IN THE

Supreme Court of Tennessee,

AT NASHVILLE

SENTINEL TRUST COMPANY and Danny N. Bates, Clifton T. Bates, Howard H. Cochran, and Gary L. O'Brien, *Appellants*	) **Supreme Court No.**) M2005-01073-SC-R11-CV))
v.	) **Court of Appeals No.**) M2005-01073-COA-R3-CV))
KEVIN P. LAVENDER, Commissioner Tennessee Department of Financial Institutions *Appellee*	) Davidson Equity No.) 04-1934-I

APPELLANTS' APPLICATION FOR PERMISSION TO APPEAL

The above-named Appellants in the Court of Appeals (herein, "Sentinel," the individual appellants being the members of Sentinel's board of directors), who were petitioners for *certiorari* and *supersedeas* in the trial court, respectfully make application to the Court, under Rule 11, T.R.App.P., for permission to appeal the judgment of the Court of Appeals affirming the final judgment dismissing the case and an interlocutory order denying *supersedeas.*

I—THE JUDGMENT OF THE COURT OF APPEALS

The opinion and judgment of the Court of Appeals were rendered December 29, 2005, and no petition for rehearing was filed. A copy of the judgment is appended hereto.

II—QUESTIONS PRESENTED FOR REVIEW

1. In reviewing a trial court decision made pursuant to its writ of *certiorari* to determine legality of administrative action by a single official (rather than a board or commission after extensive evidentiary hearing), whether the Court of Appeals erred in refusing to review the judgment *de novo* on the trial evidence, instead of restricting its review to the official's certified record, particularly in light of concessions by the Commissioner and the trial court's factual determinations on the record, where *(i)* the administrative record was a mere investigative record instead of a record of a due-process hearing, *(ii)* the statute providing review did not make the administrative action immune from judicial review, but *(iii)* specified that any review should be under a particular *certiorari* statute, T.C.A., Title 27, Chapter 9, without limitations on its scope.

2. Whether the courts below erred in refusing to apply the law of statutory construction to determine if the face of a Tennessee Banking Act section empowering the Commissioner of Financial Institutions to seize a "state bank," under restricted circumstances, empowers him as well to seize a "state trust company," when *(i)* no language within the Act literally authorizes the seizure of a state trust company under *any* circumstances, *(ii)* the Act expressly defines both types of institutions by mutually-exclusive definitions, *(iii)* the Act provides completely different remedies for the insolvency of a bank and the insolvency of a trust company, and *(iv)* it is impossible that the circumstances that empower the commissioner to seize a state bank without prior due-process hearing *could ever occur* with regard to a non-bank state trust company.

3. Whether the Court of Appeals erred in refusing to hold that the assets-seizure acts of the Commissioner and his subsequent exercise of total control over all of Sentinel's assets and business were illegal upon asserted grounds that *(i)* under U. S. Supreme Court jurisprudence, such a state seizure *without **prior** due-process hearing* is always unconstitutional when the seizure is "caused

by conduct pursuant to established state procedure, rather than random and unauthorized action." [1]; and *(ii)* there was no evidence that Sentinel was insolvent, but it was proven to be solvent when seized.

4. Whether the judgments below were lacking in due process and contrary to the law of the land by virtue of the reviewing trial court's actions *(i)* refusing to apply the law of statutory construction in arriving at its interlocutory order denying the writ of *supersedeas, (ii)* in looking back upon the interlocutory ruling as partial justification for its refusal to grant *certiorari* relief by refusing again to give studied statutory construction rationale, such failure constituting—under U. S. Supreme Court jurisprudence— a lack of the minimum degree of judicial impartiality required by due process of law, together with *(iii)* the appellate court's judgment upholding such decision, constituted action by Tennessee's judicial department in support of the unauthorized action of a Tennessee executive department, whereby Tennessee violated of one or more of the U. S. Constitutional protections forbidding state action taking property without due process of law, seizing private property without probable cause and without a magistrate-issued warrant authorizing the seizure, and seizing private property without just compensation.

5. Whether, upon the inaccurate judicial assumption by the Courts below that all Sentinel's seized assets had been transferred by the Commissioner, those courts erred in holding that *certiorari* could not restore the *status quo ante,* even partially, when *(i)* there was no evidence in the record that either possession or ownership of those assets had been transferred either tentatively or beyond recall, *(ii)* the record affirmatively establishes that millions of dollars' worth of Sentinel's cash assets and real property remain in the possession and under the exclusive control of the Commissioner, *(iii)* prudence would require the Commissioner to retain power to revoke any claimed transfers when the legality of his seizure actions was unsupported by any appellate judicial

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[1]As held in *Hudson v. Palmer,* 468 U.S. 517, 532, 104 S.Ct. 3194, 3203, 82 L.Ed. 2d 393, 407 (1984), explaining and following *Parratt v. Taylor*, 451 U.S. 527, 539; 101 S. Ct. 1908, 1915; 68 L. Ed. 2d 420, 431 (1981).

decision and was contested from the outset, and *(iv) res judicata* determination of the illegality of the Commissioner's actions is needful to make a future decision upon the liability of the State of Tennessee for its actions alleged to be totally without lawful authority under the applicable constitutional and statutory provisions, of both Tennessee and the United States, and Tennessee's common law.

III—THE RELEVANT FACTS

A prime relevant fact that requires conscious awareness to understand the dispute is the set of differences that *always* have differentiated banks and trust companies and that still persist.

The Bank is the only institution authorized to receive "deposits" against which checks can be drawn, and which receipt creates the debtor-creditor relation, so that the "deposits" are the sole property of the bank and the claims of depositors[2] are all unsecured; the bank holds cash reserves in a very small percentage of the deposits it owns and for which it is indebted; and the bank at any time may have outstanding loans *eventually* repayable to it in total amounts not required by any law or custom to be limited either by its total assets, its total deposits or both, so that the bank constantly lends non-existent money and thereby creates money substitutes as credits (and debts owed it) on its books.

The **Trust Company** receives and holds in trust large sums of money in which it has no ownership interest, the money is furnished by trust settlors and payable *eventually* to trust beneficiaries under the terms of trust indentures, and Sentinel, which acts as trustee under bond indentures, receives and would continue receiving—but for its seizure—over a hundred million dollars in trust through the course of each year, and it pays out that total of such sums throughout

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[2]Depositors enjoy no priority in division of the insolvent bank's remaining assets except a secondary priority, but only for $10.00 of the account, T.C.A. § 45-2-1504(h)(1)(D)..

every year at different dates fixed by the many trust indentures.

As a consequence, every bank is always subject to the risk of sudden insolvency which can result in a "run" on the bank, in which case the bank's future receipt of income to cover checks will end —except for the inadequate amounts that will trickle in during liquidation of its loans—leaving its unsecured "depositors" the biggest losers except, in modern times, to the limited extent to which they are protected by Federal Deposit Insurance. On the other hand, if a trust company becomes short of cash, this will cause no such emergency, because the trust company will continue to receive each year the large sums the indenture-settlors are obligated to pay, and a trust company can safely operate a trust business *without any assets* as long as its (or its owner's) credit will enable it to borrow operating expenses from its owners or banks.

The legal setting of this dispute is that from the beginning, the Commissioner and his predecessor office, originally within the former Department of Insurance and Banking, had no authority over trust companies, but only banks. In 1980, a Banking Act (T.C.A. Title 45, Chapters 1 and 2) amendment first gave the Department regulatory authority over some trust companies,[3] but only those formed thereafter with the required Commissioner-approved charter. Then in 1999, all previously-grandfathered trust companies (including Sentinel) were first subjected to Departmental authority. The amendatory act, *inter alia,* subjected *all* trust companies to both chapters of the Banking Act and to the Commissioner's regulatory authority, it contained some provisions[4] applicable only to banks, others applicable only to trust companies, and six sections applicable equally to trust companies and to banks *with fiduciary powers*. It also empowered the Commissioner to exercise *one* of his bank-control powers (but not the bank-seizure powers) over newly-regulated trust companies for only a limited 3-year period, which expired June 30, 2002, before the Commissioner seized Sentinel.

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[3]And provided some rules regarding their operation.

[4]The pre-1999 amended Banking Act also contained some provisions in each of these three categories.

Turning to facts relating to Sentinel alone, it deposited each payment from bond-issuing trust settlors in a pooled checking account it maintained at SunTrust Bank, as to which Sentinel (but not the bank) kept meticulous records of the total amount held for each bond-issuer's bondholders. Each month, it received daily interest in varying amounts and credited to each bond fund its pro-rata share of the total interest. Beginning 1998-1999, over 60 of these issuers (all health-care companies[5]) became insolvent due to changes in federal law that caused medicare and medicaid reimbursement to be lessened to the extent that they could not meet operating expenses. This caused them to default on their bond obligations, requiring Sentinel to seek to liquidate the collateral[6] on each, for which purpose it was authorized to use each such settlor's monies[7] and collateral, on which it had first priority under the trust indentures.

Sentinel's method of paying attorney fees and other large expenses of liquidation was to pay all required expenses from each settlor's moneys held in cash in its bond funds within the pooled funds, which it did by paying them from the pooled account and charging (as trustee for each settlor) to each of the settlor's bond accounts the amount of cash expended. When the cash in any defaulted trust account within the pooled funds was depleted, that trust account went into overdraft. Hence each such settlor's collateral became liable for that company's overdrafts whenever the collateral should be liquidated. Such use of overdrafts to temporarily finance collateral-liquidation expenses was in accord with the way of handling defaulted bond issuers' liquidations by trust companies throughout the United States, and its legitimacy was thoroughly briefed in the Court of Appeals.

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[5]These were "private activity" bonds, each sold under the names of a sponsoring city or county, but supported only by property and projected income, and not by public credit.

[6]This consisted only of the bond-issuer's hospital properties or other such facility, the expected stream of income having disappeared.

[7]Aside from collateral in cash and properties, each settlor's bond indenture required that large sums of money be held by the trustee in separate funds required to be retained by the trustee for limited specific uses until all bonds in the issue were redeemed. Each of these large funds was held in securities in Sentinel's name as trustee, which were held in a Sentinel securities account at SunTrust Bank.

During the period from 1998 until just before Sentinel's seizure in 2004, Sentinel continued crediting each of the undefaulted trust accounts with its pro-rata share of interest earnings on the pooled funds each month, but under Sentinel's schedule of fees and charges, each overdraft (effectively the same as a loan by the pooled fund) incurred liability to the fund for interest at the rate of 1½% a month, compounded monthly. Sentinel had no interest in nor expectation of income from such interest-earning. The interest-compounding at this high rate would be a multiple of the moneys "borrowed" from the pooled fund.[8] Each such accrual of entitlement to daily interest received from SunTrust Bank and charging of interest on overdrafts was at all times automatically computed each month on Sentinel's computer accounting systems by whether the account had a positive or negative balance.

At the conclusion of all liquidations of these 60 defaulted issues, all the net profit from compounding would become the property of the pooled fund, *i.e.,* would be pro-ratable among all the funds that had held positive balances throughout the collateral-liquidation period of years. Due to the constant receipt into and disbursement from the pooled funds in large amounts as required by all the solvent issuers' bond indentures, the fund throughout held a daily-fluxuating cash balance in the range of multi-millions of dollars, much greater than the semi-annual disbursements to bondholders that occurred on different dates in every month throughout the year. With each solvent fund credited with its portion of the earned interest paid by SunTrust Bank, the only practical effect of the overdraft charges is that it diminished the net cash available from the completion of each liquidation, for pro-ration among the holders of that issuers' thousands of bonds, but such was in accord with each governing indenture.

Additional relevant facts established by the record include the following:

- After Sentinel came under the Department's regulatory control, the Department conducted annual examinations, whose reports showed that the Department knew Sentinel was using

[8]This caused the interest debts of many bond-issuer's to mount to between double and quadruple the money "borrowed," depending upon the number of months until payment.

overdraft-charging to temporarily finance liquidation work on each issue pending completion of liquidation. The Department made no objection, but stated its approval of the way Sentinel was handling the liquidation obligations, and even complimented Sentinel.

- During the period from the commencement of the health-care bond issuers' insolvency until Sentinel's 2004 Seizure by the Commissioner, Sentinel successfully completed 50 of the 63 issuers' collateral liquidations, in many of which the accounts-receivable (overdrafts plus compounded interest) exceeded $1 million. In each of the 50, there was a full recovery of the total receivables, including interest, all of which was deposited into the pooled trust account, with the remaining balance pro-rated among bond-holders.

- For the first time, soon after previous Commissioner Houston was replaced by Commissioner Lavender's appointment, the Commissioner and Department stated objections to Sentinel's disbursing liquidation expenses from the pooled trust funds by permitting overdrafts after each such collateral-owning issuer's cash within the pooled fund was exhausted—

  - The Department first demanded an explanation of how the cost of liquidation collections was being funded, even though its own records established that the allowance of overdrafts pending liquidation had always been the funding method.

  - The Department then expressed dissatisfaction over the fact that Sentinel, with 13 liquidations then incomplete, could not establish the specific "monetary amount of loss, *if any* . . ." that Sentinel would experience upon completion of all liquidations.

  - About 3 months before the 2003 commencement of the Commissioner's final examination of Sentinel, *after the June, 2002, expiration of the Commissioner's 3-year trust-company examination powers* as vested in him by the 1999 amendatory legislation, a meeting of Commissioner Lavender and his advisors concluded that, upon completion of Sentinel's CPA's December 31, 2002 year-end audit (which was also after the examination powers had ended) if it should be revealed Sentinel was

insolvent, as expected, the Commissioner would order Sentinel to stop accepting business, would seize its assets, and would appoint a receiver to administer them.

