RICHARD SHOFER
VS.
THE STUART HACK CO., ET AL.
CASE NO: 88102069/CL-79993
VOLUME 3 of 4
EXHIBITS --- NO
TRANSCRIPTS --- YES

one CROSS HYPERL / one Record

209-98
506

1135-90

CIRCUIT COURT FOR BALTIMORE CITY
CIVIL DIVISION

Room 462 Court House East
111 N. Calvert Street
Baltimore, Md. 21202

SAUNDRA E. BANKS,
Clerk

General Information (301) 659-3700
Law (301) 659-3711
Equity (301) 659-3722

January 3, 1991

Honorable Leslie D. Gradet, Clerk
Court of Special Appeals of Maryland
Courts of Appeal Building
361 Rowe Boulevard
Annapolis, Maryland 21401-1698

Re: Richard Shofer v. The Stuart Hack Company et al.
Circuit Court for Baltimore City
Docket Number 88102069

Dear M's Gradet:

Petition for extension of time to transmit the record and Order, dated 27th. day of December, 1990, by the Court of Special Appeals of Maryland, Granting extension of time until January 28, 1991 is being returned. Above-captioned appeal was forwarded to the Court of Special Appeals on December 27, 1990.

This action is being taken per telephone conversation, this date, in which you advised same.

Yours truly,

Frances G. Stepter
Court Clerk VI

/fgs

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Court of Special Appeals
of Maryland

Annapolis, Md. 21401-1698

(301)974-3646 (DIRECT LINE)
(301) 261-2920 (WASHINGTON AREA)

TTY FOR DEAF
(301)974-2609 (DIRECT LINE)
(301) 565-0450 (WASHINGTON AREA)

Leslie D. Gradet
Clerk

Susan L. Rosenblum
Chief Deputy

JAN 02 1991

December 31, 1990

Anthony P. Palaigos, Esquire
Thomas A. Bowden, Esquire
2 Hopkins Plaza, Suite 1200
Baltimore, Maryland 21201

Re: Richard Shofer v. The Stuart Hack Company et al.
Circuit Court for Baltimore City
Docket Number: 88102069

Dear Counsel:

Your Petition for extension of time to transmit the record in the above-captioned case has been:

__XX__ GRANTED (SEE ATTACHED ORDER)

_____ GRANTED but modified as follows:

_____

_____ DENIED

Very truly yours,

Leslie D. Gradet

Leslie D. Gradet
Clerk

LDG: dp

cc: Janet M. Truhe, Esquire
Linda M. Schuett, Esquire

Mr. Clerk: Please place attached original petition and Order in record at time of transmittal.

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IN THE COURT OF SPECIAL APPEALS OF MARYLAND

RICHARD SHOFER	*	
Appellant	*	
		PHC No. 804
v.	*	
		September Term, 1990
THE STUART HACK COMPANY, et al.	*	
Appellees	*	
	*	

* * * * * * * * * * * * * * * * * *

MOTION TO EXTEND TIME FOR TRANSMITTAL OF RECORD

Richard Shofer, Appellant, by Anthony P. Palaigos, Thomas A. Bowden, and Blum, Yumkas, Mailman, Gutman & Denick, P.A., his attorneys, files this Motion pursuant to Rule 8-412(d) to extend the time for the transmittal of the record.

On October 23, 1990, Appellant's counsel timely filed a written request for a written transcript with Rita Taggart, the court reporter who stenographically recorded the hearing before Judge Ross.

On October 30, 1990, this Court entered an Order directing that this appeal proceed without a prehearing conference. Thus, the 60-day deadline for transmission of the record was established as December 29, 1990.

On December 7, 1990, Ms. Taggart advised Appellant's above-named counsel in writing that her present work load necessitated a 30-day extension from the December 29, 1990 deadline. A copy of that letter is annexed hereto and incorporated herein.

WHEREFORE, Appellant requests that this Honorable Court enter an Order extending the time for transmitting the record until January 28, 1991.

Anthony P. Palaigos /B

Thomas A. Bowden
Blum, Yumkas, Mailman, Gutman,
& Denick, P.A.
#2 Hopkins Plaza, Suite 1200
Baltimore, Maryland 21201
(301) 385-4000

Attorneys for Appellant

CERTIFICATE OF SERVICE

I CERTIFY that on this 11th day of December, 1990, a copy of this document was mailed first class, postage prepaid, to each person listed below:

Janet M. Truhe, Esquire
Semmes, Bowen & Semmes
250 West Pratt Street
Baltimore, Maryland 21201

Attorneys for Defendants

Linda M. Schuett, Esq.
Frank, Bernstein, Conaway & Goldman
300 East Lombard Street
Baltimore, Maryland 21202

Attorneys for Third-Party Defendant

Thomas A. Bowden

g:07904009.mo3

December 7, 1990

RE: Shofer v. The Stuart Hack Company

CASE NOS: 88102069/CL79993

Dear Mr. Sharkey,

Please be advised this letter is to request a thirty day extension for the above referenced matter due to my present work load.

I believe the present due date is December 29, 1990.

I'd appreciate it if you could file the necessary petition.

I thank you for your cooperation in this matter.

Sincerely,

Rita M. E. Taggart

Official Court Reporter

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IN THE COURT OF SPECIAL APPEALS OF MARYLAND

RICHARD SHOFER *

Appellant *

v. * PHC No. 804

THE STUART HACK COMPANY, et al. * September Term, 1990

Appellees *

* * * * * * * * * * * * * * * * * * *

ORDER

This matter having come before the Court on Appellant's Motion for Extension of Time for Transmittal of Record, the Court having read and considered said Motion and ~~any~~ no response thereto having been filed, it is, this 27th day of December, 1990, by the Court of Special Appeals of Maryland,

ORDERED, that Appellant's Motion be, and it is hereby, GRANTED, and it is further

ORDERED, that the time for transmitting the record in the above-captioned appeal be, and it is hereby, extended until January 28, 1991.

Leslie D. Gradet

~~JUDGE~~
Clerk

g:07904009.or5

709

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RICHARD SHOFER	:	IN THE
Appellant	:	COURT OF SPECIAL APPEALS
vs.	:	OF MARYLAND
THE STUART HACK COMPANY, et al	:	No. 1735
Appellees	:	September Term 1990

: : : : : : : : : : : : : : :

ORDER

Appellees' Motion to Correct and Supplement Record having been considered by this Court, it is this 5th day of February, 1991

ORDERED

That appellees' motion to correct the record in the above-captioned appeal is hereby granted and this Order shall constitute the amendment of the docket entries to reflect the transcript of proceedings of July 2, 1990. It is further ordered that the record is supplemented to include the transcript of proceedings of July 2, 1990.

Judge

SEMMES, BOWEN & SEMMES
250 W. Pratt Street
Baltimore, Md. 21201

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Court of Special Appeals

Courts of Appeal Building
Annapolis, Md. 21401-1699

(301) 974-3646
WASHINGTON AREA (301) 261-2920

LESLIE D. GRADET
CLERK

SUSAN L. ROSENBLUM
CHIEF DEPUTY

February 6, 1991

Janet M. Truhe, Esquire
Lee B. Zaben, Esquire
250 West Pratt Street
Baltimore, Maryland 21201

Re: Richard Shofer vs. The Stuart Hack Company et al.
No. 1735, September Term, 1990

Dear Counsel:

Be advised that Appellee's Motion to Correct and Supplement Record, filed in the captioned case, was granted by Order of this Court dated February 5, 1991. A copy of that Order is enclosed. The transcript of proceedings held on July 2, 1990 which was attached to the motion is being placed with and made a part of the record in this appeal.

Very truly yours,

Leslie D. Gradet

Leslie D. Gradet
Clerk

LDG:ls

Enclosure

cc: Anthony P. Palaigos, Esquire
Thomas A. Bowden, Esuqire
Linda M. Schuett, Esquire

RICHARD SHOFER	:	IN THE
Appellant	:	COURT OF SPECIAL APPEALS
vs.	:	OF MARYLAND
THE STUART HACK COMPANY, et al	:	No. 1735
Appellees	:	September Term 1990

: : : : : : : : : : : : : : :

APPELLEES' MOTION TO
CORRECT AND SUPPLEMENT RECORD

Appellees, Stuart Hack and The Stuart Hack Company, by their attorneys, Janet M. Truhe, Lee B. Zaben, and Semmes, Bowen & Semmes, pursuant to Maryland Rule 8-414, move this Court to supplement the record previously transmitted in the above-captioned appeal by accepting the reporter's official transcript of proceedings from the hearing of July 2, 1990 before Judge David Ross in the Circuit Court for Baltimore City. The appellees would also request that this Court correct the record so as to reflect the addition of this transcript in connection with the Order of July 2, 1990 granting defendants' Motion to Dismiss Count IV of the Amended Complaint. In support of their motion, appellees state as reasons,

1. That the transcript of the proceedings on July 2, 1990 was inadvertently omitted from the transmittal of the record in the above-captioned appeal.

SEMMES, BOWEN
& SEMMES
250 W. Pratt Street
Baltimore, Md. 21201

2. That upon discovery of the omission of this transcript, the reporter was contacted and requested to immediately transcribe the proceedings of July 2, 1990.

3. That the reporter's official transcript of proceedings dated July 2, 1990 is attached hereto.

4. That counsel for both parties in the above-captioned appeal agree that the record should be supplemented with the transcript of proceedings of July 2, 1990.

For these reasons, appellees, Stuart Hack and The Stuart Hack Company, respectfully request this Court to grant its motion to supplement and correct the record in the above-captioned appeal by adding the transcript of proceedings of July 2, 1990 to the record and correcting the record accordingly.

Respectfully submitted,

Janet M. Truhe

Janet M. Truhe

Lee B. Zaben

Lee B. Zaben

Semmes, Bowen & Semmes

Semmes, Bowen & Semmes
250 W. Pratt Street
Baltimore, Maryland 21201
539-5040
Attorneys for Appellees

SEMMES, BOWEN
& SEMMES
250 W. Pratt Street
Baltimore, Md. 21201

I HEREBY CERTIFY that on this 31st day of January, 1991, a copy of the foregoing Appellees' Motion to Correct and Supplement Record and Order were mailed to Anthony P. Palaigos, Esq. and Thomas A. Bowden, Esq., Blum, Yumkas, Mailman, Gutman & Denick, P.A., Suite 1200, 2 Hopkins Plaza, Baltimore, Maryland 21201 and Linda M. Schuett, Esq., Frank, Bernstein, Conaway & Goldman, 300 E. Lombard Street, Baltimore, Maryland 21202.

Janet M. Truhe

Janet M. Truhe

SEMMES, BOWEN
& SEMMES
250 W. Pratt Street
Baltimore, Md. 21201

CSA

91 FEB 26 AM 10:55

OCT 21 1991

RICHARD SHOFER	*	IN THE
	*	COURT OF APPEALS
v.	*	OF MARYLAND
THE STUART HACK COMPANY, et al.	*	(No. 1735, Sept. Term 1990 Court of Special Appeals)

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O R D E R

It is this 26th day of February, 1991

ORDERED, by the Court of Appeals of Maryland, on its own motion, that a writ of certiorari to the Court of Special Appeals shall issue in the above entitled case and said case shall be docketed on the regular docket as No. 165, September Term, 1990; and it is further

ORDERED that counsel shall file briefs and printed record extract in accordance with Rules 8-501 and 8-502, appellees' brief to be filed on or before March 11, 1991.

/s/ Robert C. Murphy
Chief Judge

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RICHARD SHOFER	*	IN THE
[redacted]	*	COURT OF APPEALS
v.	*	OF MARYLAND
THE STUART HACK COMPANY, et al.	*	(No. 1735, Sept. Term 1900; Court of Special Appeals)

WRIT OF CERTIORARI

STATE OF MARYLAND, to wit:

TO THE HONORABLE THE JUDGES OF THE
COURT OF SPECIAL APPEALS OF MARYLAND:

WHEREAS, Richard Shofer v. The Stuart Hack Company, et al., No. 1735, September Term, 1990 is pending before your Court and the Court of Appeals is willing that the records and proceedings therein be certified to it.

YOU ARE HEREBY COMMANDED to cause them to be sent without delay to the Court of Appeals of Maryland, together with this writ, for the said Court to proceed thereon as justice may require.

WITNESS the Chief Judge of the Court of Appeals of Maryland this 26th day of February, 1991.

Alexander L. Cummings
Clerk
Court of Appeals of Maryland

IN THE COURT OF APPEALS OF MARYLAND

No. 165

September Term, 1990

(61)

RICHARD SHOFER

v.

THE STUART HACK COMPANY
et al.

Murphy, C.J.
Eldridge
Rodowsky
McAuliffe
Chasanow
Karwacki,

JJ.

Opinion by Rodowsky, J.

Filed: September 17, 1991

This case presents issues of exclusive federal jurisdiction and of federal preemption of state law under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001 through 1461. The action is brought by a retirement plan participant against a nonfiduciary consultant to the plan for loss, including liability for income taxes, interest and penalties, allegedly caused by tax advice negligently rendered by the consultant concerning loans from the plan.

I

ERISA preemption is created by a section in that statute providing that, with certain exceptions, ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a) (1988).[1] This provision has been called "undoubtedly ... the most expansive preemption clause found in any federal statute." Conison, *The Federal Common Law of ERISA Plan Attorneys*, 41 Syracuse L. Rev. 1049, 1083 (1990). "State law" is defined in ERISA as "all laws, decisions, rules, regulations, or other State action having the effect of law." § 1144(c)(1). The Supreme Court has given the phrase "relate to" its "broad common-sense meaning, such that a state law 'relate[s] to' a benefit plan 'in the normal sense of the phrase, if it has a connection with or reference to such a plan.'" *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739, 105 S. Ct. 2380, 2389, 85 L. Ed. 2d 728, 740 (1985) (quoting *Shaw v. Delta Air Lines*, 463 U.S. 85, 97, 103 S. Ct. 2890, 2900, 77 L. Ed.

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[1]Unless otherwise indicated, all statutory references are to Title 29, U.S.C.

2d 490, 501 (1983)). Indeed, some courts hold that ERISA preempts state common law remedies even though the result leaves the plaintiff with no remedy under ERISA either. *See, e.g., Lee v. E.I. DuPont de Nemours & Co.*, 894 F.2d 755, 757-58 (5th Cir. 1990) (state law action for negligent misrepresentation preempted, despite possible lack of remedy in ERISA, where retired employees sued former employer for additional benefits provided under early retirement plan adopted shortly after plaintiffs retired).

On the other hand, there are limits to ERISA preemption. The Supreme Court has stated that "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw*, 463 U.S. at 100 n.21, 103 S. Ct. at 2901 n.21. Although the relationships to plans that have come before the Supreme Court frequently have not been "too tenuous, remote, or peripheral" to avoid preemption, there is a body of authority from other courts holding no preemption of state law claims that have *some* relationship to an ERISA benefit plan.

The subject matter jurisdictional issue in the instant matter involves § 1132(e)(1). It reads:

> "Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter [Protection of Employee Benefit Rights §§ 1001 through 1168] brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section."

The exception gives state and federal courts concurrent jurisdiction over a "civil action ... brought by a participant or beneficiary to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." § 1132(a)(1)(B).

II

Petitioner, Richard Shofer (Shofer), is an automobile dealer. He is the sole stockholder and president of Catalina Enterprises, Inc. (Catalina), which trades as Crown Motors. In 1971 Catalina adopted a pension plan which qualified under the Internal Revenue Code. Shofer was and is the plan's sole trustee.

Respondent, Stuart Hack (Hack), a Chartered Life Underwriter, is the president of respondent, The Stuart Hack Company (Hack Co.). Respondents are pension plan consultants. They prepared the Catalina plan and amendments thereto. Hack Co. acts as a professional plan administrator, and it is the administrator of the Catalina plan.[2] Respondents routinely rendered professional assistance to Catalina. This included advising Shofer or Catalina as to the tax implications of transactions that they were contemplating. That was a normal part of the business relationship between respondents, Shofer, and Catalina.

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[2]"Administrator" is a defined term in ERISA. It means "the person specifically so designated by the terms of the instrument under which the plan is operated; [or] the plan sponsor ...." § 1002(16)(A).

Sometime prior to August 9, 1984, Shofer had a telephone conversation with Hack concerning the use of funds in Shofer's account or accounts in the Catalina plan, either by way of a loan from the plan, or as security for a loan. Hack replied in a four-paragraph, single-spaced, full-page letter of August 9, 1984. Shofer's position in the instant litigation is that Hack failed to advise Shofer of the income tax consequences of borrowing from the plan.

In nine transactions between August 9, 1984, and September 30, 1986, Shofer borrowed $375,000 from the Catalina plan. Shofer used the loan proceeds to repay loans from Catalina, t/a Crown Motors, and to purchase and refurbish a property in the Virgin Islands.

Subsequently, Catalina's and Shofer's accountants, Grabush, Newman & Company, P.A. (Grabush), advised Shofer of income tax liability based on those loans. Shofer paid to the United States and to the State of Maryland for the years 1984, 1985 and 1986 income taxes, penalties, and interest totaling $120,428.19 because proceeds of the loans from the plan constituted income to him in those years. Shofer also incurred other consequential expenses.

Shofer sued Hack and Hack Co. in the Circuit Court for Baltimore City. Hack and Hack Co. impleaded Grabush as a third-party defendant. Shofer's claims eventually were stated in a second amended complaint. During the evolution of that pleading the parties engaged in discovery.

Shofer's second amended complaint is in eight counts. Counts I and II are Maryland law claims, sounding in tort and in contract,

for malpractice. Count III alleges a special relationship of trust and confidence to have existed between Shofer and the respondents, giving rise to a fiduciary duty which was breached by the allegedly incomplete advice. Counts IV through VIII are expressly predicated on breaches of the ERISA plan. The compensatory damages sought under the ERISA counts are the same as those sought in the Maryland law causes of action.

In support of their motion to dismiss, respondents argued that the first three counts of the second amended complaint were predicated on Maryland common law which was preempted by ERISA. Thus, those counts did not state a claim upon which relief could be granted because the underlying substantive law relied on for the theory of the cause of action could not be applied to the claim. Respondents argued that the ERISA-based causes of action could be asserted only in a federal court. Respondents further submitted that, because all of the counts essentially involved a breach of fiduciary duty, the federal courts had exclusive subject matter jurisdiction over all of the counts. The parties, both in their memoranda filed in, and in their oral arguments to, the circuit court went well beyond the four corners of the second amended complaint. They made free use of facts contained in discovery which appeared in the circuit court record. The joint record extract in this Court contains discovery material and an affidavit. Accordingly, we shall treat respondents' motion to dismiss as one for summary judgment, governed by Maryland Rule 2-501. *See* Md. Rule 2-322(c).

The circuit court dismissed Shofer's complaint with prejudice in its entirety.[3] Shofer appealed to the Court of Special Appeals. We issued the writ of certiorari on our own motion prior to consideration of this matter by the Court of Special Appeals.

The docket of the Circuit Court for Baltimore City reflects that no judgment has ever been entered disposing of the third-party claim by respondents against Grabush. Nor was the circuit court asked to certify its dismissal of Shofer's second amended complaint as a final judgment pursuant to Maryland Rule 2-602. Thus, this case could be dismissed as a premature appeal. *See Estep v. Georgetown Leather Design*, 320 Md. 277, 577 A.2d 78 (1990). Nevertheless, we exercise our discretion under Maryland Rule 8-602(e)(1)(C) and hereby enter as a final judgment the judgment of the Circuit Court for Baltimore City dismissing all of Shofer's claims.

III

For purposes of this appeal the respondents are not fiduciaries under the Catalina plan.[4]

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[3]After the circuit court's dismissal Shofer filed a complaint in the United States District Court for the District of Maryland. The district court granted summary judgment for Hack because the claim was barred by the ERISA statute of limitations, § 1113. Shofer v. Stuart Hack Co., 753 F. Supp. 587 (D. Md. 1991). We were advised at oral argument of this matter that the district court judgment has been appealed to the United States Court of Appeals for the Fourth Circuit.

[4]Indeed, Shofer sought voluntarily to dismiss without prejudice Counts III through VIII of the second amended complaint, thereby eliminating all counts but those alleging Maryland common law, nonfiduciary duties. The consent of the other parties was required under Maryland Rule 2-506. That consent was not obtained.

Section 1002(21)(A), in relevant part, provides that

> "a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation ... or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan."

Absent such discretionary authority, a person is not a plan fiduciary. *See* 29 C.F.R. § 2509.75-8, at 327 (1991).[5]

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[5]29 C.F.R. § 2509.75-8 is a series of questions and answers promulgated by the Secretary of Labor relating to certain aspects of fiduciary responsibility under ERISA. It includes the following at ¶ D-2:

> "Q: Are persons who have no power to make any decisions as to plan policy, interpretations, practices or procedures, but who perform the following administrative functions for an employee benefit plan, within a framework of policies, interpretations, rules, practices and procedures made by other persons, fiduciaries with respect to the plan:
> (1) Application of rules determining eligibility for participation or benefits;
> (2) Calculation of services and compensation credits for benefits;
> (3) Preparation of employee communications material;
> (4) Maintenance of participants' service and employment records;
> (5) Preparation of reports required by government agencies;
> (6) Calculation of benefits;
> (7) Orientation of new participants and advising participants of their rights and options under the plan;
> (8) Collection of contributions and application of contributions as provided in the plan;
> (9) Preparation of reports concerning participants' benefits;
> (10) Processing of claims; and
> (11) Making recommendations to others for decisions with respect to plan administration?
>
> "A: No. Only persons who perform one or more of the functions described in section [1002(21)(A)] with respect to an employee benefit plan are fiduciaries...."

In the instant matter Hack, on deposition, said that he did not have control over, and exercised no discretion over, either the plan or the plan's assets. But it is not clear from the record precisely what Hack's responsibilities were. He clearly was a consultant to the plan. Both parties also characterize him as a "plan administrator." Counsel for the respondents represented to the circuit court at one hearing in this matter that the respondents' role with respect to the Catalina plan was to "fill out forms ... provide annual reports to employees, that sort of thing."

There are appellate cases holding that certain professionals who gave advice to, or performed ministerial services for, ERISA plans were not fiduciaries. *See, e.g., Pappas v. Buck Consultants, Inc.*, 923 F.2d 531, 535-38 (7th Cir. 1991) (actuary who gave bad advice to plan held not a fiduciary); *Anoka Orthopaedic Assocs. v. Lechner*, 910 F.2d 514, 517 (8th Cir. 1990) (attorney who performed

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Paragraph D-3 of the same regulation, however, reads in part:

> "Q: Does a person automatically become a fiduciary with respect to a plan by reason of holding certain positions in the administration of such plan?
>
> "A: Some offices or positions of an employee benefit plan by their very nature require persons who hold them to perform one or more of the functions described in section [1002(21)(A)]. For example, a plan administrator or a trustee of a plan must, b[y] the very nature of his position, have 'discretionary authority or discretionary responsibility in the administration' of the plan within the meaning of section [1002(21)(A)(iii)]. Persons who hold such positions will therefore be fiduciaries."

Respondents do not contend before us that they are fiduciaries of the Catalina plan as a matter of law.

"ministerial tasks" not a fiduciary); *Painters of Philadelphia Dist. Council No. 21 Welfare Fund v. Price Waterhouse*, 879 F.2d 1146, 1151 (3d Cir. 1989) (independent accounting firm that performed audits for ERISA plan not a fiduciary); *Yeseta v. Baima*, 837 F.2d 380, 385 (9th Cir. 1988) (attorney for company who "reviewed" its plan not a fiduciary because he "did not exercise authority" over the plan). But there is "no *per se* rule that prevents professionals who render advice to an ERISA plan from becoming fiduciaries." *Pappas*, 923 F.2d at 538. *Compare Provident Life & Accident Ins. Co. v. Waller*, 906 F.2d 985, 988 n.5 (4th Cir.) (plan administrator is clearly a fiduciary), *cert. denied*, ____ U.S. ____, 111 S. Ct. 512, 112 L. Ed. 2d 524 (1990) *and U.S. Steel Mining Co. v. District 17, United Mine Workers*, 897 F.2d 149, 152 (4th Cir. 1990) (same) *with Narda, Inc. v. Rhode Island Hosp. Trust Nat'l Bank*, 744 F. Supp. 685, 694-95 (D. Md. 1990) (question of fact whether administrators were fiduciaries).

The record before us does not reveal enough about Hack's duties as "administrator" to resolve on summary judgment whether Hack was a fiduciary. Respondents' brief to us admits that "Hack's fiduciary status is not clear in the instant case ...." Brief for Appellees, Stuart Hack and The Stuart Hack Company at 32. Under these circumstances there is a genuine dispute of material fact on this issue. Consequently, our analysis proceeds by treating the respondents as nonfiduciary consultants to the plan.

IV

Respondents submit, and the circuit court necessarily concluded, that the Maryland law of negligence and contract, as the foundation for the claims asserted in Counts I and II, "relate[s] to [Catalina's] employee benefit plan," and is preempted by § 1144(a). Shofer contends that the Maryland law of contract and tort affects Catalina's benefit plan "in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 100 n.21, 103 S. Ct. at 2901 n.21. The law of ERISA preemption has been called a "'morass,'" *Capital Mercury Shirt Corp. v. Employers Reinsurance Corp.*, 749 F. Supp. 926, 929 (W.D. Ark. 1990), and a black hole which swallows up garden variety claims, *Jordan v. Reliable Life Ins. Co.*, 716 F. Supp. 582, 583 (N.D. Ala. 1989), *modified*, 922 F.2d 732 (11th Cir. 1991).

A recent illustration in the Supreme Court of preemption is *Ingersoll-Rand Co. v. McClendon*, ____ U.S. ____, 111 S. Ct. 478, 112 L. Ed. 2d 474 (1990). Texas recognized an abusive discharge action where the employer's motive was to defeat the employee's ERISA-protected pension rights. Because "[t]he Texas cause of action makes specific reference to, and indeed is premised on, the existence of a pension plan," the cause of action was preempted. ____ U.S. at ____, 111 S. Ct. at 483.

Mackey v. Lanier Collection Agency & Serv., 486 U.S. 825, 108 S. Ct. 2182, 100 L. Ed. 2d 836 (1988), illustrates a relationship between state law and a plan which does not result in preemption.

The creditor of a plan participant garnished credits held by plan trustees for the participant. The Court first held that ERISA preempted a special Georgia statute that exempted ERISA benefits from garnishment. "The state statute's express reference to ERISA plans suffice[d] to bring it within the federal law's pre-emptive reach." *Id.* at 830, 108 S. Ct. at 2185. Next, the Court addressed whether the entire Georgia garnishment procedure was preempted, if used to seize ERISA benefits. Because specific provisions of ERISA contemplate judgments against plans, *e.g.*, in favor of a beneficiary for benefits, the Court reasoned that Congress must have intended for judgments to be enforceable by state law collection procedures, as provided by the Federal Rules of Civil Procedure. The Court further said:

> "ERISA plans may be sued in a second type of civil action, as well. These cases--lawsuits against ERISA plans for run-of-the-mill state-law claims such as unpaid rent, failure to pay creditors, or even torts committed by an ERISA plan--are relatively commonplace. Petitioners ... concede that these suits, although obviously affecting and involving ERISA plans and their trustees, are not pre-empted by ERISA [§ 1144(a)]."

486 U.S. at 833, 108 S. Ct. at 2187 (footnote omitted).

Out of the "morass" the decision which emerges as factually the most relevant to the case before us is *Painters of Philadelphia Dist. Council No. 21 Welfare Fund v. Price Waterhouse*, 879 F.2d 1146 (3d Cir. 1989). The plaintiffs were trustees of an ERISA plan. In a federal district court they sued the accounting firm that had performed for the plan several of the yearly audits which are required by § 1023(a)(3)(A). Alleging that the auditors had failed to uncover fraud exceeding $1 million by the fund

administrator, the plan trustees presented four different legal theories: (1) violation of duties expressly imposed by ERISA on plan fiduciaries; (2) breach of a duty of care implied from ERISA; (3) state law breach of contract; and (4) state law negligence. Dismissal of the complaint by the district court was affirmed. The appellate court held that the auditors were not fiduciaries, and the court would not imply a cause of action. The result was to relegate the plaintiffs to state court on their state law claims. Perhaps intending to influence the future state court action, the United States Court of Appeals for the Third Circuit, in considered *dicta*, said:

> "We acknowledge appellants' argument that ERISA's broad preemption provision, 29 U.S.C. § 1144(a), preempts state professional malpractice claims as they relate to ERISA, but we are not persuaded by it.
>
> "[Here the Court quoted the passage, set forth above, from *Mackey v. Lanier Collection Agency & Serv.*]
>
> "We feel that professional malpractice actions brought by a plan are directly analogous to the situation in *Mackey*, and that, in the absence of an explicit corresponding provision in ERISA allowing a professional malpractice cause of action, Congress did not intend to preempt a whole panoply of state law in this area. Thus, we conclude that ERISA does not generally preempt state professional malpractice actions."

879 F.2d at 1153 n.7. *See also Pappas v. Buck Consultants, Inc.*, 923 F.2d at 540 & n.1 (in *dicta*, apparently agreeing with *Painters* that ERISA does not preempt certain state law claims for malpractice).

We agree with the foregoing reasoning and shall apply it here.

Neither the auditors in *Painters* nor the respondents here are fiduciaries. The state law liability of the auditors in *Painters*

would not have turned on, and that of the respondents does not turn on, the construction, interpretation or application of ERISA or of a plan; rather, those liabilities depend on duties arising from the nonfiduciary relationships. But in *Painters* the plaintiff was the plan itself, and any recovery would have become an asset of the plan. That was not enough, however, for the state common law underlying the malpractice claims to "relate to" the plan. Here, Shofer is a plan participant, but he seeks to recover, for himself, personal funds expended for individual tax liabilities and consequential expenses. The state law claims of Counts I and II of Shofer's second amended complaint are not as "related to" a plan as were the state law claims in *Painters*.

Most of the decisions which bear a factual analogy to the instant matter reach the same result as did *Painters*. *See Capital Mercury Shirt Corp. v. Employers Reinsurance Corp.*, 749 F. Supp. 926 (W.D. Ark. 1990) (state law action against administrator for negligence in providing information to medical reinsurer not preempted, in part because ERISA would not provide a federal law remedy against a nonfiduciary administrator); *Quigley v. Unum Life Ins. Co.*, 688 F. Supp. 80 (D. Mass. 1988) (state law claims against nonfiduciary insurer for incorrectly calculating amount of monthly annuity not preempted because relationship to pension plan too tenuous), *aff'd*, 887 F.2d 258 (1st Cir. 1989); *Duffy v. Cavalier*, 215 Cal. App. 3d 1517, 264 Cal. Rptr. 740 (1989) (state law action by trustees of plan against stockbrokers for breach of fiduciary duty in handling plan assets not preempted, in part because duty

from broker to customer exists independently of relationship to the plan); *Sappington v. Covington*, 108 N.M. 155, 768 P.2d 354, 357-58 (Ct. App. 1988) (state law action against insurance agents for negligently selecting an insolvent insurer not preempted because "grounded upon alleged conduct ... that has no reference to ERISA" and damages would not come from ERISA funds), *cert. denied*, 108 N.M. 115, 767 P.2d 354 (1989), *cert. denied*, 490 U.S. 1107, 109 S. Ct. 3159, 104 L. Ed. 2d 1021 (1989).

The United States Court of Appeals for the Fourth Circuit in *Pizlo v. Bethlehem Steel Corp.*, 884 F.2d 116 (4th Cir. 1989), pointed to a number of factors in that case which led the court to conclude that certain state law claims were not preempted. The plaintiffs had been terminated by their employer, allegedly in breach of an oral contract for employment to age sixty-two. These same facts were pleaded as negligent misrepresentation as well. The plaintiffs also contended that there had been an unauthorized amendment of the pension plan, but that claim was held to be preempted. The breach of contract and misrepresentation claims, however, were not preempted. The court reasoned:

> "The claims here would not submit Bethlehem to conflicting employer obligations and variable standards of recovery, determine whether any benefits are paid[,] nor directly affect the administration of benefits under the plan. The claims do not bring into question whether Plaintiffs are eligible for plan benefits, but whether they were wrongfully terminated from employment after an alleged oral contract of employment for a term. In their state law claims, the Plaintiffs seek from the corporation compensatory damages for wages and pension, health, life and disability benefits that they would have been entitled to had the alleged contract to work until age 62 not been breached. If the Plaintiffs prevail, the damages would be measured in part by the lost pension

> benefits the Plaintiffs would have received, but the pension trust itself would not be liable and the administrators of the pension plan would not be burdened in any way."

Id. at 120-21 (internal quotations and citation omitted). These factors apply with greater force to Shofer's state law claims. If Shofer is successful in this action, his damages will not be measured by a difference in plan benefits. Part of those damages will be measured by the obligation incurred for tax and interest, a figure derived from the Internal Revenue Code on the amounts borrowed from the Catalina plan, and part will be expenses consequential to that tax obligation.

Another reason why the dicta in *Painters* is persuasive is that, if the subject tax advice malpractice claim is sufficiently closely related to the Catalina plan to be preempted, there may well not be any remedy at all--not even if asserted under ERISA in an action timely filed in a federal court. This is because there can be a gap between the scope of ERISA remedies and the sweep of ERISA preemption.

Where the relationship between state law and a plan triggered preemption, courts have struggled with the problems created by this gap. In some cases, the courts have let the claim, recognized only under preempted state law, fall into the abyss. For example, in *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290 (5th Cir. 1989), the plaintiff sued under state law for breach of an alleged oral contract under which Goodrich promised that the plaintiff would receive certain retirement benefits if he left the company's employment and opened a Goodrich retail franchise. The Goodrich

retirement plan did not provide for the promised benefits. The Fifth Circuit held that there was no ERISA-based remedy, because "an oral agreement cannot be the basis of a cause of action under ERISA," *id.* at 1297, and that the state law oral contract claim was preempted.

In other cases courts have approached the gap from the ERISA remedy rim, and attempted to narrow the gap by enlarging ERISA remedies. Enlargement has involved a creative approach to equitable remedies under ERISA, and the fashioning of a body of federal common law underlying ERISA.

An impetus for the equitable remedy approach is Justice Brennan's concurring opinion in *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (1985). The lower courts had decided that ERISA preempted a cause of action, based on California law, for damages for emotional upset caused by negligent delay in processing a claim for benefits under an ERISA health plan. The Court held that no cause of action for negligent delay in claim processing was implied under ERISA. Justice Brennan, joined by three other members of the Court, pointed out that no cause of action had been asserted under § 1132(a)(3). That subsection recognizes a civil action brought

> "by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan."

The concurring justices suggested that traditional trust-law remedies for breaches of fiduciary duties imposed by ERISA on plan

administrators might be the basis for recovering extra-contractual damages as "appropriate equitable relief."

This suggestion was adopted by the United States Court of Appeals for the Sixth Circuit in *Warren v. Society Nat'l Bank*, 905 F.2d 975 (6th Cir. 1990), *cert. denied*, ____ U.S. ____, 111 S. Ct. 2256, 114 L. Ed. 2d 709 (1991). The plaintiff, a retirement plan participant, directed the trustee to "roll over" the participant's assets from the plan into a self-directed individual retirement account. The trustee did this in four distributions, two in one calendar year and the other two in the succeeding calendar year. As a result the plaintiff lost the benefit of income tax deferral on $168,000, and was subjected to state and federal tax liabilities of $87,000. The participant sued in a federal court, asserting an ERISA based claim. His complaint was dismissed. The appellate court, sitting in a three judge panel, held that this claim for extra-contractual damages could be recognized against a fiduciary as an equitable remedy under § 1132(a)(3). One judge concurred, but questioned whether, at trial, it could be proved that the fiduciary's duty extended to minimizing the exposure of plan participants to taxation. One judge dissented.

The approach in *Warren v. Society Nat'l Bank* does not apply to the case before us because of the genuine dispute over whether respondents are fiduciaries.

Enlargement of ERISA remedies by federal common law is illustrated in Judge Murnaghan's opinion for the court in *Provident Life & Accident Ins. Co. v. Waller*, 906 F.2d 985 (4th Cir.), *cert.*

denied, ____ U.S. ____, 111 S. Ct. 512, 112 L. Ed. 2d 524 (1990). The plaintiff insurance company administered the employer's self-funded benefit plan. The defendant was a participant who allegedly had been overpaid medical benefits. Thus, prior to ERISA the claim would have been a garden variety, state law based action for restitution that would inure to the plan. The court held that this claim, although preempted if asserted under state law, was recognized by federal common law. As such it was within the federal question subject matter jurisdiction of the federal courts. The court cautioned, however, that federal common law would be applied only to issues of "central concern" to ERISA. Whether the respondents in the case before us had, and breached, a duty to advise Shofer of the tax consequences of borrowing from the Catalina plan is not of "central concern" to the policies underlying, or administration of, ERISA.

Where, as here, the claim is against a nonfiduciary, some courts approach the problem from the preemption rim and close the gap by holding that there is no preemption of state law because there is no ERISA remedy against a nonfiduciary. *See, e.g., Southern Cal. Meat Cutters Unions & Food Employers Pension Trust Fund v. Investors Research Co.*, 687 F. Supp. 506, 509-10 (C.D. Cal. 1988); *Munoz v. Prudential Ins. Co. of Am.*, 633 F. Supp. 564, 570-72 (D. Colo. 1986). Other courts hold that § 1132(a)(3) allows equitable relief against fiduciaries and nonfiduciaries, so that claims against a nonfiduciary are preempted. *See, e.g., Gibson v. Prudential Ins. Co. of Am.*, 915 F.2d 414, 417-18 (9th Cir. 1990)

(nonfiduciary administrator); *Casper Air Serv. v. Sun Life Assurance Co. of Canada*, 752 F. Supp. 1005, 1009 (D. Wyo. 1990) (same).

The respondents in the instant matter rely on *Casper Air*. That was an action by plan trustees who had become liable to the plan to cover losses allegedly caused by the defendant's failure accurately to calculate lump sum benefits due to terminated employees, by the failure to terminate the plan upon notice from the trustees, and by under-funding of the plan's liabilities. Assuming, *arguendo*, that *Casper Air* correctly decides the scope of the remedy under § 1132(a)(3), the negligence of the administrator in that case is more closely related to the plan than is the claim of negligent tax advice to a participant concerning borrowings from a plan that is presented here.

This nonexhaustive survey demonstrates the wisdom of the *Painters* rationale. When respondents' nonfiduciary status is considered along with the conduct at issue and the type of damages sought, we do not believe that Congress could have intended to preempt this particular action. The conduct at issue here is simply a failure to give competent tax advice about an ERISA distribution. If Congress intended to preempt such conduct against nonfiduciaries, then arguably a tax adviser with *no* relationship to an ERISA plan who negligently advised a client that an ERISA distribution was nontaxable would be immune from liability. Moreover, the damages sought are simply the amounts Shofer personally expended because of the allegedly negligent failure to

advise. It is hard to imagine that Congress intended to preempt an action in which all potential damages would be paid by a nonfiduciary and would not inure to a plan. Where the alleged negligence of a nonfiduciary plan administrator is as removed from the plan as here, and "in the absence of an explicit corresponding provision in ERISA allowing a professional malpractice cause of action, Congress did not intend to preempt a whole panoply of state law in this area." *Painters*, 879 F.2d at 1153 n.7.

V

The respondents have argued that certain features of this case make Shofer's claim, based on Maryland malpractice law, related to the plan. Our holding in Part IV, *supra*, that the malpractice claims in Counts I and II are not preempted, denies preemptive effect to those features, with one exception, to be discussed in Part V(B), *infra*.

A

Respondents' most sweeping contention is that the malpractice claim is preempted because it was necessary for Hack to read the Catalina plan in order to determine whether borrowing by a participating employee from one or more of that employee's accounts was even permitted. That a state law claim involves reading of the plan cannot be the litmus test for preemption. There was no preemption of the Georgia garnishment procedure in *Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 108 S. Ct. 2182, despite the fact that one would have to read a plan in order to determine

the amount which a participant could withdraw from the plan at, and, perhaps, following service of the garnishment.

Respondents also argue that their conduct is regulated by ERISA. We have shown in Part III, *supra*, that this record does not support a holding, as a matter of law, that the respondents occupy a fiduciary relationship to the plan. Viewing the respondents as nonfiduciaries, their conduct, particularly with respect to tax advice to a participant, is not regulated by ERISA.

Shofer's malpractice claim, respondents further submit, affects the plan assets, so that preemption operates. By this contention respondents do not mean that any recovery by Shofer will be from plan assets, as opposed to assets of the respondents, but that Shofer's borrowings from the plan in some way have jeopardized, imperiled or adversely affected the Catalina plan. Assuming, *arguendo*, that such a relationship between a state law claim and a plan preempts the claim, the record extract in this case does not demonstrate such a relationship beyond genuine dispute as to material fact.

B

The respondents urge preemption of the malpractice claims because they attempt to include, or preserve, contingent damages by way of additional taxes that might be imposed by 26 U.S.C. § 4975 (1988), if the Internal Revenue Service were to rule that the loans to Shofer were "prohibited transactions" as therein defined. The argument is based on a paragraph in the second amended complaint

which contains allegations incorporated by reference into Counts I and II. Those allegations are:

> "Because these borrowings were in fact taxable to Shofer as income and also constituted prohibited transactions and premature distributions, Shofer incurred and continues to incur substantial federal and state tax liabilities and risk of additional liabilities as a result of these transactions."

In answers to interrogatories requesting that the damages be specified, Shofer included in his answer a category headed "Contingent liabilities," which included: "[d]isqualification of plan"; "[c]ost of 'undoing' prohibited transactions"; and "[e]xcise tax on prohibited transactions." Further, Shofer's expert witness on liability, in his deposition, referred to the potential of plan disqualification that would generate substantial tax consequences which "would visit themselves upon [Shofer] and upon the other plan participants."

At oral argument in this Court counsel for Shofer said that the respondents' argument concerning prohibited transactions was based on the expert's deposition. Shofer's counsel submitted that "if the Court reads Counts I and II, there is no mention of prohibited transactions. There is no mention of excise taxes for prohibited transactions." We consider Shofer's counsel's statement to be a concession limiting the scope of the damages claimed in Counts I and II so as to exclude the three above-described "contingent liabilities." As so limited, potential plan disqualification as a basis for respondents' argument is not in the case.

VI

Shofer also argues that the Circuit Court for Baltimore City had concurrent jurisdiction over Counts IV through VIII,[6] which are styled as breaches of various duties of care under the terms of the ERISA plan itself. The theory in these counts is most clearly articulated in Count VII, which alleges that under ¶ 11.2(c) of the plan, "all representatives of Catalina 'shall use ordinary care and diligence in the performance of their duties pertaining to the Plan ....'" These allegations, Shofer submits, seek "to enforce his rights under the terms of the plan" within the meaning of § 1132(a)(1)(B), and are therefore within the concurrent subject matter jurisdiction of state courts pursuant to § 1132(e).

We read Shofer's argument with respect to Counts IV through VIII essentially as an alternative pleading; that is, Shofer argues that even if Hack is determined to be an ERISA fiduciary, a state court has concurrent jurisdiction under § 1132(a)(1)(B) to enforce breaches of duties of care so long as those duties are written into the terms of the plan. This argument proves too much, because it could make any claim for breach of ERISA fiduciary duties subject to concurrent jurisdiction. Section 1104(a)(1)(B) provides that an ERISA fiduciary

> "shall discharge his duties with respect to a plan ... with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would

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[6]Shofer makes no argument that Count III, styled as a "Breach of fiduciary duty" under Maryland law, is not preempted by ERISA. We therefore treat that Count as preempted.

> use in the conduct of an enterprise of a like character and with like aims."

This provision, which preempts state fiduciary-obligation law relating to ERISA fiduciaries, creates duties for which liability is imposed by § 1109(a).[7] A civil action for appropriate relief under § 1109 is a civil action recognized by § 1132(a)(2), which § 1132(e)(1) assigns to exclusive federal subject matter jurisdiction. If the plan draftsperson can create "rights under the terms of the plan," for § 1132(a)(1)(B) purposes, by referring in the plan to duties on fiduciaries that are already imposed by ERISA, drafting could negate the deliberate allocation to exclusive federal jurisdiction of cases based on a fiduciary's breach of the duty to use due care. This conferral of exclusive subject matter jurisdiction on the federal courts seems clearly to be part of the congressional intent to have a nationally uniform standard of care applied to ERISA fiduciaries. Breach of a duty of care stated in a plan does not give rise to an action "to enforce ... rights under the terms of the plan" within the meaning of § 1132(a)(1)(B).

---

[7]Section 1109(a) in relevant part reads:

> "Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter [Protection of Employee Benefit Rights, §§ 1001 through 1168] shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary."

VII

We shall therefore affirm the judgment of the Circuit Court for Baltimore City on Counts III through VIII of the second amended complaint, vacate that judgment as to Counts I and II, on which the damages sought are limited as aforesaid, and remand this case for further proceedings, consistent with this opinion, on Counts I and II only.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED IN PART AND VACATED IN PART. CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS, CONSISTENT WITH THIS OPINION, ON COUNTS I AND II ONLY OF THE SECOND AMENDED COMPLAINT. COSTS TO BE PAID ONE-HALF BY THE PETITIONER AND ONE-HALF BY THE RESPONDENTS.

MANDATE

OCT 21 1991

OCT 21 1991

Court of Appeals of Maryland

No. 165 **, September Term, 19** 90

RICHARD SHOFER

v

THE STUART HACK COMPANY et al.

Appeal from the Circuit Court for Baltimore City pursuant to certiorari to Court of Special Appeals.
March 7, 1991: Notice of omitted pages in joint record extract filed.
September 17, 1991: Judgment of the Circuit Court for Baltimore City affirmed in part and vacated in part. Case remanded to that court for further proceedings, consistent with this opinion, on Counts I and II only of the second amended complaint. Costs to be paid one-half by the Petitioner and one-half by the Respondents.
Opinion by Rodowsky, J.

STATEMENT OF COSTS:

In Circuit Court:

Record	$50.00
Stenographer's Costs	$82.50

In Court of Appeals:

Petition Filing Fee	$ 297.60	
Printing Brief for Appellant	2,539.20	
Portion of Record Extract — ~~Appellant~~ Joint	187.20	
Reply Brief	10.00	
Appearance Fee — Appellant	50.00	
Filing Fee on Appeal (Court of Special Appeals)	451.20	(Stuart Hack)
Printing Brief for Appellee	43.20	(Grabush)
~~Portion of Record Extract~~ — Appellee brief	20.00	
Appearance Fee — Appellee	$3,598.40	

STATE OF MARYLAND, ss:

I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Appeals.

In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Appeals this seventeenth *day of* October *, 19* 91

Catherine L. Cummings

Clerk of the Court of Appeals of Maryland.

Costs shown on this Mandate are to be settled between counsel and NOT THROUGH THIS OFFICE.

(62)

Court of Appeals of Maryland

No. 165, SEPTEMBER TERM, 19 90

RICHARD SHOFER

v.

THE STUART HACK COMPANY et al.

DISPOSITION OF APPEAL IN COURT OF APPEALS:

Judgment of the Circuit Court for Baltimore City affirmed in part and vacated in part. Case remanded to that court for further proceedings, consistent with this opinion, on Counts I and II only of the second amended complaint.

TRANSCRIPT

RETURNED TO CIRCUIT COURT FOR BALTIMORE CITY

Date 10/17/91

BY ~~MESSENGER~~ First Class Mail

Catherine L. Cummings

REMARKS:

3 VOLUME RECORD

63

FILED

MAR 5 1992

CIRCUIT COURT FOR BALTIMORE CITY

RICHARD SHOFER,	*	IN THE
Plaintiff,	*	CIRCUIT COURT
v.	*	FOR
THE STUART HACK COMPANY, et al.,	*	BALTIMORE CITY, MARYLAND
	*	Case No. 88101069/CL79993
Defendants.		

* * * * * * * * *

ENTRY AND STRIKING OF APPEARANCE

Please strike the appearance of John J. Kenny as attorney for Third-Party Defendant Grabush, Newman & Co., P.A., and enter the appearances of Allan P. Hillman and Mark T. Holtschneider as attorneys for Third-Party Defendant, Grabush, Newman & Co., P.A.

John J. Kenny
Kenny, Vettori & Robinson
6 East Eager Street
Baltimore, Maryland 21202
(410) 625-0002

Former Attorney for Third-Party Defendant, Grabush, Newman & Co., P.A.

Allan P. Hillman
Mark T. Holtschneider
Frank, Bernstein, Conaway & Goldman
300 East Lombard Street
Baltimore, Maryland 21202
(410) 625-3500

Attorneys for Third-Party Defendant, Grabush, Newman & Co., P.A.

L:\MTH\CLI\155279.PLD
March 3, 1992

745

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of March, 1992, a copy of the foregoing Entry and Striking of Appearance was mailed first class, postage prepaid to Lee B. Zaben, Esquire, Semmes, Bowen & Semmes, 250 West Pratt Street, Baltimore, Maryland 21201, and Thomas A. Bowden, Esquire, Blum, Yumkas, Mailman, Gutman & Denick, P.A., 1200 Mercantile Bank & Trust Building, 2 Hopkins Plaza, Baltimore, Maryland 21201.

Mark T. Holtschneider

RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
THE STUART HACK COMPANY, et al.,	*	BALTIMORE CITY
	*	Case No. 88102069/CL79993
Defendants	*	
	*	
	*	

NOTICE OF SERVICE

I CERTIFY that on this 3rd day of April, 1992, a copy of Third-Party Defendant's Answers to Third-Party Plaintiff's Interrogatories was mailed, postage prepaid, to:

Lee B. Zaben, Esquire
Semmes, Bowen & Semmes
250 West Pratt Street
Baltimore, Maryland 21201
Attorneys for Defendants

Thomas A. Bowden, Esquire
Blum, Yumkas, Mailman, Gutman
& Denick, P.A.
1200 Mercantile Bank & Trust Building
2 Hopkins Plaza
Baltimore, Maryland 21201
Attorneys for Plaintiff

Allan P. Hillman
Mark T. Holtschneider
Frank, Bernstein, Conaway & Goldman
300 East Lombard Street
Baltimore, Maryland 21202
(410) 625-3500

Attorneys for Third-Party Defendant, Grabush, Newman & Co., P.A.

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FILED 65

MAY 8 1992

CIRCUIT COURT FOR BALTIMORE CITY

RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
THE STUART HACK COMPANY, et al.,	*	BALTIMORE CITY
	*	Case No. 88102069/CL79993
Defendants	*	

* * * * * * * * *

REQUEST FOR HEARING

Third-Party Defendant, Grabush, Newman & Co., P.A., by its attorneys, Allan P. Hillman, Mark T. Holtschneider, and Frank, Bernstein, Conaway & Goldman, respectfully requests a hearing on its Motion for Summary Judgment against Defendants/Third-Party Plaintiffs Stuart Hack and The Stuart Hack Company.

Allan P. Hillman
Mark T. Holtschneider
Frank, Bernstein, Conaway & Goldman
300 East Lombard Street
Baltimore, Maryland 21202
(410) 625-3500

Attorneys for Third-Party Defendant, Grabush, Newman & Co., P.A.

L:\MTH\CLI\166500.1

CERTIFICATE OF SERVICE

I CERTIFY that on this 6th day of May, 1992, a copy of Third-Party Defendant's Request for Hearing was mailed, postage prepaid, to:

Thomas M. Trezise, Esquire
Semmes, Bowen & Semmes
P.O. Box 6705
401 Washington Avenue
Towson, Maryland 21285
Attorneys for Defendants

Thomas A. Bowden, Esquire
Blum, Yumkas, Mailman, Gutman
& Denick, P.A.
1200 Mercantile Bank & Trust Building
2 Hopkins Plaza
Baltimore, Maryland 21201
Attorneys for Plaintiff

Mark T. Holtschneider

L:\MTH\CLI\166500.1

65-A

RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
THE STUART HACK COMPANY, et al.	*	BALTIMORE CITY
Defendants	*	CASE NO. 88102069/CL79993

FILED
MAY 20 1992
CIRCUIT COURT FOR
BALTIMORE CITY

* * * * * * *

MOTION TO STRIKE AND ENTER APPEARANCE

Madam Clerk:

Please strike the appearance of Semmes, Bowen and Semmes and enter the appearance of Janet M. Truhe and Bernstein, Sakellaris and Ward as counsel for the defendants in the above-captioned case.

Semmes, Bowen & Semmes
SEMMES, BOWEN AND SEMMES
250 West Pratt Street
Baltimore, Maryland 21201
(410) 539-5040

Janet M. Truhe
Janet M. Truhe
BERNSTEIN, SAKELLARIS AND WARD
Suite 2852, The World Trade Center
Baltimore, Maryland 21202
(410) 685-3400

Attorneys for Defendant Stuart Hack and
The Stuart Hack Company

750

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of May, 1992, copies of the aforegoing Motion to Strike and Enter Appearance were mailed first-class, postage-prepaid to Anthony P. Palaigos, Esquire and Thomas A. Bowden, Esquire, Blum, Yumkas, Mailman, Gutman & Denick, P.A., 1200 Mercantile Bank and Trust Building, 2 Hopkins Plaza, Baltimore, Maryland 21201 and Allan P. Hillman, Esquire and Mark T. Holtschneider, Esquire, Frank, Bernstein, Conaway and Goldman, 300 E. Lombard Street, Baltimore, Maryland 21202.

Janet M. Truhe

Janet M. Truhe

751

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Pomkro

IN THE CIRCUIT COURT FOR BALTIMORE CITY

FILED

JUN 24 1992

CIRCUIT COURT FOR BALTIMORE CITY

RICHARD SHOFER *

Plaintiff *

v. * Case No: 88102069/

THE STUART HACK COMPANY *

Defendant *

* * * * * * * * * * * * *

WITHDRAWAL OF APPEARANCE

Please withdraw the appearances of Linda M. Schuett and John J. Ryan as counsel for Third Party Defendant. Third Party Defendant continues to be represented by other counsel of record.

Linda M. Schuett
Blum, Yumkas, Mailman,
Gutman & Denick, P.A.
1200 Mercantile Bank &
Trust Building
2 Hopkins Plaza
Baltimore, Maryland 21201
(410) 385-4000

John J. Ryan
Ryan & Drewniak
1160 Spa Road, Suite 3B
Annapolis, Maryland 21403
(410) 267-0400

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, on this 23rd day of June, 1992, that a copy of the foregoing Withdrawal of Appearance was delivered by hand to:

Anthony P. Palaigos, Esquire
Thomas A. Bowden, Esquire
Blum, Yumkas, Mailman, Gutman & Denick, P.A.
1200 Mercantile Bank & Trust Building
2 Hopkins Plaza
Baltimore, Maryland 21201;

752

and was mailed first class, postage prepaid, to:

Janet Truhe, Esquire
Bernstein, Sakellaris & Ward
2600 The World Trade Center
Baltimore, Maryland 21202

Alan Hillman, Esquire
Hazel & Thomas, P.C.
Bank of Baltimore Building
120 East Baltimore Street, Suite 2100
Baltimore, Maryland 21202

Mark Holtschneider, Esquire
300 East Lombard Street
Baltimore, Maryland 21202

Linda M. Schuett

SHOFER.P1
VVS:062392

CIRCUIT COURT FOR BALTIMORE CITY DATE PRINTED 06/15/92

67

PRESIDING JUDGE .....

COURTROOM CLERK .....

STENOGRAPHER .....

ASSIGNMENT FOR FRIDAY JUNE 26, 1992 P09 2:30

CASE NUMBER - 88102069
CASE TITLE - SHOFER V STUART HACK COMPANY CL79993 CL
CATEGORY - CONTRACTS
PROCEEDING - MOTION HEARING - GENERAL

RYAN, JOHN J	DEFENSE ATTORNEY	267-0400
SCHUETT, LINDA M	DEFENSE ATTORNEY	385-4040
WHITNEY, DANIEL	DEFENSE ATTORNEY	539-5040
ZABEN, LEE	DEFENSE ATTORNEY	
HILLMAN, ALLAN	DEFENSE ATTORNEY	625-3560
BOWDEN, THOMAS A	PLAINTIFF ATTORNEY	385-4000
MAILMAN, LLOYD	PLAINTIFF ATTORNEY	539-4151
PALAIGOS, ANTHONY	PLAINTIFF ATTORNEY	385-4000

TYPE OF PROCEEDING: (____ JURY) (____ NON-JURY) (____ OTHER)

DISPOSITION (CHECK ONE)

(____ SETTLED) (____ CANNOT SETTLE) (____ NEXT COURT DATE)

(____ VERDICT) (____ REMANDED) (____ NON PROS/DISMISSED)

(____ JUDGEMENT NISI) (____ ORDER/DECREE SIGNED) (____ OTHER)
PLEASE EXPLAIN:

(____ JUDGEMENT ABSOLUTE) (____ ORDER/DECREE TO BE SIGNED)

(____ POSTPONED) (____ MOTION GRANTED)

(____ SUB CURIA) (__X__ MOTION DENIED)

JUDGE SIGNATURE Robert I.H. Hammerman DATE 6-26-92
(JEE)

154

(68 DE)

FILED

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

SEP 21 1992

CIRCUIT COURT FOR BALTIMORE CITY

RICHARD SHOFER,

Plaintiff,

v.

STEWART HACK COMPANY, et al.,

Defendants.

88102069

Case No.: 88101069/CL79993

THE STEWART HACK COMPANY, et al.,

Third-Party Plaintiff,

v.

GRABUSH, NEWMAN & CO., P.A.,

Third-Party Defendants.

SO ORDERED

REQUEST TO ENTER APPEARANCE

Please strike the appearance of Allan P. Hillman, Mark T. Holtschneider, and Frank, Bernstein, Conaway & Goldman and enter the appearance of Mark A. Gilday and Jordan Coyne Savits & Lopata as counsel for the Third-Party Defendant, Grabush, Newman & Co., P.A.

Respectfully submitted,

JORDAN COYNE SAVITS & LOPATA

By Mark A. Gilday

Mark A. Gilday 914532
1030 15th Street, N.W.
Suite 500
Washington, D.C. 20005
(202) 371-1800

755

Allan P. Hillman /mtk

Allan P. Hillman
Mark T. Holtschneider
Frank, Bernstein, Conaway &
Goldman
300 East Lombard Street
Baltimore, Maryland 21202

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of August, 1992, a copy of the foregoing Request to Enter Appearance was mailed, postage prepaid, to:

Janet M. Truhe, Esquire
Semmes, Bowen & Semmes
250 West Pratt Street
Baltimore, Maryland 21201

Thomas A. Bowden, Esquire
Blum, Yumkas, Mailman, Gutman
& Denick, P.A.
1200 Mercantile Bank & Trust Building
2 Hopkins Plaza
Baltimore, Maryland 21201

Mark A. Gilday

Mark A. Gilday

(69) DB

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

FILED

SEP 23 1992

CIRCUIT COURT FOR
BALTIMORE CITY

RICHARD SHOFER, *

Plaintiff, *

v. *

STEWARD HACK COMPANY, et al., *

Defendants *

Case No: 88102069 / CL 79993

STEWARD HACK COMPANY, et al., *

Third Party Plaintiff *

v. *

GRABUSH, NEWMAN & CO., P.A., *

Third Party Defendants, *

* * * * * * * * * *

WITHDRAWAL AND ENTRY OF APPEARANCE

Please strike the appearance of Thomas A. Bowden, Lloyd Mailman, and Anthony Palaigos, representing the lawfirm of Blum, Yumkas, Mailman, Gutman & Denick, P.A., as counsel for the Plaintiff, Richard Shofer, and please enter the appearance of Thomas H. Bornhorst as counsel for the Plaintiff.

Respectfully submitted,

001191

Thomas H. Bornhorst, #001191
2236 Southland Rd.
Baltimore, MD 21207
(410) 298-2265

75-1

BLUM, YUMKAS, MAILMAN, GUTMAN
& DENICK, P.A.

By _____
Thomas A. Bowden
1200 Mercantile Bank & Trust Bldg.
2 Hopkins Plaza
Baltimore, MD 21201
(410) 385-4000

_____
Lloyd Mailman
1200 Mercantile Bank & Trust Bldg.
2 Hopkins Plaza
Baltimore, MD 21201
(410) 385-4000

_____
Anthony Palaigos
1200 Mercantile Bank & Trust Bldg.
2 Hopkins Plaza
Baltimore, MD 21201
(410) 385-4000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of September, 1992, a copy of the foregoing Withdrawal and Entry of Appearance was mailed, postage prepaid, to counsel named below:

Janet M. Truhe, Esq.
~~SEMMES, BOWEN & SEMMES~~ Bernstein, Sakallaris & Ward
~~250 West Pratt St.~~ 2600 World Trade Center
Baltimore, MD ~~21201~~ 21202

Mark A. Gilday, Esq.
JORDAN, COYNE, SAVITS & LOPATA
1030 15th St., N.W.
Suite 500
Washington, DC 20005

_____
Thomas H. Bornhorst

(70)08

IN THE CIRCUIT COURT FOR BALTIMORE CITY

RICHARD SHOFER

Plaintiff

v.

THE STUART HACK COMPANY, et al.

Defendants

* * * * * * * CASE No. 88102069 / CL79993

THE STUART HACK COMPANY, et al.

Third Party Plaintiffs

v.

GRABUSH, NEWMAN & CO., P.A.

Third Party Defendant

* * * * * * * * * * * * * *

THIRD AMENDED COMPLAINT

Richard Shofer, Plaintiff ("Shofer"), by counsel, Thomas H. Bornhorst, files this Third Amended Complaint and states:

Facts Common to All Counts

1. The Stuart Hack Company is a Maryland corporation which provides business and professional services including such services as actuaries and pension consultants.

2. Stuart Hack is an employee of the Stuart Hack Company holding himself out as a lisenced Maryland attorney, as well as a professional actuary and pension consultant who also designs and administers pension plans.

3. Richard Shofer is the sole stockholder and president of Catalina Enterprises, Inc. t/a Crown Motors ("Catalina").

4. Catalina Enterprises, Inc. Pension Plan (the "Plan") is a qualified pension established by Defendants in 1971 for employees of Catalina.

5. At all relevant times, Shofer was the Plan's sole trustee and was also a Plan participant.

6. From 1971 through 1985, The Stuart Hack Company prepared certain of the Plan's annual federal returns as well as its statements to participants.

7. During the course of their relationship with Catalina, Shofer, and the Plan, Defendants held themselves out as expert in the tax aspects of pension planning and frequently rendered advice in this area.

8. Based on his course of dealing with Defendants and on Defendants' representations as to their knowledge and expertise, Shofer reasonably expected that any possible tax consequences resulting from Defendants' advice would be brought to his attention by the Defendants.

9. At some time prior to August 9, 1984, Shofer sought Defendants' advice as to whether it would be advisable to borrow money from the Plan or to use the Plan's assets as collateral for a loan.

10. Defendants responded with an opinion letter dated August 9, 1984, stating that Shofer could borrow up to 100% of his voluntary account and failing to mention of any adverse tax consequences of such transactions.

11. Reasonably relying on Defendants' advice, but not knowing or suspecting that a loan advance could generate liability for income tax, excise tax,

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or precipitate other liabilities such as penalties and interest, or constitute a premature distribution or a prohibited transaction, or expose the Plan to disqualification, Shofer proceeded to borrow from his voluntary account in the Plan in 1984, 1985, and 1986, the total amount of such loans being in excess of $300,000.00.

12. In fact, such loan transactions in excess of $50,000.00 constituted taxable personal income to Shofer, and separately constituted prohibited transactions by a disqualified person, and were also premature distributions, all to the effect that Shofer incurred and continues to incur substantial federal and state tax liability, liability for penalties and interest, professional expenses for accountants, pension consultants and attorneys to rectify his tax filings, and has accumulated other proximate and forseeable liabilities in consequence of these transactions.

