

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF ILLINOIS  
PEORIA DIVISION

DEBRA K. KEACH and PATRICIA A. SAGE, )  
Plaintiffs, )

vs. )

U.S. TRUST COMPANY, NA., f/k/a U.S. TRUST )  
COMPANY OF CALIFORNIA, NA., )  
ELLEN D. FOSTER, as Executrix of the Estate of )  
Thomas S. Foster and as Co-Trustee of the )  
Thomas S. Foster Trust executed on April 14, 1994, )  
THE NORTHERN TRUST COMPANY, an Illinois )  
corporation, as Co-Trustee of the Thomas S. Foster Trust )  
executed on April 14, 1994, )  
MELVYN R. REGAL, individually, as trustee or agent )  
of the Steven Jay Regal Trust, as trustee or agent of the )  
Judi Lynn Regal Trust, and as trustee or agent of the )  
John E. Regal Trust, )  
A. ROBERT PELLEGRINO, )  
VALUOMETRICS, INC., )  
HOULIHAN, LOKEY, HOWARD & ZUKIN, INC. )  
ROBERT A. OSTERTAG, JR., TERRY P. COLE, )  
ALAN R. DIX, JON D. ELLETSON, )  
STEPHEN P. BARTLEY, LYLE T. DICKES, )  
JAMES N. FREID, DALE FUJIMOTO, )  
WILLIAM J. GEHRING, HENRY R. GREGORY II, )  
JOHN F. HALPIN, RICHARD S. HODGSON, )  
JAMES H. KYLE, JOHN LAPPEGAARD, )  
GREGORY K. McALLISTER, GEORGE McKITTRICK, )  
MICHAEL F. NORBUTAS, CLAYTON PATINO, )  
JERRY L. RATHMANN, FREDERICK J. STUBER, )  
W. THOMAS STUMB, MARK SWEDLUND, )  
LEO A. VANDERVLUGT, ROBERT J. WILSON, )  
BRUCE B. WRIGHT, and )  
ASHLEY ANNE FOSTER, as trustee or agent of the )  
Ashley Anne Foster Irrevocable Trust, )  
Defendants. )

CASE NO. 01-1168

**SECOND MOTION FOR  
SUMMARY JUDGMENT  
OF DEFENDANT  
ELLEN D. FOSTER, AS  
EXECUTRIX OF THE  
ESTATE OF THOMAS S.  
FOSTER, DECEASED**

**SECOND MOTION FOR SUMMARY JUDGMENT OF DEFENDANT,  
ELLEN D. FOSTER, AS EXECUTRIX OF THE ESTATE OF  
THOMAS S. FOSTER, DECEASED**

I. INTRODUCTION.

The present motion seeks summary judgment on behalf of Defendant Ellen D. Foster, as Executrix of the Estate of Thomas S. Foster, Deceased, pursuant to FRCP 56 and CDIL Local Rule 7.1(D). The basis of the present motion is that Ellen D. Foster as Executrix is not a proper party to the present suit, and that any liability she may have had has been discharged in *In Re The Matter of the Estate of Thomas S. Foster, Deceased*, Case No. 96 P 401, in the Circuit Court of the Tenth Judicial Court of Illinois, Peoria County. Principles of *res judicata* preclude the Plaintiffs herein from reasserting their claim against Ellen D. Foster in the present action.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS.

The following statements of fact are a summary of the public records of Peoria County Circuit Court, Case No. 96 P 401, In the Matter of the Estate of Thomas S. Foster, Deceased. Except for Items 17, 21 and 26, they are not attached hereto. Items 17, 21 and 26 are copies of the State Court Orders refusing to reopen the closed estate.

1. Thomas S. Foster died testate on July 11, 1996, and his Estate was probated in Peoria County Circuit Court as Case Number 96 P 401.
2. Ellen D. Foster was appointed as Executrix of the Estate of Thomas S. Foster on July 25, 1996.

3. From August 2, 1996 to August 16, 1996, Notice to Creditors of the Estate of Thomas S. Foster was published in the Peoria Daily Record and a Certificate of Publication was filed in 99 P 401 on August 20, 1996.

4. On October 1, 1998, the Probate Court entered an Order discharging Ellen D. Foster as Executrix and closing the Estate of Thomas S. Foster.

5. On September 16, 1999, Ellen D. Foster filed a Petition to Re-Open Estate in Probate solely in order to administer newly discovered assets in the value of approximately \$219.00 in stock.