- The anticipated audit report did not opine Sentinel's insolvency but reported that it *would not be possible* to determine whether Sentinel would be solvent or insolvent until the completion of all pending liquidation proceedings Sentinel was conducting.

- Though lacking a professional opinion of insolvency, the Commissioner determined that he would order Sentinel to immediately inject $1-$2 million capital and would require Sentinel to submit a plan of details whereby it would inject enough additional capital to totally fund the over $7 million deficiency (more than half of which was the compound-interest charges),[9] and to then *go out of business.*

- As earlier planned, the Commissioner issued a "cease and desist" order to Sentinel on May 3, 2004, which required both cessation of named acts and the performance of extensive affirmative actions,[10] and in mid-May, 2004, seized all Sentinel's property and seized control of the trust funds held by it.

Trial evidence and occurrences, as to which there were no negative credibility determinations by the Chancery Court, included:

- The Commissioner, through counsel, admitted that a purpose and effect of the seizure would be to destroy Sentinel. He admitted that Sentinel's using overdraft recognitions to temporarily fund overdrafts had not caused any delay in any bondholder's receipt of the full

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[9]Although the monthly charge for overdrafts had for many years been a part of Sentinel's schedule of fees and charges, neither the Department nor any auditor demonstrated knowledge of the fact that such accounts receivable included large amounts of interest.

[10]No provision of the Act states that the Commissioner is authorized to order any bank or other entity to do any act, as distinguished from ordering the cessation of prohibited actions. One provision describes the ordering power simply as "an order to cease" for whose violation the Commissioner may remove *a bank's director* from that office. T.C.A. § 45-1-107(b).

entitlement.[11] He admitted that but for the seizure, Sentinel could have continued successfully funding liquidation costs, at the expense of each defaulted bond issuer, until the completion of all liquidations.

- Upon the assumption of the possible illegality of temporary liquidation funding through overdrafts, the trial Court commented that under the statutes, the Commissioner's seizure of a bank is not authorized by the mere fact that the bank was acting illegally in its operations, but the law required, for seizure without prior hearing, that there must be a threat of loss to depositors. *Sentinel never had any depositors.*

- All testimony at the trial was offered by Sentinel, and the Commissioner called no witnesses.

- It was proven by testimony of the President of the Tennessee Association of Certified Public Accountants, having both long experience and an impressive record of service to the judiciary that, considering the documentation before the Commissioner at the time of seizure, there was no way Sentinel could be determined to be insolvent before seizure; that it would not be possible to determine whether Sentinel would end up prosperous or insolvent until its completion of all liquidations; that the effect of the interest-compounding on indebtedness originating in overdrafts was to multiply the total receivable, as summarized above; that Sentinel's controlling-owner Bates was correct in the methodology of his determination that the amount of moneys actually used in liquidation work was less than half the total owed by all defaulted bond-issuers; that his methodology was correct in showing that the Commissioner's receiver's post-seizure collections through liquidation was sufficient to overcome any deficiency in the pooled trust fund; and Mr. Bates' testimony about the method of recording interest credits and compound-interest charges in Sentinel's pooled trust

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[11]This is relevant because the statute governing corporate trustees' fiduciary duties, T.C.A. §35-3-117(j)(3), which the Commissioner is given no power to construe, provides that a chancery court adjudging breaches of trust cannot impose a penalty or payment obligation upon the errant trustee greater than the total amount that the breach " *has resulted in no distribution to a beneficiary or a distribution that is too small, . . .* "

funds and the fact that it was faithfully followed, could absolutely be either confirmed or refuted by brief examination of Sentinel's computer records in the Commissioner's exclusive control, by any person having competent knowledge of such computer systems.

- Entries under the administration of former Commissioner Houston, up to the time of his replacement by Commissioner Lavender, recognized that Danny Bates had a sterling pre-seizure reputation among Tennessee's community of trust companies, testimony proved that he had long experience in the banking business before purchasing Sentinel Trust Company, and that until the commencement of complaints relating to bond defaults by the issuers, he held security clearances to view confidential documents by both the C.I.A. and the F.B.I., for whom he consulted when asked. He had been a C.I.A. agent in Viet Nam with the highest possible security rating during that war, and his work had included transporting and delivering top-secret intelligence reports to the Joint Chiefs of Staff in Washington.

- By testimony of the CPA who did the final audit (never released because Sentinel was seized first) Sentinel's books were always in balance at each month-end, that is, the software used to generate required bond-issue reports agreed with the separate ordinary book-keeping software used to track all moneys and the ownership thereof within both the trust system and Sentinel's own corporate affairs.

- At the time of its seizure, Sentinel owed no debts and had over about $2 million in assets, had the credit to borrow large sums of money (including a Nashville bank's written commitment to lend Sentinel $1 million on conditions acceptable to Sentinel, but whose amount the Commissioner deemed inadequate to delay seizure and liquidation), and had millions dollars worth of future profits on its books subject only to its continued competent performance of its trustee obligations.

- The Commissioner offered no evidence of any pre-seizure complaints or indications of loss of confidence by either bond issuers, bond holders, or bond counsel, and one lawyer, who

was bond counsel on over 80 bond issues trusteed by Sentinel, executed an affidavit swearing to Mr. Bates' complete integrity and reputation therefor among bond counsel, carried to the point even of refusing to "cut corners."

- With all but 3 of the remaining 13 defaulted issues having been closed out by the Commissioner's receiver since seizure, the Commissioner, through counsel, represented to the trial Court that all the performing issues and assets pertaining thereto had been transferred to substitute trustees as of December 15, 2005, in support of his contention that the *status que ante* could not be restored to any extent. However, in addition to Sentinel realty still held in its ownership but in the Commissioner's possession, it was proven by SunTrust documentation during the *certiorari* hearing that the approximately $3 million cash was still held under the Commissioner's control in Sentinel's pooled fund account at Sun Trust as of Christmas, 2005, ten days after the supposed transfer to substitute trustees. Then when the Commissioner's report to the Governor was finally released to the public for the year ending December 31, 2005 it revealed that the Commissioner still held another $4 million in additional funds from post-seizure liquidations in another separate bank account he had caused to be opened.

IV—REASONS SUPPORTING THIS COURT'S REVIEW

1. This case demonstrates the continuing need for this Court to expound the law of *certiorari* as it has always existed in cases that did not involve administrative action by a board, commission, or other such collective body arising from an administrative hearing, but involved only a single official empowered to act upon the existence of stated facts, as held by this Court,[12] and the writ

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[12]Such as the *certiorari*-reviewable power of a county official to refuse to issue a requested license or to issue a distress warrant and seize property of one who exercised a privilege without the required license, each requiring the *executive* determination of the meaning of the statutory description of the privilege and factual conclusion of whether the citizen's

always has been used to determine the legality of such single-officer acts, as occurred here, in which the petition raised issues denying that the occurrence of facts vesting the officer with the power exercised, or asserting that such power was exercised without statutory authority or in violation of constitutional prohibitions, with evidentiary judicial hearing *de novo* to establish the dispositive facts. It would appear to follow that in such cases, appellate review should likewise be *de novo* upon all evidence received in the trial pursuant to *certiorari,* as in all appeals from bench-trial evidentiary trials, in accord with provisions of statutes and of the Rules of Appellate Procedure, instead of the appellate court restricting its opinion to the narrow issue of whether there was evidence in the administrative hearing—with no such hearing held in this case—adequate to support the administrative body's findings .

2. The opinions in this case demonstrate the need for this Court's modern concise exposition of the Tennessee Constitutional requirement of total separation of powers, due to the fact that so many decisions, as this case in particular, use the term "quasi-judicial powers" with the remark that such powers cannot be totally separated, speaking of the intellectual function performed by every judge in determining *the content of controlling law.* However, such expansive terminology is too imprecise because many discretionary decisions require that this intellectual function be performed —by an executive in determining the content of law to enforce it, by legislators in determining the content of law to decide whether to amend it, by courts in making the final, binding determination in resolving conflicts between litigants, and by practicing attorneys in advising clients. All such conclusory phraseology gives no guidance and can be used, as here, to reach a decision that purports to legitimate actual breaches of the required separation of powers. This is contrary to this Court's sweeping and instructive explanation of the difference the judicial and non-judicial powers in *Woods v. State,* 130 Tenn. 100; 169 S.W. 558 (1914), quoted and followed by *House v. Creveling,* 147 Tenn. 589, 250 S.W. 357 (1922), that the law-content decision is judicial *only* when it occurs in the context of proceedings meeting the requisites of judicial proceedings, which requisites *Woods*

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activity came within that privilege as discerned, *Mayor and Aldermen v. Pearl,* 30 Tenn. 249 (1850) and *Spears v. Loague, County Clerk,* 46 Tenn. 420 (1869).

expounds. Such simple and accurate differentiation in nature of judicial review of different types of administrative action is still used in resolving whether the action was "quasi-judicial" or "quasi-legislative" to determine if the proper judicial review remedy is *certiorari* or declaratory judgment.

3. The Attorney-General throughout insisted that actual statutory phrase "state bank" should be read as "state bank or state trust company" on the basis of one isolated phrase[13] of the statute, and this insistence was accepted and followed by the Courts below, despite this Court's determination[14] that reasoning from a single isolated provision of a statute is not an application of the law of statutory construction. Hence this case presents the tragic fact that actions by a Tennessee executive department have been sanctioned by Tennessee's judiciary at both trial and appellate levels by statements accepting proffered "reasoning" that refused to apply the only thought-process by which the meaning of a complex statute can rationally be established—the law of statutory construction.

The total absence of either trial or appellate court opinion accurately stating and analyzing a corporate citizen's contentions in complaining that it has been destroyed by a department of Tennessee's government has the effect of condoning such unauthorized acts, and of thereby concealing them from the public. After Sentinel and its advisors concluded that it had proven impossible to obtain effective judicial review from Tennessee's judiciary actually expounding and following the Tennessee law of statutory construction,[15] Sentinel advisedly believed this might

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[13] Providing that the said chapters "apply to the operation and regulation of state trust companies." Chapter 112, Public Acts of 1999, § 4, codified in T.C.A. § 45-1-124(b).

[14] Such determination was made by this Court's statement: "It is not in accord with **any rule of statutory construction** to lift one sentence out from the statute and construe it alone, without reference to the balance of the statute, . . ." in *Cummings v. Sharp*, 173 Tenn. 637, 643-644, 122 S.W.2d 423, 425, as quoted and followed in *Rose v. Blewett,* 202 Tenn. 153, 163; 303 S.W.2d 709, 713 (1957).

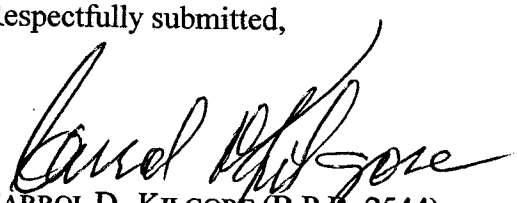
[15] This was concluded because such arguments were presented in related proceedings in the Lewis County Chancery Court and treated as invalid by that Court without expressing any reason, because the Davidson County Chancery Court denied the application for *supersedeas* by a statement of justification unrelated to Appellants' thorough presentation of statutory construction theory, and although that Court recognized the arguable validity of the arguments by

entitle it to relief in a Federal Court, but the U. S. District Court declined to exercise jurisdiction solely because of comity respect for Tennessee, saying, in part, "The higher appellate courts of Tennessee, and ultimately the United States Supreme Court, will be the final arbiters of the construction and interpretation of the Tennessee banking statutes at issue in this case." *Sentinel Trust Co., et al., v. Lavender,* 2004 U.S. Dist. LEXIS 27259 at *29. That prediction cannot come true as to Tennessee courts unless this Court shall review this case and the related cases.

It would be tragic—and should be impossible—for any Tennessee citizen, individual or corporate, to advisedly conclude that Tennessee had seized its property and destroyed its valuable business, genuinely believing that no law authorized such action, and that the action violated constitutional prohibitions, only to find Tennessee's entire judicial system effectively closed to its detailed attempts to prove the truth of these beliefs through much research, much study, and much labor, all at great expense to the citizen.

ACCORDINGLY, Appellants respectfully pray for permission to appeal to this Court.

Respectfully submitted,



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granting a discretionary appeal, the Court of Appeals rejected the discretionary appeal *sua sponte* before the deadline for the Attorney-General's response, *Sentinel Trust Co., et al. v. Lavender,* M2004-02068-COA-R10-CV. Final judgments in the related Lewis Chancery proceedings are also before this Court on separate Applications for Permission to Appeal.