13. If Shofer had been reasonably and properly advised by Defendants as to the tax consequences of such loan transactions, he would not have had any reasonable basis to borrow from his voluntary account in the Plan.

14. The Stuart Hack Company continued to render incorrect advice concerning the loan transactions, *inter alia*, on or about December 16, 1986, when The Stuart Hack Company issued a memorandum attempting to persuade Shofer's account's that the risk of tax liability was very low.

COUNT 1

(Negligence)

15. Plaintiff incorporates paragraphs 1. through 14. in this count.

16. At all times relevant to the allegations of this Complaint, Defendants held themselves out to the public in general, and represented themselves to Shofer in particular, as possessing that degree of knowledge, experience, skill, and judgment in the area of advising as to the tax consequences of transactions involving voluntary accounts in pension funds that was to be expected of a reasonably competent actuary and consultant in such business in Maryland in 1984.

17. Defendants owed a duty of reasonable care to Shofer to provide him with reasonably competent advice as to the taxes, penalties, and other consequences of trustee and participant borrowing from his voluntary account in the Plan.

18. Defendants breached their duty to Shofer, *inter alia*, by failing to advise concerning such personal loans against his voluntary account in the Plan that Shofer was a disqualified person as a trustee, that any such transactions constitute prohibited transactions; that the proceeds of such participant loans in excess of $50,000.00 were taxable as ordinary income to Shofer; that such loans threatened the qualification of the Catalina pension plan under E.R.I.S.A.; that such loans would expose Shofer to additional tax liability for excise taxes and penalties and interest; by deliberately rendering professional advice without research, without regard to the issues raised, and without regard for the truth or falsity of the information provided, omitted, or implied, when a reasonably competent consultant and professional in this area would not have so acted, failed to act, or so advised.

19. As a direct and proximate result of the acts and omissions of Defendants, Shofer has incurred, and will in the future incur additional income tax, excise tax, interest, penalties, attorney's fees, accountant's fees, loss of income, and other expenses and damages which would not have been incurred except for the negligence and gross negligence of Defendants.

WHEREFORE, plaintiff Richard Shofer demands judgment jointly and severally against Defendants The Stuart Hack Company and Stuart Hack in the amount of Three Million Five Hundred Thousand Dollars ($3,500,000.00) compensatory damages, One Million Five Hundred Thousand Dollars ($1,500,000.00) punitive damages, reasonable attorney fees, costs of this action, and interest from the date of judgment.

COUNT II

(Breach of Contract)

20. Plaintiff incorporates paragraphs 1 through 21 in this count.

21. Shofer hired Defendants to provide Shofer with reasonably competent expert and professional advice concerning his inquiry regarding loans against his account in the Plan including the tax consequences of such borrowing.

22. Defendants breached said contract for professional services, *inter alia*, by failing to inform Shofer that borrowing against his voluntary account would cause him to incur substantial tax liability and other liabilities.

23. As a direct and proximate result of such acts and omissions of Defendants, Shofer has incurred, and will incur, liabilities for additional income tax, excise tax, interest, penalties, attorney's fees, accountant's fees, loss of

income, and other expenses and damages which would not be incurred except for the negligent and grossly negligent breach of contract by Defendants.

WHEREFORE, plaintiff Richard Shofer demands judgment jointly and severally against Defendants The Stuart Hack Company and Stuart Hack in the amount of Three Million Five Hundred Thousand Dollars ($3,500,000.00) compensatory damages, One Million Five Hundred Thousand Dollars ($1,500,000.00) punitive damages, reasonable attorney fees, costs of this action, and interest from the date of judgment.

Thomas H. Bornhorst
2236 Southland Rd.
Baltimore, MD 21207
(410) 298-2265
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I CERTIFY that on this 14 day of December, 1992, a copy of the foregoing Third Amended Complaint was mailed, postage prepaid, to the following: Janet M. Truhe, Esq.
BERNSTEIN, SAKELLARIS & WARD
2852 World Trade Center
Baltimore, MD 21202

Mark A. Gilday, Esq.
JORDAN, COYNE, SAVITS & LOPATA
1030 15th St., N.W., Suite 500
Washington, DC 20005

Thomas H. Bornhorst

(41) DB

Thomas H. Bornhorst
Attorney at Law
2236 Southland Rd., Baltimore, Md 21207
(410) 298-2265

State and Federal Trial Practice

FILED FOR RECORD
92 DEC 15 AM 9:55
CIVIL DIVISION

Maryland, District of Columbia

December 8, 1992

Clerk of the Court
Circuit Court of Maryland for Baltimore City
111 North Calvert St.
Room 462
Baltimore, MD 21202

Re: Shofer v. Stewart Hack Co., et al.
Case No. 88102069 / CL 79993

Dear Clerk:

Your kind attention to the following requests is greatly appreciated:

1. Please file the enclosed Third Amemded Complaint on behalf of the Plaintiff.
2. Please place this case on the trial calendar for assignment of a date for trial by the Court, without a jury.

Sincerely,

Thomas H. Bornhorst - 001191

cc: Janet M. Truhe, Esq.
Mark A. Gilday, Esq.

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(12) DB

RECEIVED
CIRCUIT COURT FOR
BALTIMORE CITY
92 FEB 25

RICHARD SHOFER,	*	IN THE
Plaintiff,	*	CIRCUIT COURT
v.	*	FOR CIVIL DIVISION
THE STUART HACK COMPANY, et al.	*	BALTIMORE CITY
Defendants	*	Case No.: 88102069/CL79993

* * * * * * * * *

DEFENDANTS' ANSWER TO PLAINTIFF'S THIRD AMENDED COMPLAINT

The Stuart Hack Company and Stuart Hack, Defendants, by their attorneys, Janet M. Truhe and Bernstein, Sakellaris & Ward, answer Counts I and II of Plaintiff's Third Amended Complaint as follows:

FIRST DEFENSE

They generally deny liability as to each allegation of the Third Amended Complaint in accordance with Rule 2-323(d).

SECOND DEFENSE

The Third Amended Complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

That if Plaintiff suffered damages as alleged, such damages were caused by the Plaintiff's own sole or contributory negligence.

FOURTH DEFENSE

That if Plaintiff suffered damages as alleged, such damages were caused because the Plaintiff assumed the risk thereof.

FIFTH DEFENSE

The Plaintiff is estopped to complain about any advice rendered by the Defendants

pertaining to loans taken by the Plaintiff from the Catalina Enterprises, Inc. Pension Plan.

SIXTH DEFENSE

The Plaintiff has waived any claim arising out of advice rendered by the Defendants pertaining to loans taken by the Plaintiff from the Catalina Enterprises, Inc. Pension Plan.

SEVENTH DEFENSE

The Plaintiff's reliance on advice rendered by the Defendants pertaining to loans from the Catalina Enterprises, Inc. Pension Plan was unjustified when he proceeded to borrow from the Plan in 1984, 1985 and 1986.

EIGHTH DEFENSE

That Plaintiff is not entitled to recover any damages arising out of excise taxes, prohibited transactions, or disqualification because these are pre-empted and governed exclusively by federal law pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. Section 1001, et seq.

NINTH DEFENSE

That the Defendants were retained by Catalina Enterprises, Inc. to administer the Catalina Enterprises, Inc. Pension Plan and owed no legal duty to Plaintiff, personally.

TENTH DEFENSE

That the Defendants were retained by Catalina Enterprises, Inc. to administer the Catalina Enterprises, Inc. Pension Plan and had no contractual relationship with or duty to Plaintiff, personally.

ELEVENTH DEFENSE

That the accounting firm of Grabush, Newman & Co., P.A. were the Plaintiff's personal

tax advisors and prepared his personal and corporate income tax returns.

TWELFTH DEFENSE

That Plaintiff is not entitled to punitive damages arising out of any advice rendered by the Defendants pertaining to loans from the Catalina Enterprises, Inc. Pension Plan.

THIRTEENTH DEFENSE

That Plaintiff is not entitled to attorney's fees arising out of any advice rendered by the Defendants pertaining to loans from the Catalina Enterprises, Inc. Pension Plan.

FOURTEENTH DEFENSE

That Defendant, Stuart Hack, did not hold himself out as an attorney and did not provide any legal services to Plaintiff at any time relevant to the events referenced in the Third Amended Complaint.

Janet M. Truhe 910934

Janet M. Truhe
Bernstein, Sakellaris & Ward
2852 The World Trade Center
Baltimore, Maryland 21202
(410) 685-3400

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of December, 1992, a copy of the aforegoing Answer to Plaintiff's Third Amended Complaint was mailed by first class mail, postage prepaid, to Thomas H. Bornhorst, Esquire, 2236 Southland Road, Baltimore, Maryland 21207 and Mark A. Gilday, Esquire, Jordan, Coyne, Savits & Lopata, 1030 15th Street, N.W., Suite 500, Washington, D.C. 20005.

Janet M. Truhe

Janet M. Truhe

768

(13) 08

CIVIL POSTPONEMENT FORM

DATE: Dec. 31, 1992

Plaintiff(s) Richard Shofer

v.

Defendant(s) Stuart Hack
The Stuart Hack Co.
and
Grabush, Newman & Co.

IN THE
CIRCUIT COURT
FOR
BALTIMORE CITY

Computer #: 88102069

File #: CL79993

Jury ____ CT. ✓ CTF. ____ GEN ☐ MOT. 2-507 ☐

DOMESTIC JUDGE: ____ DOMESTIC MASTER: ____

PLEASE PRINT

To be postponed from: DATE: 4/9/93 PRIOR POSTPONEMENTS: Y☐ N☒

pre-trial conf. date of 3/9/93 is agreeable to all counsel and could remain as scheduled

Postponement requested by: Defendant Grabush - all counsel agree to postponement

Postponement reason: (please specify):

Conflict with previously scheduled trial date and discovery schedule

Plaintiff(s) Attorneys:	Defendant(s) Attorneys:
Thomas Bornhorst	Janet M. Truhe - Stuart Hack
	Mark Gilday - Grabush

New Trial Date: ____

Approved: ____ Denied: ✓ : Kathleen O'Donnell Friedman
(JUDGE'S SIGNATURE)

WHITE—Court File • YELLOW—CAO

CC-55

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RICHARD SHOFER,	*	IN THE
Plaintiff,	*	CIRCUIT COURT
v.	*	FOR
THE STUART HACK COMPANY, et al.	*	BALTIMORE CITY
Defendants	*	Case No.: 88102069/CL79993

* * * * * * * * *

DEFENDANTS' PARTIAL MOTION TO DISMISS
PLAINTIFF'S THIRD AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM

The Stuart Hack Company and Stuart Hack, Defendants, by their attorneys, Janet M. Truhe and Bernstein, Sakellaris & Ward, pursuant to Maryland Rule 2-322(b), move this Court for an Order dismissing from the Third Amended Complaint Plaintiff's claims for damages arising out of excise taxes, prohibited transactions, and disqualification as well as punitive damages and attorney's fees on the grounds that such claims are barred as a matter of law. In support of their Motion, Defendants state as reasons:

1. That on December 8, 1992, Plaintiff filed a Third Amended Complaint against Stuart Hack and The Stuart Hack Company for negligence (Count I) and breach of contract (Count II) arising out of Mr. Hack's failure to advise Mr. Shofer about potential tax consequences which could occur if he borrowed money from his pension plan.

2. That in Count I for negligence, Plaintiff seeks recovery of certain damages arising out of excise taxes, prohibited transactions, and disqualification of the pension plan at issue. See Third Amended Complaint at paragraphs 18-19, and 23.

3. That the Maryland Court of Appeals in Shofer v. The Stuart Hack Company, et al., 324 Md. 92, 110-111, 595 A.2d 1078 (1991), held that the three above-described damages are pre-empted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. Section

1001, et seq. and may not be recovered in the instant state case.

4. That under Maryland law, the Plaintiff has failed to state a claim for punitive damages under Counts I and II, because he has alleged only negligence and gross negligence which do not support a claim for punitive damages. See Owens-Illinois, Inc. v. Zenobia, 325 Md. 420, 601 A.2d 633 (1992).

5. That under Maryland law, the Plaintiff may not recover his attorney's fees in a negligence and breach of contract action.

6. That Plaintiff and his counsel knew that the aforegoing requests for damages were without substantial justification under Maryland law at the time the Third Amended Complaint was filed. Defendants, therefore, request their reasonable attorney's fees in having to prepare the instant Motion.

WHEREFORE, Defendants, Stuart Hack and The Stuart Hack Company, respectfully request that this Court dismiss from the Third Amended Complaint Plaintiff's claims for damages arising out of excise taxes, prohibited transactions, and disqualification as well as punitive damages and attorney's fees.

Grounds for this Motion are more fully set forth in the accompanying Memorandum.

Janet M. Truhe

Janet M. Truhe
BERNSTEIN, SAKELLARIS & WARD
2852 The World Trade Center
Baltimore, Maryland 21202
(301) 685-3400

Attorneys for Defendants, Stuart Hack and
The Stuart Hack Company

771

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of January, 1993, copies of the aforegoing Defendants' Partial Motion to Dismiss Plaintiff's Third Amended Complaint for Failure to State a Claim, Memorandum in Support, Request for Hearing and Order were mailed by first class mail, postage prepaid, to Thomas H. Bornhorst, Esquire, 2236 Southland Road, Baltimore, Maryland 21207 and Mark A. Gilday, Esquire, Jordan, Coyne, Savits & Lopata, 1030 15th Street, N.W., Suite 500, Washington, D.C. 20005.

Janet M. Truhe

Janet M. Truhe

772

RICHARD SHOFER,	*	IN THE
Plaintiff,	*	CIRCUIT COURT
v.	*	FOR
THE STUART HACK COMPANY, et al.	*	BALTIMORE CITY
Defendants	*	Case No.: 88102069/CL79993

* * * * * * * * *

MEMORANDUM IN SUPPORT OF DEFENDANTS' PARTIAL MOTION TO DISMISS PLAINTIFF'S THIRD AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM

The Stuart Hack Company and Stuart Hack, Defendants, by their attorneys, Janet M. Truhe and Bernstein, Sakellaris & Ward, file the following Memorandum in Support of their Partial Motion to Dismiss Plaintiff's Third Amended Complaint for Failure to State a Claim.

PLAINTIFF'S ALLEGATIONS

On December 8, 1992, the Plaintiff, Richard Shofer, filed a Third Amended Complaint in state court against Defendants Stuart Hack and The Stuart Hack Company for negligence (Count I) and breach of contract (Count II). The gist of each of these claims is that Mr. Hack failed to advise Mr. Shofer about potential tax consequences which could occur if he borrowed money from his pension plan. See Third Amended Complaint at ¶ 10. The Catalina Enterprises, Inc. Pension Plan (the "Plan") is a qualified pension plan established for employees of Catalina Enterprises, Inc. t/a Crown Motors, a car dealership owned and operated by the Plaintiff. Id. at ¶¶ 3 and 4. He is a shareholder and employee of Crown Motors, a participant in the Plan, and is named in the Plan as sole trustee. Id. at ¶ 5.

In his Third Amended Complaint, Mr. Shofer has alleged that these Defendants "held themselves out as expert in the tax aspects of pension planning and frequently rendered advice in this area." Id. at ¶ 7. The Plaintiff goes on to allege that "[b]ased on his course of dealing

with Defendants and on Defendants' reputations as to their knowledge and expertise," he "reasonably expected that any possible tax consequences resulting from Defendants' advice would be brought to his attention...." Id. at ¶ 8.

At some time prior to August 9, 1984, Mr. Shofer alleges that he contacted Mr. Hack and inquired whether he could borrow money from the Plan or use the Plan's assets as collateral for a loan. Id. at ¶ 9. Mr. Hack responded to the Plaintiff's inquiry in a letter dated August 9, 1984 advising him that he could borrow up to 100% of his voluntary account. Id. at ¶ 10. The letter made no mention of tax consequences. Id.

Thereafter, Plaintiff alleges that "[r]easonably relying on Defendants' advice, but not knowing or suspecting that a loan advance could generate liability for income tax[es]...," he borrowed from his voluntary account in the Plan in 1984, 1985, and 1986, the total amount of such loans being in excess of $300,000.00. Id. at ¶ 11. Plaintiff also alleges that "had [he] been reasonably and properly advised by Defendants as to the tax consequences of such loan transactions, he would not have had any reasonable basis to borrow from his voluntary account in the Plan." Id. at ¶ 13.

In Count I of his Third Amended Complaint for negligence, Plaintiff alleges that Defendants were required to exercise that degree of care "expected of a reasonably competent actuary and consultant in such business in Maryland in 1984." Id. at ¶ 16. He also states that Defendants breached that duty of care by failing to advise him that borrowing from the Plan could result in adverse tax consequences "when a reasonably competent consultant and professional in this area would not have so acted, failed to act, or so advised." Id. at ¶ 18. As part of his claim for damages under Count I, Plaintiff is seeking damages arising out of excise

taxes, prohibited transactions, and disqualification of the Plan. Id. at ¶ 18. Plaintiff further requests attorney's fees and punitive damages in the amount of $1.5 million as a result of the "negligence and gross negligence of Defendants." Id. at ¶ 19.

In Count II for breach of contract, Plaintiff alleges that he hired Defendants to provide him with "reasonably competent expert and professional advice concerning his inquiry regarding loans against his account in the Plan including the tax consequences of such borrowing." Id. at ¶ 21. Plaintiff further alleges that Defendants "breached said contract for professional services...by failing to inform [him] that borrowing against his voluntary account would cause him to incur substantial tax liability and other liabilities." Id. at ¶ 22. Mr. Shofer requests damages in the same categories referenced in Count I for negligence including attorney's fees and punitive damages in the amount of $1.5 million.

ARGUMENT

The nature of the instant Motion is to challenge Plaintiff's request for certain damages on the grounds that these are not recoverable as a matter of law in a professional negligence action. In ruling on Defendants' Motion pursuant to Maryland Rule 2-322(b) for failure to state a claim, this Court is required to assume the truth of all relevant material facts and all inferences which can be reasonably drawn from those facts. However, any ambiguity or uncertainty in the allegations bearing on whether the Plaintiff has stated a claim for certain damages must be construed against him. See Sharrow v. State Farm Mutual Automobile Insurance Co., 306 Md. 754, 511 A.2d 492 (1986).

1. The Plaintiff may not recover damages arising out of excise taxes, prohibited transactions, and disqualification of the Plan.

As part of his request for damages under Counts I and II, Plaintiff is seeking recovery

of damages arising out of excise taxes, prohibited transactions, and potential disqualification of the Plan at issue. These damages relate to the Plan and, as such, are pre-empted under federal law pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. Section 1001, et seq. The Maryland Court of Appeals, in a prior appeal of this case, specifically held that the three above-described categories of damage may not be recovered in Plaintiff's state law case for negligence and breach of contract. Shofer v. The Stuart Hack Company, et al., 324 Md. 92, 110-11, 595 A.2d 1078 (1991). Therefore, they should be dismissed from the Third Amended Complaint.

2. The Plaintiff may not recover punitive damages.

The Plaintiff has also requested $1.5 million in punitive damages under Counts I and II for negligence and breach of contract, respectively. The Maryland Court of Appeals has recently revised the law on punitive damages to substantially restrict the availability of punitive damages in a non-intentional tort case such as the instant one for professional negligence. In Owens-Illinois, Inc. v. Zenobia, 325 Md. 420, 601 A.2d 633 (1992), the Court of Appeals explicitly overruled prior holdings and heightened the standard for punitive damage claims from proof of implied malice and/or gross negligence to an actual malice standard. A plaintiff in a non-intentional tort claim must now prove that the defendant's "conduct was characterized by evil motive, intent to injure, ill-will or fraud, i.e., 'actual malice'." Id. at 460; see also Giant Food, Inc. v. Satterfield, 90 Md. App. 660, 603 A.2d 77 (1992); Greenebaum v. Williams, 788 F.Supp. 260 (D.Md. 1992) (applying Maryland law).

Plaintiff's Third Amended Complaint fails to meet this stringent standard. As is made clear by Zenobia and the subsequent decisions of the Court of Special Appeals in Satterfield and

the federal district court in Greenebaum, the Plaintiff bears the burden of alleging and proving that Stuart Hack acted with the intent to injure the Plaintiff. The Plaintiff's Third Amended Complaint, at best, alleges that Mr. Hack's conduct rose to the level of gross negligence, a level of culpability which will no longer support an award of punitive damages under Maryland law. In addition, analysis of Plaintiff's allegations in the Third Amended Complaint reveals that Plaintiff has not even alleged facts sufficient to constitute gross negligence. He repeatedly refers to the Defendants' duty of "reasonable care" and that such duty was breached when a "reasonably competent consultant and professional" would have not so acted. See Third Amended Complaint at ¶¶ 17 and 18.

In short, the allegations of professional malpractice set forth in Plaintiff's Third Amended Complaint do not state a claim for punitive damages under Maryland law. Thus, these claims for punitive damages in Counts I and II should be dismissed.

3. The Plaintiff may not recover his attorney's fees.

It is well settled under Maryland law that attorney's fees incurred by a successful party in litigation are not recoverable in the absence of special circumstances such as a contract by the parties for such payment or statutory provision therefor. See Empire Realty Co. v. Fleisher, 269 Md. 278, 305 A.2d 144 (1973). The Third Amended Complaint contains claims for negligence and breach of contract and requests reimbursement of attorney's fees. The Plaintiff does not make citation, however, to authority in any contract between the parties for such reimbursement, nor is there any statutory basis for the recovery of attorney's fees in a state law negligence and breach of contract action. Accordingly, Plaintiff's request for attorney's fees under Counts I and II should be dismissed.

SANCTIONS

That Plaintiff has failed to state a claim for damages in the three aforegoing categories as a matter of law, is clear and well settled under Maryland case law, including the prior Court of Appeals decision in this case. The claims for damages arising out of excise taxes, prohibited transactions, and disqualification of the Plan were specifically ruled out of this case in Shofer v. The Stuart Hack Company, et al., 324 Md. 92. Despite this clear ruling, Plaintiff has amended his Complaint to put these damages back into the case.

The Plaintiff's earlier Complaint also contained a claim for attorney's fees which were at one time at least properly alleged because the Plaintiff's Second Amended Complaint contained federal claims which provided for the recovery of attorney's fees if the Plaintiff prevailed. However, those claims did not survive in the prior appeal of this case which is currently for negligence and breach of contract only. Nevertheless, the Plaintiff has amended his earlier Complaint to add a claim for attorney's fees back into the case where he knows they no longer belong.

Lastly, the Plaintiff has amended his Complaint to request for the first time punitive damages in the amount of $1.5 million. Such a request for punitive damages in the context of this professional malpractice action is clearly without basis under Maryland law in light of the Court of Appeals' decision in Zenobia.

Maryland Rule 1-341 provides for the imposition of sanctions in the form of a reasonable attorney's fee where a party has made a claim in bad faith. See, e.g., Nast v. Lockett, 312 Md. 343, 539 A.2d 1113 (1988), overruled on other grounds, 325 Md. 420, 601 A.2d 633 (1992) (the sanctions contemplated by this Rule should be imposed where claims for punitive damages

are made in bad faith or without substantial justification). Clearly, Plaintiff and his counsel were on notice that any request for pension-related damages in the categories described above was improper in view of the prior Maryland Court of Appeals' decision in the instant case. Moreover, any request for punitive damages, given Plaintiff's allegations of negligence and breach of contract only, is without merit under Zenobia. The Plaintiff's claim for attorney's fees in a negligence and breach of contract action is also entirely without merit. Accordingly, the Defendants are entitled to reimbursement of their reasonable attorney's fees in having to move for dismissal of the aforementioned claims which were made without any, let alone "substantial," justification as required by the Maryland Rules.[1]

CONCLUSION

For the aforegoing reasons, Defendants request that this Court issue an Order dismissing with prejudice Plaintiff's claims for damages arising out of excise taxes, prohibited transactions, and disqualification of the Plan as well as punitive damages and attorney's fees. Defendants further request that this Court order Plaintiff to reimburse the Defendants their reasonable attorney's fees in having to prepare the instant Motion.

Janet M. Truhe

Janet M. Truhe
BERNSTEIN, SAKELLARIS & WARD
2852 The World Trade Center
Baltimore, Maryland 21202
(410) 685-3400

Attorneys for Defendants Stuart Hack
and The Stuart Hack Company

[1] At the time of the hearing on Defendants' Motion to Dismiss, counsel for Defendants will file an affidavit as to the amount of attorney's fees incurred in the preparation and argument of this Motion.

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RICHARD SHOFER,	*	IN THE
Plaintiff,	*	CIRCUIT COURT
v.	*	FOR
THE STUART HACK COMPANY, et al.	*	BALTIMORE CITY
Defendants	*	Case No.: 88102069/CL79993

* * * * * * * * *

REQUEST FOR HEARING

The Stuart Hack Company and Stuart Hack, Defendants, by their attorneys, Janet M. Truhe and Bernstein, Sakellaris & Ward, respectfully request a hearing on their Partial Motion to Dismiss Plaintiff's Third Amended Complaint for Failure to State a Claim.

Janet M. Truhe

Janet M. Truhe
BERNSTEIN, SAKELLARIS & WARD
2852 The World Trade Center
Baltimore, Maryland 21202
(301) 685-3400

Attorneys for Defendants

RICHARD SHOFER,	*	IN THE
Plaintiff,	*	CIRCUIT COURT
v.	*	FOR
THE STUART HACK COMPANY, et al.	*	BALTIMORE CITY
Defendants	*	Case No.: 88102069/CL79993

* * * * * * * * *

ORDER

Defendants' Partial Motion to Dismiss Plaintiff's Third Amended Complaint for Failure to State a Claim having been considered by this Court, and counsel having presented argument, it is this _____ day of _____, 1993,

ORDERED, that Defendants' Partial Motion to Dismiss Plaintiff's Third Amended Complaint for Failure to State a Claim is granted and the Plaintiff's claims for damages arising out of excise taxes, prohibited transactions, and disqualification as well as punitive damages and attorney's fees are dismissed with prejudice.

IT IS FURTHER ORDERED, that Plaintiff is to pay defense counsel's fees in the amount of _____.

_____

JUDGE

BERNSTEIN, SAKELLARIS & WARD
ATTORNEYS AT LAW
SUITE 2852
THE WORLD TRADE CENTER
BALTIMORE, MARYLAND 21202

(410) 685-3400
FAX (410) 685-3453

PETER D. WARD
JOHN G. SAKELLARIS
CHARLES G. BERNSTEIN
JANET M. TRUHE

C. ROBERT LOSKOT
GREGORY G. BROIKOS

OF COUNSEL
DUANE DEVORE

January 4, 1993

Civil Clerk
Circuit Court for Baltimore City
462 Courthouse East
111 North Calvert Street
Baltimore, Maryland 21202

Re: Richard Shofer v. The Stuart Hack Company, et al.
Case No. 88102069/CL79993

Dear Clerk:

Please find enclosed for filing in the above-referenced case Defendants' Partial Motion to Dismiss Plaintiff's Third Amended Complaint for Failure to State a Claim, Memorandum in Support, Request for Hearing and proposed Order.

Very truly yours,

Janet M. Truhe

Janet M. Truhe

JMT:tjc
cc: Thomas H. Bornhorst, Esquire
Mark A. Gilday, Esquire

(75) 08

RICHARD SHOFER,	*	IN THE
Plaintiff,	*	CIRCUIT COURT
v.	*	FOR
THE STUART HACK COMPANY, et al.	*	BALTIMORE CITY
Defendants	*	Case No.: 88102069/CL79993

RECEIVED FOR
1993 JAN 25 A 9:06
CIVIL DIVISION

* * * * * * * * *

MOTION TO STRIKE APPEARANCE

Madame Clerk:

Please strike the appearances of Lee B. Zaben and Daniel W. Whitney as counsel for the Defendants, Stuart Hack and the Stuart Hack Company, in the above-captioned case.

Lee B. Zaben
Lee B. Zaben

384106
Daniel W. Whitney
Daniel W. Whitney

Janet M. Truhe
Janet M. Truhe
BERNSTEIN, SAKELLARIS & WARD
2852 The World Trade Center
Baltimore, Maryland 21202
(410) 685-3400

Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22d day of January, 1993, copies of the aforegoing Motion to Strike Appearance were mailed by first class mail, postage prepaid, to Thomas H.

cc

Bornhorst, Esquire, 2236 Southland Road, Baltimore, Maryland 21207 and Mark A. Gilday, Esquire, Jordan, Coyne, Savits & Lopata, 1030 15th Street, N.W., Suite 500, Washington, D.C. 20005.

Janet M. Truhe

Janet M. Truhe

76/M9

RICHARD SHOFER,	*	IN THE
Plaintiff,	*	CIRCUIT COURT
v.	*	FOR
THE STUART HACK COMPANY, et al.	*	BALTIMORE CITY
Defendants	*	Case No.: 88102069/CL79993

* * * * * * * * *

ORDER

Defendants' Partial Motion to Dismiss Plaintiff's Third Amended Complaint for Failure to State a Claim having been considered by this Court, and counsel having presented argument, it is this 17 day of February, 1993,

ORDERED, that in accordance with the Court of Appeals opinion in Shofer v. Stuart Hack Co., et al., 324 Md. 92, 595 A.2d 1078 (1991) at 110-11, the Plaintiff may not recover damages for excise taxes, prohibited transactions or plan disqualification under Counts I and II of the Third Amended Complaint, and be it further

ORDERED, that Plaintiff's claims for punitive damages under Counts I and II are dismissed, and be it further

ORDERED, that Plaintiff's request for attorney's fees in prosecuting the instant action is dismissed but that Plaintiff may pursue recovery of any fees for professionals consequential to his tax obligation as held by the Court of Appeals in Shofer v. Stuart Hack Co., et al., 324 Md. at 105.

Thomas Ward

JUDGE THOMAS WARD

76

Judge [redacted] recuses

77 AH

9

CIVIL POSTPONEMENT FORM

DATE: 3/29/93

Plaintiff(s) RICHARD SHOFER

v.

Defendant(s) STUART HACK and GRABUSH, NEWMAN & Co.

IN THE
CIRCUIT COURT
FOR
BALTIMORE CITY

Computer #: 88102069/CL79993

File #: _____

Jury _____ CT. X CTF. _____ GEN ☐ MOT. 2-507 ☐

DOMESTIC JUDGE: _____ DOMESTIC MASTER: _____

PLEASE PRINT

To be postponed from: DATE: April 9, 1993 PRIOR POSTPONEMENTS: Y☐ N☒

Postponement requested by: Counsel for all parties

Postponement reason: (please specify):

Plaintiff has revealed 7 new categories of damage (totalling several million dollars) as consequential losses he has allegedly sustained as a result of defendants' negligence. A new expert has also been named. Trial is only 2 weeks away.

Plaintiff(s) Attorneys:	Defendant(s) Attorneys:
Thomas Bernhorst	Janet M. Truhe - Stuart Hack
	Mark Gilday > Grabush
	John May

New Trial Date: _____

Approved: _____ Denied: ✓ : _____
(JUDGE'S SIGNATURE)

WHITE—Court File • YELLOW—CAO

786

CC-55

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

78

RICHARD SHOFER, Plaintiff, v. STEWART HACK COMPANY, et al., Defendants.	
THE STEWART HACK COMPANY, et al., Third-Party Plaintiff, v. GRABUSH, NEWMAN & CO., P.A., Third-Party Defendants.	Case No. 88102069/CL79993

MOTION FOR SPECIAL ADMISSION OF OUT-OF-STATE ATTORNEY UNDER RULE 14 OF THE RULES GOVERNING ADMISSION

I, Mark A. Gilday, attorney of record in this case, move the Court to admit, for the limited purpose of appearing and participating in this case as co-counsel with me, John Tremain May of JORDAN COYNE SAVITS & LOPATA, 1030 Fifteenth Street, N.W., Suite 500, Washington, D.C. 20005, an out-of-state attorney who is a member in good standing of the Bar of the District of Columbia.

Respectfully submitted,

JORDAN COYNE SAVITS & LOPATA

By Mark A. Gilday

Mark A. Gilday
33 Wood Lane
Rockville, Maryland 20850
(301) 424-4161

CERTIFICATE AS TO SPECIAL ADMISSION

I, John Tremain May, certify on this 30th day of March, 1993, that during the proceeding twelve months, I have not been specially admitted in the State of Maryland.

John Tremain May

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Special Admission of Out-of-State Attorney Under Rule 14 of the Rules Governing Admission, was mailed, postage prepaid, this 30th day of March, 1993, to:

Janet Truhe, Esquire
Bernstein, Sakellaris & Ward
2800 World Trade Center
Baltimore, Maryland 21202

Thomas H. Bornhorst, Esquire
2236 Southland Road
Baltimore, Maryland 21207

Mark A. Gilday

LAW OFFICES
JORDAN COYNE SAVITS & LOPATA

1030 FIFTEENTH STREET, N.W.
WASHINGTON, D.C. 20005

(202) 371-1800

FAX (202) 842-2587

217 EAST REDWOOD STREET
SUITE 1201
BALTIMORE, MARYLAND 21202
(410) 625-5080
FAX (410) 625-5093

33 WOOD LANE
ROCKVILLE, MARYLAND 20850
(301) 424-4161

10486 ARMSTRONG STREET
FAIRFAX, VIRGINIA 22030
(703) 246-0900
FAX (703) 591-3673

105 LOUDOUN STREET, S.E.
LEESBURG, VIRGINIA 22075
(703) 478-1895
(703) 777-6084
FAX (703) 771-6383

MARK A. GILDAY
DC AND MD BARS
DIRECT DIAL (202) 371-6390

March 30, 1993

CL79993

Clerk
Circuit Court for
Baltimore City, Maryland

Dear Clerk:

Enclosed please find for filing with the Court one original and one copy of:

1. Motion For Special Admission of Out-of-State Attorney Under Rule 14 of the Rules Governing Admission

Kindly date stamp one copy and return in the postage pre-paid envelope provided.

Sincerely,

Deborah Barbee
Administrative Assistant
to Mark A. Gilday

/deb
Enclosure

(79) A.S.

CIVIL POSTPONEMENT FORM

DATE: 4/1/93

Plaintiff(s)
Richard Shofer

v.

Defendant(s)
The Stuart Hack Co, et al

IN THE
CIRCUIT COURT
FOR
BALTIMORE CITY

Computer #: _____

File #: M102069/CL79993 ✓

Jury _____ CT. X CTF. _____ GEN ☐ MOT. 2-507 ☐

DOMESTIC JUDGE: _____ DOMESTIC MASTER: _____

PLEASE PRINT

To be postponed from: DATE: April 9, 1993 ✓ PRIOR POSTPONEMENTS: Y☐ N☒

Postponement requested by: Counsel for all parties

Postponement reason: (please specify):
There is significant progress regarding settlement and accord between all parties concerning approach to case. Joint request for new trial date in July '93 which will allow adequate opportunity to explore new developments.

Plaintiff(s) Attorneys:	Defendant(s) Attorneys:
Thomas H. Borkhorst 2236 Southland Rd Baltimore, MD 21207	Janet Rubye, Esq Mark Coiley, Esq

New Trial Date: 9/27/93 ✓ AUG 1993 ✓ PTC: To be set

Approved: ✓ Denied: _____: _____
(JUDGE'S SIGNATURE)

WHITE—Court File • YELLOW—CAO

190

CC-55

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

80
MJ

RICHARD SHOFER, Plaintiff, v. STEWART HACK COMPANY, et al., Defendants.	:	
	:	Case No. 88101069/CL79993
THE STEWART HACK COMPANY, et al., Third-Party Plaintiff, v. GRABUSH, NEWMAN & CO., P.A., Third-Party Defendants.	:	

ORDER

ORDERED, this 7th day of April, 1993, by the District Court of Maryland for Baltimore City, that John Tremain May is admitted specially for the limited purpose of appearing and participating in this case as co-counsel for the third-party defendant, Grabush, Newman; and it is further,

ORDERED that the Clerk forward a true copy of the Motion and of this Order to the state court administrator.

Joseph P. McCurdy Jr.
JUDGE

cc: Mark A. Gilday, Esquire
JORDAN COYNE SAVITS & LOPATA
1030 15th St., N.W.
Suite 500
Washington, D.C. 20005

Janet Truhe, Esquire
Bernstein, Sakellaris & ward
2800 World Trade Center
Baltimore, Maryland 21202

Thomas H. Bornhorst, Esquire
2236 Southland Road
Baltimore, Maryland 21207

2
81VB

CIVIL POSTPONEMENT FORM

DATE: July 13, 1993

Plaintiff(s) Richard Shofer

v.

Stuart Hack
and
Defendant(s) Grabush, Newman

IN THE
CIRCUIT COURT
FOR
BALTIMORE CITY

Computer #: 88-102069 ✓

File #: CL 79993

Jury ✓ CT.____ CTF.____ GEN ☐ MOT. 2-507 ☐

DOMESTIC JUDGE:____ DOMESTIC MASTER:____

PLEASE PRINT

✓ scheduled for one wk.

To be postponed from: DATE: Sept. 27, 1993 PRIOR POSTPONEMENTS: Y☑ N☐

Postponement requested by: Stuart Hack

L to allow time for another party to be joined in the case and be included in settlement discussions.

Postponement reason: (please specify):

Mr. Hack just found out that a convention involving many of his pension firm's clients has been scheduled for Sept. 26-30 in Boston. He is scheduled to make a speech and this is a "command performance" for him in his profession, other counsel do not oppose this request.

Plaintiff(s) Attorneys:	Defendant(s) Attorneys:
Thomas Bornhorst	Janet M. Truhe (Hack) 1622, The World Trade Center Balt. MD 21202
2236 Southland Rd.	Mark Gilday (Grabush)
Balt. MD 21207	

New Trial Date: 1-24-94 ✓

Approved: ✓ Denied: ____: _____
(JUDGE'S SIGNATURE)

WHITE—Court File • YELLOW—CAO

CC

CC-55

793

(82) DB

CIVIL POSTPONEMENT FORM

DATE: 7/20/93

Plaintiff(s)

Richard Shofee

v.

Defendant(s)

The Stuart Hack Co., et al.

IN THE
CIRCUIT COURT
FOR
BALTIMORE CITY

Computer #: 88102069/CL79993 ✓

File #: _____

Jury_____ CT. ✓ CTF._____ GEN ☐ MOT. 2-507 ☐

DOMESTIC JUDGE:____ DOMESTIC MASTER:____

PLEASE PRINT

To be postponed from: DATE: 1/24/94 ✓ PRIOR POSTPONEMENTS: YES ☒ NO ☐
Due to conflict w/ defendants schedule

Postponement requested by: Third Party defendant Grayson Newman

Postponement reason: (please specify):

Parties received postponement last week and trial date assigned conflicts with third party defendant's ability to service needs of client's during 3½ month tax season. Third party defendant is accounting firm and Jan 15 - April 15 represents vast majority of work.

Plaintiff(s) Attorneys:	Defendant(s) Attorneys:
Thomas Bornhurst	Janet Trube
2236 Southland Rd	1622 The World Trade Center
Balt., MD 21207	Baltimore, MD 21202

New Trial Date: 4-94-PTC 5-23-94 ✓

3rd Party Defendant Attorney
Mark A Gilday
1030 15th Street, N.W.
Wash D.C. 20005

Approved: ✓ Denied: _____: _____
(JUDGE'S SIGNATURE)

WHITE—Court File • YELLOW—CAO

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794

RICHARD SHOFER	RECEIVED CIRCUIT COURT FOR BALTIMORE CITY	IN THE
Plaintiff		CIRCUIT COURT
v.	1994 FEB 28 A 9:21	FOR
THE STUART HACK COMPANY, et al.		BALTIMORE CITY
Defendants	*	CASE NO. 88102069/CL79993

* * * * * * * * * * * * * * * * *

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT AS TO PLAINTIFF'S DAMAGES

Defendants, Stuart Hack and The Stuart Hack Company, by their attorneys, Janet M. Truhe and Bernstein, Sakellaris, Ward & Truhe, move pursuant to Maryland Rule 2-501, for summary judgment in their favor as to Plaintiff's Third Amended Complaint. In the alternative, Defendants move for partial summary judgment as to certain items of damage claimed by Plaintiff in the instant case on the grounds that there is no dispute of material fact and they are entitled to judgment as a matter of law on those claims. In support of their Motion, Defendants state as reasons:

1. That on December 8, 1992, Plaintiff filed a Third Amended Complaint against Stuart Hack and The Stuart Hack Company for negligence (Count I) and breach of contract (Count II) contending that Mr. Hack, who was a pension consultant to the Plaintiff's business only, should have advised him about potential tax consequences which could occur if Plaintiff borrowed money from his pension.

2. That the pension at issue in this case is a qualified pension plan established for the employees of Catalina Enterprises, Inc., a used-car dealership owned and operated by the Plaintiff.

3. That at all times relevant to this case, Defendants were under contract to Catalina Enterprises, Inc. to administer the pension plan.

4. That the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq., is a federal statute regulating all employee benefit plans, including the pension plan at issue in this case.

5. That Plaintiff's state law claims for monetary damages against non-fiduciaries like the Defendants should be deemed pre-empted by ERISA, 29 U.S.C. § 1144(a), given the recent Supreme Court case of Mertens v. Hewitt Associates, _____ U.S. _____, 113 S.Ct. 2063 (1993).

6. That as part of the damages claimed in this case, Plaintiff seeks recovery of excise taxes in the amount of $53,240.00 and penalties arising out of prohibited transactions in the amount of $310,807.00.

7. That the Maryland Court of Appeals in Shofer v. The Stuart Hack Company, et al., 324 Md. 92, 110-11, 595 A.2d 1078 (1991) ("Shofer I"), held that excise taxes and prohibited transaction penalties are pre-empted by federal law under ERISA and may not be recovered in the instant state court case.

8. That after the Plaintiff filed his Third Amended Complaint, Judge Thomas Ward of this Court ruled on February 17, 1993 that Plaintiff may not recover any damages for excise taxes or prohibited transactions in this case; nevertheless, Plaintiff continues to claim such damages.

9. That as part of the damages claimed in this case, Plaintiff also seeks recovery of additional income taxes of $51,831.00 imposed by the Internal Revenue Service solely because Plaintiff failed to follow the proper procedures for borrowing money from his pension.

10. That at all times when Plaintiff was borrowing money from his pension, he was its sole trustee and had a fiduciary obligation imposed on him under ERISA to conduct himself properly with respect to all transactions affecting the pension.

11. That at all times when Plaintiff was borrowing money from his pension in 1984, 1985, and 1986, it is undisputed that Plaintiff did not consult with Defendants or anyone else about the proper procedures for borrowing money from a pension.

12. That at all times when Plaintiff was borrowing money from his pension, it is undisputed that Defendants did not and could not have known that Plaintiff was taking money out of the pension.

13. That under the holding of the Maryland Court of Appeals in Shofer I, Plaintiff may not recover additional tax damages imposed solely by virtue of the fact that he failed to follow proper procedures in borrowing money from a pension because such damages are strictly pension-related and, thus, pre-empted from recovery in state court under federal law.

14. That as part of the damages claimed in this case, Plaintiff further seeks recovery of damages in the amount of $46,532.10 allegedly incurred as a result of Plaintiff's inability

in 1988 to refinance his second home in the Virgin Islands due to existing tax liens.

15. That such damages were wholly unforeseeable at the time of the alleged negligence on August 4, 1984 and are too speculative and remote to be recovered under Maryland law.

16. That as a part of the damages claimed in this case, Plaintiff also seeks recovery of "other economic damages" in the form of lost salary in 1991 and 1992 of $400,000.00, which Plaintiff claims he has sustained as a result of having to devote time to litigation activities, and lost profits of $1,929,471.00 as a result of declining sales in his used-car business over the past eight years, which Plaintiff claims was caused solely by Defendants' negligence.

17. That under Maryland law, such damages were unforeseeable and too speculative to have been proximately caused by the Defendant's alleged negligence on August 4, 1984 and, thus, may not be recovered in this case.

18. That trial in this case is set for May 23, 1994 and will be non-jury.

WHEREFORE, Defendants, Stuart Hack and The Stuart Hack Company, respectfully request that this Court dismiss Plaintiff's Third Amended Complaint or, in the alternative, dismiss all claims for damages arising out of excise taxes, prohibited transactions, Plaintiff's failure to follow proper procedures in borrowing from his pension, Plaintiff's inability to refinance his Virgin Islands property, lost salary, and lost business profits.

Grounds for this Motion are more fully set forth in the accompanying Memorandum.

Janet M. Truhe

Janet M. Truhe
BERNSTEIN, SAKELLARIS, WARD & TRUHE
Suite 1622
The World Trade Center
Baltimore, MD 21202
(410) 685-3400

Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of February, 1994, copies of the aforegoing Defendants' Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment as to Plaintiff's Damages, Memorandum in Support, Request for Hearing, and proposed Orders were mailed to: Thomas H. Bornhorst, Esquire, 2236 Southland Road, Baltimore, Maryland 21207; Mark A. Gilday, Esquire, Jordan Coyne & Savits, 1030 Fifteenth Street, N.W., Washington, D.C. 20005; and Thomas A. Bowden, 1200 Mercantile Bank & Trust Building, 2 Hopkins Plaza, Baltimore, Maryland 21201.

Janet M. Truhe

Janet M. Truhe

RICHARD SHOFER	*	**IN THE**
Plaintiff	*	**CIRCUIT COURT**
v.	*	**FOR**
THE STUART HACK COMPANY, et al.	*	**BALTIMORE CITY**
Defendants	*	**CASE NO. 88102069/CL79993**
	*	

* * * * * * * * * * * * * * * *

REQUEST FOR HEARING

Defendants, Stuart Hack and The Stuart Hack Company, by their attorneys, Janet M. Truhe and Bernstein, Sakellaris, Ward & Truhe, respectfully request a hearing on their Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment as to Plaintiff's Damages.

Janet M. Truhe

Janet M. Truhe
BERNSTEIN, SAKELLARIS, WARD & TRUHE
Suite 1622
The World Trade Center
Baltimore, MD 21202
(410) 685-3400

Attorneys for Defendants

RICHARD SHOFER	*	**IN THE**
Plaintiff	*	**CIRCUIT COURT**
v.	*	**FOR**
THE STUART HACK COMPANY, et al.	*	**BALTIMORE CITY**
Defendants	*	**CASE NO. 88102069/CL79993**
	*	

* * * * * * * * * * * * * * * * *

ORDER

Defendants' Motion for Summary Judgment as to Plaintiff's Third Amended Complaint having been considered by this Court, and counsel having presented argument, it is this _____ day of _____, 1994, ORDERED

That Plaintiff's state law claims for money damages are pre-empted under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a), and the Third Amended Complaint is dismissed.

_____
Judge

RICHARD SHOFER	*	**IN THE**
Plaintiff	*	**CIRCUIT COURT**
v.	*	**FOR**
THE STUART HACK COMPANY, et al.	*	**BALTIMORE CITY**
Defendants	*	**CASE NO. 88102069/CL79993**
	*	

* * * * * * * * * * * * * * * * *

ORDER

Defendants' Motion for Partial Summary Judgment as to Plaintiff's Damages having been considered by this Court, and counsel having presented argument, it is this _____ day of _____, 1994, ORDERED

That Plaintiff may not recover damages arising out of excise taxes, prohibited transactions, his failure to follow proper procedures in borrowing from his pension, his inability to refinance his Virgin Islands property, lost salary, and lost business profits.

_____
Judge

804

RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
THE STUART HACK COMPANY, et al.	*	BALTIMORE CITY
Defendants	*	CASE NO. 88102069/CL79993
	*	

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT AS TO PLAINTIFF'S DAMAGES

Defendants, The Stuart Hack Company and Stuart Hack, by their attorneys, Janet M. Truhe and Bernstein, Sakellaris, Ward & Truhe, file the following Memorandum in Support of their Motion for Partial Summary Judgment or, in the alternative, Partial Summary Judgment as to Plaintiff's Damages.

STATEMENT OF FACTS

In order to understand the bases for Defendants' Motion for Summary Judgment as to Plaintiff's Third Amended Complaint and Partial Summary Judgment as to certain damages, it is necessary to examine both the factual and procedural history of the current action.

A. Procedural History of State Case

On April 11, 1988, Shofer filed suit in this Court against Stuart Hack and The Stuart Hack Company, pension consultants, for negligence (Count I), breach of contract (Count II), and common law breach of fiduciary duty (Count III). The gist of each of these claims was that Hack failed to advise Shofer about potential tax consequences which could occur if he borrowed money from his

pension plan. Shortly thereafter, on May 17, 1988, Shofer filed an Amended Complaint which added a fourth count for breach of fiduciary duty under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq. ("ERISA"). This count was based upon exactly the same conduct complained of in the original three counts, but also sought attorney's fees in addition to compensatory damages.

On March 6, 1990, Hack moved for dismissal of Count IV of the Amended Complaint on the ground that this Court lacked subject matter jurisdiction over an ERISA claim for breach of fiduciary duty which, under 29 U.S.C. § 1132(e)(1), is within the exclusive jurisdiction of the federal courts. On July 2, 1990, this Court granted Hack's Motion to Dismiss.

On August 9, 1990, Shofer filed a Second Amended Complaint which contained the original three counts for negligence, breach of contract, and common law breach of fiduciary and added five new counts for enforcement of Shofer's right to competent advice from Hack under 29 U.S.C. § 1132(a)(1)(B). State courts have limited concurrent jurisdiction with respect to certain types of claims under ERISA and Shofer was attempting to recast his claims to fall within the scope of that jurisdiction. The factual predicate of each of the new ERISA counts was, however, the same as alleged in the state law causes of action, namely that Hack failed to advise Shofer about tax consequences which could occur if he borrowed money from his pension plan.

Thereafter, Hack filed a Motion to Dismiss the entire Second Amended Complaint on the grounds that: (1) the common law negligence, breach of contract, and breach of fiduciary duty claims

XH

(Counts I - III) are pre-empted under 29 U.S.C. § 1144(a), and (2) the remaining ERISA counts (IV - VIII) were in fact still breach of fiduciary duty claims subject to the exclusive jurisdiction of the federal courts. In an attempt to salvage his state court case, Shofer responded to Hack's motion by agreeing to voluntarily dismiss Counts III - VIII (the five ERISA claims and the state law breach of fiduciary duty claim). This was because "[b]ased on the facts elucidated in discovery to date, combined with research as to the ERISA statute and relevant federal and state case law, Shofer has concluded that Hack was not acting as a fiduciary with respect to Shofer or the [pension] plan when he gave the incorrect advice on which the Second Amended Complaint is based." See Plaintiff's Response in Opposition to Defendants' Motion to Dismiss the Second Amended Complaint at p. 17 (filed September 20, 1990)(emphasis in original).

After hearing, this Court dismissed the remaining state law negligence and breach of contract claims because "under the broad language of the ERISA statute as interpreted by the Supreme Court, these claims necessarily relate to ERISA, relate to the pension plan and, therefore, are pre-empted." See Transcript of Proceedings at p.32 (October 12, 1990). On October 16, 1990, Shofer filed a timely notice of appeal and, on its own motion, the Maryland Court of Appeals issued a writ of certiorari.[1]

---

[1] After dismissal of the state court action, Shofer also filed suit in federal court on October 19, 1990, notwithstanding the fact that limitations had run on all of his claims. Hack filed a Motion for Summary Judgment which was subsequently granted by Judge Frederic Smalkin on January 3, 1991. Shofer v. Stuart Hack Co., 753 F.Supp. 587 (D. Md. 1991). Shofer appealed that decision to the United States Court of Appeals for the Fourth

On September 17, 1991, the Maryland Court of Appeals affirmed in part and reversed in part this Court's dismissal of Plaintiff's Second Amended Complaint. Shofer v. The Stuart Hack Co., et al., 324 Md. 92, 595 A.2d 1078 (1991) ("Shofer I"). It affirmed the dismissal of Counts IV - VIII agreeing with Hack's argument that these were in actuality still breach of fiduciary duty claims over which there is exclusive federal jurisdiction. Id. at 111-113. With respect to the two state law claims for negligence and breach of contract, however, the Court reversed. This was despite ERISA's broad pre-emption clause, 29 U.S.C. § 1144(a), which even the Court recognized as "the most expansive pre-emption clause found in any federal statute." Id. at 94, quoting Conison, The Federal Common Law of ERISA Plan Attorneys, 41 Syracuse L.Rev. 1049, 1083 (1990). It held that Shofer's state law claims survived ERISA pre-emption, relying on dicta from the Supreme Court opinion in Mackey v. Lanier Collection Agency & Service, Inc., 486 U.S. 825 (1988), as well as the fact that a finding of pre-emption would leave Shofer without any remedy in either state or federal court.[2] Clearly troubled by

---

Circuit urging the adoption of a new principle of equitable tolling. Judge Smalkin's ruling was, however, affirmed on appeal and Shofer's federal case was over Shofer v. Stuart Hack Co., 970 F.2d 1316 (4th Cir. 1992). Shofer recently filed suit in this Court for legal malpractice against the law firm of Blum, Yumkas, Mailman, Gutman & Denick, P.A., which represented him in the state and federal court actions.

[2] Interestingly, the Court noted that several Federal Courts of Appeal have not been reluctant to find pre-emption even though plaintiffs were left without a remedy in state or federal court for non-fiduciary misconduct (as has been alleged in the instant case). See Shofer v. The Stuart Hack Company, 324 Md. at 109-106. Indeed, both the Fifth and Eleventh Circuits, as well as several lower federal district courts, have held that such a gap between the scope of ERISA remedies and the sweep of

the fact that certain damage issues were so related to the pension that pre-emption of the entire case was appropriate, however, the Court simply dismissed all pension-related damages, i.e., excise taxes, prohibited transaction penalties, and possible plan disqualification from the case. See Shofer v. The Stuart Hack Co., et al., 324 Md. at 110-11. Thus, on remand, Shofer could potentially recover only the additional taxes, interest and penalties (totalling $120,428.19 as of the date of the Court's opinion) imposed because a portion of the Plan loans constituted additional income, and consequential damages in the form of certain fees paid to various professionals who have assisted Shofer in straightening out his tax situation. Id. at 96 and 105.

Since the Maryland Court of Appeals issued its opinion in Shofer I, the United States Supreme Court has decided the case of Mertens v. Hewitt Associates, ____ U.S. ____, 113 S.Ct. 2063 (1993). In Mertens, the Supreme Court held that ERISA does not authorize suits for money damages against non-fiduciaries and, as part of its reasoning, noted that any such state law claims are likely pre-empted as well under ERISA's broad pre-emption provision. This was the very argument which Hack made to the Maryland Court of Appeals, but which the Court rejected. In view of Mertens and the Supreme Court's repudiation of the very same arguments on which the Maryland Court of Appeals found no pre-emption in Shofer

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ERISA pre-emption "is legitimate if it is the result intended by Congress." Howard v. Parisian, Inc., 807 F.2d 1560 (11th Cir. 1987); see also Cefalu v. B.F. Goodrich Co., 871 F.2d 1290 (5th Cir. 1989); Light v. Blue Cross and Blue Shield of Alabama, 790 F.2d 1247 (5th Cir. 1986); Casper Air Service v. Sun Life Assurance Co., 752 F.Supp. 1005 (D. Wyo. 1990); Rollo v. Maxicare of Louisiana, Inc., 695 F.Supp. 245 (E.D. La. 1988).

I, Hack seeks summary judgment as to Plaintiff's entire Third Amended Complaint.[3] In the alternative, they seek dismissal of certain categories of damage claimed by Plaintiff on the grounds that they are either unforeseeable, too speculative, or otherwise not recoverable under Maryland law.

B. Underlying Facts of State Case

The Plaintiff, Richard Shofer, has filed suit in this Court against Defendants seeking damages from them as a result of their failure to advise him about tax consequences which could occur if he borrowed money from his pension plan. See Third Amended Complaint at ¶ 18. The Catalina Enterprises, Inc. pension plan ("the Plan") is a qualified pension plan established for employees of Catalina Enterprises, Inc. t/a Crown Motors, a used-car dealership owned and operated by the Plaintiff. Id. at ¶ 4. In 1971, The Stuart Hack Company and Stuart Hack were hired by Catalina Enterprises, Inc. to administer the Plan. Id. at ¶ 6; see also Plaintiff's Response in Opposition to Defendants' Motion to Dismiss the Second Amended Complaint at p.1. Hack's functions were administrative and consisted primarily of record-keeping with respect to participant benefits. The Plaintiff is a participant in the Plan and is named in the Plan as Trustee. See Third Amended Complaint at ¶'s 3 and 5.

Shortly before August 9, 1984, Shofer contacted Hack and inquired whether he could borrow money from the Plan or use the Plan's assets as collateral for a loan. Id. at ¶ 9. Shofer's inquiry of Hack was brief and general. See Deposition of Richard

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[3] Defendants' legal analysis on this point is set forth more fully at p. 9 infra.

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Shofer at p.103 (attached hereto as **Exhibit B**). It is undisputed that at the time Shofer made this inquiry in August, 1984, he did not tell Hack: (1) how much he was intending to borrow from the Plan;[4] (2) how often he was intending to borrow from the Plan;[5] (3) the purpose(s) for which he wanted to borrow from the Plan;[6] or whether he was even going to borrow from the Plan at all. Id. at pp. 86-87, 104 and 109. Hack responded to Shofer's inquiry in a letter dated August 9, 1984 advising him that "you can borrow up to 100% of your voluntary account." See Larash Deposition Exhibit No. 5 (attached hereto as **Exhibit C**). The letter made no mention of tax consequences. However, it is undisputed that Shofer never specifically asked Hack about tax consequences on any loans from the Plan. See **Exhibit B** at p.105.

After advising Shofer in August of 1984 simply that he could borrow money from his pension, Hack heard nothing further from him in this regard until sometime in the fall of 1986. See Deposition of Stuart Hack at p.349 (attached hereto as **Exhibit D**). At that time, Shofer advised Hack that he had borrowed $260,000.00 from the

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[4] Only loans in excess of $50,000.00 plus Shofer's voluntary contributions to the Plan (which were $76,600.00) would have been taxable as income. Thus, Shofer could have borrowed up to $126,600.00 without any adverse tax consequences.

[5] Shofer eventually borrowed from the Plan on nine separate occasions over a three year period totalling $375,000.00. See Answer No. 3 to Interrogatories Propounded by Stuart Hack (filed November 11, 1988).

[6] The loans were used by Shofer to (1) pay back a personal debt to his company, (2) purchase and refurbish property in the Virgin Islands, and (3) purchase a condominium at the Inner Harbor. Id. See also Exhibit B at pp. 157-58.

Plan in 1984, $80,000.00 in 1985, and $35,000.00 in 1986. Id.; see also Answer No. 3 to Interrogatories Propounded by Stuart Hack.

When Hack rendered his advice in August of 1984, the Baltimore accounting firm of Grabush, Newman & Co., P.A. ("Grabush") was providing personal and business accounting services to the Plaintiff and his car dealership. See **Exhibit B** at p.88. Since 1970, this firm prepared Shofer's personal and corporate tax returns, the Form 990T for the Plan (which is filed whenever a pension plan has taxable income), and rendered tax advice to the Plaintiff generally. See **Exhibit E** at p.14. Shofer has previously testified in this case that he consulted with Kenneth Larash and Phil Matz at Grabush whenever he had a personal tax question; however on this occasion Shofer chose not to consult with anyone at Grabush at all. See **Exhibit B** at p. 88. Mr. Hack was also aware that Grabush performed these services for the Plaintiff at the time he wrote the August 9, 1984 letter. See **Exhibit D** at pp. 150-51.

Although Grabush knew that Shofer had borrowed from his pension at the time Shofer's 1984 and 1985 returns were prepared, a portion of the monies taken from the Plan was not considered by Grabush as taxable income. See Deposition of Kenneth Larash at pp. 31-32 and 39-41 (attached hereto as **Exhibit E**). Grabush later concluded that some of these loans were taxable. Id. at p. 68. Grabush then advised Shofer to amend his tax returns for 1984 and 1985 to reflect a portion of the borrowings from the Plan as additional taxable income in these years.[7]

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[7] On April 18, 1989, Hack filed a Third Party Claim against Grabush for indemnity but Shofer has never amended his case to bring a direct claim against Grabush.

In the instant case, Shofer is seeking from Hack, the additional taxes, penalties, and interest he has incurred as a result of his failure to pay income tax on a portion of the monies he borrowed from the Plan, as well as a variety of other damages which will be discussed more fully herein. However, it is undisputed that Hack was not Shofer's tax advisor during any of the pertinent events in this case and did not play any role in the preparation of his tax returns. Hack's sole legal relationship with Shofer was in his capacity as plan administrator (hired by the Plan only) and Shofer's capacity as trustee/participant. He was not Shofer's attorney, nor was he Shofer's accountant, tax preparer, or personal financial advisor. Shofer, individually, was not a client of Hack's firm, and he has never alleged or contended that he was.

ARGUMENT

A. Plaintiff's Third Amended Complaint is Pre-empted by ERISA.

The Employee Retirement Income Security Act of 1974 is a federal statute which regulates all employee benefit plans (including the Plan in this case), established "by any employer engaged in commerce or in any industry or activity affecting commerce." 29 U.S.C. § 1003(a)(1). It has a broad pre-emption provision which provides that it "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a) (emphasis added). A state law "relates to" an employee benefit plan "if it has a connection with or reference to such a plan." Shaw v. Delta Air Lines, Inc., 463

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U.S. 85, 97-98 (1983). As the Supreme Court has observed, "the express pre-emption provisions of ERISA are deliberately expansive, and designed to 'establish pension plan regulation as exclusively a federal concern.'" Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41, 46-47 (1987), quoting Alessi v. Raybestos - Manhattan, Inc., 451 U.S. 504, 523 (1981).

Moreover, the pre-emption of state law claims involving pension matters is not strictly limited to those situations dealing with claims for benefits. The Supreme Court has noted many times in the past that the "expansive sweep" of the ERISA pre-emption provision "is not limited to 'State laws specifically designed to affect employee benefit plans.'" Pilot Life Insurance Co. v. Dedeaux, 481 U.S. at 48-49, quoting Shaw v. Delta Air Lines, Inc., 463 U.S. at 98. It is not meant, therefore, to pre-empt only those state laws dealing with the subject matters of ERISA - reporting, disclosure, fiduciary responsibility and the like. Shaw v. Delta Air Lines, Inc., 463 U.S. at 99. As the Court noted in Shaw:

> The bill that became ERISA originally contained a limited pre-emption clause applicable only to state laws relating to ERISA. The Conference Committee rejected these provisions in favor of the present language, and indicated that the section's pre-emptive scope was as broad as its language.

Id.

In addition, the only type of case over which state courts have concurrent jurisdiction with federal courts on pension matters is one for benefits. See 29 U.S.C. § 1132(a)(1)(B), which provides that:

> A civil action may be brought...by a participant or beneficiary...to recover benefits due to him under the terms of his plan, to enforce

> his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

All other claims involving pension matters are specifically excluded from the jurisdiction of state courts. See, e.g., Pratt v. Delta Air Lines, Inc., 675 F.Supp. 991, 998-99 (D. Md. 1987) (state abusive discharge claim against employer pre-empted because it "relates to" employee benefit plan, even though it seeks relief for emotional distress, mental anguish and punitive damages).

