Orsinger*, 428 F.2d at 1114.
77. *Mo. Pac. R.R. . Co.*, 702 F. Supp. at 633.
78. *Id.* (quoting *In re* Lehigh & New England Ry. Co., 657 F.2d 570, 575 (3d Cir. 1981)).
79. *In re Ann Arbor R.R. Co.*, 623 F.2d at 482.

Pacific Railroad Company v. Escanaba & Lake Superior Railroad Company, decided in 1988.[80] There the court went through a three-pronged process in determining whether the funds held were to be properly construed as part of the estate or whether they were to be divided up among the specialized interests of other railroad creditors.[81] In evaluating the circumstances which led to this conclusion:

> [T]he court noted (a) that the commingling of funds by the collecting carrier did not defeat the finding of a trust, because the commingling was to have been temporary under the established account-settling practice; (b) that the interline railroads evinced no intent to create a debtor-creditor relationship and no interest was payable on the outstanding funds; and (c) that neither the equities nor logic supported the contention that one railroad may retain funds belonging to another.[82]

In finding that the funds in question were held in trust, the court then reiterated that a trust does not need to be specifically detailed in the contract and that, "[a] constructive trust may also be imposed where, as here, one takes advantage of necessities (e.g. interline freight charge collection practices) to obtain assets under circumstances which render retention thereof unconscionable."[83]

The *Begier* court, in looking at the difficulty of determining property ownership and interest, took the *Ann Arbor Railroad* and *Missouri* decisions and commingled them with the Internal Revenue Services ("IRS") definitions on trust-fund tax provisions.[84] IRS provision, 26 U.S.C § 7501, states:

> "Whenever any person is required to collect or withhold any internal revenue tax from any other person and to pay over such tax to the United States, the amount of tax so collected or withheld shall be held to be special fund in trust for the United States." The statutory trust extends, then, only to "the amount of tax so collected or withheld."[85]

The provision intends to give a United States citizen the advantages and benefits of the trust doctrine with respect to collected and withheld taxes.[86] In the *Begier* case, American International Airways, Inc. ("AIA") filed for Chapter 11 bankruptcy and protection/relief from its

80. *See Mo. Pac. R.R. Co.*, 702 F. Supp. at 632 (relying on the decision in *In re Ann Arbor R.R. Co.*, 623 F.2d 480 (6th Cir. 1980)).

81. *Id.* at 633 (citing Iowa R.R. Co. v. Moritz, 840 F.2d 535 (7th Cir. 1988)).

82. *Mo. Pac. R.R. Co.*, 702 F. Supp. at 632 (citing *In re Ann Arbor R.R. Co.*, 623 F.2d at 482).

83. *Mo. Pac. R.R., Co.*, 702 F. Supp. at 633.

84. *See Begier*, 496 U.S. at 60.

85. *Id.*

86. *Id.* at 70.

creditors.[87] AIA had held off a part of its monetary assets in a special fund that was to pay the United States government taxes to the best of its ability.[88] Begier was appointed trustee by the Bankruptcy Court to help oversee AIA's problems and the Chapter 11 liquidation plan.[89] Begier's power as trustee enabled him, under section 547(b) to avoid payments "that would 'enable a creditor to receive payment of a greater percentage of his claim against the debtor that he would have received if the transfer had not been made and he had participated in the distribution of the assets of the bankrupt estate.'"[90] Begier sought to exercise that avoidance power and so he filed suit against the United States government in order to prevent the IRS from collecting the money held in the special fund.[91] Overall, the Third Circuit Court of Appeals found that such monies were not to be avoided, because they had been specifically set aside in order to pay the IRS.[92] Begier was able to avoid the payments that AIA had made from its general accounts.[93] This case is key for its field because it lays out a clear designation of what the powers of the trustee are and just what sort of estate assets can be protected from creditors.

