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THE FACT THAT AN APPLICATION FOR REGISTRATION, EXEMPTION OR QUALIFICATION OF SECURITIES IS MADE ON BEHALF OF COMMON LAW OR MASSACHUSETTS TYPE BUSINESS TRUST DOES NOT AS A MATTER OF LAW PROHIBIT THE EXEMPTION, REGISTRATION OR QUALIFICATION OF ITS SECURITIES, CERTIFICATES OF BENEFICIAL INTEREST, OR SHARES IN THE TRUST—CHAPTER 1707., §§1707.01 to 1707.45, 2733.01(C), R.C.

SYLLABUS:

1. The fact that an application for registration, exemption or qualification of securities pursuant to the provisions of Chapter 1707., Revised Code, is made on behalf of a common law or Massachusetts type business trust does not as a matter of law prohibit the exemption, registration or qualification of its securities, certificates of beneficial interest, or shares in the trust as required under Section 1707.01 to 1707.45, inclusive, Revised Code.

2. The provisions of Section 2733.01 (C), Revised Code, are applicable to common law or Massachusetts business trusts in the same fashion and manner and to the same extent as they would be applicable to any other association of persons acting as a corporation without being legally incorporated, but the mere fact that such a business organization is in operation does not constitute sufficient reason to proceed under that statute.

Columbus, Ohio, March 24, 1961

Hon. John W. Bush, Director of Commerce
Ohio Departments Building, Columbus, Ohio

Dear Sir:

I have your request for my opinion which reads as follows:

"An application for qualification for sale pursuant to Section 1707.09, Revised Code of Ohio, for Certificates of Beneficial Interest or shares of a Real Estate Investment Trust has been filed with the Division of Securities.

"An examination of said application discloses that applicant is a common law or Massachusetts type business trust organized in Pennsylvania pursuant to a Declaration of Trust dated December 20, 1960. Said trust has been organized to function as a Real Estate Investment Trust of the type contemplated in the recent amendment by adding Sections 856, 857 and 858 to Section 10(a)

Subchapter M of Chapter 1 of the Internal Revenue Code of 1954 providing, in substance, certain tax benefits accruing to the earnings of such an entity. The Division of Securities is aware of certain other trusts that are in state of preparation anticipatory to the sale of their securities in this state and which trusts will be organized in Ohio as well as in other states. The problem is therefore of major importance in the ultimate disposition of applications.

"A similar request for opinion was made by my predecessor to which the Attorney General made reply in 1931 OAG No. 3438. This opinion replied substantially upon a decision in 19 OA 436 Lucas County) State ex rel. v. Meyer, In commenting, the Attorney General reflected that 'in 1925 the Court of Appeals of Lucas County substantially overruled the foregoing opinions of the Attorney General and, I think, rendered a decision at variance with the Ackerman case'. (State ex rel. v. Ackerman, et al., 51 O.S. 163). An appeal of the Meyer case was not taken to the Supreme Court.

"In view of this background your opinion is respectfully requested upon the following questions:

"1. Does the fact that the applicant is a common law trust of the type shown by the application, as a matter of law, prohibit the exemption, registration or qualification of its securities, certificates of beneficial interest or shares in the trust as required under Sections 1707.01 to 1707.45, inclusive, Revised Code?

"2. Are the provisions of Section 2733.01(C), Revised Code, applicable to such association of persons?

"3. If your opinion as to (1) and (2) are in the affirmative shall it apply with equal emphasis on trusts domiciled in the State of Ohio and those validly domiciled in a foreign state?

"4. Is the opinion expressed in 1931 OAG 3438 confirmed and deemed controlling?

"We enclose a copy of the application, included exhibits and correspondence."

The syllabus of Opinion No. 3438, Opinions of the Attorney General for 1931, page 992, referred to in your request reads as follows:

"Under the Ohio Securities Act, certificates of beneficial interest or shares of a common law trust should be qualified in accordance with the provisions of such act before being sold in Ohio by a licensed dealer in securities."

The initial statements of the then Attorney General in Opinion No. 3438, *supra,* are, except for the designation of the statutes involved, fully

applicable to the questions raised in the instant request and read as follows:

> "In so far as the Ohio Securities Act (Sections 8624-1, et seq., General Code) is concerned, instead of prohibiting the qualification of certificates of beneficial interest or shares of a common law trust, such certificates or shares are expressly recognized as securities within the meaning of the act and may not be sold in this state unless qualified as therein provided.
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> "Section 8624-2, General Code, provides that 'the term "security" ** shall include ** certificates evidencing any interest in any trust.' This section further defines 'person' as including a 'trust, trustee of a trust.' There appears also in this same section a definition of the term 'director' as including 'each trustee of a trust.' "
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> (Sec. 8624-1, et seq., General Code are now Sec. 1707.01, et seq., Revised Code, and the quoted provisions of Sec. 8624-2 General Code are now found in Sec. 1707.01, Revised Code.)