Because Plaintiff's original negligence and breach of contract claims related to an employee plan, Hack moved to dismiss the Second Amended Complaint in its entirety on the basis of ERISA pre-emption. This Court agreed that Plaintiff's liability and damage claims "relate to ERISA, relate to the pension plan and, therefore, are pre-empted." See Transcript of Proceedings at p. 32 (October 12, 1990). Shofer appealed and the Maryland Court of Appeals issued a writ of certiorari on its own motion. On September 17, 1991, the Court affirmed in part, but reversed with respect to the dismissal of the two state law claims. Despite recognition of ERISA's broad pre-emption clause, the Maryland Court of Appeals, relying chiefly on dicta from the Supreme Court opinion in Mackey v. Lanier Collection Agency & Service, Inc., 486 U.S. 825 (1988), held that Shofer's state law claims could go forward. It also permitted these claims to go forward in state court out of concern that a finding of pre-emption would leave Shofer without any remedy in either state or federal court (now that limitations had already run on any federal suit). In so holding, however, the Court dismissed all pension-related damages in the case, i.e., excise taxes, prohibited transaction penalties, and possible plan

disqualification. Shofer v. The Stuart Hack Co., et al., 324 Md. at 111.

Since the Maryland Court of Appeals issued its opinion in Shofer I, the United States Supreme Court has decided the case of Mertens v. Hewitt Associates, _____ U.S. _____, 113 S.Ct. 2063 (1993). In Mertens, the Supreme Court held that ERISA does not authorize suits for money damages, such as is in the case here, against non-fiduciaries. With respect to whether claims for money damages could go forward in state court against non-fiduciaries, the Court assumed (without deciding) and the dissent argued, that any such state law claims are likely pre-empted as well under ERISA's broad pre-emption provision. Indeed, the fact that state law claims for non-fiduciary misconduct would presumably be pre-empted, was an argument used by petitioners in Mertens in favor of allowing such claims to go forward in federal court. The Mertens Court was not persuaded by this gap argument and noted:

> even assuming (without deciding) that petitioners are correct about the pre-emption of previously available state - court actions, vague notions of a statute's "basic purpose" are nonetheless inadequate to overcome the words of its text regarding the specific issue under consideration. This is especially true with legislation such as ERISA, an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests - not all in favor of potential plaintiffs.

Id. at 13-14 (citations omitted). Further, the dissent in Mertens noted that although the majority stopped just short of actually deciding the pre-emption implications of its holding:

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> it is difficult to imagine how any common-law remedy for the harm alleged here - participation in a breach of fiduciary duty [by a non-fiduciary] concerning an ERISA - governed plan - could have survived enactment of ERISA's "deliberately expansive" pre-emption provision.

Id. at 5 f.2.

When it decided Shofer I, the Maryland Court of Appeals did not, of course, have the benefit of the aforementioned views. Instead, it was troubled by the fact that "if [Shofer's] malpractice claim is sufficiently closely related to the Catalina plan to be pre-empted, there may not be any remedy at all - not even if asserted under ERISA... because there can be a gap between the scope of ERISA remedies and the sweep of ERISA pre-emption." Shofer v. Stuart Hack Co., et al., 324 Md. at 105. It then went on to side with the minority of federal courts which have resolved this gap in favor of allowing plaintiffs to go forward on pension-related claims involving non-fiduciary misconduct in state court.

However, the majority of federal courts addressing this problem have held, as Hack argued to the Maryland Court of Appeals, that a gap between the scope of ERISA remedies and the sweep of ERISA pre-emption "is legitimate if it is the result intended by Congress." Howard v. Parisian, Inc., 807 F.2d 1560, 1565 (11th Cir. 1987); see also Cefalu v. B.F. Goodrich Co., 871 F.2d 1290 (5th Cir. 1989); Light v. Blue Cross and Blue Shield of Alabama, 790 F.2d 1247 (5th Cir. 1986); Casper Air Service v. Sun Life Assurance Co., 752 F.Supp. 1005 (D. Wyo. 1990); Rollo v. Maxicare of Louisiana, Inc., 695 F.Supp. 245 (E.D. La. 1988). The Supreme Court in Mertens agreed with that reasoning. Because of the views

recently expressed on this issue by the Court in Mertens, Hack requests that the issue of pre-emption of Shofer's negligence and breach of contract claims be revisited.

In the past, the Supreme Court has flatly rejected the contention that state law relating to employee benefit plans could be construed to supplement ERISA:

> The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA.

Pilot Life Insurance Co. v. Dedeaux, 107 S.Ct. at 1556 (state law causes of action alleging improper processing of a claim for benefits were pre-empted). In Mertens, the Supreme Court also expressed concern that "[e]xposure to that sort of liability [for money damages by non-fiduciaries under ERISA and under state claims] would impose high insurance costs upon persons who regularly deal with and offer advice to ERISA plans, and hence upon ERISA plans themselves." Mertens v. Hewitt Associates, 113 S.Ct. at 2072. Noting the tension between the "primary" ERISA goal of benefiting employees and the "subsidiary" goal of containing costs, the Court concluded that "[w]e will not attempt to adjust the balance between those competing goals that the text [ERISA] adopted by Congress has struck." Id.

The other basis for the Maryland Court of Appeals' holding in 1991 that Shofer's state law claims survived ERISA's broad pre-emption clause came from the following dicta in the Supreme Court's

earlier opinion in Mackey v. Lanier Collection Agency & Service, Inc., 486 U.S. 825, 833 (1988) where the Court stated:

> ERISA plans may be sued in a second type of civil action, as well. These cases - lawsuits against ERISA plans for run-of-the-mill state-law claims such as unpaid rent, failure to pay creditors, or even torts committed by an ERISA plan - are relatively commonplace. Petitioners and the United States (appearing here as amicus curiae) concede that these suits, although obviously affecting and involving ERISA plans and their trustees, are not pre-empted by ERISA....

Typical of cases which seized upon this dicta was the decision by the Third Circuit in Painters of Philadelphia District Counsel v. Price Waterhouse, 879 F.2d 1146 (3d Cir. 1989), a case relied on heavily by the Maryland Court of Appeals in finding that Shofer's state law malpractice claims were not pre-empted. In Painters, the Third Circuit suggested in dicta only that state law malpractice claims are "directly analogous" to the common-law claims discussed in Mackey and concluded that "in the absence of an explicit corresponding provision in ERISA allowing a professional malpractice cause of action [against non-fiduciaries], Congress did not intend to pre-empt a whole panoply of state law in this area." Id. at 1153 n.7.

The Mertens case clearly undercuts this analysis in Painters and is a repudiation of such reasoning. And although the majority in Mertens did not directly decide the question of whether a state law malpractice claim for money damages against a non-fiduciary was pre-empted, it assumed for the purpose of its opinion that it was and expressed the view that Congress rationally could have pre-

empted such a claim at the same time it was leaving any parallel claim out of ERISA. Of additional significance is the fact that Justice White, who authored the majority opinion in Mackey, also authored the dissent in Mertens. His comment that "it is difficult to imagine how any common-law remedy...could have survived enactment of ERISA's deliberately expansive pre-emption provision", strongly suggests that lower courts such as Painters have been giving undue weight to his earlier dicta in Mackey and that those decisions emanating from the 5th and 11th Circuits, see supra at p. 13, are in fact in line with the Supreme Court's views on this issue. Mertens makes clear the fact that the Supreme Court does view state law claims for money damages against non-fiduciaries, like those brought by Shofer against Defendants here, as pre-empted by ERISA.

For these reasons, Defendants request that summary judgment be entered in their favor as to Counts I and II of the Third Amended Complaint.

B. Defendants are Entitled to Partial Summary Judgment as to Certain Damages.

Defendants also move, in the alternative, for partial summary judgment as to certain categories of Plaintiff's damages. All of the damages sought by Plaintiff in this case are summarized in a letter dated October 20, 1993 to counsel from Thomas H. Bornhorst. See Rosenberg Deposition Exhibit No. 2 (attached hereto as **Exhibit F**). Set forth below are those items of damages which Defendants contend are not recoverable in this case for the reasons set forth therein.

1. Excise taxes and prohibited transaction penalties

As part of his request for damages under Counts I and II, Plaintiff is seeking recovery of excise taxes in the amount of $53,240.00 and penalties arising out of prohibited transactions in the amount of $310,807.00. Id. at p. 2. However, these damages do relate to the Plan (because they were imposed strictly because of violations of federal pension law) and, as such, are pre-empted pursuant to ERISA. The Maryland Court of Appeals so held in Shofer I. Shofer v. The Stuart Hack Company, et al., 324 Md. at 110-11.

In addition, when Plaintiff filed his Third Amended Complaint on December 8, 1992 requesting these same damages, Defendants filed a motion to dismiss these items for failure to state a claim citing the Court of Appeals' ruling in Shofer I. Defendants' motion was granted by this Court on February 17, 1993. See **Exhibit A.** Nevertheless, Plaintiff continues to pursue these damages and Defendants request that this Court again reaffirm the dismissal of these damages from this case so that no claims in this regard may be pursued at the time of trial on May 23, 1994.

2. Additional income taxes for failure to follow proper procedures for borrowing from the Plan

Plaintiff also seeks recovery of additional income taxes of $51,831.00 imposed by the Internal Revenue Service solely because Plaintiff failed to follow the proper procedures for borrowing money from his pension. See **Exhibit F** at p. 3. This damage **is** new -- it was not claimed by Shofer at the time Shofer I was decided. Defendants contend that Plaintiff may not recover this item of damage for two reasons. First, this penalty was imposed strictly because Plaintiff did not pay interest on the loans he

took from the pension on a timely basis as required by ERISA. See **Exhibit B** at p. 91. Because Plaintiff sustained this damage simply by virtue of the fact that he failed to repay money to a pension in accordance with federal pension law, this damage is clearly pension -related so as to be pre-empted. This was the same basis on which the Court of Appeals dismissed the excise taxes and prohibited transaction penalties in Shofer I. Moreover, the Court also held in Shofer I that, assuming liability, Plaintiff's damages in this case were limited to taxes on income (plus penalties and interest) and consequential damages in the form of reimbursement for professional fees incurred during Plaintiff's tax audit. See Shofer v. The Stuart Hack Co., et al., 324 Md. at 105, 110-11. This Court reaffirmed these specific rulings in its Order of February 17, 1992. See **Exhibit A.**

Plaintiff may not recover this damage for another reason. Shofer admits that, at the time he borrowed from the pension in 1984, 1985 and 1986, he simply assumed he knew how to borrow money from his pension properly. See **Exhibit B** at p. 94. Despite the fact that he was the Plan's Trustee, Shofer has conceded that he did not consult with anyone when he took the loans and that he alone decided the applicable rate of interest, duration, and other terms. Id. at pp. 118-19, 121-22, 127-28, 133, 141, 143, 154, 156, and 159. In fact, Shofer admits that at no time from August 9, 1984 to September 30, 1986, when he was borrowing the monies at issue, did he even have any conversation with Mr. Hack about taking the loans. Id. at pp. 129-30. Defendants could not have been negligent for failing to advise the Plaintiff about transactions they did not even know were taking place. Moreover, Defendants did

not become aware of the loans until September of 1986 when Plaintiff finally furnished them with data showing all Plan transactions. See **Exhibit D** at p. 349. Mr. Hack had repeatedly requested this data from Shofer who, as Plan Trustee, was the only one who would have had such information. Id. at p. 454. As a factual and legal matter, therefore, Defendants cannot be held responsible for any penalties imposed upon Shofer arising out of his failure to follow proper procedures in borrowing from the pension. Thus, Defendants seek dismissal of this category of damage as well.

3. Refinancing of Virgin Islands Property

As part of the damages sought in this case, Plaintiff is also claiming that tax liens, imposed upon him as a result of his not being able to afford his additional tax debt, prevented him in 1988 from refinancing his second home in St. Thomas. See **Exhibit F** at p. 3; see also **Exhibit B** at p. 94. Plaintiff originally bought this home in 1985 for $225,000.00 and borrowed money from his pension for the downpayment. See **Exhibit B** at p. 94.[8] Shofer claims that his inability to refinance this home from "13% to at least 9% available in 1988" has cost him $46,532.10 (the difference between Shofer's present mortgage principal of $153,411.72 and the principal at 9% which would have been $118,887.02). **Exhibit F** at p. 3.

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[8] Mr. Shofer put twenty percent down and financed the remainder. Exhibit B at p. 94. Today, he still pays a $2,000.00 monthly mortgage on this home which he visits each year and refuses to rent or sell out because he "like[s] it too much." Id. at p. 242. Shofer also borrowed additional money from his pension in 1985 to refurbish this property. Id. at p. 145.

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Regardless of whether this alleged damage is viewed under a contract or negligence analysis, it is not recoverable under Maryland law for several reasons. First, it is too speculative, a fact which even Shofer's own damage expert, Theodore Rosenberg, noted when he declined Shofer's request to calculate it because there were too many unknowns, i.e., interest rate, date of refinancing, bank approval, etc. See Deposition of Theodore H. Rosenberg at pp. 82-83 (attached hereto as **Exhibit G**). It is well settled under Maryland law that damages must be probable, not possible and may not be based on speculation. See Automatic Retailers of America, Inc. v. Evans Cigarette Service Co., 269 Md. 101, 110-11, 304 A.2d 581 (1973).

This damage is also not recoverable under either a negligence or contract theory for another important reason. At the time the alleged malpractice occurred in August of 1984, the Plaintiff did not even own the Virgin Islands property at issue. Thus, any alleged damage arising out of Plaintiff's inability to refinance that property could hardly have been foreseeable to Hack in 1984 when he was advising Shofer about borrowing from the Plan.

An analogous professional malpractice case recently decided by the Maryland Court of Appeals illustrates Defendants' argument in this regard. In Stone v. Chicago Title Insurance Company of Maryland, 330 Md. 329, 624 A.2d 496 (1993), Plaintiff purchased a home in Washington, D.C. for $285,000.00 in September, 1989. He employed the Defendant law firm to handle the settlement of that purchase, including the examination of the title of the property. In June, 1990, Plaintiff applied to the Maryland National Bank for a home equity loan in the amount of $50,000.00 to purchase "stock

puts" to protect his financial position in the stock market in response to anticipated margin calls on certain stocks he had purchased on credit. The loan was to be secured by a second mortgage on his home. The loan was provisionally approved on July 2, however, in mid-July, the bank notified Plaintiff that a Deed of Trust which encumbered his seller's title had not been released of record. Between July 18 and August 2, Plaintiff and representatives of the bank made numerous attempts to contact someone at the Defendant law firm to get the Deed of Trust which was recorded against his home released. Meanwhile, on August 1, 1980, Plaintiff's broker called his margin account loans and without the home equity loan funds, Plaintiff was forced to sell his stock at a substantial loss to meet his broker's demand.

Plaintiff subsequently sued the law firm, which handled the original settlement of his property, claiming that as a result of its failure to record a release of the outstanding lien, he was unable to close on the home equity loan in a timely fashion, and as a result, was forced to sell his stock at a substantial loss to raise the money to meet the margin call. However, as the Court of Appeals pointed out in its opinion, there was no allegation in the Plaintiff's complaint that anyone at the law firm had knowledge that Plaintiff was "speculating on credit in the stock market and that the Maryland National home equity loan was the only source of funds available to him in case of financial emergency." Id. at 333.

The Defendant law firm moved to dismiss Plaintiff's complaint contending that the damages claimed for breach of contract and negligence were unforeseeable and speculative "inasmuch as a causal

nexus could not be demonstrated between their negligence and the injuries suffered by [Plaintiff]." Id. Defendants' motion was granted and Plaintiff appealed. The Court of Appeals issued a writ of certiorari and, subsequently, a published opinion affirming the lower court. The Court's analysis of why the Plaintiff's damages in Stone were not recoverable will be discussed at length by Defendants herein because it has application not only to Shofer's damage as it relates to the Virgin Islands property, but also to the next two items of damage which will be discussed in more detail below.

In Stone, the Court viewed the issue as being one of whether the possibility of Plaintiff's stock market losses in August, 1990 was foreseeable to the law firm in September, 1989, so that it should have known at that time that negligent handling of the settlement could proximately result in those losses nearly a year later. After reviewing pertinent Maryland case law on the recoverability of damages in contract and tort actions, the Court stated that any damage claimed by Stone must fall within a general field of danger which the law firm should have anticipated in order to be recoverable. In otherwords, "'the actor's conduct may be held not to be a legal cause of harm to another where after the event and looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm.'" Id. at 337, quoting Restatement (Second of Torts) § 435(2) (1965). In other words, there must be an "acceptable nexus" between the negligent act and the ensuing harm. Id. at 338. To avoid the attachment of liability, it must appear "highly extraordinary" that the negligent

conduct should have brought about the harm. Id. The Court went on to note that the only exception to this rule would be where "the special circumstances under which the contract was actually made, were communicated by the Plaintiff to the Defendant, and thus known to both parties...." Id. at 339.

Applying these principles to the facts of Stone, the Court pointed out that:

> Stone would have us hold that his loss arising from the August, 1990 collapse in the market in certain stocks in which he was speculating was proximately caused by his sale of those stocks, which was caused by his lack of funds to pay off other loans, which was caused by his inability to secure a second mortgage before August 6, 1990, which in turn was caused by [the law firm's] failure to record timely the release of the extinguished lien on his home. He argues that but for [the law firm's] negligence he would have secured a home equity loan and used the proceeds to meet his broker's margin call, thus avoiding the sale of stock to raise capital in a falling market.

Id. at 340. The Court would not go that far, and held "We believe that Stone's stock market damages were a highly extraordinary result of [the law firm's] failure to timely record the release." Id. at 341. It also held that in the absence of Plaintiff having notified the law firm at the time of its allegedly negligent conduct that he was speculating in the stock market and would have no other source of money except to borrow against his home in the event of financial emergency, Defendant could not be held liable for the harm which ultimately befell Stone.

Similarly, Mr. Shofer in the instant case would have this Court hold that his loss arising from his inability to refinance property in 1988 was proximately caused by the tax liens, which

were caused by his lack of funds to pay off his additional tax debt, which was caused by the fact that Shofer had no available source of money in 1988 when his tax debt came due, which in turn was caused solely by Hack's alleged failure to advise Shofer that loans from the Plan (which Hack never even knew about, see supra at pp. 7-8) over a certain amount were taxable as income, and which Shofer claims he never would have taken but for the fact that he did not know these tax implications. The verb tenses used by Plaintiff in and of themselves are indicative of the speculative and highly unforeseeable nature of this loss. Under the Court of Appeals' analysis of similar damages in Stone, they are clearly not recoverable in a malpractice action where the defendant had no knowledge of the plaintiff's special circumstances just as in the case here. Accordingly, Defendants request that this category of damage be dismissed.

4. Other economic damages

Finally, Plaintiff is seeking recovery of "other economic damages" in the form of: 1) lost salary in 1991 and 1992 of $400,000.00, which the Plaintiff claims he sustained as a result of having to devote time to litigation activities, and 2) lost profits of $1,929,471.00 as a result of declining sales in his used-car business over the past eight years, which the Plaintiff claims was caused solely by Defendants' alleged negligence on August 4, 1984. See **Exhibit F** at p.4.

Under Maryland law as discussed in the Stone case, such damages could not have been foreseeable to Hack when he advised Plaintiff in August, 1984 that he could borrow from his pension and

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are too speculative to have been proximately caused by any alleged negligence at that time.[9]

With respect to the first category of "other economic losses," lost salary, Shofer has testified that he was unable to pay himself a salary of $200,000.00 in 1991 to make up for "my loss of services to the company" as a result of spending approximately "20% of my time to Hack litigation matters" during the past five years. **Exhibit B** at pp. 109-10. The Plaintiff cannot point to any Maryland authority, however, which permits a party to recover compensation for time spent in litigation. The rule in Maryland is that each party bears his own expenses. See Collier v. M.D. - Individual Practice Ass'n, 327 Md. 1, 11-17, 607 A.2d 537 (1992).[10]

With respect to the second category of economic damage sought in this case, lost business profits, Shofer calculates that he has lost $1,929,471.00 in profits from his used-car business from 1988 to 1992 solely as a result of Hack's negligence in 1984. See **Exhibit F** at p. 4. According to Shofer, the number of cars he has sold has dropped from an average of 450 in the mid to late 1980's to 320 last year. See **Exhibit B** at p. 113. Shofer attributes this

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[9] Interestingly, Shofer's own damage expert, Theodore Rosenberg, also refused to get involved in the calculation of these two items of damage because to do so would have involved too much "guessing." See **Exhibit G** at p. 87.

[10] The plaintiff also claims that he did not pay himself a salary in 1992 because to do so would have driven his company's balance sheet "further into the minus hole." **Exhibit B** at 112. Shofer is also claiming lost business profits from the Hack litigation, out of which he presumably would have paid himself a salary in 1992. Shofer fails to offer any explanation as to why a recovery of damages in both categories would not be duplicative.

drop in sales to a decline in inventory which he in turn attributes to a loss in capital. Id. The loss of capital Shofer attributes to his loss of credit with the Maryland National Bank which Shofer claims disappeared because of his tax liens. Id. at p. 114. Under Shofer's theory, the decline in profits from his used-car business was proximately and completely caused by Hack's failure to advise him about potential tax implications arising out of Plan loans, although Shofer did acknowledge that there was an economic recession at one point during this time period. Id. at p. 132.

Assuming, arguendo, that Shofer's damages in this category are even genuine, at best, they are a "highly extraordinary" result of any negligence on the part of Hack in advising Shofer about borrowing money from the Plan in 1984. Just as in the Stone case, where the Court held there was no "acceptable nexus" between the law firm's negligent conduct and the stock market losses suffered by the Plaintiff, there is simply no reasonable relationship between any failure on the part of Hack in 1984 to advise the Plaintiff about loans he did not even know the Plaintiff would take and the Plaintiff's alleged $1.9 million in lost profits from his used-car dealership in the last eight years. Therefore, Defendants seek dismissal of all economic damages in the form of lost salary and lost business profits.

CONCLUSION

For the aforegoing reasons, Defendants, Stuart Hack and The Stuart Hack Company, request that this Court dismiss Plaintiff's Third Amended Complaint. In the alternative, they request that this Court dismiss all claims for damages arising out of excise taxes, prohibited transactions, Plaintiff's failure to follow

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proper procedures in borrowing from his pension, his inability to refinance his Virgin Islands property, lost salary, and lost business profits.

Janet M. Truhe

Janet M. Truhe
BERNSTEIN, SAKELLARIS, WARD & TRUHE
Suite 1622
The World Trade Center
Baltimore, MD 21202
(410) 685-3400

Attorneys for Defendants

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Exhibit A

2-10

RICHARD SHOFER,	*	IN THE
Plaintiff,	*	CIRCUIT COURT
v.	*	FOR
THE STUART HACK COMPANY, et al.	*	BALTIMORE CITY
Defendants	*	Case No.: 88102069/CL79993

* * * * * * * * *

ORDER

Defendants' Partial Motion to Dismiss Plaintiff's Third Amended Complaint for Failure to State a Claim having been considered by this Court, and counsel having presented argument, it is this 17 day of February, 1993,

ORDERED, that in accordance with the Court of Appeals opinion in Shofer v. Stuart Hack Co., et al., 324 Md. 92, 595 A.2d 1078 (1991) at 110-11, the Plaintiff may not recover damages for excise taxes, prohibited transactions or plan disqualification under Counts I and II of the Third Amended Complaint, and be it further

ORDERED, that Plaintiff's claims for punitive damages under Counts I and II are dismissed, and be it further

ORDERED, that Plaintiff's request for attorney's fees in prosecuting the instant action is dismissed but that Plaintiff may pursue recovery of any fees for professionals consequential to his tax obligation as held by the Court of Appeals in Shofer v. Stuart Hack Co., et al., 324 Md. at 105.

THOMAS WARD
THE JUDGE'S SIGNATURE APPEARS
ON THE ORIGINAL DOCUMENT

TRUE COPY
Test:
Sandra E. Banks
CLERK

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Exhibit B

VOL. I.

RICHARD SHOFER	:	IN THE
Plaintiff	:	CIRCUIT COURT
v.	:	FOR
THE STUART HACK COMPANY, et al.	:	BALTIMORE CITY
Defendants	:	Case No. 88102069/CL79993

Baltimore, Maryland

February 2, 1990

Deposition of RICHARD SHOFER, Plaintiff, called for oral examination by counsel for the Defendants, taken at the law offices of Semmes, Bowen & Semmes, Conference Room 17-A, 250 West Pratt Street, beginning at 10:12 a.m.

A P P E A R A N C E S

THOMAS A. BOWDEN, ESQ., on behalf of the Plaintiff.

JANET M. TRUHE, ESQ., and LEE B. ZABEN, ESQ., on behalf of the Defendants.

LINDA M. SCHUETT, ESQ., on behalf of the Third-Party Defendant, Grabush & Newman.

Reported By: Dawn M. Hart, CSR
Riggleman, Turk & Nelson
(301) 539-6398

that I'd gotten from Mr. Hack that I could borrow up to the limit of what was in my voluntary account.

Q No, that's not my question.

A Okay. I, I had intended initially on borrowing, I think two hundred and fifty thousand, I'm not sure.

Q All right.

A Two hundred, two hundred fifty, somewhere in that, I don't remember.

Q Did you tell Mr. Wilson how much money you were planning to borrow?

A Probably. Yes, it was probably part of the plan but I -- I can't remember exactly what I said to Mr. Wilson or what figure that I might have said.

Q All right. And the reason why you would be giving this money to Crown Motors is that, is because you owed Crown Motors seven to eight hundred thousand dollars anyway; isn't that correct?

A Yes.

Q Did you tell Mr. Hack you were planning to borrow approximately two hundred and fifty thousand dollars?

A I don't recall that any specific amount was

mentioned or not.

Q But you think you probably, you mentioned the amount to Mr. Wilson?

A Probably, yes, I -- I can't imagine that there was any part of any major financial transaction I would have had that I wouldn't have made him privy to or aware of.

Q Let me get back to my earlier question. Did you discuss this loan from your pension plan idea with anyone other than Mr. Hack and Mr. Wilson in August of 1984?

A Probably others at the bank. There, if there were any other -- let's see, Mr. Wilson had a supervisor, I think the supervisor may have been Barry Blumberg, and I'm not sure, but -- by this time, see, my relationships with the loan officer sort of changed from time to time and I think I had such a good relationship and good working relationship with Mr. Wilson that I didn't, I might not have even spoke with others at Maryland National then, I, it might have just been him. And other than he, Sally.

Q Anyone else?

A I don't think so.

Q Did you ever discuss this idea with anyone at

Grabush Newman?

A I don't think so.

Q With regard to personal tax questions, generally who would you go to for tax advice during this period, during 1984?

A Just Grabush Newman.

Q So it would be your habit whenever you had a personal tax question to contact Grabush Newman?

A Yes. Another name comes up to me now that I sort of forgot before lunch.

Q Who is he?

A He's a tax man at Grabush Newman's that I have great faith in. I --

Q You discussed --

A I would initially always go to Ken LaRash but would suggest to Ken if it was an important issue would he pass it by Phil Matz. There may have been one or two occasions where some issue came up that I requested Phil Matz to be involved in.

Q Did you consult with Mr. Matz at anytime in August of '84 with regard to this idea of borrowing money from your

A I don't recall anything beyond that, no.

Q And is it fair to say that you assumed you knew how to borrow money from your pension?

A Yes.

Q You assumed you knew how to do it properly?

A Yes.

Q Let's go to No. 4, the loss of opportunity to refinance the St. Thomas property.

When did you first buy that property?

A 1985.

Q What was the purchase price?

A I think it was 225,000.

Q How much did you put down?

A Twenty percent.

Q Did you finance the rest?

A Yes.

Q What were your monthly payments?

A A little over 2,000. I think around 2,100.

Q To whom did you pay that?

A To the seller of the property. Mrs. Sawyer was her name.

Q Over an hour or under an hour?

A Oh, I don't think any -- excuse me. But I don't think any telephone conversation with Stuart lasted more than, I can't ever remember talking more than, I think twenty minutes at the most, I -- and you know, it could have been five minutes or ten, but I don't -- you know, a half an hour was a long, or more is a long conversation and I don't think, I can't remember having that much of a conversation with Stuart ever.

Q All right. On this particular occasion --

A At least on the telephone.

Q Okay. Generally speaking, I understand that, on this particular occasion when you first mentioned this idea to Mr. Hack, what did you say to him?

A I don't know what I said because I don't remember the conversation.

Q All right. At all?

A Not really, you know, I can surmise what I must have, that what the subject matter must have been but I can't really specifically remember.

Q So you can only speculate as to what you might

have said?

A That's right. Now, I can't remember whether it was morning or afternoon.

Q All right. Do you recall telling Mr. Hack why you wanted to borrow money from your pension plan?

A I don't recall if I did or didn't.

Q Do you have any notes concerning your telephone conversation with Mr. Hack this first occasion?

A No.

Q Do you have any notes concerning telephone conversations with Mr. Hack on this matter at all prior to the first time you borrowed money?

A No. I've seen memos from people and normally it's not my habit to -- I don't, I don't have a memo calendar, diary, and don't take notes like a lot of professionals do. I -- I do sometimes scribble names on folders or something if it's something that I know that I have to remember that I can't commit to normal memory, that if a new person called me that I didn't know him about an issue and he wanted to give me a phone number, I had a file on an issue I might scratch it on a piece of paper and put it in that file so I'd know

his name and phone number. But if it's about an issue that I can commit to memory and I know or I feel that I can commit it satisfactorily to memory, I don't make notes.

Q Why did you call Stuart Hack on this matter?

A Because he was the logical one to call.

Q Well, what were you trying to get from him, what type of information?

A I wanted to know the appropriateness and feasibility of borrowing from the pension if I could.

Q In other words you wanted to know whether it was lawful?

A I wanted to know anything about it that was relevant to borrowing and lawful particularly.

Q Do you recall whether you asked him about any personal tax consequences to you of borrowing money from your pension plan?

A I don't remember whether I did or didn't, but I can almost assuredly surmise that I didn't.

Q Why do you think you didn't?

A Because I didn't imagine that there would be any tax consequences. I didn't think it was a tax issue or a

Wilson.

Q Other than the ones we've talked about already?

A No, as I repeat that I can't think of anyone.

Q All right. Did you advise Mr. Hack in August of 1984 that you were going to take one loan?

A I can't recall my conversations with Mr. Hack in August of '84.

Q All right. Following your discussions with Mr. Hack in August of '84, did you take any money from your pension plan?

A Yes.

Q When was the first time?

A I don't know the date, but I think, I think it was August 8th, I think, fifty thousand dollars.

Q All right. In your Answers to Interrogatories you stated that the first time you took money was August 9th, 1984.

A Maybe it was, you know, saying --

Q Why did you take money on this particular date?

A I can only assume that because I had been assured verbally by Mr. Hack of the appropriateness of it, that I

Q But your gross salary?

A Was $200,000, yes.

Q In what year?

A Well, every year since, I think, '86 was the first year. It might have been 150 or so in '86, but '87, '88, '89, I think at least through '90, I think was 200,000 for a period of four years at least, four maybe five.

Q Well, let me get into Category No. 2 which is capital loss and its relationship with salary.

Isn't the salary that you are claiming damage for contained within that capital loss? In other words, you would have paid yourself a salary out of monies earned by the business and you are saying in Category B, if I understand you correctly, that this is a business loss?

A If it was not for the capital loss that occurred, I would have paid myself a salary.

I don't think, well, there was another reason I didn't pay myself a salary. It was because of the losses to the company and its inability to pay me a salary. But it was also calculated as a result of my loss of services to the company.

I gave the company virtually a hundred percent of my active week during the normal year prior to the Hack litigation.

Q Well, what happened in 1991 to cause that to be different?

A Well, in every year since this litigation started, I have devoted approximately 20 percent of my time to Hack litigation matters. One day out of a normal workweek.

There were, God knows, how many meetings, not only with Blum, Yumkas, but with Giampetro, with Grabush, Newman, with discovery materials, depositions, and all of this diverted from my effectiveness to the company.

So it was determined what would be fair and actually I made the determination that what would be fair is that if for five years I lost the company lost 20 percent of my services in each calendar year, that I should forego a salary in the calendar year '91 to compensate the company for that loss of my physical services.

That has nothing to do with the loss of capital that was available to the company. The loss of working capital having to do as a chain of events with the loss of

Q And it is because of this percentage of time during each of the years we have talked about that you have made a determination that Crown Motors should not have to pay you your full salary?

A For the calendar year of '91 that was the determination. For the calendar year '92 it was the deterioration of the company's balance sheet that I didn't want to drive it any further into the minus hole. I think my balance sheet is, like, minus six or $700,000 net worth now balance sheet. All the accumulated profits from the previous years are gone and it has a minus net worth. My corporation does.

Q Well --

A And a salary would just make it more of a minus net worth.

Q How do you make any money, Mr. Shofer?

A How do we make money?

Q Yes.

A Well, we sell cars, and cars get a good gross profit, we get a finance charge, and then up until recent years we were selling, up through the mid '80s, into the late

'80s, we were selling more than four hundred cars a year. And there was a good cash flow from that. And in recent years due to a reduction in working capital and available inventory, we turn our inventory over so many times a year, so if we have a car and it is sitting at our location, either the main location or Washington Boulevard, we are going to sell that car in an average number of days. So the more cars we have the more cars we sell in an average number of days because we have a variety in inventory and somebody will like it. And as we lower our inventory through necessity, if we don't have the working capital for the inventory, we lower our opportunity and we will sell less cars.

In fact, some charts I have produced and figures to back this up based on history and pulled right out of my computer, just something that I made up theoretically, but I have computer printouts of actual sales statistics to back it up.

As our inventory drops and our sales dropped, we dropped down from 450 cars to 300 and a low of 320-some cars last year. But the drop was a steady drop as my availability of working capital and inventory dropped.

I had a credit line with Maryland National that was a million one, approximately, up until '89 when the tax liens appeared and the credit line disappeared. They turned my account over to a work-out unit and they started dictating that my debt would amortize at a certain rate. I was making $17,000 a month payments to them on the warehouse debt. All the other debt they put on hold, just interest only, as the warehouse debt was amortizing. And that continued for, I think, from '89 until '92. I kept amortizing it.

But that was a serious drain. That money would have otherwise been available, if I could have even maintained a credit line without having it reduced so severely and quickly, I would have been able to keep supporting a certain amount of inventory and produce sales from that. But as I had to keep producing cash flow to pay down corporate debt, or pay down pension warehouse debt, it was a drain on available funds to finance cars and to replace cars that were sold.

So this meant lost sales. And I have been borrowing money from my company, and if you say how do I live, and that was your question, I owe my company a lot of money that I have borrowed. I get rental income from the company,

pension plan the first time, did anyone assist you in taking this loan?

A I don't know what you mean by that.

Q Well, did you know how to go about taking money from the pension plan?

A Write a check, yes.

Q Pardon me?

A Yes, I just wrote a check.

Q Did anyone tell you that that's the way you do it?

A To write a check from the pension to my personal account?

Q Right.

A No, didn't have to.

Q What do you mean they didn't have to?

A I mean I knew that was the only way it was going to get from the pension plan to my personal account was if I wrote a check from the pension to my personal account. I think that's what happened.

Q Did you know how to take money from your plan in terms of the mechanics, proper documents?

A Yes, I thought I did, I believe I did.

Q Did you ever consult with anyone on that --

A No.

Q -- on the mechanics?

A No, no.

Q You just assumed you knew how to do it properly?

A Yes.

MS. SCHUETT: Five-minute break.

(Thereupon, a brief recess was taken.)

Q (By Ms. Truhe) In connection with this first loan, Mr. Shofer, what documents, if any, did you prepare?

A Only a note.

Q A note. From you to the pension plan?

A Yes.

Q In response to a request for production of documents on the issue of these notes, you provided me with the following two pages. Would you take a look at those and identify them for me, please? For now, just generically.

A Yes, these are notes reflecting amounts of loans.

MS. TRUHE: Let's mark those as Shofer Deposition Exhibits 2-A and 2-B.

A Yes.

Q -- August 9th, 1984. All right. Let's look at the first note on Shofer Deposition Exhibit 2-A, it's a note dated August 23rd, 1985. Let me just ask you -- 4, sorry -- if you can recall anything about the August 9th, 1984 note, some similarities between these. I notice on this note it says due on demand, was the August 9th, 1984 note the same in that regard?

A I can't recall.

Q All right. When you took this first loan of sixty thousand dollars on August 9th, 1984, did you ever tell anyone that, in fact, you took this loan?

A The sixty-some thousand?

Q Yes.

A I don't recall.

Q Were you planning to repay the loan?

A Yes.

MS. SCHUETT: Yes, I didn't hear that question.

MS. TRUHE: Was he planning to repay the loan.

MS. SCHUETT: Oh, okay.

Q How did you decide the interest to be repaid?

A You mean the rate?

Q Yes.

A I think I determined from what money rates were at the time and what that, that would be, would be an arm's length rate.

Q Do you recall what the rate was?

A I don't recall, I have to look and I think it was twelve percent, I think they were all twelve percent.

Q Did you repay the loan, the first loan?

A The hundred and fifty thousand?

Q No, the sixty thousand.

A The sixty, oh, yes.

Q When did you repay it?

A I think from documents that I've seen that it was repaid when I started taking these loans.

Q All right. In Answers to Interrogatories you stated you repaid the first loan on August 23rd, 1984; does that sound correct?

A That would seem correct, yes.

Q Do you recall the amount you repaid?

of speaking, Glen Wilson assisted me by making the funds available through the means of the second mortgage. To that extent, he assisted me, I guess.

Q What documents did you prepare in connection with taking the second loan?

A The note for a hundred and fifty thousand dollars.

Q All right. And is that the note that is reflected on the top of Shofer Deposition Exhibit 2-A?

A Yes.

Q All right. Now, the note says due on demand, who decided the terms of that note?

A I did.

Q Why did you decide it would be on demand?

A Well, I'm the trustee and I didn't think that I was going to demand it before I had it to pay back.

Q So, in other words, you wanted it to be left up to yourself as trustee to decide when this loan would be repaid?

A Well, not exactly. It was not my intention that it would be forever.

Q But you wanted to be flexible?

A I think it required some flexibility because I

wasn't in a position of at anytime knowing where I would be in six months or a year financially.

Q All right. And did you decide the rate of interest on this second loan the same way you did on the first loan?

A Yes.

Q And what was the rate of interest?

A Twelve percent.

Q Now, when you took this second loan, did you consult with anyone?

A No.

Q After you took the loan, did you tell anyone about it?

A Well, it speaks for all of the loans that I think Miss Ciconne was aware, not Miss Ciconne, Miss McHale was aware of all the loans because she was the bookkeeper and she handled the checkbooks. I don't know that on each and, in fact, I feel certain then that on -- of course, we're only talking about the second loan, but --

Q Right.

A Probably the second loan, the big one, they are

the biggest of all of them, probably Glen Wilson was aware of that transaction somehow. I don't specifically recall any conversations, but I'm going to assume he was aware of it in some way.

Q Do you recall whether you advised Mr. Hack that you were taking money, this money a second time from your pension plan?

A I don't recall having any conversations with Mr. Hack after getting that letter in August.

Q Do you recall having any conversations with Mr. Hack after getting the August 4, 1984 with reference to any of the loans that you took from your pension plan through 1986?

A Through 1986?

Q Yes, through the last, the time of the last loan you took.

A Okay.

MR. BOWDEN: What was that time, just so --

A September 30th, '86.

Q Okay. So from August 9th, 1984 to September 30th, 1986, do you recall having any conversation, conversation

with Mr. Hack about taking money from your pension plan?

A No.

Q Did you repay the second loan?

A A hundred and fifty thousand, I think most of that has been repaid at this time. I would have to look at my own statements, but I think most of it has been repaid.

Q Do you recall when you repaid it?

A 1988. Sometime during the calendar year 1988.

Q Where did you get the money to repay that second loan?

A I think part of it was salary from Crown Motors. Part of it was that -- I think in the beginning of '88, the very beginning of '88, I repaid sixty-some thousand dollars by means of permanently -- there was a portion of my voluntary account that represented funds that I had put in myself out of -- in other words, there's an employer contribution and an employee contribution. Well, this was my employee funds, the, the aggregate amount of my employee funds accumulated over the years was sixty-some thousand dollars.

Now, on that money income taxes had already been

Q No, in 1988 the average number of cars in inventory was 35 and you sold 454 cars. But in 1989, the average number of cars in inventory was with one more than that but yet you sold less, 440.

A So it is not perfect. But it generally shows a trend.

Q Go ahead. Continue.

A Nothing is, you know, nothing is perfect, but it shows a trend.

MR. GILDAY: That is the key to this case.

A You see when it drops to 25, I drop again.

Now, of course, this is an inflation year. This is not an inflation year. So I had the same inventory it is even worse because there is a recession, not inflation, but any way, there is the relationship. So the relationship shows that it is a sensible relationship.

Now, we go back to here. What I did was go to my actual books and pull off averages, what my average down payment was. I would go to a whole year's data in my computer to get what is the average cost of a car. I would get a model. I will take, if I have 400 cars that I retail, I will

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Crown Motors. I mean I'd have to look at this trail of it, but I think that's where it went.

Q You state in Answers to Interrogatories that the fifty thousand dollars was used to purchase Virgin Island property; does that refresh your recollection?

A Not the fifty, no, that fifty wasn't.

Q So --

A Because that was, that fifty is 9/5 of '84 and the Virgin Island property wasn't purchased until '85.

Q To that extent, your Answer to that Interrogatory is in error?

A I'm -- if that's what I said I did with fifty thousand dollars, that's an error.

Q All right. Did anyone assist you in taking that third loan from your pension plan?

A The third loan is 9/5/84?

Q Right.

A No, no more than the others.

Q All right.

A In fact, probably less. I don't know that Glen Wilson was even aware or that I even phoned him or anything

specifications of --

Q Did you keep --

A -- of the Chase.

Q All right. Did you keep a copy of the loan application?

A I probably, I may have, have a copy somewhere, I don't know.

MS. TRUHE: Mr. Bowden, would you check on that?

MR. BOWDEN: Be happy to.

MS. TRUHE: Okay.

Q (By Ms. Truhe) Now, we're up to the fourth loan, or we were talking about the fourth loan, I believe, yes. Do you recall consulting with or telling anyone about the taking of this fourth loan from your pension plan?

A I don't recall.

Q All right. Were you planning to repay the loan?

A The fourth loan?

Q Yes.

A Oh, yes.

Q What rate of interest?

was.

Q How much money did you borrow?

A Three thousand dollars.

Q All right. And could you have gotten the three thousand dollars from any other source other than your pension plan?

A Well, it's a small amount and I may have been able to get it from my company, Crown Motors.

Q Did you make any attempt to do that?

A No.

Q Did anyone assist you in taking the fifth loan from your pension plan?

A No more than the others.

Q All right.

A That I can recall.

Q All right. What documents did you prepare in connection with the fifth loan?

A A note dated February 25th for three thousand dollars.

Q And you prepared that note?

A Yes.

Q Sixth.

A Okay. Sixth time was on July 30th, 1985.

Q And how much money did you take at that time?

A Twelve thousand dollars.

Q Why that amount?

A I think that's what I needed to complete personally the purchase of new furniture for one of the investment properties on the Virgin Islands that needed to be refurnished.

Q What were you doing with these Virgin Island properties, were you renting them?

A Yes. One, the large -- the more expensive of the two I put on the -- there was a management, there's a management organization. This was a golf resort or is a golf resort and there was a management organization in place that was finding short-term vacationers for these properties and --

Q By the way were these two properties single homes?

A Sort of, they weren't -- I would almost call it like a, a two-dwelling structure with an upper and under unit.

Q All right.

were not going to produce them until they had an agreement not to sue.

And here is Blum, Yumkas telling me I should sue Grabush, Newman to bring them in to protect myself. I don't want to sue my accountants, I didn't tell my accountants, well, did I tell them I don't want to sue them but I didn't tell them I won't sue them, I told Grabush, Newman I would not sue them. But Grabush, Newman said we are not going to do anymore work for you. I was not going to sue them anyway. I had already known that.

But they came back and said we are not going to do anymore work for you unless you agree not to sue us. That was like blackmail. I said, okay, Tom, work out an agreement with them.

While he was working out the agreements suddenly out of nowhere and without warning, Dick said, the bank said, Dick, the deal is off, we are not going to lend you a $500,000. They don't name the amount because the amount was not clearly exact yet, but we are not going to lend you any money. And I said, but I don't have any more money to give you back. They said we will take a mortgage on your Liberty

A Well, --

Q -- refurnishing and refurbishing?

A I would say that it was predominantly for the one that I was completely refurbishing, but there may have been some small part of it that went to the other. There's a whole raft of bills in that first year, 1985, that, there's a package of bills and invoices.

Q All right. Did anyone assist you in taking the seventh loan from your pension plan?

A No more than the others.

Q What documents did you prepare in connection with the seventh loan?

A A note dated August 13, 1985.

Q That appears on Shofer Deposition Exhibit 2-B?

A Yes.

Q Did you prepare that note?

A Yes.

Q Did you consult with or tell anyone about this seventh loan?

A Not that I can recall.

Q Were you planning to repay the loan?

don't recollect, but I'm going to make an assumption that it was part of the refurbishing expenses. I'm looking at the close proximity of the other loans.

Q Could you have gotten this money from any other source other than your pension plan?

A No.

Q Why not?

A Well, it was available in the pension and would have been a strain to Crown Motors.

Q Did anyone assist you in taking this eighth loan from your pension plan?

A Not that I recall.

Q What documents did you prepare in connection with the eighth loan?

A A note dated August 21st, 1985.

Q Does that appear on Shofer Deposition Exhibit 2-B?

A Yes.

Q Who prepared that document?

A I did.

Q Did you consult with or tell anyone about this eighth loan?

A Not that I recall.

Q Were you planning to repay the loan?

A Yes.

Q What was the rate of interest?

A Twelve percent.

Q Did you decide the rate of interest?

A Yes.

Q Did you repay the loan?

A No.

Q Why not?

A It's not due yet.

Q When is it due?

A Well, my understanding now -- it's due on demand according to the note, but my understanding now is according to pension law it has to be repaid within five years of the date that it's taken.

Q Did there come a time when you borrowed additional money from the pension plan?

A Yes.

Q When was that?

A September 30th, 1986.

Q How much money did you borrow?

A Thirty-five thousand dollars.

Q Why did you borrow thirty-five thousand dollars?

A Now we get to the Harbor Court deposit, I think, if I recall I used twenty-five thousand dollars of it as a refundable deposit on a condominium at Harbor Court.

Q What did you do with the rest?

A And I think the rest, I don't know but it may have gone to either pay a tax bill, a personal obligation or to repay a portion of debt to Crown Motors. I really don't know how the other ten thousand dollars went.

Q Okay. I believe you stated in Answers to Interrogatories that this money went again to refurbishing Virgin Island property, would to that extent your answer to that Interrogatory be incorrect?

A I think on the '86 -- yes, I think the Harbor Court had something, I think that had something to do with Harbor Court --

Q Okay.

A -- deposit.

Q All right. Could you have gotten this money from

any other source?

A No.

Q Why not?

A Talking '86. I don't know that I had a readily and practically available source as, as easy to use as the pension. I think that was the most practical way to do it. My recollection of my -- my recollection of my status at that time would lead me to believe that was the most practical way.

Q Did anyone assist you in taking the ninth loan from your pension plan?

A Not that I recall.

Q What documents did you prepare in connection with the ninth loan?

A A note dated September 30th, 1986.

Q And you prepared that note?

A Yes.

Q Did you consult with or tell anyone about this loan?

A Not that I recall.

Q Were you planning to repay the loan?

A Not now.

Q Why not?

A Because I like it too much.

Q Do you rent it out?

A No.

Q Is there any equity in it?

A Yes.

Q How much?

A Probably sixty, seventy thousand dollars. Oh, excuse me, no, there is no equity in it because there is still a mortgage -- there is a second mortgage outstanding to the pension for seventy-five thousand dollars. When you add the first and second mortgage there is really no equity.

Q Mr. Shofer, do you recall receiving a request for production of documents from me back in June of 1988?

A I don't specifically recall. I know I did receive that.

Q No. 6 of that request asks you to produce all correspondence between the plaintiff and defendants from 1980 to the present. To your knowledge have you produced all of those documents?

office, and I wanted it finished as soon as possible. And that was in the Spring of '89, regarding '88 taxes and anything prior.

The reason I wanted it specifically was because my bank had agreed to give me an extended line of credit, and there were now meetings and negotiations going on with resolving whatever had to be resolved to put that new larger credit line in place. Grabush-Newman was sort of -- they were cooperating in producing material, and then they got enjoined in this lawsuit. Well, when they got enjoined in the lawsuit, they stopped doing work for me and said that they were going to do no more work; it was sort of unofficial, it didn't come in a letter form, that I can remember, but there were strong references to it. And, in fact, they just stopped doing any work until they could extract an agreement from me not to proceed against them with litigation myself. Blum-Yumkas suggested I do so and bring them in as defendants just to protect myself.

MR. GILDAY: Excuse me. To bring them in, or not to bring them in?

THE WITNESS: To bring them in.

A Blum-Yumkas said they're bringing them in, if you don't put any blame on them, that you're going to lose money if you don't protect yourself. I said no, they've been my accountants for fourteen years and I don't want to destroy my relationship with them. And I said, in addition to that, it's critical that I need them because I'm, A, I'm in IRS audits now, but most importantly, I'm got this bank loan going and it's so important that they produce the material that I need to finish this bank loan.

Q Let me stop you right there, Mr. Shofer. Did anyone ever tell you -- and by anyone I mean at Blum-Yumkas or any other legal advisor -- did anyone ever tell you that Grabush-Newman was required to assist you with the IRS audit and was required to provide all of the information that you've just made reference to regardless of whether you had signed any agreement?

A No, no one ever told me that.

Q All right. Please continue.

A So, Tom Bowden in a letter to me said that Grabush-Newman's -- and I'm paraphrasing, but it's in a letter -- made reference to the fact, in no uncertain terms,

VOL. I.

RICHARD SHOFER		:	IN THE
	Plaintiff	:	CIRCUIT COURT
v.		:	FOR
THE STUART HACK COMPANY, et al.		:	BALTIMORE CITY
	Defendants	:	Case No. 88102069/CL79993

Baltimore, Maryland

February 2, 1990

Deposition of RICHARD SHOFER, Plaintiff, called for oral examination by counsel for the Defendants, taken at the law offices of Semmes, Bowen & Semmes, Conference Room 17-A, 250 West Pratt Street, beginning at 10:12 a.m.

A P P E A R A N C E S

THOMAS A. BOWDEN, ESQ., on behalf of the Plaintiff.

JANET M. TRUHE, ESQ., and LEE B. ZABEN, ESQ., on behalf of the Defendants.

LINDA M. SCHUETT, ESQ., on behalf of the Third-Party Defendant, Grabush & Newman.

Reported By: Dawn M. Hart, CSR
Riggleman, Turk & Nelson
(301) 539-6398

that I'd gotten from Mr. Hack that I could borrow up to the limit of what was in my voluntary account.

Q No, that's not my question.

A Okay. I, I had intended initially on borrowing, I think two hundred and fifty thousand, I'm not sure.

Q All right.

A Two hundred, two hundred fifty, somewhere in that, I don't remember.

Q Did you tell Mr. Wilson how much money you were planning to borrow?

A Probably. Yes, it was probably part of the plan but I -- I can't remember exactly what I said to Mr. Wilson or what figure that I might have said.

Q All right. And the reason why you would be giving this money to Crown Motors is that, is because you owed Crown Motors seven to eight hundred thousand dollars anyway; isn't that correct?

A Yes.

Q Did you tell Mr. Hack you were planning to borrow approximately two hundred and fifty thousand dollars?

A I don't recall that any specific amount was

mentioned or not.

Q But you think you probably, you mentioned the amount to Mr. Wilson?

A Probably, yes, I -- I can't imagine that there was any part of any major financial transaction I would have had that I wouldn't have made him privy to or aware of.

Q Let me get back to my earlier question. Did you discuss this loan from your pension plan idea with anyone other than Mr. Hack and Mr. Wilson in August of 1984?

A Probably others at the bank. There, if there were any other -- let's see, Mr. Wilson had a supervisor, I think the supervisor may have been Barry Blumberg, and I'm not sure, but -- by this time, see, my relationships with the loan officer sort of changed from time to time and I think I had such a good relationship and good working relationship with Mr. Wilson that I didn't, I might not have even spoke with others at Maryland National then, I, it might have just been him. And other than he, Sally.

Q Anyone else?

A I don't think so.

Q Did you ever discuss this idea with anyone at

Exhibit C

THE STUART HACK COMPANY
Consultants & Actuaries
4623 Falls Road
Baltimore, Maryland 21209
(301) 366-8700
Washington, D.C. 621-4064

Writer's Direct Dial No

August 9, 1984

PERSONAL AND CONFIDENTIAL

Mr. Richard Shofer
Crown Motors
5006 Liberty Heights Avenue
Baltimore, Maryland 21207

Cross-P.S. Pension Section Catalogue and

Dear Dick:

You questioned whether assets of your money purchase pension plan and profit sharing plans can be used as collateral for loans, whether you can borrow against these plans and whether there is any special treatment for your voluntary account under these plans.

First of all, let's distinguish between the voluntary account and the employer account. The employer account cannot be put up as collateral for a loan, and loans to participants against their employer account are limited to a total of $50,000 for all plans for up to a maximum of five years (for a longer period of time if used for the purchase or substantial improvement to a primary residence). Further, we would recommend that any loans against an employer account should be fully collateralized (this means collateral in addition to the value of the account itself).

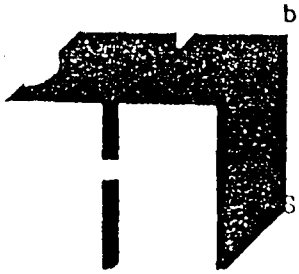
There is an entirely different treatment for voluntary accounts. First, there is no limit on the amount that can be borrowed against the account or the length of time for which it can be outstanding. Also, the account, itself, can stand as collateral for the loan against the voluntary account. Further, the voluntary account can be put up as collateral for a loan from a bank or other source. The loan agreement will have to include a provision that you cannot withdraw money from your voluntary account, and thus dissapate the collateral, however.

The law is pretty clear on the inability to use employer account values as collateral for a loan. There is no law on restrictions of using voluntary account money for collateral for a loan. The TEFRA provisions on the limits on loans apply only to employer accounts and specifically do not apply to employee voluntary accounts. In my opinion, you can use your voluntary account as collateral for a loan or you can borrow up to 100% of your voluntary account. The terms of the loan must be reasonable as to the interest rate and pay back period.

Cordially,

Stuart Hack

SH:mn



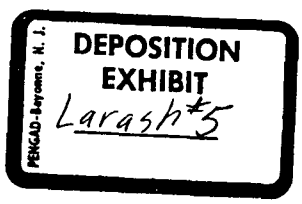


Exhibit D

RICHARD SHOFER	*	of the CIRCUIT COURT
Plaintiff	*	FOR
vs.	*	BALTIMORE CITY
the STUART HACK COMPANY	*	MARYLAND
or	*	
STUART HACK	*	Case No 88102069/CL7993
Defendants	*	

- - - - - -

Deposition or STUART HACK, was taken on Thursday, March 16, 1989, commencing at 9:00 a.m., at 2 Hopkins Plaza, Baltimore, Maryland, before DEBBIE K. LAMBERT, Notary Public.

- - - - - -

Reported By:

DEBBIE K. LAMBERT

accountant is the only member of the team who should advise the client as to tax implications of pension transactions?

A. It is not meant to say that at all. What I am describing are the roles.

Q. So a pension consulting firm such as yours is fully qualified to advise on tax implications of pension transactions, is that correct?

A. To the limited degree of what the -- how it involves the pension plan. It doesn't necessarily have the ability to know what the client's individual tax implications are from other sources. Within the narrow scope of what is happening within the plan, yes.

Q. You will certainly have a general knowledge of the personal tax implications of pension transactions?

A. Yes.

Q. What was the role of Graybush, Newman -- if you know of any role -- that they played, in advising Mr. Shofer as to tax implications of pension

transactions, in the 1980's?

MS. TRUHE: Objection.

You may answer.

THE WITNESS: To the best of my knowledge, they had an initial and ongoing general tax advisory relationship with him and prepared his tax returns for himself and his business and advised him initially to have a plan, advised him to bring this in and knew that he had a plan and had the ability to tell him to keep it, or drop it, or use it, or don't use it and that they -- that this was a integral part of the tax advice that they were giving him on a regular annual basis.

Q. Is it the case that on August 9th, 1984, you were capable of advising Mr. Shofer as to the tax implications of the loan transactions that he was contemplating?

A. That's correct.

Q. And by "you", I mean, you personally and the company. Is that still correct?

A. Me personally. I can't tell you that

4975.

Q Well, assuming that Mr. Shofer made loans totaling $315,000 -- you can assume that fact --

MS. TRUHE: When?

MR. BOWDEN: -- for the purposes of this question.

THE WITNESS: As of what date?

MR. BOWDEN: After your letter.

MS. TRUHE: When? After --

THE WITNESS: As of what date?

MR. BOWDEN: After August 9, 1984, and --

MS. TRUHE: When?

MR. BOWDEN: -- prior to the end of 1986.

THE WITNESS: I want you to know that I had no knowledge of him taking a loan or the amount of his loan until his data came in some time in 1986.

BY MR. BOWDEN:

Q I'm not asking that question right now.

A That's what it sounded like to me.

Q I'm asking you to assume that he made such loans, whether --

in any way negligent in the transactions that led to this lawsuit?

A Yes. I think failure to send us asset data in a timely fashion.

Q And why was that negligent?

A Well, because we needed the data to do the job for him correctly, and because it would have given us notification a lot earlier that he had made plan loans.

Q You testified that the 1984 asset data came in November -- or came in late 1986.

A That's correct.

Q Did you have to get extensions for filing returns? Well, strike that.

When was the 1984 return due under law if it were filed timely?

A Well, it's due at 7-1/2 months, I believe. So it would have been due like August 15th, is it? I believe.

Q Of 1985.

A Of 1985. And you can get a 60 day extension on that, I believe, which take -- I think you can extend

Exhibit E

Baltimore, Maryland

August 2, 1990

Deposition of KENNETH EUGENE LARASH, C.P.A., a Witness, called for oral examination by counsel for the Defendants and Third-Party Plaintiffs, taken at the law offices of Semmes, Bowen & Semmes, Conference Room 17-A, 250 West Pratt Street, beginning at 10:50 a.m.

A P P E A R A N C E S

THOMAS A. BOWDEN, ESQ., on behalf of the Plaintiff.

JANET M. TRUHE, ESQ., and LEE B. ZABEN, ESQ., on behalf of the Defendants and Third-Party Plaintiffs.

LINDA M. SCHUETT, ESQ., on behalf of the Third-Party Defendant.

A I don't know but somebody in our firm.

Q But you have no idea who?

A No.

Q Did that person give you any files or information or did you just start from scratch?

A Well, when I start a job I always review last year's files, so they would have been available.

Q But you have no idea who worked on this file at Grabush, Newman prior to you, is that correct?

A No.

Q All right.

A I mean yes, that's correct.

Q What was your understanding as to the services Grabush had been retained to perform prior to your involvement if any for Mr. Shofer or his business?

A To prepare financial statements, tax returns for the corporation, Catalina Enterprises, Inc., to prepare a tax form No. 990T for the pension plan and to prepare his individual Form 1040.

Q Now, these financial statements were for the corporation?

If I was, again if I was doing the return, I would then take the information, put it on the form, I don't remember when we switched putting his tax return on computer, but we, in the early days we were putting, we were doing everything by pencil on his individual return so I would put it in by pencil and then the return and the related information and the prior year's tax return and related information would go to the tax department for review. If somebody else was preparing the return, they would have turned the tax return over for review. I just am not too sure about the steps that they would have followed.

Q All right. So if someone else were taking this data that you gave them that you had collected from Mr. Shofer, they would make, or fill out a tentative tax return and send it to the tax department for its review?

A Right.

Q And if you were doing all of these steps, you would send the tentative tax return to the tax department for review; is that correct?

A That's right.

Q And was that done every year?

A Yes, so far as I know every year.

Q What happened after it was sent to the tax department for review?

A Somebody would have been assigned to review it.

Q Do you know who that was?

A It varied from year to year, but their initials would be on the transmittal sheet.

Q All right.

A Do you want their process, their procedures that they followed or --

Q Yes.

A I'm not specifically familiar with how they go down item by item other than I know they trace in, from whatever work papers are there, trace the numbers in. If they've spotted something that's a question, they may just call me on the phone for a brief conversation but normally they would list out their questions on the back of that transmittal form and put the return back on my desk. Then I would try to resolve the points or have a little meeting with the party, sometimes I would be, I would have to follow up with a phone call to Dick Shofer, we'd try to resolve the

Q -- prior to the preparation of this tax return?

A Prior to the preparation of this tax return?

Q Yes.

MS. SCHUETT: Objection to the form of the question. Go ahead.

A Go ahead, oh. The earliest document that's dated and initialed by me that I could find in the files indicated that I worked on the pension plan general ledger for 1984 and it's, I believe it's a page of journal entries dated June 17th of '85, so that appears to be the first time I became aware.

MR. BOWDEN: What was that date again, excuse me?

THE WITNESS: June 17th, 1985.

Q And you stated that was in the course of preparing the ledger for the pension plan?

A Yes, well, the work -- it's called working trial balance, yes.

Q That's when you first became aware that Mr. Shofer had taken loans from his pension plan in 1984?

A Right, correct.

Q Had Grabush, Newman already completed its preparation of Mr. Shofer's 1984 tax return when you became aware that he had taken loans from his pension plan?

A When we prepared his individual tax return?

Q Yes.

A We -- we didn't find the transmittal sheet for this, did we? --

Q No.

A Well, this date --

MS. SCHUETT: Referring to Larash Deposition Exhibit 1.

A -- shows that the interview for the individual return was July 29th, and as I previously said, I had worked on the pension plan on June 17th, so yes, July 29th, I obviously already knew that he had loans with the pension plan.

MS. SCHUETT: That didn't exactly correspond to her question but I think your answer is clear despite that.

Q Well, just to make sure it's absolutely clear, you knew at the time you sat down with Mr. Shofer to compile the

information on Larash Deposition Exhibit No. 1 that he had taken loans from his pension plan in 1984?

A Yes.

Q Do you recall discussing these loans with Mr. Shofer at anytime prior to the completion of this individual tax return by Grabush?

MS. SCHUETT: This meaning the 1984 return?

Q The 1984 return.

A I don't specifically recall any discussions on the matter other than obtaining the interest expense on the loan which is noted on Exhibit 1.

Q Do you recall whether you asked Mr. Shofer for that figure or whether that was one given to you by him?

A He would have given me a list of all of the interest expenses that he had paid for the whole year, then I would have compared that with what I knew from the prior year to see if he had forgotten any loans.

Q How were these loans treated on the 1984 return for tax purposes, how were these loans taken into account?

A On the original return, the interest expense was deducted that he paid to the pension plan, or put into a

Q Mr. Marvel.

A No doubt Richard Shofer.

Q Anyone else?

A I don't recall anyone else.

Q Did you do any independent, and by independent I mean any research yourself into this issue prior to the completion of this return?

A I would say no, I left it all up to Alan Marvel.

Q Let's get into this issue of the taxability of these loans and the discovery of a problem with regard to their tax treatment. When did you or anyone at Grabush learn that there was any problem with regard to Grabush's tax treatment of loans Mr. Shofer had taken from his pension plan in 1984, 1985, or 1986?

MS. SCHUETT: Objection to the form of the question, you can answer it.

A It would have been through my discussions with Alan Marvel, again probably in the Fall of 1986.

Q When did Alan Marvel come to the firm?

A I think it was June 30th, '86.

Q How did he come to have anything to do with Mr.