Overall, the railroad interline accounts are not instruments that impair a secured interest, but are simply accounting determinations of who has a right to the various funds. Many courts have found the existence of constructive trusts and upheld that the monies held in question belong to the plaintiff party since they are not something that is collected for only a temporaneous amount of time.[94] Thus, there is a consistent application of trust fund concepts to deny general creditors access to the funds.[95]

IV. Owner Operator - Motor Carriers and Trucking Industry

Unlike railroads, the motor carrier trucking industry does not rely on inter-company accounting sheets.[96] Instead, motor carriers use lease agreements.[97] Motor carrier lease agreements are specified agreements

87. *Id.* at 56.
88. *Id.* at 55-56.
89. *Begier*, 496 U.S. at 56.
90. *Id.* at 56-57.
91. *Id.* at 57.
92. *Id.*
93. *Id.*
94. *See, e.g.*, *Penn Cent.*, 486 F.2d at 525.
95. *See Mo. Pac. R.R. Co.*, 702 F. Supp. at 634 (granting summary judgment respecting plaintiffs' trust funds claims for relief).
96. There is no interline system for motor carrier trucking as there is in the railroad industries. Rather the Federal 'Truth-in-Leasing' regulation, 49 C.F.R. § 376, govern what is required of owner-operator motor carrier agreements, while the AAR provides some guidelines for how interline railroad systems are to function. *See* 49 C.F.R. § 376; *Penn Cent.*, 486 F.2d at 521 n.1.
97. *New Prime, Inc.*, 339 F.3d at 1003.

between a lessor and lessee concerning the details of leases and revenue allocation between the lessee and the lessor.[98] As is set forth in more detail below, under the Code of Federal Regulations ("CFR"), certain terms must be in these leases.[99] These lease agreements at times create escrow funds that are held by a designated party.[100] Escrow funds were defined in *Owner-Operator Independent Drivers Association v. New Prime* as "[m]oney deposited by the lessor with either a third party or the lessee to guarantee performance, to repay advances, to cover repair expenses, to handle claims, to handle license and State permit costs, and for any other purposes mutually agreed upon by the lessor and the lessee."[101] To the extent that the Escrow fund is not over abused, all that is required is the specific process of successorship.[102] If there is no way to distinguish the trust funds from the general assets of the named owner of the account, it is probably abuse to artificially attempt to segregate the funds for a particular claiming creditor who would like to be designated as a beneficiary.[103] So, what does this mean for the parties involved? Simply, that the debtor will have some protection of trust funds from every creditor that is attempting to make a claim against the debtor's estate.

Also, unlike the railroads, there are federal regulations the parties are required to follow concerning the agreements. The CFR Federal "Truth-in-Leasing" regulation requires that motor carriers and owner-operators enter into written leases that explicitly address certain contractual issues, such as compensation and duration.[104] This regulation specifically deals with amending leasing agreements and determining the escrow funds allocated.[105] For example, an "Amended Lease Agreement must: (1) specify what the funds held in escrow may be used for . . . and (2) specify what items owed to Success at the termination or completion of the lease may be offset against any escrow funds to be returned to Lessee. . . ."[106] The lease must not only specify what items the escrow funds can be applied towards, but it must also specify the conditions a lessor must fulfill for the fund to be returned, the time frame for the return (not later than forty-five days), and any other obligations that the authorized carrier may deduct monies for.[107] A written lease regarding

98. Owner-Operator Indep. Drivers Ass'n v. Swift Transp., 367 F.3d 1108, 1109-10 (9th Cir. 2004).
99. *See id.* at 1110.
100. *See New Prime*, 339 F.3d at 1009.
101. *Id.* (quoting 49 C.F.R. § 376.2(l) (2002)).
102. *Id.*
103. *See id.* at 1009-10.
104. *See* 49 C.F.R. §§ 376.11-.12 (2002); *Swift*, 376 F.3d at 1110.
105. *See* 49 C.F.R. § 376.12; *see also New Prime*, 339 F.3d at 1009.
106. *New Prime*, 339 F.3d at 1009 (citing 49 C.F.R. §§ 376.12(k)(2); (k)(5)).
107. *See New Prime*, 339 F.3d at 1009; *see also* 49 C.F.R. § 376(k)(2), (k)(6)).