Certificate of Service

It is hereby certified that copies of the foregoing application have been mailed by First Class Mail, postage prepaid, to:

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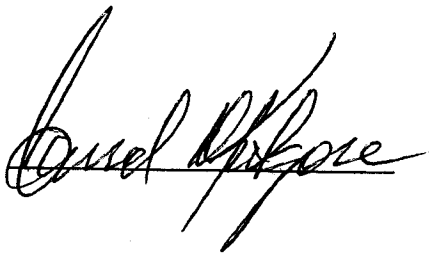

APPENDIX

Copy, Opinion of the Court of Appeals

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 17, 2005 Session

FILED
DEC 29 2005
Clerk of the Courts

IN RE: SENTINEL TRUST COMPANY

A Direct Appeal from the Chancery Court for Lewis County
No. 4781 The Honorable R. E. Lee Davies, Chancellor

Nos.: M2005-00031-COA-R3-CV, M2005-01773-COA-R3-CV

SENTINEL TRUST COMPANY, et al v. KEVIN P. LAVENDER

A Direct Appeal from the Chancery Court for Davidson County
No. 04-1934-I The Honorable Walter C. Kurtz, Judge

No. M2005-01073-COA-R3-CV

This appeal involves three cases consolidated for oral argument. Because of the duplication of the major issues in the cases, we consolidate the cases into one opinion. The Commissioner of the Tennessee Department of Financial Institutions, acting on statutory authority, took emergency possession of a Tennessee trust company, filing due notice of such action in the Chancery Court of Lewis County. Subsequently, the Commissioner gave notice, as required by statute, of the liquidation of the company, which was commenced in the Chancery Court of Lewis County. The company filed a petition for writ of certiorari and supersedeas in the Chancery Court of Davidson County. The court denied the petition for supersedeas and dismissed the writ of certiorari. Appellants appeal. We affirm. In the Lewis County Chancery Court proceeding, the court approved the transfer by the Commissioner of the various fiduciary accounts administered by the company and other assets of the company, and the appellants appeal. We affirm. Included in the disposition of the property was real estate located in Bellevue, and the Commissioner filed a motion in the Lewis County Chancery Court for approval of the sale of this real estate. Objections were filed to the Bellevue sale motion. The court, after hearing proof, approved the sale. Appellants filed separate appeals. We affirm.

Tenn. R. App. P. 3; Appeal as of Right; Judgments of the Trial Courts Affirmed

W. FRANK CRAWFORD, P.J., W.S., delivered the opinion of the court, in which ALAN E. HIGHERS, J. and DAVID R. FARMER, J., joined.

Carroll D. Kilgore of Nashville, Tennessee for Appellants, Sentinel Trust Company, Danny N. Bates, Clifton T. Bates, Howard H. Cochran, and Gary L. O'Brien

Paul G. Summers, Attorney General and Reporter; Michael E. Moore, Solicitor General, Janet M. Kleinfelter, Senior Counsel for Appellee, Commissioner Kevin P. Lavender, Tennessee Department of Financial Institutions

J. Graham Matherne of Nashville, Tennessee for Appellees, Commissioner Kevin P. Lavender and Receivership Management, Inc., Receiver for Sentinel Trust Company

OPINION

Sentinel Trust Company is a state-chartered trust company located in Hohenwald, Lewis County, Tennessee. Danny N. Bates, Clifton T. Bates, Howard H. Cochran and Gary L. O'Brien ("Appellants") are all either former directors, officers and/or shareholders of Sentinel. Appellee, Kevin P. Lavender ("Commissioner") is the Commissioner of the Tennessee Department of Financial Institutions.

In April of 1999, the Tennessee General Assembly enacted Public Chapter 112, with an effective date of July 1, 1999. The enactment of Public Chapter 112 revised T.C.A. § 45-1-124[1]

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[1] Public Act 112 made the following changes to T.C.A. § 45-1-124. T.C.A. § 45-1-124(d) was amended by adding the language and punctuation "trust companies," after the words "state banks," and before the words "savings and loan associations," and by deleting subsection (b) in its entirety and substituting the following as a new subsection (b). Changes are indicated below in bold:

> **(b) To the full extent consistent with such rights, liabilities, and penalties, all state banks and, to the extent applicable, all banks, shall hereafter be operated in accordance with the provisions of this chapter and chapter 2 of this title. Unless the commissioner determines otherwise, the provisions of chapters 1 and 2 of this title, and the rules thereof, shall also apply to the operation and regulation of state trust companies and banks whose purposes and powers are limited to fiduciary purposes and powers.**
>
> (d) Except to the extent inconsistent with or contrary to specific provisions of chapters 1, 2 and 3 of this title, Tennessee state banks, **trust companies,** savings and loan associations, and savings banks, and their directors, officers and shareholders shall be governed by and subject to the Tennessee Business Corporation Act, compiled in title 48, chapters 11-27, as the same may be amended from time to time, and successor statutes thereto. The commissioner has the authority to interpret the Tennessee

(continued...)

such that "the provisions of chapters 1 and 2 of [the Tennessee Banking Act], and the rules thereof, shall also apply to the operation and regulation of state trust companies and banks whose purposes and powers are limited to fiduciary purposes and powers." Under T.C.A. § 45-1-104, the Commissioner is charged with enforcing and administering the provisions of chapters 1 and 2 of Title 45 of the Tennessee Code Annotated. [2] On June 16, 1999, the Department of Financial Institutions ("Department") sent a letter to all Tennessee trust companies not previously under the Department's regulation, including Sentinel, informing the trust companies that, with the enactment of Public Chapter 112, they were now subject to the jurisdiction of the Department.

On December 31, 1999, the Department commenced a formal examination of Sentinel pursuant to T.C.A. §§ 45-1-124(h)[3] and 45-2-1602(a)(1).[4] The Department made the following findings: Sentinel had no written policies for any aspect of their Trust Administration Department. Sentinel's President and sole shareholder, Danny Bates, had virtually unrestricted access to all areas of the company with few compensating controls. Furthermore, the Department found that Mr. Bates was responsible for all of Sentinel activities including

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(...continued)

Business Corporation Act as it applies to financial institutions subject to regulation by the commissioner.

[2]

Chapter 1, Part 1, of Title 45, Department of Financial Institutions, reads:

The department, created by § 4-3-101, is charged with the execution of all laws relative to persons doing or engaged in a banking or other business as provided in this title, except for pawnbrokers covered by chapter 6 of this title or persons licensed under the Tennessee Title Pledge Act of 1995, chapter 15 of this title.

[3] T.C.A. § 45-1-124(h) reads as follows:

(h) All state trust companies operating on July 1, 1999, shall have such period of time as the commissioner determines to be reasonable and prudent to conform to the requirements of chapters 1 and 2 of this title and the regulations thereunder, but such period shall not exceed three (3) years from July 1, 1999. During this period of time, to conform to the requirements of chapters 1 and 2 of this title, the commissioner may conduct examinations at such company's expense, and apply the requirements of chapters 1 and 2 of this title as deemed appropriate.

[4]

T.C.A. § 45-2-1602 reads as follows:

(a)(1) The commissioner shall, either personally or by competent examiner appointed by the commissioner, visit and examine every bank subject to the commissioner's supervision at least once in each year. The commissioner has discretion to determine the scope of the examination; provided, that a full-scope examination, as set out in subsection (b), shall be conducted by the commissioner or the commissioner's designee at least once in every three (3) years. The commissioner has discretion to accept, in any calendar year, all or part of an examination report of a federal banking regulatory agency conducted of a state bank in that year.

managing and monitoring existing accounts, compilation of the general ledger, asset management and account reconciliation. Additionally, the report stated that collateral enforcement costs were being paid by allowing overdrafts within the pooled fund against each defaulted bond-issuer, which consisted of fees and expenses associated with defaulted bonds that had not been collected. The Department's examination report noted these deficiencies and violations and gave Sentinel a composite rating of "3".[5] However, the report also included the analysis that "Management works aggressively" and that Sentinel had a "high rate of success in resolving defaulted bonds in favor of bondholders." The Department's report noted that Sentinel was a grandfathered trust company and had until three years after the July 1, 1999 enactment of Public Chapter 112 to come into compliance with the noted deficiencies and violations.

In November of 2000, the Department was made aware of a judgment from Davidson County Chancery Court against Sentinel in the case of ***National Commerce Financial Bancorporation v. Sentinel Trust Company,*** No. 97-2243-I. The lawsuit alleged that Sentinel had breached its contractual fiduciary obligations as trustee under trust indentures securing certain private placement notes. National Commerce Financial Bancorporation was awarded $2,226,047, a judgment that, if made final, would be in excess of Sentinel's capital and would deem the trust company insolvent. On November 16, 2000, the then Commissioner of the Tennessee Department of Financial Institutions, Bill Houston, served a Cease and Desist Order upon Sentinel, and downgraded Sentinel's composite rating from a "3" to a "5". In February of 2001, settlement negotiations took place between Sentinel and National Commerce Financial Bancorporation ("NCFB"). The judgment was settled for $575,000, which prevented Sentinel from being declared insolvent. The Cease and Desist Order was lifted in the context of the Department's year 2000 report, discussed *infra*.

On January 26, 2001, the Department began an examination of Sentinel for the year ending December 31, 2000. Following the examination, a report was issued by the Department on July 17, 2001. Again, the report noted that Mr. Bates had virtually unrestricted access to all areas of the company with few compensating controls. Additionally, the report found that there was no documentation of management's reconciliation and review procedures and no third party was reviewing Mr. Bates' reconciliation of deposit accounts. The report further noted that there were inconsistencies in the accuracy of the corporate and trust records and that there was no internal audit function in place. The report specifically stated that "[r]econciling trust and corporate general records was difficult" and that "the accuracy of reports appears suspect due to inconsistencies in totals, as well as, the varying formats and data processing systems used." While it was noted that the "overall account administration appears generally acceptable and the company complies with the governing account instruments," the report found that guidelines and

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All trust companies and bank trust departments in Tennessee are evaluated under the standards provided by the Uniform Interagency Trust Rating System. Under this system, a trust company or department is evaluated in five component areas: management; operations; internal controls and audits; earnings; compliance and asset management. The trust company is rated "1" to "5" (with "1" being the best and "5" being the worst) in each component area and then given a composite rating between "1" and "5."

policies in regards to operations, internal controls, reconcilement of deposits and securities, balancing of accounts, information technology, audit function, investment management and contingency plan were all needed in order to prove supervision of Sentinel's corporate trust activities. Sentinel received a composite rating of "3" following the Department's examination of Sentinel's operations in 2000, and it was recommended that Sentinel be required to submit progress reports to the Department every ninety days. Once again, the report noted that Sentinel was a grandfathered trust company and had until three years after the July 1, 1999 enactment of Public Chapter 112 to come into compliance with the noted deficiencies and violations.

On April 22, 2002, the Department began its third annual examination of Sentinel for the year ending December 31, 2001. During this examination, former Commissioner Houston was replaced by the Appellee, Kevin P. Lavender. During the course of the examination, Mr. Bates admitted that he had left $800,000 in assets off the Company's balance sheet when he submitted call reports to the Commissioner in an attempt to make Sentinel look less fiscally solvent while negotiating a settlement with NCFB. The report that resulted from the examination of Sentinel's 2001 operations was issued by Commissioner Lavender on February 4, 2003. The report noted, again, that Mr. Bates continued to be primarily responsible for trust operations and continued to perform the majority of the corporate operation tasks himself. The report stated that the Board of Directors of Sentinel had adopted the Federal Deposit Insurance Corporation's Statement of Principle of Trust Department Management as part of its Policy Manual. However, the report noted that Sentinel continued to operate without a formal internal audit program and that Mr. Bates continued to record and reconcile all depository accounts and handle most of the fiduciary bookkeeping without any internal review. Most notably, the report raised the issue of overdrafts in the accounts of the defaulted bond issues and noted that it was not clear as to how these overdrafts were funded. The report speculated that it appeared that the overdrafts were being funded from other bond issues and warned of the necessity of the trust company "to keep trust account assets separate," and that "the funds of one bond issue are not to be used for another bond issue." Sentinel again received a letter written by Commissioner Lavender that accompanied the examination report, in which, the Commissioner requested that Sentinel management "provide information as to how overdrafts are currently being funded for various bond issues." On April 16, 2003, Mr. Bates wrote the Commissioner explaining funding of the overdrafts. The pertinent part of that letter reads as follows:

> Fees and expenses are charged to the appropriate principal or income cash account of trust accounts as and when the fees and expenses are incurred. As a result, a cash overdraft will occur if payment is charged to an account holding little or no actual cash assets. In virtually all cases, however, the account will have non-cash assets in the process of being converted to cash and/or may hold collectible cash apart from the trustee. . . . Each trust account is separately identified and accounted for on a stand-alone basis. Cash and investment securities are collectively held for the individual accounts. Non-fungible assets such as real property, receivables and other pledged collateral are counted as nominal assets until converted into

> cash and received into the account. Fees and expenses are funded from collective cash assets and charged to appropriate individual trusts.
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> * * *
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> When assets are converted to cash, the overdraft is liquidated. All trust accounts should hold assets in excess of any temporary cash overdraft. Sentinel recognizes that disbursements for a trust in excess of recoverable assets are to be recorded as a corporate expense. That has been and remains its corporate policy.

On June 13, 2003, the Department began an examination of Sentinel for the year ending December 31, 2002. On July 25, 2003, the Department was informed that Sentinel's audit firm, Charles Welch and Associates, had withdrawn and declined to complete Sentinel's 2002 audit due to the inability of the accounting firm to obtain from Sentinel management evidence needed to evaluate the fair value of Sentinel's corporate fiduciary receivables. Mr. Bates then hired an independent CPA, Mr. Jim Brewer, to reconcile Sentinel's cash accounts, including the pooled fiduciary account. In response to this information, the Department sent a memo to Mr. Bates on August 8, 2003. In the memo, the Department requested explanations of several accounting issues that arose during the examination, in particular, the question of why the cash balance did not reconcile to either the fiduciary or corporate balance sheet totals or to the bank account statements. Mr. Bates responded to the Department's request in writing stating that, while the "cash balance figure reported on the Trust Department Balance Sheet does not exist as an account register," which can be examined independently of the actual trust accounts, Mr. Bates believed Sentinel's accounts were reconciled and balanced. On May 31, 2003, Mr. Bates provided an Account Reconciliation Report.