Exhibit F

Thomas H. Bornhorst

Attorney at Law
2236 Southland Rd., Baltimore, Md 21207
(410) 298-2265

State and Federal Trial Practice — Maryland, District of Columbia

October 20, 1993

Janet M. Truhe, Esq.
BERNSTEIN, SAKELLARIS, WARD & TRUHE
Suite 1622
The World Trade Center
Baltimore, MD 21202

Mark A. Gliday, Esq.
JORDAN, COYNE, SAVITS & LOPATA
1030 15th St., N.W.
Suite 500
Washington, DC 20005

Re: Shofer v. Hack v. Grebush

Dear Counsel:

This letter and enclosures is intended to supplement Plaintiff's Answers to Interrogatories and Production of Documents, to provide a framework for our discussion concerning damages on October 21 and the continuation of Mr. Shofer's deposition on October 22. Damage figures have been revised accordingly.

a. Experts:

Plaintiff will not use William C. Martin, C.P.A in this case previously noted. Discussions with Mr. Martin did not produce any substantive work and it became apparent to Plaintiff that an actuarial consultant would be more suitable. For that purpose Plaintiff has received assistance in several areas from the following individual whose vitae is attached.

Theodore M. Rosenberg, MLR, Inc
5007 West Forest Park Ave.
Baltimore, MD 21207
(410) 448-3134

b. Additional Suit::

Suit has been filed against Blum, Yumkas et. al., copy attached. Service of process is being withheld pending a settlement, although Mr. Shofer is still evaluating his exposure under the circumstances, especially on the basis of the

information in the following section. It is certainly possible you have overlapping concerns, in at least these terms:

The prohibited transactions/excise tax effects have been ruled out of our present case, but you are aware of my feeling that even after Shofer v. Hack there will be a further attempt in federal court concerning these damages. Excise damages may not sufficiently accrue for the cause of action until actually assessed. A notice of intention to assess with prospective penalties was received in January 1993, and a final determination is still pending in the Department of Labor. On that account the IRS 1/8/93 notice has been superseded by a notice dated 9/8/93, copy attached.

I realize your opposition will be vigorous and even based on two separate appeals decisions, State and Federal, in Shofer v. Hack itself. I have necessarily adopted these views myself in the statements of cause against Blum, Yumkas. I assume that you would share my interest in the earliest possible determination of whether Hack might be exposed to further litigation and damages beyond the instant case.

If the case is pursued against Blum, Yumkas, I expect the damage issues to be particular to the excise consequences, unwarrented counsel fees, and incidentals which you convince the court belong on the shelf with prohibited transactions consequences.

c. Excise Taxes:

Excise taxes are mentioned here for whatever significance you might consider, which is more than first appears. You already have the related documents, but I have attached parts of the IRS notice dated January 8, 1993 highlighting the additional proposed excise tax of $53,420, penalties calculated through 6/93.

Also, please note the additional "100%" tax in the amount of $310,807.00 (!) if the prohibited transactions are not corrected within the taxable period, which I presently assume is the period during which they are finalized, which should be imminent. That would mean repayment of the loans in full by Shofer back to the pension in addition to payment of the taxes. Shofer has no reasonable way to comply and no defense whatever to his liability for such taxes and penalties. (The ad damnum against Blum, Yumkas was understated in the interests of settlement, which may be unlikely in view of the preceeding.)

d. Elimination of a damage category

Concerning item # 4. from my summary of 3/22/93 in the amount of $44,116.28, this claim is withdrawn. Mr. Rosenberg gave his opinion that such damages would not accrue under the circumstances.

e. Liability concerning damages:

1. Federal and State Income Taxes, Interest, Penalties:

Calculated to 12/20/93 these totals are: Federal $65,418; fed penalties $18,165; fed interest $89,868.47; State $14,135.25; st. penalties $3,533.81; st. interest $24,740.67, total:

$215,861.70
(less present value of the tax liability in the future)

a) Rosenberg's approach is direct and reasonable. The real value being calculated is the value of the pension shelter. The difference between now/later is that taxes paid later are paid with money which has been sheltered in the pension earning 12% interest, whereas taxes paid now are with after taxes and unsheltered funds. The credit back in this instance is a present value which would be the equivalent of the entire tax liability paid in the future with sheltered dollars.

b) Future tax liability depends on the interest rate. Current Federal and State totals 40%, while a future rate of at least 45% is more probable. The amount taxable in the future would would be $188,400, as follows: Loans totalled $315,000, less $76,600 repaid from volunteer account, less $50,000 excludable without penalties = $188,400. At 45% the future taxes would be $84,780, which would be reduced to present value for credit against the $215,861.70 total .

2. Loss of contributions to volunteer account

These damages calculate the personal loss of sheltered dollars in the pension fund by the need under the circumstances for Shofer to repay the loans to the extent of his available cash and credit. $76,600.00 of those funds were transferred from Shofer's own post-tax contributions to his voluntary plan, effectively losing the shelter for those funds. The loss to Shofer was calculated by Rosenberg in the chart attached in the amount of:

$1, 823,018.00

3. Income taxes due on unpaid loan interest

In the absence of adequate advice concerning procedure, interest which was allowed to accrue on loans taken was separately charged to Shofer as additional income with tax assessed in the amount of::

$51,831.00

4. Loss of opportunity to refinance St. Thomas property:

The loans were used in part to purchase this property, which became encumbered by the very nature of the loans. Tax liens against Shofer and lost credit precluded him from refinancing the 13% to at least 9% available in 1988. As of 12/20/93 the difference between the present mortgage principle ($153,411.72) and the principle at 9% ($118,887.02) is:

$46,532.10

Tax attorney Allen Schwait represents Shofer regarding this tax liability which arose from the 1988 tax audit triggered by the amended returns. Mr. Schwait's professional fees in this regard would be added to the category below.

5. Profesional fees

a)	Grabush	$17,596.60
b)	Giampetro	$29,316.25
c)	Schwait	_____
d)	Hack	$1,435.00

6. Other Economic damages

These damages fall in two categories: loss of salary and a negative net worth of Shofer's corporate stock as a result of a lost credit line and tax liens. Shofer was unable to draw salary in 1991 and 1992 and has calculated the damage to his holdings in Crown Motors based on actual sales history and a distinct decline in inventory from circumstances which accrued in 1988 and thereafter. Losses are calculated through 1992.

a)	Salary	$400,000.00
b)	Capitol loss	$1,929,471.00

7. Total damages stated above:

$4,515,061.40

Sincerely,

Thomas H. Bornhorst

cc: R. Shofer

Exhibit G

RICHARD SHOFER	:	IN THE
Plaintiff	:	CIRCUIT COURT
vs.	:	FOR
THE STUART HACK CO., et al.	:	BALTIMORE CITY
Defendants	:	Case No. 88102069/CL79993

Baltimore, Maryland

November 23, 1993

Deposition of THEODORE M. ROSENBERG, A Witness, called for oral examination by counsel for the Defendant, Stuart Hack, taken at the law offices of Bernstein, Sakellaris, Ward & Truhe, Suite 1622, The World Trade Center, before Henny Hunter Gerard, Notary Public, beginning at 10:40 o'clock a.m.

A P P E A R A N C E S

THOMAS H. BORNHORST, ESQ., on behalf of the Plaintiff.

JANET M. TRUHE, ESQ., on behalf of the Defendant, Stuart Hack.

MARK A. GILDAY, ESQ., on behalf of the Defendant, Grabush, Newman.

Reported By:
Henny Hunter Gerard, RPR-CM
Riggleman, Turk & Nelson
(410) 539-6398

some but you did not think you could help him on others?

A Yes.

Q At this point you do not specifically recall what those others damages were?

A I recalled one of them, his failure to refinance a mortgage on a piece of property, and I just said there is just no way on earth I can quantify that to what you would have had, I can't do both sides of it. I can't come up with a quantity of what could have been a damage. I will agree with him that in fact if in the situation with all the tax liens outstanding, that is a real damage, but it is not something that I can deal with and I can quantify.

Q Why not?

MS. TRUHE: Why not?

A I don't know what rate he could have gotten. I can't match it against anything. There are all kinds of damages which are real that you can't always figure out what they are. And I can't do everything.

MS. TRUHE: What were the unknowns associated with having to figure that out? You said the interest rate being one?

A The interest rate, it is not even in the United States. The exact date he would have refinanced, what other credit situations that I can't figure, but, you know, I know in fact that probably there was in fact a cost, but I can't tell him how much it was.

Q (By Mr. Gilday) And that is because there are too many unknown variables?

A Maybe somebody else can deal with them.

Q Do you know who that person would be? You are the numbers guy here.

A I am the numbers guy. But sometimes I have to say I just don't know the answer to this, and I can't, you know, I can't answer everything. I have got to stick to what I think I understand.

Q Let me take a look at some other areas of damages and ask you if you recall him discussing these with you. We have already discussed the taxes, penalty and interest and the loss of contributions to his voluntary account.

Do you recall Mr. Shofer discussing with you any losses that he believed or any damages that he believed he suffered as a result of income taxes that were due on unpaid

A Or it simply can't be done. And in some of these things it is just a matter of guessing, it is just going to be more work than they are really going to want done or there is something they have to handle themselves. They don't need me.

Q You also testified Dick Shofer provided you with some numbers that he had run but you did not use them, correct?

A Correct.

Q Do you recall whether those numbers were generally higher or lower than the numbers you ran?

A Generally lower.

Q You also referred on several occasions that he was forced to take these loans.

What do you mean by that?

A Forced to take this action. While he obviously felt, and I think he made this, I guess you could get his statement on it, but, I mean --

Q Based upon his conversations with you.

A Based upon conversations with me he obviously felt if he didn't convert this at the time, he felt that if he didn't convert this, that the IRS was going to come and shut

RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
THE STUART HACK CO., et al.	*	BALTIMORE CITY
Defendants	*	CASE No. 88102069 / CL79993

* * * * * * * * * * *

CONSENT MOTION FOR AN ENLARGEMENT OF TIME
AND LEAVE TO FILE PLAINTIFF'S RESPONSE TO DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT (OR PARTIAL SUMMARY JUDGMENT
AS TO PLAINTIFF'S DAMAGES)

The Plaintiff and the parties, through counsel, respectfully request the court to allow an enlargement of time for the filing of Plaintiff's Response to Defendant's Motion for Summary Judgment or Partial Summary Judgment as to Plaintiff's Damages, stating for cause:

1. Plaintiff's Motion for Judgment was filed on or about February 23, 1994, Plaintiff's Response due on or before March 10, 1994.

2. Plaintiff's Motion was delivered by the postal service to Plaintiff 's counsel on March 3, 1994 greatly shortening the Plaintiff's time to prepare a reasonable Response in due course under the Rules.

3. For such cause Plaintiff seeks an enlargement of time until March 16, 1994 to file his Response to Defendant's motion .

RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
THE STUART HACK CO., et al.	*	BALTIMORE CITY
Defendants	*	CASE No. 88102069 / CL79993

* * * * * * * * * * *

ORDER

This Court, having considered the Consent Motion of the parties seeking an enlargement of time for filing of Plaintiff's Response to Defendant's Motion for Summary Judgment / Partial Summary Judgment as to Damages, and cause for such action being presented, it is this ____ day of _____, 1994,

ORDERED: that Plaintiff's Response to the motion of the Defendant shall be due on or before March 16, 1994.

_____

Judge

4. The parties anticipate that this request will not delay the scheduling of any hearing which may be set concerning Defendant's motion , or otherwise adversely affect the trial schedule of this case, now set for May 23, 1994.

WHEREFORE, the Plaintiff and the parties, by counsel, respectfully request leave of the Court to enlarge the time under the Rules, until March 16, 1994, for filing of Plaintiff's Response to Defendant's Motion for Summary Judgment / Partial Summary Judgment as to Damages, a proposed Order attached hereto.

Respectfully submitted:

/s/ Thomas H. Bornhorst

Thomas H. Bornhorst
2236 Southland Rd.
Baltimore, MD 21207
(410) 298-2265
Attorney for Plaintiff

/s/ Janet M. Truhe (thb)

Janet M. Truhe
[formerly BERNSTEIN, SAKELLARIS, WARD & TRUHE] newly:
WARD, JANOFSKY & TRUHE
210 W. Pennsylvania Ave., Suite 505
Towson, MD 21204
(410) 321-4890
Attorney for Defendant Stuart Hack and The Stuart Hack Co.

/s/ Mark A. Gilday (thb)

Mark A. Gilday
JORDAN, COYNE & SAVITS
1030 15th St., NW
Washington, DC 20005
(202) 371-1800
Attorney for Defendant Grabush Newman & Co.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of March, 1994, that a copy of the foregoing Consent Motion and proposed Order was mailed first class, postage prepaid, to Janet M. Truhe, Esq., WARD, JANOFSKY & TRUHE, 210 W. Pennsylvania Ave., Suite 505, Towson, MD 21204 and Mark A. Gilday, JORDAN, COYNE & SAVITS, 1030 15th St., NW, Washington, DC 20005.

/s/ Thomas H. Bornhorst
Thomas H. Bornhorst

(85) DB

RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
THE STUART HACK CO., et al.	*	BALTIMORE CITY
Defendants	*	CASE No. 88102069 / CL79993

* * * * * * * * * * *

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT AS TO PLAINTIFF'S DAMAGES

Background In Brief

Defendants Stuart Hack and the Stuart Hack Co. (hereafter the "Defendant") have filed the instant motion seeking the following relief in the alternative:

a) Summary judgment on jurisdictional grounds, seeking reconsideration of a Court of Appeals decision on point in this particular case.

b) Additional partial summary judgment on selected items of plaintiff's damages.

The plaintiff finds no need to recite again the procedural history in this case set forth in the Defendants Memorandum, which raises the following issues in turn.

Issues and Argument

ISSUE 1.

DOES THE 1993 DECISION OF THE SUPREME COURT IN MERTENS et al v. HEWITT ASSOCIATES PROVIDE NEW JURISDICTIONAL GROUNDS FOR DISMISSAL OF PLAINTIFF'S STATE CLAIMS?

Argument: Plaintiff asserts that the Mertins decision (508 US __, 124 L.Ed 2d 161, 113 S.Ct 2063 [1993]), is singularly inappropriate to the Defendant's case for summary

judgment on jurisdictional grounds. The misleading use offered by the Defendant is clarified by the U.S. Circuit Court of Appeals in the same case, Mertens v. Hewitt Associates, 948 F.2d 607 (9th Cir. 1991). That opinion reflects that following the district court dismissal of both ERISA and pendent California state claims in professional malpractice, the 9th Circuit agreed with the trial court as to the ERISA claims. In general, it held that the actuary in this case did not function as an ERISA-defined fiduciary and could not, therefore, become liable for claims made under ERISA, a decision further upheld by the Supreme Court. While the Defendant was accurate in this regard, Defendant fails to inform this Court that the 9th Circuit upheld the state claim in Mertens, an issue which was not appealed to the Supreme Court or considered by it in the decision.

The district court's dismissal of the state claim in Mertens was not based on jurisdictional grounds under ERISA, but rather on the district court's interpretation of the California statute of limitations. The Circuit Court of Appeals stated: "We affirm the district court's dismissal of the ERISA-based claims, but reverse its dismissal of the pendent state law claim.. " (948 F.2d at 608), ..."a professional malpractice claim under California law"(at 609) (all underline added). The Mertens case adds its weight to, not against, the viability of state claims for professional negligence in the case of ERISA plan service providers who do not otherwise qualify as ERISA fiduciaries.

As it bears on plaintiff's opposition hereinafter, a relevant distinction is made in the majority opinion of Justice Scalia in Mertens concerning the difference between duties which are set forth in ERISA and the threshhold term "fiduciary" as it bears on ERISA preemption. In

rebuttal to the dissent's "certitude" that "the statute clearly does not bar such a suit," Justice Scalia rejoins: (footnote 5., 124 L.Ed 2d at 169)

> That, of course, is not the issue. The issue is whether the statute affirmatively *authorizes* such a suit....A similar duty (not to assist in the fiduciary's breach) is set forth in ERISA; but as we have noted, only *some* common-law "nonfiduciaries" are made subject to it, namely, those who fall within ERISA's artificial definition of "fiduciary." (underline added).

The distinction made above by the Supreme Court is highly relevant to the instant case on grounds other than the jurisdictional issue it implies and addresses elsewhere. There is no question that the ERISA preemption provisions "are deliberately expansive, and designed 'to establish pension plan regulation as exclusively a federal concern' " (Def. Memorandum, p.10, with cites). But the requirements of ERISA preemption is now a notably different matter than the required use of ERISA for definitions and professional standards which also regulate the conduct of non-fiduciary service providers.

Mertens helps to clarifiy the difference between the "duties" imposed by ERISA (that is, those provisions which establish standards of conduct concerning pensions) by distinguishing such duties from the more limited scope of ERISA-mandated claims and preemption. It is much more clear in 1994 that plaintiff's case is not a suit concerning " pension plan regulation ." Plaintiff does not seek enforcement of any pension benefit or any pension plan provision. However, ERISA is still relevant to the instant case, especially as one essential measure of the standards of knowledge and practice which bear on Defendant's professional conduct and service in regards to the ill-advised loans made by plaintiff against his personal account when plaintiff was a pension trustee with a majority interest in the Catalina Enterprises pension fund.

In the absence of authority or applicable argument being presented by the Defendant, plaintiff urges that Defendant's Motion for Summary Judgment be denied.

ISSUE 2

CAN THE PRIOR RULING OF THE COURT OF APPEALS AS TO EXCISE TAXES FOR PROHIBITED TRANSACTIONS SUPPORT FURTHER CLAIMS ASSERTED UNDER THE THIRD AMENDED COMPLAINT FOR SUCH DAMAGES?

Argument: With full and due regard for the prior rulings in this case, counsel nonetheless believes with sincerely that the position cited below is meritorious in arguing further against the opinion of the Court of Appeals on the issue of excise taxes and prohibited transactions and would not otherwise seek reconsideration.

First, the issue as restated above in fact has not, in true essence, been decided prior to this motion. When the Court of Appeals decision is read in its entirety, it is clear that scant attention was given to the so-called 'contingent liabilities' which included excise tax damages arising from the same conduct and giving rise to other tax liabilities. Those damages were not assessed at that time by DOL and were not quantified prior to a notice from the Department of Labor dated January 8, 1993 attached as Exhibit #1.

In Shofer v. Hack Co, 595 A.2d 1078, 1087 (Md. 1991) the court simply used a statement by plaintiff's counsel in oral argument as "a concession limiting the scope of the damages claimed in Counts I and II so as to exclude the three above-described 'contingent liabilities.'" The court strangely refers to former counsel's statement that "if the Court reads Counts I and II, there is no mention of prohibited transactions", which is factually inaccurate by the language of the Second Amended Complaint , and as further implied directly in the courts

own remarks preceeding in part V(B) of the decision. The court refers with particularity to allegations (from Facts Common to All Counts) that incorporated by reference into Counts I and II (by paragraphs 17 and 22 in the second amended complaint itself) that Shofer's borrowings "also constitued prohibited transactions... and risk of additional liabilities as a result of these transactions."(from paragraph 13.) In addition but not so noted by the court, paragraph 12 of the same complaint literally mentions excise taxes as well, further confusing greatly the procedural intentions of the Court of Appeals in this instance.

The extent of such excise tax damages is evidence in the proposed determination of the U.S. Labor Department (that plaintiff's loans were deemed prohibited transactions subject to certain quantified excise taxes) published by notice dated January 8, 1993 (attached as Exhibit #2.). Current communications with the Department of Labor suggest that its final assessment of plaintiff's excise tax liability will occur in the immediate future and prior to the trial of this case in May 1994. Under Section 4975 (b) of the Internal Revenue Code, and at the time of such assessment by the Labor Department, there will also accrue to this plaintiff a 100% penalty, with total excise tax exposure at the present in the vicinity of $400,000.00.

Subsequent to the opinion of the Court of Appeals, plaintiff has filed a Third Amended Complaint with recitals throughout concerning prohibited transactions and excise tax damages, e.g., paragraphs 11, 12, 15 (by reference), 18, 19, 20 (by reference) and 23, including such language in all counts. The enlarged damage statements in the Third Amended Complaint flow directly from the same allegations of fact and claims for expanded and accumulating tax liabilities which have appeared in this case from the outset. Counsel cannot identify any principles of law represented by the prior ruling of the Court of Appeals (or as may apply through the

Maryland Rules of Procedure) which preclude this plaintiff from proceeding further on his claim for excise tax damages at this juncture.

Counsel believes that the substance of Defendant's real position as to excise tax damages in this case may appear in Defendant's Eighth Defense in answer to plaintiff's Third Amended Complaint. It asserts "(t)hat Plaintiff is not entitled to recover any damages arising out of excise taxes, prohibited transactions, or disqualification because these are pre-empted and governed exclusively by federal law pursuant to (ERISA)."

Plaintiff strongly opposes this position because it presumes case law which has not been produced. The Court of Appeals did not adopt that position when, apparently on grounds of a factual mistatement by counsel rather than a clear concession of law, presumed excise taxes to be out of this case. Nor do cases such as Mertens support such a result. If Mertens helps the court concerning this issue, such guidance would come from recognizing its narrowed application of ERISA preemption and the supporting distinction between ERISA subject matter jurisdiction on the one hand and ERISA subject matter in general on the other (counsel's characterization).

The simple view of the instant case is that plaintiff Shofer simply asserts that Defendant's professional advice triggered massive and unanticipated tax liabilities because ERISA standards were completely discounted in the relevant advice. There is no functional distinction between using ERISA to define the income tax liability of the plaintiff and using ERISA to define the nature and extent of plaintiff's excise tax liability when both liabilities flow directly from the same events and neither involves claims against an ERISA fiduciary for plan benefits.

For all reasons cited above, the plaintiff urges this Court to hold that evidence may be introduced at trial concerning excise tax damages and that such damages are not precluded as a matter of law in this case.

ISSUE 3.

AS A MATTER OF LAW, IS PLAINTIFF PRECLUDED FROM INTRODUCING EVIDENCE AT TRIAL CONCERNING ADDITIONAL INCOME TAXES LEVED AGAINST HIM FOR FAILURE TO FOLLOW PROPER PROCEDURES FOR BORROWING FROM THE PLAN.

Argument: The nature and extent of the Defendant's professional responsibilities in this case will be determined by expert testamony as well as other testamony and evidence on the basis of which a trial court must first reach determinations of fact concerning the nature and extent of Defendant's professional duties and liability under the circumstances. Simply the recitation of this issue of itself seems to make clear on its face that summary judgment is inappropriate under to the circumstances. Whatever license plaintiff assumed rightly or wrongly from time to time in the loan process cannot be fairly considered without a full presentation of the plaintiff's case and the very process in question relates this issue directly to the loan presumptions. Plaintiff's mindset under the circumstances is a pendant issue rather than a threshhold one, and it would seem highly inappropriate to isolate this issue as a matter of law by the use of summary judgment.

In general, Defendant's Memorandum goes to great lengths to introduce arguments in mitigation of the Defendant's fundamental liability in this case in spite of the fact that there is no relevant motion pending on the liability issue itself. The matter of liability in this case clearly raises disputes of fact for the trier of fact, and the Defendant does not argue otherwise.

90X

ISSUE 4

IS PLAINTIFF PRECLUDED AS A MATTER OF LAW FROM INTRODUCING EVIDENCE THAT LOAN-GENERATED TAX LIENS AND RELATED CREDIT LOSS PREVENTED FAVORABLE REFINANCING ON HIS SECOND HOME IN ST. THOMAS AND OCCASIONED OTHER ECONOMIC DAMAGES, INCLUDING LOST SALARY, AND LOST PROFITS

Argument While incorporating other arguments above herein, Plaintiff also refers to Defendant's Memorandum, p. 23, at the bottom of which it states: " ...Mr.. Shofer in the instant case would have this Court hold that his loss arising from his inability to refinance property in 1988 was proximately caused by the tax liens....(etc)." This opposition to Defendant's motion does not ask the Court to so hold as Defendant argues, since any such holding would be highly inappropriate as it concerns a disposition of summary judgment prior to trial on merits. Plaintiff simply argues that the presentation of such damages at trial is not precluded by operation of law where the most recognizable and fundamental effect of Defendant's negligence was to redefine the nature and extent of plaintiff's income and financial assets.

The plaintiff lost assets which he had previously gained because pension funds, which previously represented one class of enjoyment and priviledge to the plaintiff, by the nature of Hack's advice suddenly and unexpectedly became liabilities at the other extreme, without the ability of the plaintiff to control the difference because of the sheer weight of his new financial responsibilities, only part of which is represented by enormous debt in the guise of federal taxes, and additionally by the related burdens of tax liens and loss of personal credit. Those burdens have enlarged proportionally and measurably through the years as the Defendant has charted his course in this litigation in resistance to satisfying plaintiff's claims, and the Defendant should have no arguments of shock as to the extent of plaintiff's personal pecuniary losses at this date.

Defendant's arguments based on deposition statements of plaintiff's actuarial expert, Mr. Rosenberg, are quite misleading. In questioning Mr. Rosenberg on p. 82 (Defendant Exhibit G), he states at lines 10 and 11 that ...."with all the tax liens outstanding, that is real damage....." When Mr. Rosenberg states, immediate following , ..." but it is not something that I can deal with and I can quanitfy" he was responding directly to counsel's questions on the basis of not having been engaged by the plaintiff as an expert to do any research or to prepare any numbers for for purposes of this issue in the case.

The additional responses by Mr. Rosenberg in lines 15 - 18 concerning ignorance of any appropriate (finance) rate means that he is unable to run numbers, which is his limited specialty, stated thus on p. 26 (Exhibit #3): In response to a question concerning any opinion he might hold on malpractice in this case: "....I do not pretend to be an expert on pension law. I work with time values and money, and not with the pension law." Likewise, Mr. Rosenberg is not a homeowner in St. Thomas or a professional who would have reason to know about such finance rates under the circumstances. Even his prior statement connecting tax liens to "real damages" can hardly be argued by the plaintiff himself as admissible evidence of an actual financial loss. Mr. Rosenberg simply seems to be saying that there would be a finite value assignable to the loss.

Myerberg, Sawyer & Rue, P.A. v. Agee, 51 Md.App. 711, 466 A.2d 69 (1982), involved a breach of contract action for certification of a title that was not marketable. The trial judge permitted the jury, in assessing damages to consider : 1. Economic loss occasioned by increased costs of construction and financing; 2. Attorney's fees expended to establish access to the property, 3. Capital gains taxes paid for failure to purchase another property within the time limitations prscribed by law, and 4. The amount of earned hazard insurance premium the

appellees were required to purchase by the lending institution (466 A.2d 73). Appellants argued therein that "The extent of the increased costs of construction and financing were not forseeable to the appellants, and, thus, appellants are not liable in contract for these damages." The court replied thus: "The appellants acknowledge that they were cognizant of a fluctuating economy. In light of such instability, any competent counsel should anticipate that the slightest fault in so delicate an economic balance would cause a tremor, if not a quake, which could result in a sudden rise in the inflation rate, or even a recessionary reversal. Considering the almost annual increases and pressures to increase allowable interest rates which may be empirically noted during the last decade, it is with some ill-grace that appellant argues that *any* attorney, even one of his experience and education, should not, as a matter of law, be charged with the forseeability of the legislative interest increase permitted in 1979." After further noting appellants special knowledge concerning the subject matter, the court continued:

"But such exceptional perception is not really relevant to the test of forseeability when applied to an attorney who is relied upon by a layman to protect his investment from pitfalls which are not readily apparent to those in foreign fields of endeavor. Under the circumstances of this case, the trend was admitedly apparent and.....we certainly decline to hold as a matter of law that such damages were unforseeable." Shofer claims that the "trend" in the present case was closer to certitude, because the plaintiff was especially positioned and cloaked with apparent recognition of the taxation effect of pension loans by a pension fiduciary who would also become, thereby, a "disqualified person" subject to prohibited transaction taxes and penalties.

Counsel for plaintiff argues that Defendant's particular advice to this plaintiff can be equated to an attorney advising his client that there is no statute of limitations on personal

injury claims in the State of Maryland. Defendant's advice in this case to plaintiff was not simply careless, like missing a statute of limitations or transposing some accounting figures. Defendant's advice to the plaintiff was affirmatively published by him, by the author and administrator of a pension plan to the pension trustee and principle shareholder, an opinion inexcapably holding out the weight of Defendant's expertise. Without, however, regard to the truth or non-truth of its content in this instance. While plaintiff was charged for his research in this instance (Exhibit #3) as expected, the tax consequences alone suggest the work was not done. Unfortunately punitive damages are not yet available for such wanton professional recklessness in Maryland.

Also not incidentally, defendant is a lisenced attorney in the state of Maryland, concertedly applying himself in the pension field as an acknowledged and published expert. For some sense of the discrepancy in this case between the fundamental facts and Defendant's claims of shock and innocence at the full, direct, and continuing effect of the loan events, plaintiff refers the court to a volume written and published by the defendant: Stuart Hack, J.D., C.L.U., Retirement Planning for Professionals, John Wiley & Sons, 1988.

The Defendant's book contains the following ERISA matters discussed in separate sections with subsections: 14.1: Prohibited Transactions; 14.2 Fiduciary Responsibility; 14.3 Reporting and Disclosure requirements; 14.4 Role of Professional Advisers and 14.5 Other Excise Taxes. Presumably the Defendant also knew about such matters in 1984, 1985, and 1986 when plaintiff's loans were made. The Defendant was not simply a specialized administrative clerk in this case as the defense implies. It even appears to fall well within the realm of ordinary knowledge in the business community, if not at large, that pensions are a tax-shelter device by nature, by design, and by the allowances of the formative ERISA and IRS regulations.

It should be for a trial court hearing the merits in this case to decide which facts and which damages are forseeable flow from the events in this case and to what degree. Mr. Hack himself appeared highly concerned when the suggested tax consequences were raised to his attention by accounts Grabush Newman and the plaintiff. See Exhibit #4, where the Defendant responds by letter to plaintiff's letter of concern also attached as Exhibit #5.

For purposes of the instant motion, plaintiff urges the Court to find that the Defendant has not met the burden of showing or argument that the most favorable inferences concerning the plaintiff's case should preclude plaintiff's from presenting his damage claims to the court in this case as a matter of law.

Respectfully submitted,

Thomas H. Bornhorst
2236 Southland Rd.
Baltimore, MD 21207
(410) 298-2265
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of March, 1994, a copy of the aforegoing Opposition to Defendant's Motion for Summary Judgment with exhibits was mailed first class, postage prepaid, to Janet M. Truhe, Esq., WARD, JANOFSKY & TRUHE, 210 W. Pennsylvania Ave., Suite 505, Towson, MD 21204, and to Mark A. Gilday, Esq., JORDAN, COYNE, SAVITS & LOPATA, 1030 15th St., N.W., Suite 500, Washington, DC 20005.

Thomas H. Bornhorst

Thomas H. Bornhorst
Attorney at Law
2236 Southland Rd., Baltimore, Md 21207
(410) 298-2265

State and Federal Trial Practice — Maryland, District of Columbia

March 17, 1994

Clerk of the Court
Circuit Court of Maryland for Baltimore City
111 North Calvert St.
Room 462
Baltimore, MD 21202

88102069/CL 79993
Shofer v Hack Co

Re: ~~Shofer et. al. v. Blum, Yumkas, Mailman, Gutman & Denick, P.A.~~
Case No. ~~93285087 / CL 171133~~
8049

Dear Clerk:

Your kind attention to the following is requested:

1. Please file the attached exhibits which were separated from Plaintiff's Opposition to Defendant's Motion for Summary Judgment or Partial Summary Judgment as to Plaintiff's Damages, filed 3/16/94

Sincerely,

Thomas H. Bornhorst

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(SHOFER V. THE STUART HACK CO. 88102069 / CL 79993)

Re Pleading: Plaintiff's Opposition to Defendant's Motion for Summary Judgment or Partial Summary Judgment as to Plaintiff's Damages

EXHIBIT # 1

Pleading page reference: 4.

Exhibit Identification: January 8, 1993 IRS Notice to Plaintiff, first notice of excise tax assessment

No. of exhibit pages: (10)

Additional exhibit notes: 1. ERRATA - Plaintiff's reference pleading (p.4) states this as a Department of Labor publication in error.

2. ADDITIONAL PAGE attached to this exhibit is a related IRS notice dated September 8, 1993 holding in abeyance the effects of further tax processes pending outcome of Department of Labor investigation (findings on excise tax).

Form 5438
(Rev. January 1990)

Department of the Treasury – Internal Revenue Service

Report of Examination — Excise Taxes on Employee Plans

(Under Sections 4971, 4972, 4973(a)(2), 4975, 4979 and 4980 of the Internal Revenue Code)

Name and address of employer or disqualified person	Name and address of plan
RICHARD SHOFER 216 ST. DUNSTANS ROAD BALTIMORE, MD 21212	CATALINA ENTERPRISES, INC. PENSION PLAN 5006 LIBERTY HEIGHTS AVE. BALTIMORE, MD 21207

Social security or employer identification number	Plan number	Return form number
219-28-1068	001	5330

Examiner's name	Net increase (or decrease) in tax
LORI A. BROZEK	$53,420 *

Person with whom examination changes were discussed
Name NICHOLAS J. GIAMPETRO Title P.O.A.

Examination Change Items	Taxable Years Ended 8612	8712	8812
1. Section 4975 - Prohibited transactions *(If more than one transaction, use a code such as A, B, or C, and explain each transaction in "Other information" below, or on an attachment)*			
a. Corrected: ☐ Yes ☒ No			
b. Date Corrected:			
c. Computation:			
(i) Amount involved shown on return or as previously adjusted	$ 0	$ 0	$ 0
(ii) Total adjustments to amount involved *(Explain in "Other information")*	46,785	103,513	152,500
(iii) Total amount involved, as corrected	46,785	103,573	152,500
(iv) Initial tax liability, as corrected (5% of line 1(c)(iii))	2,339	5,175	7,624
2. Section 4971 - Accumulated funding deficiency			
a. Corrected: ☐ Yes ☐ No			
b. Date corrected:			
c. Computation:			
(i) Accumulated funding deficiency shown on return or as previously adjusted	$	$	$
(ii) Total adjustments to accumulated funding deficiency *(Explain in "Other information")*			
(iii) Accumulated funding deficiency, as corrected			
(iv) Initial tax liability, as corrected *(10% of line 2(c)(iii) for plan years beginning after 12-31-88; 5% for multi-employer plans or for plan years beginning before 1-1-89.)*			

Examination Change Items (Cont.)	Taxable Years Ended		
	8612	8712	8812
1. Section 4980 - Tax on Reversion of Qualified Plan Assets to Employer			
a. Date of Reversion:			
b. Computation:			
(i) Reversion amount shown on return or as previously adjusted	$	$	$
(ii) Total adjustments to reversion amount			
(iii) Total reversion, as corrected			
(iv) Tax liability, as corrected *(10% of line 3(b)(iii) (15% for reversions occurring on or after Oct. 21, 1988, pursuant to plan terminations on or after Oct. 21, 1988)*			
2. Other Chapter 43 taxes: - Section 4972 - Section 4973 - Section 4979			
Corrected: ☐ Yes ☐ No			
b. Kind of tax:			
c. Computation:			
(i) Non-deductible/Excess contributions shown on return or as previously adjusted	$	$	$
(ii) Total Adjustments to non-deductible/excess contributions			
(iii) Total non-deductible/excess contributions, as adjusted			
(iv) Tax liability, as corrected			
4. Total initial tax liability, as corrected *(Total of lines 1(c)(iv), 2(c)(iv), 3(b)(iv) and 4(c)(iv))*	2,339	5,175	7,624
5. Total initial tax liability shown on return or as previously adjusted	0	0	0
6. Deficiency *(Increase in initial tax) (Line 5 less line 6)*	2,339	5,175	7,624
7. Overassessment *(Decrease in initial tax) (Line 6 less line 5)*			
8. Additional taxes under sections 4971(b) and 4975(b)	46,785	56,728	48,988
10. Penalties *(Code section (Explain in "Other information")*	1,111	2,458	3,507

Other information *(attach additional sheets, if necessary)*

FOR PENALTY CALCS., SEE FORM 5318
SEE ATTACHED FOR CALC. OF INITIAL & SECOND-LEVEL TAXES

★ DOES NOT INCLUDE PENALTIES OR 100% TAX SHOWN IN LINES 9 & 10

Examiner's signature	Key district	Date	Agreement secured
Lori A. Brozek	BALTIMORE	12-03-92	☐ Yes ☒ No

Department of the Treasury — Internal Revenue Service

Form 5438
(Rev. January 1990)

Report of Examination — Excise Taxes on Employee Plans

(Under Sections 4971, 4972, 4973(a)(2), 4975, 4979 and 4980 of the Internal Revenue Code)

Name and address of employer or disqualified person	Name and address of plan
RICHARD SHOFER 216 ST. DUNSTANS ROAD BALTIMORE, MD 21212	CATALINA ENTERPRISES, INC. PENSION P 5006 LIBERTY HEIGHTS AVE. BALTIMORE, MD 21207

Social security or employer identification number	Plan number	Return form number
219-28-1068	001	5330

Examiner's name	Net increase (or decrease) in tax
LORI A. BROZEK	$53,420 *

Person with whom examination changes were discussed

Name NICHOLAS J. GIAMPETRO Title P.O.A.

Examination Change Items	Taxable Years Ended 8912	9012	9112
1. Section 4975 - Prohibited transactions *(If more than one transaction, use a code such as A, B, or C, and explain each transaction in "Other information" below, or on an attachment)*			
a. Corrected: ☐ Yes ☒ No			
b. Date Corrected:			
c. Computation:			
(i) Amount involved shown on return or as previously adjusted	$ 0	$ 0	$ 0
(ii) Total adjustments to amount involved *(Explain in "Other information")*	201,358	253,509	310,807
(iii) Total amount involved, as corrected	201,358	253,509	310,807
(iv) Initial tax liability, as corrected (5% of line 1(c)(iii))	10,067	12,675	15,540
2. Section 4971 - Accumulated funding deficiency			
a. Corrected: ☐ Yes ☐ No			
b. Date corrected:			
c. Computation:			
(i) Accumulated funding deficiency shown on return or as previously adjusted	$	$	$
(ii) Total adjustments to accumulated funding deficiency *(Explain in "Other information")*			
(iii) Accumulated funding deficiency, as corrected			
(iv) Initial tax liability, as corrected *(10% of line 2(c)(iii) for plan years beginning after 12-31-88; 5% for multi-employer plans or for plan years beginning before 1-1-89.)*			

Examination Change Items (Cont.)	Taxable Years Ended		
	8912	9012	9112
Section 4980 - Tax on Reversion of Qualified Plan Assets to Employer			
a. Date of Reversion:			
b. Computation:			
(i) Reversion amount shown on return or as previously adjusted	$	$	$
(ii) Total adjustments to reversion amount			
(iii) Total reversion, as corrected			
(iv) Tax liability, as corrected *(10% of line 3(b)(iii) (15% for reversions occurring on or after Oct. 21, 1988, pursuant to plan terminations on or after Oct. 21, 1988)*			
Other Chapter 43 taxes: · Section 4972 · Section 4973 · Section 4979			
Corrected: ☐ Yes ☐ No			
b. Kind of tax:			
c. Computation:			
(i) Non-deductible/Excess contributions shown on return or as previously adjusted	$	$	$
(ii) Total Adjustments to non-deductible/excess contributions			
(iii) Total non-deductible/excess contributions, as adjusted			
(iv) Tax liability, as corrected			
Total initial tax liability, as corrected *(Total of lines 1(c)(iv), 2(c)(iv), 3(b)(iv) and 4(c)(iv))*	10,067	12,675	15,540
Total initial tax liability shown on return or as previously adjusted	0	0	0
Deficiency *(Increase in initial tax) (Line 5 less line 6)*	10,067	12,675	15,540
Overassessment *(Decrease in initial tax) (Line 6 less line 5)*			
Additional taxes under sections 4971(b) and 4975(b)	48,858	52,151	57,297
0. Penalties *(Code section (Explain in "Other information")*	4,027	4,310	4,352

Other information *(attach additional sheets, if necessary)*

FOR PENALTY CALCS., SEE FORM 5318
SEE ATTACHED FOR CALC. OF INITIAL & SECOND-LEVEL TAXES

* DOES NOT INCLUDE PENALTIES OR 100% TAX SHOWN IN LINES 9 & 10

Examiner's signature	Key district	Date	Agreement secured
Lori A. Blozek	BALTIMORE	12-03-92	☐ Yes ☒ No

Form **5318**
(Rev. August 1988)

Penalties for Failure to File Tax Return and Pay Tax

(Internal Revenue Code Sections 6651(a)1 and 6651(a)2)

Schedule Number

Name and Address of Taxpayer

RICHARD SHOFER
216 ST. DUNSTANS RD.
BALTIMORE, MD 21212

Kind of Tax	Taxpayer's Identifying Num
EXCISE	219-28-1068
Return Number	**Date of Report**
5330	12-03-92

Computation of Penalties *(Penalty Chart on back)*	Tax Periods			
	8612	8712	8812	8912
A. Tax shown on delinquent tax return	2,339	5,175	7,624	10,067
B. Less: Timely tax payments and credits	—	—	—	—
C. Tax subject to penalties	2,339	5,175	7,624	10,067
D. Number of months of failure to file tax return *(if 5 or more, write 5)*	5	5	5	5
E. Number of months of failure to pay tax *(if 50 or more, write 50)*	50	50	47	35
F. Percentage rate for failure to file tax return *(line D x 4.5%)*	22.5	22.5	22.5	22.5
G. Percentage rate for failure to pay tax *(line E x 0.5%)*	25	25	23.5	17.5
H. Penalty for failure to file tax return *(line F x line C)*	526	1,164	1,715	2,265
I. Less payments and credits	—	—	—	—
J. Total penalty for failure to file tax return	526	1,164	1,715	2,265
K. Penalty for failure to pay tax *(line F x line C)*	585	1,294	1,792	1,762
L. Less payments and credits	—	—	—	—
M. Total payment for failure to pay tax	585	1,294	1,792	1,762
N. Negligence Penalty *(Section 6653(a))*				
O. Total Penalties *(line J, plus M, plus N)*	1,111	2,458	3,507	4,027

Remarks:

PENALTIES CALCULATED THRU 6/93. IF THE REQUIRED FORM 5330 HAS NOT BEEN FILED & THE TAX NOT PAID - THE PENALTIES CONTINUE TO ACCRUE.

Form **5318**
(Rev. August 1988)

Penalties for Failure to File Tax Return and Pay Tax

(Internal Revenue Code Sections 6651(a)1 and 6651(a)2)

Schedule Number

Name and Address of Taxpayer	Kind of Tax	Taxpayer's Identifying Numb
RICHARD SHOFER 216 ST. DUNSTANS RD. BALTIMORE, MD 21212	EXCISE	219-28-1068
	Return Number: 5330	Date of Report: 12-03-92

Computation of Penalties (Penalty Chart on back)	Tax Periods			
	9012	9112		
A. Tax shown on delinquent tax return	12,675	15,540		
B. Less: Timely tax payments and credits	—	—		
C. Tax subject to penalties	12,675	15,540		
D. Number of months of failure to file tax return (if 5 or more, write 5)	5	5		
E. Number of months of failure to pay tax (if 50 or more, write 50)	23	11		
F. Percentage rate for failure to file tax return (line D x 4.5%)	22.5	22.5		
G. Percentage rate for failure to pay tax (line E x 0.5%)	11.5	5.5		
H. Penalty for failure to file tax return (line F x line C)	2,852	3,497		
I. Less payments and credits	—	—		
J. Total penalty for failure to file tax return	2,852	3,497		
K. Penalty for failure to pay tax (line F x line C)	1,458	855		
L. Less payments and credits	—	—		
M. Total payment for failure to pay tax	1,458	855		
N. Negligence Penalty (Section 6653(a))				
O. Total Penalties (line J, plus M, plus N)	4,310	4,352		

Remarks:

PENALTIES CALCULATED THRU 6/93. IF THE REQUIRED FORM 5330 HAS NOT BEEN FILED & THE TAX NOT PAID - THE PENALTIES CONTINUE TO ACCRUE.

4/1

Form 870
(Rev. February 1986)

Department of the Treasury – Internal Revenue Service

Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment

Date received by Internal Revenue Service

Names and address of taxpayers *(Number, street, city or town, State, ZIP code)*

RICHARD STOFER
216 ST. DUNSTANS RD.
BALTIMORE, MD 21212

Social security or employer identification number

219-28-1068

Increase (Decrease) in Tax and Penalties

Tax year ended	Tax 4973(a)	4975(b)		Penalties 6651(a)(1)	6651(a)(2)
12-31-86	$ 2,339	$	$	$ 526	$ 585
12-31-87	$ 5,175	$	$	$ 1,164	$ 1,294
12-31-88	$ 7,624	$	$	$ 1,715	$ 1,792
12-31-89	$ 10,067	$	$	$ 2,265	$ 1,762
12-31-90	$ 12,675	$	$	$ 2,852	$ 1,458
12-31-91	$ 15,540	$ 310,807	$	$ 3,497	$ 855
TOTALS	$ 53,420	$ 310,807	$	$ 12,019	$ 11,417

(For instructions, see back of form)

Consent to Assessment and Collection

I consent to the immediate assessment and collection of any deficiencies *(increase in tax and penalties)* and accept any overassessment *(decrease in tax and penalties)* shown above, plus any interest provided by law. I understand that by signing this waiver, I will not be able to contest these years in the United States Tax Court, unless additional deficiencies are determined for these years.

Signatures			
			Date
			Date
	By	Title	Date

CATALINA ENTERPRISES, INC.
MONEY PURCHASE PLAN #001

"SCHEDULE A"

Period	1986	1987	1988	1989	1990	1991
1986	$2,339	$2,339	$2,339	$2,339	$2,339	$2,339
1987		2,836	2,836	2,836	2,836	2,836
1988			2,449	2,449	2,449	2,449
1989				2,443	2,443	2,442
1990					2,608	2,608
1991						2,865
4975(a) Tax	$2,339	$5,175	$7,624	$10,067	$12,675	$15,540

Amounts Involved:

1986	$46,785
1987	$56,728
1988	$48,988
1989	$48,858
1990	$52,151
1991	$57,297
	$310,807 (Total for 100% tax per 4975(b))

NOTE: If the prohibited transactions are not corrected within the taxable period, Sec. 4975(b) tax of $310,807 will apply.

Internal Revenue Service

Department of the Treasury

District
Director

31 Hopkins Plaza, Baltimore, MD 21201

▷ JAN 8 1993

Richard Shofer
216 St. Dunstans Road
Baltimore, Maryland 21212

Name of Plan:
Catalina Enterprises, Inc. Pension Plan
TIN/Plan Number: 219-28-1068
Form Number: 5330
Tax Period(s) Ended:12-31-86,12-31-87
12-31-88,12-31-89,12-31-90,12-31-91
Person to Contact: John F. Mossman
Telephone Number: (410) 962-1761
In Reply Refer to: IRS-EP/EO:T:JFM

CERTIFIED MAIL

Dear Sir or Madam:

We have enclosed a copy of our examination report explaining why we believe an adjustment of your tax liability is necessary.

If you accept our findings please sign and return the enclosed agreement form within 30 days from the date of this letter. The copy is for your records. If you also wish to make payment, the enclosed Publication 1020 contains the appropriate instructions.

If you do not accept our findings, we recommend you request a hearing with our office of Regional Director of Appeals. This request must be made within 30 days from the date of this letter and must also be accompanied by a written protest. If you request a hearing, we will forward your protest to the Office of Regional Director of Appeals and they will contact you to schedule an appointment. The enclosed Publication 1020 explains what your protest should contain. When you write, please provide your daytime telephone number and the most convenient time for us to call if we need to contact you.

If we do not hear from you within 30 days from the date of this letter, we will close your case on the basis of the recommendation shown in the examination report. If you have any questions, please contact the person whose name and telephone number are shown above.

Thank you for your cooperation.

Sincerely yours,

H. J. Hightower

H. J. Hightower
District Director

Enclosures:
Explanation - Form 886-A
Examination Report - Form 5438
Penalties - Form 5318
Agreement - Form 870
Publication 1020
Envelope

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Internal Revenue Service

Regional Counsel Mid-Atlantic Region

Department of the Treasury

PHILADELPHIA APPEALS
600 Arch Street, Rm. 4454
Philadelphia, PA 19106

Person to Contact:
John C. Lancaster
Telephone Number:
(215) 597-2002
Refer Reply to:
A:PHI:JCL
Date:
SEP 08 1993

Tax Year Ended:
1984, 1985, 1986, 1987,
1988, 1989, 1990 & 1991

In re: Excise Tax

Catalina Enterprises, Inc.
5006 Liberty Heights Avenue
Baltimore, MD 21212
Attn: Richard Shofer, President

Dear Mr. Shofer:

Please be advised that your case is being returned to the EP/EO Division, Baltimore, Maryland for further consideration pending the investigation by the Department of Labor.

If you have any questions, please call the person whose name and telephone number are shown above.

Sincerely yours,

Charles F. Fisher
Associate Chief, Appeals

cc: Nicholas J. Giampetro, Esq.
Thomas H. Bornhorst, Esq.

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(SHOFER V. THE STUART HACK CO. 88102069 / CL 79993)

Pleading: Plaintiff's Opposition to Defendant's Motion for Summary Judgment or Partial Summary Judgment as to Plaintiff's Damages

2

EXHIBIT # 2

Pleading page reference: 5.

Exhibit Idenfication: None.

No of exhibit pages: (0)

Exhibit Note: This was an unintended duplication of Exhibit #1

(SHOFER V. THE STUART HACK CO. 88102069 / CL 79993)

Pleading: Plaintiff's Opposition to Defendant's Motion for Summary Judgment or Partial Summary Judgment as to Plaintiff's Damages

EXHIBIT # 3

Pleading page reference: 9.

Exhibit Idenfication: Rosenberg deposition, 11/23/93, p. 26

No. of exhibit pages: (2)

Exhibit Note:

RICHARD SHOFER	:	IN THE
Plaintiff	:	CIRCUIT COURT
vs.	:	FOR
THE STUART HACK CO., et al.	:	BALTIMORE CITY
Defendants	:	Case No. 88102069/CL79993

Baltimore, Maryland

November 23, 1993

Deposition of THEODORE M. ROSENBERG, A Witness, called for oral examination by counsel for the Defendant, Stuart Hack, taken at the law offices of Bernstein, Sakellaris, Ward & Truhe, Suite 1622, The World Trade Center, before Henny Hunter Gerard, Notary Public, beginning at 10:40 o'clock a.m.

A P P E A R A N C E S

THOMAS H. BORNHORST, ESQ., on behalf of the Plaintiff.

JANET M. TRUHE, ESQ., on behalf of the Defendant, Stuart Hack.

MARK A. GILDAY, ESQ., on behalf of the Defendant, Grabush, Newman.

Reported By:
Henny Hunter Gerard, RPR-CM
Riggleman, Turk & Nelson
(410) 539-6398

issue concerning Mr. Hack's alleged malpractice?

A Right.

Q Would that also be true with respect to any alleged malpractice on the part of Grabush-Newman, the accounting firm who prepared Mr. Shofer's tax returns?

A That is correct.

Q Are you familiar with the accounting firm of Grabush-Newman?

A No, not at all.

Q Can you tell me anything else that Mr. Shofer discussed with you during that initial telephone contact in the Spring of 1993?

A I mean, no, it was a rather short contact. We basically set up an appointment to go further.

Q Did there come a time when you met with Mr. Shofer?

A Yes.

Q Was anyone else present?

A Mr. Bornhorst was present for part of the meeting, I don't remember whether we started and talked to him later, and he was there.

Q Do you recall when you met?

(SHOFER V. THE STUART HACK CO. 88102069 / CL 79993)

Pleading: Plaintiff's Opposition to Defendant's Motion for Summary Judgment or Partial Summary Judgment as to Plaintiff's Damages

EXHIBIT # 4

Pleading page reference: 12.

Exhibit Identification: Plaintiff letter to Defendant dated March 12, 1987

No. of exhibit pages: (3)

Exhibit Note:

CATALINA ENTERPRISES, INC.
5000 LIBERTY HEIGHTS AVENUE
BALTIMORE, MARYLAND 21207

RICHARD SHOFER
PRESIDENT

TELEPHONE:
AREA CODE (301) 466-3333

March 12, 1987

PERSONAL AND CONFIDENTIAL

Stuart Hack
The Stuart Hack Co.
4623 Falls Rd.
Baltimore, Md. 21209

Dear Stuart:

My accountants, Grabush, Newman & Co., have recently informed me that I am subject to income tax on a considerable amount of money that I have borrowed from my pension fund voluntary contribution account. They have informed me that loans in excess of fifty thousand dollars are taxable according to I.R.S. regulations.

Needless to say, this came as quite a disturbing revelation. I presented Grabush Newman with the letter you had written me on August 9, 1984, a copy of which I am enclosing. Despite what your letter states, they say I may owe a lot of money to Uncle Sam.

This news disturbed me to the extent that I sought advise from an independent pension attorney, Nicholas Giampetro. He only confirmed that tax is due.

At this time I envision among other things:
1. Federal and state income tax on approximately $200,000 resulting from loans from the voluntary account in excess of the allowable fifty thousand dollars - all at the maximum personal tax rate.
2. Penalties and interest on these taxes going back to 1984 when the first loan was made.
3. Amended personal income tax returns going back to 1984.
4. Additional penalties and interest for underestimating income tax due based on the new amended returns.
5. A general I.R.S. audit of my personal, corporate, and pension returns for several years, triggered by the amending of my personal returns.
6. An unthinkable amount of time expended relating to this matter and possible audits.
7. An even more unthinkable amount of money for accountants and lawyers related to the consequences of this matter and any audits that may occur.
8. A devastating loss to the future value of my voluntary pension

account as a result of these loans.
9. A general weakening of the soundness of the Pension Plan effecting not only me but, perhaps, other participants.
10. The appearance of a significant six figure personal tax liability on my personal balance sheet, which would undoubtedly undermine my auto business credit line and relationship with my bank as well as others.
11. Possible Federal and State liens against both myself personally and my business as a result of not being able to pay this large and unexpected tax and penalty burden.

I was entitled to rely on your advice. I did, and now I am in a jam. Relying on your advice I borrowed $200,000 in 84 more in 85 and still more in 86.

Although there could be even other, as yet unforseen consequences, you can well imagine that the nightmarish possibilities above have moved me to seek additional legal advice.

It is my understanding from the advice that I have received that I should be able to look to the Stuart Hack Co. for relief.

I am writing you now that the present situation is clear to me to enlist your aid in resolving this mess in a friendly way if possible.

Our relationship has spanned about fourteen years without a negative word between us. I desire to keep it that way as much as possible.

There is no doubt that based on the legal advice that I have been forced to seek, that this matter will soon be brought to the attention of your insurers.

The question is - Can we communicate openly, attack this unfortunate issue together, and resolve it with a minimum of expense and discomfort to us all (including your insurers) or - are the lawyers going to be the only winners.

At this time I desire that you present this matter to your insurers quickly. Please give this matter your urgent attention. Assess the situation as soon as possible and likewise have your insurers do the same.

Many of the potentially damaging events mentioned earlier in this letter may be avoided if we work together to resolve this.

I have not got much time. Based on what I have now learned I must file an amended return soon for 84 and perhaps 85. I do not have cash to pay with those amended returns.

Please write me, and have your insurers write, stating (as I have done) your willingness and desire to expedite this matter in a

pleasant manner.

As soon as you clarify you position to me regarding this matter and as soon as your insurers state their position to me I will know how to proceed.

On the other hand, a lack of timely communication from you that you desire to work this out, as you must realize, will both fracture our relationship and force me into the arms of attorneys to seek relief. Please do not allow this to happen. Because of my relationship with you, I want to do everything possible to avoid the agonies of litigation.

Cordially,

Richard Shofer

RS/ca

(SHOFER V. THE STUART HACK CO. 88102069 / CL 79993)

Pleading: Plaintiff's Opposition to Defendant's Motion for Summary Judgment or Partial Summary Judgment as to Plaintiff's Damages

EXHIBIT # 5

Pleading page reference: 12.

Exhibit Identification: Defendant letter to Plaintiff dated April 8, 1987

No. of exhibit pages: (4)

Exhibit Note:

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THE STUART HACK COMPANY

Consultants & Actuaries

4623 Falls Road
Baltimore, Maryland 21209
(301) 366-8700
Washington, D.C. 470-7435 Writer's Direct Dial No.

April 8, 1987

PERSONAL AND CONFIDENTIAL

Richard Shofer, President
Catalina Enterprises, Inc.
5000 Liberty Heights Avenue
Baltimore, Maryland 21207

Dear Dick:

This is in response to your letter dated March 12, 1987, regarding loans you made from the retirement plan.

Your accountants raised the issue on the loans some time ago. We did some research and concluded there was not a problem. I have suggested to Ken Larash that he arrange a meeting with you, him, the attorney you have hired and me to go over the facts together. The best possible resolution is to be able to conclude you do not have a problem. To conclude otherwise could be very costly to all of the parties involved.

I recommend we meet with this positive goal in mind.

Cordially,

Stuart

Stuart Hack

SH/rbp

CC: Harvey Newman, CPA
Kenneth Larash, CPA
Alan Vandendriessche

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16 day of March, 1994, a copy of the aforegoing Opposition to Defendant's Motion for Summary Judgment with exhibits was mailed first class, postage prepaid, to Janet M. Truhe, Esq., WARD, JANOFSKY & TRUHE, 210 W. Pennsylvania Ave., Suite 505, Towson, MD 21204, and to Mark A. Gilday, Esq., JORDAN, COYNE, SAVITS & LOPATA, 1030 15th St., N.W., Suite 500, Washington, DC 20005.

Thomas H. Bornhorst

(1)

CIVIL POSTPONEMENT FORM

DATE: March 18, 1994

Plaintiff(s) Richard Shofer

v.

Defendant(s) Stuart Hack
The Stuart Hack Co.
and
Grabush, Newman & Co.
(Third Party Def.)

IN THE
CIRCUIT COURT
FOR
BALTIMORE CITY

Computer #: 88102069

File #: CL79993

Jury ____ CT. X CTF. ____ GEN X MOT. 2-507 ☐

DOMESTIC JUDGE: ____ DOMESTIC MASTER: ____

PLEASE PRINT

Hearing on Def's motion for Summary Judgment (likely to take several hours)
To be postponed from: DATE: APRIL 22, 1994 PRIOR POSTPONEMENTS: Y☐ N☒

Postponement requested by: Plaintiff's and Defense Counsel

Postponement reason: (please specify):

Defense counsel will be in Day 4 of a previously scheduled jury trial in the City; Plaintiff's counsel has a previously scheduled meeting with the U.S. Dept. of Labor re Richard Shofer's pension at issue in this case - Counsel for all parties would like the pending motion for*

Plaintiff(s) Attorneys:	Defendant(s) Attorneys:	
Thomas H. Bornhorst	Janet M. Truhe	Mark A. Gilday
2236 Southland Rd	210 W. Pennsylvania Ave. Suite 505	Jordan, Coyne & Savitz
Baltimore, MD 21207	Towson, MD 21204	Wash. D.C.

New Trial Date: 5/4/94

Approved: ____ Denied: ____ : ____ (JUDGE'S SIGNATURE)

Rec'd 3/21/94 th ~~4/25/95~~ $30 (12)

WHITE—Court File • YELLOW—CAO

CC-55

* summary judgment and trial of May 23 specifically assigned to the same judge. This has been a protracted case.

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RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
THE STUART HACK CO., et al.	*	BALTIMORE CITY
Defendants	*	CASE No. 88102069 / CL79993

* * * * * * * * * * *

ORDER

This Court, having considered the Consent Motion of the parties seeking an enlargement of time for filing of Plaintiff's Response to Defendant's Motion for Summary Judgment / Partial Summary Judgment as to Damages, and cause for such action being presented, it is this 22nd day of March, 1994,

ORDERED: that Plaintiff's Response to the motion of the Defendant shall be due on or before March 16, 1994.

Judge

938

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

RICHARD SHOFER,	*	
Plaintiff,	*	
v.	*	Case No.: 88102069/CL79993
THE STUART HACK COMPANY, et al.,	*	
Defendants.	*	

NOTICE OF WITHDRAWAL

Clerk of the Court:

You will please withdraw the appearance of Mark A. Gilday as attorney of record for the defendant Grabush, Newman & Co., P.A. and enter the appearance of Jayson L. Spiegel of Jordan Coyne & Savits as co-counsel with John Tremain May on behalf of defendant Grabush, Newman & Co., P.A.

Please direct all future notices to the attention of Jayson L. Spiegel.

JORDAN COYNE & SAVITS

By Mark A. Gilday

Mark A. Gilday
33 Wood Lane
Rockville, Maryland 20850
(301) 424-4161

JORDAN COYNE & SAVITS

By Jayson L. Spiegel

Jayson L. Spiegel
33 Wood Lane
Rockville, Maryland 20850
(301) 424-4161

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Notice of Withdrawal was mailed, postage prepaid, this 22nd day of March, 1994, to:

Janet M. Truhe, P.A.
Ward, Janofsky & Truhe, P.A.
Court Towers - Suite 505
210 W. Pennsylvania Avenue
Towson, Maryland 21204

Thomas H. Bornhorst, Esquire
2236 Southland Road
Baltimore, MD 21207

Shirlie N. Laake, Esquire
7th Floor
729 E. Pratt Street
Baltimore, Maryland 21202

Mark O. Gilday

Mark A. Gilday

(89) DE

RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
THE STUART HACK CO., et al.	*	BALTIMORE CITY
Defendants	*	CASE NO.: 88102069/ CL79993
	*	

* * * * * * * * * * * *

DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT AS TO PLAINTIFF'S DAMAGES

Defendants, Stuart Hack and The Stuart Hack Company, by their attorneys, Janet M. Truhe and Ward, Janofsky & Truhe, P.A., file the following Reply to the Plaintiff's Opposition to Defendants' Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment as to Plaintiff's Damages. Because Defendants' original motions were intended to be a comprehensive presentation of the arguments Defendants wished to make, the Reply here will be narrow in scope and aimed solely at responding to the Plaintiff's relatively brief arguments in opposition.

SUMMARY JUDGMENT - ERISA PREEMPTION

Plaintiff's Opposition to Defendants' request that the issue of ERISA pre-emption be revisited, is misleading in its discussion of the pertinent case law and remarkable for its admissions on the pre-emption issue. First, Plaintiff misrepresents the Ninth Circuit's holding in Mertens v.

Hewitt Associates, 948 F.2d 607 (9th Cir. 1991), when he states that the Court of Appeals upheld the Plaintiffs' state law malpractice claim on jurisdictional grounds. See Plaintiff's Opposition at p. 2. The sole issue decided by the Ninth Circuit with respect to the state law claim, however, was whether there was a factual dispute over when the Plaintiffs should have discovered Defendant's alleged wrongs for the purpose of triggering limitations. The Court did not, as Plaintiff contends, even address, let alone decide, the issue of whether the state law claim was pre-empted under ERISA. This was an argument which was never raised by any of the parties until the case reached the Supreme Court. At that point, the argument that a state law claim for non-fiduciary professional misconduct (like in the instant case) would likely be pre-empted, was one used by the Mertens Plaintiffs in favor of allowing such claims to go forward in federal court under ERISA. Nevertheless, the Supreme Court upheld the Ninth Circuit's dismissal of the Plaintiff's federal ERISA claims and, in so doing, noted with respect to the pre-emption issue:

> even assuming (without deciding) that petitioners are correct about the pre-emption of previously available state-court actions, vague notions of a statute's "basic purpose" are nonetheless inadequate to overcome the words of its text regarding the specific issue under consideration. This is especially true with legislation such as ERISA, an enormously complex and detailed statute that resolved innumerable disputes between powerful

> competing interests - not all in favor of potential plaintiffs.