Escrow funds must include the following:

1. The amount of any escrow fund. . .
2. The specific items to which the escrow fund can be applied.
3. That . . . the authorized carrier shall provide an accounting to the lessor. . .
4. The right of the lessor to demand to have an accounting. . .
5. That . . . the carrier shall pay interest on the escrow fund. . .
6. The conditions the lessor must fulfill in order to have the escrow fund returned. . . .[108]

Since the ICCTA, "motor carriers are required to register with the Department of Transportation ("DOT") in order to ship most types of cargo in interstate commerce."[109] These regulations are in place to ensure that the secured interests of the authorized carriers are protected and to allow for the enforcement of the federal regulations. Such protection for authorized carriers enables them to prevent the interests of all general creditor parties from piercing the monies of the estate and taking what is not rightfully theirs. Such clear rules, as stated in the "Truth-in-leasing" regulations provides that such disputes as may arise can be quickly solved and adequately determined as to exactly who has a secured versus general (unsecured) interest in the estate of the bankrupt party.

V. Impact of In re Intrenet

The recent court decision by the bankruptcy court in *In re Intrenet*[110] has a potential impact on both the railroad and motor carrier communities. The decision further clarifies that railroads and motor carriers holding the property of another for the benefit of that other does not permit the holding entity to count those funds as part of the property of their estate in the event of bankruptcy.[111] As is clearly defined by the federal bankruptcy laws, "[p]roperty over which the debtor has legal title but not an equitable interest becomes property of the estate 'only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold."[112] "Also, property over which a debtor exercises some power solely for the benefit of another is not property of the estate. . . Thus, property held by a debtor

108. *In re* Intrenet, Inc., 273 B.R. 153, 156 (Bankr. S.D. Ohio 2002) (citing 49 C.F.R. § 376.12(k)).

109. *Swift*, 367 P.3d at 1110.

110. *In re Intrenet, Inc.*, 273 B.R. 153 (Bankr. S.D. Ohio 2002). Tractor-trailer lessors commenced suit for declaratory judgment of funds that lessors had deposited with carrier-lessees. The funds were deposited as required by the lease to cover permit costs and other purposes. The Bankruptcy Court held that the funds were held in trust and therefore were not "property of the estate."

111. *Id.* at 157.

112. *Id.* (quoting 11 U.S.C. § 541(d)(2002)).

in trust for the benefit of another is not property of the estate."[113] With that distinction of what property is and is not permitted to be counted within the estate, the railroads and motor carriers are able to clearly determine what assets remain. As such, *In re Intrenet* serves to put the proverbial nail in the coffin of determining who has a secured interest in the property.[114]

VI. ARE THE AIRLINES NEXT?

Recently, credit card companies have implemented reserve requirements with airlines in order to reduce the risk of loss in the event that the airlines go bankrupt.[115] In October 2004, legislation was proposed and attached to the Intelligence Reform bill ostensibly to protect consumers from the airlines that cannot meet their resold ticket commitments.[116] Instead, this legislation would protect credit card companies and customers.[117] Rather of having to refund credit card and ticket purchases, the ticket holder would be required to seek other travel arrangements.[118] The bill is intended to extend the requirement that the airlines honor tickets of defunct carriers for an additional year.[119] Normally the credit card companies that process the airline accounts are responsible for covering the ticket costs, since the credit card holder can ask for a refund from the credit card issuer.[120] This bill would, "shift potential losses from credit-card companies . . . to airlines."[121] The pending legislation is advanced and promoted as a protection for consumers but what this bill does is shift the risk from the credit card issuer to the consumer and to the airlines. Credit card companies have already required airlines to set aside some reserve funds since the World Trade Center attacks of September 11, 2001 in order to protect against the possible event of massive refunds.[122] These holdings could be considered funds held in trust for a future, but mostly they are an instrument that is triggered only during emergency circumstances.[123] Without the new bill, the airlines would have to continue to set aside greater and greater amounts of reserve capital to cover the risks of going under and ensuring the repayment of refunds to the credit card