6. On September 16, 1999, the Probate Court entered an Order Re-Opening Probate Estate "...for the sole purpose of transferring the remaining estate property still standing in the name of the decedent.... The Executor shall not be required to provide publication notice to creditors and shall not be required to provide notice to interested parties...."

7. On January 30, 2001, Debra K. Keach and Patricia A. Sage, the Plaintiffs herein, by their attorneys Sutkowski & Washkuhn, sent a letter to U.S. Trust Company, NA, Trustee of the Foster & Gallagher Employee Stock Ownership Plan which requested, among other things, "Information regarding any review as to ESOP recourse against fiduciaries, parties-in-interest, and professional advisors." The same letter was sent to Robert A. Ostertag, Jon D. Elletson, Alan R. Dix, and Terry P. Cole. Said letters are contained as Exhibit 98 to the original Complaint herein and all subsequent Complaints in the present cause. Keach and Sage did not send said letters to Ellen D. Foster as Executrix of the Estate of Thomas S. Foster, nor file them with the Probate Court. Foster filed the letters in the Probate Court on May 29, 2002, as part of her Memorandum described in paragraph 19 below.

8. On March 1, 2001, Ellen D. Foster, Executrix of the Estate of Thomas S. Foster, filed herein her Petition to Close Estate.

9. On April 6, 2001, the present action was filed in the United States District Court.

10. On April 19, 2001, an Order was entered discharging Ellen D. Foster in the probate case and closing the Estate of Thomas S. Foster.

11. At a hearing in the present cause on November 8, 2002, this Court raised the issue of whether there was still a Foster Estate with assets to proceed against. It directed the attorneys for Keach and Sage to file a petition with the Probate Court to determine whether the estate could be reopened. Transcript at 49-54.

12. On December 18, 2001, Keach and Sage filed in the Probate Court an Agreed Petition to Re-Open Probate Estate, which recited that Ellen D. Foster, Executrix, does not object to the re-opening of the Estate (hereinafter First Petition to Re-Open). Said Agreed Order recited that the estate was to remain open pending the disposition of the present cause, which it cited by name and case number.

13. At a hearing on the First Petition to Re-Open on January 8, 2002, the Northern Trust Company and Ellen D. Foster, as Co-Trustees of the Thomas S. Foster Trust, entered their appearances and filed a Motion to Dismiss Petition to Re-Open Probate Estate. In that Motion to Dismiss, Northern Trust Company and Foster asserted that the First Petition to Re-Open was without adequate basis in the Probate Act, was not allowable under Section 2-1401 of the Code of Civil Procedure, and was inadequate in failing to allege the necessary prerequisites for a motion under 2-1401. At that hearing, the Probate Court entered an Order giving Petitioners

Keach and Sage 30 days to respond to the Motion to Dismiss, and Northern Trust Company and Ellen D. Foster as Co-Trustees 30 days to respond to Keach and Sage's pleading.

14. In response to the above, Petitioners Keach and Sage filed a Memorandum of Law in Opposition to Motion to Dismiss Agreed Petition to Re-Open Probate Estate, on or about March 6, 2002, which asserted that the Co-Trustees had no standing to object to the First Petition to Re-Open; asserted that failing to re-open the estate would improperly deprive Keach and Sage of a remedy for their claims under the ERISA statute, 29 U.S.C. §1001 et seq., for the present case pending in federal court; asserted that the Order of April 16, 2001 closing the estate was procured by a fraud on the Court perpetrated by the attorneys for Ellen D. Foster as Executrix; and argued that the First Petition to Re-Open was sufficient under Section 2-1401 of the Code of Civil Procedure.

15. In response to the above, Foster filed Response of Executor Ellen D. Foster to Keach and Sage's Memorandum of Law in Opposition to Motion to Dismiss Agreed Petition to Re-Open Estate, on March 18, 2002. In that Memorandum, Foster asserted that her attorneys had not been guilty of any fraud in connection with the present cause of action.

16. On March 12, 2002, the Northern Trust and Foster filed their Memorandum of Law in Support of Motion to Dismiss Agreed Petition to Re-Open Estate, which reviewed the law concerning both the Probate Act and Section 2-1401 of the Code of Civil Procedure, and asserted that the First Petition to Re-Open should be denied.