On October 6, 2003, the Commissioner met with the Board of Directors of Sentinel to inquire as to how expenses were funded for defaulted bond issues. The Commissioner also stressed the urgency for a financial statement audit of the company in order for the Commissioner to determine the solvency of Sentinel. On October 10, 2003, Mr. Bates advised the Commissioner that a new CPA firm, Kraft CPAs ("Kraft"), had been engaged to perform an audit for 2002.

On March 19, 2004, Kraft provided the Department with a copy of the audit report of Sentinel for the year ending December 31, 2002. In the report, Kraft identified approximately $9.4 million in fiduciary account receivables, of which approximately $7.5 million resulted from expenditures Sentinel had made in connection with defaulted bond issues and related unreimbursed costs and expenses. However, Kraft declined to give an opinion as to the financial status of Sentinel because Sentinel's records had been inadequate for Kraft to satisfy themselves as to the existence, amount, or collectability of the receivables. Kraft also reported that: (1) Sentinel's Trust Department and companies cash had been commingled in the same bank account, (2) Sentinel appeared to have paid company expenses from the Trust Department account and reimbursed the Trust Department at a later date, and (3) Sentinel had not been

preparing an accurate reconciliation of the bank balance to the general ledger on a monthly basis but was simply adjusting the general ledger balance to the bank's monthly balance, which resulted in the company and Trust Department significantly overstating cash as of December 31, 2002.

Following the receipt of the 2002 audit report, Department examiners returned to Sentinel on March 22, 2004 to conduct a reconciliation of the balance of the fiduciary accounts as of December 31, 2003, the balance in the pooled fiduciary account, and the overdrafts on the defaulted bond issues. This reconciliation reflected a net cash shortage in the pooled fiduciary account of $5,789,011. After notifying Sentinel of net cash shortage, the Department examiners met with Mr. Bates and a Kraft auditor on April 1, 2004. At the meeting, Mr. Bates asked whether the Department's analysis and resulting determination of an approximate $5.7 million shortfall was incorrect. Mr. Bates admitted that the $5,789,011 figure was close to the amount of the shortfall. However, Mr. Bates failed to bring to the Department examiner's attention the alleged existence of a substantial amount of outstanding fees owed to Sentinel that would be available to offset this cash shortage.

On April 5, 2004, the Commissioner sent a letter to Sentinel requesting an opinion of counsel regarding Sentinel's practice of funding defaulted bond expenses with funds from other non-related bond issues. The Department defined this practice as follows:

> Sentinel served as the indenture trustee for various high-yield, unregistered municipal and corporate bonds. In a number of instances, the debtor had failed to make the scheduled principal and/or interest payments and the bond had been declared in default per the terms of the indenture. Sentinel, in its role as indenture trustee, would then fund various expenses relative to these defaulted issues, such as insurance, security, legal and other professional fees, in an effort to protect the value of the underlying collateral. While the governing indenture and/or bondholder indemnification usually provided for the reimbursement of these expenses from the proceeds from the sale of the collateral, Sentinel did not have adequate corporate liquidity to fund these expenses, in the event that the defaulted issue did not already have sufficient funds on deposit with Sentinel. Thus, in order to fund these expenses, Sentinel would "borrow" from other non-related bond issues by writing checks and/or wires on its pooled demand deposit account.... This practice of "borrowing" from the pooled fiduciary account to fund the expenses of the defaulted issues resulted in approximately $7.5 million in fiduciary account receivables that Kraft had been unable to substantiate as to their actual existence, amount or collectability.

On April 28, 2004, at a meeting with the Commission, Sentinel, and Sentinel's legal representatives from Waller, Lansden, Dortch & Davis, PLLC ("Waller Lansden"), Sentinel's legal counsel indicated that Sentinel's practice of funding defaulted bond expenses with funds from other non-related bond issues was "inappropriate" and that such expenses were typically funded with corporate assets. During a meeting of the same parties on April 30, 2004, Mr. Bates admitted that his most recent calculations showed that Sentinel had a deficit fiduciary cash position of approximately $7.25 million. Following this meeting, the Sentinel Board of Directors adopted a new Corporate Trust Policy, which provided that, in order to avoid the loss of collateral or senior secured position, "advances may be made up to the expected liquidation value," but that "funds may not be advanced from any trust account if it is anticipated that the advance creates an overdraft in the affected account."

On May 3, 2004, and as a result of Mr. Bates' May 3, 2004 admission that his most recent calculations showed that Sentinel had a deficit fiduciary cash position of approximately $7.25 million, the Commissioner issued an Emergency Cease and Desist Order and Notice of Charges against Sentinel, pursuant to T.C.A. §§ 45-1-107(a)(4), (5) and (c).[6] The Order and Notice declared that the Commissioner had determined that Sentinel was operating in an unsafe and unsound manner and ordered Sentinel to make an initial infusion of capital in the amount of $2 million by the close of business on May 17, 2004, in order to partially replenish the fiduciary cash deficiency. In addition, the order directed Sentinel to submit a capital plan outlining their plans to completely replenish the fiduciary pooled account and the steps to be taken to provide sufficient operating capital. On May 6, 2004, Sentinel's legal counsel from Waller Lansden advised the Sentinel Board of Directors that it was in the best interest of the trust company for the Board to ask Mr. Bates to resign as president and director of Sentinel. Furthermore, the attorneys advised the Board that, if Mr. Bates did not voluntarily resign, they would have to resign as counsel to Sentinel. Mr. Bates refused to resign and Waller Lansden subsequently resigned from its representation of Sentinel.

On May 17, 2004, the Commissioner and Department staff met with Sentinel's new legal counsel, Mary Neil Price from the firm of Miller and Martin. Legal counsel admitted that they had not prepared the capital plan that the May 3 order of the Commissioner required because

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[6] T.C.A. § 45-1-107(a)(4), (5) and (c) read as follows:

(a) In addition to other powers conferred by this title, the commissioner has the power to:
(4) Order any person to cease violating a provision of this title or lawful regulation issued under this title;
(5) Order any person to cease and desist from engaging in any unsafe or unsound banking practice when such practice is likely to cause insolvency or dissipation of assets or earnings of a state bank or is likely to otherwise seriously prejudice the interests of the depositors of a state bank; and

(c) Notice and opportunity for a hearing shall be provided in advance of any of the foregoing actions in this section taken by the commissioner, except the formulation of regulations of general application. In cases involving extraordinary circumstances requiring immediate action, the commissioner may take such action but shall promptly afford a subsequent hearing upon application to rescind the action taken.

they did not have a "good enough handle on the financial situation." However, Sentinel's new legal counsel provided an outline of proposed steps in order to "improve Sentinel's financial position" and to "maximize funds available to repay any deficits in any default trust accounts for which funds are not available from other sources." These steps included: (1) certain actions to reduce Sentinel's operating expenses, (2) an attempt to accelerate collection of advanced expenses on the defaulted bond issues, and (3) the financing of real property owned by Sentinel. Again, there was no mention in the proposed steps of the existence of substantial fees (default and administrative) owed to Sentinel that would be available to maximize funds available to repay any deficits in any default trust accounts.

On May 18, 2004, the Commissioner took emergency possession of Sentinel, pursuant to T.C.A. §§ 45-2-1502 (2000);[7] and,pursuant to T.C.A. § 45-2-1502 (b)(1), filed notice in the Chancery Court of Lewis County. Due to Sentinel's failure to submit a capital plan outlining the company's plans to replenish the fiduciary pooled account and failure to make an initial infusion of $ 2 million in capital by the May 17 deadline, and in light of the record as a whole, the

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T.C.A. § 45-2-1502, Commissioner in Possession, reads in pertinent part:
(a) The commissioner may take possession of a state bank if, after a hearing, the commissioner finds:
(1) Its capital is impaired or it is otherwise in an unsound condition;
(2) Its business is being conducted in an unlawful or unsound manner;
(3) It is unable to continue normal operations; or
(4) Its examination has been obstructed or impeded.
(b)(1) The commissioner shall take possession by posting upon the premises a notice reciting that the commissioner is assuming possession pursuant to this section and the time, not earlier than the posting of the notice, when such possession shall be deemed to commence. A copy of the notice shall be filed in a court of general or equity jurisdiction in the county in which the institution is located. The commissioner shall notify the federal reserve bank of the district of taking possession of any state bank which is a member of the federal reserve system, and shall notify the Federal Deposit Insurance Corporation of the taking possession of any insured bank.
(2) When the commissioner has taken possession of a state bank, the commissioner shall be vested with the full and exclusive power of management and control, including the power to continue or to discontinue the business, to stop or to limit the payment of its obligations, to employ any necessary assistants, to execute any instrument in the name of the bank, to commence, defend and conduct in its name any action or proceeding in which it may be a party, to terminate the commissioner's possession by restoring the bank to its board of directors, to appoint a receiver to have all of the rights, powers, duties and obligations granted to the commissioner in possession for the purpose of liquidation or reorganization, and to reorganize or liquidate the bank in accordance with §§ 45-2-1503 and 45-2-1504. As soon as practicable after taking possession, the commissioner shall make an inventory of the assets and file a copy thereof with the court in which the notice of possession was filed.
(3) When the commissioner has taken possession, there shall be a postponement until six (6) months after the commencement of such possession of the date upon which any period of limitation fixed by a statute or agreement would otherwise expire on a claim or right of action of the bank, or upon which an appeal must be taken or a pleading or other document must be filed by the bank in any pending action or proceeding.
(c)(1) If, in the opinion of the commissioner, an emergency exists which will result in serious losses to the depositors, the commissioner may take possession of a state bank without a prior hearing. Any person aggrieved and directly affected by this action of the commissioner may have a review by certiorari as provided in title 27, chapter 9. (Emphasis added).

Commissioner determined that taking possession of Sentinel was the appropriate action necessary to protect the bond issuers and bondholders. In addition, on May 18, 2004, the Commissioner issued an order appointing Receivership Management, Inc. ("Receiver") to act as the Receiver of Sentinel pursuant to T.C.A. § 45-2-1502(b)(2).

Immediately after taking possession of Sentinel, the Receiver and Department personnel began reviewing Sentinel's records to determine an accurate assessment of Sentinel's financial status. The fact that Sentinel was using two different accounting systems (Quick Books and AccuTrust fiduciary account system) hampered the process because the entries in the two systems were not consistently reconciled with each other or with the bank statements from the pooled fiduciary account. On June 15, 2004, the Department issued a preliminary report, which stated that,as of December 31, 2003, Sentinel had a cash deficiency in the pooled fiduciary account of $5,789,011. In the four months between December 31, 2003 and May 18, 2004, the deficiency grew and ranged from $7,612,218 in Quick Books to $8,430,722 in the AccuTrust fiduciary accounting system. The report further reflects that, as of May 18, 2004, Sentinel had corporate assets of $1,389,682 and was insolvent in an amount of at least $6,225,445.

On June 17, 2004, the Commissioner and Department personnel met with Mr. Bates and his new attorney, Carrol Kilgore, to give them an opportunity to respond to the findings reflected in the Department's report of Sentinel's financial status or, in the alternative, to submit a written response prior to the Commissioner taking any action with respect to the report. Neither Mr. Bates nor Mr. Kilgore made any substantive changes to the report, and despite having indicated they would submit a written response by the next day, they declined to do so. Consequently, based on the determination that Sentinel was insolvent in an amount of at least $6,225,000, that Sentinel did not have sufficient liquid assets to pay off its bondholders and creditors, that Sentinel did not have a viable plan for the infusion of sufficient capital to eliminate the $7.6 to $8.4 million cash deficiency in the pooled fiduciary account, and from the record as a whole, the Commission determined that liquidation of Sentinel pursuant to T.C.A. §§ 45-2-1502(c)(2)[8] and 1504[9] was necessary and appropriate. Accordingly, on June 18, 2004, the

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[8] *See supra* note 9.

[9] T.C.A. §§ 45-2-1504 reads:

(a) In liquidating a state bank, the commissioner may exercise any power of the office of commissioner, but shall not, without the approval of the court in which notice of possession has been filed:

(1) Sell any asset of the organization having a value in excess of five hundred dollars ($500);

(2) Compromise or release any claim if the amount of the claim exceeds five hundred dollars ($500), exclusive of interest; or

(3) Make any payment on any claim, other than a claim upon an obligation incurred by the commissioner, before preparing and filing a schedule of the commissioner's determinations in accordance with this chapter.