The initial question to be decided, therefore, is whether the law of Ohio has changed since 1931 so as to preclude the operation of a business and therefore the sale of securities of such business under a business organization known as a common law or Massachusetts type business trust.

In 1933 the Supreme Court of Ohio decided the case of *Goubeaux, Recr. v. Krickenberger, Exvx., et al,* 126 Ohio St., 302. The court in the Goubeaux case, *supra,* had before it a question dealing with the nature of the business organization of which Goubeaux was the receiver. The court determined that such organization was a partnership. However, beginning on page 314 of that opinion the following language pertinent to your request is found:

> "The so-called 'Massachusetts trust' is a form of business organization consisting of an arrangement whereby property is conveyed to trustees in accordance with an instrument of trust, to be held and managed for the benefit of such persons as may from time to time be holders of transferable certificates entitling holders to share ratably in income of the property, and, on termination of the trust, in the proceeds, *Hecht et al., Trustees, v. Malley,* 265 U.S., 144, 44 S. Ct., 462, 68 L. Ed., 949.
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> "If the trustees of such a trust are free from the control of the certificate holders, a trust is created; but if they are to be subject to the control of the stockholders or shareholders, or substantially so, as if such trustees are but managing agents, the arrangement constitutes a partnership, regardless of whether the stockholders actually exercised the authority vested in them by the agreement.

> "In this case the certificate holders, or shareholders, or depositors, or members, by whatever name called, are principals, and the board of trustees, or managers, are their mere managing agents. The ultimate power of control is given to the certificate holders in the articles of association.
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> "* * * * * * * * *
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> "In speaking of 'Massachusetts trusts' the editors of American Law Reports, in volume 7, at page 613, have placed this editorial note: 'It seems to be almost universally conceded, at least in the absence of prohibitory or controlling statute, that business trusts of the character known as 'Massachusetts trusts,' and which in the great majority of the cases are *in fact nothing more than common-law partnerships,* or joint stock companies or associations formed or organized in the nature of a trust, with the capital dividend (divided) into certificates or shares and usually represented by stock, to carry on a business for profit and in the interest and for the benefit of the certificate or share holders,— are, generally speaking, legal and valid.' "

The foregoing opinion obviously recognized the existence of a business organization known as a Massachusetts Trust, although the court found that the company involved in the suit was not a trust. I have been unable to find any other statement made by a court of Ohio defining or otherwise dealing directly with this problem, nor do I know of any statutory law which would prohibit the organization of this type of business trust.

In the case of *West v. McNamara; Employers Liability Assurance Corporation, Ltd.,* 159 Ohio St., 187, the court had before it a question dealing with the liability of an insurance company under what is commonly called the omnibus clause of an insurance contract covering automobile liability. The majority of the opinion held that under such clause, the insurance company is not liable where the negligent act complained of was committed by a permittee of a permittee of a permittee of the named insured. The named insured in the *West* case, *supra,* was the H. F. Hammon Development Company of Florida. Judge Zimmerman in a dissenting opinion stated that both counsel for the plaintiff and for the defendant insurance company referred to the H. F. Hammon Development Company as a "Massachusetts trust." Judge Zimmerman went on to conclude, apparently relying on *Goubeaux v. Krickenberger,* 126 Ohio St., 302, *supra,* that the said H. F. Hammon Development Company was in reality a co-partnership and therefore the remoteness of the negligent party to the insured was lessened. The majority opinion did not consider this question.

To my knowledge there is no specific case in Ohio which directly determines the liability of the shareholders of a business trust. The usual rule applied to such trusts is that no liability in excess of their investment can be assessed to the shareholders for the acts of the trustee. (See 156 A.L.R., 104) However, if a court were to follow the *Goubeaux* case, *supra,* as Judge Zimmerman apparently did, and follow in its entirety the statement emphasized in the *Goubeaux* case, *supra,* from the American Law Reports, greater liability is likely to be imposed upon such shareholders. The imposition of such liability would perhaps frustrate the desirability of such business organization, but it would not prevent the operation of the business of the applicants in question.