Mertens v. Hewitt Associates, _____ U.S. _____, 113 S.Ct. 2063 (1993) (emphasis added). Further, the dissenters in Mertens pointed out that although the majority stopped just short of actually deciding the pre-emption implications of its holding:

> it is difficult to imagine how any common-law remedy for the harm alleged here - participation in a breach of fiduciary duty [by a non-fiduciary] concerning an ERISA - governed plan - could have survived enactment of ERISA's "deliberately expansive" pre-emption provision.

Id. at 5 f.2 (Slip Opinion). Thus, the Defendants' discussion of the impact of the Mertens case on the pre-emption issue here (set forth more fully in Defendants' original motion), is fair and accurate.

Second, and most importantly, Plaintiff admits for the first time in this case that the standards regarding professional conduct set forth in the ERISA statute have application to the case here. As Plaintiff states in his Opposition:

> ERISA is still relevant to the instant case, especially as one essential measure of the standards of knowledge and practice which bear on Defendant's professional conduct and service in regards to the ill-advised loans made by plaintiff against his personal account when plaintiff was a pension trustee with a majority interest in the Catalina Enterprises pension fund.

Plaintiff's Opposition at p. 3. Plaintiff is now conceding the very same argument which Defendants made in Shofer I to the Court of Appeals in favor of pre-emption. Attached hereto is an excerpt from Defendants' Brief on this point. See Brief for Appellee Stuart Hack and The Stuart Hack Company at pp. 11-16. Plaintiff's admission in this regard is an important one, and further underscores the necessity for this Court to revisit the issue of pre-emption. Plaintiff is acknowledging that the ERISA statute is an "essential measure of the standards of knowledge and practice which bear on Defendant's professional conduct and service." Thus, an examination of ERISA's provisions will be required in order for this Court to decide the Plaintiff's liability and damage claims. This is the very vice which the ERISA pre-emption provision set forth in 29 U.S.C. § 1144(a) was designed to prevent by requiring such cases to be litigated exclusively in the federal courts. For these reasons and the reasons more fully set forth in Defendants' Motion for Summary Judgment on this issue, Defendants request that Plaintiff's Third Amended Complaint be dismissed.

PARTIAL SUMMARY JUDGMENT AS TO CERTAIN DAMAGES

Defendants have also moved, in the alternative, for partial summary judgment as to certain categories of Plaintiff's damages set forth below.

1. Excise taxes and prohibited transactions penalties

As part of his request for damages in this case, Plaintiff admits in his Opposition that he is still seeking recovery of excise taxes in the amount of $53,240.00[1] and prohibited transaction penalties of $310,807.00. Plaintiff's Opposition at p.4. Both categories of damage are unique in that they were assessed solely by virtue of the fact that Plaintiff, as Trustee and a fiduciary to the Plan, violated certain pension laws set forth in the ERISA statute when he took money out of his pension in 1984, 1985 and 1986. It is undisputed that these damages never would have accrued but for the fact that pension money was involved.

It was for this, among other reasons, that Defendants first argued pre-emption of the liability and damage claims contained in Plaintiff's Second Amended Complaint. As the Court of Appeals in Shofer I recognized:

> the respondents have argued that certain features of this case make Shofer's claim, based on Maryland malpractice law, related to the [P]lan. Our holding in Part IV, supra, that the malpractice claims in Counts I and II are not pre-empted, denies pre-emptive effect to those features, with one exception to be discussed in Part V(B), infra.

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[1] According to the Plaintiff's Opposition, the precise amount of excise taxes which Plaintiff owes was determined by the Department of Labor in January of 1993. Plaintiff's Opposition at p. 4. Nevertheless, Plaintiff sought recovery of this specific category of damage in his Second Amended Complaint which was dismissed by this Court on October 12, 1990 on the basis of ERISA pre-emption.

Shofer v. The Stuart Hack Company, et al., 324 Md. 92, 109, 595 A.2d 1078 (1991) ("Shofer I"). In Part V(B), the Court of Appeals stated that Defendants "urge pre-emption of the [state law] malpractice claims because they attempt to include, or preserve, contingent damages by way of additional taxes that might be imposed by 26 U.S.C. § 4975 (1988), if the Internal Revenue Service were to rule that the loans to Shofer were "prohibited transactions" as therein defined." Id. at 110. The Court goes on to note that "[i]n answers to interrogatories requesting that the damages be specified, Shofer included in his answer a category headed "Contingent liabilities," which included: "[d]isqualification of [P]lan"; "[c]ost of 'undoing' prohibited transactions"; and "[e]xcise tax on prohibited transactions." Id. at 111 (emphasis added). The Court goes on to state in its opinion that when confronted with these three specific categories of damage and their obvious relation to the Plan so as to warrant pre-emption, Plaintiff's counsel backed away from these claims and stated that they were not in the Second Amended Complaint. Id. The Court of Appeals then held: "We consider Shofer's counsel's statement to be a concession limiting the scope of the damages claimed in Counts I and II so as to exclude the three above-described "contingent liabilities." Id. (emphasis added).

The Court's decision in Shofer I on these issues is the law of this case and this Court is bound thereby. See Kline v. Kline, 93 Md.App. 696, 700, 614 A.2d 984 (1992) ("a ruling by an appellate court upon a question becomes the 'law of the case' and is binding on the courts and litigants in further proceedings in the same matter").

Undaunted, the Plaintiff subsequently filed a Third Amended Complaint on December 8, 1992 seeking, among other things, two of these same damages, i.e., excise taxes and prohibited transactions penalties. Defendants filed a motion to dismiss for failure to state a claim citing the Court of Appeals' rulings in Shofer I. Defendants' motion was granted by Judge Thomas Ward on February 17, 1993 who agreed with Defendants' reading of the plain language of the Court of Appeals' opinion on this issue. See Exhibit A (attached to Defendants' original motion). Clearly, excise taxes and prohibited transaction penalties are not recoverable in this state action, and Plaintiff's continued pursuit of these damages in defiance of previous court rulings is simply improper. Therefore, Defendants seek dismissal of these claims and request that sanctions be imposed if Plaintiff should attempt to pursue them again at the time of trial.

2. Additional income taxes for failure to follow proper procedures for borrowing from the Plan

Plaintiff also seeks recovery of additional income taxes of $51,831.00 imposed by the Internal Revenue Service solely because Plaintiff failed to follow the proper procedures for borrowing money from his pension. This damage is new -- it was not claimed by Shofer at the time Shofer I was decided. The same rationale which supported the dismissal of excise taxes and prohibited transaction penalties in Shofer I (due to their relatedness to the Plan), however, also supports pre-emption of this item of damage. Thus, it should be dismissed as a matter of law on the basis of ERISA pre-emption.

In addition, in reversing the dismissal of Plaintiff's state law malpractice claims, the Court of Appeals indicated in Shofer I that, assuming liability, Plaintiff's damages on remand would be limited to taxes on income (plus penalties and interest) and consequential damages in the form of reimbursement for professional fees incurred during Plaintiff's tax audit. The Court had excluded all other types of damage because they were pension-related. Judge Thomas Ward of this Court reaffirmed these specific rulings in his Order of February 17, 1992. In his Opposition to Defendants' motion for partial summary judgment, Plaintiff simply states that there are disputes of fact with respect to the issue of liability for this item damage. Plaintiff's

argument in this regard is beside the point. Regardless of the issue of who might be responsible for this damage, the rulings made in Shofer I would indicate that Plaintiff may not recover this type of damage either in a state court action because of its inter-relationship with pension law. In his Opposition, Plaintiff has not responded to that argument on the merits at all. Thus, Defendants again renew their request that this category of damage be dismissed because it is pre-empted under ERISA from recovery as a matter of law in a state court case.

3. Refinancing of Virgin Islands property and other economic damages

Defendants have also moved for summary judgment as to several other items of alleged damage, i.e., Plaintiff's inability to refinance his Virgin Islands property, lost salary and lost business profits, on the grounds that such losses are too speculative and unforeseeable to be recovered under Maryland law. Accordingly, Defendants' reply to Plaintiff's opposition to the dismissal of these three remaining damages will be discussed collectively herein.

In his Opposition, Plaintiff makes several misrepresentations of fact and fails to address why the recent case of Stone v. Chicago Title Insurance Company of Maryland, 330 Md. 329, 624 A.2d 496 (1993)(cited in Defendants' Motion), should not control the disposition of the aforementioned categories of damage. In addition, the sole case cited by Plaintiff in his discussion on these

issues, Myerberg, Sawyer & Rue, P.A. v. Agee, 51 Md.App. 711, 466 A.2d 69 (1982), further supports the reasons why Defendants should not be held liable for such damages here.

First, Plaintiff claims that dismissal of these items of damage is inappropriate because Mr. Hack is a licensed attorney "applying himself in the pension field as an acknowledged and published expert." Plaintiff's Opposition at p. 11. Although, Mr. Hack is in fact a licensed attorney, he has never practiced law and did not hold himself out as an attorney in his dealings with the Plaintiff. In addition, the Plaintiff has never contended that any attorney-client relationship existed between himself and Mr. Hack.

Second, Plaintiff claims that the Defendants "should have no arguments of shock as to the extent of Plaintiff's personal pecuniary losses at this date," suggesting that Mr. Hack somehow knew all along about Plaintiff's alleged inability to refinance his Virgin Islands property, his alleged inability to draw a salary and his alleged lost business profits. It is undisputed by the parties, based on deposition testimony to date, that Mr. Hack did not even know the Plaintiff had purchased property in the Virgin Islands and was unaware of any alleged business losses until long after this litigation was brought. Thus, as a factual and legal matter, there was nothing foreseeable about any of

these damages when Hack rendered his advice to the Plaintiff in August of 1984.

Finally, Plaintiff's citation to the Myerberg case in supports Defendants' position here that Plaintiff's remaining categories of damage should be dismissed. In Myerberg, a lawyer and his firm were contractually engaged to examine title to unimproved property which Plaintiffs had contracted to purchase and, if title proved marketable, to effect the requisite conveyance. Most importantly in terms of the facts in that case, the Defendants were "specifically informed that the [Plaintiffs], who were moving from California, intended to build a new home on the site, which was to be financed and constructed on a pre-determined schedule." Myerberg, Sawyer & Rue, P.A. v. Agee, 51 Md.App. 711, 712, 466 A.2d 69 (1982). In its opinion, the Court of Special Appeals also noted that "The conveyance was made by [Defendants] who were apprised, and aware, of the consequences of unmarketable title, as well as the construction cost and interest increases that a delay may occasion in real estate transactions." Id. Based upon Defendants' assurance of marketability, the Plaintiffs in Myerberg then obtained a loan commitment after negotiating a construction price with the builder. A short time later, however, the bank's attorney informed the Plaintiffs that the Defendants' title search was defective because it disclosed no recorded right of access to the property.

Thereafter, the bank refused to honor its commitment with the Plaintiffs absent some record of right of way, and the Plaintiffs sustained a variety of damages as a result.

Given the Defendants' actual knowledge of the Plaintiffs' special circumstances in Myerberg, it was clearly proper for the judge to permit the jury in that case to consider Plaintiffs' claims for: (1) economic loss occasion by increased costs of construction and financing; (2) attorney's fees expended to establish access to the property; (3) capital gains taxes paid for failure to purchase another property within the time limitations prescribed by law; and (4) the amount of earned hazard insurance premium that Plaintiffs were required to purchase by the lending institution. The Court of Special Appeals held that Defendants could be liable for each of these various damages because they were known by and, therefore, foreseeable to the Defendants at the time of their negligence.

This is precisely the same rationale on which the attorneys in the Stone v. Chicago Title Insurance Company of Maryland case were not held liable for Plaintiff's unexpected losses in the stock market. The Plaintiff in Stone had attempted to tie these to the attorney's negligent handling of a property settlement. The Court of Appeals held that in the absence of Plaintiff having notified the law firm at the time of its allegedly negligent conduct that

he was speculating in the stock market and would have no other source of money except to borrow against his home in the event of financial emergency, Defendant could not be held liable for the harm which ultimately befell Stone.

Similarly, the Plaintiff in the instant case would have this Court hold that his alleged losses arising from his inability to refinance Virgin Islands property in 1988, his inability to draw a salary in 1991 and 1992 and his lost profits as a result of declining sales in his used-car business over the past eight years, were all foreseeable to Mr. Hack at the time of his alleged negligence on August 9, 1994. The rulings of the Court of Appeals in Stone, like the ones made earlier by the Court of Special Appeals in Myerberg, make clear that knowledge of the Plaintiff's special circumstances is the touchstone of foreseeability and, therefore, liability. Without the one, damages arising out of the other are not recoverable as a matter of law. The Plaintiff makes no attempt in his Opposition to address this legal principle; indeed the Plaintiff does not even mention the Stone case. Defendants, therefore, seek dismissal of Plaintiff's three remaining categories of damage on the grounds that they are too speculative and unforeseeable as a matter of law to be recovered in the case here.

CONCLUSION

For the aforegoing reasons, as well as the ones set forth more fully in Defendants' earlier Motion, Defendants respectfully renew their request for summary judgment as to Plaintiff's Third Amended Complaint or, in the alternative, summary judgment as to certain categories of damage.

Janet M. Truhe
WARD, JANOFSKY & TRUHE, P.A.
Court Towers - Suite 505
210 W. Pennsylvania Avenue
Towson, Maryland 21204
(410) 321-4890

Attorney for Defendants
Stuart Hack and The Stuart
Hack Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of April, 1994, copies of the aforegoing Defendants' Reply to Plaintiff's Opposition to Defendants' Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment as to Plaintiff's Damages were mailed first class, postage prepaid to: Thomas H. Bornhorst, Esquire, 2236 Southland Road, Baltimore, Maryland 21207; Jayson L. Spiegel, Esquire, and John T. May, Esquire, Jordan Coyne & Savits, Suite 500, 1030 15th Street, N.W., Washington, D.C. 20005;

and to Shirlie Norris Lake, Esquire, 7th Floor, Scarlett Place, 729 East Pratt Street, Baltimore, Maryland 21202.

Janet M. Truhe

Janet M. Truhe

and damage claims against Hack contained in Counts I and II necessarily relate to and affect the Plan and its assets. For these reasons, Judge Ross found that they are pre-empted under ERISA and cannot be maintained in state court (E.525).[18]

A. Shofer's Liability and Damage Claims Concern Conduct Regulated by ERISA, Affect Plan Assets and Require Interpretation of the Plan Document.

Shofer's arguments that his state common law tort and contract claims only remotely relate to the Plan, have no affect on the Plan's assets, and will not require the trial court "to interpret or even refer to the Plan, except perhaps in passing," are wholly without merit. Appellant's Brief at pp. 24-25, 29. First, these claims concern conduct governed by ERISA. A review of the Second Amended Complaint demonstrates that the only relationship between

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[18] Shofer cannot avoid the pre-emptive effect of § 1144(a) simply by omitting from his complaint all reference to ERISA and violations of § 1104(a)(1)(B) ("Fiduciary Duties"). See Muenchow v. Parker Pen Co., 615 F.Supp. 1405, 1417 (W.D. Wis. 1985) (state cause of action for intentional misrepresentation against employer arising out of false statements concerning employee benefits plan was pre-empted notwithstanding plaintiffs' failure to allege that defendant was acting in a fiduciary capacity at the time the statements were made or any reference to the ERISA statute in his complaint); see also Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 25 (1983) ("any state action coming within the scope of [§ 1132(a)] of ERISA would be removable to federal district court, even if an otherwise adequate state cause of action were pleaded without reference to federal law.").

Shofer and Hack was the relationship existing because of Hack's role in the administration of the Plan.

The Second Amended Complaint notes that Stuart Hack and The Stuart Hack Company held themselves out as "professional actuaries and consultants who provide professional advice to trustees and beneficiaries of pension plans as to the proper use of assets of such plans." (E. 227) ("Facts Common to All Counts" at paragraph 1). Shofer in fact concedes the nature of this relationship. "Stuart Hack and The Stuart Hack Company were professional pension consultants, hired by Catalina Enterprises, Inc. to administer Catalina's pension plan." (E.285).

In short, Hack was retained by the Plan, not by Shofer individually, and Hack's advice to Shofer regarding loans from the pension was rendered in his capacity as plan administrator in response to Shofer in his capacity as a trustee and participant.[19] Hack's sole legal relation with

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[19] It is clear from the very first sentence of the August 9, 1984 letter that Hack in his role as pension consultant to the Plan was responding to a series of questions by Shofer who as a participant/trustee wondered if he could use monies in the Plan.

> You questioned whether assets of your money purchase pension plan and profit sharing plans can be used as collateral for loans, whether you can borrow against these plans and whether there is any special treatment for your voluntary account under these plans. (E.438) (Emphasis added).

Shofer was by virtue of the Plan. There is no basis in fact to support a claim that Hack owed any common law duty to Shofer. Instead, Hack's conduct is governed by ERISA.

ERISA specifically imposes a duty of due care on Plan fiduciaries, including plan administrators such as Hack when they act in a fiduciary capacity. An ERISA fiduciary is obligated to discharge his duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). Such fiduciary standards are set forth in the Plan, itself, and track the language of the ERISA statute (E.446 at paragraph 11.6). Because Shofer has still not completely abandoned his claim that Hack was acting in a fiduciary capacity (Appellant's Brief at p. 20), his negligence and breach of contract claims must necessarily be analyzed in that context. As such, Shofer's allegations that Hack failed to exercise due care in providing advice to a Plan participant, fall squarely within the scope of ERISA regulation and pre-emption. See Brock v. Self, 632 F.Supp. 1509, 1517-18 (W.D. La. 1986) (state law claims for fraudulent misrepresentation and breach of contract against fiduciary pre-empted); Muenchow v. Parker Pen Co., 615 F.Supp. 1405,

1416-17 (W.D. Wis. 1985) (state law misrepresentation claim against employer pre-empted despite any reference in state court complaint to ERISA or allegation that employer was acting in a fiduciary capacity at the time the statements were made); Richland Hospital, Inc. v. Raylon, 516 N.E.2d 1236, 1240-41 (Ohio 1987) (state law misrepresentation claim against fiduciary pre-empted); Lembo v. Texaco, Inc., 182 Cal. App. 3d 299, 227 Cal. Rptr. 289 (Cal. App. 2 Dist. 1986) (state law claims against employer/fiduciary for fraud, misrepresentation, and infliction of emotional distress arising out of inducement to retire before effective date of retirement benefits program pre-empted).[20]

Second, Shofer's allegations of negligence and breach of contract directly concern the Plan's assets. In borrowing from his pension, Shofer was depleting Plan

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[20]At the same time Shofer is arguing that Hack might have owed a fiduciary duty in this case, he also contends that Hack was not an ERISA fiduciary. Appellant's Brief at p. 20. Even if Hack is not considered a fiduciary under ERISA, Shofer claims that Hack is still charged with a duty of ordinary care (E.158 at paragraph 11.2(c)). Under 29 U.S.C. § 1104(a)(1)(B) of ERISA, the duty of ordinary care is one of the fiduciary duties enumerated under the statute. Thus, there is no substantive legal difference between the claim for breach of fiduciary duty and the claims for negligence and breach of contract in this case. Section 1104(a)(1)(B) establishes a "prudent man" standard of care. Accordingly, Shofer's claims for negligence and breach of contract directly concern and implicate duties owed under this section and principles of federal common law developed with reference to this section. See infra at p. 24.

assets in reliance upon Hack's advice that he could do so (E.229). Shofer also contends that Hack was negligent in failing to advise him how to take Plan assets (E.444). See 29 U.S.C. 1108(b) (requiring loans to be adequately secured which in this case they were not). Lastly, Shofer contends that as a result of Hack's failure to advise him correctly about the tax consequences of loans and the proper procedure for taking them from the pension, the Plan is under the potential of being disqualified altogether, thereby causing Shofer and other participants in the Plan to suffer significant tax damage (E.444).

Third, Shofer's claims require interpretation of the terms of the Plan document. Shofer is seeking damages in the form of certain excise taxes which will be imposed if his loans are deemed prohibited transactions by the I.R.S. (E.187, C. 4. "Contingent liabilities - Excise tax on prohibited transactions."). Whether there was a prohibited transaction under ERISA will depend upon an interpretation of the loan provisions of the Plan document and whether these were violated when Shofer borrowed money (E.444). See 29 U.S.C. § 1108(b)(1). In addition, Shofer claims that Hack was negligent in failing to properly amend the loan provisions in the 1984 Plan Amending Restatement to authorize the Plan assets Shofer had already taken (E.442-43).

Contrary to Shofer's assertion that his negligence and contract claims are not pre-empted because they do not relate to the Plan or affect its assets, both the liability and damage claims contained within these counts are integrally bound up with the Plan such that they can only be resolved with reference to it.

B. Because the Liability and Damage Claims Contained Within the Negligence and Breach of Contract Counts "Relate To" the Plan, They Are Pre-empted.

ERISA is a federal statute which regulates all employee benefit plans, including the Plan at issue here, established "by any employer engaged in commerce or in any industry or activity affecting commerce." 29 U.S.C. § 1003(a)(1). The broad pre-emption provision of ERISA provides that it "shall supersede any and all State laws[21] insofar as they may now or hereafter relate to any employee benefit plan...." 29 U.S.C. § 1144(a) (emphasis added). A state law "relates to" an employee benefit plan "if it has a connection with or reference to such a plan." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97-98 (1983) (footnote omitted). As the Supreme Court observed, "the express pre-emption provisions of ERISA are deliberately expansive, and

[21] The term "State law" is defined in the statute to include "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." 29 U.S.C. § 1144(c)(1).

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Circuit Court for Baltimore City

111 North Calvert Street
Baltimore, Maryland 21202

Joseph H. H. Kaplan
Administrative Judge

396-5080
City Deaf TTY 396-4930

March 31, 1994

Thomas H. Bornhorst, Esquire
2236 Southland Road
Baltimore, MD 21207

Janet M. Truhe, Esquire
Ward, Janofsky & Truhe, P.A.
Suite 505, Court Towers
210 W. Pennsylvania Avenue
Towson, MD 21204

Jayson Spiegel, Esquire
Suite 500
1030 15th Street, NW
Washington, DC 20005

Re: Shofer v. Stuart Hack Company
Case Nº 88102069/CL79993

Dear Counsel:

I am in receipt of Ms. Truhe's letter to me of March 24, 1994, seeking special assignment for the above captioned case. Following a review of the court file, I do hereby grant protracted status to this case and assign it to Judge Ellen L. Hollander who will handle all future proceedings.

Additionally, the motions hearing scheduled before Judge Gordy on May 23rd is hereby cancelled and will be rescheduled by Judge Hollander.

Sincerely yours,

Joseph H. H. Kaplan
Administrative Judge

kak
cc: Judge Ellen M. Heller, JICC
Judge Ellen L. Hollander
Robert J. Ignatowski
Frank Sherry

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IN THE CIRCUIT COURT FOR BALTIMORE CITY

RICHARD SHOFER,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Case No. 88102069/CL79993
	:	
THE STUART HACK COMPANY, et al.	:	
	:	
Defendants.	:	

MOTION TO CONSOLIDATE CASES

Defendant The Stuart Hack Company and Stuart Hack, and third-party defendant Grabush, Newman & Company, P.A., pursuant to Maryland Rule of Procedure 2-503, hereby move this Honorable Court for an order consolidating this case for trial with Richard Shofer, et al. v. Blum Yumkas, Mailman, Gutman & Demick, P.A., No. CL171133/93285087, presently pending in this Court, and for cause state:

1. Plaintiff herein seeks damages purportedly flowing from allegedly improper advice he received from his pension plan consultant as to the tax consequences of borrowing from his pension plan. Defendants have sued third-party defendant for indemnification and contribution, claiming that third-party defendant, as accountants for plaintiff, should have prepared plaintiff's income tax returns to reflect a portion of plaintiff's borrowings as income.

2. Plaintiff seeks damages in the form of taxes, penalties and interest due on the loans, as well as consequential damages in the form of alleged personal and business losses ostensibly flowing from the tax consequences of the loans.

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3. Trial is tentatively set for May 23, 1994. This case has been granted protracted status and specially assigned. Presently pending before the Court is a motion for summary judgment.

4. In Richard Shofer, et al. v. Blum Yumkas, Mailman, Gutman & Demick, P.A., No. CL171133/93285087, plaintiff alleges that he retained the Blum Yumkas law firm to file suit against defendants herein to recover damages in the form of taxes, interest and penalties and other economic losses. In the Blum Yumkas litigation, plaintiff claims that as a consequence of Blum Yumkas' alleged negligence, plaintiff is barred from recovering certain pension-related taxes and penalties.

5. In the Blum Yumkas case, plaintiff will have to prove its case "within a case", i.e., that plaintiff had a meritorious cause of action against the Hack defendants herein. Moreover, plaintiff will have to establish the damages it allegedly suffered because of the Hack defendants' conduct, i.e., plaintiff will have to quantify his alleged losses in the form of taxes, penalties, interests, and consequential damages.

6. Obviously, the purported liability of the Hack defendants and the damages allegedly flowing therefrom are issues which are identical in both this case and the Blum Yumkas case. If the two cases are tried separately, separate fact finders will have to hear identical evidence

as to the Hack defendants' alleged liability and damages. Separate trials would, therefore, be an inefficient use of judicial resources and possibly lead to inconsistent and irreconcilable results.

7. Accordingly, the interest of judicial economy, efficiency and justice dictate that these two cases be consolidated for purposes of trial.

8. Depending on the disposition of the damages portion of the pending motion for summary judgment, defendants and third-party defendant may claim against the Blum Yumkas law firm for indemnification and contribution. Defendants and third-party defendants contend that certain of the damages claimed herein by plaintiff against them flow exclusively from the purported negligence of the Blum Yumkas law firm. Accordingly, consolidating the two cases is particularly compelling in light of the claim which may be asserted against Blum Yumkas if the disposition of the pending summary judgment motion so dictates.

Wherefore, defendants and the third-party defendant pray that this Honorable Court enter an order:

a) consolidating this case with Richard Shofer, et al. v. Blum Yumkas, Mailman, Gutman & Demick, P.A., No. CL171133/93285087 for purposes of trial; and

b) granting such other and further relief as the nature of cause may require.

Respectfully submitted,

WARD, JANOFSKY & TRUHE, P.A.

By _____
Janet M. Truhe
Court Towers - Suite 505
210 W. Pennsylvania Ave.
Towson, Maryland 21204
(410) 321-4890

JORDAN COYNE & SAVITS

By _____
Jayson L. Spiegel
33 Wood Lane
Rockville, Maryland 20850
(301) 424-4161

MEMORANDUM OF POINTS AND AUTHORITIES

Maryland Rule 2-503, the record herein and the record in Shofer et al. v. Blum Yumkas Mailman Gutman Demick, P.A., No. CL171133/93285087.

_____
Jayson L. Spiegel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was Motion to Consolidate Cases mailed, postage prepaid this 19 day of April, 1994, to:

Thomas H. Bornhorst, Esq.
2236 Southland Road
Baltimore, Maryland 21207

Janet M. Truhe, Esq.
Ward, Janofsky & Truhe, P.A.
Court Towers - Suite 505
210 W. Pennsylvania Avenue
Towson, Maryland 21204

Shirlie N. Lake, Esq.
7th Floor
729 E. Pratt Street
Baltimore, Maryland 21202

Jayson L. Spiegel

IN THE CIRCUIT COURT FOR BALTIMORE CITY

RICHARD SHOFER,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Case No. 88102069/CL79993
	:	
THE STUART HACK COMPANY, et al.	:	
	:	
Defendants.	:	

ORDER

Upon consideration of defendant and third-party defendant's motion to consolidate, and all supporting and opposing documents and arguments of counsel, if any, having been received and considered, and it appearing that it is good cause therefor, it is this _____ day of _____, 1994 by the Circuit Court for Baltimore City and the same is hereby

ORDERED that the motion is GRANTED; and it is further

ORDERED that the instant case and the case of Richard Shofer v. Blum Yumkas, Mailman, Gutman & Demick, P.A., CL17133/93285087 presently pending in this Court, shall be consolidated for purposes of trial.

SO ORDERED.

_____
Circuit Court Judge

Copies to:

Jayson L. Spiegel, Esq.
Jordan Coyne & Savits
33 Wood Lane
Rockville, Maryland 20850
(301) 424-4161

Thomas H. Bornhorst, Esq.
2236 Southland Road
Baltimore, Maryland 21207

Janet M. Truhe, Esq.
Ward, Janofsky & Truhe, P.A.
Court Towers - Suite 505
210 W. Pennsylvania Avenue
Towson, Maryland 21204
(410) 321-4890

Shirlie N. Lake, Esq.
7th Floor
729 E. Pratt Street
Baltimore, Maryland 21202

IN THE CIRCUIT COURT FOR BALTIMORE CITY

RICHARD SHOFER,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Case No. 88102069/CL79993
	:	
THE STUART HACK COMPANY, et al.	:	
	:	
Defendants.	:	

REQUEST FOR HEARING

Defendant and third-party defendant respectfully request a hearing on their joint motion for consolidation.

Respectfully submitted,

WARD, JANOFSKY & TRUHE, P.A.

By _____
Janet M. Truhe
Court Towers - Suite 505
210 W. Pennsylvania Avenue
Towson, Maryland 21204
(410) 321-4890

JORDAN COYNE & SAVITS

By _____
Jayson L. Spiegel
33 Wood Lane
Rockville, Maryland 20850
(301) 424-4161

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foreging Request for Hearing was mailed, postage prepaid this 19 day of April, 1994, to:

Thomas H. Bornhorst, Esq.
2236 Southland Road
Baltimore, Maryland 21207

Janet M. Truhe, Esq.
Ward, Janofsky & Truhe, P.A.
Court Towers - Suite 505
210 W. Pennsylvania Avenue
Towson, Maryland 21204

Shirlie N. Lake, Esq.
7th Floor
729 E. Pratt Street
Baltimore, Maryland 21202

Jayson L. Spiegel

90A

RICHARD SHOFER, et al	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
STUART HACK, COMPANY	*	BALTIMORE CITY
	*	Case No. 881020269/CL7993
Defendants		

* * * * * * * * * * * *

RICHARD SHOFER, CATALINA ENTERPRISES, INC. AND CATALINA ENTERPRISES, INC., PENSION TRUST	*	IN THE
Plaintiff/Counter-Defendants	*	CIRCUIT COURT
v.	*	FOR
BLUM, YUMKAS, MAILMAN, GUTMAN & DENICK, P.A.	*	BALTIMORE CITY
Defendants/Counter-Plaintiffs	*	Civil Action No. 93285087/CL171133

* * * * * * * * * * * *

OPPOSITION TO MOTION TO CONSOLIDATE CASES

Defendant/Counter-Plaintiff in Civil Action No. 93285087/CL171133, Blum, Yumkas, Mailman, Gutman & Denick, P.A., ("Blum Yumkas") by its attorneys, Shirley Norris Lake, Mark Anthony Kozlowski, and Eccleston and Wolf, hereby submits this Opposition to the pending Motion to Consolidate Cases.

I. STATEMENT OF FACTS

The genesis of this litigation arose in 1984 when it is alleged that Stuart Hack, Defendant in Civil Action No. 881020269/CL7993, improperly advised the plaintiff, Richard Shofer ("Shofer"), that it was permissible to use pension funds for personal loans. Relying on Hack's advice, between August 9, 1984 and September 20, 1986, Shofer borrowed approximately $375,000.00 from the pension plan ("Catalina plan") serving his business.[1] Hack

[1] Shofer is the sole share holder and President of Catalina Enterprises (a/k/a Crown Motors) which deals in the sale of automobiles. The employees of Shofer's businesses were served by a pension plan which is qualified under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq.

was the Catalina plan's consultant, and he routinely rendered professional assistance to the plan including advising Shofer as to the tax implications of transactions that were contemplated.

Sometime after borrowing the proceeds from the Catalina Plan, Shofer's accountants, Grabush, Newman & Company, P.A. ("Grabush"), Third Party Defendant in Civil Action No. 881020269/CL7993, allegedly advised Shofer of income tax liability based on those loans. It is alleged that because Hack failed to disclose that the loans were "income" under the tax code, Shofer was forced to pay additional taxes and penalties as he did not disclose the loans as income.[2]

Shofer began litigation in April, 1988 by filing, through his attorneys, Blum Yumkas, Richard Shofer et al. v. Stuart Hack Co., No. 88102069/CL7993 ("Hack Complaint"), a three count Complaint in the Baltimore City Circuit Court against Hack and his Company (collectively "Hack") alleging negligence, breach of contract and breach of fiduciary duty. An Amended Complaint was filed by Shofer in May, 1988 which added a fourth count for violation of ERISA. The ERISA based action sought damages for anticipated excise taxes and penalties on prohibited transactions as well as attorney fees. Hack eventually impleaded Grabush as a Third Party Defendant.

A Motion to Dismiss Count IV (the ERISA claim) of the Amended Complaint was filed by Hack in March, 1990 asserting that the Circuit Court lacked subject matter jurisdiction as the ERISA claim was exclusively within federal jurisdiction. Judge Ross found that a claim for breach of fiduciary duty under ERISA to be within exclusive federal jurisdiction and he dismissed Count IV with leave to amend. Shofer, thereafter, filed a Second Amended Complaint which set forth three counts under common law and five counts under ERISA. Hack then filed a Motion to Dismiss again asserting that exclusive federal jurisdiction applied to the ERISA based claims and arguing that the common law claims were preempted by ERISA's

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[2] Shofer allegedly paid to the Federal Government and to the State of Maryland income taxes, penalties and interest totaling approximately $120,428.00 for the years of 1984, 1985 and 1986 as the proceeds of the loans constituted income from those respective years.

preemption provision. On October 12, 1990, Judge Ross dismissed the Second Amended Complaint without leave to amend.[3]

Shofer pursued an appeal to the Court of Special Appeals; the Court of Appeals, however, issued a Writ of Certiorari on its own motion. The case was briefed and argued before the Court. By written opinion dated September 17, 1991, the Court of Appeals affirmed the dismissal of the ERISA based claims. Shofer v. Stuart Hack Co., 324 Md. 92, 113, 595 A.2d 1078 (1991). The Court, however, held that the state law causes of action were not preempted by ERISA and it remanded the case for trial. Id. at 109.

After remand, on December 5, 1992, Shofer filed a Third Amended Complaint containing counts for negligence and breach of contract. Shofer asserted that included among the damages sought under in the common law counts in the Third Amended Complaint were excise taxes and prohibited transaction penalties. Hack again moved to dismiss the Third Amended Complaint to the extent that ERISA damages were alleged. On February 17, 1993, this Court, by Judge Ward, granted Hack's Motion to Dismiss.

Extensive discovery has been completed, including depositions as well as written discovery, in the underlying Hack litigation and, until only recently, a trial date was scheduled for May 23, 1994. A new trial date has been established on July 11, 1994.[4]

At the time the Hack Complaint was filed, Shofer was represented by Lloyd Mailman and Tom Bowden of the law firm of Blum, Yumkas, Mailman, Gutman and Denick, P.A. ("Blum, Yumkas"). Blum Yumkas continued to represent the plaintiff until June, 1992.

On or about October 12, 1993, Shofer filed Richard Shofer, et al v. Blum, Yumkas, Mailman, Gutman & Denick, P.A., No. 93285087/CL171133 ("Blum, Yumkas

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[3] Shortly after Judge Ross dismissed the Second Amended Complaint in October, 1990, while still represented by Blum, Yumkas, Shofer filed a Complaint in the United States District Court for the District of Maryland which contained the identical causes of action set forth in the Second Amended Complaint. Hack, thereafter, filed a Motion To Dismiss raising a statute of limitations defense which was later granted by Judge Smalkin. The District Court's dismissal of the federal lawsuit was upheld by the Fourth Circuit Court of Appeals in June, 1992.

[4] A scheduling conference was held in the Hack case on April 28, 1994 before the Honorable Ellen Hollander to whom the Hack case has been specially assigned. The purpose of the scheduling conference was to discuss the impending May 26, 1994 trial date. Although not a party to the Hack matter, at the request of Judge Hollander, the undersigned counsel appeared on behalf of Blum, Yumkas. A trial date of July 11, 1994 was set for the Hack case only.

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Complaint") against Blum, Yumkas asserting two separate causes of action for legal malpractice and breach of contract. The gravamen of the Blum, Yumkas litigation is the assertion that the defendants breached the applicable standard of care by failing to file, within the statute of limitations, a federal court lawsuit asserting ERISA damages. Blum, Yumkas, which was only recently served with process, filed a responsive pleading on March 7, 1994 as well as a Counter-Claim for legal fees. As the Blum Yumkas litigation is in its infancy stages, no discovery whatsoever has been completed. Additionally, the Circuit Court has recently entered a Scheduling Order which has assigned the Blum, Yumkas case for trial in March, 1995.

On or about April 19, 1994, only one month before the then May 23, 1994 trial date in the Hack case, by Motion filed only in the Shofer litigation, Hack and Grabush sought to postpone the trial of the Shofer case by asserting that consolidation of the two cases is appropriate. In support of their Motion, Hack/Grabush contend that, to succeed in the Blum, Yumkas litigation, Shofer will have to "prove [a] case within a case." See, Motion at 2. Further, the movants allege that Shofer will "have to establish the damages it allegedly suffered because of the Hack Defendants conduct, i.e. Plaintiff will have to quantify his alleged losses in the form of taxes, penalties, interest, and consequential damages." Id. Finally, in a rather illogical leap of supposition, the movants maintain "the purported liability of the Hack Defendants and the damages allegedly flowing therefrom are issues which are identical in both the [Shofer litigation] and the Blum, Yumkas [matter]. Id. The contentions of Hack/Grabush are without merit.

II. CONSOLIDATION OF THE HACK AND BLUM YUMKAS CASES WOULD BE GROSSLY INAPPROPRIATE.

1. Consolidation will not serve the interest of justice.

Considering the late stage of the Hack litigation and given that the Blum, Yumkas litigation is in its infancy stage, consolidation, for all intents and purposes, is impracticable and virtually impossible. The underlying case is presently scheduled for trial on July 11, 1994, now approximately ten weeks away. The legal malpractice cannot be prepared in such a short period

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of time and to force Blum, Yumkas to so prepare would be grossly prejudicial. Moreover, Shofer, the only common party in the two cases, objects to the consolidation. As neither Hack or Grabush is a party to the Blum, Yumkas litigation, neither has standing to seek consolidation. If the Hack case is postponed to allow consolidation, such a delay would unfairly require Shofer to wait even longer for his day in court. From either perspective, consolidation at this juncture would not serve the interest of justice for either Shofer or Blum, Yumkas.

2. Consolidation is not appropriate under Md. Rule 2-503.

Maryland Rule 2-503(a), allows a trial court discretion to consolidate separate trials where such "actions involve a common question of law or fact or common subject matter." Rule 2-503(a). Only a cursory review of the separate liability and damages issues presented in Hack and Blum, Yumkas cases reveal that no such "common issues of law or fact" exist.

The Maryland Court of Appeals has reduced the Hack litigation to allegations of professional malpractice by Hack arising from his alleged failure to properly advise Shofer of tax consequences of loans from the Catalina Fund and the allegation against Grabush that its own negligence caused the plaintiff's damages. Those allegations have nothing to do whatsoever with Shofer's separate legal malpractice action against Blum, Yumkas which arises from the alleged failure to file a lawsuit within the applicable statute of limitations. Shofer's order of proof in both cases will be drastically different. In the Hack case, Shofer must present expert testimony in the area of pension consulting and tax advise. On the other hand, Shofer must present testimony of legal experts to prove his claim against Blum, Yumkas. Order of proof on the liability issues will involve separate testimony and separate documents.

Shofer's theory against Blum, Yumkas will not, as Hack/Grabush contend, require the Plaintiff to prove the identical cause of action against Hack as is asserted in the Hack case; rather, Shofer will only have the obligation to demonstrate that he had a viable cause of action under ERISA which was subject to the exclusive jurisdiction of the federal court and which Blum, Yumkas failed to file within the applicable statute of limitations. In Hack, Shofer will

have to prove that he has viable state law causes of action. Thus, the questions of liability relative to each case involve separate and distinct allegations.

Moreover, the alleged damages arising from the legal malpractice claim are those damages which would have been recoverable under a potential ERISA claim against Hack. Under the current ruling of this Court, as made by Judge Ward on May 23, 1994, those damages are distinct and separate from those damages which may be recoverable from Hack pursuant to Shofer's state law cause of action. Now pending before this Court is a Motion for Summary Judgment filed by Hack in the underlying case. A portion of that Motion asserts that the ERISA based damages, excise taxes and prohibited transaction penalties, are barred from the trial. Shofer, in his opposition, contends that such damages were part of the initial Complaint filed in 1988 and, that the Court of Appeals and Judge Ward's ruling excluding such damages is incorrect. To the extent that such damages are held to be recoverable under Shofer's common law causes of action, it may be possible for Shofer to fully recover from Hack all damages he allegedly sustained, thus, eliminating the basis of the legal malpractice claim. Accordingly, if Hack's Motion for Summary Judgment is granted as to the ERISA based damages, there will clearly be no common issues in the two cases. On the other hand, if the Court denies the Motion as to these damages, and Shofer is permitted to proceed to trial on them, then he will have suffered no damage as a result of the failure by Blum Yumkas to bring the ERISA claim in federal court within the proper limitations period. Accordingly, regardless of the Court's ruling on the pending Motion for Summary Judgment, consolidation is not appropriate.

3. No basis for indemnification or contribution exists against Blum, Yumkas.

The movants maintain that pending disposition of their Motion for Summary Judgment, a claim for indemnification and/or contribution may exist against the Blum, Yumkas law firm. There is absolutely no legal basis on which Hack and/or Grabush have grounds to seek indemnification and/or contribution from Blum, Yumkas. Under Maryland law, a claim seeking indemnification on contribution constitutes a form of derivative liability which is contingent on a

finding of liability on the main claim on the part of the party from whom contribution/indemnification is sought. Soper v. Kahn, 568 F.Supp. 398 (1983). In other words, the essence of a third party claim, which is the only method through which Hack/Grabush could assert claim for indemnification and/or contribution, is that the asserted liability of the third-party defendant to the defendant must be for all or part of the claim of the original plaintiff against the original defendant. Tradjer v. Montgomery Co., 300 Md. 539, 479 A.2d 1321 (1984), see also Md. Rule 2-332.

The damages sought from the Hack and Grabush center on allegations of negligence and breach of contract which arose in 1984 and thereafter. In no way could the law firm of Blum, Yumkas be found to be a joint tortfeasor with respect to Shofer's claim against Hack and Grabush arising out of negligent advice which occurred years before Blum, Yumkas became involved with the Plaintiff. Moreover, any such third-party claim would be untimely under Md. Rule 2-332 and subject to a Motion to Strike inasmuch as it would be filed approximately six years after the original Complaint. Accordingly, there exists no circumstance under which a claim for indemnification and/or contribution could be asserted against Blum, Yumkas.

4. The underlying Shofer litigation must proceed to judgment prior to disposition of Shofer's legal malpractice claim against Blum, Yumkas.

Until such time as the Hack claim proceeds to judgment, any alleged damages flowing from the alleged negligent actions of Blum, Yumkas are speculative. Should Shofer receive full compensation for his losses resulting from the negligence of Hack, there will be no damages which may be asserted in the separate legal malpractice claim. Accordingly, under such circumstances, Shofer will fail to present a viable legal malpractice claim in as much as such a claim requires proof of damages. See, Kendall v. Rogers, 181 Md. 606, 611-12, 31 A.2d 312 (1943). Furthermore, while no cases directly address this point in Maryland, other states have held that a legal malpractice action for loss of rights is premature where, in a suit pending on behalf of the plaintiff against the tortfeasor, those same rights are claimed. In the instant

case, Shofer in his Opposition to the pending Motion for Summary Judgment, maintains that excise taxes and prohibited transaction penalties, which form the basis of his ERISA claim, are included in and recoverable under his state common law causes of action. In the event that the Court rules that such damages may be presented in the plaintiff's case-in-chief, the legal malpractice action against Blum, Yumkas should be stayed pending a determination of whether such damages are recoverable from Hack and/or Grabush. See, Marchand v. Miazza, 151 So.2d 372 (1963); Anderson v. Anderson, 399 N.E.2d 391 (1979); Eddleman v. Dowd, 648 S.W.2d 632 (1983). Because the Blum Yumkas case cannot proceed until the underlying litigation is concluded, the cases are clearly inappropriate for consolidation.

III. CONCLUSION

For the reasons stated herein, Defendant/Counter-Plaintiff, Blum, Yumkas, requests that this Honorable Court enter an Order denying the Motion To Consolidate Cases.

Shirlie Norris Lake
Mark Anthony Kozlowski
ECCLESTON AND WOLF
7th Floor, Scarlett Place
729 East Pratt Street
Baltimore, Maryland 21202-4460
(410) 752-7474

Counsel for Blum, Yumkas, Mailman, Gutman & Denick, P.A., Defendant/Counter-Plaintiff.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of May, 1994, a copy of the aforegoing Opposition to Motion to Consolidation was mailed, postage prepaid, to Thomas H. Bornhorst, Esquire, 2236 Southland Road, Baltimore, Maryland 21207, counsel for Richard Shofer, et al. and, to Janet M. Truhe, Esquire, Ward Janofsky & Truhe, P.A., Court Towers Suite 505, 210 West Pennsylvania Avenue, Towson, Maryland 21204, counsel for Stuart Hack Company, et al.

and, to Jason L Spiegel, Esquire, Gordan Coyne & Savits, 33 Wood Lane, Rockville, Maryland 20850, counsel for Grabush Newman & Company, P.A.

Mark Anthony Kozlowski

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Law Offices
Eccleston and Wolf
Professional Corporation

7TH FLOOR, SCARLETT PLACE
729 E. PRATT STREET
BALTIMORE, MARYLAND 21202-4460
(410) 752-7474
FAX (410) 752-0611

SUITE 450
1750 K STREET, N. W.
WASHINGTON, D. C. 20006-2300
(202) 857-1696
FAX (202) 857-0762

MARK ANTHONY KOZLOWSKI

May 6, 1994

Clerk,
The Circuit Court
for Baltimore City
Courthouse East
111 North Calvert Street
Baltimore, Maryland 21202

RE: Richard Shofer, et al v. Stuart Hack, Company
Case No: 88102069/CL7993

Richard Shofer, Catalina Enterprises, Inc. and Catalina Enterprises, Inc., Pension Trust v. Blum, Yumkas, Mailman, Gutman & Denick, P.A.
Civil Action No: 93285087/CL171133

Dear Clerk:

Enclosed for filing please find an Opposition to Motion to Consolidate Cases and Notice to Strike and Enter Appearance with regard to the above-referenced case. Once filed, kindly sign and date the enclosed copy of this letter and return it to me in the self-addressed, stamped envelope I have provided.

Thank you for your attention to this matter.

Sincerely,

ECCLESTON AND WOLF

By: _____
Mark Anthony Kozlowski

MAK/ljr
Enclosures

SIGNED: _____

DATED: _____

cc: Judge Ellen L. Hollander
Thomas H. Bornhorst, Esquire
Janet Truhe, Esquire
Jason L. Spiegel, Esquire

RICHARD SHOFER, et al	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
BLUM, YUMKAS, MAILMAN, GUTMAN & DENICK, P.A.	*	BALTIMORE CITY
	*	Civil Action No. 93285087 CL171133
Defendants		

* * * * * * * * * * *

NOTICE TO STRIKE AND ENTER APPEARANCE

Please withdraw the appearance of Laurie A. Lyte, Esquire, Co-Counsel for the Defendent/Counter-Plaintiff, Blum, Yumkas, Mailman, Gutman & Denick, P.A. and, enter the appearance of Mark Anthony Kozlowski, Esquire as Co-Counsel for the Defendant/Counter-Plaintiff.

Shirlie Norris Lake
Mark Anthony Kozlowski
ECCLESTON AND WOLF
7th Floor, Scarlett Place
729 East Pratt Street
Baltimore, Maryland 21202-4460
(410) 752-7474

Counsel for Defendant/Counter-Plaintiff

CERTIFICATE OF SERVICE

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Mark A. Kozlowski

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CASE #: 88102069/CL79993

PLAINTIFF(s): RICHARD SHOFER

DEFENDANT(s): THE STUART HACK COMPANY, et al

========PERSON SERVED / DESCRIPTION / DATE, TIME / ADDRESS=======

ANDREA JACKSON	W/F - 5'6" 120LBS	5/18/94 10:25AM	100 S. CHARLES ST 3RD FLOOR BALTIMORE, MD

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L. John Boone II

PRIVATE PROCESS SERVER

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(NAME OF COURT)

Richard Shofer (PLAINTIFF/PETITIONER) vs The Stuart Hack COmpany,et al (DEFENDANT/RESPONDENT) 88102069/CL79993

I declare that I am a citizen of the United States, over the age of eighteen and not a party to this action. And that within the boundaries of the state where service was effected, I was authorized by law to perform said service.

Service: I served Maryland National Bank
NAME OF PERSON/ENTITY BEING SERVED

with the (documents) Subpoena; Attachment to Notice of Deposition Duces Tecum; Notice of Deposition'

by serving Andra Jackson . NAME RELATIONSHIP

at ☐ Home
☐ Business 100. S. Charles Street Balt, Md MNB 3rd floor.

May 12, 1994 DATE at 1200 NOON TIME

Thereafter copies of the documents were mailed by prepaid, first class mail on _____ DATE

from _____ . CITY STATE

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☐ By leaving, during office hours, copies at the office of the person/entity being served, leaving same with the person apparently in charge thereof.

☐ By leaving copies at the dwelling house or usual place of abode of the person being served, with a member of the household 18 or older and explaining the general nature of the papers.

☐ By posting copies in a conspicuous manner to the address of the person/entity being served.

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☐ **Address Does Not Exist** ☐ **Service Cancelled by Litigant** ☐ **Unable to Serve in a Timely Fashion**

Service Attempts: Service was attempted on: ( ) _____ DATE TIME , ( ) _____ DATE TIME

( ) _____ DATE TIME , ( ) _____ DATE TIME , ( ) _____ DATE TIME .

Description: Age: 30 yrs Sex: F Race: W Hgt: 5'5" Wgt: 120lbs Hair: Bl. Glasses:

I declare under penalty of perjury that the information contained herein is true and correct and this affidavit was executed on

May 12, 1994 DATE Baltimore CITY MD STATE

Les Jenkins P.P.S
SIGNATURE OF PROCESS SERVER

Les Jenkins

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State of
County of

subscribed and sworn before me, a notary public, this _____ day of _____ .

WITNESS MY HAND AND OFFICIAL SEAL TO

_____
NOTARY PUBLIC

RICHARD SHOFER	*	**IN THE**
Plaintiff	*	**CIRCUIT COURT**
v.	*	**FOR**
THE STUART HACK CO. ET AL.	*	**BALTIMORE CITY**
Defendant	*	
* * * * * * *	*	**CASE NO. 88102069/CL79993**
THE STUART HACK CO. ET AL.	*	
Third-Party Plaintiff	*	
v.	*	
GRABUSH, NEWMAN & CO., P.A.	*	
Third-Party Defendant	*	

* * * * * * * * * * * * *

MEMORANDUM OPINION AND ORDER

Introduction

Defendants Stuart Hack ("Hack") and The Stuart Hack Company (together, "Defendants") have filed a "Motion for Summary Judgment Or, In The Alternative, Partial Summary Judgment As To Plaintiff's Damages" (the " Motion"). Defendants argue that the causes of action asserted by Plaintiff Richard Shofer ("Plaintiff" or "Shofer") in his Third Amended Complaint are wholly preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-461 (1988 & Supp. 1994) ("ERISA"), and, alternatively, that Plaintiff is not entitled to certain categories of damages which he claims.

Factual Background

The long history of this case has been thoroughly chronicled elsewhere,[1] and will only be repeated here to the extent relevant to the present issues. While there are many material facts which remain in dispute, the material facts pertinent to the legal issues presented by Defendants' Motion are largely undisputed.

Shofer is the sole shareholder and president of Catalina Enterprises, Inc. ("Catalina"), trading as Crown Motors. He is also the sole trustee of Catalina's qualified pension plan. The Stuart Hack Company ("Hack Co."),[2] a pension plan consulting firm, was hired by Shofer to prepare and administer Catalina's pension plan. Sometime prior to August 9, 1984, Shofer had a telephone conversation with Hack concerning the use of funds in Shofer's accounts in the Catalina pension plan, either as a loan from the plan or as security for a loan. Hack replied in a letter of August 9, 1984, stating that "you can use your voluntary account as collateral for a loan or you can borrow up to 100% of your voluntary account. The terms of the loan must be reasonable as to the interest rate and pay back period." Defendants' Memorandum In Support of the Motion, Exhibit C (letter from Hack to Shofer).

In nine transactions between August 9, 1984 and September 30, 1986, Shofer borrowed $375,000 from the Catalina pension plan. Shofer used these proceeds to repay loans from Catalina, and to purchase and refurbish property in the Virgin Islands. Grabush, Newman & Co., P.A. ("Grabush"), the accountants for Catalina and Shofer, had prepared

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[1]In particular, this court relies on the case history recounted by the Court of Appeals in Shofer v. The Stuart Hack Co., 324 Md. 92, 95-98 (1991) (hereinafter referenced as "Shofer I").

[2]Stuart Hack is the president of Hack Co.

Catalina's tax returns for the tax years 1984, 1985, and 1986, without including the funds Shofer had borrowed from the plan as income. Eventually, Grabush discovered that such use of pension funds constituted a distribution for income tax purposes and advised Shofer of his tax liabilities for those loans. Subsequently, Shofer was required to pay additional income taxes, penalties, and interest, amounting to more than $120,000. In addition, tax liens were placed on Shofer's Virgin Islands property, which he claims prevented him from refinancing the loans for that property at a lower interest rate.

In April of 1988, Shofer sued Defendants in the Circuit Court for Baltimore City; Shofer complained inter alia, that Defendants failed to advise Shofer of the tax consequences attendant to use of the pension funds. Shofer asserted various grounds for relief, including several state law claims (contract, tort, and breach of fiduciary duty) and several ERISA-based theories. Defendants impleaded Grabush as a third-party defendant. Defendants also moved to dismiss Plaintiff's complaint on the ground that the Maryland common law claims were preempted by ERISA, and that the ERISA claims could only be heard in federal court. Judge David Ross dismissed all claims against Hack, with prejudice, and Shofer appealed.[3] The Court of Appeals issued a writ of certiorari upon its own motion before the Court of

[3]At that time, Shofer was represented by the law firm of, Blum, Yumkas, Mailman, Gutman & Denick, P.A. On October 19, 1990, following the dismissal by Judge Ross, Shofer's counsel instituted suit in federal district court on the ERISA claims. Shofer v. Stuart Hack Co., 753 F.Supp. 587 (D.Md. 1991). However, the suit was dismissed on statute of limitations grounds. The dismissal was affirmed by the Fourth Circuit. Shofer v. Stuart Hack Co., 970 F.2d 1316 (4th Cir. 1992). Shofer has since sued his original attorneys in the Circuit Court for Baltimore City (Case No. 93285087-CL171133).

Special Appeals heard the matter.[4]

The Court of Appeals reversed in part, and vacated in part. After surveying the cases addressing ERISA preemption, the Court held that ERISA does not preempt Shofer's state law malpractice claims against nonfiduciaries. Shofer I.[5] But only the Maryland law claims (Counts I and II) which survived; all of the ERISA based claims were held to be preempted. The Court then determined that Shofer could recover, as damages, for his income tax liability. However, the Court ruled out recovery for other contingent, consequential damages which Plaintiff might suffer based on Defendants' alleged malpractice.

As to the state law claims, Hack had argued for preemption because Shofer sought to preserve contingent damages, including additional taxes which might flow from a decision of the Internal Revenue Service that the loans constituted "prohibited transactions," damages for ultimate disqualification of the plan, and for excise taxes on prohibited transactions. Id. at 110-111. The Court did not squarely address whether pursuit of such contingent damages would require ERISA preemption.[6] Instead, the Court said: "We consider Shofer's counsel's statement [at oral argument] to be a concession limiting the scope of the damages claimed . . . so as to exclude the three above-described 'contingent liabilities.' As so limited, potential plan disqualification as a basis for [Hack's] argument is not in the case."

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[4]Hack's claims against Grabush were never adjudicated, but the Court of Appeals entered a final judgment under Maryland Rule 2-602(e)(1)(C).

[5]The Court of Appeals acknowledged a factual dispute as to whether Hack was a fiduciary under the plan, Shofer I, at 100-01, but, for purposes of the appeal, determined Hack was not a fiduciary. Id., at 98. The parties agree that Defendants are not "fiduciaries" as defined in ERISA. See also Shofer I, 324 Md. at 98-101.

[6]The Court also did not discuss whether its decision would have been different if the damages in question were not merely contingent.

Id., 324 Md. at 111.

On December 10, 1992, Shofer filed his Third Amended Complaint, in which he raised claims for damages based on "income tax, excise tax, interest, penalties, attorney's fees, accountant's fees, loss of income, and other expenses and damages" under the theories of breach of contract and negligence. See Defendants' Memorandum in Support of the Motion, Exhibit F (Shofer's itemization of damages). He also seeks punitive damages. On January 5, 1993, Defendants filed a motion to dismiss the Third Amended Complaint, relying in part on Shofer I. On February 17, 1993, Judge Thomas Ward issued an Order dismissing the punitive damages claim, and prohibiting recovery of damages for "excise taxes, prohibited transactions or plan disqualification." His Order also limited the available damages to income taxes and professional fees relating to those taxes. On February 28, 1994, Defendants filed the Motion which is the subject of this opinion.

Discussion

I. Preemption of State Law Malpractice Claims

Defendants argue that, in light of dicta in the recent Supreme Court case of Mertens v. Hewitt Assoc., ___ U.S. ___, 113 S.Ct. 2063, 2071 (1993), all of Plaintiff's theories are preempted by ERISA, whether those theories are based upon Maryland law or upon ERISA itself. This court disagrees.

In Shofer I, the Court of Appeals had relied primarily on Mackey v. Lanier Collection Agency & Serv., 486 U.S. 825 (1988), and Painters of Philadelphia Dist. Council No. 21 Welfare Fund v. Price Waterhouse, 879 F.2d 1146 (3d Cir. 1989), to find that

Shofer's state law claims are not preempted by ERISA. In analyzing ERISA preemption, the Court in Shofer I focused on the fact that the Mackey and Painters cases were significantly similar to the present case. Shofer I, 324 Md. at 101-09. Mackey concerned the validity of a special Georgia statute expressly exempting ERISA-plan benefits from common law garnishment. The Supreme Court first held that ERISA preempted the statute, 486 U.S. at 830, and then went on to reason that Congress necessarily contemplated that benefits from an ERISA plan would be subject to garnishment under state law. Id. at 831-33. The Court said:

> ERISA plans may be sued in a second type of civil action, as well. These cases--lawsuits against ERISA plans for run-of-the-mill state-law claims such as unpaid rent, failure to pay creditors, or even torts committed by an ERISA plan--are relatively commonplace. Petitioners . . . concede that *these suits, although obviously affecting and involving ERISA plans and their trustees, are not preempted by ERISA.*

Id. at 833 (footnote omitted; emphasis added).

More relevant to the present facts, Painters concerned a malpractice suit by ERISA-plan trustees against an accounting firm performing yearly audits of the plan, for failure to uncover fraud by the plan administrator. In rejecting the defendant's preemption argument, the Painters court relied on Mackey to hold that ERISA does not generally preempt state professional malpractice actions. 879 F.2d at 1153 n.7. Accord, Pappas v. Buck Consultants, Inc., 923 F.2d 531, 540 & n.1 (7th Cir. 1991) (dicta, apparently agreeing that ERISA does not preempt certain state law malpractice claims).

Defendants now urge that the Court of Appeals would have decided Shofer I differently if it had been able to consider Mertens. On the surface, Mertens appears to have

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significant similarities to the instant case. Upon closer examination, however, it does not apply here. In Mertens, the plan participants sued the actuary that had performed the actuarial work for the plan, along with all fiduciaries of the plan, on the theories of breach of duty based on ERISA and malpractice based on California law. The federal district court dismissed the malpractice claims on the ground that they were barred by the applicable statute of limitations, and plaintiffs appealed. Mertens, 948 F.2d at 609. After discussing the "discovery rule" under California law, the Ninth Circuit reversed and remanded the malpractice claims, expressly authorizing the district court to allow the claim to continue if, in its discretion, it wished to exercise pendent jurisdiction. Id., 948 F.2d at 613-14.

The Supreme Court granted certiorari as to the limited question of "whether ERISA authorizes suits for money damages against nonfiduciaries who knowingly participate in a fiduciary's breach of fiduciary duty." Mertens, 113 S.Ct. at 2066. Among other arguments, the petitioners relied on ERISA § 502(a)(3), which allows for "appropriate equitable relief," as a basis for claiming what the Supreme Court characterized as "nothing other than compensatory damages." Mertens, 113 S.Ct. at 2068. Petitioners warned that if the scope of remedies available under ERISA § 502(a)(3) were not extended to cover all relief available under common law for breach of trust, a prospective plaintiff would not be able to recover damages--either under ERISA or under corresponding state law claims, which petitioners asserted were preempted. Id. at 2066-71. In other words, if the Court interpreted narrowly the scope of available remedies under ERISA § 502(a), it would create a "gap" of injury for which there would be no recovery; that, according to petitioners, would be inconsistent with the purpose of ERISA. The Court stated:

> In the last analysis, the petitioners . . . ask us to give a strained interpretation to § 502(a)(3) in order to achieve the "purpose of ERISA to protect plan participants and beneficiaries." . . . They note, as we have, that before ERISA nonfiduciaries were generally liable under state trust law for damages resulting from knowing participation in a trustee's breach of duty, and they assert that such actions are now pre-empted by ERISA's broad pre-emption clause. . . . Thus, they contend, our construction of § 502(a)(3) leaves beneficiaries like petitioners with *less* protection than existed before ERISA, contradicting ERISA's basic goal of "promot[ing] the interests of employees and their beneficiaries in employee benefit plans."
>
> Even assuming (without deciding) that petitioners are correct about the pre-emption of previously available state-court actions, vague notions of a statute's "basic purpose" are nonetheless inadequate to overcome the words of its text regarding the *specific* issue under consideration. This is especially true with legislation such as ERISA, an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests--not all in favor of potential plaintiffs.

Id. at 2071-72 (citations omitted; emphasis in original).[7]

In the instant case, Defendants argue that the second paragraph of the above passage, quoted from Mertens, necessarily implies that the petitioners in that case were "correct about the pre-emption of previously available state-court actions," Id., even though the Court refused to extend its holding to that effect. Such an argument stretches the limits of logic. The only issue then before the Court was whether ERISA § 502(a)(3) authorized recovery of money damages from nonfiduciaries for breaches of duties imposed by ERISA upon fiduciaries. Id., 113 S.Ct. at 2067-68 & n.5. In this context, the passage merely indicates that the holding was correct *even if* state common-law actions would be preempted, and that petitioners' reference to ERISA's underlying purpose did not avail them.

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[7]The dissent in Mertens, citing Ingersoll-Rand Co. v. McClendon, 111 S.Ct. 478 (1990), wondered whether any state law action could survive the implications of the Mertens decision. Mertens, 113 S.Ct. at 2074 n.2. In McClendon, the Court struck down a Texas statute that expressly permitted suit for abusive discharge when the employer's motive was to defeat the employee's ERISA-protected pension rights, based on the fact that the statute was premised on the existence of an ERISA pension plan. 111 S.Ct. at 483.