(b) Within six (6) months of the commencement of liquidation, the commissioner may elect to terminate any executory contract under which the state bank has contracted either to receive or to provide services, such services specifically including advertising, or any obligation of the bank as a

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[9](...continued)
lessee. A lessor who receives sixty (60) days' notice of the commissioner's election to terminate the lease shall have no claim for rent other than rent accrued to the date of termination or for claims for damages for such termination.
(c) As soon after the commencement of liquidation as is practicable, the commissioner shall take the necessary steps to terminate all fiduciary positions held by the state bank and take such action as may be necessary to surrender all property held by the bank as a fiduciary and to settle its fiduciary accounts. Such fiduciary accounts may be transferred by the commissioner to another qualified corporate fiduciary as determined by the commissioner, and notice of such transfer must be given by registered mail to the parties by the transferee corporate

fiduciary.
(d) As soon after the commencement of liquidation as practicable, the commissioner shall send notice of the liquidation to each known depositor, creditor and lessee of a safe deposit box or bailor of property held by the bank at the address shown on the books of the institution. The notice shall also be published in a newspaper of general circulation in the community once a week for three (3) successive weeks. The commissioner shall send with the notice a statement of the amount shown on the books of the institution to be the claim of the depositor or creditor. The notice shall demand that property held by the bank as bailee or in a safe deposit box be withdrawn by the person entitled thereto and that claims of depositors and creditors, if the amount claimed differs from that stated in the notice to be due, be filed with the commissioner before a specified date not earlier than sixty (60) days thereafter in accordance with the procedure prescribed in the notice.
(e) Safe deposit boxes, the contents of which have not been removed before the date specified, shall be opened by the commissioner in the manner provided for boxes upon which the payment of rental is in default, and the sealed packages containing the contents and the certificates, together with any unclaimed property held by the bank as bailee and certified inventories thereof, shall be reported to the state treasurer who shall deal with them in accordance with the provisions of the Uniform Disposition of Unclaimed Property Act, compiled in title 66, chapter 29.
(f) Within six (6) months after the last day specified in the notice for the filing of claims or such longer period as may be allowed by the court in which notice of possession has been filed, the commissioner shall:
(1) Reject any claim if the commissioner doubts the validity thereof;
(2) Determine the amount, if any, owing to each known creditor or depositor and the priority class of the claim under this chapter and chapter 1 of this title;
(3) Prepare a schedule of the commissioner's determinations for filing in the court in which notice of possession was filed; and
(4) Notify each person whose claim has not been allowed in full and publish once a week for three (3) successive weeks a notice of the time when and the place where the schedule of determinations will be available for inspection and the date, not sooner than thirty (30) days thereafter, when the commissioner will file the schedule in court.
(g) Within twenty (20) days after the filing of the commissioner's schedule, any creditor, depositor or stockholder may file an objection to any determination made. Any objections so filed shall be heard and determined by the court, upon such notice to the commissioner and interested claimants as the court may prescribe. If the objection is sustained, the court shall direct an appropriate modification of the schedule. After filing the schedule, the commissioner may, from time to time, make partial distribution to the holders of claims which are undisputed or have been allowed by the court, if a proper reserve is established for the payment of disputed claims. As soon as is practicable after the determination of all objections, the commissioner shall make final distribution.
(h)(1) The following claims shall have priority:

1. (A) Obligations incurred by the commissioner;

(continued...)

commissioner issued a Notice of Liquidation of Sentinel Trust Company.

Pursuant to T.C.A. § 45-2-1504(c), which requires the Commissioner to terminate all fiduciary positions held by Sentinel as soon as practicable, the Commissioner, through the appointed Receiver, sought to transfer the trustee and executor positions that Sentinel held on three personal trust accounts to new trustees or executors. On July 2, 2004, the Commissioner filed a motion seeking the approval of the Lewis County Chancery Court to transfer Sentinel's fiduciary positions on these three personal trust accounts, as well as to transfer all of the verified investments assets separately held by Sentinel on behalf of those accounts. Appellants did not object to the transfer, and an agreed order approving these transfers was entered by the Lewis County Court on July 19, 2004.

Next, the Commissioner and Receiver filed a motion seeking approval to transfer the fiduciary positions on Sentinel's remaining bond accounts not in default, and four defaulted bond accounts to successor fiduciaries. The Appellants filed an objection to this motion on November 12, 2004. Appellants argued that the Lewis County Chancery Court lacked subject matter jurisdiction to approve the transfer of the bond issues based on the Appellants' belief that the provisions of T.C.A. § 45-2-1504 applied only to state banks, not to trust companies. A hearing on the motion was held on November 15, 2004. The trial court granted the motion of the Commissioner and Receiver approving transfer of the bond issues, and the order was entered on

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[9](...continued)

(B) Wages and salaries of officers and employees earned during the three-month period preceding the commissioner's possession in an amount not exceeding six hundred dollars ($600) for any one (1) person;

(C) Fees and assessments due to the department; and
(D) Deposits to the extent of ten dollars ($10.00) for each depositor.
(2) After the payment of all other claims with interest at the maximum rate permitted on time deposits, the commissioner shall pay claims otherwise proper which were not filed within the time prescribed.
(3) If the sum available for any class is insufficient to provide payment in full, such sum shall be distributed to the claimants in the class pro rata.
(I) Any assets remaining after all claims have been paid shall be distributed to the stockholders in accordance with their respective interests.
(j) Unclaimed funds remaining after completion of the liquidation shall be transferred to the state treasurer to be dealt with in accordance with the provisions of the Uniform Disposition of Unclaimed Property Act, compiled in title 66, chapter 29.
(k) When the assets have been distributed in accordance with this chapter and chapter 1 of this title, the commissioner shall file an account with the court. Upon approval thereof, the commissioner shall be relieved of liability in connection with the liquidation and the charter shall be canceled.

November 15, 2004. Further, the trial court certified the order as a final appealable order, pursuant to Tenn. R. Civ. P. 54. On November 24, 2004, the Receiver filed an announcement informing the court that the parties had agreed to transfer of the fiduciary positions on the bond issues that had been reserved from the November 15, 2004, Order and requested entry of a final order approving such transfers. An order granting that request was entered by the Lewis County Chancery Court on December 1, 2004. The Appellants filed a Notice of Appeal from the Lewis County Chancery Court's order on December 10, 2004.

Prior to the finalization of the Lewis County Chancery Court's orders transferring the fiduciary positions on Sentinel's bond accounts, the Appellants filed a petition in Davidson County Chancery Court for a writ of supersedes and common law writ of certiorari, seeking judicial review of the Commissioner's decisions to take possession of, and to liquidate, Sentinel. The Appellants argued that the Commissioner had no authority to exercise his bank regulatory powers against Sentinel because the governing statutes allowing the Commissioner the power to take possession and liquidate applied solely to banks, not to trust companies. The writ of certiorari was issued on July 1, 2004.

On July 16, 2004, Appellants filed a motion requesting an expedited hearing only on the petition for writ of supersedeas. On July 16, 2004, the Commissioner filed a response to Appellants' motion stating that he had no objection to an expedited hearing on the writ of supersedeas and requested that the court also expedite a hearing on the writ of certiorari. On July 27, 2004, the Commissioner filed the Administrative Record, and a response to the Appellants' motions. The Commissioner asserted that he had acted with express statutory authority in taking possession of and liquidating Sentinel, and that there was substantial and material evidence in the record to support his decisions. On August 4, 2004, the Commissioner filed a supplemental response to the petition for supersedeas that included a transcript of the legislative history debates on Public Chapter 112, which the Commissioner asserted demonstrated the Legislature's understanding and intent that all the provisions of the Tennessee Banking Act would apply to state trust companies. Before a hearing could be held on the petition for writ of supersedeas, on July 30, 2004, Appellants filed a supplemental petition seeking mandamus and specifically requesting an order from the Davidson County Chancery Court directing the Commissioner to cease the ongoing liquidation of Sentinel under the jurisdiction of the Lewis County Chancery Court. The mandamus petition was abandoned by Appellant. At a hearing on August 5, 2004, the Davidson County Chancery Court offered to consolidate the hearing on the request for supersedeas with the writ of certiorari so that all issues before the court could be timely resolved. The Appellants, however, were not willing to agree to a consolidated hearing and sought to proceed solely on the request for supersedeas,(based only upon the legal argument that the Commissioner was acting without statutory authority). The Appellants sought the writ of supersedeas because "Sentinel Trust Company is not a bank, and has none of the characteristic attributes of a bank" and argued that the statutory powers the Commissioner exercised only apply to a bank and, therefore, the Commissioner acted "illegally" and "wholly outside his administrative and policing authority." On August 9, 2004, the court issued an order denying the petition for writ of supersedeas. The Davidson County Chancery Court order reads, in pertinent part, as follows:

> In 1999, the General Assembly amended the [Tennessee Banking] Act to specifically make trust companies subject to all of its provisions, not just those pertaining to fiduciaries.
>
> * * *
>
> [The] provisions of Chapter 112 make it clear the General Assembly's intent that all of Chapters 1 and 2 of Title 45 shall apply to the operation and regulation of state trust companies and that such companies shall fully comply and conform with all the provisions of these chapters.

The court did not make a finding as to the factual foundation supporting the decisions to take possession and liquidate, as such issues were not presented to the court.

On August 13, 2004, in the event that the Davidson County Court declined to vacate or revise its previous order, Appellants filed a motion with the Davidson County Chancery Court requesting that the court: (1) vacate or revise its August 9 order, (2) enter final judgment for Appellants upon both the writs of certiorari and supersedeas on the basis of the pleadings, (3) reserve to the Appellants the right to an evidentiary hearing, and (4) grant an immediate interlocutory appeal. On August 24, 2004, the trial court issued an order denying the motion requesting the court to vacate or revise its August 9, 2004 order. However, the trial court did grant Appellants permission to seek an interlocutory appeal pursuant to Rule 9 of the Tenn. R. App. P. On August 27, 2004, Appellants filed an application for permission to appeal, and on application for extraordinary appeal. On September 1, 2004, the Middle Section of the Tennessee Court of Appeals issued an order dismissing both appeals. The Order read, in pertinent part, as follows:

> Having reviewed the application and supporting documents, we cannot conclude that an interlocutory appeal is necessary to prevent irreparable harm or to prevent needless, expensive and protracted litigation. Nor can we conclude that the trial court has so far departed from the acceptable and usual course of judicial proceedings as to require immediate review under Tenn. R. App. P. 10.

Six months later, on March 4, 2005, the Appellants filed a motion with the Davidson County Chancery Court requesting that the case be transferred to the Lewis County Chancery court for hearing or, in the alternative, to set a scheduling conference so that a trial date could be set. After a status conference, the court issued an order setting a final hearing for March 29, 2005. The court further noted that, because this was a post-seizure hearing, it would be liberal in allowing the introduction of evidence in order to insure that the hearing fully complied with the concepts of due process, despite the fact that the Appellants had waited almost eight months post-seizure to seek a hearing challenging the Commissioner's actions. Following a two-day evidentiary hearing, the court issued a memorandum and order on April 13, 2005, in which it denied the petition for writ of certiorari and dismissed the case. The memorandum and order of the court reads, in pertinent part:

> This Court was always open and ready to grant the petitioners [Appellants] a prompt post-seizure and/or post liquidation notice hearing. The failure to have a prompt post-seizure hearing challenging the factual basis for the seizure was entirely the fault of the petitioners. Petitioners' counsel in August, 2004 insisted that his legal arguments were so strong that he did not need a hearing on the facts. He insisted on a hearing limited to his argument that the banking statutes did not apply to trust companies. . . . This insistence was pressed in the face of the Court's offer to give him a final hearing on all issues within 7-10 days of August 5, 2004. When petitioners lost their legal argument in state court, they were so sure of their position that they then went to federal court where they again lost.
>
> Finally, having failed to win on their legal argument, petitioners finally in March, 2005, ten (10) months after the Commissioner took possession, requested a hearing challenging the Commissioner's factual determinations.
>
> The Court continues to adhere to its decision expressed in its memorandum and order of August 9, 2004 that the banking statutes apply to trust companies and that the statutory structure allowing the Commissioner to take possession pursuant to T.C.A. § 45-2-1502(c)(1) and related statutes is constitutional.
>
> * * *
>
> The factual challenge to the Commissioner's action has now been delayed so long by the petitioners that this case is now moot. See Boyce v. Williams, 389 S.W.2d 272, 277-78 (Tenn. 1965). The receivership and liquidation have proceeded now for eleven (11) months, and the record indicates that Sentinel is but an empty shell. While Humpty Dumpty could perhaps have been put back together in the Summer of 2004 [Sentinel] can no longer be put back together.

Furthermore, the court found that, if it were to reach the factual merits, it would affirm the actions of the Commissioner. The court stated that the facts support the conclusion of the Commissioner that an emergency existed, that the money in the pooled trust account belonging to the bond holders was in immediate danger, and that the record supported the Commissioner's decision to liquidate. The Appellants filed a Notice of Appeal from the Davidson County Chancery Court's order on April 19, 2005.

As part of the continuing liquidation of Sentinel, the Commissioner and Receiver filed a motion with the Lewis County Chancery Court on May 2, 2005, seeking an approval of the sale of the Sentinel Trust Bellevue, Tennessee property ("Bellevue Property"), pursuant to T.C.A. §

45-2-1504(a)(1). T.C.A. § 45-2-1504(a)(1) states that, in liquidating a state-chartered trust company, court approval would be needed to sell an asset of the trust company having a value of in excess of Five Hundred Dollars ($500). This property was titled in the name of Sentinel Trust Company and was being used as an office location for conducting the business of Sentinel. On May 26, 2005, Appellant Bates filed an objection to the sale, alleging again that the Commissioner lacked authority. The Lewis County Court held a hearing on May 26, 2005 and issued an order that same day granting the sale of the Bellevue Property and certified the order as final pursuant to Tenn. R. Civ. P. 54.02. Mr. Bates filed a Notice of Appeal on June 14, 2005, and the appeal was docketed in the court as a separate appeal from the pending Lewis County case. No motion for stay was filed with the court to postpone the sale, and, as a result, the sale of the Bellevue Property closed on July 8, 2005.

On appeal, the Appellants present several issues for review, which we have rephrased as follows:

1. Whether the Tennessee Banking Act is unconstitutional on its face by vesting in the Commissioner, a member of the Executive Branch of the government, powers which may be vested only in the judiciary, including the appointment of receivers, remove corporate directors, declare corporations insolvent?