17. A hearing on the First Petition to Re-Open was had on March 18, 2002, at which the Probate Court entered an Order denying the First Petition to Re-Open. The Court ruled that to the extent that the First Petition to Re-Open was brought pursuant to Section 24-9 of the

Probate Act, it was denied. To the extent that the First Petition to Re-Open was brought to set aside the April 19, 2001 Order closing the Estate, it was also denied. The Order further stated "The Petitioners' Petition to Re-Open, to the extent brought to set aside the October 1, 1998 order closing the Estate is denied without prejudice, the Court granting the Petitioners 30 days (or up to and including April 17, 2002) to amend or refile a Petition as to the October 1, 1998 order without further notice of this order to the parties."

18. In response to the above, Keach and Sage filed, on or about April 18, 2002, a Second Petition to Reopen Probate Estate (hereinafter "Second Petition to Reopen"). The Second Petition to Reopen asserted certain case law which Keach and Sage argued would allow this Court to reopen the Foster Estate, without the need to proceed under Section 2-1401 of the Code of Civil Procedure.

19. In response to the above, on May 29, 2002, Foster filed her Memorandum of Law of Ellen D. Foster, as Executor of the Estate of Thomas S. Foster, Deceased, in Opposition to Second Petition to Reopen Probate Estate. Said Memorandum asserted that the arguments currently offered by Keach and Sage were those which the Court had rejected in its Order of March 18, 2002, and should not be considered further. The Memorandum further argued that the Second Petition to Reopen did not meet the requirements of Section 2-1401 of the Code of Civil Procedure, and that the case authority cited by Keach and Sage did not support the relief they requested.

20. On June 18, 2002, Northern Trust Company and Ellen D. Foster as Co-Trustees filed their Response to Second Petition to Reopen Estate of Thomas S. Foster, which asserted

that the case authority cited by Petitioners was not applicable to the instant cause, and was based upon versions of the Probate Act which were no longer in effect.

21. A hearing on the Second Petition to Reopen on July 8, 2002, and the Court entered an Order on July 11, 2002, which denied the Second Petition to Reopen. The Order noted that Petitioners concede that their motion is not brought pursuant to Section 24-9 of the Probate Act, and ruled that there is no other authority to reopen the decedent's estate other than in 24-9. The Order further noted that Petitioners concede their motion is brought pursuant to Section 2-1401 of the Code of Civil Procedure, and ruled that Petitioners have been unable to establish due diligence and therefore are not entitled to relief under Section 2-1401.

22. On August 9, 2002, Petitioners Keach and Sage filed a pleading entitled Motion to Set Aside Order, For Leave to File Amended Complaint, and To Stay Further Proceedings.

23. On August 12, 2002, Keach and Sage filed a Notice of Appeal to the Appellate Court of Illinois, Third Judicial District, in Case Number 3-02-0616, from the Probate Court's Order of July 11, 2002.

24. On September 10, 2002, the Northern Trust Company and Ellen D. Foster, as Co-Trustees of the Thomas S. Foster Trust, filed their Motion to Strike From the Record Petitioners' Motion to Set Aside Order, For Leave to File Amended Complaint, and To Stay Further Proceedings.

25. On September 20, 2002, Foster filed her Executrix, Appellee's Motion to Strike Notice of Appeal and Dismiss Appeal.

26. On September 25, 2002, the Probate Court entered an Order which denied the Co-Trustees' Motion to Strike and denied Petitioner Keach and Sage's Motion to Set Aside Order,

Leave to File Amended Complaint, and To Stay Further Proceedings in its entirety. The same Order denied Petitioners' Motion for Leave to File Supplemental Authority, which was filed after the argument on the Petitioners' other motions.

27. On October 3, 2002, Keach and Sage filed a Notice of Appeal to the Appellate Court of Illinois, Third Judicial District, in Case Number 3-02-0762, from the Probate Court's Order of September 25, 2002.

28. Pursuant to Motion of the Appellants Keach and Sage, Case Nos. 3-02-0616 and 3-02-0762 were consolidated by the Appellate Court on November 1, 2002.

29. On November 1, 2002, the Appellate court denied Motion of Appellee to Strike Notice of Appeal and Dismiss Appeal.

### III. APPLICABLE LAW

#### A. Time to File Claims Against Decedent's Estate.

Under the Illinois Probate Act, claims against the estate must be filed with the court within six months after publication of the estate and within two years after the death of the decedent. 755 ILCS 5/18-3, 5/18-12. (Mr. Foster died on July 11, 1996).