> All that ERISA has eliminated, *on these assumptions* [that money damages are available under 29 U.S.C. § 502(a)(3)], is the common law's joint and several liability, for *all* direct and consequential damages suffered by the plan, on the part of persons who had no real power to control what the plan did. Exposure to that sort of liability would impose high insurance costs upon persons who regularly deal with and offer advice to ERISA plans, and hence upon ERISA plans themselves. There is, in other words, a "tension between the primary [ERISA] goal of benefitting employees and the subsidiary goal of containing pension costs.

Id., 113 S.Ct. at 2072 (first emphasis added; second emphasis in original).

Other remedies for other tortious conduct are apparently not affected by Mertens. Accordingly, this court cannot conclude, as Defendants argue, that had the Court of Appeals had the benefit of Mertens, its ruling would have been different. Nor is this court prepared to rely on Mertens as a basis to overrule Shofer I.[8] Accordingly, this court concludes that Plaintiff's malpractice claims are not preempted.

II. Damages

In the Third Amended Complaint, Shofer claims six distinct types of damages: income taxes, excise taxes, tax penalties, lost opportunity to refinance his St. Thomas property,[9] fees from professional advisors, and lost salary and profits. Third Amended Complaint, ¶¶ 12, 18, 19, 23; see also, Defendants' Memorandum in Support of the Motion,

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[8]It is hardly appropriate for the trial judge to overrule the appellate court.

[9]At the hearing before this court, Shofer conceded that a lost opportunity to take advantage of favorable mortgage rates, coming some four to six years after the allegedly negligent advice, was too speculative; he has therefore dropped his claim for this type of damage.

Exhibit F.[10] Defendants argue that Shofer I and Judge Ward's Order of February 7, 1993 both limited Plaintiff's potential recovery to income taxes and professional fees. Defendants maintain that all other damages, such as recovery for excise taxes, are preempted. Apart from the costs of professional advice, Defendants also claim that all other forms of damage were so unforeseeable as to preclude recovery.

A. Preempted Damages

At the appellate argument, counsel for Shofer "submitted that 'if the Court reads [the State law claims in] Counts I and II there is no mention of prohibited transactions. There is no mention of excise taxes for prohibited transactions.'" Shofer I, 324 Md. at 111. The Court then determined that Plaintiff's counsel conceded Shofer could not recover for so-called, "'[c]ontingent liabilities,' which included [damages for] 'disqualification of plan'; 'cost of "undoing" prohibited transactions'; and 'excise tax on prohibited transactions.'" Id. (quoting Shofer's answers to interrogatories). Accordingly, the Court said that a claim for malpractice that excludes the three "contingent liabilities" is not preempted by ERISA. It further determined that damages arising from plan disqualification are "not in the case." Id. Indeed, Shofer has received the benefit of a ruling by the Court that he may pursue his malpractice claim. Had the Court considered the claim as including the specified damages, the Court may well have ruled that it was preempted.

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[10]At the hearing before this court, the parties explained that borrowing from the plan constituted a distribution to Shofer, generating income tax liability, as well as a prohibited transaction by an interested party to the pension plan, generating excise tax liability. Shofer also suffered the tax penalties because he did not timely and correctly file his tax returns following the plan transactions.

Hack now argues that this court is bound by the decision in Shofer I. Hack also claims that the reason excise taxes are preempted is because, in order to determine whether a party is "interested" and a transaction regarding an ERISA plan is "prohibited," one must refer to the plan and interpret ERISA itself. Shofer responds, inter alia, that there is no substantive difference between income and excise taxes, vis-a-vis the plan or otherwise. Thus, if Defendants' argument were correct, income taxes would be equally preempted, but the Court of Appeals ruled they were not. Shofer also asserts that the issue of the contingent damages really was not addressed by the Court of Appeals, based upon the "concession" of prior counsel, and because the damages then were contingent only.

In response to this court's questions, counsel for Defendants could not fully explain why income taxes, on the one hand, are compensable while excise taxes, on the other hand, are not. Nevertheless, this court finds itself between the proverbial "rock and a hard place:" the Court of Appeals seems to have spoken as to the status of Plaintiff's claims for damages, and this court is bound by that ruling.[11] Kline v. Kline, 93 Md. App. 696, 700 (1992) (under the doctrine of the "law of the case," a ruling by an appellate court upon an issue becomes binding on the courts and litigants in further proceedings in the same matter). Moreover, by an Order dated February 17, 1993, Judge Ward also ruled that Plaintiff cannot pursue these damages, based on Shofer I. Therefore, this court will treat these categories of damages as excluded from Plaintiff's claims.

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[11]The Court said it "vacate[d the] judgment as to Counts I and II, on which the damages sought are limited as aforesaid...." 324 Md. at 113 (emphasis added).

B. Unforeseeable Damages

Plaintiff seeks three additional types of damages which Defendants maintain are too unforeseeable to permit recovery. Specifically, Shofer seeks recovery for tax penalties arising from the failure to borrow funds from the plan according to the correct procedure, fees from professional advisors, and lost salary and profits. Defendants' Motion, ¶¶ 9, 14, 16; Plaintiff's Opposition to Defendant's [sic] Motion for or Partial as to Plaintiff's Damages, at 7-12.

It is well settled that negligence is not actionable unless it is a proximate cause of the injury alleged. Atlantic Mut. Ins. Co. v. Kenney, 323 Md. 116, 127 (1991). It is also axiomatic that the harm for which recovery is sought must be foreseeable. "The actor's conduct may be held not to be a legal cause of harm to another where[,] after the event and looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm." Stone v. Chicago Title Ins. Co., 330 Md. 329, 337 (1993) (quoting Restatement (2d) of Torts, § 435(2) (1965)). Cf. Id., 330 Md. at 339 (quoting at length from Hadley v. Baxendale, 9 Exch. 341 (1954) (Eng.)).

The case of Stone v. Chicago Title Ins. Co. is particularly instructive. There, Stone, a stock speculator, hired an attorney to help finance the purchase of property. Stone did not tell the attorney that Stone intended to have the property readily available as collateral for loans. The attorney failed to record the release deed of trust in a timely manner. As a consequence, when Stone's broker imposed a margin call, the financing bank refused to advance loan proceeds to Stone until that release had been recorded, and because Stone had no other ready source of cash, he was forced to sell stock at a loss to cover his stock debts.

Ruling that Stone could not recover from the attorney for the stock loss, the Court stated:

> . . . Stone would have us hold that his loss arising from the . . . collapse in the market in certain stocks in which he was speculating was proximately caused by his sale of those stocks, which was caused by his lack of funds to pay off other loans, which was caused by his inability to secure a second mortgage before [the margin call], which in turn was caused by [the attorney]'s failure to record timely the release of the extinguished lien on his home. He argues that but for [the attorney]'s negligence he would have secured a home equity loan and used the proceeds to meet his broker's margin call, thus avoiding the sale of stock to raise capital in a falling market. We disagree. . . .
>
> There was no allegation . . . that [the attorney] or his firm had knowledge at any time that Stone was buying stock on margin. No reasonable person would have foreseen that almost a year after the settlement which [the attorney] conducted Stone would have an emergency need for cash, would attempt to borrow against his home to satisfy that need, and unable to do so would have to sell stock in a depressed market to raise it. Furthermore, there is no allegation that [the attorney] was notified of Stone's financial crisis at the time the problem was brought to his attention.

Id., 330 Md. at 340-41.

In the instant case, Shofer is claiming that Hack should have foreseen, at the time he wrote his letter to Shofer, that the possible consequences of Hack's negligent advice included tax penalties incurred by Shofer's own failure to file his tax returns properly and on time, as well as Catalina's lost revenues and decrease in inventory (and, consequently, Shofer's lost income) due to an extensive tax burden, and lost income and revenue flowing from the time Shofer has had to devote to this litigation.[12] Applying Stone here, it is clear that Shofer's

[12]Shofer makes these claims even though he admitted that during the period in which he borrowed from the fund he never asked anyone about the procedure to borrow money and never told Hack that he was in fact borrowing money from the pension fund. Defendants' Memorandum in Support of Defendants' Motion, at 7-8, 18-19 (citing the Deposition of Shofer, February 2, 1990, attached as Exhibit B, and the Deposition of Hack, March 16, 1989, attached as Exhibit D). Further, Shofer makes these allegations even though Grabush, the tax-preparer for two critical years, may have made omissions constituting professional negligence, which may constitute a superseding cause.

claims demand too much of the concept of foreseeability. As a consequence, these damages cannot be recovered.

Conclusion

Plaintiff's state law malpractice claims are not preempted. However, Plaintiff can only seek recovery of damages in accordance with the limitations set forth in Shofer I and Judge Ward's Order of February 7, 1993. Based on the foregoing, it is, this 11th day of July, 1994, by the Circuit Court for Baltimore City, ORDERED that Defendant's Motion for Summary Judgment be, and the same hereby is, DENIED. It is further ORDERED that Defendant's Motion for Partial Summary Judgment as to the Plaintiff's Damages be, and the same hereby is, GRANTED.

Ellen L. Hollander

Judge Ellen L. Hollander

cc: Thomas H. Bornhorst, Esq.
Janet M. Truhe, Esq.
Mark A. Kozolowski, Esq.
Jayson L. Spiegel, Esq.

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VOL. I.

RICHARD SHOFER		:	IN THE
	Plaintiff	:	CIRCUIT COURT
v.		:	FOR
THE STUART HACK COMPANY, et al.		:	BALTIMORE CITY
	Defendants	:	Case No. 88102069/CL79993

Baltimore, Maryland

February 2, 1990

Deposition of RICHARD SHOFER, Plaintiff, called for oral examination by counsel for the Defendants, taken at the law offices of Semmes, Bowen & Semmes, Conference Room 17-A, 250 West Pratt Street, beginning at 10:12 a.m.

A P P E A R A N C E S

THOMAS A. BOWDEN, ESQ., on behalf of the Plaintiff.

JANET M. TRUHE, ESQ., and LEE B. ZABEN, ESQ., on behalf of the Defendants.

LINDA M. SCHUETT, ESQ., on behalf of the Third-Party Defendant, Grabush & Newman.

Reported By: Dawn M. Hart, CSR
Riggleman, Turk & Nelson
(301) 539-6398

that I'd gotten from Mr. Hack that I could borrow up to the limit of what was in my voluntary account.

Q No, that's not my question.

A Okay. I, I had intended initially on borrowing, I think two hundred and fifty thousand, I'm not sure.

Q All right.

A Two hundred, two hundred fifty, somewhere in that, I don't remember.

Q Did you tell Mr. Wilson how much money you were planning to borrow?

A Probably. Yes, it was probably part of the plan but I -- I can't remember exactly what I said to Mr. Wilson or what figure that I might have said.

Q All right. And the reason why you would be giving this money to Crown Motors is that, is because you owed Crown Motors seven to eight hundred thousand dollars anyway; isn't that correct?

A Yes.

Q Did you tell Mr. Hack you were planning to borrow approximately two hundred and fifty thousand dollars?

A I don't recall that any specific amount was

mentioned or not.

Q But you think you probably, you mentioned the amount to Mr. Wilson?

A Probably, yes, I -- I can't imagine that there was any part of any major financial transaction I would have had that I wouldn't have made him privy to or aware of.

Q Let me get back to my earlier question. Did you discuss this loan from your pension plan idea with anyone other than Mr. Hack and Mr. Wilson in August of 1984?

A Probably others at the bank. There, if there were any other -- let's see, Mr. Wilson had a supervisor, I think the supervisor may have been Barry Blumberg, and I'm not sure, but -- by this time, see, my relationships with the loan officer sort of changed from time to time and I think I had such a good relationship and good working relationship with Mr. Wilson that I didn't, I might not have even spoke with others at Maryland National then, I, it might have just been him. And other than he, Sally.

Q Anyone else?

A I don't think so.

Q Did you ever discuss this idea with anyone at

Grabush Newman?

A I don't think so.

Q With regard to personal tax questions, generally who would you go to for tax advice during this period, during 1984?

A Just Grabush Newman.

Q So it would be your habit whenever you had a personal tax question to contact Grabush Newman?

A Yes. Another name comes up to me now that I sort of forgot before lunch.

Q Who is he?

A He's a tax man at Grabush Newman's that I have great faith in. I --

Q You discussed --

A I would initially always go to Ken LaRash but would suggest to Ken if it was an important issue would he pass it by Phil Matz. There may have been one or two occasions where some issue came up that I requested Phil Matz to be involved in.

Q Did you consult with Mr. Matz at anytime in August of '84 with regard to this idea of borrowing money from your

pension plan?

A No.

Q Why not?

A I didn't think there was a tax issue involved in it.

Q Other than those that you have identified, Mr. Wilson, perhaps Mr. Blumberg and others at Maryland National Bank, Sara, and Mr. Hack, did you discuss your loan idea with anyone else in August of 1984?

A I can't think of anyone right now.

Q All right.

MR. BOWDEN: Did you say Sara or Sally?

Q One in the same?

A Sara is her proper name.

MR. BOWDEN: Is that what it is?

MS. TRUHE: Sally is the alias.

MR. BOWDEN: Same woman.

MS. SCHUETT: That clears up a couple of questions I had.

(Discussion off the record.)

MR. BOWDEN: Sara is her proper name and Sally

Q Over an hour or under an hour?

A Oh, I don't think any -- excuse me. But I don't think any telephone conversation with Stuart lasted more than, I can't ever remember talking more than, I think twenty minutes at the most, I -- and you know, it could have been five minutes or ten, but I don't -- you know, a half an hour was a long, or more is a long conversation and I don't think, I can't remember having that much of a conversation with Stuart ever.

Q All right. On this particular occasion --

A At least on the telephone.

Q Okay. Generally speaking, I understand that, on this particular occasion when you first mentioned this idea to Mr. Hack, what did you say to him?

A I don't know what I said because I don't remember the conversation.

Q All right. At all?

A Not really, you know, I can surmise what I must have, that what the subject matter must have been but I can't really specifically remember.

Q So you can only speculate as to what you might

have said?

A That's right. Now, I can't remember whether it was morning or afternoon.

Q All right. Do you recall telling Mr. Hack why you wanted to borrow money from your pension plan?

A I don't recall if I did or didn't.

Q Do you have any notes concerning your telephone conversation with Mr. Hack this first occasion?

A No.

Q Do you have any notes concerning telephone conversations with Mr. Hack on this matter at all prior to the first time you borrowed money?

A No. I've seen memos from people and normally it's not my habit to -- I don't, I don't have a memo calendar, diary, and don't take notes like a lot of professionals do. I -- I do sometimes scribble names on folders or something if it's something that I know that I have to remember that I can't commit to normal memory, that if a new person called me that I didn't know him about an issue and he wanted to give me a phone number, I had a file on an issue I might scratch it on a piece of paper and put it in that file so I'd know

his name and phone number. But if it's about an issue that I can commit to memory and I know or I feel that I can commit it satisfactorily to memory, I don't make notes.

Q Why did you call Stuart Hack on this matter?

A Because he was the logical one to call.

Q Well, what were you trying to get from him, what type of information?

A I wanted to know the appropriateness and feasibility of borrowing from the pension if I could.

Q In other words you wanted to know whether it was lawful?

A I wanted to know anything about it that was relevant to borrowing and lawful particularly.

Q Do you recall whether you asked him about any personal tax consequences to you of borrowing money from your pension plan?

A I don't remember whether I did or didn't, but I can almost assuredly surmise that I didn't.

Q Why do you think you didn't?

A Because I didn't imagine that there would be any tax consequences. I didn't think it was a tax issue or a

Wilson.

Q Other than the ones we've talked about already?

A No, as I repeat that I can't think of anyone.

Q All right. Did you advise Mr. Hack in August of 1984 that you were going to take one loan?

A I can't recall my conversations with Mr. Hack in August of '84.

Q All right. Following your discussions with Mr. Hack in August of '84, did you take any money from your pension plan?

A Yes.

Q When was the first time?

A I don't know the date, but I think, I think it was August 8th, I think, fifty thousand dollars.

Q All right. In your Answers to Interrogatories you stated that the first time you took money was August 9th, 1984.

A Maybe it was, you know, saying --

Q Why did you take money on this particular date?

A I can only assume that because I had been assured verbally by Mr. Hack of the appropriateness of it, that I

the biggest of all of them, probably Glen Wilson was aware of that transaction somehow. I don't specifically recall any conversations, but I'm going to assume he was aware of it in some way.

Q Do you recall whether you advised Mr. Hack that you were taking money, this money a second time from your pension plan?

A I don't recall having any conversations with Mr. Hack after getting that letter in August.

Q Do you recall having any conversations with Mr. Hack after getting the August 4, 1984 with reference to any of the loans that you took from your pension plan through 1986?

A Through 1986?

Q Yes, through the last, the time of the last loan you took.

A Okay.

MR. BOWDEN: What was that time, just so --

A September 30th, '86.

Q Okay. So from August 9th, 1984 to September 30th, 1986, do you recall having any conversation, conversation

with Mr. Hack about taking money from your pension plan?

A No.

Q Did you repay the second loan?

A A hundred and fifty thousand, I think most of that has been repaid at this time. I would have to look at my own statements, but I think most of it has been repaid.

Q Do you recall when you repaid it?

A 1988. Sometime during the calendar year 1988.

Q Where did you get the money to repay that second loan?

A I think part of it was salary from Crown Motors. Part of it was that -- I think in the beginning of '88, the very beginning of '88, I repaid sixty-some thousand dollars by means of permanently -- there was a portion of my voluntary account that represented funds that I had put in myself out of -- in other words, there's an employer contribution and an employee contribution. Well, this was my employee funds, the, the aggregate amount of my employee funds accumulated over the years was sixty-some thousand dollars.

Now, on that money income taxes had already been

did anyone assist you in taking the loan from your pension plan?

A No. Not that I can remember.

Q What documents did you prepare in connection with the sixth loan?

A A note dated July 30th, 1985.

Q Is that a copy of the note that appears at the top of Deposition Exhibit 2-B?

A Yes.

Q And did you prepare that note?

A Yes.

Q Did you consult with or tell anyone about this sixth loan --

A Not that I can recall.

Q -- other than your wife?

A Not that I can recall.

Q Were you planning to repay that loan?

A Yes.

Q At what rate of interest?

A Twelve percent.

Q Did you decide the interest rate?

A Yes.

Q Did you repay the loan?

A No.

Q Why not?

A It's not due yet.

Q Is that note also due on demand?

A Yes.

Q Did there come a time when you borrowed additional money from your pension plan?

A Yes.

Q When was that?

A August 13th, 1985.

Q How much did you borrow?

A Twenty-five thousand dollars.

Q Why did you borrow twenty-five thousand dollars?

A I had an impulse, I had something that had been festering in my mind for a few years and I thought I wanted to buy a condominium downtown in Harbor Court and I borrowed it to put down as an option. It was sort of like an option money, a refundable option money on purchasing a condo in Harbor Court.

A Not that I recall.

Q Were you planning to repay the loan?

A Yes.

Q What was the rate of interest?

A Twelve percent.

Q Did you decide the rate of interest?

A Yes.

Q Did you repay the loan?

A No.

Q Why not?

A It's not due yet.

Q When is it due?

A Well, my understanding now -- it's due on demand according to the note, but my understanding now is according to pension law it has to be repaid within five years of the date that it's taken.

Q Did there come a time when you borrowed additional money from the pension plan?

A Yes.

Q When was that?

A September 30th, 1986.

Q How much money did you borrow?

A Thirty-five thousand dollars.

Q Why did you borrow thirty-five thousand dollars?

A Now we get to the Harbor Court deposit, I think, if I recall I used twenty-five thousand dollars of it as a refundable deposit on a condominium at Harbor Court.

Q What did you do with the rest?

A And I think the rest, I don't know but it may have gone to either pay a tax bill, a personal obligation or to repay a portion of debt to Crown Motors. I really don't know how the other ten thousand dollars went.

Q Okay. I believe you stated in Answers to Interrogatories that this money went again to refurbishing Virgin Island property, would to that extent your answer to that Interrogatory be incorrect?

A I think on the '86 -- yes, I think the Harbor Court had something, I think that had something to do with Harbor Court --

Q Okay.

A -- deposit.

Q All right. Could you have gotten this money from

VOLUME III

RICHARD SHOFER	:	IN THE
Plaintiff	:	CIRCUIT COURT
v.	:	FOR
THE STUART HACK COMPANY, et al.	:	BALTIMORE CITY
Defendants	:	Case No. 88102069/CL79993

Baltimore, Maryland

April 1, 1993

Continued deposition of RICHARD SHOFER, Plaintiff, called for oral examination by counsel for the Defendant, The Stuart Hack Company, taken at the law offices of Bernstein, Sakellaris & Ward, Suite 2852, The World Trade Center, beginning at 9:10 o'clock a.m.

Reported By: Beatriz D. Fefel, RPR, Notary Public
Riggleman, Turk & Nelson
(410) 539-6398

seventy-six-six of a debt obligation to do other things with.

MR. GILDAY: This was paper?

A Pay, pay, pay income, pay income taxes that were going to be coming due, pay income taxes that were going to be coming due, legal fees coming due, professional fees that were going to be coming due. Any matter of expense that I was obligated to be involved in.

Q Did you understand when you took the seventy-six-six out of your voluntary account that you would be losing the tax shelter on the growth of that money?

A **Yes.**

Q All right.

A I resisted wanting to do that because of that. And it became a, a lesser of two, whatever was the lesser of two evils.

Q How much money have you paid to Blum-Yumkas for legal fees?

A Approximately a hundred thousand.

Q Do you owe them any money?

A Approximately sixty thousand more.

Q Did you agree to pay Blum-Yumkas on an hourly

VOL. IV.

RICHARD SHOFER	:	IN THE
Plaintiff	:	CIRCUIT COURT
vs.	:	FOR
THE STUART HACK CO., et al.	:	BALTIMORE CITY
Defendants	:	Case No. 88102069/CL79993

Baltimore, Maryland

October 22, 1993

Deposition of RICHARD SHOFER, Plaintiff, called for oral examination by counsel for the Defendants, taken at the law offices of BERNSTEIN, SALKELLARIS, WARD & TRUHE, before Henny Hunter Gerard, Notary Public, beginning at 10:00 o'clock a.m.

Reported By:
Henny Hunter Gerard, RPR-CM
Riggleman, Turk & Nelson
(410) 539-6398

Thereupon ---

RICHARD SHOFER

Plaintiff, called for oral examination by counsel for the Defendants, having been first duly sworn by the Notary Public, was examined and testified as follows:

EXAMINATION BY MS. TRUHE:

Q Mr. Shofer, before we get into the nitty-gritty of your damages in this case, I would like to review for a moment the information pertaining to your loans from the pension in the years 1984, 1985 and 1986.

In 1984, you took three loans from your pension, is that correct?

A Yes.

Q The first one was on August 9th, 1984 in the amount of $640,000?

A I believe that is correct. I have not looked at any notes but I believe it is correct from my recall.

Q Showing you what has been previously marked in this case as Shofer Deposition Exhibits 2-A and B, I believe these are the notes you wrote to the pension for all the various amounts of the money which you borrowed during the three

years.

A Yes. I notice that there is no note for the 60,000 that I see here.

Q Do you know where that is?

A There may not have been a note produced because it was intended to be a short-term loan anyway. It was only intended to satisfy a short-term need until I could replace it with a more permanent larger loan.

Q Do you know --

A So it was paid off quickly.

Q Do you know whether there was ever a note for the August 9th, 1984 loan in the amount of $60,000?

A I can't recall at this time whether there was. There may have been and it may have been destroyed when it was paid off, but I can't recall.

Q The next loan you took was on August 23rd, 1984 in the amount of $150,000, is that correct?

A Yes.

Q And then the third loan you took was on September 5th, 1984 in the amount of $50,000, isn't that correct?

A Yes.

Q So the total amount of money you borrowed from your pension in 1984 was $260,000, is that correct?

A Well, not exactly, because I repaid the $60,000 loan before I took the $150,000 loan. So my thoughts at the time were that since one replaced the other, that the total borrowing as of the time I took the August 23rd loan was 150,000 because the 60,000 had been repaid.

Q That is why I am confused.

On August 9th, 1984 you withdrew from your pension $60,000, correct?

A Well, this does not show that. But I believe that is true.

Q And then on August 23rd, 1984, you withdrew, as reflected by the note in that exhibit, $150,000, is that correct?

A Yes, but simultaneously I repaid the 60. So at that time I had a total loan from the pension of 150.

Q Well, when you say you repaid the 60, what did you repay the 60 with?

A With a check.

Q From your own money?

A I don't have any documentation to substantiate how it was repaid, but my recall is I wrote a check back to the pension for the 60 plus the accrued interest on the 60 at that time and started afresh with 150. And my mindset was that I was at that time 150,000 into the pension or, you know, that is what my loan was.

Q But is that only because you had repaid the 60 by the time you took the 150 out, is that correct?

A Yes.

Q Now, let's get into how much has been repaid.

We have just established the August 9th, 1984 loan in the amount of $60,000 was repaid, is that correct?

A Yes.

Q Who paid that?

A I did.

Q When you say you did, did you write it from your own personal checking account or did this come from Crown Motors?

A I wrote it from my own checking account. That is my recollection.

Excuse me, I want to mention something else with

regard to that. When I was asked to produce documents on all of my loans, I neglected to consider the $60,000 loan because it was such a short-term and it was repaid so quickly, that I was more, I focused on the one from 150 forward, all of those loans. The 60 was, like, a short-term. So I was possibly just negligent in not looking for the canceled check on that one. But I am sure there is one.

Q That is fine.

But we have established in 1984 you withdrew a total of 260,000 from your pension plan, is that correct?

A Yes.

Q Now, 60,000, the very first loan was repaid by you personally, is that correct?

A Yes.

Q How about the second loan on August 23rd, 1984 in the amount of 150,000, has any portion of that been repaid?

A Yes.

Q Who paid that?

A I did.

Q Personally?

A Yes.

Q It was not drawn on Crown Motors or any other account on your behalf?

A No.

Q When was that repaid?

A I will have to refer to my notes if I have them, but my recollection is that in the year 1988, I repaid a hundred and some thousand dollars in a period of, over the year, in several payments. The first payment was at the very beginning of the year and I think I have my year right when I say 1988.

On January 1st or the first business day of the year, I repaid $76,600 and I did that by reclassifying a portion of my loan, the voluntary contribution portion, as reducing my, I reduced my interest in my voluntary account that way.

I think it was actually done by journal entry rather than a check. But it was a reduction in my interest in my voluntary account.

Q But one way or another --

A And then subsequently I made other payments by check during the calendar year from my personal account to the

pension to reduce the loan further for a total reduction of over a hundred thousand dollars that year.

Q So one way or another, either through payments by you personally to the pension plus the reclassification of the $76,600 in your voluntary account, you paid back in full the $150,000 loan, is that correct?

A No. I don't even know that I have with me notes that would say exactly how much was repaid but --

Q Do you want this?

A I don't know if it would be in there.

MR. BORNHORST: If that is Dick's --

A Give it to me, but I don't think that it is in there. There is so much that I don't have with me.

I think that is the only year that I did repay on the balance of the loan and if the loan, the original loan was 310, we can subtract what it is now, my balance from the original 310, and that is the amount that I paid in the calendar year of '88.

I think I owe a total of 180,000 or --

Q Currently?

A Yes. So from the 310 down to the 180 something,

that is what I repaid in the year of '88.

Q Let's back up a moment.

Is it your testimony that you don't recall whether you wrote a note to the pension for the August 9th, 1984 loan?

A Yes.

Q Now, we have established that in 1984 you withdrew a total of $260,000. Let's go to 1985.

The first loan which was actually the -- I'm sorry, let's back up a moment.

The third loan you took in 1984 was on September 5th for $50,000, correct?

A Yes.

Q 1985. The first loan you took was in the amount of $35,000 on February 21st?

A Correct.

Q The next loan you took was for $3,000 on February 25th?

A Correct.

Q The next loan you took was on July 30th, 1985 in the amount of $12,000?

A Yes.

Q The next loan, August 13th, 1985 in the amount of $25,000?

A Yes.

Q The next loan and the last loan you took in 1985 was on August 21 in the amount of $5,000?

A Yes.

Q My total for 1985 is $80,000 from your pension, does that sound right?

A Yes.

Q Now, in 1986, you took one loan on September 30th in the amount of $35,000, is that correct?

A Yes.

Q Now, I have a grand total of $375,000 which you withdrew from your pension. I realize some of this has been repaid. But that is what the three years total, is that correct?

A That is correct except that all of that money was not out at any one time. The 60 was paid before the 150 was drawn.

Q I understand.

And today it is your best estimate that you owe

somewhere around $180,000 in outstanding loans to the pension?

A Well, I know exactly how much I owe in my office, I have the records, but it is 180-some thousand dollars, yes.

Q Does that include interest?

A The interest is paid currently, so there is no accruing interest that is not paid, at least annually before the end of the year.

Q What do you mean the interest is being paid?

A As interest accrues, the annual interest is paid timely each year so that even if there is no reduction of principal the interest payments are kept current.

Q Who has been making those interest payments?

A I have.

Q Personally?

A Yes.

MS. TRUHE: Mr. Bornhorst, could you get us the exact figure as far as how much Mr. Shofer currently owes to his pension in terms of outstanding loans?

A I am sure I could call my office and have that for you.

Q No, that is fine, if Tom would just supply that to

volunteer account. I think you mean voluntary account, is that correct?

A Yes.

Q Now, you state that these damages calculate the personal loss of shelter dollars in the pension fund by the need under the circumstances for Shofer to repay the loans to the extent of his available cash and credit, 76,600 of those funds were transferred from Shofer's own post tax contributions to his voluntary plan effectively losing the shelter for those funds. The loss to Shofer was calculated by Rosenberg in the chart attached in the amount of $1,823,018.

Q Could you explain to me briefly why this $76,600 is a damage? Because as I understand it, that money represents your voluntary or, I'm sorry, your personal contributions to the pension, isn't that correct?

A Yes.

Q So to that extent, you were not required by law to pay that money back when you borrowed it out, is that correct?

A I was required to pay it back by law as long as it stood as a note payable to the pension.

Q Right. But when you reclassified it as personal --

Exhibit C

THE STUART HACK COMPANY
Consultants & Actuaries
4623 Falls Road
Baltimore, Maryland 21209
(301) 366-8700
Washington D.C. 621-4064

Writer's Direct Dial No.

August 9, 1984

PERSONAL AND CONFIDENTIAL

Corres. - P.S. Section Catalogue

Mr. Richard Shofer
Crown Motors
5006 Liberty Heights Avenue
Baltimore, Maryland 21207

Dear Dick:

You questioned whether assets of your money purchase pension plan and profit sharing plans can be used as collateral for loans, whether you can borrow against these plans and whether there is any special treatment for your voluntary account under these plans.

First of all, let's distinguish between the voluntary account and the employer account. The employer account cannot be put up as collateral for a loan, and loans to participants against their employer account are limited to a total of $50,000 for all plans for up to a maximum of five years (for a longer period of time if used for the purchase or substantial improvement to a primary residence). Further, we would recommend that any loans against an employer account should be fully collateralized (this means collateral in addition to the value of the account itself).

There is an entirely different treatment for voluntary accounts. First, there is no limit on the amount that can be borrowed against the account or the length of time for which it can be outstanding. Also, the account, itself, can stand as collateral for the loan against the voluntary account. Further, the voluntary account can be put up as collateral for a loan from a bank or other source. The loan agreement will have to include a provision that you cannot withdraw money from your voluntary account, and thus dissapate the collateral, however.

The law is pretty clear on the inability to use employer account values as collateral for a loan. There is no law on restrictions of using voluntary account money for collateral for a loan. The TEFRA provisions on the limits on loans apply only to employer accounts and specifically do not apply to employee voluntary accounts. In my opinion, you can use your voluntary account as collateral for a loan or you can borrow up to 100% of your voluntary account. The terms of the loan must be reasonable as to the interest rate and pay back period.

Cordially,

Stuart Hack

SH:mn

Exhibit D

1571

RICHARD SHOFER	:	IN THE
Plaintiff	:	CIRCUIT COURT
v.	:	FOR
THE STUART HACK COMPANY, et al.	:	BALTIMORE CITY
	:	Case No. 88102069/ CL79993
Defendants		
* * * * * * * * * * *	:	
THE STUART HACK COMPANY, et al.	:	
	:	
Third-Party Plaintiffs	:	
v.	:	
GRABUSH, NEWMAN & CO., P.A.	:	
	:	
Third-Party Defendant	:	

Reported By: Dawn M. Hart, CSR
Riggleman, Turk & Nelson
(301) 539-6398

Baltimore, Maryland

August 2, 1990

Deposition of KENNETH EUGENE LARASH, C.P.A., a Witness, called for oral examination by counsel for the Defendants and Third-Party Plaintiffs, taken at the law offices of Semmes, Bowen & Semmes, Conference Room 17-A, 250 West Pratt Street, beginning at 10:50 a.m.

A P P E A R A N C E S

THOMAS A. BOWDEN, ESQ., on behalf of the Plaintiff.

JANET M. TRUHE, ESQ., and LEE B. ZABEN, ESQ., on behalf of the Defendants and Third-Party Plaintiffs.

LINDA M. SCHUETT, ESQ., on behalf of the Third-Party Defendant.

A I don't know but somebody in our firm.

Q But you have no idea who?

A No.

Q Did that person give you any files or information or did you just start from scratch?

A Well, when I start a job I always review last year's files, so they would have been available.

Q But you have no idea who worked on this file at Grabush, Newman prior to you, is that correct?

A No.

Q All right.

A I mean yes, that's correct.

Q What was your understanding as to the services Grabush had been retained to perform prior to your involvement if any for Mr. Shofer or his business?

A To prepare financial statements, tax returns for the corporation, Catalina Enterprises, Inc., to prepare a tax form No. 990T for the pension plan and to prepare his individual Form 1040.

Q Now, these financial statements were for the corporation?

Q -- prior to the preparation of this tax return?

A Prior to the preparation of this tax return?

Q Yes.

MS. SCHUETT: Objection to the form of the question. Go ahead.

A Go ahead, oh. The earliest document that's dated and initialed by me that I could find in the files indicated that I worked on the pension plan general ledger for 1984 and it's, I believe it's a page of journal entries dated June 17th of '85, so that appears to be the first time I became aware.

MR. BOWDEN: What was that date again, excuse me?

THE WITNESS: June 17th, 1985.

Q And you stated that was in the course of preparing the ledger for the pension plan?

A Yes, well, the work -- it's called working trial balance, yes.

Q That's when you first became aware that Mr. Shofer had taken loans from his pension plan in 1984?

A Right, correct.

Q Had Grabush, Newman already completed its preparation of Mr. Shofer's 1984 tax return when you became aware that he had taken loans from his pension plan?

A When we prepared his individual tax return?

Q Yes.

A We -- we didn't find the transmittal sheet for this, did we? --

Q No.

A Well, this date --

MS. SCHUETT: Referring to Larash Deposition Exhibit 1.

A -- shows that the interview for the individual return was July 29th, and as I previously said, I had worked on the pension plan on June 17th, so yes, July 29th, I obviously already knew that he had loans with the pension plan.

MS. SCHUETT: That didn't exactly correspond to her question but I think your answer is clear despite that.

Q Well, just to make sure it's absolutely clear, you knew at the time you sat down with Mr. Shofer to compile the

information on Larash Deposition Exhibit No. 1 that he had taken loans from his pension plan in 1984?

A Yes.

Q Do you recall discussing these loans with Mr. Shofer at anytime prior to the completion of this individual tax return by Grabush?

MS. SCHUETT: This meaning the 1984 return?

Q The 1984 return.

A I don't specifically recall any discussions on the matter other than obtaining the interest expense on the loan which is noted on Exhibit 1.

Q Do you recall whether you asked Mr. Shofer for that figure or whether that was one given to you by him?

A He would have given me a list of all of the interest expenses that he had paid for the whole year, then I would have compared that with what I knew from the prior year to see if he had forgotten any loans.

Q How were these loans treated on the 1984 return for tax purposes, how were these loans taken into account?

A On the original return, the interest expense was deducted that he paid to the pension plan, or put into a

IN THE CIRCUIT COURT FOR BALTIMORE CITY

RICHARD SHOFER	:	
Plaintiff,	:	
v.	:	Case No. 88102069/CL79993
THE STUART HACK CO. et al.	:	
Defendants.	:	

NOTICE OF WITHDRAWAL AND ENTRY OF APPEARANCE

Clerk of the Court:

You will please withdraw the appearance of Jayson L. Spiegel as attorney of record for defendants The Stuart Hack Company and enter the appearance of Deborah M. Whelihan.

Please direct all future notices and correspondence to the attention of John T. May and Deborah M. Whelihan at our Washington, D.C. address.

Respectfully submitted,

JORDAN COYNE & SAVITS

By: _____

Jayson L. Spiegel
33 Wood Lane
Rockville, Maryland 20850
(301) 424-4161

911346

By: _____

Deborah M. Whelihan
33 Wood Lane
Rockville, Maryland 20850
(301) 424-4161

Mailing Address:
1030 15th Street, N.W.
Suite 500
Washington, D.C. 20005

912756

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Notice of Withdrawal and Entry of Appearance was mailed, postage prepaid, this ~~22nd~~ 23rd day of September, 1994 to:

Thomas H. Bornhorst, Esq.
2236 Southland Road
Baltimore, Maryland 21207

Janet M. Truhe, Esq.
Ward, Janofsky & Truhe, PA
Court Towers - Suite 505
210 W. Pennsylvania Avenue
Towson, Maryland 21204

Jayson L. Spiegel

1000

(94) AS

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

RICHARD SHOFER, Plaintiff, v. STEWART HACK COMPANY, et al., Defendants.	
THE STEWART HACK COMPANY, et al., Third-Party Plaintiff, v. GRABUSH, NEWMAN & CO., P.A., Third-Party Defendants.	Case No. 88101069/CL79993

CERTIFICATE REGARDING DISCOVERY

I HEREBY CERTIFY that a copy of this Certificate Regarding Discovery and a copy of the Third Party Defendant's Second Request For Production of Documents to Plaintiff, were mailed, postage prepaid, on this 27th day of October, 1994, to:

Janet Truhe, Esquire
Ward, Janofsky, & Truhe, P.A.
Court Towers
Suite 505
210 West Pennsylvania
Towson, Maryland 21204

Thomas H. Bornhorst, Esquire
2236 Southland Road
Baltimore, Maryland 21207

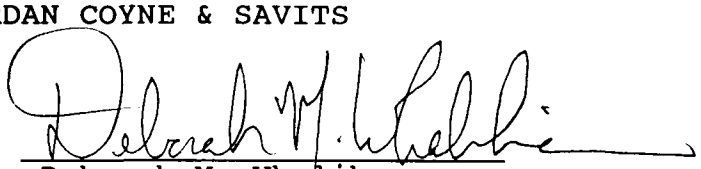
I will retain the originals of these documents in my possession, without alteration, until the case is concluded in

1071

this Court, the time for noting an appeal has expired, and any appeal noted has been decided.

Respectfully submitted,

JORDAN COYNE & SAVITS

By: 

Deborah M. Whelihan
33 Wood Lane
Rockville, Maryland 20850
(301) 424-4161

Mailing Address:

1030 15th Street, N.W.
Suite 500
Washington, D.C. 20005

(95 A5)

RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
THE STUART HACK CO., et al.	*	BALTIMORE CITY
Defendants	*	Case No. 88102069/CL79993

* * * * * * * * * * * * *

DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO PLAINTIFF'S DAMAGES

Defendants, Stuart Hack and The Stuart Hack Company, by their attorneys, Janet M. Truhe and Ward, Janofsky & Truhe, P.A., move pursuant to Maryland Rule 2-501, for partial summary judgment as to certain categories of damage claimed by the Plaintiff in the instant case on the grounds that there is no dispute of material fact and they are entitled to judgment as a matter of law. In support of their Motion, Defendants state as reasons:

1. That on December 8, 1992, Plaintiff filed a Third Amended Complaint against Stuart Hack and The Stuart Hack Company for negligence (Count I) and breach of contract (Count II) contending that Mr. Hack, who was a pension consultant to the Plaintiff's business only, should have advised him about potential tax consequences which could occur if Plaintiff borrowed money from his pension.

2. That after Hack advised Shofer he could borrow from his pension in a letter dated August 9, 1984, Shofer proceeded to take nine loans from his pension totalling $375,000 in 1984, 1985 and 1986.

3. That at all times when Plaintiff was borrowing money from his pension in 1984, 1985 and 1986, it is undisputed that Plaintiff did not consult with Defendants.

4. That the pension at issue in this case is a qualified pension plan established for the employees of Catalina Enterprises, Inc., a used-car dealership owned and operated by the Plaintiff.

5. That at all times relevant to this case, Defendants were under contract to Catalina Enterprises, Inc. to administer the pension.

6. That the Employee Retirement Income Security Act of 1974 ("ERISA") 29 U.S.C. § 1001, et seq., is a federal statute regulating all employee benefit plans, including the pension plan at issue in this case.

7. That ERISA contains a broad pre-emption provision (29 U.S.C. § 1144(a)), which provides that it "shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan."

8. That as part of the damages once claimed in this case, Plaintiff sought recovery of excise taxes and penalties arising out of prohibited transactions.

9. That the Maryland Court of Appeals in Shofer v. The Stuart Hack Company, et al., 324 Md. 92, 110-11, 595 A.2d 1078 (1991) ("Shofer I"), held that excise taxes and prohibited transaction penalties were pension-related and, therefore, pre-empted by federal law under ERISA; thus, they could not be recovered in the instant state court case.

10. That after the Plaintiff filed his Third Amended Complaint still claiming entitlement to such damages, Judge Thomas Ward of this Court ruled on February 17, 1993 that Plaintiff may not recover any damages for excise taxes or prohibited transactions as held in Shofer I.

11. That Plaintiff continued to claim entitlement to the aforegoing pension-related damages which were again dismissed by Judge Ellen Hollander on July 11, 1994.

12. That as part of her Order of July 11, 1994, Judge Hollander also dismissed Plaintiff's claim for damages arising out of penalties assessed as a result of his failure to follow proper procedures in borrowing from his pension; she held that such damages were pension-related and too speculative and unforeseeable to have been proximately

caused by any alleged negligence on the part of Defendants in August of 1984.

13. That as part of the total monies Shofer withdrew from his pension, $76,600.00 had originally been contributed to the pension by Shofer personally, and was withdrawn without any adverse tax consequences.

14. That Shofer understood when he withdrew his personal contributions to the pension of $76,600.00 that he would be losing the tax shelter on the growth of this money.

15. That as part of the damages currently claimed in this case, Shofer seeks recovery of $1,823,018.00, which he says he would have earned on the $76,600.00, had it remained sheltered in the pension until the year 2059.

16. That Plaintiff assumed the risk of losing his tax shelter on the $76,600.00 when he voluntarily withdrew it from his pension.

17. That Plaintiff's damage in the form of lost earnings on his personal contributions to the pension could not have been foreseen by the Defendants when they rendered their advice in August of 1984, and never would have occurred but for the fact that pension money was involved.

18. That given the limitations on damages imposed by the Court of Appeals in Shofer I concerning ERISA pre-emption of all pension-related damages and Judge Hollander's recent dismissal of Plaintiff's damages (incurred as a

result of failing to follow proper procedures in borrowing from the pension) on this same basis, Plaintiff may not recover any damages arising out of his withdrawal of sheltered funds from the pension.

19. That as a result of Plaintiff's failure to pay additional income tax on money he borrowed from the pension in 1984, 1985 and 1986, Plaintiff has been assessed federal and state income tax penalties totalling $21,698.81, and interest of $114,609.14.

20. That Plaintiff may not recover "penalties" against Defendants because they did not prepare the income tax returns at issue, nor did they even know that Plaintiff had borrowed money from the pension when the returns at issue were being prepared by Plaintiffs' accountants.

21. That Plaintiff may not recover "interest" against Defendants because Plaintiff has had the use of the money which he should have been paid in additional income taxes, and Defendants could not have reasonably foreseen that Plaintiff would be unable to pay his taxes when amended returns were filed to reflect a portion of the loans from the pension as additional income.

WHEREFORE, Defendants, Stuart Hack and The Stuart Hack Company, respectfully request that this Court dismiss all claims for damages arising out of lost earnings on the

$76,600.00 had it remained sheltered in the pension until the year 2059, as well as tax penalties and interest.

Grounds for this Motion are more fully set forth in the accompanying Memorandum.

Janet M. Truhe

Janet M. Truhe
WARD, JANOFSKY & TRUHE, P.A.
Court Towers - Suite 505
210 W. Pennsylvania Avenue
Towson, Maryland 21204
(410) 321-4890

Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of December, 1994, copies of the foregoing **Defendants' Motion for Partial Summary Judgment as to Certain Categories of Plaintiff's Damages, Memorandum in Support, Request for Hearing and Order** were mailed by first class mail, postage prepaid, to John T. May, Esquire, Deborah M. Whelihan, Esquire, Jordan Coyne & Savits, 1030 Fifteenth Street, N.W., Suite 500, Washington, DC 20005 and to Thomas H. Bornhorst, Esquire, 2236 Southland Road, Baltimore, MD 21207.

Janet M. Truhe

Janet M. Truhe

RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
THE STUART HACK CO., et al.	*	BALTIMORE CITY
Defendants	*	Case No. 88102069/CL7993

* * * * * * * * * * * *

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO PLAINTIFF'S DAMAGES

Defendants, The Stuart Hack Company and Stuart Hack, by their attorneys, Janet M. Truhe and Ward, Janofsky & Truhe, P.A., file the following Memorandum in Support of their Motion for Partial Summary Judgment as to certain categories of the Plaintiff's damages.

STATEMENT OF FACTS

In order to understand the bases for Defendants' Motion for Partial Summary Judgment, it is necessary to review both the factual and procedural history of the current action.

A. Procedural History of State Case

On April 11, 1988, Richard Shofer filed suit in this Court against Stuart Hack and The Stuart Hack Company, pension consultants, for negligence (Count I), breach of contract (Count II), and common law breach of fiduciary duty

(Count III). The gist of each of these claims was that Hack failed to advise Shofer about potential tax consequences which might occur if Shofer borrowed money from his pension plan. Shortly thereafter, on May 17, 1988, Shofer filed an Amended Complaint which added a fourth count for breach of fiduciary duty under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq. ("ERISA"). This count was based upon exactly the same conduct complained of in the original three counts, but also sought attorney's fees in addition to compensatory damages.

On March 6, 1990, Hack moved for dismissal of Count IV of the Amended Complaint on the ground that this Court lacked subject matter jurisdiction over an ERISA claim for breach of fiduciary duty which, under 29 U.S.C. § 1132(e)(1), falls within the exclusive jurisdiction of the federal courts. On July 2, 1990, this Court granted Hack's Motion to Dismiss.

On August 9, 1990, Shofer filed a Second Amended Complaint which contained the original three counts for negligence, breach of contract and common law breach of fiduciary duty and added five new counts for enforcement of Shofer's right to competent advice from Hack under 29 U.S.C. § 1132(a)(1)(B). State courts have limited concurrent jurisdiction with respect to certain types of claims under ERISA, and Shofer was attempting to recast his claims to

fall within the scope of that jurisdiction (thereby preserving the possibility of recovering attorney's fees). The factual predicate of each of the new ERISA counts was, however, the same as alleged in the state law causes of action, namely that Hack failed to advise Shofer about tax consequences which could occur if he borrowed money from his pension plan.

Thereafter, Hack filed a Motion to Dismiss the entire Second Amended Complaint on the grounds that: (1) the common law negligence, breach of contract, and breach of fiduciary duty claims (Counts I-III) were pre-empted under 29 U.S.C. § 1144(a), and (2) the remaining ERISA counts (IV-VIII) were in fact still breach of fiduciary duty claims subject to the exclusive jurisdiction of the federal courts. In an attempt to salvage his state court case, Shofer responded to Hack's motion by agreeing to dismiss voluntarily Counts III-VIII (the five ERISA claims and the state law breach of fiduciary claim). This was because "[b]ased on the facts elucidated in discovery to date, combined with research as to the ERISA statute and relevant federal and state case law, Shofer has concluded that Hack was not acting as a fiduciary with respect to Shofer or the [pension] plan when he gave the incorrect advice on which the Second Amended Complaint is based." See Plaintiff's Response in Opposition to Defendants' Motion to Dismiss the

Second Amended Complaint at p. 17 (filed September 20, 1990) (emphasis in original).

After hearing, Judge David Ross dismissed the remaining state law negligence and breach of contract claims because "under the broad language of the ERISA statute as interpreted by the Supreme Court, these claims necessarily relate to ERISA, relate to the pension plan and, therefore, are pre-empted." See Transcript of Proceedings at p. 32 (October 12, 1990). On October 16, 1990, Shofer filed a timely notice of appeal and, on its own motion, the Maryland Court of Appeals issued a writ of certiorari.[1]

On September 17, 1991, the Maryland Court of Appeals affirmed in part and reversed in part this Court's dismissal of Plaintiff's Second Amended Complaint. Shofer v. The Stuart Hack Co., et al., 324 Md 92, 595 A.2d 1078 (1991) ("Shofer I"). It affirmed the dismissal of

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[1] Following dismissal of Plaintiff's entire state court action, Shofer then filed suit in federal court, notwithstanding the fact that limitations had run on all of his claims. Hack filed a Motion for Summary Judgment which was subsequently granted by Judge Frederic Smalkin. Shofer v. Stuart Hack Co., 753 F.Supp. 587 (D. Md. 1991). Shofer appealed to the United States Court of Appeals for the Fourth Circuit urging the adoption of a novel principle of equitable tolling. Judge Smalkins' ruling was, however, affirmed on appeal and Shofer's federal case was over. Shofer v. Stuart Hack Co., 970 F.2d 1316 (4th Cir. 1992). Shofer recently filed suit in this Court for legal malpractice against the law firm of Blum, Yumkas, Mailman, Gutman & Denick, P.A., which had represented him in the state and federal court actions.

1012

Counts IV-VIII agreeing with Hack's argument that these were in actuality still breach of fiduciary duty claims over which there is exclusive federal jurisdiction. Id. at 111-113.

With respect to the two state law claims for negligence and breach of contract, however, the Court reversed. This was despite ERISA's broad pre-emption clause, 29 U.S.C. § 1144(a), which even the Court recognized as "the most expansive pre-emption clause found in any federal statute." Id. at 94. But it held that Shofer's state law claims nevertheless survived ERISA pre-emption, in large part, because a finding of pre-emption would leave Shofer without any remedy, now that limitations had run in federal court. Id. at 105. Clearly troubled by the fact that certain damage issues were so related to the pension that pre-emption of the entire case was appropriate, however, the Court dismissed all pension-related, damages, i.e., excise taxes, prohibited transaction penalties, and possible plan disqualification. Id. at 110-111. Thus, on remand, the Court of Appeals stated that Shofer could potentially recover only the additional taxes, interest and penalties (totalling $120,428.19 as of the date of the Court's opinion) assessed against him because a portion of the pension loans constituted additional income, and consequential damages in the form of fees paid to various

professionals who have assisted Shofer in straightening out his tax situation. Id. at 96 and 105. Accordingly, at the upcoming trial in this case, Plaintiff may recover only the foregoing types of damage because, as the Court of Appeals held in Shofer I, these are personal to Shofer and not pension-related.

B. Underlying Facts of State Case

Shofer has filed suit in this Court against Defendants seeking damages from them as a result of their alleged failure to advise him about tax consequences which could occur if he borrowed money from his pension plan. See Third Amended Complaint at ¶ 18. The Catalina Enterprises, Inc. Pension Plan ("the Plan") is a qualified pension plan established for employees of Catalina Enterprises, Inc. t/a Crown Motors, a used car dealership owned and operated by the Plaintiff. Id. at ¶ 4. In 1971, The Stuart Hack Company and Stuart Hack were hired by Catalina Enterprises, Inc. to administer the Plan. Id. at ¶ 6. Hack's functions were administrative and consisted primarily of record-keeping with respect to participant benefits. See Deposition of Stuart Hack at pp. 110-11 (attached hereto as **Exhibit A**). The Plaintiff is a participant in the Plan and is named in the Plan as Trustee. See Third Amended Complaint at ¶¶'s 3 and 5.

Shortly before August 9, 1984, Shofer contacted Hack by telephone, and inquired whether he could borrow money from the Plan or use the Plan's assets as collateral for a loan. Id. at ¶ 9. Shofer's inquiry of Hack was brief, general, and lasted about twenty minutes. See Deposition of Richard Shofer (Vol. I) at p. 103 (attached hereto as **Exhibit B**). It is undisputed that at the time Shofer made this inquiry in August of 1984, he did not tell Hack: (1) how much he was intending to borrow from the Plan;[2] (2) how often he was intending to borrow from the Plan;[3] (3) the purpose(s) for which he wanted to borrow from the plan,[4] or whether he was even going to borrow from the Plan at all. Id. at pp. 86-87, 104 and 109. Hack responded to Shofer's inquiry in a letter dated August 9, 1984 advising him that "you can borrow up to 100% of your

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[2] Only loans in excess of $50,000.00 plus Shofer's voluntary contributions to the Plan (which were $76,600.00) would have been taxable as income. Thus, Shofer could have borrowed up to $126,600.00 without any adverse tax consequences.

[3] Shofer eventually borrowed from the Plan on 9 separate occasions in 1984, 1985 and 1986 for a total of $375,000.00. See Deposition of Richard Shofer (Vol. IV) at pp. 3-12 (also attached hereto as **Exhibit B**).

[4] The loans were used by Shofer to (1) to pay back personal debts to his company, (2) purchase and refurbish two properties in the Virgin Islands, and (3) purchase a condominium at the Inner Harbor. See Answer No. 3 to Interrogatories propounded by Stuart Hack (filed Nov. 11, 1988); see **Exhibit B** at pp. 157-58.

voluntary account." See Larash Deposition Exhibit No. 5 (attached hereto as **Exhibit C**). The letter made no mention of tax consequences. However, it is undisputed that Shofer never specifically asked Hack about tax consequences on any loans from the Plan. See **Exhibit B** at p. 105.

After advising Shofer in August of 1984 simply that it was possible to borrow money from the pension, Hack heard nothing further from Shofer in this regard until sometime in the fall of 1986. **Exhibit A** at p. 349. At that time, Shofer advised Hack that he had borrowed a total of $260,000.00 from the Plan in 1984, $80,000.00 in 1985 and $35,000.00 in 1986. Id.; see also Answer No. 3 to Interrogatories propounded by Stuart Hack.

When Hack rendered his advice in August of 1984, the Baltimore accounting firm of Grabush, Newman & Co., P.A. ("Grabush"), was providing personal and business accounting services to the Plaintiff and his car dealership. See **Exhibit B** at p. 88. Since 1970, this firm prepared Shofer's personal and corporate tax returns, the Form 990T for the pension (which is filed whenever a pension plan has taxable income), and rendered tax advice to Plaintiff generally. See Deposition of Kenneth Larash at p. 14 (attached hereto as **Exhibit D**). Shofer has previously testified in this case that he consulted with Kenneth Larash and Phil Matz at Grabush whenever he had a personal tax question; however, in

August of 1984, Shofer chose not to consult with anyone at Grabush at all. **Exhibit B** at p. 88-89. Mr. Hack was aware that Grabush performed personal tax services for the Plaintiff at the time he wrote the August 9, 1984 letter. **Exhibit B** at pp. 150-51.

Although Grabush knew that Shofer had borrowed from his pension at the time they prepared Shofer's 1984 and 1985 tax returns, a portion of the monies taken from the Plan was not considered by Grabush as taxable income and not reflected as such on the returns either. See **Exhibit D** at pp. 39-43. However, Grabush later concluded in the summer of 1986 that some of these loans were in fact taxable to Shofer as income. Id. at p. 68. Grabush then advised Shofer to amend his tax returns for 1984 and 1985 to reflect a portion of the borrowings from the Plan as additional taxable income in these years.[5]

In the instant case, Shofer is seeking from Hack the additional taxes, penalties and interest he has been assessed as a result of his failure to pay income taxes on a portion of the monies he borrowed from the pension in 1984, 1985 and 1986. Shofer's state and federal penalties total $23,698.81. See Letter dated October 20, 1993 from Thomas

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[5] On April 18, 1989, Hack filed a Third Party Claim against Grabush for their negligent preparation of the Plaintiff's tax returns.

Bornhorst to all counsel (attached hereto as **Exhibit E**). The monies which Shofer owes in additional interest total $114,609.14. Id. However, it is undisputed in this case that Hack was not Shofer's tax advisor during any of the pertinent events in this case and did not play any role in the preparation of his tax returns. Hack's sole legal relationship with Shofer was in his capacity as plan administrator (hired by the pension plan only) and Shofer's capacity as a Trustee/Participant. Hack was not Shofer's attorney, nor was he Shofer's accountant or tax preparer. Shofer, individually, was not a client of Hack's firm, and he has never alleged or contended that he was.

In addition, Shofer is seeking another type of damage which Defendants contend may not be recovered. As part of the total monies he withdrew from the pension, $76,600.00 had been contributed to the pension by Shofer personally, and was withdrawn without any adverse tax consequences. As part of the damages currently being claimed in this case, however, Shofer seeks recovery of $1,823,018.00 which he says he would have earned on the $76,600.00 had it remained sheltered in the pension tax-free until the year 2059! **Exhibit B** (Vol. IV) at p. 79 and Rosenberg Deposition Exhibit No. 3 (attached hereto as

Exhibit F).[6] The Plaintiff has previously testified, though, that he understood he was losing the benefit of the pension's tax shelter when he withdrew the $76,000.00 from it. **Exhibit B** (Vol. III) at p. 346.

ARGUMENT

1. The Plaintiff may not recover penalties and interest from Defendants.

Because a portion of the money Shofer borrowed from his pension in 1984, 1985 and 1986 was deemed taxable income, Shofer has been assessed taxes, penalties and interest in each of these tax years by both the federal and Maryland State governments. The total amounts in each of these three categories during the tax years in question are as follows:

1984 - 1986

TAXES		
$65,418.00 (federal) $14,135.25 (state)	TOTAL	$ 79,553.25
PENALTIES		
$18,165.00 (federal) $ 5,533.81 (state)	TOTAL	$ 23,698.81
INTEREST		
$89,868.47 (federal) $24,740.67 (state)	TOTAL	$114,609.14

[6] Defense counsel has just received a letter from counsel for the Plaintiff who advised that Mr. Rosenberg has recently revised his calculation, and now puts the Plaintiff's damages at $2,178,325.18.

See **Exhibit E** at pp. 2-3 (calculated to 12/20/93).[7]

As part of the damages being claimed in this case, Plaintiff is seeking recovery from Defendants, Stuart Hack and the Stuart Hack Company, the penalties and interest portion of the taxes he has been assessed. However, Defendants are not liable for these two categories as a matter of law for several reasons.

First, with respect to penalties, it is dispositive that Defendants have not been sued for negligent preparation of Plaintiff's tax returns. The only allegation of negligence against Defendants concerns their advice about borrowing money from Plaintiff's pension plan. The penalties assessed against Plaintiff were not imposed because the money was borrowed, but because the money was taxable and the taxes were not timely paid. Simply put, Plaintiff has failed to state a claim upon which relief may be granted for this element of Plaintiff's damages and Defendants request that this category be dismissed.

Regarding the "interest" which has been assessed on the monies Plaintiff should have paid in federal and state taxes (during the three years in question), Defendants cannot be held responsible for this type of damage either. This is because Plaintiff has had the continuous use of all

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[7] Plaintiff has been formally requested to supplement his tax damage figures, but has not yet done so.

of the money he should have paid in taxes during these years, including the interest thereon. If Defendants are required to pay the $114,609.14 in tax interest which has been assessed, the Plaintiff will receive a windfall.

In essence, the "interest" portion of the taxes Plaintiff currently owes is not really a damage at all. The Plaintiff has always had the use of the money he should have paid in taxes. Thus, the Plaintiff has sustained no damage as a matter of law in this area, and is not entitled to seek recovery of it from Defendants. Therefore, this claim should be dismissed from the trial of this action as well.

The interest portion of Plaintiff's taxes is not recoverable against Defendants, under either a negligence or contract theory, for another important reason. Interest never would have continued to accrue on the unpaid taxes if Plaintiff had been able to pay the additional taxes he owed when his amended returns were filed in 1986. Any alleged damage arising out of Plaintiff's inability to pay those taxes in 1986 could hardly have been foreseeable to Hack in 1984 when he was advising Shofer about borrowing from his pension.

An analogous professional malpractice case recently decided by the Maryland Court of Appeals illustrates Defendants' argument in this regard. In Stone v. Chicago Title Insurance Company of Maryland, 330 Md. 329,

624 A.2d 496 (1993), Plaintiff purchased a home in Washington, D.C. for $285,000.00 in September of 1989. He employed the Defendant law firm to handle the settlement of that purchase, including the examination of title to the property. In June of 1990, Plaintiff applied to the Maryland National Bank for a home equity loan in the amount of $50,000.00 to purchase "stock puts" to protect his financial position in the stock market in response to anticipated margin calls on certain stocks he had purchased on credit. The loan was to be secured by a second mortgage on his home. The loan was provisionally approved on July 2, however, in mid-July, the bank notified Plaintiff that a Deed of Trust which encumbered his seller's title had not been released of record. Between July 18 and August 2, Plaintiff and representatives of the bank made numerous attempts to contact someone at the Defendant law firm to get the Deed of Trust, which was recorded against his home, released. Meanwhile, on August 1, 1980, Plaintiff's broker called his margin account loan and without the home equity loans, Plaintiff was forced to sell his stock at a substantial loss to meet his broker's demand.

Plaintiff subsequently sued the law firm, which handled the original settlement of his property, claiming that as a result of its failure to record a release of the outstanding lien, he was unable to close on the home equity

loan in a timely fashion and, as a result, was forced to sell his stock at a substantial loss to raise the money to meet the margin call. However, as the Court of Appeals pointed out in its opinion, there was no allegation in the Plaintiff's complaint that anyone at the law firm had knowledge that Plaintiff was "speculating on credit in the stock market and that the Maryland National home equity loan was the only source of funds available to him in case of financial emergency." Id. at 333.

The Defendant law firm moved to dismiss Plaintiff's complaint contending that the damages claimed for breach of contract and negligence were unforeseeable and speculative "inasmuch as a causal nexus could not be demonstrated between their negligence and the injury suffered by [Plaintiff]." Id. Defendants' motion was granted and Plaintiff appealed. The Court of Appeals issued a writ of certiorari, and subsequently a published opinion affirming the lower court. The Court's analysis of why the Plaintiff's damages in Stone were not recoverable will be discussed at length by Defendants herein because it has application not only to Shofer's damage as it relates to the interest portion of the taxes he now owes, but also to the next item of damage (lost earnings on the $76,600.00) which will be discussed in more detail below.

In Stone, the Court viewed the issue as being one of whether the possibility of Plaintiff's stock market losses in August of 1990 was foreseeable to the law firm in September of 1989, so that it should have known at the time that negligent handling of the settlement could proximately result in those losses nearly a year later. After reviewing pertinent Maryland case law and the recoverability of damages in contract and tort actions, the Court stated that any damage claim by Stone must fall within a general field of danger which the law firm should have anticipated in order to be recoverable. In other words, "'the actor's conduct may be held not to be a legal cause of harm to another where after the event and looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm.'" Id. at 337, quoting Restatement (Second of Torts) § 435(2)(1965). Thus, there must be an "acceptable nexus" between the negligent act and the ensuing harm. Id. at 338. The Court went on to note that the only exception to this rule would be where "the special circumstances under which the contract is actually made, were communicated by the Plaintiff to the Defendant, and thus known to both parties. . . ." Id. at 339.