2. Whether the trial court erred when it held that the Tennessee Banking Act applies to the trust companies and whether the Commissioner exceeded his jurisdiction or acted illegally in taking possession of Sentinel Trust Company?

3. Whether there exists substantial or material evidence in the record to support the Commissioner's decision to take possession of Sentinel Trust Company and subsequent decision to liquidate the company?

4. Whether the chancery court properly issued orders approving a transfer of Sentinel's fiduciary positions to successor trustees?

5. Whether, pursuant to the Tennessee Banking Act, the Commissioner had authority to retain the fiduciary positions as to defaulted bond issues, while transferring non-defaulted bond issues?

6. Whether the commissioner has the authority to sell the Bellevue Property upon approval of the receivership court?

7. Whether the receivership court erred in approving the sale of the Bellevue Property for $320,000?

8. Whether the trial court erred when it denied the petition for a writ of certiorari, declaring the case moot?

In summary, the Appellants' primary arguments are that the Tennessee Banking Act does not apply to trust companies, and that the Commissioner exceeded his jurisdiction when he took possession of Sentinel Trust Company. The remaining issues are extensions of these primary questions.

1. Whether the Tennessee Banking Act is unconstitutional on its face by vesting in the Commissioner, a member of the Executive Branch of the government, powers which may be vested only in the judiciary, including the appointment of receivers, remove corporate directors, declare corporations insolvent?

The Appellants assert that T.C.A. § 45-2-1502 violates the separation of powers provision of Art. II, § 2 of the Tennessee Constitution. Specifically, Appellants contend that the fact that the statute allows the Commissioner to place a trust company in receivership (and other such related duties) is a judicial power vested solely in the Courts of Tennessee. Appellants argue that the power to impose a receivership is, and has always been, one of the powers vested solely in the judicial branch of the Tennessee government, and that any statute that vests this power in any member of the executive or legislative departments is unconstitutional. The Commissioner argues that there is a distinct difference between the power to institute a court-created equity receivership and the power to institute an administrative receivership, and that the power to institute an administrative receivership is clearly one that is vested in the executive branch of government.

The Tennessee Constitution states that "[t]he powers of the government shall be divided into three distinct departments; the Legislature, Executive and Judicial," and that "[n]o person or persons belong to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted." Tennessee Constitution, art. II, §§ 1 and 2. In ***Richardson v. Tennessee Board of Dentistry,*** 913 S.W.2d 446 (Tenn. 1995), the Tennessee Supreme Court further defines the roles of the governmental branches stating that "[t]he legislative branch has the authority to make, alter, and repeal the law; the executive branch administers and enforces the law; and the judicial branch has the authority to interpret and apply the law." ***Id.*** at 453. While the departments of government have been characterized as "independent" and "co-equal," they have also been viewed as "interdependent" because their functions overlap. ***Summers v. Thompson,*** 764 S.W.2d 182, 189 (Tenn.1988); ***State v. King,*** 973 S.W.2d 586, 588 (Tenn.1998); ***Underwood v. State,*** 529 S.W.2d 45, 47 (Tenn.1975). As stated in ***House v. Creveling,*** 147 Tenn. 589, 250 S.W. 357 (Tenn. 1923), as a matter of practice, it has been found impossible to entirely preserve the theoretical lines between the three departments of government. Official powers are commonly conferred on

administrative officers, boards and commissions. ***Woods v. State,*** 130 Tenn. 100,169 S.W. 558, 559 (Tenn. 1914). So, the fact that limited judicial or legislative power may be conferred upon an executive or administrative officer would not necessarily affect the validity of a statute. ***See, e.g., Bank of Commerce & Trust Co. v. Senter,*** 149 Tenn. 569, 260 S.W. 144, 151 (Tenn. 1924). A legislative enactment which does not frustrate or interfere with the adjudicative function of the courts does not constitute an impermissible encroachment upon the judicial branch of the government. ***Underwood v. State,*** 529 S.W.2d at 47.

It is a fundamental rule of law that the departments, agencies, and commissions of government have no inherent or common-law power of their own. ***General Portland, Inc. v. Chattanooga Hamilton County Air Pollution Control Bd.,*** 560 S.W.2d 910, 914 (Tenn. Ct. App. 1976). They are purely creatures of statute. Accordingly, governmental agencies have only those powers expressly granted by statute and those powers required by necessary implication to enable them to fulfill their statutory mandate, and the statutes should be construed liberally since they are remedial in nature. ***Sanifill of Tenn., Inc. v. Tennessee Solid Waste Disposal Control Bd.,*** 907 S.W.2d 807, 810 (Tenn. 1995); ***Tennessee Pub. Serv. Comm'n v. Southern Ry.,*** 554 S.W.2d 612, 613 (Tenn. 1977). Actions taken by a governmental agency without the required authority are nullities. ***Sanifill of Tennessee, Inc.,***907 S.W.2d at 810.

The General Assembly is empowered to confer on the Commissioner of the Tennessee Department of Financial Institutions only those judicial powers reasonably necessary as an incident to the accomplishment of the purposes for which the Department of Financial Institutions was created. The purpose of the "Tennessee Banking Act" is, *inter alia*, to provide for the sound conduct of the regulated businesses and the conservation of their assets. ***See*** T.C.A. § 45-1-102 (2000). The statute further provides:

> (d) The purposes of this chapter and chapter 2 of this title shall constitute standards to be observed by the commissioner of financial institutions in the commissioner's exercise of authority under this chapter and chapter 2 of this title, and shall constitute rules of construction in all matters of construction and application of those chapters.

T. C. A. § 45-1-102(d).

T.C.A. § 45-2-1502 authorizes the Commissioner to take possession of a trust company if he finds that certain circumstances exist. Furthermore, the statute provides that, when the commissioner has taken possession of a trust company, "the commissioner shall be vested with the full and exclusive power of management and control, including the power . . . to appoint a receiver to have all of the rights, powers, duties and obligations granted to the commissioner in possession for the purpose of liquidation or reorganization, and to reorganize or liquidate the

bank in accordance" with specific provisions of the Tennessee Banking Act. We find that the powers enumerated in T.C.A. § 45-2-1502 authorizing the Commissioner to appoint a receiver, to remove corporate directors, and the power to declare corporations insolvent are powers required to enable the Commissioner to fulfill his statutory mandate under T. C. A. § 45-1-102. The powers bestowed upon the Commissioner are limited to those judicial powers reasonably necessary as an incident to the accomplishment of the purposes for which the Department of Financial Institutions was created. Therefore, we find that T.C.A. § 45-2-1502 does not violate the separation of powers provision of Art. II, § 2 of the Tennessee Constitution.

2. Whether the trial court erred when it held that the Tennessee Banking Act applies to the trust companies and whether the Commissioner exceeded his jurisdiction or acted illegally in taking possession of Sentinel Trust Company?

The trial court concluded that the Tennessee banking laws codified in Chapters 1 and 2 of Title 45 of the Tennessee Code apply to trust companies. In order to determine whether the trial court's conclusion was in error, we must delve into the construction of T.C.A. § 45-1-124, (and in particular the provisions of the 1999 amendments to that statute) and T.C.A. § 45-2-1502. The Tennessee Banking Act was first adopted by the Tennessee General Assembly in 1969. Originally, the Act only required that all state banks be operated in accordance with its provisions. However, in 1980, the General Assembly amended the Act to expand the scope of its application as follows:

> Provided, however, a state bank or trust company whose purposes and powers are limited to fiduciary purposes and powers shall be subject only to the provisions pertaining to fiduciaries in Chapters 1 through 11 of this title and such other provisions of said chapters as the Commissioner determines are reasonably necessary for the sound operation of such banks or trust companies.

T.C.A. § 45-1-124 (1980).

In 1999, as discussed *supra*, the General Assembly again amended the Banking Act through the enactment of Public Chapter 112, which further revised T.C.A. § 45-1-124. Specifically, the General Assembly modified T.C.A. § 45-1-124(d) by adding the language and punctuation "trust companies." In addition, subsection (b) was completely modified, and subsections (e) through (h) were added. Following the 1999 Amendments, § 45-1-124 reads, as follows (with amendments in bold):

> (a) The existence of state banks formed or existing on April 2, 1969, shall not be impaired by the enactment of this chapter and chapter 2 of this title, or by any change in the requirements for the formation of state banks, or by any amendment or repeal of the laws under which they were formed or created, and except as otherwise expressly provided in those chapters, the repeal of a prior act or acts by those

chapters shall not affect any right accrued or established, or any liability or penalty incurred, under the provisions of such act, prior to the repeal thereof.

(b) To the full extent consistent with such rights, liabilities, and penalties, all state banks and, to the extent applicable, all banks, shall hereafter be operated in accordance with the provisions of this chapter and chapter 2 of this title. Unless the commissioner determines otherwise, the provisions of chapters 1 and 2 of this title, and the rules thereof, shall also apply to the operation and regulation of state trust companies and banks whose purposes and powers are limited to fiduciary purposes and powers.
(c) All powers granted in this chapter and chapter 2 of this title may be freely exercised by any corporation, which is empowered by its charter under any prior act of the general assembly and any amendments thereto, to exercise the rights and powers which appertain and belong to a banking institution or to conduct a general banking business, without the necessity of amending its charter, unless such charter expressly prohibits the exercise of such powers.

(d) Except to the extent inconsistent with or contrary to specific provisions of chapters 1, 2 and 3 of this title, Tennessee state banks, **trust companies,** savings and loan associations, and savings banks, and their directors, officers and shareholders shall be governed by and subject to the Tennessee Business Corporation Act, compiled in title 48, chapters 11-27, as the same may be amended from time to time, and successor statutes thereto. The commissioner has the authority to interpret the Tennessee Business Corporation Act as it applies to financial institutions subject to regulation by the commissioner.

(e) The charter of a trust company granted by the commissioner shall not be void due to the enactment of any amendment or repeal of the laws under which it was formed if such trust company is in operation, as determined by the commissioner, on July 1, 1999.

(f) A company engaged in activities subject to chapters 1 and 2 of this title, on July 1, 1999, but formed, as determined by the commissioner, prior to the enactment of Acts 1980, ch. 620, and not previously subject to regulation by the commissioner, may continue to act as a fiduciary without submitting an application. However, such entity shall be otherwise fully subject to chapters 1 and 2 of this title.

> **(g) A company authorized by its charter, prior to the enactment of Acts 1980, ch. 620, to engage in fiduciary activities, but not engaging in fiduciary activities on July 1, 1999, must file the appropriate application to establish a trust company and then fully comply with chapters 1 and 2 of this title.**
>
> **(h) All state trust companies operating on July 1, 1999, shall have such period of time as the commissioner determines to be reasonable and prudent to conform to the requirements of chapters 1 and 2 of this title and the regulations thereunder, but such period shall not exceed three (3) years from July 1, 1999. During this period of time, to conform to the requirements of chapters 1 and 2 of this title, the commissioner may conduct examinations at such company's expense, and apply the requirements of chapters 1 and 2 of this title as deemed appropriate.**

T. C. A. § 45-1-124 (1999). *See also* Public Acts Ch. 112.

It is well settled that the interpretation of statutory law is a judicial function. ***See, e.g., State ex rel. Comm'r of Transp. v. Med. Bird Black Bear White Eagle***, 63 S.W.3d 734, 754 (Tenn. Ct. App.2001) (citations omitted). When interpreting a statute, the role of the Court is to "ascertain and give effect to the legislative intent." ***Sharp v. Richardson***, 937 S.W.2d 846, 850 (Tenn. 1996). In the absence of ambiguity, legislative intent is derived from the face of the statute, and the Court may not depart from the "natural and ordinary" meaning of the statute's language. ***Davis v. Reagan***, 951 S.W.2d 766, 768 (Tenn. 1997); ***Westland West Community Assoc. v. Knox County***, 948 S.W.2d 281, 283 (Tenn. 1997).

The Appellants argue that, because the General Assembly did not add the designation "trust companies" in each individual section of Chapters 1 and 2 of Title 45, when it amended the statute in 1999, that trust companies are only subject to the Commissioner's regulation where "trust company" is expressly included or under those provisions pertaining specifically to fiduciaries. Appellants assert that "no statute provides that the term 'bank' includes 'trust company' with reference to any other provisions of the Tennessee Banking Act." Therefore, Appellants argue that the Commissioner has no authority to exercise any of his "bank regulatory powers" against Sentinel, a non-banking trust company. Specifically, the Appellants contend that, because T.C.A. § 45-2-1502[10] (which authorizes the Commissioner to take possession of a "state bank" in certain circumstances) does not include the term "trust company," the Commissioner has no authority to take possession of a trust company under the statute . Consequently, Appellants assert that the Commissioner exceeded his jurisdiction, or acted illegally, when he took possession of Sentinel pursuant to the provisions of T.C.A. § 45-2-1502.

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[10] For the complete text of T.C.A. § 45-2-1502, *see supra* note 7.

The Commissioner argues that the Appellants misconstrue the clear and complete language of T.C.A. § 45-1-124, and instead ask this Court to focus solely on the definition of "state bank" to the exclusion of all other provisions. The Commissioner argues that the intent of the General Assembly is clearly set forth in Public Chapter 112, T.C.A. § 45-1-124, which states that "***the provisions of Title 45, Chapters 1 and 2 and the rules thereof shall also apply to the operation and regulation of state trust companies*** and banks whose purposes and powers are limited to fiduciary purposes and powers" (emphasis added). Because T.C.A. § 45-2-1502 is a provision contained within Chapter 2 of Title 45, the Commissioner asserts that the statutory language applies to the operation and regulation of Sentinel.

