COURT OF COMMON PLEAS OF PHILADELPHIA
ORPHANS' COURT DIVISION

Control No. 056105

 # 3 June 2005

No. 270 ST of JULY TERM 1902

Estate of LEWIS ELKIN, Deceased

Sur account entitled Second Account of First Pennsylvania Bank N.A. Trustee For "The Lewis Elkin Fund For The Relief Of Disabled School Teachers In The Employ Of The City Of Philadelphia" Under The Second Item Of The Will

Stated From September 1, 1949 To December 15, 1982

Sur account entitled Amended And Restated Second Account Of Wachovia Bank, N.A., Trustee For The Lewis Elkin Fund Under Will Of Lewis Elkin, Deceased

Accounting For The Period December 15, 1982 To December 31, 2005

Before O'KEEFE, ADM. J.

These accounts were called for audit **June 6, 2005 & December 19, 2007**

Counsel appeared as follows:

ARLEN M. TOMPKINS, ESQ., of ABRAHAMS, LOEWENSTEIN & BUSHMAN, P.C. - for Wachovia Bank, N.A., Trustee and Accountant

ANTHONY R. LA RATTA, ESQ., of ARCHER & GREINER, P.C. - for Wachovia Bank, N.A., Trustee and Accountant

JAMES F. MANNION, ESQ., and JENNIFER DI VETERANO GAYLE, ESQ., of MANNION PRIOR LLP - for The Athenaeum of Philadelphia, Wills Eye Health System, The Merchants Fund of Philadelphia, Jewish Family and Children's Services of Philadelphia, and Inglis House, Beneficiaries and Objectants

CHARLES E. DONOHUE, ESQ., SENIOR DEPUTY ATTORNEY GENERAL --- for the Commonwealth of Pennsylvania, Office of Attorney General, as Parens Patriae for Charities

This trust arises under the Will and Codicil of Lewis Elkin, dated December 18, 1894 and October 27, 1897, whereby the testator gave the residue of his estate in trust, to create a Fund to be named "The Lewis Elkin Fund for the relief of disabled Female School teachers in the employ the City of Philadelphia", from which Fund annuities are to be paid to unmarried, female teachers who have taught in the Public Schools of the City of Philadelphia, for a period of twenty-five years, and, have no means of support. The testator further provided that any excess income should go to The Jewish Foster Home (now Jewish Family and Children's Services of Philadelphia), Wills Eye Hospital (now Wills Eye Health System), Philadelphia Home for Incurables (now Inglis House), the Merchants Fund of Philadelphia, and, The Athenaeum of Philadelphia. In regard to investments, the Testator provided that his Executors and Trustees, "....are not confined to legal

investments, but can invest in approved Stocks and Loans, not out of this State."

Copies of the Will and Codicil are annexed to the audit papers in this matter.

Lewis Elkin, the testator, died on July 7, 1901.

The accounts are of the fund awarded in trust by an Adjudication of Boland, J., dated January 27, 1950, which Adjudication confirmed the First Account of The Pennsylvania Company for Banking and Trusts, formerly The Pennsylvania Company for Insurances on Lives and Granting Annuities, Trustee for the Lewis Elkin Fund.

The accounts have been filed to acquaint interested parties with transactions which have occurred in the period September 1, 1949 to December 31, 2005; to allow this Court to pass on the Claim of Wachovia Bank, N.A., for $750,000.00 in Trustee's Commissions, on Principal, for ordinary services rendered from September 1, 1949 to December 31, 2005; to allow this Court to pass on the Claim of Wachovia Bank, N.A., for $260,000.00 in Trustee's Commissions, on Income, in addition to $240,900.00 in "Commission on income receipts", or, "Actual Income Commissions received by Trustee", which appear on Pages 288 through 292 of the Amended And Restated Second Account, for ordinary services rendered in the years 1999 through 2005; and, to allow this Court to pass on the separate Petition of Wachovia Bank, N.A., seeking to be Released from the Restriction in the Will that investments may be made, "...in approved Stocks and Loans, not out of this State."

The Lewis Elkin Fund is a perpetual charitable trust which continues for the uses and purposes set forth in the Will and Codicil of the testator.

Amended And Consolidated Objections have been filed by The Athenaeum of Philadelphia, Wills Eye Health System, The Merchants Fund of Philadelphia, Jewish Family and Children's Services of Philadelphia, and, Inglis House (hereinafter referred to as the Beneficiaries). The Commonwealth of Pennsylvania, Office of Attorney General, as Parens Patriae for Charities, has joined in the Amended and Consolidated Objections of the Beneficiaries.

At a Hearing held on the Accounts and Objections, Wachovia offered the testimony of Reginald J. Middleton and William Lowry. Mr.Middleton has been a full time employee of Wachovia or its corporate predecessors since 1988. Mr.Middleton took over management of The Lewis Elkin Fund in March of 2000. Mr.Middleton oversees all of Wachovia's responsibilities with regard to the Lewis Elkin Fund, and, coordinates the delivery of all of Wachovia's services to the Beneficiaries. Mr.Middleton signed the Accounts on behalf of Wachovia. Mr.Middleton did the calculations which underlie the Claim of Wachovia Bank, N.A., for $750,000.00 in Trustee's Commissions, on Principal, for ordinary services rendered from September 1, 1949 to December 31, 2005. Mr.Lowry has been a Portfolio Manager for thirty-four years. Eleven of those years have been spent in the employ of Wachovia and its predecessors. Mr.Lowry has been involved with the Elkin Fund for five years, and, is now the Fund's Portfolio Manager. In addition to the testimony of Mr.Middleton and Mr.Lowry, Wachovia offered one Exhibit which as been marked "A-1". Exhibit "A-1" consists of Billings of Counsel for Wachovia for the period June 9, 2004 through November 21, 2005, and, corresponds with payments of Counsel Fees which appear at Page 280 of the Amended and Restated Account, and, total $42,618.12. Exhibit "A-1" is

the subject of a Motion In Limine.

The Beneficiaries offered the testimony of Kenneth J. Levin, Esquire. Mr.Levin has served as Counsel to Wills Eye Health System in the matter of the Lewis Elkin Fund. Mr.Levin has been practicing Law since 1968; concentrates his practice in the field of Trusts and Estates; and, has served as Chair or Co-Chair of his firm's Trusts and Estates Department four fourteen years. In the course of his practice, Mr.Levin has dealt with issues concerning Private Foundations regularly, about twice a year, since 1969. In addition to the testimony of Mr.Levin, the beneficiaries offered twenty-five Exhibits which have been marked and received as Exhibits "O-1" through "O-9"; Exhibits "O-11" through "O-22"; Exhibits "O-24" and "O-25"; and, Exhibits "O-29" and "O-30".

Resolution of the issues raised in this matter must rest upon the following background.

By the Act of March 17, 1864, P.L. 53, hereinafter the 1864 Act, the Legislature provided as follows, to wit, "That in all cases, where the same person shall, under a will, fulfill the duties of executor, and trustee, it shall not be lawful for such person to receive, or charge, more than one commission...."

The 1864 Act was in effect when, in 1901, Wachovia's corporate predecessor, The Pennsylvania Company For Insurances On Lives And Granting Annuities, received $46,639.01 in commissions, on Principal, for its services as Executor of the Estate of Lewis Elkin, Deceased.

After having served as Executor, Wachovia's corporate predecessor, The Pennsylvania Company For Insurances On Lives And Granting Annuities, then served

as Trustee under the Will of Lewis Elkin.

