

## *Antifraud*

### **Fraudster Loses Bid to Unfreeze Assets to Pay SEC Defense Attorney**

Securities fraud convict Thomas Rittweger, appearing pro se from the federal prison where he is incarcerated, failed March 8 to persuade the U.S. District Court for the Southern District of New York to unfreeze assets in a related 10-year old Securities and Exchange Commission civil enforcement action so that he has the funds to hire an attorney to defend him in the SEC lawsuit (*SEC v. Credit Bancorp Ltd.*, S.D.N.Y., 99 Civ. 11395, 3/8/10).

In a decision by Judge Robert W. Sweet, the court said no defendant--either civil or criminal--has the right to use frozen investor funds to pay his or her attorney. In this case, "Rittweger has made no showing that the funds he seeks are not part of the securities fraud."

#### **Risky Investments.**

In the underlying lawsuit, the commission alleged that Rittweger and other Credit Bancorp officials fraudulently obtained investments of at least \$120 million from top executives of publicly traded companies. Allegedly, the executives were told they could earn interest on blocks of stock that ordinarily must be held for a year or longer before they can be sold. In exchange for handing over the stock to Credit Bancorp, the stockholders were told to expect an annual risk-free return in the 4 percent to 14 percent range, the SEC said.

However, the agency charged, rather than placing the securities in trust accounts, as promised, the defendants either sold the stock or transferred it to accounts controlled by Credit Bancorp. The securities then were margined or sold outright and the proceeds used to purchase higher-risk investments.

Among other consequences, the dispute led to the imposition of an asset freeze and the appointment of a receiver for Credit Bancorp. In April 2000, the court clarified the scope of the asset freeze as to Rittweger, saying the defendant could collect "reasonable and necessary legal fees" pursuant to certain insurance policies. Rittweger agreed that the funds could be paid directly to his attorney; he did not seek modification of the freeze to pay legal expenses from any other source.

Two years later, Rittweger was indicted on securities fraud and conspiracy charges. Shortly thereafter, the court approved a settlement in the civil case between Credit Bancorp, the insurance companies, and the receiver, which included the stipulation that certain sums would be paid to Rittweger's attorney.

In June 2003, Rittweger was found guilty in the criminal case. In June 2005, he was sentenced to 135 months in prison and ordered to pay more than \$18 million in restitution. He has been imprisoned since Jan. 27, 2006.

Three years later, on Nov. 5, 2008, the SEC moved for summary judgment against Rittweger. On Nov. 19, the court granted a motion by Rittweger's attorney to withdraw from the case.

### **Depletion of Funds.**

In the motion to unfreeze assets in the SEC suit, Rittweger asked the court to release \$200,000 to hire new counsel in the SEC case, and to release \$3.4 million paid on his behalf by Credit Bancorp's insurers as part of a proposed but not finalized settlement agreement between Rittweger and the commission. According to Rittweger, the SEC promised that he would be credited for the \$200,000 against any settlement amount. He also contended that he was entitled to approximately \$3.4 million pursuant to the settlement agreement between the receiver and the insurers.

Denying Rittweger's motion, the court said that as to the \$200,000, the defendant “provides no evidence to support a claim that these assets, held in the name of Credit Bancorp, actually belonged to him.” As to the \$3.4 million, a settlement between Rittweger and the SEC is a “condition precedent” to any claim Rittweger might have under the insurer settlement agreement, the court stated. It also said that the asset freeze--entered upon the SEC's showing of a prima facie securities violation--“is necessary to avoid further depletion of funds pending a final judgment.”

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**“It has already been determined in earlier proceedings that the evidence set forth by the SEC was sufficient to warrant a freeze,” the court noted.**

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“Despite numerous opportunities,” it added, “Rittweger has not, until this time, contested the imposition of the asset freeze ... or taken any steps to challenge the evidence presented against him.” Moreover, the court stated, an asset freeze “is particularly warranted where the defendant's alleged conduct involves fraud.” In this case, Rittweger “has made no showing that the funds he seeks are not part of the securities fraud.”

“It has already been determined in earlier proceedings that the evidence set forth by the SEC was sufficient to warrant a freeze. Rittweger raises no valid independent evidentiary basis for lifting it, nor for paying his attorneys' fees using funds paid by the Insurers to the Receiver as part of their settlement. Moreover, the Court is authorized to preserve assets to assure Rittweger's payment of disgorgement and civil penalties, should those be warranted,” the court held.

### **Due Process Concerns.**

Denver lawyer Michael MacPhail, Holme, Roberts & Owen LLP--who previously spoke with BNA regarding the due process implications of the SEC's expanded use of temporary restraining orders (41 SRLR 1630, 8/31/09)--commented that the court's order in this case raises similar due process concerns. "The defendant has his assets frozen, and, as a result, his counsel appears to have limited his involvement in the case by not challenging the SEC's evidence or asking for relief from the freeze order."

"Although it appears that the defendant was authorized to collect attorney fees from one or more insurance carriers," MacPhail remarked, "it does not appear that the carriers in fact covered his legal costs. Insurance companies often dispute their coverage obligations in securities fraud cases."

In this case, MacPhail commented, Rittweger's lawyer withdrew from the civil case, "apparently due to his non-payment, and the defendant, writing from jail and attempting to represent himself, filed a belated motion to unfreeze assets to pay for attorney fees. Under this scenario," he contended, "the defendant was effectively deprived of counsel in the civil case, which made it virtually impossible to contest the SEC's evidence and propriety of the freeze order.... The entry of the asset freeze order at the beginning of the case essentially ended the litigation on the SEC's terms."

MacPhail said he "continue[s] to believe that the SEC's blanket opposition to carving out reasonable amounts for living expenses and attorney's fees, and courts' tendencies to go along with the SEC's position, raises troubling due process issues."

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