Applying these principles to the facts of Stone,

the Court pointed out that:

> Stone would have us hold that his loss arising from the August, 1990 collapse in the market in certain stocks in which he was speculating was proximately caused by his sale of those stocks, which was caused by his lack of funds to pay off other loans, which was caused by his inability to secure a second mortgage before August 6, 1990, which in turn was caused by [the law firm's] failure to record timely the release of the extinguished lien on his home. He argues that but for [the law firm's] negligence he would have secured a home equity loan and used the proceeds to meet his broker's margin call, thus avoiding the sale of stock to raise capital in a falling market.

Id. at 340. The Court did not agree with Plaintiff, and stated "we believe that Stone's stock market damages were a highly extraordinary result of [the law firm's] failure to timely record the release." Id. at 341. It also held that in the absence of Plaintiff having notified the law firm at the time of its allegedly negligent conduct that he was speculating in the stock market and would have no other source of money except to borrow against his home in the event of financial emergency, Defendant could not be held liable for the harm which ultimately befell Stone.

In the instant case, Plaintiff would have this Court hold that his failure to pay additional income taxes in 1986 was proximately caused by the fact that he had no available source of funds in 1986 when his tax debt came due (as opposed to some other reason such as an unwillingness to liquidate assets), which in turn was caused solely by Hack's alleged failure to advise Shofer that loans from the pension (which Hack never even knew were being taken) over a certain amount were taxable as income, and which Shofer claims he never would have taken but for the fact that he did not know these tax implications. The foregoing verb tenses in and of themselves are indicative of the speculative and highly unforeseeable nature of this category of alleged loss. Under the Court of Appeals analysis of similar damages in Stone, the interest portion of taxes assessed against Shofer is clearly not recoverable in a malpractice action where the Defendant has no knowledge of the Plaintiff's special circumstances. Accordingly, Defendants request that this category of damage be dismissed.[8]

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[8] Under the reasoning of Stone, Judge Ellen Hollander previously dismissed several other categories of alleged damage, i.e., tax penalties arising from failure to borrow funds from the pension according to correct procedures, inability to refinance Virgin Islands property, lost salary of $400,000.00 in 1991 and 1992 and lost business profits of $1,929,471.00 as a result of declining sales in Plaintiff's used car business over the past eight years. See Opinion dated July 11, 1994 at pp. 12-14.

2. The Plaintiff may not recover lost earnings on the $76,600.00 which voluntarily withdrew from his pension with full knowledge that he would be losing the tax shelter thereon.

As part of the total monies Shofer withdrew from his pension, $76,600.00 had originally been contributed to the pension by Shofer personally. It had been paid into the pension with after-tax dollars, thus, it could be withdrawn without any adverse tax consequences. As part of the damages currently being claimed in this case, however, Shofer seeks recovery of $1,823,0181.00 which he calculates he would have earned on the $76,600.00 had it remained sheltered in the pension (tax-free) until the year 2059. **Exhibit B** (Vol. IV) at p. 79 and **Exhibit F**. The Plaintiff has previously testified, though, that he understood he was losing the benefit of the pension's tax shelter when he withdrew the $76,600.00 from it. **Exhibit B** (Vol. III) at p. 346. Thus, it is undisputed that Plaintiff knowingly and voluntarily risked the loss of this shelter when he withdrew the money.

Defendants cannot be held liable for this category of damage for several reasons. First, Plaintiff assumed the risk of his damages as a matter of law. Under Maryland law, three elements must be established for the Plaintiff to be held to have assumed the risk of his damages: (1) he had knowledge of the risk of danger; (2) he appreciated that

risk; and (3) he voluntarily exposed himself to it. Liscombe v. Potomac Edison Co., 303 Md. 619, 630, 495 A.2d 838 (1985). In the instant case, it is undisputed that the Plaintiff withdrew all of his personal contributions from the pension with full knowledge of the loss of his tax shelter thereon. For this reason alone, he may not recover this item of alleged damage from the Defendants.

Second, this damage is new -- it was not claimed by Shofer at the time Shofer I was decided. However, it should be dismissed on the same basis that other damages were dismissed by the Court of Appeals (i.e., excise taxes and prohibited transaction penalties), because it is pension-related and, thus, pre-empted under ERISA. Indeed, this category of damage would not be a damage at all but for the fact that pension money is involved. As the Court of Appeals indicated in Shofer I, assuming liability, Plaintiff's damages on remand will be limited to taxes on income and consequential damages in the form of reimbursement for professional fees incurred during Plaintiff's tax audit. Shofer v. The Stuart Hack Company, et al., 324 Md. at 105, 109-11.

The calculation of this element of Plaintiff's alleged damages necessarily involves pension-related issues. Plaintiff's expert, Mr. Rosenberg, has calculated a hypothetical payout of the $76,600, and the income earned

thereon, over the hypothetical life of the Pension Plan. Specifically, Mr. Rosenberg estimates that if the $76,600 had not been borrowed from the Plan, it would have grown at a rate of 15.6% since 1984 to today and into the future. Plaintiff claims that he should be reimbursed because the $76,600 was taken out of the Plan and therefore did not grow at all. Mr. Rosenberg now estimates the value of such growth to be approximately 2.2 million dollars.

Such damages are directly pre-empted by ERISA, as interpreted in Shofer I. In that case, the Court distinguished between claims that were pension-related, and thus pre-empted, and those that were not. Two of the essential distinguishing features were described as follows.

First, "the claims here would not... directly affect the administration of benefits of the plan." Shofer v. The Stuart Hack Company, et al., 595 A.2d at 1084. In this case, however, the calculation of these damages does directly affect the administration of the benefits of the plan. Mr. Rosenberg's calculations generate estimated "Annuity Payments" and "Death Payments" from the pension plan between 1994 and 2059. Mr. Shofer's claim is therefore indistinguishable from a claim that the fund was mismanaged and that income on money invested in the fund was therefore lost. Such a claim is clearly pre-empted by ERISA.

Second, the Court held that:

> If Shofer is successful in this action, his damages will not be measured by a difference in plan benefits. Part of those damages will be measured by the obligation incurred for tax and interest, a figure derived from the Internal Revenue Code on the amounts borrowed from the Catalina plan, and part will be expenses consequential to that tax obligation.

Id.

This new category of damages is, however, measured by a difference in plan benefits. Thus, it is pre-empted. Having calculated these damages in this way, Plaintiff cannot claim otherwise.

Plaintiff's damages involve the application of ERISA law in several other ways, as well. First, Plaintiff has added to his damages the sum of $189,389 in "additional involuntary withdrawals." These withdrawals, presumably made necessary by Plaintiff's failure to pay off his taxes and his loans, further result in a difference in Plan benefits.

Second, Plaintiff's calculations assume that the $76,600 and income earned thereon has been lost forever. Defendants submit that if this were a proper element of damage, the income that would have been earned to date could be put back into the Plan after the trial. That money could then grow until the year 2059 at 15.6% tax free. Thus,

Plaintiff's damage calculation should stop on the day a judgment, if any, is handed down. This contention requires an examination of ERISA law to determine whether the lost earnings could be put back in the Plan.[9] The Court need not answer this question, however, since the question itself demonstrates that these damages are inextricably intertwined with ERISA law considerations and must, therefore, be considered to be pre-empted.

The Court of Appeals decision in Shofer I is the law of this case and this Court is bound thereby. See Kline v. Kline, 93 Md. App. 696, 700, 614 A.2d 984 (1992) ("a ruling by an appellate court upon a question becomes the 'law of the case' and is binding on the courts and litigants in further proceedings in the same matter). That Plaintiff may not seek any pension-related damages in the trial of this state court case was reaffirmed by Judge Thomas Ward on February 17, 1993 and Judge Ellen Hollander on July 11, 1994 at pp. 10-11.

Lastly, Defendants request dismissal of the $1,823,018.00 in damages which Plaintiff is seeking as a result of having lost his tax shelter, because such damage could not have been reasonably foreseen by Hack when he was rendering his advice to Plaintiff in August of 1984. It is

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[9] Defendants contend that they can.

important to note at that time, Shofer did not even advise Hack whether he was going to borrow any money from the pension, let alone how much. The rulings of the Court of Appeals in Stone make clear that knowledge of the Plaintiff's special circumstances is a touchtone of foreseeability and, therefore, liability. Without the one, damages arising out of the other are not recoverable as a matter of law. There is simply no way Hack could have reasonably foreseen in August of 1984 that Plaintiff would proceed to withdraw $375,000.00 over the course of the next three years, risk losing his tax shelter on his entire personal contribution to the pension of $76,600.00, fail to repay any of the loans in accordance with ERISA guidelines, fail to pay the tax debt attendant upon the borrowing of such huge sums of money, and do all of this without ever consulting Hack.

CONCLUSION

For the foregoing reasons, Defendants Stuart Hack and The Stuart Hack Company, request that this Court dismiss all claims for damages arising out of penalties, interest, and loss of the Plaintiff's tax shelter on his personal contributions of $76,600.00 to the pension.

Janet M. Truhe
WARD, JANOFSKY & TRUHE, P.A.
Court Towers - Suite 505
210 W. Pennsylvania Avenue
Towson, Maryland 21204
(410) 321-4890

Attorneys for Defendants

Exhibit A

EXHIBITS TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

RICHARD SHOFER	*	of the CIRCUIT COURT
Plaintiff	*	FOR
vs.	*	BALTIMORE CITY
the STUART HACK COMPANY	*	MARYLAND
or	*	
STUART HACK	*	Case No 88102069/CL7993
Defendants	*	

- - - - - -

Deposition or STUART HACK, was taken on Thursday, March 16, 1989, commencing at 9:00 a.m., at 2 Hopkins Plaza, Baltimore, Maryland, before DEBBIE K. LAMBERT, Notary Public.

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Reported By:

DEBBIE K. LAMBERT

A. The plan administrator is technically -- is the person listed in the plan document. And I am going to have to read Dick's plan document to refresh my memory, but I would be shocked if I find out that it doesn't say Catalina Enterprises.

So the plan administrator in this case is Catalina Enterprises. Typically, a legal, quote "plan administrator" will hire a plan administration firm, a third party firm, to carry out some, or all, of the duties of the plan administrator.

Q. Well, did that happen in this case?

A. In this case they hired our firm to carry out -- well, I'm looking at number one here; maintaining plan records. I think we need a definition, did we maintain them or did Dick maintain them?

He maintained them. We were -- we were the people who took those plan records, reviewed them, determined if there was anything wrong with the records, in order to be able to complete 5500 forms and determine employee account balances.

But we did not maintain, in the initial instance, those records, and were dependant upon him to give us the records.

And you need to now that there are two -- there is a, quote "plan administrator" and then there is a, quote, "contract administrator".

Q. Let's get into that a little later because I want to pursue that. As long as we have got this open here, can we go through and you tell me who did what?

A. Sure.

Well, we certainly did number two; determining employee eligibility. We calculated --

Q. That was Hack Company?

A. Hack Company. We calculated benefits in vesting, we prepared the reporting forms, we processed benefit claims, we prepared participant benefit statements, we reviewed the operation versus the goals, we prepared a overall report on the plan.

I'm not sure that we were ever were called upon necessarily to do number nine, specifically,

4975.

Q Well, assuming that Mr. Shofer made loans totaling $315,000 -- you can assume that fact --

MS. TRUHE: When?

MR. BOWDEN: -- for the purposes of this question.

THE WITNESS: As of what date?

MR. BOWDEN: After your letter.

MS. TRUHE: When? After --

THE WITNESS: As of what date?

MR. BOWDEN: After August 9, 1984, and --

MS. TRUHE: When?

MR. BOWDEN: -- prior to the end of 1986.

THE WITNESS: I want you to know that I had no knowledge of him taking a loan or the amount of his loan until his data came in some time in 1986.

BY MR. BOWDEN:

Q I'm not asking that question right now.

A That's what it sounded like to me.

Q I'm asking you to assume that he made such loans, whether --

Exhibit B

computation and a -- I forget the name of the form, but investment interest expense might be listed and that's the only extent to which they show up.

Q Can you show me where that was done on the 1984 return?

MS. SCHUETT: She's got that highlighted for you but --

A This is a Schedule A Form 1040 and it shows up there.

Q Whose handwriting is that?

A The preparer is David Lane.

Q Who made the decision to deduct these monies as interest expenses?

A It would have been a combination of David Lane and myself.

Q Can you tell me anything about how that decision was made?

A I don't have any recollection.

Q Do you recall having any discussion with Mr. Lane about this issue?

A No. Unless there's notes attached to the

transmittal letter I don't remember having any.

Q Do you know why this money was treated as an interest expense?

A Because it was payment of interest on a loan.

Q And at the time you knew it was a loan from a pension plan, is that correct?

A Yes.

Q Now, did you talk with anyone other than Mr. Lane about the tax treatment of these monies from the pension plan?

MS. SCHUETT: Objection to the form of the question. You may answer.

Q Well, prior to the time this return was completed by Grabush, Newman did you have any conversation with anyone -- and I'm assuming you spoke with Mr. Lane but if that's not correct please say so -- but do you recall talking with anyone about the tax treatment of these loans?

MS. SCHUETT: Okay, just to get this clear I think he already testified that he doesn't, unless it's marked on a sheet somewhere, he doesn't recall ever having discussed it with the preparer. If the question --

Q Mr. Marvel.

A No doubt Richard Shofer.

Q Anyone else?

A I don't recall anyone else.

Q Did you do any independent, and by independent I mean any research yourself into this issue prior to the completion of this return?

A I would say no, I left it all up to Alan Marvel.

Q Let's get into this issue of the taxability of these loans and the discovery of a problem with regard to their tax treatment. When did you or anyone at Grabush learn that there was any problem with regard to Grabush's tax treatment of loans Mr. Shofer had taken from his pension plan in 1984, 1985, or 1986?

MS. SCHUETT: Objection to the form of the question, you can answer it.

A It would have been through my discussions with Alan Marvel, again probably in the Fall of 1986.

Q When did Alan Marvel come to the firm?

A I think it was June 30th, '86.

Q How did he come to have anything to do with Mr.

Exhibit E

Thomas H. Bornhorst

Attorney at Law
2236 Southland Rd., Baltimore, Md 21207
(410) 298-2265

State and Federal Trial Practice — Maryland, District of Columbia

October 20, 1993

Janet M. Truhe, Esq.
BERNSTEIN, SAKELLARIS, WARD & TRUHE
Suite 1622
The World Trade Center
Baltimore, MD 21202

Mark A. Gliday, Esq.
JORDAN, COYNE, SAVITS & LOPATA
1030 15th St., N.W.
Suite 500
Washington, DC 20005

Re: Shofer v. Hack v. Grebush

Dear Counsel:

This letter and enclosures is intended to supplement Plaintiff's Answers to Interrogatories and Production of Documents, to provide a framework for our discussion concerning damages on October 21 and the continuation of Mr. Shofer's deposition on October 22. Damage figures have been revised accordingly.

a. Experts:

Plaintiff will not use William C. Martin, C.P.A in this case previously noted. Discussions with Mr. Martin did not produce any substantive work and it became apparent to Plaintiff that an actuarial consultant would be more suitable. For that purpose Plaintiff has received assistance in several areas from the following individual whose vitae is attached.

Theodore M. Rosenberg, MLR, Inc
5007 West Forest Park Ave.
Baltimore, MD 21207
(410) 448-3134

b. Additional Suit::

Suit has been filed against Blum, Yumkas et. al., copy attached. Service of process is being withheld pending a settlement, although Mr. Shofer is still evaluating his exposure under the circumstances, especially on the basis of the

information in the following section. It is certainly possible you have overlapping concerns, in at least these terms:

The prohibited transactions/excise tax effects have been ruled out of our present case, but you are aware of my feeling that even after Shofer v. Hack there will be a further attempt in federal court concerning these damages. Excise damages may not sufficiently accrue for the cause of action until actually assessed. A notice of intention to assess with prospective penalties was received in January 1993, and a final determination is still pending in the Department of Labor. On that account the IRS 1/8/93 notice has been superseded by a notice dated 9/8/93, copy attached.

I realize your opposition will be vigorous and even based on two separate appeals decisions, State and Federal, in Shofer v. Hack itself. I have necessarily adopted these views myself in the statements of cause against Blum, Yumkas. I assume that you would share my interest in the earliest possible determination of whether Hack might be exposed to further litigation and damages beyond the instant case.

If the case is pursued against Blum, Yumkas, I expect the damage issues to be particular to the excise consequences, unwarrented counsel fees, and incidentals which you convince the court belong on the shelf with prohibited transactions consequences.

c. Excise Taxes:

Excise taxes are mentioned here for whatever significance you might consider, which is more than first appears. You already have the related documents, but I have attached parts of the IRS notice dated January 8, 1993 highlighting the additional proposed excise tax of $53,420, penalties calculated through 6/93.

Also, please note the additional "100%" tax in the amount of $310,807.00 (!) if the prohibited transactions are not corrected within the taxable period, which I presently assume is the period during which they are finalized, which should be imminent. That would mean repayment of the loans in full by Shofer back to the pension in addition to payment of the taxes. Shofer has no reasonable way to comply and no defense whatever to his liability for such taxes and penalties. (The ad damnum against Blum, Yumkas was understated in the interests of settlement, which may be unlikely in view of the preceeding.)

d. Elimination of a damage category

Concerning item # 4. from my summary of 3/22/93 in the amount of $44,116.28, this claim is withdrawn. Mr. Rosenberg gave his opinion that such damages would not accrue under the circumstances.

e. Liability concerning damages:

1. Federal and State Income Taxes, Interest, Penalties:

Calculated to 12/20/93 these totals are: Federal $65,418; fed penalties $18,165; fed interest $89,868.47; State $14,135.25; st. penalties $3,533.81; st. interest $24,740.67, total:

$215,861.70
(less present value of the tax liability in the future)

a) Rosenberg's approach is direct and reasonable. The real value being calculated is the value of the pension shelter. The difference between now/later is that taxes paid later are paid with money which has been sheltered in the pension earning 12% interest, whereas taxes paid now are with after taxes and unsheltered funds. The credit back in this instance is a present value which would be the equivalent of the entire tax liability paid in the future with sheltered dollars.

b) Future tax liability depends on the interest rate. Current Federal and State totals 40%, while a future rate of at least 45% is more probable. The amount taxable in the future would would be $188,400, as follows: Loans totalled $315,000, less $76,600 repaid from volunteer account, less $50,000 excludable without penalties = $188,400. At 45% the future taxes would be $84,780, which would be reduced to present value for credit against the $215,861.70 total .

2. Loss of contributions to volunteer account

These damages calculate the personal loss of sheltered dollars in the pension fund by the need under the circumstances for Shofer to repay the loans to the extent of his available cash and credit. $76,600.00 of those funds were transferred from Shofer's own post-tax contributions to his voluntary plan, effectively losing the shelter for those funds. The loss to Shofer was calculated by Rosenberg in the chart attached in the amount of:

$1, 823,018.00

3. Income taxes due on unpaid loan interest

In the absence of adequate advice concerning procedure, interest which was allowed to accrue on loans taken was separately charged to Shofer as additional income with tax assessed in the amount of::

$51,831.00

4. Loss of opportunity to refinance St. Thomas property:

The loans were used in part to purchase this property, which became encumbered by the very nature of the loans. Tax liens against Shofer and lost credit precluded him from refinancing the 13% to at least 9% available in 1988. As of 12/20/93 the difference between the present mortgage principle ($153,411.72) and the principle at 9% ($118,887.02) is:

$46,532.10

Tax attorney Allen Schwait represents Shofer regarding this tax liability which arose from the 1988 tax audit triggered by the amended returns. Mr. Schwait's professional fees in this regard would be added to the category below.

5. Profesional fees

a)	Grabush	$17,596.60
b)	Giampetro	$29,316.25
c)	Schwait	_____
d)	Hack	$1,435.00

6. Other Economic damages

These damages fall in two categories: loss of salary and a negative net worth of Shofer's corporate stock as a result of a lost credit line and tax liens. Shofer was unable to draw salary in 1991 and 1992 and has calculated the damage to his holdings in Crown Motors based on actual sales history and a distinct decline in inventory from circumstances which accrued in 1988 and thereafter. Losses are calculated through 1992.

a)	Salary	$400,000.00
b)	Capitol loss	$1,929,471.00

7. Total damages stated above:

$4,515,061.40

Sincerely,

Thomas H. Bornhorst

cc: R. Shofer

Exhibit F

						Tax		Int		
12/31/84	23,360.00	5,840.00	0.00	29,200.00	11%	5,747.00	1,436.75	0.00	7,183.75	12.00%
03/31/85			951.19	30,157.19	13%			188.81	7,372.56	13.00%
06/30/85			993.26	31,150.44	13%			195.01	7,567.57	13.00%
09/30/85			875.63	32,026.07	11%			201.42	7,768.99	13.00%
12/31/85	34,836.00	8,709.50	900.24	76,473.81	11%	6,032.00	1,508.00	208.04	15,517.02	13.00%
03/31/86			1,908.83	78,382.64	10%			380.95	15,897.98	12.00%
06/30/86			1,978.49	80,361.13	10%			392.50	16,290.47	12.00%
09/30/86			1,843.59	82,204.72	9%			404.39	16,694.86	12.00%
12/31/86	7,220.00	3,610.00	1,885.89	94,920.61	9%	2,366.25	589.06	416.64	20,056.81	12.00%
03/31/87			2,129.74	97,050.35	9%			500.66	20,557.48	12.00%
06/30/87			2,201.99	99,252.34	9%			515.83	21,073.31	12.00%
09/30/87			2,276.98	101,529.32	9%			531.46	21,604.78	12.00%
12/31/87			2,329.22	103,858.54	9%			547.57	22,152.34	12.00%
03/31/88			2,356.46	106,215.00	9%			564.16	22,716.50	12.00%
06/30/88			2,409.93	108,624.93	9%			581.25	23,297.76	12.00%
09/30/88			2,492.00	111,116.93	9%			598.87	23,896.63	12.00%
12/31/88			2,549.17	113,666.10	9%			617.01	24,513.64	12.00%
03/31/89			2,550.33	116,216.43	9%			635.71	25,149.35	12.00%
06/30/89			2,636.85	118,853.29	9%			654.97	25,804.32	12.00%
09/30/89			2,726.65	121,579.94	9%			674.82	26,479.14	12.00%
12/31/89			2,789.21	124,369.14	9%			695.27	27,174.41	12.00%
03/31/90			2,790.48	127,159.62	9%			776.67	27,951.08	13.00%
06/30/90			2,885.15	130,044.77	9%			802.19	28,753.27	13.00%
09/30/90			2,983.40	133,028.17	9%			828.54	29,581.81	13.00%
12/31/90			3,051.84	136,080.01	9%			855.78	30,437.58	13.00%
03/31/91			3,053.23	139,133.24	9%			815.21	31,252.79	12.00%
06/30/91			3,156.82	142,290.06	9%			839.91	32,092.70	12.00%
09/30/91			3,264.32	145,554.38	9%			865.36	32,958.06	12.00%
12/31/91			3,339.21	148,893.59	9%			891.58	33,849.65	12.00%
03/31/92			3,378.27	152,271.87	9%			918.60	34,768.25	12.00%
06/30/92			3,454.92	155,726.79	9%			946.43	35,714.68	12.00%
09/30/92			3,171.66	158,898.44	8%			975.11	36,689.80	12.00%
12/31/92			2,828.18	161,726.63	7%			1,004.66	37,694.45	12.00%
03/31/93			2,815.40	164,542.03	7%			1,122.29	38,816.75	13.00%
06/30/93			2,896.52	167,438.55	7%			1,159.16	39,975.91	13.00%
09/30/93			2,980.19	170,418.74	7%			1,197.25	41,173.15	13.00%
12/31/93			3,033.23	173,451.97	7%			1,236.58	42,409.73	13.00%
	65,416.00	18,165.50	89,868.47			14,135.25	3,533.81	24,740.67		

EXHIBIT NO. #5
1-23-93
H. GERARD

Years from Involuntary Conversion	5.968515	01/01/88
Fixed Equivalent Interest Rate	15.41%	
Rate After 12/20/2003	13.00%	
Tax Exempt Interest Rate	1.88%	

Amount necessary to replace lost Benefit	$1,823,018

Tax Rate :	State	Federal	Combined
	8.00%	39.00%	43.88%

Year Begin	Fund	Lx(J)	Lx(M)	Lx(F)	Dx(MJ)	Dx(FJ)	Dx(M)	Dx(F)	Dx(J)	Joint Life Expect	Male Life Expect	Fem Life Expect	Joint Life Annuity	Male Life Annuity	Fem Life Annuity	Death Payout	Interest Earned on Fund	Basis Adjust Vol part	Tax on Payout	Net Payout Aft Tax	PV Aft Tax
12/20/93	182,033	1,000,000	0	0	5,836	2,442	0	0	14							3	28,410	1	1	2	2
12/20/94	210,439	991,708	2,442	5,836	6,310	2,490	16	15	16							11	32,843	4	3	8	8
12/20/95	243,271	982,892	4,916	12,131	6,866	2,715	34	34	19							25	37,967	7	8	17	16
12/20/96	281,214	973,292	7,597	18,963	7,512	2,945	59	58	23							45	43,889	11	15	30	28
12/20/97	325,057	962,812	10,483	26,417	8,239	3,181	90	88	26							77	50,731	16	27	50	46
12/20/98	375,711	951,364	13,574	34,569	9,266	3,415	133	125	34							127	58,637	22	46	81	72
12/20/99	434,221	938,649	16,856	43,710	10,109	3,652	182	172	40							196	67,769	30	74	124	109
12/20/2000	501,792	924,848	20,326	53,647	10,973	3,888	242	228	47							301	78,314	40	114	186	160
12/20/2001	579,806	909,939	23,972	64,392	11,854	4,124	314	296	55							446	90,490	51	173	273	231
12/20/2002	669,849	893,906	27,782	75,950	12,773	4,361	399	376	64							651	104,543	64	257	393	327
12/20/2003	773,742	876,709	31,744	88,348	14,670	4,605	534	472	79	27.20382	16.58117	25.58798	25,016	1,486	2,680	912	93,293	2,650	12,042	18,052	14,707
12/20/2004	836,941	857,356	35,814	102,546	15,818	4,923	665	600	93	26.20853	15.84791	24.72004	27,497	1,900	3,487	1,234	100,759	2,682	13,794	20,323	16,253
12/20/2005	903,583	836,521	40,072	117,764	17,067	5,228	823	751	110	25.21882	15.12883	23.85963	30,142	2,407	4,485	1,652	108,602	2,715	15,784	22,902	17,977
12/20/2006	973,499	814,118	44,476	134,079	18,417	5,574	1,014	939	130	24.23562	14.42521	23.00641	32,943	3,024	5,715	2,201	116,796	2,749	18,049	25,833	19,904
12/20/2007	1,046,413	789,996	49,036	151,557	19,860	5,963	1,243	1,174	155	23.26009	13.73843	22.16170	35,878	3,770	7,224	2,921	125,302	2,786	20,627	29,166	22,057
12/20/2008	1,121,921	764,016	53,756	170,243	21,116	6,379	1,500	1,462	183	22.29365	13.06984	21.32686	38,915	4,670	9,064	3,831	134,062	2,823	23,545	32,936	24,448
12/20/2009	1,199,502	736,340	58,634	189,898	22,669	6,976	1,825	1,857	224	21.33754	12.41641	20.50295	42,030	5,751	11,280	5,090	143,007	2,865	26,893	37,259	27,147
12/20/2010	1,278,358	706,470	63,785	210,710	24,227	7,376	2,214	2,279	265	20.39454	11.78313	19.69554	45,142	7,054	13,942	6,617	152,034	2,904	30,651	42,104	30,111
12/20/2011	1,357,637	674,602	68,948	232,658	25,758	7,730	2,668	2,773	311	19.46577	11.17084	18.89997	48,197	8,584	17,120	8,513	161,033	2,940	34,873	47,540	33,371
12/20/2012	1,436,257	640,803	74,010	255,643	27,235	8,028	3,191	3,347	362	18.55289	10.58018	18.11591	51,117	10,353	20,885	10,834	169,868	2,973	39,587	53,602	36,932
12/20/2013	1,512,937	605,179	78,846	279,531	27,936	8,286	3,702	4,016	408	17.65752	10.01189	17.34296	53,814	12,365	25,308	13,492	178,382	2,996	44,750	60,229	40,732
12/20/2014	1,586,339	568,548	83,430	303,451	29,224	9,068	4,369	5,108	501	16.77980	9.45587	16.58117	56,257	14,649	30,386	17,456	186,407	3,033	50,776	67,972	45,121
12/20/2015	1,653,997	529,755	88,129	327,567	30,303	9,262	5,147	6,082	574	15.92839	8.92320	15.84791	58,183	17,278	36,160	21,674	193,652	3,047	57,153	76,142	49,611
12/20/2016	1,714,354	489,615	92,245	351,788	31,141	9,405	6,004	7,228	655	15.10129	8.41463	15.12883	59,533	20,129	42,697	26,852	199,937	3,051	64,047	84,963	54,337
12/20/2017	1,765,280	448,415	95,645	375,701	31,672	9,483	6,931	8,566	741	14.30069	7.93082	14.42521	60,181	23,146	49,987	32,431	205,017	3,040	71,395	94,351	59,227
12/20/2018	1,804,551	406,519	98,197	398,808	31,511	9,486	7,830	10,113	822	13.52882	7.47233	13.73843	60,014	26,248	57,977	38,815	208,844	3,010	79,003	104,050	64,110
12/20/2019	1,830,142	364,700	99,853	420,206	31,311	9,277	8,848	11,729	902	12.78635	7.03315	13.06984	59,000	29,368	66,505	45,782	210,595	2,959	86,749	113,905	68,888
12/20/2020	1,840,083	323,210	100,282	439,788	30,670	9,070	9,858	13,687	989	12.07429	6.61974	12.41641	57,057	32,290	75,498	53,597	210,667	2,890	94,584	123,858	73,525
12/20/2021	1,832,309	282,481	99,494	456,771	29,556	8,737	10,829	15,853	1,067	11.39589	6.23240	11.78313	54,151	34,875	84,685	61,777	208,655	2,797	102,105	133,383	77,718
12/20/2022	1,805,476	243,121	97,402	470,473	27,949	8,276	11,702	18,202	1,130	10.75227	5.87145	11.17084	50,338	36,931	93,761	69,985	204,442	2,678	108,970	142,045	81,238
12/20/2023	1,758,903	205,766	93,977	480,219	25,787	7,706	12,358	20,707	1,167	10.14390	5.53661	10.58018	45,744	38,278	102,356	77,705	197,993	2,533	114,769	149,315	83,820
12/20/2024	1,692,813	171,107	89,325	485,299	23,362	6,876	12,870	22,786	1,158	9.56989	5.22347	10.01189	40,587	38,819	110,032	83,563	189,373	2,355	118,760	154,242	84,988
12/20/2025	1,609,184	139,711	83,332	485,875	20,670	6,167	13,093	25,447	1,150	9.02337	4.93442	9.45587	35,148	38,334	116,636	89,461	178,840	2,170	121,726	157,851	85,371
12/20/2026	1,508,447	111,724	76,406	481,098	17,812	5,412	13,029	28,097	1,113	8.50968	4.66784	8.92320	29,593	38,695	121,526	93,848	166,494	1,971	122,816	159,046	84,430
12/20/2027	1,393,079	87,388	68,789	470,813	14,930	4,640	12,671	30,644	1,046	8.02761	4.42189	8.41463	24,187	34,564	124,317	96,415	152,653	1,761	121,864	157,618	82,128
12/20/2028	1,266,250	66,770	60,758	455,099	12,107	3,885	11,971	32,960	953	7.57575	4.19451	7.93062	19,155	31,461	124,714	96,801	137,705	1,547	118,742	153,410	78,461
12/20/2029	1,131,803	49,824	52,672	434,225	9,577	3,135	11,108	34,625	838	7.15159	3.97836	7.47233	14,691	27,919	122,541	94,470	122,096	1,332	113,338	146,264	73,435
12/20/2030	994,278	36,275	44,699	409,177	7,349	2,492	10,044	36,258	722	6.74932	3.77436	7.03315	10,902	24,023	118,016	90,918	106,338	1,130	106,509	137,349	67,678
12/20/2031	856,758	25,711	37,148	380,269	5,474	1,924	8,874	37,382	604	6.37211	3.57841	6.61974	7,801	20,071	111,066	85,509	90,792	940	98,075	126,372	61,120
12/20/2032	723,103	17,710	30,197	348,361	3,957	1,438	7,669	37,916	490	6.01912	3.38772	6.23240	5,369	16,265	101,997	78,524	75,881	787	88,369	113,786	54,017
12/20/2033	596,829	11,825	23,965	314,403	2,777	1,036	6,460	37,772	384	5.69000	3.20060	5.87145	3,542	12,761	91,261	70,263	61,962	611	77,762	100,064	46,626
12/20/2034	480,984	7,627	18,522	279,408	1,884	713	5,346	36,741	290	5.38420	3.01620	5.53661	2,230	9,666	79,439	60,891	49,406	474	66,589	85,638	39,168
12/20/2035	378,163	4,740	13,889	244,552	1,235	472	4,294	35,235	211	5.09762	2.83436	5.22347	1,336	7,041	67,273	51,477	38,394	360	55,625	71,501	32,099
12/20/2036	289,430	2,822	10,066	210,552	778	296	3,345	33,083	147	4.83230	2.65542	4.93442	756	4,910	55,272	42,154	29,028	265	45,121	57,972	25,545
12/20/2037	215,366	1,600	7,017	178,247	469	175	2,521	30,398	98	4.58671	2.47943	4.66784	402	3,262	44,011	33,395	21,327	190	35,490	45,579	19,713
12/20/2038	155,623	859	4,671	148,321	268	97	1,819	27,320	62	4.35922	2.30880	4.42189	199	2,046	33,929	25,558	15,208	132	27,030	34,702	14,732
12/20/2039	109,099	432	2,949	121,269	144	49	1,250	23,894	36	4.14773	2.14318	4.19451	91	1,204	25,305	18,789	10,516	88	19,878	25,511	10,630
12/20/2040	74,226	202	1,748	97,520	73	23	809	20,567	20	3.94508	1.98386	3.97836	38	658	18,292	13,398	7,050	57	14,186	18,200	7,444
12/20/2041	48,891	87	962	77,026	34	10	488	17,307	10	3.75199	1.83169	3.77436	15	329	12,779	9,199	4,572	36	9,779	12,543	5,036
12/20/2042	31,140	34	484	59,752	14	4	269	14,275	5	3.56444	1.68731	3.57841	5	148	8,627	6,088	2,862	22	6,515	8,354	3,292
12/20/2043	19,133	12	218	45,492	5	1	134	11,554	2	3.37979	1.55124	3.38772	1	59	5,620	3,881	1,725	13	4,189	5,371	2,077
12/20/2044	11,298	4	86	33,943	2	0	58	9,178	1	3.19661	1.42376	3.20060	0	20	3,521	2,376	997	7	2,593	3,324	1,262
12/20/2045	6,378	1	28	24,766	0	0	21	7,149	0	3.01449	1.30501	3.01620	0	6	2,112	1,391	549	4	1,538	1,971	734
12/20/2046	3,418	0	7	17,618	0	0	6	5,447	0	2.83377	1.19493	2.83436	0	1	1,206	773	286	2	868	1,112	407
12/20/2047	1,725	0	1	12,170	0	0	1	4,045	0	2.65527	1.09336	2.65542	0	0	649	404	139	1	462	592	212
12/20/2048	811	0	0	8,126	0	0	0	2,919	0	2.47941	1.00000	2.47943	0	0	327	196	63	0	229	294	104
12/20/2049	350	0	0	5,207	0	0	0	2,027	0	2.30880	0.00000	2.30880	0	0	152	87	26	0	105	134	46
12/20/2050	137	0	0	3,180	0	0	0	1,347	0	2.14318	0.00000	2.14318	0	0	64	35	10	0	43	56	19
12/20/2051	48	0	0	1,832	0	0	0	848	0	1.98386	0.00000	1.98386	0	0	24	12	3	0	16	20	7
12/20/2052	14	0	0	984	0	0	0	499	0	1.83169	0.00000	1.83169	0	0	8	4	1	0	5	7	2
12/20/2053	4	0	0	485	0	0	0	270	0	1.68731	0.00000	1.68731	0	0	2	1	0	0	1	2	1
12/20/2054	1	0	0	215	0	0	0	132	0	1.55124	0.00000	1.55124	0	0	0	0	0	0	0	0	0
12/20/2055	0	0	0	83	0	0	0	56	0	1.42376	0.00000	1.42376	0	0	0	0	0	0	0	0	0
12/20/2056	0	0	0	27	0	0	0	20	0	1.30501	0.00000	1.30501	0	0	0	0	0	0	0	0	0
12/20/2057	0	0	0	7	0	0	0	6	0	1.19494	0.00000	1.19493	0	0	0	0	0	0	0	0	0
12/20/2058	0	0	0	1	0	0	0	1	0	1.09338	0.00000	1.09336	0	0	0	0	0	0	0	0	0
12/20/2059	0	0	0	0	0	0	0	0	0	1.00013	0.00000	1.00000	0	0	0	1	0	0	1	1	0

RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	**FOR**
THE STUART HACK CO., et al.	*	BALTIMORE CITY
Defendants	*	Case No. 88102069/CL7993

* * * * * * * * * * * * *

REQUEST FOR HEARING

Defendants, Stuart Hack and The Stuart Hack Company, by their attorneys, Janet M. Truhe and Ward, Janofsky & Truhe, P.A., respectfully request that their Motion for Partial Summary Judgment be heard on January 30, 1995, the date set for hearing on all open motions in this case.

Janet M. Truhe

Janet M. Truhe
WARD, JANOFSKY & TRUHE, P.A.
Court Towers - Suite 505
210 W. Pennsylvania Avenue
Towson, Maryland 21204
(410) 321-4890

Attorneys for Defendants

RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
THE STUART HACK CO., et al.	*	BALTIMORE CITY
Defendants	*	Case No. 88102069/CL7993

* * * * * * * * * * * *

ORDER

Defendants' Motion for Partial Summary Judgment as to Plaintiff's damages having been considered by this Court, and counsel having presented argument, it is this _____ day of _____, 1995,

ORDERED that Plaintiff may not recover damages for penalties and interest as a result of his failure to pay additional income tax owed in 1984, 1985 and 1986.

IT IS FURTHER ORDERED that Plaintiff may not recover damages arising out of lost earnings on the $76,000 in personal contributions he made to his pension which would have grown tax-free had these monies remained sheltered in the pension.

_____
Judge Andre M. Davis

SHOFER.MOT

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RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
THE STUART HACK CO., et al.	*	BALTIMORE CITY
Defendants	*	
* * * * * *		Case No. 88102069 / CL 79993
THE STEWART HACK CO., et al.,	*	assigned to Judge Andre M. Davis
Third-Party Plaintiff	*	
v.	*	
GRABUSH, NEWMAN & CO., P.A.	*	
Third Party Defendant		

* * * * * * * * * * *

PLAINTIFF'S RESPONSE AND OPPOSITION TO DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO PLAINTIFF'S DAMAGES

I. Standards for summary judgment.

The Defendants' motion and supporting memorandum lead a confused trail away from recognizable standards for summary judgment and well away from the elimination of any remaining damage issues in this case a matter of law prior to the trial of this protracted and greatly narrowed case set for trial on February 27, 1995. Counsel finds no authorities or usage whatever in Defendants' motion/memorandum referring, except through assumptions, to any such standards having been recognized or met by their own motion except by its title.

Defendants' approach spites the requirement of Rule 2-311(c) that a motion "...shall state with particularity the grounds and the authorities in support of each ground."

Defendants literally fail to assert that there are no disputes of material fact, simply choosing to marshall a volume of thinly-disguised arguments asserted as facts. Nor do Defendants trace such "facts" to or from any well-defined authority or principle which should operate at this time in this case to preclude the full evidentiary hearing which has been pending for six years.

As a generous example of Defendants' unique style, Defendants argue that the evidence of income tax liability in this case - as a matter of law appropriate for summary judgment - should not also include evidence of the penalties and interest which accompany such taxes. In context, this silly and unsupported proposition has three main legs. First is a forseeability argument which deserves nothing but curiosity.

Second is the unsupported (and unrelated to the cause) argument-on-its-face that the Plaintiff was in a position to mitigate his damages (a legal term not used by Defendants) by covering the tax liabilities when they first occurred.

Third, Defendants claim entitlement to summary judgment on this issue because Plaintiff somehow gained the use of the funds with which he failed to pay for his tax liability. These are most extra-ordinary arguments and very difficult to dignify.

In similar fashion Defendants conclude, inter alia, that the Plaintiff was not entitled to claim the costs of repairing the bad loans within the pension by distributions because he "assumed the risk" that distributions from his pension would terminate his tax shelter advantages on those funds. The argument avoids entirely any factual setting of substance except the distribution itself. It also avoids Defendants knowledge that Mr. Shofer's original shelter advantages under the terms of the pension had already been lost by

the very existence of the loans, which - to not only Mr. Shofer but anyone else watching - represented a tax-generating machine within Plaintiffs account, working night and day.

Defendants do not produce legal precedents for the court to follow in most instances and in general ask the court to follow a tortured and impossible trail back and forth through the procedural history of this case with a similar lack of focus and authority. Counsel will also argue that Defendants badly misconstrue and apply the prior Court of Appeals decision in this case (characterized as "Shofer I" in the motion at hand). Finally, defendants' frequent use of the expression "it is undisputed" is usually vague and argumentative on the strength of its own terms, especially when applied to the duties of the court regarding a motion for summary judgment.

As stated in Modern Maryland Civil Procedure, John A. Lynch, Jr. and Richard W. Bourne, (Michie Co., 1993), Section 8.5 Summary Judgment, p. 623:

> "...(R)ecognizing that summary judgment sidesteps a great deal of the adjudicatory process of the Maryland Rules and the Maryland Constitution, the Maryland courts have scrupulously limited scope of the inquiry upon a motion for summary judgment. Upon such a motion *the court decides whether there are any material factual issues that must be tried*, it does not resolve such issues. The Court of Appeals has held that a hearing on a motion for summary judgment is "not a substitute for a trial, but only a hearing to decide whether a trial is necessary" (C.A. opinion referring to footnote 111., White v. Friel, 210 Md. 274, 286, 123 A.2d 303, 308 (1956), [*italics, underline added*])
>
> "The similarity in the federal courts of the inquiry involved in the summary judgment and what is now called the motion for judgment as a matter of law (directed verdict), has led to a tendency to treat the two motions as governed by the same standard.....'Both motions...call upon the court to make basically the same determination - that there is no genuine issue of fact and that the moving party is entitled to prevail as a matter of law. As a result, several courts have equated the showing required for a grant of summary judgment with that for a directed verdict and have stated that a court should not grant summary judgment it it could not grant a directed verdict in the same case'...." (id p. 623, 624, Maryland cases on point noted in footnote 117, inter alia, Lynx, Inc. v. Ordnance Prod., Inc., 273 Md. 1, 327 A.2d 502 (1974), *[parenthesis comment added]*).

II. Factual Background

Rather than assemble a mosaic of discovery to represent the factual background asserted by the Plaintiff in this much-narrowed case, counsel has provided, and incorporates fully herein, affidavits attached as Exhibit #1 (the affidavit of plaintiff, Richard Shofer) and Exhibit #2, (the affidavit of plaintiff's financial expert, Theodore M. Rosenberg). Counsel alerts the court that Mr. Rosenberg was discovered, in deposition, also to be a factual witness from a history of being directly involved with Defendant Stuart Hack in the sale of pension tax-shelters, the terms "pension" and "tax-shelter" function as one and the same to a business client such as the Plaintiff, and indeed, throughout the pension industry and business community. In support of such assertion, counsel refers the court to Exhibits #1 and #2 in their entirety rather than replicating the text in the body of this response. Plaintiff argues that the material facts provided in Exhibits #1 and #2 operate to cast this case and relevant damages in a substantially different light than anything implied or presented by the Defendants on a factual basis in their motion or memorandum.

Exhibit #3 is a letter dated 1/30/85 to Mr. Shofer from Charmaine B. Gordon, Esq., an attorney working for The Stuart Hack Co., obviously to provide assistance to clients in the area of pension/tax law by the subject within the letter itself. While the letter does not pertain directly to the events in this case, counsel chose it as an exhibit to characterize the active and interested nature of The Stuart Hack Co. in tax law and the kind of consultation initiated by Hack with clients, particularly the Plaintiff. While counsel realizes that there is no pending motion as to liability at this time, the substance of plaintiff's claims for damages go directly to the substance of plaintiff's relationship with the Defendants, and Exhibit 3. presents further evidence supporting Mr. Shofer's ignorance

about potential liability as he considered his advised ability to take up to 100% of his voluntary account for personal loans. The facts illustrate that Mr. Hack's advice was given with the kind of reckless abandon characteristic of gross negligence, hardly an ordinary professional mistake on Defendants' part considering his prior deliberation.

Exhibit #4. is an extract of the writing of Defendant Stuart Hack, also a member of the Maryland Bar, who has become a published author in his field of pensions, "retirement planning", and related tax-shelter transactions. Included are the cover page and preface page (beginning only), the Summary Contents, and pages 355 thru 363, Stuart Hack, J.D., C.L.U., Retirement Planning for Professions, John Wiley & Sons, 1988.

In view of summary judgment standards and the supplications of the Defendant in the instant motion, it should raise a dispute of material fact (concerning Mr. Hack's responsibilities and forseeable effects) simply to name Mr. Hack's publication. However, since it also reads like a sourcebook concerning the most significant definitions, interrelationships, issues and standards which are at issue in this case, counsel incorporates all of Exhibit #4.herein simply for the purpose of giving the court access to a small sampling of the section titles and writing concerns pertinent to the trial of liability and damages in this case.

Exhibits #1 thru #4 add necessary character and significance to the August 9, 1984 letter-of-advice from Mr. Hack to Mr. Shofer (the letter itself in Exhibit C, Defendants' motion) and the triggering event giving rise to Plaintiff's claims. The facts presented to this court dispute Defendants assertion in Motion, paragraph # 1. that Mr. Hack "...was a pension consultant to the Plaintiff's business only, ..." There are *clearly* disputes

of material fact which relate to the full nature and extent of the professional/client relationship existing between the parties in this case.

More importantly, there is insufficient evidence before the court on which it might decide the particular damage issues now raised by Defendant. The damages which still remain in this case, such as taxes, interest, penalties, and professional fees along with the other special, measurable, and forseeable costs of undoing the particular loan transactions themselves, are not outside of any ruling or dicta which should preclude a full evidentiary hearing at the trial level.

The full nature and extent of Defendants' duties to the Plaintiff under the circumstances necessarily govern the types of damages which *radiate directly from the loan dollars in this case until those loans no longer exist*. The Plaintiff simply asks for an opportunity to present further evidence, and the testamony of experts, on the remaining issues. Those issues include, as the Exhibits herewith clearly indicate, facts central to the proximate relationship and forseeability in the professional/client relationship between the parties in this professional malpractice case. Forseeability standards set forth in Stone v. Chicago Title Insurance Co. of Md., 330 Md. 329, 624 A.2d 496 (1993), argued on p.13 et seq. of Defendants' memorandum, are not violated by the facts set forth in Plaintiffs' exhibits, only by Defendants tortured use of that case in the present context.

To qualify certain arguments above, counsel does not argue that excise-tax damages have not been precluded by operation of the decision in *Shofer I.* Plaintiff's entitlement to sue for income taxes on the facts, but not sue for corresponding excise taxes is an anomaly. In reviewing the decision in full light this result splits one of the children in

this case down the middle, but no doubt Judge Hollander was correct in her Memorandum Opinion and Order of 7/11/94 that the dismissal of the excise tax issue under the auspices of "contingent damages" put the court "...between the proverbial 'rock and a hard place'..."

The issue is raised here because of Defendant's representations in the instant motion concerning far-reaching implications of law regarding the elimination of excise tax damages, apparently accomplished in oral argument by an inadvertent (even inaccurate) statement of plaintiff's former counsel in this case rather than any considered facts and law. Rooted in the issue of the Defendants' liability in this case is the collateral fact that Plaintiff's excise tax liability arose under law the moment the loans were taken since they were prohibited transactions. This state malpractice case was not disqualified because it involved federal pension issues and definitions, precisely the opposite. Excise taxes are not now in this case for trial, but trial issues involve each and every standard of care violated by the Defendant, issues which factually involve overlapping ERISA definitions and IRS tax provisions, without which the Defendant Stuart Hack would have no profession and without which the Plaintiff Richard Shofer would be entitled to no damages whatever.

III. Procedural History and Prior Decisions

The Plaintiff joins the Defendants in recommending the trial court give the fullest regard to the scope and language of the decision of the Court of Appeals in Shofer v. Hack (supra). (for contrast, see Exhibit #5, a review of Shofer I. which appeared in BNA PENSION REPORTER, Vol. 18, p. 1764, 1765, 9/30/91)

However, the parties in this case also have wildly different views of the nature and extent of the opinion in Shofer I. Within this environment, Defendants also fail

consistently to account for Shofer I. as a summary judgment review rather than the review of a full evidentiary hearing of issues. Defendants dismiss Plaintiff's procedural right to amend damages as they surface and accrue, at least those which relate directly back to the factual background complained of in the complaint.

In addition, the Defendants' motion fails to erase a profoundly simple premise. That is, Defendants fail to account for the main ruling and effect of the Shofer I. opinion: The facts giving rise to the Plaintiff's state claims for professional negligence do not - by operation of law following the Court of Appeals decision - involve a factual setting or lingering damages which can trigger ERISA federal preemption pursuant to 29 U.S.C. Sec. 1144(a). Defendants arguments to the contrary undo the very foundation of the decision itself.

The court in Shofer I. was fully aware that the facts and circumstances giving rise to potential liability in this case have an indispensible relationship to federal statutes through ERISA and Internal Revenue Code standards and provisions. The dismissal giving rise to the appeal in Shofer I. applied those reasons - even with approval (while overturning the result):

> "...(T)he circuit court necessarily concluded, that the Maryland law of negligence and contract, as the foundation for the claims asserted in Counts I and II, " relate(s) to (Catalina's) employee benefit plan," and is preempted by Sec. 1144(a)." (Shofer v. Hack, supra, 595 A.2d 1078, 1082)

Painters of Philadelphia Dist. Council No. 21 Welfare Fund v. Price, Waterhouse, 879 F.2d 1146, (3d Cir.1989), involved a suit by trustees of a pension plan where auditors had failed to uncover fraud exceeding $1 million by the fund administrator. Under arguments made by Defendants in the motion at hand (but not applied to Painters),

the facts in Painters would absolutely give rise to federal preemption, the direct loss of pension assets being a real measure of damages, but the Court of Appeals in Shofer I noted otherwise:

"The state law liability of the auditors in *Painters* would not have turned on, and that of the respondents (Plaintiff Shofer) does not turn on, the construction, interpretation or application of ERISA or of a plan; rather, those liabilities depend on duties arising from the nonfiduciary relationships. But in *Painters* the plaintiff was the plan itself, and any recovery would have become an asset of the plan. That was not enough, however, for the state common law underlying the malpractice claims to "relate to" the plan." (Shofer v. Hack. 595 A.2d 1078, 1083, underline added)

"Moreover, the damages sought are simply the amounts Shofer personally expended because of the allegedly negligent failure to advise. It is hard to imagine that Congress intended to preempt an action in which all potential damages would be paid by a nonfiduciary and would not inure to a plan. Where the alleged negligence of a nonfiduciary plan administrator is as removed from the plan as here, and "in the absence of an explicit corresponding provision in ERISA allowing a professional malpractice cause of action, Congress did not intend to preempt a whole panoply of state law in this area". (Id. at 1086, citing within: *Painters*, 879 F.2d at 1153 n.7.)

By reflecting on the non-fiduciary status of the Defendants as plan administrator, and by upholding the state malpractice claims in this case, Shofer I. precludes the effectiveness of any argument that the loan events within the ERISA pension, or any forseeable consequences thereof, are "related to" the pension for purposes of ERISA preemption for any issue left in this case.

Respectfully submitted,

Thomas H. Bornhorst
Counsel for Plaintiff
2236 Southland Rd.
Baltimore, MD 21207
(410) 298-2265

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11 day of January, 1995, a copy of the aforegoing Plaintiff's Response and Opposition To Defendant's Motion for Partial Summary Judgment as to Plaintiff's Damages, with exhibits #1 - #5, was mailed first class, postage prepaid, to John T. May, Esq.,and Deborah M. Whelihan, Esq., JORDAN, COYNE, SAVITS & LOPATA, 1030 15th St., N.W., Suite 500, Washington, DC 20005 and to Janet M. Truhe, Esq., WARD, JANOFSKY & TRUHE, 210 W. Pennsylvania Ave., Suite 505, Towson, MD 21204.

Thomas H. Bornhorst

Cardinal

1100

#1

RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
THE STUART HACK CO., et al.	*	BALTIMORE CITY
Defendants	*	
* * * * * *		Case No. 88102069 / CL 79993
THE STEWART HACK CO., et al.,	*	
Third-Party Plaintiff	*	
v.	*	
GRABUSH, NEWMAN & CO., P.A.	*	
Third Party Defendant		

* * * * * * * * * * *

AFFIDAVIT OF RICHARD SHOFER

1. I am Richard Shofer, Plaintiff in this action, residing at 216 St. Dunstans Rd., Baltimore, MD 21212 and I am also the 100% owner and active manager of Catalina Enterprises, Inc. t/a Crown Motors in Baltimore, MD. I am trustee and the majority shareholder in the Catalina Enterprises Pension Trust, I am over eighteen years of age, and I am competent to testify concerning the matters set forth herein.

2. In 1984 my pension account had grown to the point where I began to wonder if the account could be used for personal loans. I then asked my pension consultant, Stuart Hack, about the possibility of loans and he advised me by letter that I could borrow up to 100% of my voluntary account. I was the only individual in the company who qualified for such an account and the creation of my personal account was my primary motivation in establishing a pension tax-shelter.

3. It never occurred to me at any time, either before or after I asked Stuart Hack for advice concerning the loans, that loans from my voluntary pension account would generate taxable events. It was not even a remote thought that such loans had any potential whatever to qualify as pension distributions and personal income to me, and also prohibited transactions since I was pension trustee. At no time did I anticipate that such loans would generate massive taxes, IRS audits, Department of Labor audits, and resulting IRS liens which would also curtail all existing bank credit to my business.

4. Since these events began to accrue I have never been in a financial position to cover the resulting tax liabilities or repay the substance of the principal of the bad loans back to my account, which has continued to generate income and excise taxes, interest, and penalties. Since February 1993 I have been under the published threat by the DOL of an addition 100% excise-tax surcharge in excess of $300,000.00 if my prohibited-transaction loans were not extinguished prior to the formal assessment of excise-tax liability, which was pending a Department of Labor audit of the Catalina Pension Trust completed in 1994.

5. Under these circumstances, the only available recourse has been a pending agree with the Department of Labor to accept distributions from my pension account as of 7/31/94 in order to extinguish my loan obligations, having already made minor repayments as I was able, and having already reclassified $76,600.00 of personal contributions to my account to effect a similar reduction of the loan burden.

5. When I first consulted with Mr. Hack concerning these loans, I believed that my pension funds were tax-sheltered by the pension itself, which also contains strict clauses designed for distributions to be made well into the future. Those clauses were prepared by Mr.

Hack when we discussed and redrafted my pension document at the beginning of our relationship.

6. I approached Mr. Hack for advice concerning the loans with full confidence in his ability, and responsibility as my pension consultant, to advise me concerning any potential for adverse consequences to the assets in my account. Mr. Hack was the only professional that had any relationship in my mind with the issue of taking loans from my account."

7. As a result of having to account for my escalating personal tax liability created by the consequences of the loans within my pension account, I have lost significant tax-shelter opportunity, opportunity represented in real dollars in my account, and under the terms of my account prior to the advice given to me by Mr. Hack, and my reliance on that advice.

8. As trustee of my pension I am aware that federal regulations preclude the replacement of the funds lost by the distributions I am forced to initiate from my pension account. While I can invest up to 25% of my personal salary from Crown Motors each year into my voluntary account, I have been unable to pay myself a salary in the past three years due to the accumulating burden of loss of credit and other events ensuing from the loans recommended by Mr. Hack, the detrimental effects of which have become more and more critical as the years have passed, and to this day.

9. The information set forth in this affidavit has, in various forms, been provided to the Defendants by my depositions and in other documents and discovery provided to the Defendants through my attorney(s) from time to time.

I solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of the foregoing paper are true.

1-10-95
Date

Richard Shofer

#2

RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
THE STUART HACK CO., et al.	*	BALTIMORE CITY
Defendants	*	
* * * * * *		Case No. 88102069 / CL 79993
THE STEWART HACK CO., et al.,	*	
Third-Party Plaintiff	*	
v.	*	
GRABUSH, NEWMAN & CO., P.A.	*	
Third Party Defendant		

* * * * * * * * * * *

AFFIDAVIT OF THEODORE M. ROSENBERG

1. I am Theodore M. Rosenberg, President of M.L.R., Inc., an economic and statistical consulting company located at 5007 West Forest Park Ave., Baltimore, MD 21207. I am over eighteen years of age and I am competent to testify concerning the matters stated herein.

2. I have been engaged in this case by the Plaintiff as an expert witness regarding certain financial losses to sheltered pension funds in the account of Richard Shofer, losses which were occasioned by loans in excess of $50,000.00 made between Mr. Shofer and his pension account in 1984, 1985, and 1986.

3. It is my professional opinion that the steps taken by Mr. Shofer to reduce and extinguish his tax liability for the ill-advised loans, namely the reclassification of personal contributions of $76,600.00, and the further distribution of account assets required under agreement with the U.S. Department of Labor, effective July 31, 1994, in amounts so as to

extinguish Mr. Shofer's loans within the pension, represent necessary and reasonable events which were involuntary to Mr. Shofer under the circumstances in that there were no other financial alternatives of which I am aware which could end the tax liabilities accruing while such loans remained within the pension account.

4. My measurements of loss in this case involve the difference to Mr. Shofer in sheltered assets encumbered by good loans on the one hand, as expected, versus the effect of bad loans, loss of tax shelter, and necessary distributions on the other. My conclusions regarding the time-value of money lost within Mr. Shofer's pension shelter are supported by recognized statistical tables in the actuarial field.

5. I am also a fact witness in this case regarding my professional association with the Defendant Stuart Hack while I worked at the Chesapeake Life Insurance Group in the 1970s where I was involved with selling insurance, annuity, and other tax-shelter packages, to pensions.

6. Since pension plans did not yet exist for certain prospects in those instances, I personally knew and called in Stuart Hack as a pension expert to evaluate the tax-shelter needs of particular clients and to discuss the advantages of a pension being used as a tax shelter, which was the principle purpose of pensions to small and medium size businesses. I assisted Mr. Hack in selling his services as the professional who could also fully prepare and administer the pension document itself.

7. One such occasion of my direct dealing with Mr. Hack involved the Seigel Auction Galleries in New York when Mr. Hack and I traveled together to New York in order to sell Mr. Seigel on how a pension plan would create tax-shelter opportunity according to his

needs. In the course of such meetings, as I certainly anticipated, Mr. Hack stated to clients in my presence that he was fully qualified to discuss sheltering funds in a pension and that a pension "could make you a tremendous amount of money by sheltering funds from taxes" and additional words to that effect.

8. Chesapeake Life dealt with many pension consultants around the country and Mr. Hack's approach was typical of the principal representations made by this industry to prospective clients in every instance.

I solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of the foregoing paper are true.

1/10/95
Date

Theodore M. Rosenberg

#3

THE STUART HACK COMPANY
Consultants & Actuaries
10233 Falls Road
Baltimore, Maryland 21209
(301) 366-8700
Washington, D.C. 621-4064

Writer's Direct Dial No.

January 30, 1985

Mr. Richard Shofer
Catalina Enterprises, Inc.
5006 Liberty Heights Avenue
Baltimore, Maryland 21215

RE: **TEFRA and REA Changes to Your Retirement Plans**

Dear Mr. Shofer:

As indicated in our letter of November 6, 1984, the Tax Equity and Fiscal Responsibility Act, passed in 1982, the Tax Reform Act of 1984 and the Retirement Equity Act of 1984 require substantial changes to your retirement plans.

A new document incorporating all of the new law changes should be adopted by March 31, 1985. The cost for this will be $1500.00.

Please authorize us to make the necessary changes to your plan and have the document ready for your execution by March 31, 1985. We must hear from you by February 18, 1985 if the March 31, 1985 deadline is to be met.

Sincerely,

Charmaine B. Gordon

Charmaine B. Gordon, Esquire

CBG:dla

I authorize The Stuart Hack Company to prepare a new plan document as indicated above. PENSION PLAN ONLY AT THIS TIME

Richard Shofer
(Signed)

2/21/85
(Date)

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whether trustees have abused their discretion, the court of appeals said. According to the appeals court, this factor does not outweigh the other considerations present here.

The appeals court also found that the owner trustees did not violate any fiduciary duties by relying on the advice of an attorney who was also co-counsel for the plan. Nothing in ERISA explicitly requires that outside counsel invariably be consulted, the appeals court said.

Reversions

COURT APPROVES SETTLEMENT IN GULF PENSION PLAN LITIGATION

SAN FRANCISCO—(By a BNA Staff Correspondent)—A Texas federal court has approved a $111.4 million partial settlement in a class action filed by former Gulf Oil Co. employees over withheld pension benefits (*In re: Gulf Pension Litigation*, DC STexas, No. 86-4365 9/20/91).

The U.S. District Court for the Southern District of Texas in a Sept. 20 hearing indicated it would approve the settlement in which 19,500 former Gulf employees will receive surplus pension funds from two older Gulf Plans—the Contributory Retirement Plan and Supplemental Annuity Plan. San Francisco-based Chevron bought Gulf in 1984, and the companies pension plans were merged. The two surplus plans were closed in 1970.

Under the agreement that was reached in June, former Gulf employees will receive $111.4 million, including $7 million for vesting of 1,000 participants. Chevron will keep $94.5 million of $190 million surplus retirement funds it claimed it was entitled to while the remaining funds will go to workers (18 *BPR* 1085). The trial court in April held that Chevron is entitled to $620 million in surplus funds in the Gulf Pension Plan (18 *BPR* 682, 13 *EBC* 1873).

Ellen Doyle, a plaintiffs' attorney with Berger, Kapetan, Malakoff & Meyers of Pittsburgh, said the settlement still will require Internal Revenue Service approval and actuarial work, "but now we can start to do the work."

About 500 class members each year have died, and Doyle said Sept. 26 that the case could have gone for another five years with appeals. "If there's no appeal taken of the approval settlement it will be less than a year," until class members get checks.

Part of the case will continue, including issues having to do with the surplus in the major plan. Plaintiffs will not pursue the horizontal partial termination and certain claims of breach of fiduciary duty, two of which the class won at trial. Doyle said the former Gulf employees have agreed to settle such claims if Chevron is able to settle with government agencies investigating the issues.

The assets employees will receive constitute about 60 percent of the surplus, Doyle said.

HMOs

MALPRACTICE MAY LEAD TO LIABILITY BASED ON PLAN REFERRALS TO PHYSICIANS

DETROIT—(By a BNA Staff Correspondent)—Health maintenance organizations can be held responsible in malpractice lawsuits brought against doctors the HMOs have recommended, a Michigan ciruit court ruled (*Decker v. Saini*, Mich CirCt, No. 88-361768, 9/17/91).

The decision by the Michigan Circuit Court for Oakland County is believed to be the first such judgment in the state to establish that HMOs may be held liable for the doctors on their rosters.