#### B. Grounds For Reopening A Decedent's Estate..

The only grounds for reopening an estate under the Probate Act are "...to permit the administration of a newly discovered asset or of an unsettled portion of the estate on the petition of any interested person." 755 ILCS 5/24-9.

In *Estate of Miller*, 28 Ill.App.2d 110, 170 N.E.2d 640 (1<sup>st</sup> Dist. 1960), a claimant brought a suit to enforce a tort claim against the closed estate of a decedent. The Probate Court refused the petition to reopen, and the Appellate Court affirmed. It found that the claims had not been submitted to the Probate Court within the limitations period contained within the Probate Act. It held that an untimely submission of a claim cannot be used to reopen an estate and held that if a closing judgment of a probate court is procured through fraud, the movant can seek to attack it on that basis, but the movant must establish the fraud by clear and convincing evidence.

C. Relief From Final Orders and Judgments.

735 ILCS 5/2-1401 provides a method for a litigant to obtain relief from final orders and judgments after thirty days from their entry. However, such relief is limited to a period of two years following the entry of the judgment or order from which relief is sought, and the movant must show that he has a meritorious claim, that he exercised due diligence in the original action, and that he exercised due diligence in filing his 2-1401 petition. *Smith v. Airoom, Inc.*, 114 Ill.2d 209, 220-221, 499 N.E.2d 1381 (1986).

In *Estate of Bilotti*, 56 Ill.App.3d 552, 372 N.E.2d 122 (3<sup>rd</sup> Dist. 1978), *aff'd. sub nom. Commercial National Bank of Peoria v. Bruno*, 75 Ill.2d 343, 389 N.E.2d 163 (1979), an estate had been opened for an intestate decedent, and the known heirs at law had been paid the assets of the estate. Subsequently, individuals claiming to be heirs at law filed a petition to re-open the estate pursuant to the Probate Act, Illinois Revised Statutes 1975, ch. 3, pr 24-9 [now 755 ILCS 5/24-9] and the predecessor of 735 ILCS 5/2-1401. The Appellate Court held that it was improper for the Circuit Court to re-open the estate pursuant to section 24-9 of the Probate Act, since that section was limited to disposition of newly discovered assets or unsettled portions of

the estate. The court implied, without explicitly stating, that any remedy the petitioners might claim would have to be made pursuant to 5/2-1401, and this holding was affirmed by the Supreme Court of Illinois. 75 Ill.2d at 351, 389 N.E.2d at 355.

Similar applications of section 72 of the Civil Practice Act (the predecessor of 5/2-1401) occurred in *In Re Estate of Arcicov*, 94 Ill.App.2d 122, 236 N.E.2d 365 (1<sup>st</sup> Dist. 1968) and in *In Re Estate of Rudder*, 78 Ill.App.3d 517, 397 N.E.2d 556 (2<sup>nd</sup> Dist. 1979). *Rudder* noted that a petitioner proceeding under that section must show not only a meritorious defense (or cause of action) but also the exercise of due diligence. 78 Ill.App.3d at 521, 397 N.E.2d at 103.

D. *Res Judicata*.

Under the principle of *res judicata*, Illinois law bars a later proceeding between the same parties for the same cause of action, when a final judgment has been entered in an earlier cause of action between those parties. The bar extends to all issues that could have been raised in the original proceeding, as well as those which were actually raised.

"For the doctrine of *res judicata* to apply, the following three requirements must be satisfied: (1) there was a final judgment on the merits rendered by a court of competent jurisdiction, (2) there is identity of cause[s] of action, and (3) there is an identity of parties or their privies." *4901 Corporation v. Town of Cicero*, 220 F.3d 522, 529 (7<sup>th</sup> Cir. 2000), quoting *River Park, Inc. v. City of Highland Park*, 184 Ill.2d 290, 703 N.E.2d 883, 889 (1998).

The principles of *res judicata* apply to a probate proceeding. *In Re Trapani's Estate*, 21 Ill.App.2d 19, 157 N.E.2d 83, 93, (2<sup>nd</sup> Dist. 1959).

Under the Rules of Decision Act, 28 U.S.C. §1738, federal courts are bound to give to the judgments of the state courts of Illinois the same *res judicata* effects that an Illinois court would give to those decisions. *Harl v. City of LaSalle*, 679 F.2d 123, 125 (7<sup>th</sup> Cir. 1982).