113. *In re Intrenet, Inc.*, 273 B.R. at 157 (citing 11 U.S.C. § 541(b)(1); *Begier*, 496 U.S. at 59)).
114. *See In re Intrenet, Inc.*, 273 B.R. at 157.
115. Scott McCartney, *Bill to Protect Fliers from Shutdowns has Surprising Beneficiary*, WALL ST. J, Oct. 26, 2004, at D1.
116. *Id.* at D6.
117. *Id.* at D1.
118. *Id.* at D6.
119. *Id.* at D1.
120. McCarney, *supra* note 117, at D1.
121. *Id.*
122. *Id.* at D6.
123. *Id.*

companies and ticket holders.[124] With this bill, Congress is shifting that risk to the airlines' normal operating procedures.[125] By requiring airlines, when they are short of cash, to set aside additional funds as reserves impairs the ability of the airlines to pay its other creditors and also its secured creditors.[126]

VII. Conclusion

The CFR does not clearly define any security provisions for bankruptcy. It is up to the courts to determine the estate of the bankrupt and to determine whether there are any trust or escrow interests that exist. Both the owner-operator lease agreements and the interline railroad accounts do not create a new tax shelter for businesses to avoid or reduce income taxes, nor, so long as they are reasonably defined and set up, do they add or diminish the property in the estate of the holder. The answer to the question posed of whether the use of the trust concepts as a means of segregating the assets of a bankrupt is diminishing the right of other creditors or even impairing secured lenders appears to be no.

There are no recent CFR amendments that oppose these court decisions that have created a rule of law that is impairing Interstate Commerce. In fact, there are no recent amendments to the CFR that have had any impact on either the owner-operator agreements or the interline railroad accounts. Even if there were such amendments, would those amendments apply retroactively to existing agreements or conduct? The Supreme Court of the United States has determined that it is not Congress's intent to govern retroactively.[127] It does not appear that it would impair the rights of creditors, increase any parties' liability retroactively, or impose new duties on those transactions already completed.[128]

This evolution and application of trust concepts to interline accounts and motor carrier leases has diminished the assets available to the debtors creditors. The trust fund exclusion from the estate of the bankrupt reduces funds accessible to creditors, but there has been no showing that a creditor was relying on these assets when it extended credit, and thus we have come full circle to the age old balancing of interests of the law of trusts. A recent decision from the Minnesota Court of Appeals has also

124. McCarney, *supra* note 117, at D6.

125. *Id.* at D1.

126. A general creditor, otherwise known as an unsecured creditor, is defined as "[a] creditor who, upon giving credit, takes no rights against specific property of the debtor." A secured creditor, on the other hand, is defined as "[a] creditor who has the right, on the debtor's default, to proceed against collateral and apply it to the payment of the debt." Black's Law Dictionary (8th ed. 2004).

127. *New Prime*, 339 F.3d at 1006 (citing Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994)).

128. *New Prime*, 339 F.3d at 1007.

found that premiums held by an insurance agent are not trust funds.[129] If the insurer consents to the agent's commingling of the premiums with other expenses, they are inconsistent with the concepts of trusts.[130]

Courts are not using trusts and escrow funds to negatively impact the rights of creditors, whether secured or unsecured. If a creditor can show reliance on the account as in the Minnesota case, then the creditor has prevailed. If the courts are applying generic accounts common in an industry, such as interline and motor lease agreements, then the creditor is not being impaired. There is no history of these assets being available to the creditor beforehand.

At the present time, there is no evidence of any proposed legislation in Congress, and there are no new pending federal regulations recently published in the Federal Register that might impact or modify the Court's rulings or the applications of these rulings. Nor are there any individual State actions that appear to be the beginnings of any sort of change in the current system. Not only is there no pending legislation to change this rule, this author sees no reason to change the current rules. The system is working efficiently and in a fair or just manner. There is not a party that is being clearly left out and unable to recover claims, instead the system provides for all creditors to recover if they can effectively prove the case that there interests in the bankrupt estate comes before that of others.

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129. *See Mid-Continent Agencies, Inc.*, 485 N.W.2d at 149.
130. *Id.* at 149-50.