The suit was filed by Todd P. Decker of Birmingham, Mich., on behalf of his son, John, 16. The suit alleged that Dr. Inder Saini and Dr. Syed M.A. Khan failed to diagnose a cancerous tumor that resulted in the amputation of the boy's right arm.

Blue Care Network of Southeastern Michigan also was named in the lawsuit because the Deckers, through an employer, selected Saini from the insurer's list of primary care doctors. Khan, a Troy, Mich., radiologist, was recommended to the Deckers by Saini, the opinion says. Khan has no affiliation with Blue Care Network.

The trial is expected to be held by February 1992, said Ralph W. Barbier Jr., an attorney representing Blue Care. Blue Care had asked to be dismissed from the case since it is an insurer, not a health care provider.

"All the judge has said is that this is a question of fact," Barbier said Sept. 26. "But certainly he has not ruled that [we] are liable. I think it'll be resolved in our favor."

Decker's lawyer, Norman H. Rosen, however, successfully argued that BCN should be included because it limited the family's choice of doctors.

Subscribers pay HMOs annual fees for health insurance, and the HMOs then pay participating doctors directly.

Rosen said the Deckers believed BCN had the best doctors as members and that they chose Saini because he was on BCN's list. They said they relied on BCN's brochure, which promised the "best care" available from "our" doctors.

"My client had choices of several HMOs, but they paid money for the Network because it was (affiliated with Michigan insurer) Blue Cross. They were relying on Blue Cross to provide the best care," Rosen said Sept. 25.

"It's called ostensible agency," and it's not unlike when a person goes into an emergency room. "They don't know what doctor they're going to get. My clients didn't have any knowledge of their people before," Rosen said.

BCN argued that the Deckers expected actual health care from Saini, not the insurer, and that they had the opportunity to reject him and select another physician.

The court said when an HMO conducts itself in a fashion akin to a health care provider it will be subject to the same liabilities as a traditional health care provider.

The court said, "imposing vicarious liability on HMOs for the malpractice of their member physicians would strongly encourage them to select physicians with the best credentials. Otherwise, HMOs would have no such incentive and might be driven by economics to retain physicians with the least desirable credentials, for the lowest price. In the interest of encouraging high standards of health care, it behooves the Courts to hold HMOs liable for the conduct of their participating physicians, when the facts merit it."

The court also allowed the Deckers to maintain its claim against BCN for the actions of the non-member physician to whom they were referred by the member physician.

Preemption

ERISA NO BAR TO STATE ACTION FOR DAMAGES FROM CONSULTANT'S ADVICE

The Employee Retirement Income Security Act does not preempt a pension plan participant's state law action against a non-fiduciary plan consultant seeking damages for tax liability allegedly incurred as a result of the consultant's negligent advice about the consequences of a plan loan, the Maryland Court of Appeals held (*Shofer v. Stuart Hack Co.*, Md CtApp, No. 165, 9/17/91).

The participant is the sole stockholder and president of an automobile dealership and also is the sole trustee of the

dealership's employee pension plan. The consulting firm is a professional pension plan consultant, is the administrator of the dealership's plan, and routinely provided advice about the tax implications of plan transactions.

In 1984, the participant sought advice from the consultant about using his plan account through a plan loan or as security for a loan. The participant then borrowed $375,000 from the plan to repay loans from the dealership for purchasing out-of-state property. The dealership's accountants later told the participant that the loans were income, and the participant had to pay state and federal income taxes, penalties, and interest of more than $120,000.

The participant then sued the pension consulting firm for malpractice, alleging negligent tax advice about an ERISA plan distribution, and for breach of fiduciary duties under state law. A state trial court dismissed the action in its entirety and the participant appealed.

The appeals court presumed that the consulting firm was not an ERISA plan fiduciary, observing that the record did not establish that the firm exercised discretionary authority with respect to the plan.

According to the appeals court, the participant's malpractice claim is not sufficiently "related to" the benefit plan to be preempted by ERISA. Any liability of the consultants depends on duties arising from non-fiduciary relationships, not on plan interpretation or application, and the participant seeks to recover personal expenses, not plan benefits, the court said.

The court concluded that the malpractice claim was not one Congress intended ERISA to preempt. A finding of preemption might immunize from liability a tax adviser with no relationship to an ERISA plan who negligently advised a client that a plan distribution was non-taxable, the court said. However, it held that the fiduciary claims, as an alternative basis for recovery, were properly dismissed as matters exclusively within federal jurisdiction.

COBRA

EMPLOYER HELD LIABLE FOR FAILING TO PROVIDE BENEFITS

An employer that failed to inform a discharged employee of his right to continue group health insurance coverage must pay the difference between the employee's expenses covered by an individual conversion policy and the amount that would have been covered by continued group insurance, the U.S. Court of Appeals for the Fifth Circuit ruled (*Kidder v. H & B Marine, Inc.*, CA 5, No. 90-3340, 4/12/91).

The appeals court's decision affirms a district court's finding as to the employer's liability, but overturns the district court's conclusion that the plan insurer was also liable for failing to inform the employee of his COBRA rights (17 *BPR* 789, 12 *EBC* 1345).

In an earlier opinion, now withdrawn and replaced by this opinion, the appeals court had affirmed the district court's apportionment of 75 percent of the liability to the employer and 25 percent to the insurer (18 *BPR* 520, 13 *EBC* 1625).

In mid-1986, H & B Marine merged with a commonly controlled firm with which it frequently exchanged employees, leaving a single firm called H & B Construction. Blue Cross and Blue Shield of Louisiana began underwriting a group health insurance plan for H & B Construction in September 1986, but did not know about the merger or that COBRA might apply, as H & B's application listed only 18 covered employees. However, the January 1987 premium statement listed more than 20 employees for the merged firm.

When Oreste Kidder was discharged from his job at H & B Marine in February 1987, he was told that he was eligible for an individual conversion policy but not for continued group health insurance. After Kidder's wife incurred substantial medical expenses in March 1987, Kidder sued H & B and Blue Cross to recover the difference between the expenses covered by the conversion policy and the greater amount that would have been covered by the group policy.

The appeals court agreed with the district court that COBRA applied to H & B's health insurance plan, and that H & B was therefore liable for its failure to notify Kidder of his right to continue his group plan benefits. However, the appeals court found that Blue Cross was not so liable.

H & B's insurance plan was an ERISA welfare benefit plan, the appeals court found. According to the court of appeals, H & B's payment of premiums on behalf of its employees, although not alone sufficient to create a plan, was substantial evidence that a plan, fund, or program was established.

In addition, the appeals court held that COBRA's exemption for employers with fewer than 20 employees did not apply, considering pre-merger Marine and Construction employees as a single group for all of 1986, the year before Kidder's discharge. Although COBRA's reference to a common control rule was deleted in 1989, nothing prevents courts from applying the rule to corporations that are separate only in form, the appeals court said. There was no indication that Congress intended to allow employers to avoid the law's requirements by dividing themselves into smaller firms, each with fewer than 20 employees, the appeals court said.

Thus, the appeals court found that H & B was required under COBRA to notify Kidder of his right to continue benefits at the commencement of the plan and also required to notify Kidder whenever his COBRA rights were materially affected. However, the appeals court held that neither notification requirement attached to Blue Cross. According to the appeals court, Blue Cross was never adequately notified either that a COBRA plan had commenced—that is that 20 or more employees were now enrolled, so that th small-employer exception did not apply—or that a qualifying event had occurred with regard to Kidder.

Fiduciary Duty

DE NOVO REVIEW APPLIES IN CASE INVOLVING DUTY TO PROPERLY MANAGE PLAN

A de novo rather than an arbitrary and capricious star ard of judicial review applies in a lawsuit involving pl fiduciaries' duty to safeguard and properly manage employee benefit plan, the U.S. District Court for the I trict of Maryland decided (*Kowalewski v. Detweiller*, Md, No. MJG-88-3413, 8/29/91).

Albert Kowalewski, a participant and former co-admi trator of the Steamship Trade Association—Internati Longshoremens' Association Pension and Benefits Fu sued eight trustees or former trustees of the plan, char that they had engaged in prohibited transactions under Employee Retirement Income Security Act, viol ERISA's provisions governing the conduct of plan co- ciaries, and also violated the Taft-Hartley Act.

Addressing a threshold question presented in the cas district court found that an arbitrary and capricious s ard of review is inapplicable to the trustee's conduct al by Kowalewski. Instead, the district court held that novo inquiry into the trustees' conduct is appropriat

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Preface

This book assembles the issues, alternatives, law, design techniques, and numerical applications involved in retirement planning for professionals and includes all of the TRA '86 law changes. It begins with a discussion of retirement needs, and is then organized to take the reader from the basics of qualified and nonqualified plans, through unique planning tools and solutions, to whether or not to incorporate, to methods of handling plans on firm terminations, and, finally, to a discussion of plan investments and estate tax planning techniques.

The types of professionals to whom this book is addressed include:

Attorneys who are responsible for advising professional clients on issues involving the establishment and operation of retirement plans. They will find herein unique plan provisions, answers to design problems, identification of stumbling blocks, solutions to planning problems, and descriptions of how to use the myriad of plans available. Attorneys who must develop retirement plans for their own firms can utilize this work not only as a foundation for retirement planning, but also to uncover the range of planning approaches, tools to solve firm plan problems, and creative approaches to maximize what the firm can accomplish through its retirement plans.

Accountants advising clients on retirement planning, financial planners who want to learn about retirement planning for professionals, and pension consultants who want to broaden their base of

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after-tax personal savings is no where near as tax-efficient as a qualified retirement plan.

To save money personally, you must first pay income taxes. Then you invest the money and pay taxes on the annual earnings. Through a qualified plan you pay no taxes on the money as you put it away and the plan pays no taxes on the investment earnings as it accumulates. You can accumulate three to four times as much money on the same annual deposit budget through a qualified plan as through after-tax personal savings.

But assuming you do accumulate significant personal assets, they can be used for retirement. In Section 13.5 of this chapter, an example is given showing the advantage of using your already taxed personal savings while the tax deferred qualified plan benefit accruals grow tax-free.

13.5.5 Life Insurance Cash Value

Most professionals own a fair amount of life insurance. The cash values growing in these policies can be used for retirement. One way of using the cash values is to borrow against them. The loan proceeds are tax-free.

In the alternative, withdrawals can be made against the cash value in some types of insurance. Withdrawals are tax-free until you recover all of the premiums you paid. The balance is taxable as ordinary income. Dividends from life insurance policies are tax-free, also, to the extent of recovery of your basis in the policy.

You can cash in the policies and pay ordinary income tax on the cash value in excess of your basis. Or you can convert the policies into an annuity. If you annuitize the cash value of the policy, the difference between cumulative premiums paid and the expected total annuity income is subject to tax. Each installment is proportioned between the taxable and nontaxable elements.[5]

Any loans taken and any dividends received in cash are subtracted from the basis the insured has in the contract for purposes of determining the taxable portion of annuity installments or cash value withdrawals.[6]

[5] I.R.C. § 72(b).
[6] I.R.C. § 72(c)(4).

Fourteen

Miscellaneous Issues in Qualified Plans

14.1 PROHIBITED TRANSACTIONS

ERISA § 406 prohibits *transactions* between a qualified plan and *parties in interest*. I.R.C. § 4975(c) contains the corresponding provisions of the Internal Revenue Code. For purposes of the Code, a *party in interest* is referred to as a *disqualified person.*

14.1.1 Party in Interest

A *party in interest* is:

1. A plan participant
2. The plan sponsor
3. An employer contributing to the plan
4. Any brother, sister, parent, or child of any of the above

14.1.2 Prohibited Transaction Examples

Prohibited transactions include (but are not limited to):

1. A purchase or sale or exchange or leasing of an asset involving the plan and a party in interest

2. A loan of money or other extension of credit from the plan or to the plan involving a party in interest
3. A party in interest providing services to the plan
4. The plan providing services to a party in interest
5. A contribution to the plan other than in cash unless the plan is a profit sharing plan[1]

14.1.3 Universal Prohibited Transaction Exemptions

Certain transactions that would otherwise be prohibited have been granted universal or class exemptions. This means that any transaction which falls within the scope of the exemption can use the exemption. The most important such exemption is a loan to a plan participant. This is described in depth in Section 14.1.7.

Here is a partial list of prohibited transaction class exemptions that could affect professionals:

1. Life insurance sales[2] by a party in interest
2. Sale of securities by a stockbroker who is a party in interest[3]
3. Investment in[4] sponsoring employer's debt instruments
4. Purchase or sale of a life insurance policy between a participant and the plan[5]

14.1.4 Individual Prohibited Transaction Exemptions

Individual plans can request a separate exemption from the Department of Labor (DOL). Thousands of these have been requested and granted. Typical ones are:

1. A sale of an asset to or from the plan
2. A loan to or from the employer

[1] PWBP Opinion Letter, March 8, 1985.
[2] PT Exemption 77-9.
[3] PT Exemption 75-1.
[4] PT Exemption 85-68.
[5] PT Exemptions 77-7 and 77-9.

3. A lease of property between the plan and a party in interest
4. A joint venture with a party in interest

In granting these exemptions, the DOL typically requires that:

1. The terms be reasonable
2. More than sufficient collateral be provided
3. An independent third party (typically a bank) monitor the transaction
4. Property is independently appraised
5. No more than 25% of plan assets be involved
6. The transaction benefit plan participants

14.1.5 Plan Loans to a Party in Interest

In general, a loan to a party in interest is a prohibited transaction.[6] Such a transaction must be corrected as soon as it is discovered and a penalty of 5% of the interest on the transaction must be paid to the IRS.[7] A Form 5330 must be completed and filed with the IRS describing the transaction. Within 90 days after notice is received to correct the transaction, it must be corrected or a penalty of 100% of the interest must be paid to the IRS. Penalties are paid by the disqualified person involved in the transaction and are not tax deductible.[8]

14.1.6 Plan Loans to a Third Party

Loans from a qualified plan to a disinterested third party are treated just like any other plan investment. There must be adequate collateral. The terms of the loan must be reasonable as to repayment period and interest charged. The loan must not be a disproportionately large percentage of the trust assets.[9]

[6] I.R.C. § 4975(c).
[7] I.R.C. § 4975(f)(4).
[8] I.R.C. §§ 4975(a) and 4975(b).
[9] ERISA § 404(a)(1)(C).

14.1.7 Loans to Plan Participants

Loans are permitted to plan participants as an exception to the prohibited transaction rules.[10] However, there are limits to the amount loaned to a participant without having adverse tax consequences. Tax-free loans are limited to the greater of $10,000 or the lesser of $50,000 or 50% of the present value of the vested accrued benefit. The exemption does *not* cover owner–employees, which include, for this purpose, shareholder–employees of an S corporation, 10% or greater partners and sole proprietors.[11] This limit is for *all* plans sponsored by the same employer (or controlled group) under which a participant is covered. In other words, you get only one tax-free maximum loan limit even though you may be covered under more than one plan sponsored by the same employer.

The maximum payback period for a nontaxable loan is over five years, with principal and interest being amortized ratably and paid at least quarterly. If the loan is for purchase or substantial improvement to the participant's residence, the loan can be for more than five years, with principal and interest segments amortized ratably over the term of the loan.

If you had already borrowed more than the limit before August 13, 1982, there is no taxation as long as you repay the loan under the terms of the loan as of August 13, 1982. Any change in the terms makes it a new loan subject to the new limits. Any new loan before the old one is repaid is added to the old loan to determine whether you exceed the limits.

You can have a series of loans, the total of which is less than the dollar limit with no taxation on the loans. Could you have a series of consecutive five-year loans, the last payment of which is in 10 years and the combined total of which is less than the dollar limit? TRA '86 ended this possibility.[12] The $50,000 limit is reduced by the excess of:

1. The participant's highest outstanding loan balance during the preceding 12-month period, or
2. The outstanding loan balance on the date of the new loan.

[10] I.R.C. §§ 72(a) and 4975(d); ERISA § 408(d); TEFRA § 236.
[11] I.R.C. § 4975(d).
[12] I.R.C. § 72(p)(2)(A).

What happens if you exceed the limits? The amount in excess of the dollar amount loan limits is treated as a taxable distribution. If the loan extends for more than five years (unless it is a home loan), the entire loan is taxable.[13] You must pay ordinary income tax on an excess taxable loan, and you still owe the money back to the plan. If the excess loan is taken prior to your age 59 1/2, you also owe an extra 10% penalty tax because it is deemed to be a distribution prior to age 59 1/2.[14]

When you repay the excess loan, it is treated as a nondeductible employee contribution. This means you have basis in the payback and will pay no taxes on it when it is distributed to you or your beneficiary as a retirement, disability, death, or severance benefit. Also, you can borrow your basis created by the payback of the prior excess loan from the plan tax free in addition to the $50,000 limit.[15]

(a) LOANS MUST BE REASONABLE

Loans to plan participants still must be reasonable in amount and terms. If plan assets are treated as if they are personal assets of the participant or if the plan turns out to be primarily for the purpose of loaning money to key employees, the plan may be disqualified.

(b) TAX TREATMENT OF INTEREST

Interest paid by a participant on a plan loan is treated as consumer interest and is not tax-deductible, unless the loan is used for a valid business purpose or is secured by a qualified residence mortgage on the participant's residence.[16]

Participants who are key employees cannot tax deduct interest on any loans made after 12/31/86. Loans made prior to 1/1/87 secured by qualified residence mortgages or used for a valid business purpose are tax-deductible.[17] Interest on any other pre-1987 loan to a key employee is not tax-deductible.[18]

[13] I.R.C. § 72(p)(1)(2).
[14] I.R.C. § 72(m).
[15] Treas. Reg. § 1.4.
[16] I.R.C. § 163(d)(1); I.R.C. § 163(d)(3); I.R.C. § 163(h).
[17] I.R.C. § 72(p)(3); § 1134(e) of TRA '86.
[18] I.R.C. § 163(h).

14.2 FIDUCIARY RESPONSIBILITY

Anyone having any direct or indirect control over plan assets is deemed to be a fiduciary. Qualified plan fiduciaries are charged with the highest degree of responsibility in protecting and increasing plan assets. Fiduciaries include, but are not limited to the following parties:

1. Plan trustees
2. Plan sponsor
3. Plan administrator
4. Plan asset custodian
5. Plan service providers
6. Anyone who exercises discretionary authority over administration or managing the plan or disposition of its assets
7. Anyone who renders advice for a fee or other direct or indirect compensation[19]

There are several court cases that have found fiduciaries guilty of malfeasance and personally liable to the plan,[20] resulting in court enforced repayment to the plan for investment losses.

14.2.1 Role of the Trustee

The trustee holds all plan assets in its name and usually is responsible for all plan investment decisions. In some cases, the trustee hires an investment adviser. Sometimes the plan sponsor hires a trustee to hold title to assets and keep asset records, and an investment adviser to choose the investments. Another arrangement is that the trustee hires a bank to act as custodian and hold the assets, and also hires an investment adviser to determine plan investments.

[19] I.R.C. § 4975(e)(3).

[20] *See,* for example, *Leigh & Dusek v. Engle,* 727 F.2d 113 (7th Cir. 1984); *Eaves v. Penn,* 587 F.2d 453 (10th Cir. 1978); *Marshall v. Kelly,* 465 F. Supp. 341 (D.C. Okla. 1978).

How do you decide who the trustee should be and who should make investment decisions? Circumstances have a lot to do with this. For most large professional firms with many partners or owners, record keeping and investment selection would be very cumbersome if the trustees were appointed from among the owners. So there is an immediate given that a corporate (bank) trustee will be appointed to hold title to all plan assets and keep asset records. (An exception may be a partnership of corporations, where each partner may be trustee of his or her own plan.)

Where the professional organization is small, with only a few owners or one owner, the owners usually act as trustee for the plan. The reason for this involves a psychological and a cost factor. The psychological factor in larger professional groups is that they are more institutional; they feel comfortable having an outside party be the trustee. This also avoids internal complaints or politics practiced against any co-owners. The trustee fee is split among many owners (or disappears into overhead) and is more acceptable than to a small group.

On the other hand, smaller groups tend to have a much more independent, entrepreneurial approach to life and prefer to invest their own money rather than watch someone else do it for them.

14.2.2 Investing the Funds

Once a trustee is selected, how are the plan assets invested? Where individual account plans are involved (money purchase, profit sharing, Section 401(k), target benefit, or a one person DBP), there is a strong desire for each professional to direct the investment of his or her account. This is practical because each has a separate account. Where one large DBP covers more than one owner, individual investment direction is pointless because the plan assets are treated as one common fund for deposit determination purposes and individual plan participants have a precalculated benefit accrual that does not change, regardless of the investment experience.

Once the decisions are made as to investment direction, what alternative investments are there? Almost any type of investment you can think of is available. In Chapter 10 you will find more on investment alternatives.

14.3 REPORTING AND DISCLOSURE REQUIREMENTS

14.3.1 Form 5500

Each qualified plan must file a 5500 series form to the IRS each year. If the plan covers 100 or fewer participants (participants include retirees due or receiving benefits directly from the plan, beneficiaries due or receiving benefits, and active plan participants), a 5500C must be filed once every three years and a 5500R may be filed for each of the intervening two years. If there are over 100 participants, a full 5500 form must be filed every year. Also, an audit of plan assets must be made each year if the plan covers over 100 participants and beneficiaries and assets are not held by an institution, such as a bank, that is subject to state or federal regulations.

Separate schedules also must be filed along with the 5500 series forms. If the plan is a DBP, a Schedule B is required. It is the actuarial certification as to whether the plan meets the minimum funding standards, whether deposits have been made on time, and whether the plan assumptions are reasonable. If the plan has purchased an insurance product and/or services from a party in interest, a Schedule A must be filed, disclosing commissions and fees paid. A Schedule SSA is filed for terminated participants entitled to a vested benefit where distribution of the benefit is deferred. Schedule P is filed to trigger the statute of limitations on the 5500 series form. Without filing a Schedule P, issues relating to the 5500 form may be raised by the IRS at any time in the future.

14.3.2 Penalties for Late 5500 Filing

The entire 5500 series forms, including all schedules, must be filed within seven months of the last day of the plan year. If the employer has an extension in filing its tax return (and the employer's taxable year and the plan year coincide) and that extension runs past the seven months, the 5500 filing date automatically is extended to the employer tax return extension date. Also, you can request a specific filing extension for the 5500 series forms by making a timely application on form

5558 requesting the extension. This is not automatic, but if granted, it adds up to two and one-half months to the filing date.

If the form is not filed by the deadline, including extensions, there is a $25 per-day penalty payable to the IRS by the employer. The IRS will waive that penalty if satisfactorily extenuating circumstances exist.

If the Schedule B is not filed by the due date for the 5500 series, there is a $1000 penalty. The $25 per-day penalty is waived until it exceeds $1000 and then the penalty is the greater of $1000 or $25 per day.

14.3.3 Summary Annual Report

A summary annual report (SAR) must be posted in a conspicuous place or distributed to all plan participants within nine months after the close of the plan year, or, in the case of a welfare plan which uses group insurance arrangements, within nine months of the close of the fiscal year of the trust or other entity which files the annual report. If a plan participant requests an SAR or information about his or her benefit account, this must be provided within 30 days after the request (unless the failure results from matters beyond the plan administrator's control). Failure to provide the information is subject to a $100 per-day penalty, payable by the plan administrator to the participant.

14.3.4 PBGC-1

This is the annual report and annual per participant premium payment reporting form to the Pension Benefit Guaranty Corporation (currently the premium is $8.50 per participant per year). It applies to professional service organizations only if there are over 25 participants. For plans covering fewer than 500 participants, Form PBGC-1 is due within seven months after the end of the plan year. For plans covering 500 but fewer than 10,000 participants, effective with plan years beginning in 1986 the due date is the end of the second month following the close of the plan year. If the form and payment are late, an interest charge will be imposed on the amount of the head tax that was due. In addition, a late-payment penalty charge is assessed on any premium payment due, but not paid, by the last day payment is permitted. The penalty for late premium payments is the greater of 5% of

RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
THE STUART HACK CO., et al.	*	BALTIMORE CITY
Defendants	*	Case No. 88102069/~~CL7993~~ CL79993

* * * * * * * * * * * * *

REQUEST FOR HEARING

Defendants, Stuart Hack and The Stuart Hack Company, by their attorneys, Janet M. Truhe and Ward, Janofsky & Truhe, P.A., respectfully request that their Motion for Partial Summary Judgment be heard on January 30, 1995, the date set for hearing on all open motions in this case.

Janet M. Truhe

Janet M. Truhe
WARD, JANOFSKY & TRUHE, P.A.
Court Towers - Suite 505
210 W. Pennsylvania Avenue
Towson, Maryland 21204
(410) 321-4890

Attorneys for Defendants

RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
THE STUART HACK CO., et al.	*	BALTIMORE CITY
Defendants	*	Case No. 88102069/CL7993

* * * * * * * * * * * * *

DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE AND OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO PLAINTIFF'S DAMAGES

Defendants, Stuart Hack and The Stuart Hack Company, by their attorneys, Janet M. Truhe and Ward, Janofsky & Truhe, P.A., file the following Reply to Plaintiff's Response and Opposition to Defendants' Motion for Partial Summary Judgment as to Plaintiff's Damages.

Although the Plaintiff's Opposition purports to be a response to Defendants' recent Motion, it is for the most part a personal and often times intemperate attack on defense counsel, that hardly addresses the issues raised in Defendants' Motion. Defendants have filed a motion for partial summary judgment as to certain categories of Plaintiff's damages which they believe may not be recovered in this case as a matter of law. Rather than respond to the merits of Defendants' arguments, however, Plaintiff essentially argues the basic liability issue in this case,

i.e., whether Stuart Hack in August of 1984 should have advised Shofer about potential tax consequences which might occur if Plaintiff borrowed money from his pension. See, e.g., Plaintiff's Opposition at p. 5 ("The facts illustrate Mr. Hack's advice was given with the kind of reckless abandon characteristic of gross negligence, hardly an ordinary professional mistake. . . .").[1] To the extent Plaintiff does address specific damage categories in his Opposition, he continues to argue entitlement to recovery of damages which have already been dismissed from this case.[2]

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[1] See also Exhibit 2 (attached to Plaintiff's Opposition) which is an Affidavit of Theodore M. Rosenberg who was retained by the Plaintiff for the limited purpose of calculating his tax losses. In his Affidavit, Mr. Rosenberg discusses his prior relationship with Stuart Hack (¶¶'s 5-8), presumably in an effort to support Plaintiff's argument that because Mr. Hack was knowledgeable about using pensions as a tax shelter he should have given the Plaintiff personal income tax advice at the time of their telephone call in August of 1984. Again, all of this goes to the main liability issue in this case, and not to the issues of whether Plaintiff may recover tax penalties, interest and lost earnings on personal contributions to his pension which are the subject of Defendants' Motion for Partial Summary Judgment.

[2] For example, Plaintiff continues to raise the issue of excise taxes, (Plaintiff's Opposition at pp. 6-7), inability to draw a salary in the last three years (Exhibit 1 at ¶ 8), and certain business losses (id.). These were all previously dismissed by Judge Hollander as either pre-empted under Shofer I (excise taxes) or unforeseeable and to speculative under the authority of Stone v. Chicago Title Insurance Company of Maryland, 330 Md. 329, 624 A.2d 496 (1993)(salary and business losses).

Accordingly, the argument set forth in Defendants' Motion with respect to (1) tax penalties, (2) interest owed on unpaid taxes, and (3) lost earnings on Plaintiff's personal contributions to the pension, remain unchallenged. They also demonstrate that Defendant is clearly entitled to summary judgment as summarized briefly below.

1. Penalties

As a result of Plaintiff's failure to pay income taxes on monies he borrowed from the pension in 1984, 1985 and 1986, Plaintiff has been assessed federal and state income tax penalties totaling $23,698.81. See Memorandum in Support of Defendants' Motion for Partial Summary Judgment as to Plaintiff's Damages at p. 11 and Exhibit E at pp. 2-3 (previously attached to Defendants' Motion). As a factual and legal matter, however, Plaintiff may not recover "penalties" because it is undisputed that Defendants did not prepare the income tax returns at issue, and did not even know that Plaintiff had borrowed money from the pension when the returns were being prepared by Plaintiffs' accountants during the relevant tax years.

In his Opposition, Plaintiff does not appear to address these arguments or otherwise discuss the issue of why Defendants should be held legally responsible for the penalties which have been assessed as a result of the accountants' failure to show the loans as additional income

on the returns. Therefore, Defendants seek summary judgment in their favor as to this category of damage.

2. Interest

As a result of Plaintiff's failure to pay income taxes on loans he took from the pension in 1984, 1985 and 1986, Plaintiff has also been assessed interest on the taxes owed of $114,609.14. See Memorandum in Support of Defendants' Motion for Partial Summary Judgment as to Plaintiff's Damages at p. 11 and Exhibit E at pp. 2-3 (previously attached to Defendants' Motion).

With respect to "interest", Defendants are also entitled to summary judgment on this type of damage for several reasons. First, Plaintiff has had the use of all of the money he should have paid in taxes, including the interest thereon. If Defendants are required to pay the $114,609.14 in tax interest which has been assessed, the Plaintiff will receive a windfall. It is well settled that a plaintiff's recovery should be reduced by any direct benefit that the plaintiff receives from the defendant's wrongful act. See Restatement (Second) of Torts, § 920A (1979); Levi v. Schwartz, 201 Md. 575, 95 A.2d 322 (1953)(where the defendant's tortious act has caused damage to plaintiff but in doing so has conferred a special benefit upon him, the value of the benefit may be considered in mitigation of damages where that is equitable). In the

instant case, the Plaintiff will not be damaged by having to pay the "interest" portion of the taxes he currently owes because he has always had the use of (and, therefore, the interest earnings on) the money he should have paid in taxes.

Although there is no Maryland case on point, several courts have held that interest payments to the IRS are not recoverable as a damage because the plaintiff has had the use of the money he now owes in taxes. See Alpert v. Shea Gould Climenko & Casey, 559 N.Y.S.2d 312 (A.D. 1 Dept. 1990)(interest owed to IRS on taxes as a result of disallowed deductions not recoverable in legal malpractice case) and cases cited therein. As the New York appellate court in Alpert explained:

> the equities militate in favor of barring recovery of such interest rather than allowing plaintiffs the windfall of both having used the tax monies for seven years and recovering all interest thereon.

Id. at 315; see also Ackerman v. Price Waterhouse, 591 N.Y.S.2d 936, 946 (Sup. Ct. 1992)(interest paid to the IRS is not a damage recoverable in accounting malpractice case because it was a payment for the use of the money during the time when the plaintiff/taxpayer was not entitled to it).

As indicated in Defendant's Motion, the interest portion of Plaintiff's taxes is not recoverable, under

either a negligence or contract theory, for another reason. Interest never would have continued to accrue on the unpaid taxes if Plaintiff had been able to pay the additional taxes he owed when his amended returns were filed in 1986. Any alleged damage arising out of Plaintiff's inability to pay those taxes in 1986 could hardly have been foreseeable to Mr. Hack in 1984 when he was advising Shofer about borrowing from his pension.[3] Under the authority of Stone v. Chicago Title Insurance Company of Maryland, Defendants cannot be held responsible for the fact that Plaintiff allegedly had no available source of funds in 1986 when his tax debt came due, absent any knowledge on the part of Hack about Plaintiff's loans from the pension during the years in question. It is undisputed in this case that Mr. Hack did not know the Plaintiff was borrowing any money from his pension at the time the loans were taken and was not privy to Plaintiff's personal financial circumstances. Like the defendants in Stone, Defendants in the case here are not liable for damages resulting from the fact that Plaintiff was a financial house of cards.

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[3] This is especially true considering the fact that when Mr. Hack advised Shofer in August of 1984 that he could borrow from his pension, Shofer was able to borrow up to $126,600.00 without any adverse tax consequences. This is because only loans in excess of $50,000.00 above Shofer's personal contributions to the pension (which were $76,600.00) were taxable as income.

In his Opposition, Plaintiff makes no attempt to show why the interest portion of his taxes should be recoverable in this case. Defendants have demonstrated why it is not as a matter of law. Therefore, they request judgment in their favor as to this category of damage.

3. Loss of Earnings on Plaintiff's Personal Contributions to the Pension.

As part of the total monies Plaintiff withdrew from his pension, $76,600.00 had originally been contributed to the pension by Plaintiff, personally. It had been paid into the pension with after-tax dollars and, therefore, could be withdrawn without any adverse tax consequences. As part of the damages being claimed, however, Shofer seeks recovery of $1,823,018.00 which his expert calculates he would have earned on the $76,600.00 had it remained sheltered in the pension (tax-free) until the year 2059. See Exhibit B (Vol. IV) at p. 79 and Exhibit F (previously attached to Defendants' Motion).

Defendants seek judgment in their favor as to this category of damage for several reasons. First, the Plaintiff has previously testified that he understood was losing the benefit of the pension's tax shelter when he withdrew the $76,600.00 from it. See Exhibit B (Vol. III) at p. 346 (previously attached to Defendants' Motion). Thus, it is undisputed that Plaintiff knowingly risked the

loss of this shelter when he withdrew the money to spend on other things and cannot, under Maryland law, now recover it as a damage from these Defendants.

Second, this category of damage is pension-related and, thus, pre-empted under ERISA. Although this specific category of damage had not been claimed at the time Shofer I was decided, it should be dismissed on the same basis, i.e., pension-relatedness, that other damages were dismissed by the Court of Appeals such as excises taxes and prohibited transaction penalties. As the Court indicated in Shofer I, assuming liability, Plaintiff's damages on remand would be limited to personal tax obligations and consequential damages in the form of reimbursement for professional fees incurred during Plaintiff's tax audit. Shofer v. The Stuart Hack Company, et al., 324 Md. 92, 105, 109-10, 595 A.2d 1078 (1991). That this type of damage is pension-related is established by the fact that a calculation of damages in this category directly impacts plan benefits and will involve a consideration of ERISA law. See Memorandum in Support of Defendants' Motion for Partial Summary Judgment at pp. 20-23.

Finally, as Defendants argued in their Motion for Partial Summary Judgment, this category of damage should not be recoverable because it could not have been reasonably foreseen by Mr. Hack when he was rendering his advice to

Plaintiff in August of 1984. Under the authority of Stone v. Chicago Title Insurance Company of Maryland, knowledge of the Plaintiff's special circumstances is the touchstone of foreseeability and, therefore, liability. It is undisputed that Shofer did not even advise Hack in August of 1984 whether he was going to borrow any money from the pension, let alone how much. Indeed, one of the other questions Shofer asked Mr. Hack was whether he could use plan assets as collateral for a loan. See Exhibit C (previously attached to Defendants' Motion). Mr. Hack did not know what, if anything, Plaintiff was planning to do when their August 1984 conversation concluded. Thus, there was no way Mr. Hack could have reasonably foreseen in August of 1984 that Plaintiff would withdraw $375,000.00 from his pension over the course of the next three years, and risk losing the tax shelter on his entire personal contribution to the pension of $76,600.00.

It does not appear from Plaintiff's Opposition that Plaintiff has responded to any of the foregoing arguments with respect to the loss of the tax shelter on the $76,600.00. Moreover, Defendants have demonstrated their entitlement to dismissal of this category of damage on the grounds of assumption of risk, pre-emption and lack of foreseeability as a matter of law. Therefore, summary

judgment should be entered in favor of Defendants as to this category of damage.

For the foregoing reasons, Defendants, Stuart Hack and The Stuart Hack Company, respectfully renew their request that this Court dismiss all claims for damages arising out of penalties, interest, and loss of the Plaintiff's tax shelter on his personal contributions of $76,600.00 to the pension.

Janet M. Truhe
WARD, JANOFSKY & TRUHE, P.A.
Court Towers - Suite 505
210 W. Pennsylvania Avenue
Towson, Maryland 21204
(410) 321-4890

Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of January, 1995, copies of the foregoing **Defendants' Reply to Plaintiff's Response and Opposition to Defendants' Motion for Partial Summary Judgment as to Plaintiff's Damages** were mailed by first class mail, postage prepaid, to John T. May, Esquire, Deborah M. Whelihan, Esquire, Jordan Coyne & Savits, 1030 Fifteenth Street, N.W., Suite 500, Washington, DC 20005 and to Thomas H. Bornhorst, Esquire, 2236 Southland Road, Baltimore, MD 21207.

Janet M. Truhe

Janet M. Truhe

Entered 2/3/95

RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
THE STUART HACK CO., et al.	*	BALTIMORE CITY
Defendants	*	Case No. 88102069/CL7993

* * * * * * * * * * * * *

ORDER

Defendants' Motion for Partial Summary Judgment as to certain categories of Plaintiff's damages having been considered by this Court, and counsel having presented argument, it is this 31st day of Jan., 1995,

ORDERED that Defendants' Motion is DENIED without prejudice as to tax penalties and interest.

It is further ORDERED that Defendants' Motion is GRANTED as to Plaintiff's claim for lost earnings on the $76,600.00 in personal contributions which he made to his pension. This claim is barred by assumption of the risk, lack of foreseeability and pre-emption under the Employee Retirement Income Security Act as that statute was interpreted by the Court of Appeals in Shofer v. The Stuart Hack Company, et al., 324 Md. 92, 595 A.2d 1978 (1991).

André M. Davis

JUDGE ANDRE M. DAVIS

SHOF1315.ORD

2 csm 2/3/95

WARD, JANOFSKY & TRUHE, P.A.

ATTORNEYS AT LAW

COURT TOWERS
SUITE 505
210 W. PENNSYLVANIA AVENUE
TOWSON, MARYLAND 21204

(410) 321-4890
FAX (410) 321-1948

PETER D. WARD
JULIE C. JANOFSKY
JANET M. TRUHE*
*Also admitted in D.C.

January 31, 1995

HAND-DELIVERY

The Honorable Andre M. Davis
Circuit Court for Baltimore City
100 North Calvert Street - Room 636
Baltimore, MD 21202

RE: Richard Shofer v. The Stuart Hack Company, et al.
Case No. 88102069/CL7993

Dear Judge Davis:

Enclosed please find a proposed Order which I believe reflects the rulings you made on Defendants' Motion for Partial Summary Judgment at the hearing yesterday. Copies of the enclosed Order have been sent via facsimile this afternoon to all counsel in this case.

If you have any questions or would like any revisions made to the Order, please let me know.

Respectfully,

Janet M. Truhe

Janet M. Truhe

JMT/jek

Enclosure

cc: Thomas H. Bornhorst, Esquire
John T. May, Esquire

DAVI1315.LTR

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RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
THE STUART HACK CO., et al.	*	BALTIMORE CITY
Defendants	*	
* * * * * *		Case No. 88102069 / CL 79993
THE STEWART HACK CO., et al.,	*	Judge Andre M. Davis
Third-Party Plaintiff	*	
v.	*	
GRABUSH, NEWMAN & CO., P.A.	*	
Third Party Defendant	*	

* * * * * * * * * * *

CONSENT MOTION FOR REVISION OF PRIOR ORDER

Plaintiff, by counsel, and with consent of all parties, respectfully requests that the Court's Order dated January 31, 1995 be revised, for cause stating:

1. The revision sought by the Plaintiff would add the underlined language, stated below in parenthesis, to the end of the following sentence (see Exhibit A.attached hereto): "It is further ORDERED that Defendant's Motion is GRANTED as to Plaintiff's claim for lost earnings on the $76,600.00 in personal contributions which he made to his pension." (, and in regard to other lost sheltered earnings on distributions used to extinguish Plaintiff's pension loans.)

2. The issue involving other distributions was raised at the hearing by way of facts in exhibits, e.g. Affidavit of Plaintiff, Richard Shofer, and by

Plaintiff's counsel directly who asked the Court if the ruling on the $76,600. encompassed the area of other distributions necessary to extinguish the bad loans themselves (which was also the purpose of Plaintiff's reclassification treatment of his personal pension contributions of $76,600).

3. At the hearing the Court agreed that Plaintiff's claims for such further distributions were also precluded by its ruling.

4. That Plaintiff seeks a clear opportunity to include the subject-matter of losses occasioned by such distributions in the anticipated interlocutory appellate review of Plaintiff's damages.

5. That, while the issue of such distributions was not raised directly by the Defendant's Motion for Partial Summary Judgment, the Defendants cannot be prejudiced under the circumstances where the Court has ruled in favor of the Defendants on the issue and Plaintiff concedes that further argument on point would not have presented a new perspective on this issue to the Court.

6. A proposed Order is attached hereto for consideration of the Court.

7. That the Memorandum and Order requested by the Court regarding final judgments to enable interlocutory appeal of damage issues has been drafted in anticipation of the Court's approval of the instant motion.

WHEREFORE, Plaintiff requests that the Court grant revision of its prior Order of January 31, 1995.

Respectfully submitted,

Thomas H. Bornhorst
2236 Southland Rd.
Baltimore, MD 21207
(410) 298-2265
Attorney for Plaintiff

Janet M. Truhe
WARD, JANOFSKY & TRUHE, P.A.
Court Towers, Suite 505
210 W. Pennsylvania Ave.
Towson, MD 21204
(410) 321-4890
Attorney for Defendant

John Tremain May
JORDAN, COYNE & SAVITS, P.A.
1030 15th St., N.W., Suite 500
Washington, DC 20005
(202) 371-1800
Attorney for Third- Party Defendant

Exhibit A.

Entered 2/3/95

RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
THE STUART HACK CO., et al.	*	BALTIMORE CITY
Defendants	*	Case No. 88102069/CL7993

* * * * * * * * * * * * *

ORDER

Defendants' Motion for Partial Summary Judgment as to certain categories of Plaintiff's damages having been considered by this Court, and counsel having presented argument, it is this 31st day of Jan., 1995,

ORDERED that Defendants' Motion is DENIED without prejudice as to tax penalties and interest.

It is further ORDERED that Defendants' Motion is GRANTED as to Plaintiff's claim for lost earnings on the $76,600.00 in personal contributions which he made to his pension. This claim is barred by assumption of the risk, lack of foreseeability and pre-emption under the Employee Retirement Income Security Act as that statute was interpreted by the Court of Appeals in Shofer v. The Stuart Hack Company, et al., 324 Md. 92, 595 A.2d 1978 (1991).

ANDRE M. DAVIS
JUDGE
THE JUDGE'S SIGNATURE APPEARS ON THE ORIGINAL DOCUMENT

SHOF1315.ORD

Thomas H. Bornhorst
Attorney at Law
2236 Southland Rd., Baltimore, Md. 21207
(410) 298-2265
State and Federal Trial Practice
Maryland, District of Columbia

February 22, 1995

Hand delivered by counsel

The Honorable Andre M. Davis, Judge
Circuit Court for Baltimore City
111 N. Calvert St., Room 636
Baltimore, MD 21202

ATTN: Carrie A. Howie

Re: Shofer v. Stuart Hack Co. et. al. v. Grabush Newman
Case No. 88102069/CL79993

Dear Ms Howie:

In accordance with the instructions of Judge Davis, and with approval of all counsel, a Memorandum and Order is enclosed for entry of final judgment on prior orders of Judge Ward, Judge Hollander, and Judge Davis to allow for interlocutory appeal of damage issues in this case.

As we discussed yesterday by phone, a preliminary issue is also raised by the enclosed Consent Motion for Revision of Judge Davis' Order of January 31, 1995. This motion seeks to clarify the Plaintiff's right to argue on appeal in favor of the loss of sheltered earnings on pension distributions used to extinguish Plaintiff's loans. The Memorandum and Order has been prepared in anticipation of Judge Davis' approval of this preliminary matter.

Thank you for your kind attention to these matters.

Sincerely,

Thomas H. Bornhorst
Counsel for Plaintiff

cc: Janet M. Truhe, Esq.
WARD, JANOFSKY & TRUHE
Suite 505, Court Towers
210 W. Pennsylvania Ave.
Towson, MD 21204

John May, Esq.
Deborah M. Whelihan, Esq.
JORDAN, COYNE & SAVITS
Suite 500
1030 15th St., NW
Washington, DC 20005

(99 ADW

RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
THE STUART HACK CO., et al.	*	BALTIMORE CITY
Defendants	*	
* * * * * *		Case No. 88102069 / CL 79993
THE STEWART HACK CO., et al.,	*	Judge Andre M. Davis
Third-Party Plaintiff	*	
v.	*	
GRABUSH, NEWMAN & CO., P.A.	*	
Third Party Defendant	*	

* * * * * * * * * * * *

ORDER

Plaintiff's (Consent) Motion for revision of the January 31, 1995 Order of this Court having been considered, it is this 23rd day of February, 1995,

ORDERED that the prior ruling of this Court under Order of January 31, 1995, as to Defendants' Motion for Partial Summary Judgment regarding certain categories of Plaintiff's damages, shall be revised as follows:

ORDERED that Defendants' Motion is DENIED without prejudice as to tax penalties and interest.

It is further ORDERED that Defendants' Motion is GRANTED as to Plaintiff's claim for lost earnings on the $76,600.00 in personal contributions which he made to his pension and in regard to other lost sheltered earnings on distributions used to extinguish Plaintiff's pension loans. These claims are barred by assumption of the risk, lack of forseeability and pre-emption under the Employee Retirement Income Security Act as that

statute was interpreted by the Court of Appeals in Shofer v. The Stuart Hack Company, et al., 324 Md. 92, 595 A.2d 1978 (1991).

André M. Davis

Andre M. Davis, Judge

MAR 6 1995

100 ADW

RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
STUART HACK	*	BALTIMORE CITY
AND	*	
THE STUART HACK CO.	*	
	*	
Defendants	*	Case No. 88102069/CL7993
* * * * * * *		
THE STUART HACK CO., et al.	*	
Third Party Plaintiff	*	
v.	*	
GRABUSH, NEWMAN & CO., P.A.	*	
Third Party Defendant	*	

* * * * * * * * * * * *

MEMORANDUM AND ORDER

The parties appeared before this Court on February 13, 1995 for a Pretrial Conference. At that time, Plaintiff advised this Court that, no matter what the result of the upcoming non-jury trial in this case (scheduled to begin on February 27, 1995), he will appeal all of the rulings on damages previously rendered by this Court since this case was remanded for trial. See Shofer v. The Stuart Hack Co., 324 Md. 92, 595 A.2d 1078 (1991) which substantially

restricted the damages the Plaintiff may recover in this case on his state law claims for negligence and breach of contract in view of the broad pre-emptive effect of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq..

Specifically, on February 17, 1993, this Court (J. Ward) entered judgment in favor of the Defendants on their Partial Motion to Dismiss Plaintiff's Third Amended Complaint for Failure to State a Claim, and held, in accordance with the decision of the Court of Appeals in Shofer v. The Stuart Hack Co., that Plaintiff may not recover damages for excise taxes, prohibited transactions or plan disqualification. This Court also dismissed Plaintiff's claims for punitive damages and attorney's fees.

In addition, on July 11, 1994, this Court (J. Hollander) entered judgment in favor of Defendants on their Motion for Partial Summary Judgment as to Plaintiff's Damages, and held that Plaintiff may not recover damages arising out of excise taxes, prohibited transactions, his failure to follow proper procedures in borrowing from his pension, his inability to refinance his Virgin Islands property, lost salary and lost business profits. This Court denied Defendants' Motion to the extent it requested

dismissal of the Plaintiff's Third Amended Complaint in its entirety.[1]

Lastly, on January 31, 1995, this Court (J. Davis) entered judgment in favor of the Defendants on their Motion for Partial Summary Judgment as to Plaintiff's claim for loss of sheltered earnings within his pension account due to reclassification of personal contributions in the amount of $76,600.00 and subsequent distributions used to extinguish Plaintiff's pension loans.[2]

The Plaintiff claims, and this Court agrees, that the viability of the ERISA-related damage claims, in particular, will impact and dictate this Court's evidentiary rulings on both liability and damage issues. Therefore, this Court, with the consent of all parties and with the recognition that certification should be reserved for the very infrequent case, believes that this matter involves such a situation and that interlocutory appellate review is necessary and appropriate at this time. Accordingly, based on the foregoing, it is this 23rd day of

---

[1] Defendants sought dismissal of Plaintiff's Third Amended Complaint on the ground of pre-emption in view of the recent Supreme Court case of Mertens v. Hewitt Associates, ____ U.S. _____, 113 S.Ct. 2063 (1993).

[2] This Court denied Defendants' Motion without prejudice as to tax penalties and interest.

February, 1995 by the Circuit Court of Baltimore City, Maryland, hereby

ORDERED, pursuant to Maryland Rule 2-602(b), there being no just reason for delay, this Court directs the entry of a final judgment as to its rulings contained in the Order dated February 17, 1993, the Order dated July 11, 1994, and the Order dated January 31, 1995, as revised on February 23, 1995.

André M. Davis

Andre M. Davis, Judge

MAR 6 1995

Sum
5-6-95

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RICHARD SHOFER	*	IN THE
Plaintiff	*	
	*	CIVIL DIVISION CIRCUIT COURT
v.	*	FOR
THE STUART HACK CO., et al.	*	BALTIMORE CITY
Defendants	*	
* * * * * *		Case No. 88102069 / CL 79993
THE STEWART HACK CO., et al.,	*	
Third-Party Plaintiff	*	
v.	*	
GRABUSH, NEWMAN & CO., P.A.	*	
Third Party Defendant		

* * * * * * * * * * *

NOTICE OF INTERLOCUTORY APPEAL

To the Clerk of the Court:

Notice is hereby given that the plaintiff, Richard Shofer, will appeal, to the Court of Special Appeals of Maryland, the February 23, 1995 ruling of Judge Andre M. Davis pursuant to Maryland Rule 2-602(b) entering as final judgments the rulings contained in the Orders of this Court dated February 17, 1993, July 11, 1994, and January 31, 1995 as revised on February 23, 1995.

Respectfully submitted,

Thomas H. Bornhorst
Attorney for Plaintiff
2236 Southland Rd.
Baltimore, MD 21207
(410) 298-2265

1149

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of March, 1995, a copy of the aforegoing Notice of Interlocutory appeal was mailed first class, postage prepaid, to Janet M. Truhe, Esq., WARD, JANOFSKY & TRUHE, 210 W. Pennsylvania Ave., Suite 505, Towson, MD 21204, and.to John T. May, Esq. and Deborah M. Whelihan, Esq., JORDAN, COYNE, SAVITS & LOPATA, 1030 15th St., N.W., Suite 500, Washington, DC 20005.

Thomas H. Bornhorst

FILED

MAR 24 '95

CIRCUIT COURT FOR BALTIMORE CITY

102 P.R.

RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
STUART HACK	*	BALTIMORE CITY
AND	*	
THE STUART HACK CO.	*	
	*	CL-79993
Defendants	*	Case No. 88102069/CL7993
* * * * * * *		
THE STUART HACK CO., et al.	*	
Third Party Plaintiff	*	
v.	*	
GRABUSH, NEWMAN & CO., P.A.	*	
Third Party Defendant	*	

* * * * * * * * * * * *

NOTICE OF CROSS APPEAL

MADAM CLERK:

Please note an Appeal to the Court of Special Appeals from the judgment dated February 23, 1995 in the above-captioned case, on behalf of the Defendants, Stuart Hack and The Stuart Hack Company.

Janet M. Truhe

Janet M. Truhe
WARD, JANOFSKY & TRUHE, P.A.
Court Towers - Suite 505
210 W. Pennsylvania Avenue
Towson, Maryland 21204
(410) 321-4890

Attorneys for Defendants

PHC & memo mailed 3/24/95 P.R.

CROS3235.APP

1151

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23d day of March, 1995, copies of foregoing **Notice of Cross Appeal** were mailed by first class mail, postage prepaid, to John T. May, Esquire, Deborah M. Whelihan, Esquire, Jordan, Coyne, Savits & Lopata, 1030 Fifteenth Street, N.W., Suite 500, Washington, DC 20005 and to Thomas H. Bornhorst, Esquire, 2236 Southland Road, Baltimore, Maryland 21207.

Janet M. Truhe

Janet M. Truhe

WARD, JANOFSKY & TRUHE, P.A.

ATTORNEYS AT LAW

COURT TOWERS
SUITE 505
210 W. PENNSYLVANIA AVENUE
TOWSON, MARYLAND 21204

(410) 321-4890
FAX (410) 321-1948

PETER D. WARD
JULIE C. JANOFSKY
JANET M. TRUHE*
*Also admitted in D.C.

March 23, 1995

Clerk, Circuit Court for
Baltimore City
Courthouse East
111 North Calvert Street, Room 448
Baltimore, MD 21202

Re: Richard Shofer v. The Stuart Hack Company, et al.
Case No. 88102069/~~CL7993~~ CL-79993

Dear Madam Clerk:

Enclosed please find a Notice of Cross Appeal which I would appreciate your filing in the above case. Also enclosed is a check in the amount of $50.00, payable to the Clerk of the Court of Special Appeals and a check in the amount of $60.00, payable to your office.

Thank you very much for your assistance.

Very truly yours,

Janet M. Truhe

JMT/gj
Enclosure
cc: John T. May, Esquire w/encl.
Thomas H. Bornhorst, Esquire w/encl.
CLER3235.LET

FILED 103

RICHARD SHOFER	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
THE STUART HACK CO., et al.	*	BALTIMORE CITY
Defendants	*	
* * * * * *		Case No. 88102069 / CL 79993
THE STEWART HACK CO., et al.,	*	assigned to Judge Andre M. Davis
Third-Party Plaintiff	*	
v.	*	
GRABUSH, NEWMAN & CO., P.A.	*	
Third Party Defendant		

* * * * * * * * * * *

CIRCUIT COURT FOR BALTIMORE CITY

LINE / NOTICE

To the Clerk of the Court:

This will serve notice required under Maryland Rule 8-402 (a) (2) that the undersigned Plaintiff's counsel, Thomas H. Bornhorst, directs his appearance not be entered in the appeal now pending to the Court of Special Appeals of Maryland and/or to the Court of Appeals of Maryland. Plaintiff / Appellant is proceeding pro se pending further appearance of counsel in the appeal.

Respectfully submitted, 001191

Thomas H. Bornhorst, Esq.
2236 Southland Rd.
Baltimore, MD 21207
(410) 298-2265

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of April, 1995, a copy of the aforegoing LINE / NOTICE under Maryland Rule 8-402 (a) (2) was mailed first class, postage prepaid, to John T. May, Esq.,and Deborah M. Whelihan, Esq., JORDAN, COYNE, SAVITS & LOPATA, 1030 15th St., N.W., Suite 500, Washington, DC 20005 and to Janet M. Truhe, Esq., WARD, JANOFSKY & TRUHE, 210 W. Pennsylvania Ave., Suite 505, Towson, MD 21204 and to Richard Shofer, 216 St. Dunstans Rd., Baltimore, MD 21212.

Thomas H. Bornhorst

Thomas H. Bornhorst
Attorney at Law
2236 Southland Rd., Baltimore, Md. 21207
(410) 298-2265
State and Federal Trial Practice
Maryland, District of Columbia

April 6, 1995

Clerk of the Court
Appeals Section
Circuit Court for Baltimore City
111 N. Calvert St., Room 448
Baltimore, MD 21202

Re: Shofer v. Stuart Hack Company v. Grabush Newman
Case No. 88102069/CL79993

Dear Clerk:

Please note and file the enclosed LINE / NOTICE required under Maryland Rule 8-402 (a)(2) regarding the non-appearance of counsel for Plaintiff / Appellant in the appeal now pending in the above case.

Thank you for your kind attention to this matter.

Sincerely,

Thomas H. Bornhorst

cc: Janet M. Truhe, Esq.
WARD, JANOFSKY & TRUHE
Suite 505, Court Towers
210 W. Pennsylvania Ave.
Towson, MD 21204

Richard Shofer
216 St. Dunstans Rd.
Baltimore, MD 21212

John May, Esq.
Deborah M. Whelihan, Esq.
JORDAN, COYNE & SAVITS
Suite 500
1030 15th St., NW
Washington, DC 20005

GINA

104 GH DUE 6-5-95

CSA/PHC Form No. 2 Mailed: April 6, 1995

IN THE COURT OF SPECIAL APPEALS

FILED

APR 7 '95

CIRCUIT COURT FOR BALTIMORE CITY

BIP 3-20-95

RICHARD SHOFER *

*

vs. * PHC No. 136

* September Term, 1995

STUART HACK et al. *

*

O R D E R

The Court of Special Appeals, pursuant to Maryland Rule 8-206(a)(1), orders and directs that the above captioned appeal proceed without a Prehearing Conference.

BY THE COURT

Alan M. Wilner
CHIEF JUDGE

Date: April 6, 1995

cc:* Saundra E. Banks, Clerk
Circuit Court for Baltimore City
Thomas H. Bornhorst, Esquire
Janet M. Truhe, Esquire
John T. May, Esquire

*Mr./Ms. Clerk: Will you kindly place this Order with the record in this cause (Your 88102069A/CL-79993). The date of this Order establishes commencement of the 10 day period under Md. Rule 8-411(b) and the 60 day period for transmittal of the record under Md. Rule 8-412(a).

Leslie D. Gradet

Leslie D. Gradet, Clerk

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D. Lee
2-23-10
Image 462

MSAREF.NET, MSA SC 5458
An Archives of Maryland Publication

8

MSA SC 5458-82-152

Dates: 2010/02/17
Description: Case numbers received from J. Hollander -

BALTIMORE CITY CIRCUIT COURT (Paternity Papers) Arrington v. Rodriguez, 1989, Box 169 Case No. 119070 [MSA T3351-923, CW/16/31/25]
File should be named msa_sc5458_82_152_[full case number]-####
2010-02-22 C Baker scanned 137 pages, created pdf and uploaded pdf to msaref for folder #1.
2010-02-22 C Baker scanned 164 pages, created pdf and uploaded pdf to msaref for folder #2.
2010-02-22 C Baker scanned 292 pages, created pdf and uploaded pdf to msaref for folder #3.

BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Rolnik v. Union Labor Life Ins. Co., 1987, Case No. 87313071
Case is split between 2 boxes:
Box 387 [MSA T2691-2026, HF/8/35/8]
Box 388 [MSA T2691-2027, HF/8/35/9]
2010-02-19 F. Leach scanned 369 pages, created pdf and uploaded pdf to msaref for folder #1.
2010-02-19 D. Lee scanned 271 pages, created pdf and uploaded pdf to msaref for folder #2.
2010-02-19 D. Lee scanned 326 pages, created pdf and uploaded pdf to msaref for folder #3.
2010-02-22 F. Leach scanned 432 pages, created pdf and uploaded pdf to msaref for folder #4.
2010-02-22 D. Lee scanned 473 pages, created pdf and uploaded pdf to msaref for folder #5.

BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Shofer v.The Stuart Hack Co., Box 128 Case No. 88102069 [MSA T2691-2232, HF/11/30/3]
See also for "brick binders":
Box 527 [MSA T2691-2631, HF/11/38/18]
Box 528 [MSA T2691-2632, HF/11/38/19]
D. Lee
2-23-10
Image 462
File should be named msa_sc5458_82_152_[full case number]-####

BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Attorney Grievance Commission v. Yacono, 1992, Box 1953 Case No. 92024055 [MSA T2691-4591, OR/12/14/65] **File not in Box**
File should be named msa_sc5458_82_152_[full case number]-####

BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Feldmann v. Coleman, 1993, Box 391 Case No. 93203022 [MSA T2691-5466, OR/22/08/037]
2010-02-19 F. Leach scanned 30 pages, created pdf and uploaded pdf to msaref
File should be named msa_sc5458_82_152_[full case number]-####

BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Jefferson v. Ford Motor Credit Corp., 1993, Box 470 Case No. 93251040 [MSA T2691-5545, OR/22/10/20]

2010-02-18 F. Leach scanned 289 pages, created pdf and uploaded pdf to msaref
File should be named msa_sc5458_82_152_[full case number]-####

BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Shofer v. The Stuart Hack Co. and Blum, Yumkas, Mailman, 1993, Box 518 Case No. 93285087 [MSA T2691-5593, OR/22/11/20]
2010-02-18 D. Lee scanned 125 pages, created pdf and uploaded pdf to msaref
File should be named msa_sc5458_82_152_[full case number]-####

BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Booth v. Board of Appeals, 1993, Box 589 Case No. 93330026 [MSA T2691-5665, OR/22/12/45]
2010-02-18 D. Lee scanned 124 pages, created pdf and uploaded pdf to msaref
File should be named msa_sc5458_82_152_[full case number]-####

BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Scott v. Dept. of Public Safety, 1993, Box 603 Case No. 93342002 [MSA T2691-5679, OR/22/13/11]
2010-02-19 F. Leach scanned 139 pages, created pdf and uploaded pdf to msaref
File should be named msa_sc5458_82_152_[full case number]-####

BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Stubbins v. Md. Parole Comm'n., 1993, Box 616 Case No. 93354003 [MSA T2691-5692, OR/22/13/24]
2010-02-18 C. Baker scanned 66 pages, created pdf and uploaded pdf to msaref
File should be named msa_sc5458_82_152_[full case number]-####

BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Fitch v. DeJong, 1994, Box 109 Case No. 94077005 [MSA T2691-5817, OR/28/9/2]
2010-02-18 C. Baker scanned 238 pages, created pdf and uploaded pdf to msaref
File should be named msa_sc5458_82_152_[full case number]-####

BALTIMORE CITY CIRCUIT COURT (Criminal Papers) State v. Bowden, 1987, Box 142 Case No. 18721501 [MSA T3372-984, CW/2/23/13]
File should be named msa_sc5458_82_152_[full case number]-####

BALTIMORE CITY CIRCUIT COURT (Criminal Papers) State v. Redmond, 1988, Box 191 Case No. 48828071 [MSA T3372-1282, HF/11/23/43]
2010-02-19 F. Leach scanned 50 pages, created pdf and uploaded pdf to msaref
File should be named msa_sc5458_82_152_[full case number]-####

BALTIMORE CITY CIRCUIT COURT (Criminal Papers) State v. Parker, 1990
Box 100 Case Nos. 290213034,35 [MSA T3372-1476, OR/16/16/8]
2010-02-19 C. Baker scanned 63 pages, created pdf and uploaded pdf to msaref
Box 104 Case Nos. 290221060,61 [MSA T3372-1480, OR/16/16/12]
2010-02-18 F. Leach scanned 87 pages, created pdf and uploaded pdf to msaref
File should be named msa_sc5458_82_152_[full case number]-####

BALTIMORE CITY CIRCUIT COURT (Criminal Transcripts) State v. Monk, 1991, Box 78 Case No. 591277019 [MSA T3657-403, OR/17/11/21]
2010-02-19 D. Lee scanned 460 pages, created pdf and uploaded pdf to msaref
File should be named msa_sc5458_82_152_[full case number]-####

BALTIMORE CITY CRIMINAL COURT (Transcripts) Eraina Pretty, 1978, Box 43 Case Nos. 57811846, 57811847, 57811848, 57811858, 57811859, 57811860 [MSA T496-3990, OR/18/22/41]
Case 57811847 and Case 57811858 have pull slips in the record center box that indicate the files were sent back to Baltimore City Circuit Court attn: Jack Blake in 1993.
File should be named msa_sc5458_82_152_[full case number]-####

BALTIMORE CITY CIRCUIT COURT (Criminal Papers) State v. Johnson (or Johnson-Bey),

1987, Box 11 Case No. 28701917 [MSA T3372-853, CW/2/20/26]

Accession No.: MSA SC 5458-82-152

Date Entered: 02/17/2010
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No. Pages: 0
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Notes | Edit Database Entry

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System design by Dr. Edward C. Papenfuse and Nancy Bramucci.
Programmed in *Microsoft SQL Server* and *Cold Fusion 7.0* by Nancy Bramucci.
Technical support provided by Wei Yang, Dan Knight, Tony Darden, and Matt Davis.
Version 2.8.1