The 1864 Act was re-enacted by Section 45 of the Fiduciaries Act of June 7, 1917, P.L. 447, hereinafter the 1917 Act, which provides as follows, to wit,

> **"In all cases where the same person shall, under a will, fulfill the duties of executor and trustee, it shall not be lawful for such person to receive or charge more than one commission upon any sum of money coming into or passing through his hands, or held by him for the benefit of other parties; and such single commission shall be deemed a full compensation for his services in the double capacity of executor and trustee: PROVIDED, that any such trustee shall be allowed to retain a reasonable commission on the income he may receive from any estate held by him in trust as aforesaid."**

The 1917 Act was repealed by the Act of April 10, 1945, P.L. 189. In an opinion by Justice Allen M. Stearne, dated June 27, 1951, in the matter of Williamson Estate, 368 Pa. 343, at 352, our Supreme Court said the following, to wit,

> **".... The Act of April 10, 1945, supra, repealing section 45 of the Fiduciaries Act of 1917, supra, which prohibited the same individual from receiving commissions both as executor and trustee may not be applied retroactively. Appellant, the corporate fiduciary, accepted this trust in 1930 under the law as it then existed. It was paid in full (except for commissions thereafter received by it on income it received and distributed). Such acceptance fixed the rights, liabilities, exemptions, defenses and expectations of both life tenant and remaindermen. Their rights were vested under what necessarily is an implied contract. Such rights having vested, and appellant having been paid in full, the imposition of additional compensation under a retroactive interpretation of this statute would be unconstitutional under the Fourteenth Amendment of the United States Constitution: ...." (citations omitted)**

The Legislature enacted the Act of May 1, 1953, P.L. 190, 20 P.S. § 3274, hereinafter the 1953 Act, after the decision in the Williamson case. Section 2 of the 1953 Act provides as follows, to wit,

> **"Whenever it shall appear either during the continuance of a trust or at its end, that a fiduciary has rendered services for which he has not been fully compensated, the court having jurisdiction over his accounts shall allow him such original or additional compensation out of the trust income or the trust principal or both, as may be necessary to compensate him for the services theretofore rendered by him."**

Section 5 of the 1953 Act provides as follows, to wit,

> **"This act shall apply: (1) To all services heretofore rendered by any fiduciary; (2) To all services hereafter rendered by any fiduciary heretofore appointed; (3) To all services hereafter rendered by any fiduciary hereafter appointed in a trust heretofore created; and (4) To all services hereafter rendered by any fiduciary of a trust hereafter created."**

Section 6 of the 1953 Act provides as follows, to wit,

> **"If the Constitution of the United States or of this Commonwealth prevents the application of this act to services falling in one or more of the four categories listed in section 5, hereof, the act shall nevertheless apply to services falling in the other categories or category."**

In the matter of Scott Estate, 418 Pa. 332 (1965), our Supreme Court was asked to determine whether or not the discussion in Williamson, on retroactive application of the 1945 Act, was dictum, and, whether or not the 1953 Act could be applied retroactively. In an opinion by Chief Justice Bell, dated June 30, 1965, in Scott, at 337-338; at 339; and, at 339-340, the Court stated the following, to wit,

> **" Irrespective of whether this part of the *Williamson Estate* opinion was or was not dictum, we find it persuasive and applicable. It is clear as crystal that the corporate trustee in that case, as in this case, accepted a commission at the termination of the executorship which the applicable Act of 1917, in the clearest imaginable language stated was to be 'a *full compensation* [on principal] for his services in the double capacity of executor and trustee' *and that this provision was to apply in all cases where the same person fulfilled the duties of executor and testamentary trustee*. To now allow the Act of 1945 to abrogate and nullify what the**

corporate trustee with its eyes open, had been paid and had accepted in 1941 as full compensation on principal for all its ordinary services in its dual capacity of executor and trustee, would be to make a mockery of the law and of the rights of all parties, beneficiaries and fiduciaries alike. This we are unwilling to do."

*** * * ***

"We hold that *Williamson* Estate directly controls the instant case and that the 1953 Act stands on the same footing as the 1945 Act."

*** * * ***

"...., while a corporate fiduciary can probably prove its present costs as contrasted with its costs 25 years ago,* how, *at this late date*, can such a fiduciary prove what service it rendered during a lengthy 25-50 year trust, when so many persons who handled the trust estate will have died or be unable to accurately remember details? Isn't it clear that the retroactive application of the Acts of 1945 and 1953, at this late date, would not only greatly increase litigation but would also open a Pandora's box?"**

" The many bank mergers which have taken place will often increase these difficulties."**

Chief Justice Bell summarized the state of the law on trustee's commissions in the following language in his opinion, dated November 14, 1967, in Ehret Estate, 427 Pa. 584, 587-588, to wit,

" With respect to a trust created prior to 1945, the law has been thus clearly established: Unless a testator or settlor clearly provides otherwise--(1) a corporate or an individual fiduciary who was *both executor and* trustee was entitled, under the act of 1864 and the Act of 1917, infra, to only one commission on principal for its *ordinary* services in *both capacities*, and this was payable upon the termination of its services as executor; (2) the Act of April 10, 1945, P.L. 189, which specifically repealed (a) §45 of the Fiduciaries Act of June 7, 1917, as amended, and (b) §§2, 5 (1), 5 (2) and 6 of the Act of May 1, 1953, P.L. 190, 20 P.S. §3274, et seq., which permitted (under certain specified circumstances)

> **payment of more than one commission on principal to a fiduciary who served as both executor and trustee in wills or trusts created prior thereto, cannot Constitutionally be retroactively applied; (3) *such Constitutional limitations* as well as the statutory restrictions or prohibitions contained in the Act of 1864 and of 1917 *have no application* (a) to fiduciaries who were entitled even, before the termination of the trust, to an *interim* commission on principal for *unusual or extraordinary* services, or (b) to fiduciaries who resign or die before the termination of the executorship or trusteeship, as the case may be: ...." (citations omitted)**

The Probate, Estates and Fiduciaries Code, hereinafter PEF Code, was enacted as the Act of June 30, 1972, P.L. 508, No. 164. As originally enacted, Section 7185 of the PEF Code read as follows, in pertinent part, to wit,

> **"§ 7185. Compensation**
>
> **(a) When Allowed. The court shall allow such compensation to the trustee as shall in the circumstances be reasonable and just, and may take into account the market value of the trust at the time of the allowance, and calculate such compensation on a graduated percentage.**
>
> **(b) Allowed Out Of Principal Or Income. Neither the fact that a fiduciary's service has not ended nor the fact that the trust has not ended shall be a bar to the fiduciary's receiving compensation for his services out of the principal of the trust. Whenever it shall appear either during the continuance of a trust or at its end, that a fiduciary has rendered services for which he has not been fully compensated, the court having jurisdiction over his accounts, shall allow him such original or additional compensation out of the trust income or the trust principal or both, as may be necessary to compensate him for the services theretofore rendered by him. The provisions of this section shall apply to ordinary and extraordinary services alike.**
>
> **(c) ....."**

By the Act of February 18, 1982, P.L. 45, No. 26, Section 7185 (b) of the PEF Code was amended to read as follows, to wit,

> **" (b) Allowed Out Of Principal Or Income. The fact that a fiduciary's service has not ended or the fact that the trust has not ended or the fact that the trust is perpetual shall not be a bar to the fiduciary's receiving compensation for his services out of the principal of the trust. Whenever it shall appear either during the continuance of a trust or at its end, that a fiduciary has rendered services for which he has not been fully compensated, the court having jurisdiction over his accounts, shall allow him such original or additional compensation out of the trust income or the trust principal or both, as may be necessary to compensate him for the services theretofore rendered by him. The provisions of this section shall apply to ordinary and extraordinary services alike."**

Section 14 of the Act of October 12, 1984, P.L. 929, No. 182, provides that Section 7185 of the PEF Code, as amended by the Act of February 18, 1982, P.L. 45, No. 26,

> **"....shall apply to all trusts regardless of whether the trust was created before, on or after February 18, 1982."**

Since the passage of the Federal Tax Reform Act of 1969, the Lewis Elkin Fund has been regarded as a Private Foundation, under the Internal Revenue Code, hereinafter the IRC, and, has annually filed a Form 990-PF, Return Of Private Foundation. Because the Lewis Elkin Fund is a Private Foundation, Section 4942 of the IRC requires that it distribute an amount equal to five per cent of the fair market value of its assets, in so-called qualifying distributions, each year. If it fails to make the required qualifying distributions, the Lewis Elkin Fund is subject to the imposition of Taxes and Penalties.