In addition to the doctrine of *res judicata*, federal courts are precluded by the Rooker-Feldman doctrine from reviewing the judgments of state courts where the federal claimant, rather than presenting an independent claim, is simply seeking to have the decision of the state court reversed. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983); *4901 Corporation v. Town of Cicero*, 220 F.3d 522 (7<sup>th</sup> Cir. 2000).

#### IV. ARGUMENT

In the present cause of action, the parties are identical with those in the probate proceedings recited above: Keach and Sage as Plaintiffs-Petitioners and Ellen D. Foster as Executrix as the Defendant. The cause of action is the same, namely a supposed violation of ERISA by the Defendant's decedent, Thomas S. Foster. Keach and Sage asserted the present ERISA action filed on April 6, 2001, as the sole basis of their right to damages in the probate action, and never cited any other basis.

The Probate Court's Order of July 11, 2002, was a final and appealable Order, which disposed of all pending claims. To the extent that there could be any ambiguity on that point, the Order of September 25, 2002 removed it.

Thus, all the criteria for the application of *res judicata* have been met.

Keach and Sage have filed appeals of the Probate Court's last two Orders, as recited above, and those appeals are pending. Nonetheless, this Court may (and should) dismiss all counts against Ellen D. Foster as Executrix on the grounds that the Probate Court has declined to reopen the estate and thus the estate and this Defendant Executrix are no longer in existence.

Should the Illinois Appellate Court require any further proceedings, the Plaintiffs can so inform this Court.

V. CONCLUSION.

For the reasons given above, the Second Claim and the Ninth Claim (insofar as it asserts a cause of action against Ellen D. Foster as Executrix) of the First Amended Complaint should be dismissed with prejudice.

ELLEN D. FOSTER, as Executrix of the Estate  
of Thomas S. Foster, Deceased,

By Charles G. Roth  
Charles G. Roth, ARDC 02399113  
James W. Springer, ARDC 06192903

## CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing document was served upon the following by placing the same in an envelope, postage fully prepaid, and by depositing said envelope in a U.S. Post Office Mail Box in Peoria, Illinois, or by hand delivery, on the 6<sup>TH</sup> day of DEC., 2002, addressed as follows:

Mr. Dean Rhoads  
Sutkowski & Rhoads, Ltd.  
124 S.W. Adams St.  
Suite 560  
Peoria, IL 61602

Mr. Richard J. Pautler  
Thompson Coburn LLP  
One Firststar Plaza  
34<sup>th</sup> Floor  
St. Louis, MO 63101

Mr. Timothy Bertschy  
Heyl, Royster, Voelker & Allen  
124 S.W. Adams St., Suite 600  
Peoria, IL 61602

Mr. Robert Eccles  
O'Melveny & Myers  
555 13<sup>th</sup> St. NW  
Washington, DC 20004

Ms. Nancy Ross  
McDermott, Will & Emery  
227 W. Monroe Street  
Chicago, IL 60606-5096

Mr. Jeffrey B. Rock  
Hasselberg, Rock, Bell & Kuppler  
4600 N. Brandywine Drive  
Assoc. Bank Bldg. Suite 200  
Peoria, IL 61614-5591

Mr. Dean R. Essig  
Attorney at Law  
135 Washington Square  
Washington, IL 61571

Mr. Stephen D. Gay  
Husch & Eppenberger L.L.C.  
401 Main Street  
Suite 1400  
Peoria, IL 61602

Mr. Bradley M. Jones  
Mr. Richard L. Pemberton  
Meagher & Geer, P.L.L.P.  
4200 Multifoods Tower  
33 South Sixth Street  
Minneapolis, MN 55402

Mr. Leland L. Smith  
Hinshaw & Culbertson  
456 Fulton Street  
Suite 298  
Peoria, IL 61602-1220

Mr. Sari Alamuddin  
Seyfarth Shaw  
55 E. Monroe, Suite 4200  
Chicago, IL 60603

Mr. James C. Bailey  
Steptoe & Johnson LLP  
1330 Connecticut Avenue NW  
Washington, DC 20036

Mr. Roy G. Davis  
Davis & Campbell L.L.C.  
401 Main Street, Suite 1600  
Peoria, Illinois 61602

Mr. Robert Riffle  
Elias, Meginnes, Riffle & Seghetti  
416 Main Street, Suite 1400  
Peoria, Illinois 61602

*Charles G. Roth*

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Charles G. Roth, ARDC 02399113  
James W. Springer, ARDC 06192903