The trial court found that the provisions of Chapter 112 "make it clear the General Assembly's intent that all of Chapters 1 and 2 of Title 45 shall apply to the operation and regulation of state trust companies and that such companies shall fully comply and conform with all the provisions of these chapters, not just the provisions pertaining to fiduciary activities." We agree with the trial court's determination. We find that the statute is not ambiguous and that the Legislature's intent to bring state trust companies under the umbrella of the Tennessee Banking Act is clear from the plain and ordinary meaning of the statutory language. *See* T.C.A. § 45-1-124(b) and (d). Moreover, the addition of T.C.A. § 45-1-124(h) granting "all state trust companies operating . . . a period of time as the commissioner determines to be reasonable and prudent to conform to the requirements of chapters 1 and 2 of this title and the regulations thereunder" is further evidence of the Legislature's intent to expand the reach of the Tennessee Banking Act to encompass trust companies. Therefore, T.C.A. § 45-2-1502, which authorizes the Commissioner to take possession of a state bank under certain circumstances, also vests in the Commissioner the full authority to take possession of a Tennessee trust company under the same set of circumstances.[11]

3. Whether there exists substantial or material evidence in the record to support the Commissioner's decision to take possession of Sentinel Trust Company and subsequent decision to liquidate the company?

The Commissioner took emergency possession of Sentinel on May 18, 2004. Appellants argue that the financial condition of Sentinel was not sufficiently impaired to warrant the Commissioner's action. Specifically, Appellants argue that there was no risk of serious losses to the depositor. Because emergency possession was allegedly not warranted, the Appellants contend that the Commissioners actions denied Appellants their right to a pre-possession hearing.

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In the absence of ambiguity, as in the present case, legislative intent is derived from the face of a statute, and the Court may not depart from the "natural and ordinary" meaning of the statute's language. However, we have reviewed the legislative history of Public Chapter 112 and find that the intent of the legislature expressed therein fully supports the interpretation as expressed by the trial court and this Court on review.

T.C.A. § 45-1-1502(a) provides that the Commissioner may take possession of a state bank or trust company if he finds one of the following four criteria are met:

> (1) Its capital is impaired or it is otherwise in an unsound condition;
> (2) Its business is being conducted in an unlawful or unsound manner;
> (3) It is unable to continue normal operations; or
> (4) Its examination has been obstructed or impeded.

The Commissioner may take emergency possession of a state bank or trust company, without a preliminary hearing, if the additional criterion stated in T.C.A. § 45-1-1502(c)(1) exists :

> If, in the opinion of the commissioner, an emergency exists which will result in serious losses to the depositors, the commissioner may take possession of a state bank without a prior hearing. Any person aggrieved and directly affected by this action of the commissioner may have a review by certiorari as provided in title 27, chapter 9.

The writ of certiorari is not available as a matter of right; its grant or denial is within the sound discretion of the trial court, and will not be reversed on appeal unless there is abuse of that discretion. ***Boyce v. Williams,*** 389 S.W.2d 272, 277 (Tenn. 1965). Further, the scope of review under the common law writ of certiorari is very narrow. It does not involve an inquiry into the intrinsic correctness of the decision of the tribunal below, but only into the manner in which the decision was reached. T.C.A. § 27-8-101. ***See, also, Robinson v. Clement,*** 65 S.W.3d 632, 635 (Tenn. Ct. App. 2001) (citing ***Arnold v. Tennessee Bd. of Paroles,*** 956 S.W.2d 478, 480 (Tenn. 1997)); ***Watts v. Civil Serv. Bd. for Columbia,*** 606 S.W.2d 274, 277 (Tenn.1980)***; 421 Corp. v.. Metropolitan Gov't,*** 36 S.W.3d 469, 474 (Tenn. Ct. App. 2000); ***Hoover, Inc. v. Metropolitan Bd. Of Zoning Appeals,*** 924 S.W.2d 900, 904 (Tenn. Ct. App. 1996)***; Powell, v. Parole Eligibility Review Bd.,*** 879 S.W.2d 871, 873 (Tenn. Ct. App. 1994). Thus, in the case at bar, under the standard of review for the common law writ, if there is substantial or material evidence in the record to support the existence of any one of the conditions set out in T.C.A. § 45-1-1502(a), and if there is also sufficient evidence that an emergency existed, which would have resulted in serious losses to the depositors, then the Commissioner's decision to take possession of Sentinel will be upheld.

In its "Notice of Possession of Sentinel Trust Company" filed with the Chancery Court of Lewis County on May 18, 2004, the Commissioner provided the following as a basis for the possession of Sentinel:

> 1. Sentinel Trust Company ("Sentinel") is a Tennessee corporation engaged in fiduciary activities and subject to regulation by the Commissioner under the Tennessee Banking Act pursuant to Tenn. Code Ann. § 45-1-124.
> 2. On May 3, 2004, the Commissioner issued an Emergency Order directing Sentinel to cease and desist from engaging in

unsafe and unsound banking practices. That Order found that Sentinel had used pooled fiduciary funds to provide operating capital for non-related defaulted bond issues, thereby creating a fiduciary cash shortfall that greatly exceeds Sentinel's current operating capital and that Sentinel had failed to reconcile fiduciary cash and corporate cash accounts in a timely and accurate fashion and to keep accurate books and records.

3. Efforts to infuse sufficient capital have been unsuccessful. Sentinel's potential liability for the cash shortfall in the pooled fiduciary account exceeds its current capital level. Furthermore, Sentinel has been unable to provide the Tennessee Department of Financial Institutions with a capital plan as required by the Emergency Cease and Desist Order to demonstrate how Sentinel could make the pooled fiduciary account whole.

Accordingly, the Commissioner took possession of Sentinel based upon the existence of the condition stated in T.C.A. § 45-1-1502(a)(1), that being Sentinel's business was being conducted in an unsound manner. Specifically, the record reflects that Sentinel used pooled fiduciary funds to provide operating capital for non-related, defaulted bond issues, thereby creating a fiduciary cash shortfall that greatly exceeded Sentinel's current operating capital. Even Sentinel's own counsel conceded that Sentinel's practice of funding defaulted bond expenses with funds from other non-related bond issues was "inappropriate." On April 30, 2004, Mr. Bates, by his own admissions, stated that his calculations showed that Sentinel had a deficit fiduciary cash position of approximately $7.25 million. The record reflects that, as early as the Department's report for Sentinel's year ending December 31, 1999, the trust company had failed to reconcile fiduciary cash and corporate accounts in an accurate fashion and to keep accurate books and records in accordance with industry standards and Department regulations. Additionally, Sentinel had failed to submit a capital plan outlining the company's plans to replenish the fiduciary pooled account, and had failed to make an initial infusion of $ 2 million in capital by the May 17 deadline, as required by the Emergency Cease and Desist Order filed on May 3, 2004.

In their arguments, Appellants never deny that the above conditions existed at the time the Commissioner took possession of Sentinel. Rather, Appellants admit that Sentinel's practice of borrowing monies on deposit in the pooled fiduciary account from non-related bond issues to fund the expenses of defaulted bond issues resulted in a significant deficiency in cash in the pooled fiduciary account. Moreover, Mr. Bates specifically admitted that he used the total cash held by the trust department (i.e. monies deposited in trust to be used for the purposes specified in the indenture) in a manner that was contrary to the indentures that governed Sentinel's actions as trustee. By their own admissions, prior to the Commissioner's taking possession of Sentinel, Appellants were engaging in practices that not only violated the Tennessee Banking Act, but also violated the FDIC's Statement of Principles of Trust Department Management, which

Sentinel adopted as part of its corporate policies. Furthermore, these practices violated the indentures and contractual agreements between the bond issuers and Sentinel as fiduciary. From the record before us, we conclude that there is ample material evidence to indicate that Sentinel's business was being conducted in an unsound manner. Consequently, the actions of the Commissioner in taking possession of Sentinel on May 18, 2004 were justified.

We now turn to the question of whether there is sufficient material evidence in the record to support the Commissioner's decision to take emergency possession of Sentinel without a prior hearing pursuant to T.C.A. §45-2-1502(c)(1). The statute states that, when "an emergency exists which will result in serious losses to the depositors, the commissioner may take possession of a state bank without a prior hearing." The Appellants argue that the Commissioner lacked authority to take possession of Sentinel under the emergency status for two reasons. First, because Sentinel is not a "bank" and, secondly, because Sentinel does not have any "depositors." Based upon the foregoing discussion, Appellants' argument that a trust company is not a bank and may not be substituted in the Tennessee Banking Act for a bank is misplaced. As discussed, *supra*, chapters 1 and 2 of the Tennessee Banking Act also apply to trust companies. Therefore, T.C.A. § 45-2-1502, which authorizes the Commissioner to take possession of a state bank under certain circumstances, also vests in the Commissioner the full authority to take possession of a Tennessee trust company under those same set of circumstances. Under T.C.A. § 45-2-1502, the question is whether there is sufficient material evidence in the record, from which we may conclude that potential for a serious loss to depositors existed. With deficits in Sentinel's pooled fiduciary account in excess of $7 million, bond issuers were certainly at risk of serious losses. We find that sufficient material evidence exists to support the Commissioner's decision to take emergency possession of Sentinel Trust Company.

We must also determine whether there is sufficient material evidence in the record to support the Commissioner's decision to liquidate Sentinel. While T.C.A. § 45-2-1502 sets out the specific grounds that must be met in order for the Commissioner to take possession of a bank or trust company, the statute does not enumerate criteria that must be met before the Commissioner may or should , liquidate. Rather, T.C.A. § 45-2-1502 (b)(2) leaves the decision of liquidation to the discretion of the commissioner, to wit:

> When the commissioner has taken possession of a state bank, the commissioner shall be vested with the full and exclusive power of management and control, including the power to continue or to discontinue the business, to stop or to limit the payment of its obligations, to employ any necessary assistants, to execute any instrument in the name of the bank, to commence, defend and conduct in its name any action or proceeding in which it may be a party, to terminate the commissioner's possession by restoring the bank to its board of directors, to appoint a receiver to have all of the rights, powers, duties and obligations granted to the commissioner in possession for the purpose of liquidation or reorganization, and to reorganize or liquidate the bank in accordance with §§ 45-2-1503 and

> 45-2-1504. As soon as practicable after taking possession, the commissioner shall make an inventory of the assets and file a copy thereof with the court in which the notice of possession was filed.

T. C. A. § 45-2-1502 (b)(2).

This Court's scope of review is the same as in the trial court: to review the findings of fact of the Commissioner upon the standard of substantial and material evidence. ***DePriest v. Puett,*** 669 S.W.2d 669, 673 (Tenn. Ct. App. 1984). The evidence before the Commissioner must be such relevant evidence as a reasonable mind might accept as adequate to support a rational conclusion and such as to furnish a reasonably sound basis for the action under consideration. ***Pace v. Garage Disposal Dist.,*** 390 S.W.2d 461, 463 (Tenn,. 1965).

Department representatives and the Receiver submitted a preliminary report on June 15, 2004, which indicated that Sentinel had a fiduciary cash deficiency ranging between $7.6 and $8.4 million. Further, the report indicated that Sentinel was operating at a net loss and was insolvent at least in the amount of $6.2 million. The findings in the reports, coupled with the fact that the Sentinel Board of Directors and officers had no viable plan for infusion of capital, support the Commissioner's determination that liquidation of the company was necessary.

Despite the fiduciary cash deficiency, Appellants argue that the trust company was not insolvent at that time of liquidation. However, the evidence strongly preponderates against the Appellants' depiction of the stability of Sentinel at the time the Commissioner decided to liquidate the trust company. The record reflects that Mr. Bates himself confirmed that the pooled fiduciary account had a cash deficiency of $5,789,011 as of December 31, 2003 and a deficiency of approximately $7.25 million as of April 30, 2004. Given the fact that Sentinel's net worth was $1.3 million, the extent of the cash deficiency was itself sufficient evidence for the Commissioner to determine that liquidation was necessary and appropriate. Moreover, the record contains additional evidence to support a decision to liquidate. Sentinel's fee revenues were not sufficient to cover the operating expenses of the company. This resulted in a net loss of $163,501 for the first four months of 2004. The trust company did not maintain monetary reserves to correspond to the risk associated with the fiduciary activities they had undertaken. Furthermore, Sentinel had no formal or written business plan to guide them, nor any means to provide for a infusion of capital. The evidence before the Commissioner of an admitted multi-million fiduciary cash deficiency well in excess of Sentinel's net worth, the company's poor earning performance, the lack of any reserve in relation to losses, current operation at a net loss, and no plan or means of how the company would eliminate the deficiencies, provide a sound basis for the Commissioner's decision to liquidate Sentinel.

4. Whether the chancery court properly issued orders approving a transfer of Sentinel's fiduciary positions to successor trustees?