Since the passage of the Act of June 17, 1971, P.L. 181, No. 23, 10 P.S. § 201 et seq., hereinafter the Charitable Instruments Act of 1971, the Will and Codicil of Lewis Elkin have been deemed to include such provisions as are necessary to avoid the imposition of taxes under Section 4942 of the IRC, including, specifically, a

provision that the Trustee of the Lewis Elkin Fund shall distribute such amounts of principal as may be necessary to meet the requirement that it distribute an amount equal to five per cent of the fair market value of its assets, in so-called qualifying distributions, each year.

By the Act of December 21, 1998, P.L. 1067, No. 141, hereinafter the 1998 Act, the Legislature added Section 8113 to the Probate, Estates and Fiduciaries Code, hereinafter the PEF Code. Section 8113 of the PEF Code pertains to charitable trusts and provides, in pertinent part,

> **" (a) Election.--Notwithstanding the foregoing provisions of this chapter, the trustee of a trust held exclusively for charitable purposes may elect to be governed by this section unless the governing instrument expressly provides that the election provided by this section shall not be available.**
>
> **(b) Eligibility for election.--To make an election under this section, the trustee shall adopt and follow an investment policy seeking a total return for the investments held by the trust, ... The policy constituting the election shall be in writing, shall be maintained as part of the permanent records of the trust and shall recite that it constitutes an election to be governed by this section.**
>
> **(c) Effect of election.--If an election is made to be governed by this section, the term 'income' shall mean a percentage of the value of the trust. The trustee shall, in a writing maintained as part of the permanent records of the trust annually select the percentage and determine that it is consistent with the long-term preservation of the real value of the principal of the trust, but in no event shall the percentage be less than 2% nor more than 7% per year. The term 'principal' shall mean all other assets held by the trustee with respect to the trust.**
>
> **(d) Revocation of election.--The trustee may revoke an election to be governed by this section if the revocation is made as part of an alternative investment policy seeking the long-term preservation of the real value of**

the principal of the trust. The revocation and alternative investment policy shall be in writing and maintained as part of the permanent records of the trust.

(e) Value determination.--for purposes of applying this section, the value of the trust shall be the fair market value of the cash and other assets held by the trustee with respect to the trust, whether such assets would be considered 'income' or 'principal' under the other provisions of this chapter, determined at least annually and averaged over a period of three or more preceding years. ....."

The Comment to Section 8113 of the PEF Code provides, in pertinent part, that,

" The above rules are necessary only in connection with trusts which state that only the income can be expended currently. Trusts which allow the application of both principal and income can be managed on a total return basis in any event. In addition, charitable trusts that are private foundations for Federal income tax purposes already have the ability to expend 'principal' to the extent provided in section 1 of the act of June 17, 1971 (P.L. 181, No. 23 (10 P.S. § 201)). Accordingly, this provision will provide needed flexibility primarily to those charitable trusts that are not private foundations."

By the Act of July 7, 2006, P.L. 625, No. 98, the legislature deleted Chapter 71 from the PEF Code, and, added Chapter 77 (the Uniform Trust Act) thereto. As part of the Uniform Trust Act, Section 7768 of the PEF Code pertains to compensation of trustees and provides, in pertinent part,

"§ 7768. Compensation of trustee - UTC 708

(a) If unspecified.--If neither the trust instrument nor a separate written agreement .... specifies the trustee's compensation, to trustee is entitled to compensation that is reasonable under the circumstances. .....

*** * * ***

(c) Entitlement not barred.--None of the following shall bar a trustee's entitlement to compensation from the income or principal of the trust:

(1) The trust is perpetual or for any other reason has not yet terminated.

(2) The trustee's term of office has not yet terminated.

(3) The trustee of a testamentary trust also acted as a personal representative of the settlor and was or might have been compensated for services as a personal representative from the principal of the settlor's estate.

(d) Court authority.--In determining reasonable compensation, the court may consider, among other facts, the market value of the trust and may determine compensation as a fixed or graduated percentage of the trust's market value. The court may allow compensation from principal, income or both and determine the frequency with which compensation may be collected. Compensation at levels that arise in a competitive market shall be presumed to be reasonable in the absence of compelling evidence to the contrary.

(e) Cemetery lots.--The authority in this section....."

The Comment to Section 7768 of the PEF Code provides, in pertinent part, that,

" This section is an amalgamation of UTC § 708 and former 20 Pa.C.S. §7185 and codifies existing Pennsylvania law. ..... Subsection (c) (3) repeals the contrary rule of *In re Williamson's* Estate, 82 A.2d 49 (Pa. 1951), as to the few trusts that might still be affected by the rule. ....."

Since 1901, when The Pennsylvania Company For Insurances On Lives And Granting Annuities received $46,639.01 in commissions, on Principal, for its services as Executor of the Estate of Lewis Elkin, Deceased, none of Wachovia Bank's corporate predecessors has received any commissions, on Principal, for their ordinary services as Trustee. However, Wachovia has now made a Claim for $750,000.00 in Trustee's commissions, on Principal, for ordinary services rendered from September 1,

1949 to December 31, 2005. Testifying for Wachovia, Mr.Reginald Middleton gave the following account of how he arrived at said figure of $750,000.00, to wit,

> **"A. From annual statements dating from 1982 through 2005, I took the market value and the estimated income from those statements, plugged them into a spreadsheet that had a calculation of what our standard fee schedule would be for those years." NT 27**
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> *** * * ***
>
> **"A. The $750,000 was calculated from '82 to '85. When we calculated based on those numbers, we felt that the $750,000 was reasonable for '82 to 2005, so, therefore, it would be reasonable from 1949 through 2005." NT 28**
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> *** * * ***
>
> **"A. We didn't feel that we were originally compensated from 1949 to 2005. I calculated the fee, comparing it to the fee schedules from 1992 through 2005. That difference was so substantial that we thought that $750,000, although it was discounted from the difference between the fee schedule, was reasonable just for the period 1982 through 2005." NT 28**
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> *** * * ***
>
> **"A. The initial analysis was a figure of about $1.2 million. We felt that it would be reasonable to request $750,000 of that difference, just for those years dating back to 1982. So certainly since there was another larger period -- now, the market value is substantially lower. The market value in 1982 was $4 million. So, yes, there were years that we did not calculate a fee, but the 1.4 that we calculated just for that time period was substantial enough that we felt the $750,000 was fair and reasonable compensation to request." NT 29**

On cross-examination by Counsel for the Beneficiaries, Mr.Middleton confirmed that the services for which Wachovia now seeks $750,000.00 in Trustee's commissions, on Principal, were ordinary services. Wachovia did not mark or offer copies of Mr.Middleton's spreadsheets or calculations. It did not mark or offer copies of the

annual statements, or, of the standard fee schedules, dating from 1982 through 2005, upon which the calculations were based. It offered no proof that the standard fee schedules represent, "Compensation at levels that arise in a competitive market...," within the meaning of Section 7768 (d) the Uniform Trust Act. It offered little or no proof of who did what to earn the requested $750,000.00 in Trustee's commissions on Principal.

At Pages 288 through 292 of its Amended And Restated Account, Wachovia Bank and its corporate predecessor, First Union National Bank, take a combined total of $240,900.00 in charges which are labeled, "Commission on income receipts", for the period 1999 through 2005. At Page 6 of the Rider to its Amended And Restated Petition For Adjudication And Statement Of Proposed Distribution, Wachovia makes a Claim for, "....fair, reasonable and just additional compensation out of Trust income in the amount of $260,000.00 for the period 1999-2005 and thereafter pursuant to Section 8113 of PEF Code." Testifying for Wachovia, Mr.Reginald Middleton identified Exhibit "B" to Wachovia's Amended And Restated Petition For Adjudication And Statement Of Proposed Distribution as a calculation which had been done by Counsel for Wachovia. Said Exhibit "B" has two columns of figures: one labeled "Income Commissions payable for 1999 through 2005 with deemed 8113 election under 20 Pa. C.S. § 8113 (See attached calculations)", which column adds up to $ 500,900.00; and, one labeled "Less: Actual Income Commissions received by Trustee for 1999 through 2005", which column adds up to $ 240,900.00. Mr.Middleton gave the following explanation of how Counsel had arrived at said figure of $260,000.00, to wit,

> **"A. I believe counsel calculated five percent of the -- he calculated the five percent income fee that was actually**

> **collected for those years, and compared that against the five percent of income that was calculated based on the distributable amount of income, the income that was distributed to the beneficiaries, and multiplied that distributable income number by five percent, and took the difference. The difference between the dividends and interest, so to speak, and the income that was distributed to the beneficiaries was the $260,000." NT 30-31**

Mr.Middleton confirmed that calculations done on said Exhibit "B" were computed on an annual basis for the period 1999 through 2005, and, that an Income commission rate of five percent was used in arriving at said figures of $ 500,900.00 and $ 240,900.00.