My specific answer to your first question is therefore that the fact that an application for registration, exemption or qualification of securities, pursuant to the provisions of Chapter 1707., Revised Code, is made on behalf of a common law or Massachusetts type business trust, does not, as a matter of law, prohibit the exemption, registration and qualification of the securities, certificates of beneficial interest or shares.

Your second question deals with the applicability of the provisions of Section 2733.01, Revised Code, which reads in part as follows:

> "A civil action in quo warranto may be brought in the name of the state:
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> "* * * * * * * * *
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> "(C) Against an association of persons who act as a corporation within this state without being legally incorporated."

As pointed out by my predecessor in Opinion No. 3438, *supra,* the decision of the Court of Appeals in the case of *State ex rel. Stuart v. Meyer, et al.,* 19 Ohio App., 436 (1925) is apparently at variance with the decision of the Supreme Court in the case of *State ex rel. v. Ackerman, et al.,* 51 Ohio St., 163 (1894). Both cases were actions in *quo warranto* and each was based in part at least upon statutory provisions similar to Section 2733.01(C), *supra.* The reasoning of the courts in arriving at the conclusions in each case is well stated. The business conducted in the *Ackerman* case through what appears to have been a business trust, was that of insurance. The court in its decision dealt at great length with the nature of the business of insurance and the regulation thereof in the public interest. The business conducted in the *Meyer* case was the operation of a cemetery for profit. The court in that case considered the statutory provisions

relating to cemetery operations, and found that there was no provision which precluded the operation of a cemetery for profit. The court went on to say in the *Meyer* case that, in Ohio, natural persons or any associations of them in the absence of a statutory prohibition may engage in any legitimate business.

It is, of course, clear that no person may engage in a business which is lawfully regulated by the state in such a manner as to subvert or prevent such regulation. This apparently was of primary concern to the court in determining the issue in the *Ackerman* case, *supra.* In the *Meyer* case the question was not complicated by the fact that the business involved was one which was coupled with so great a public interest as to be regulated as the business of insurance. I therefore must conclude, in an attempt to reconcile these two decisions, that any association of persons, be it operating as common law or Massachusetts type business trusts or otherwise, is amenable to the provisions of Section 2733.01(C), Revised Code, when it is shown by the nature of the business and the operation of the same that the association is unlawfully acting as a corporation.

I am strengthened in this conclusion by the following statement of the court in the *Ackerman* case, *supra,* beginning at page 196:

> "* * * The association has the appearance, and some of the characteristics of a corporation formed for the purpose of doing a general insurance business in its line, and its form of policies, and mode of conducting its business are calculated to impress one who does not make a critical examination, with the belief that it is a corporation, conforming to the usages of such companies. The character of the organization under which the defendants are operating, and their method of business, bring them, we think, within the purview of that clause of Section 6760, of the Revised Statutes, which authorizes an action in *quo warranto* to be brought 'against an association of persons who act as a corporation within this state without being legally incorporated.' * * *"

Obviously, however, the provisions of Section 2733.01 (C), Revised Code, do not preclude the association of persons in lawful business organizations other than corporations.

In specific answer to your second question, therefore, it is my opinion that the provisions of Section 2733.01 (C), Revised Code, are applicable to common law or Massachusetts business trusts in the same fashion and manner and to the same extent as they would be applicable to any other

association of persons acting as a corporation without being legally incorporated, but that said section does not preclude or prevent the organization and lawful operation of such business organizations.

The first two questions being answered in the negative, your third question need not be answered.

As to your fourth question, and in accordance with the answer to the first question, Opinion No. 3438, Opinions of the Attorney General for 1931, page 992, is approved and followed.

Summarizing, it is my opinion and you are advised:

1. The fact that an application for registration, exemption or qualification of securities pursuant to the provisions of Chapter 1707., Revised Code, is made on behalf of a common law or Massachusetts type business trust does not as a matter of law prohibit the exemption, registration or qualification of its securities, certificates of beneficial interest, or shares in the trust as required under Section 1707.01 to 1707.45, inclusive, Revised Code.

2. The provisions of Section 2733.01 (C), Revised Code, are applicable to common law or Massachusetts business trusts in the same fashion and manner and to the same extent as they would be applicable to any other association of persons acting as a corporation without being legally incorporated, but the mere fact that such a business organization is in operation does not constitute sufficient reason to proceed under that statute.

Respectfully,
MARK MCELROY
Attorney General