Appellants challenge the validity of the orders approving the transfer of Sentinel's fiduciary positions to successor trustees on several grounds. First, Appellants argue that the Tennessee Banking Act does not authorize the Commissioner or the courts to transfer assets of trust companies, only state banks. As discussed, *supra*, the provisions of Public Chapter 112 clearly indicate the General Assembly's intent that all of Chapters 1 and 2 of Title 45 of the Tennessee Code apply to the operation and regulation of state trust companies. In particular, T.C.A. § 45-2-1504(c) states that, after commencement of the liquidation of a financial institution, "the Commissioner **shall** take the necessary steps to terminate all fiduciary positions held by [the institution]." (emphasis added). Specifically, the statute states that such "fiduciary accounts may be transferred by the commissioner to another qualified corporate fiduciary. . . ." T.C.A. § 45-2-1504(c). Consequently, the plain language of T.C.A. § 45-2-1504(c) authorizes the Commissioner to transfer Sentinel's fiduciary positions to successor trustees.

The Appellants next assert that the Tennessee Banking Act is unconstitutional in that it violates the separation of powers requirement of the Tennessee Constitution. However, as discussed, *supra*, the powers bestowed upon the Commissioner by this statute are limited to those judicial powers reasonably necessary to the accomplishment of the purposes for which the Department of Financial Institutions was created. Consequently, T.C.A. § 45-2-1504 does not violate the separation of powers provision of Art. II, § 2 of the Tennessee Constitution.

Finally, the Appellants argue that the Tennessee Banking Act simply does not give the Lewis County Chancery Court jurisdiction "to permit or forbid the transfer of trust assets," including the removal and appointment of substitute trustees. Based upon this assertion, the Appellants contend that the Lewis County Chancery Court's orders approving the transfer of Sentinel's fiduciary positions are void for lack of jurisdiction.

Once the Commissioner determines that liquidation of a financial institution is necessary, such liquidation is governed by the provisions of T.C.A. § 45-2-1504. Under the statute, the Commissioner is authorized to do any of the following:

> (1) Sell any asset of the organization having a value in excess of five hundred dollars ($500);
> (2) Compromise or release any claim if the amount of the claim exceeds five hundred dollars ($500), exclusive of interest; or
> (3) Make any payment on any claim, other than a claim upon an obligation incurred by the commissioner, before preparing and filing a schedule of the commissioner's determinations in accordance with this chapter.

T.C.A. § 45-2-1504(a). However, before taking any of the enumerated actions, the Commissioner, under subsection (a), must obtain approval of the court in which the notice of possession has been filed.

T.C.A. § 45-2-1504(c) further requires the Commissioner to take the following action:

> As soon after the commencement of liquidation as is practicable, the commissioner shall take the necessary steps to terminate all fiduciary positions held by the state bank and take such action as may be necessary to surrender all property held by the bank as a fiduciary and to settle its fiduciary accounts. Such fiduciary accounts may be transferred by the commissioner to another qualified corporate fiduciary as determined by the commissioner, and notice of such transfer must be given by registered mail to the parties by the transferee corporate fiduciary.

Appellants argue that because subsection (c) does not require the Commissioner to seek court approval in the termination of fiduciary positions, the Lewis County Chancery Court had no authority to approve the transfer of Sentinel's fiduciary positions. However, the Appellants construction of the statute ignores the dictates set forth in subsection (a). This section not only permits, but also requires the court's approval before the Commissioner may "sell any asset of the organization having a value in excess of five hundred dollars." The transfer of Sentinel's fiduciary positions represents a transfer of Sentinel's right to receive, among other revenue, trustee administration fees and paying agent fees. The record indicates that the Appellants themselves characterize the rights to receive these fees as an asset in excess of $4 million. For the foregoing reasons, the Lewis County Chancery Court had clear statutory authority to rule upon the Commissioner's motion to transfer Sentinel's fiduciary positions to successor fiduciaries.

5. Whether, pursuant to the Tennessee Banking Act, the Commissioner had authority to retain the fiduciary positions as to defaulted bond issues, while transferring non-defaulted bond issues?

Appellants challenge the transfer of Sentinel's fiduciary positions to successor trustees on the grounds that such transfers must include all of Sentinel's fiduciary positions , as opposed to just the non-defaulted bond issues. Because the Appellants did not raise this issue in the trial court, it will not be considered on appeal. It is well settled that issues not presented to the trial court may not be presented for the first time on appeal. ***Smith v. Harriman Util. Bd.,*** 26 S.W.3d 879, 887 (Tenn. Ct. App. 2000). This Court has appellate jurisdiction only. ***Foley v. Dayton Bank & Trust,*** 696 S.W.2d 356, 359 (Tenn. Ct. App. 1985) (citing T.C.A. § 16-4-108 (1980)). Consequently, this Court may only decide issues which were brought to the attention of the trial judge, "and acted upon or pretermitted by him." ***Clement v. Nichols,*** 209 S.W.2d 23, 24 (Tenn.1948). The record before this Court contains no indication that this issue proffered by the

Appellants in this appeal was raised to the trial court below. However, even if we were to address this issue, we note that the plain language of T.C.A. § 45-2-1504(c) does not require that the Commissioner transfer all of an organization's fiduciary positions, only that the Commissioner "take all necessary steps to terminate all fiduciary positions" held by the organization.

6. Whether the commissioner has the authority to sell the Bellevue Property upon approval of the receivership court?

Appellants challenge the authority of the Commissioner to sell Sentinel's Bellevue Property on several grounds. First, Appellants argue that the Tennessee Banking Act does not authorize the Commissioner or the Receiver to sell assets of trust companies, only state banks. As stated, *supra*, the provisions of Public Chapter 112 indicate the General Assembly's intent that all of Chapters 1 and 2 of Title 45 of the Tennessee Code apply to the operation and regulation of state trust companies. T.C.A. § 45-2-1504 outlines the process for liquidating a financial institution under the Tennessee Banking Act. The statute specifically states that the Commissioner may sell **any** asset of the organization. T.C.A. § 45-2-1504(a) (emphasis added). Consequently, the Commissioner, and his appointed Receiver, were authorized, under to T.C.A. § 45-2-1504, to sell Sentinel's Bellevue Property upon approval of the receivership court.

Again, Appellants assert that the Tennessee Banking Act is unconstitutional in that it violates the separation of powers requirement of the Tennessee Constitution by granting the Commissioner the power to appoint a receiver and liquidate assets of a trust company. Appellants contend that, because the Tennessee Banking Act vests in the Commissioner (a member of the Executive branch of the state government) powers that allegedly may be vested only in the judiciary, the Act is unconstitutional. However, as discussed *supra*, the powers bestowed upon the Commissioner are limited to those judicial powers reasonably necessary to the accomplishment of the purposes for which the Department of Financial Institutions was created. Therefore, T.C.A. § 45-2-1504 does not violate the separation of powers provision of Art. II, § 2 of the Tennessee Constitution.

7. Whether the receivership court erred in approving the sale of the Bellevue Property for $320,000?

Appellants contend that trial court erred in approving the sale of Sentinel's Bellevue Property. Specifically, Appellants assert that the $320,000 price approved by the receivership court was below the fair market price, and that the court should have "requir[ed] an appraisal at market value." However, the Appellants present no evidence to support a finding that the fair market value of the property is anything other than the $320,000 for which it was sold. The Appellants merely argue that the sale was a "forced sale" and should not have been approved. The Commissioner and Receiver state that the sale of the Bellevue was not a forced sale. The evidence supports the Commissioner and Receiver's position that it was a full list value sale at a fair market value set by a reputable real estate agent. In particular, the $320,000 list price for the Bellevue Property was set by a Nashville real estate agent after review of comparables, property

condition, and property location. The property was listed for six months prior to its sale, and the property had a tax assessment value of $291,000.

Next, the Commissioner and Receiver assert that they are not prevented, in liquidating assets, from seeking and gaining court approval of the sale of an asset simply because the Appellants' expectations of what a fair market value might bring was not obtained from the sale transaction. T.C.A. § 45-2-1504 outlines the process that the Commissioner must follow in order to liquidate a financial institution. T.C.A. § 45-2-1504(a) states that the "commissioner may exercise any power of the office of commissioner, but shall not, without the approval of the court in which notice of possession has been filed (1) sell any asset of the organization having a value in excess of five hundred dollars." T.C.A. § 45-2-1504(a)(1). This is the only restriction placed upon the Commissioner or his appointed Receiver in the execution of a sale of a financial institutions assets. The Appellants are attempting to prevent the receivership court from approving a sale of assets, without proof that the sale price is one equivalent to a "fair market value." This requirement simply does not exist in the statute. Nonetheless, the question is moot because the record reflects that the sale of the Bellevue Property for $320,000 was a fair and reasonable amount.

8. Whether the trial court erred when it denied the petition for a writ of certiorari, declaring the case moot?

On April 13, 2005, the Davidson County Chancery Court denied the Appellants' petition for writ of certiorari and declared the case moot. The trial court's order, filed the same day, reads in pertinent part, as follows:

> This Court was always open and ready to grant the petitioners [Appellants] a prompt post-seizure and/or post -liquidation notice hearing. The failure to have a prompt post-seizure hearing challenging the factual basis for the seizure was entirely the fault of the petitioners. Petitioners' counsel in August, 2004 insisted that his legal arguments were so strong that he did not need a hearing on the facts. He insisted on a hearing limited to his argument that the banking statutes did not apply to trust companies. . . . This insistence was pressed in the face of the Court's offer to give him a hearing on all issues within 7-10 days of August 5, 2004. When petitioners lost their legal argument in state court, they were so sure of their position that they then went to federal court where they again lost. Finally, having failed to win on their legal argument, petitioners finally in March 2005, ten (10) months after the Commissioner took possession, requested a hearing challenging the Commissioner 's factual determinations.
>
> * * *

> The factual challenge to the Commissioner's action has been delayed so long by the petitioners that this case in now moot. . . . The receivership and liquidation have proceeded now for eleven (11) months, and the record indicates that Sentinel is but an empty shell. While Humpty Dumpty could perhaps have been put back together, in the Summer of 2004 [Sentinel] can no longer be put back together.

The Appellants assert that because "[t]here is in this record no evidence that any of Sentinel's assets have been conveyed away beyond redemption," this Court can reverse the trial court's approval of Sentinel's liquidation. Appellants seek an order from this Court directing the Commissioner to return Sentinel to its status as of May 18, 2004 (i.e. prior to possession by the Commissioner).

Our analysis is guided by our Supreme Court's decision in ***Boyce v. Williams,*** 389 S.W. 2d 272 (Tenn. 1965). In ***Boyce,*** following the merger of a domestic insurance company with a foreign company, the insurance company's stockholders filed a petition for the common law writ of certiorari to vacate the Commissioner of Insurance's approval of the merger, that the merger be enjoined and the assets of the two corporations be segregated. The petition alleged that the commissioner was without authority to approve the merger. The trial court dismissed the petition upon finding that the commissioner had not exceeded his jurisdiction or acted illegally. Upon review, the Tennessee Supreme Court addressed the question of whether an effectual relief could be granted well after the companies had merged and assets had been transferred, to wit:

> Should we now grant the relief sought and remand the case to the trial court for trial it would only amount to further delay.
>
> University has now been merged with a foreign corporation and we dare say most, if not all, its assets are in a foreign state and out of the jurisdiction of the courts of this state.
>
> Thus, the courts of this state cannot grant to appellants any effectual relief and to now remand the case for a trial would be a useless gesture on our part. The question of whether the commissioner's approval of the merger should be vacated or whether appellants are entitled to an injunction and a segregation of the assets of University as prayed for in the petition have become moot.
>
> * * *
>
> Where it appears the act to be enjoined has been consummated, an action for an injunction presents only a moot question and will be dismissed

Boyce, 389 S.W.2d 272, 277–278 (citations omitted). The Appellants argue that ***Boyce*** is but "an anomaly – it should not be taken as an inspiration to intentionally repeat ancient mistakes." We disagree. ***Boyce v. Williams*** is well-settled precedent that the courts of Tennessee have

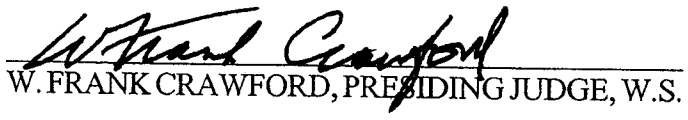
relied upon in defining their scope of jurisdiction and is, in fact, directly analogous to the case at bar.

When the trial court denied the Appellants' petition for writ of certiorari and declared the case moot, the receivership and liquidation had been under way for eleven months, and all but four of Sentinel's defaulted bond issues had been transferred to successor trustees. As the trial court stated, Sentinel was in essence an empty shell. Furthermore, the failure to promptly have a post-seizure hearing challenging the factual basis for the seizure was entirely the fault of the petitioners. As stated in ***Boyce***:

> The rule is well established that review proceedings are not allowed for the purpose of setting abstract questions, but only to correct errors injuriously affecting the rights of some party to the litigation. Accordingly, an appeal or error proceeding will be dismissed if the question presented by it . . . has become moot or academic or if, . . . an event has occurred which makes a determination of it unnecessary or renders it impossible for an appellate court to grant effectual relief.

Boyce, 389 S.W.2d 272, 278 (citations omitted). By the time the factual hearing occurred in late March, 2005, the ongoing liquidation of Sentinel and transfer of Sentinel's assets made it impossible for the court to grant effectual relief. Consequently, we find that the Davidson County Chancery Court did not err in denying the petition for a writ of certiorari and in declaring the case moot.

Accordingly, and for the foregoing reasons, the final orders of the respective trial courts are affirmed. Costs of these appeals are assessed to the Appellants, Danny N. Bates, Clifton T. Bates, Howard H. Cochran, Gary L. O'Brien, and their respective sureties.



W. FRANK CRAWFORD, PRESIDING JUDGE, W.S.