Beneficiaries' Exhibit "O-25" is a Letter dated July 11, 2005, from Arlen M. Tompkins, Esquire, Counsel to Wachovia, to Kenneth J. Levin, Esquire, Counsel to Wills Eye Health System. Paragraph 10 of said Letter reads as follows, to wit,

> **" 10. The Trust has not adopted a "spending rule" pursuant to Section 8113 of the PEF Code. The Trustee is not currently contemplating adopting a "spending rule" should the investment restriction be lifted by the Court. The Trustee has advised me that the computation of the required distribution amount under Section 8113 is different than the amount of the annual distribution required under I.R.C. Section 4942 (a) in order to avoid the imposition of the excise tax under I.R.C. Section 4940 (e). Adopting a "spending rule" under Section 8113 will create administrative difficulties and is unnecessary for charitable trusts that are private foundations for Federal income tax purposes since such trusts already have the ability to expend 'principal' to avoid the excise tax imposed by I.R.C. Section 4942 (a) under Pennsylvania law. See 10 P.S. Section 201 (1)."**

On cross-examination by Counsel for the Beneficiaries, Mr.Middleton gave the following responses concerning Wachovia's "deemed 8113 election under 20 Pa. C.S. § 8113", to wit,

"Q. I understand that. But now under 8113, Wachovia, not in the alternative, but in addition, is claiming $ 260,000 in income compensation, correct?

A. Correct.

Q. And 8113 is an election that the trust can make to, in essence, have it be distributed on a total return basis. Is that a fair statement?
A. Correct.

Q. This trust is already subject to 4942, as we have discussed earlier, correct?

A. Correct.

Q. So there is already a requirement imposed upon this trust under 4942 to distribute roughly five percent of the principal value; isn't that correct?

A. Correct.

Q. But the theory is that Wachovia made a determined or constructive election under 8113. That's the theory of your compensation claim, correct?

A. Correct.

Q. Wachovia never, in fact, made the election under 8113?

A. No, it didn't.

Q. And if 8113 applied, there would be some recharacterization of principal as income, and then you would apply the five percent against that total amount, and that's how you get to the $ 260,000. Is that a fair statement?

A. Correct." NT 91-92

*** * * ***

"Q. Wachovia is claiming that it made a deemed election even though it didn't make an actual election?

A. We didn't make an actual election, correct.

Q. And in July, 2005, not only did you not make it, but your counsel is representing that you had no intention of making it, correct?

A. Correct.

Q. And that it would impose administrative difficulties, correct?

A. To the extent that 4942 uses a different calculation. Forty-nine forty-two uses an average monthly market value calculation, and 8132 uses a three-year annual, so the numbers would be close. But I guess the major point is you get the five percent two different ways.

Q. But the sole purpose of claiming a deemed election is so that Wachovia can make a claim for $ 260,000 in additional compensation; isn't that correct sir?

A. That is correct.

Q. There is no suggestion that 8113 is for the benefit of the trust or the beneficiaries; isn't that correct?

A. No, not in this statement here. No, there is no claim of that.

Q. Do you know what the phrase self-dealing means, Mr.Milton?

A. Sure.

Q. Did Wachovia give any consideration in whether making this deemed election or claiming that there was a deemed election, when the sole purpose of it was for making a $260,000 claim for compensation -- did it give any consideration as to whether that was self-dealing? NT 94-95

*** * * ***

A. The deemed election was reasonable, and we did not feel that making that deemed election would be self-dealing. That is a correct statement right there." NT 96

Wachovia offered no testimony from Mr.Lowry, the Portfolio Manager of

the Lewis Elkin Fund, concerning its, "....deemed 8113 election under 20 Pa.C.S. § 8113." It offered no proof that an Income commission rate of five percent represents, "Compensation at levels that arise in a competitive market...," within the meaning of Section 7768 (d) of the Uniform Trust Act. It offered little or no proof of who did what to earn, "....fair, reasonable and just additional compensation out of Trust income in the amount of $260,000.00 for the period 1999-2005 and thereafter pursuant to Section 8113 of PEF Code."

In certain of their Objections, the Beneficiaries have charged Wachovia and its corporate predecessors with breaches of fiduciary duty arising out of the status of the Lewis Elkin Fund, and, the Merchants Fund of Philadelphia, as Private Foundations under the Internal Revenue Code. As previously noted, Section 4942 of the I.R.C. requires that the Lewis Elkin Fund distribute an amount equal to five per cent of the fair market value of its assets, in so-called qualifying distributions, each year. If the required qualifying distributions are not made, the Lewis Elkin Fund is subject to the imposition of Taxes and Penalties. In the thirty-four years from the passage of the Charitable Instruments Act of 1971 to the closing date of the Wachovia's Amended And Restated Second Account, Wachovia and its corporate predecessors have distributed an amount equal to five per cent of the fair market value of the assets of the Lewis Elkin Fund, in equal shares, each year, to the five Beneficiaries of the Fund, namely The Athenaeum of Philadelphia, Wills Eye Health System, The Merchants Fund of Philadelphia, Jewish Family and Children's Services of Philadelphia, and, Inglis House. Under the Charitable Instruments Act of 1971, such distributions have been made from Income of the Fund, and, as necessary, from Principal of the Fund.

Kenneth J. Levin, Esquire, testified that The Athenaeum of Philadelphia, Wills Eye Health System, Jewish Family and Children's Services of Philadelphia, and, Inglis House, are so-called Public Charities, and, that distributions to the said four Beneficiaries are counted in determining whether the Lewis Elkin Fund has met its annual distribution requirement under Section 4942 of the Internal Revenue Code. Mr.Levin stated that, because the Merchants Fund of Philadelphia is, itself, a Private Foundation, under the IRC, distributions from the Lewis Elkin Fund to the Merchants Fund are not counted in determining whether the Elkin Fund has met its annual distribution requirement under Section 4942 of the IRC unless the Merchants Fund makes certain uses of the distributions within two years of each distribution. If the Merchant Fund does not use monies which it receives from the Lewis Elkin Fund, in the required manner, within two years of a distribution, the Lewis Elkin Fund must make additional, qualifying distributions, to The Athenaeum of Philadelphia, Wills Eye Health System, Jewish Family and Children's Services of Philadelphia, and, Inglis House, the so-called Public Charities, or, be subject to Taxes and Penalties which can be, in the words of Mr.Levin, "....astronomical....". NT 171

Kenneth J. Levin, Esquire, described the process whereby he gathered information from representatives of Wachovia Bank and the Merchants Fund. Mr.Levin testified that he requested copies of the Forms 990-PF, Returns Of Private Foundations, which had been filed on behalf of the Lewis Elkin Fund. He initially got three or four Returns. He eventually got eleven Returns for the thirty-three year period involved. Mr.Levin gave the following testimony, on direct examination, in response to questions from Counsel for the Beneficiaries, to wit,

"Q. Did you notice anything that concerned you from those tax returns?

A. Yes, there were a number of things. One was that the Merchants Fund was identified in the early returns as a private non-operating foundation, and in the more recent returns as a public charity. ...." NT 137

*** * * ***

"Q. And what conclusion did you come to?

A. Well, it was hard to come to a conclusion generally because of the lack of tax returns, and also because the accounting, which was filed for a very extended period of time, had no income accounting for most of it. So that in starting to reconstruct what was income and principal, some of the distribution requirements depend on whether money is distributed of income or corpus. It was very difficult to do that. There were also large transfers, somewhere in the neighborhood of a million dollars, from principal to income just in a two or three-year period, which were unexplained. So it was hard, but I did come to the conclusion rather rapidly that the amount required to be distributed had not been distributed." NT 138-139

*** * * ***

"Q. Did Wachovia have in its files the information that was needed to make the evaluation you were making?

A. Wachovia advised me that it did not have the tax returns and did not have any of the other necessary information. ...." NT 139

*** * * ***

"Q. And once you received the information that you were able to receive, did you come to a conclusion regarding the distributions?

A. I did, but it wasn't 100 percent clear. It was certainly clear that there were very substantial under-distributions, certainly well in excess of a million dollars. There were certain criteria that had to be used to test exactly how much

the under-distributions were, and there was not sufficient information to answer all those questions. But I ultimately came to the conclusion that as to the four public charities, the under-distributions came to approximately $1,600,000." NT 141

*** * * ***

"Q. Were these easy calculations?

A. They were very difficult calculations, and in order to resolve the issues, they required doing the calculations over and over again on various assumptions, ..." NT 143-144

*** * * ***

"Q. From your impression and the work that you were doing here, did you have a sense as to whether or not Wachovia viewed it as its obligation to have this information?

A. The answer to that question that I can give is that Wachovia presented the position that it was the Merchant Fund's obligation to furnish the information to Wachovia. So if you are asking me what position did Wachovia take as to whether it was obligated to get the information, in general, Wachovia said that it was Merchant Fund's obligation, which Merchants Fund failed to meet, and Wachovia did not have the obligation. That was somewhat of a gloss. At times, they acknowledged that they did have the obligation, but they said that they were dependent on Merchants Fund, and if Merchants Fund couldn't come up with it, they had no further obligation at this time to get it." NT 145-146

Mr.Levin gave the following testimony, on cross-examination, in response to questions from Counsel for Wachovia, to wit,

"Q. Would you agree in the end that all five of the charities received an additional $400,000 earlier than they would have otherwise received it?

A. What do you mean by that? What do you mean by 'earlier than they would have otherwise received it'?

Q. Instead of paying out those additional monies over time to the charities, through your efforts or otherwise, the charities ended up getting more money sooner?

A. No, I think they got the money later. The charities would have received the money starting in 1973 if they would have been given the money when it was due. My efforts were only to get them now they money they should have been paid over this 34-year period. So I would say they got the money much later than they normally would have received it. Certainly the four public charities that's true of.

Under the Internal Revenue Service Rules, in order to make up for that shortfall, because the Merchants Fund's distributions didn't qualify, the other charities needed to receive these additional funds, or some other method of correcting that problem would have had to have been found. So the resolution that was ultimately reached, which was to pay these charities the shortfall so that they would be qualifying distributions, and to permit Wachovia to go back to the Internal Revenue Service and ask to have the 15 percent/100 percent excise taxes waived, that resolution came about through payment today of monies through means that should have been paid over a 30-some-year period. They should have been waived is the answer." NT 166-167

Mr.Levin gave the following testimony, on re-direct examination, in response to questions from Counsel for the Beneficiaries, to wit,

"Q. Mr.Levin, if I understand your testimony, the under-distribution placed the trust at risk of assessment of tax or penalties, but it wasn't actually assessed in the end, to your knowledge?

A. I don't know whether it was assessed or not, except for my conversation with you. There certainly was a very substantial risk, in my view. Certainly under the IRS rules, if you read the Internal Revenue Code regulations, there would have been a 15 percent tax -- I think it's now been increased to 30 percent - in the first year, and a 100 percent excise tax or penalty taxes each subsequent year, and the figures would have been astronomical in excise tax and penalty. How lenient the IRS is in waiving those, and what factors it would take into consideration, are not within my

knowledge." NT 170-171

Testifying for Wachovia, Mr.Reginald J. Middleton gave the following testimony regarding the so-called "under-distributions" to The Athenaeum of Philadelphia, Wills Eye Health System, Jewish Family and Children's Services of Philadelphia, and, Inglis House, to wit,

> **"THE WITNESS: When the argument was made that there was an under-distribution, we thought it was a unique argument. We investigated it. We thought there was some merit to the argument, so instead of fighting it and getting a private letter ruling, we agreed to make additional distributions to the charities, because we did think that there was some merit to that argument.**
>
> **BY MR. LaRATTA:**
>
> **Q. And from the charities' standpoint, what was the end result, on the charities side?**
>
> **A. The end result was that the distributions -- we agreed that the distributions to the Merchants Fund that we made on an annual basis didn't qualify as a qualifying distribution to the trust, so we made additional distributions to the other four charities in the amount of what that under-distribution was calculated to be.**
>
> **Q. And do you recall what the amount of the equalizing payments were to the other charities?**
>
> **A. The total to the four charities was a little over 1.6 million.**
>
> **Q. Is it fair to say, then, that the four charities other than the Merchants Fund received approximately $400,000 in accelerated payments, so to speak?**
>
> **A. They received $400,000 in additional distributions, that's correct." NT 35-36**

Mr.Middleton recalled that the under-distributions were paid to The Athenaeum of

Philadelphia, Wills Eye Health System, Jewish Family and Children's Services of Philadelphia, and, Inglis House, in August of 2006.

On cross-examination, in response to questions from Counsel for the Beneficiaries, Mr. Middleton admitted that Wachovia Bank and its corporate predecessors knew that the Merchants Fund was a Private Foundation under the Internal Revenue Code. Forms-990PF, Returns Of Private Foundation, which were filed on behalf of the Lewis Elkin Fund, for the years 1995, 1996 and 1997, correctly identify the Merchants Fund as a Private Foundation. However, the Forms-990PF for the years 1998, 1999, 2000, 2001, 2002, and, 2003, incorrectly identify the Merchants Fund as a Public Charity. When Mr.Middleton took charge of the Lewis Elkin fund, in March of 2000, he did not make inquiries of Wachovia's Tax Department, or, of the Merchants Fund, to confirm whether or not the Merchants Fund was a Private Foundation or a Public Charity. In the words of Mr.Middleton,

> **"A. The Elkin Fund, not being a discretionary grant-making foundation, I was not aware that making these distributions, these mandatory distributions, from that trust did not count as a qualifying distribution." NT 60-61**

The Form-990PF, for the year 2004, again incorrectly identifies the Merchants Fund as a Public Charity. Mr.Middleton learned that the Merchants Fund was a Private Foundation at a point in 2005 which was after Mr.Levin had presented his theory of under-distributions to Wachovia Bank. The Form-990PF, for the year 2005, was filed in November of 2006, after Wachovia had paid out $1,600,000.00 in under-distributions, and, again, incorrectly identifies the Merchants Fund as a Public Charity. On cross-examination, Counsel for the Beneficiaries asked Mr.Middleton about Wachovia's persistence in filing incorrect Forms-990PF, in the following exchange, to wit,

> **"Q. So we have the tax returns from '94. We see the mistakes and the designation of Merchants Fund, and Wachovia has come to the Court and asked for additional compensation for the services that were rendered during this period, right?**
>
> **A. The informational statement that is attached to that return I think is as material to the return as them not typing in my middle initial. That's technically incorrect, but none of those designations had any material change on how the tax was calculated. It didn't result in any additional penalties, interest, additional tax or additional fines by the bank. So, yes, they were incorrect, but we don't believe that they were material at all." NT 70**

Other evidence regarding the so-called "under-distributions", in the form of Exhibits offered by the Beneficiaries, include: a Letter from a Senior Trust Officer at First Pennsylvania Bank to the Secretary-Treasurer of the Merchants Fund of Philadelphia, dated July 19, 1978, seeking a copy of the Annual Report of the Merchants Fund so that First Pennsylvania Bank could make sure that it was discharging its responsibilities under IRS Regulations; a Letter from the IRS to First Pennsylvania Bank, dated April 11, 1986, regarding the Form 990-PF for the tax year ended December 31, 1983, in which Letter the Bank is warned that, in the future, taxes will be imposed upon the Lewis Elkin Fund, under Section 4945 (a) (1) of the IRC, if the Lewis Elkin Fund does not meet reporting requirements regarding the Merchants Fund; in house Memos, dated November 20, 1988 and April 25, 1989, reminding a man named Gregory D'Angelo to get information from the Merchants Fund so that the Lewis Elkin Fund could meet its reporting requirements, and, reminding Mr.D'Angelo that failure to meet the reporting requirements would result in assessment of Penalties; and, a Letter to the Merchants Fund, dated May 15, 1995, requesting copies of the Financial Statements for the Merchants Fund for 1988 through 1994.

Upon consideration of all of the evidence on the subject of so-called under-distributions, including the testimony of Mr.Levin and Mr.Middleton, and, the Exhibits offered by the Beneficiaries, I find that Wachovia and its corporate predecessors breached their fiduciary duty to the Beneficiaries, continuously, over a period of thirty-four years; that said breach of fiduciary duty subjected the Lewis Elkin Fund to a very substantial risk of the imposition of astronomical Taxes and Penalties; and, that said breach of fiduciary duty deprived the Beneficiaries who are Public Charities of the use of monies which should have been distributed to them over said period of thirty-four years. In making the foregoing finding of breach of fiduciary duty, I have given great weight to the testimony of Mr.Levin, which I believe is clear and convincing, and, I have given little weight to the testimony of Mr.Middleton, which I believe is undermined by the Beneficiaries' Exhibits. In the matter of the under-distributions, Wachovia and its corporate predecessors have not met the higher standard of care which is expected of corporate fiduciaries. See Kramer Estate (No 2), 24 Fiduc. Rep.2d 198, at 202 (2004).

In passing upon the Claim of Wachovia Bank for $750,000.00 in Trustee's commissions, on Principal, for ordinary services rendered from September 1, 1949 to December 31, 2005, I find that said Claim must be denied because Wachovia has made no factual record which will support approval of said Claim. See In Re Ischy Trust, Etc., 490 Pa. 71 (1980); Estate of Lux, 480 Pa. 256 (1978); Conti Estate, 8 Fiduc Rep 2d 272 (O.C., Phila., 1988); Preston Estate, 385 Pa.SuperiorCt. 48 (1989); Sonovick Estate, 373 Pa.SuperiorCt. 396 (1988); and, Reed Estate, 462 Pa. 336 (1975). Wachovia has offered nothing more than the testimony of Mr.Middleton as to how he calculated

said Claim, and, brief testimony of Mr.Middleton and Mr.Lowry about the performance of the investments in the Lewis Elkin Fund. As previously noted, Wachovia did not mark or offer copies of Mr.Middleton's spreadsheets or calculations. It did not mark or offer copies of the annual statements, or, of the standard fee schedules, dating from 1982 through 2005, upon which the calculations were based. It offered no proof that the standard fee schedules represent, "Compensation at levels that arise in a competitive market...," within the meaning of Section 7768 (d) the Uniform Trust Act. It offered little or no proof of who did what to earn the requested $750,000.00 in Trustee's commissions on Principal. As Judge Lefever stated in his concurring and dissenting opinion in Scott Estate, 34 D.&C.2d 727(1965), at 737,

> **".... This court is not bound by a corporate fiduciary's own evaluation of the worth of its services .... The determination of the value of the trustee's services is for this court.**
>
> **Both corporate and individual fiduciaries should be properly compensated. 'The laborer is worthy of his hire.' We should not, and do not, expect a trustee to perform fiduciary services at a loss. Corporate fiduciaries perform valuable and useful services in the community, which deserve to be encouraged. However, the burden is upon the fiduciary to prove what is fair and reasonable compensation."**

On the record made by Wachovia Bank in this matter, I have no factual basis upon which to award it $750,000.00 in Trustee's commissions on Principal. Furthermore, I find that the Claim of $750,000.00 is excessive and unreasonable in light of the aforementioned breaches of fiduciary duty by Wachovia and its corporate predecessors in the matter of the so-called under-distributions. See Estate of Geniviva, 450 Pa.SuperiorCt. 54 (1996).

In passing upon the Claim of Wachovia Bank for $750,000.00 in Trustee's

commissions, on Principal, for ordinary services rendered from September 1, 1949 to December 31, 2005, I hold that said Claim must be denied because it is barred by the decisions in the matters of Williamson Estate, 368 Pa. 343 (1951); Scott Estate, 418 Pa. 332 (1965); and, Ehret Estate, 427 Pa. 584 (1967).

At Page 15 of its Post Trial Brief, Wachovia argues that the decision in Williamson, supra., does not apply to a perpetual charitable trust because,

> **"....there are no remaindermen in a perpetual charitable trust who could expect to receive the corpus at the end of the trust, and therefore there would be no party who would have an alleged vested contract right. The only parties in interest are the Charities who are entitled to receive the income of the Trust in perpetuity."**

I find no merit in the aforesaid argument because, at Page 351 of the decision in Williamson, supra., our Supreme Court makes the following reference to the perpetual charitable trust in the matter of Curran's Estate, 310 Pa. 434, to wit,

> **".... In extreme cases, in trusts of unusual duration, the entire principal *could be* greatly diminished or even consumed by the annual allowance of a trustee's commission upon principal. For example, the record in *Curran's Estate*, 310 Pa. 434, 165 A. 842, discloses that, in a charitable trust, testator directed the accumulation of income until the corpus (p. 436) '...shall yield annually thirty thousand dollars. ...' ...."**

Our Supreme Court thus had perpetual charitable trusts, as well as private trusts, in mind when it decided Williamson. I further find no merit in the aforesaid argument because Wachovia Bank has taken a contrary position at Pages 7 and 8 of its Memorandum Of Law in the matter of the perpetual charitable trust for the benefit of Albert Einstein Medical Center, under the Will and Codicils of Anna E. Fridenberg, at Orphans' Court Number 261 of 1941, wherein Wachovia argues as follows, to wit,

" Even assuming for the purposes of this argument that the Supreme Court's finding of an implied contract that 'fixed' and 'vested' the interests of beneficiaries is correct, it is clear that beneficiaries may waive rights and it is equally clear that parties to a contract may agree to amend that contract. This has always been true in the case of a charitable trust, such as the Fridenberg Trust, where all beneficial interests vested in Einstein in 1940, ..."

*** * * ***

" The *Williamson* holding that a retroactive application of the repeal of the 1917 act violates the Fourteenth Amendment cannot apply to a charitable trust where the interest is vested and the charitable beneficiary can represent its interests. ....."

*** * * ***

"..... To apply *Williamson* to the Fridenberg Trust, where Einstein's identity and interest are known and vested, denies Einstein's constitutionally protected right to contract with the trustee on matters such as the trustee's compensation. ....."

At Pages 9 through 13 of its Post Trial Brief, Wachovia argues that the statutory prohibition on the same individual receiving commissions on Principal, as both Executor and Trustee, which prohibition existed under the 1864 Act, as re-enacted by the 1917 Act, has effectively been repealed by former Section 7185 (b) of the PEF Code, and, by current Section 7768 of the Code. I find no merit in this argument because, following the decisions of our Supreme Court in the matters of Williamson Estate, 368 Pa. 343 (1951); Scott Estate, 418 Pa. 332 (1965); and, Ehret Estate, 427 Pa. 584 (1967), I hold that the Beneficiaries under the Will and Codicils of Lewis Elkin have vested rights, under an implied contract, and, that it would be unconstitutional, under the Fourteenth Amendment of the United States Constitution, to apply retroactively any statute which repeals the prohibition on the same individual receiving commissions on

Principal, as both Executor and Trustee, which prohibition existed under the 1864 Act, as re-enacted by the 1917 Act. For this reason, former Section 7185 (b) of the PEF Code, as amended by the Act of February 18, 1982, P.L. 45, No. 26, and, Section 7768 of the Uniform Trust Act, as enacted by the Act of July 7, 2006, P.L. 625, No. 98, may not be applied retroactively to allow the Claim of Wachovia Bank for $750,000.00 in Trustee's commissions, on Principal, for ordinary services rendered from September 1, 1949 to December 31, 2005.

In passing upon the Claim of Wachovia Bank for, "....fair, reasonable and just additional compensation out of Trust income in the amount of $260,000.00 for the period 1999-2005 and thereafter pursuant to Section 8113 of PEF Code.", I find that said Claim must be denied because Wachovia has made no factual record which will support approval of said Claim. The testimony of Mr.Middleton, as to how Counsel for Wachovia made the calculations which appear in Exhibit "B" to Wachovia's Amended And Restated Petition For Adjudication And Statement Of Proposed Distribution, is not a sufficient factual basis upon which to award the requested, "....fair, reasonable and just additional compensation out of Trust income in the amount of $260,000.00 for the period 1999-2005 and thereafter pursuant to Section 8113 of PEF Code." As previously noted, Wachovia offered no proof that an Income commission rate of five percent represents, "Compensation at levels that arise in a competitive market...," within the meaning of Section 7768 (d) of the Uniform Trust Act. It offered little or no proof of who did what to earn the requested, "....fair, reasonable and just additional compensation out of Trust income in the amount of $260,000.00 for the period 1999-2005 and thereafter pursuant to Section 8113 of PEF Code." Furthermore, I

find that the Claim of $260,000.00 is excessive and unreasonable in light of the aforementioned breaches of fiduciary duty by Wachovia and its corporate predecessors in the matter of the so-called under-distributions.

In passing upon the Claim of Wachovia Bank for, "....fair, reasonable and just additional compensation out of Trust income in the amount of $260,000.00 for the period 1999-2005 and thereafter pursuant to Section 8113 of PEF Code.", I reject the argument that Wachovia has made a "deemed" election under Section 8113.

As previously noted, since the passage of the Act of June 17, 1971, P.L. 181, No. 23, 10 P.S. § 201 et seq., known as the Charitable Instruments Act of 1971, the Will and Codicil of Lewis Elkin have been deemed to include such provisions as are necessary to avoid the imposition of taxes under Section 4942 of the IRC, including, specifically, a provision that the Trustee of the Lewis Elkin Fund shall distribute such amounts of principal as may be necessary to meet the requirement that it distribute an amount equal to five per cent of the fair market value of its assets, in so-called qualifying distributions, each year. Also as previously noted, in the thirty-four years from the passage of the Charitable Instruments Act of 1971 to the closing date of the Wachovia's Amended And Restated Second Account, Wachovia and its corporate predecessors have distributed an amount equal to five per cent of the fair market value of the assets of the Lewis Elkin Fund, in equal shares, each year, to the five Beneficiaries of the Fund, namely The Athenaeum of Philadelphia, Wills Eye Health System, The Merchants Fund of Philadelphia, Jewish Family and Children's Services of Philadelphia, and, Inglis House. Under the Charitable Instruments Act of 1971, such distributions have been made from income of the Fund, and, as necessary, from

principal of the Fund.

Nothing in Section 4942 of the IRC, or, in the Charitable Instruments Act of 1971, requires the adoption of, ".... an investment policy seeking a total return for the investments held by the trust, ...", as that phrase is used in Section 8113 (b) of the PEF Code. Nothing in Section 4942 of the IRC, or, in the Charitable Instruments Act of 1971, requires changing the definitions of the words Income and Principal, as those words are re-defined in Section 8113 (c) of the PEF Code. The Comment to Section 8113 indicates that it might not apply to, "....charitable trusts that are private foundations for Federal income tax purposes...", that is, to charitable trusts such as the Lewis Elkin Fund, because such trusts, "....already have the ability to expend 'principal'....".

Mr.Middleton testified that Wachovia Bank has never, in fact, made an "actual" election under Section 8113 of the PEF Code. Mr.Middleton testified that the "deemed" election was made for the sole purpose of enabling Wachovia to make a Claim for $260,000.00, and, that the "deemed" election was not made for the benefit of the Lewis Elkin Fund or the Beneficiaries. In the category of "General Disbursements" of Principal, at Pages 47 and 48 of its Amended And Restated Second Account, Wachovia takes credit for "Cash transferred to income" in the total amount of $4,031,141.49. In the category of "General Disbursements" of Income, at Page 296 of its Amended And Restated Second Account, Wachovia takes credit for "Cash transferred to principal" in the total amount of $1,044,330.59. There is no proof in the record that the aforementioned transfers of cash were made for any purpose other than to comply with the annual distribution requirements of Section 4942 of the Internal Revenue Code. There is no proof in the record that Wachovia Bank has ever made a

written election to adopt and follow an investment policy seeking a total return for the investments held in the Lewis Elkin Fund, as required by Section 8113 (b). There is no proof in the record that Wachovia Bank has ever made a written selection of a percentage of the value of the Fund, as required by Section 8113 (c). There is no proof in the record that Wachovia Bank has ever made a written determination that its selected percentage is consistent with the long-term preservation of the real value of the principal of the trust, as required by Section 8113 (c).

On the record made by Wachovia Bank, I hold that it has never made any election, "actual" or "deemed", under Section 8113 of the PEF Code. The so-called "deemed" election is nothing more than a tactic designed to re-define the terms "Income" and "Principal" in an effort to evade the statutory prohibition on the same individual receiving commissions on Principal, as both Executor and Trustee, which prohibition existed under the 1864 Act, as re-enacted by the 1917 Act, and, thereby put more money in the pocket of the Trustee.

In passing upon the Claim of Wachovia Bank for, "....fair, reasonable and just additional compensation out of Trust income in the amount of $260,000.00 for the period 1999-2005 and thereafter pursuant to Section 8113 of PEF Code.", I hold that said Claim must be denied because it is barred by the decisions in the matters of Williamson Estate, 368 Pa. 343 (1951); Scott Estate, 418 Pa. 332 (1965); and, Ehret Estate, 427 Pa. 584 (1967). This is because the Beneficiaries under the Will and Codicils of Lewis Elkin have vested rights, under an implied contract, and, it would be unconstitutional, under the Fourteenth Amendment of the United States Constitution, to apply retroactively any statute which repeals the prohibition on the same individual receiving commissions on

Principal, as both Executor and Trustee, which prohibition existed under the 1864 Act, as re-enacted by the 1917 Act. For this reason, Section 8113 of the PEF Code may not be applied retroactively to allow the Claim of Wachovia Bank for, "....fair, reasonable and just additional compensation out of Trust income in the amount of $260,000.00 for the period 1999-2005 and thereafter pursuant to Section 8113 of PEF Code."

In Objection No. 5, the Beneficiaries seek to surcharge Wachovia Bank in the amount of $55,584.00, which is the total of billings for the services of Mr.Levin, his colleagues, and, his staff, in period May 25, 2005 through September 30, 2007, in the matter of the so-called under-distributions. I have previously found that Wachovia and its corporate predecessors have breached their fiduciary duty in said matter. Exhibit "O-30" consists of copies of the said billings. Mr.Levin testified how he and his paralegal prepared the entries which appear on Exhibit "O-30". On the record made by the parties in this matter, I hold that the Beneficiaries' Claim for counsel fees, for services in the matter of the so-called under-distributions, must be denied because it is subject to the general rule that each party must pay his own counsel fees, and, because, in the matter of the so-called under-distributions, Wachovia and its corporate predecessors have not engaged in conduct which merits the imposition of counsel fees upon it under the equity powers of this Court, or, under statute. See Estate of Wanamaker, 314 Pa.SuperiorCt. 177 (1983); Weiss Estate, 4 Fiduc Rep 2d 71 (1983); and, 42 Pa.C.S.A. § 2503 (7) and (9).

In Objection No. 6, the Beneficiaries seek to surcharge Wachovia Bank, in an unstated amount, as interest on the so-called under-distributions. I have previously found that Wachovia and its corporate predecessors have breached their fiduciary duty

in said matter. I have further found that said breach of fiduciary duty deprived the Beneficiaries who are Public Charities of the use of monies which should have been distributed to them over a period of thirty-four years. However, the record in this matter will not support an award of any sum certain for loss of interest on the so-called distributions. On cross-examination, Mr.Levin gave the following testimony concerning interest, to wit,

> **"A. I think there was a loss of interest to the charities in the funds that they would have received had they received them in a timely fashion. As part of the negotiations, the compilation of that claim would be very complicated, because, of course, leaving the money in the fund produced a certain return there, and we would have had to go back through every year and compare the return that was actually received in the trust with the interest that we would have gotten. And Mr.Tompkins and I basically agreed that that was a little bit more complicated than the amount involved covered." NT 168**

As the Objectants, the Beneficiaries have the burden of proving breach of fiduciary duty, and, a related loss. See Estate of Stetson, 463 Pa. 64 (1975), and, Miller's Estate, 345 Pa. 91 (1942). This Court will not engage in speculation to arrive at the amount of a surcharge. The Claim for interest on the so-called under-distributions is denied.

At Pages 280 of its Amended And Restated Account, under Disbursements of Income, Wachovia Bank takes a combined total of $42,618.12 in credits for payment of Legal Fees to the firm of Shaiman, Drucker, Beckman & Sobel, LLP, for "Professional services". In Objection No. 6, the Beneficiaries seek to surcharge Wachovia Bank, in the amount of said payments of Legal Fees. Exhibit "A-1" consists of copies of the billings which underlie the payments in the Account. By separate Decree, bearing even date herewith, I have Granted a Motion In Limine, and, barred the admission of Ex "A-1"

on the ground that it was not timely produced to Counsel for the Beneficiaries in Discovery. Mr.Middleton testified that he reviewed the billings included in Exhibit "A-1", and, approved payment thereof. Wachovia offered no other evidence in support of the challenged payments of Legal Fees. In passing on a Claim for Legal Fees, I must consider the following factors:

> **"...: the amount of work performed; the character of the services rendered; the difficulty of the problems involved; the importance of the litigation; the amount of money or value of the property in question; the degree of responsibility incurred; whether the fund involved was 'created' by the attorney; the professional skill and standing of the attorney in his profession; the results he was able to obtain; the ability of the client to pay a reasonable fee for the services rendered; and, very importantly, the amount of money or the value of the property in question." LaRocca Estate, 431 Pa. 542, 546 (1968) (citations omitted)**

See also Estate of Lux, 480 Pa. 256 (1978); Conti Estate, 8 Fiduc Rep 2d 272 (O.C., Phila., 1988); Preston Estate, 385 Pa.SuperiorCt. 48 (1989); Sonovick Estate, 373 Pa.SuperiorCt. 396 (1988); and, Reed Estate, 462 Pa. 336 (1975). To the extent that the challenged Legal Fees are for prosecuting Wachovia's Claims for commissions, they are not payable out of the Lewis Elkin Fund because,

> **" In prosecuting a claim for compensation, a fiduciary is subject to the general rule that a party who retains counsel to protect or advance his own interests must pay his own counsel fees. See *Wanamaker Trust*, 30 Fiduc. Rep. 240. Accordingly, the fees of an attorney employed to substantiate a fiduciary's claim for compensation are not compensable from the estate: *Powers Est*., 58 D.&C. 379, 386; *Fiduciary Review*, Aug. 1997, p. 4; and, *Nicely Estate*., 18 Fiduc. Rep. 2d 397, 415." Moss Trust, 21 Fiduc. Rep. 2d 151, 153 (O.C., Phila., 2001)**

Because Wachovia has made no factual record which will support the challenged

Legal Fees, Objection No. 6 is Sustained; the credits totaling $42,618.12 will be stricken from the Amended And Restated Account; and, the sum of $42,618.12 will be added back to the balances available for distribution.

At Pages 46 of its Amended And Restated Account, under Disbursements of Principal, Wachovia Bank takes credit for a payment of $1,500.00, for "Tax Service Fees", in 2004 and 2005. At Page 294 of its Amended And Restated Account, under Disbursements of Income, Wachovia Bank takes credit for seventeen payments, totaling $16,900.00, for "Tax Service Fees", in the period 1983 through 2000. In Objection No. 3, the Beneficiaries seek to surcharge Wachovia Bank, in the total amount of $18,400.00, for said payments of Tax Service Fees. Mr.Middleton testified that the payments of Tax Service Fees were for the preparation of Forms 990-PF. He also testified that Wachovia does not have Tax Returns for years prior to 1994. On the record made by Wachovia Bank in this matter, I have no factual basis upon which to approve payment of $18,400.00 in Tax Service Fees. Furthermore, I find that the payments of said Fees are excessive and unreasonable in light of the aforementioned breaches of fiduciary duty by Wachovia and its corporate predecessors in the matter of the so-called under-distributions. Objection No. 3 is Sustained; the credits totaling $18,400.00, for payment of Tax Service Fees, will be stricken from the Amended And Restated Account; and, the sum of $18,400.00 will be added back to the balances available for distribution.

At Page 89 of the Second Account of First Pennsylvania Bank, stated for the period from September 1, 1949 to December 15, 1982, Wachovia's corporate predecessor, First Pennsylvania Bank, takes credit, under Income Distributions To

Beneficiaries, for a distribution of $75,000.00. In Objection No. 9, the Beneficiaries seek to surcharge Wachovia Bank, in the total amount of $75,000.00, for said distribution. It is the duty of a fiduciary to justify the items for which credit is taken in his Account, and, to produce vouchers or equivalent proof in support thereof. See Strickler Estate, 354 Pa. 276 (1946). Mr.Middleton testified concerning said distribution of $75,000.00, but, I found his testimony to be confusing and unconvincing. Accordingly, Objection No. 9 is Sustained; the credit of $75,000.00, for a distribution of income, will be stricken from the Second Account of First Pennsylvania Bank, stated for the period from September 1, 1949 to December 15, 1982; and, the sum of $75,000.00 will be added back to the balances available for distribution.

At Page 267 of its Amended And Restated Account, under Receipts Of Income, Wachovia Bank charges itself with receipt of $2,675.35 on 11/10/86, and, $3,144.47 on 2/28/87, as "Adjustments for missing records". In Objection No. 11, the Beneficiaries seek to surcharge Wachovia Bank for each of said receipts. Mr.Middleton testified that the receipts or adjustments in question were made because Wachovia cannot find statements for November of 1986 or February of 1987. Because the challenged items are receipts and not credits, their presence in the Account causes no harm to the Beneficiaries. Accordingly, Objection No. 11 is Dismissed.

At Pages 3 and 4 of the Second Account of First Pennsylvania Bank, stated for the period from September 1, 1949 to December 15, 1982, Wachovia's corporate predecessor, First Pennsylvania Bank, states that it has an "Income Balance Remaining" in the amount of $79,188.35. At Page 105 of its Amended And Restated Account, under Receipts of Income, Wachovia Bank charges itself with receipt of

$45,202.09 as "12/15/82 Balance per Second Account". In Objection No. 10, the Beneficiaries seek to surcharge Wachovia Bank, in the net amount of $33,986.26, representing the difference between the foregoing entries of "Income Balance Remaining", and, "12/15/82 Balance per Second Account.". Mr.Middleton testified concerning said entries, but, I found his testimony to be confusing and unconvincing. Accordingly, Objection No. 10 is Sustained, and, the net amount of $33,986.26 will be added back to the balances available for distribution.

As previously noted, the Will of Lewis Elkin provides that his Executors and Trustees, "....are not confined to legal investments, but can invest in approved Stocks and Loans, not out of this State." In an effort to remove the foregoing investment restriction, Wachovia Bank has filed a Petition headed "Petition To Release Fiduciary From Investment Restriction Pursuant To 20 Pa.C.S. § 7202 (b) And To Invest Trust Assets In Accordance With Pennsylvania's Prudent Investor Rule, 20 Pa.C.S. § 87201, *et seq*." This Petition is opposed by the Beneficiaries. Section 7202 (b) of the PEF Code reads as follow, in pertinent part, to wit,

> **"§ 7202. Default rule.**
>
> **(a) General rule. -- Except as otherwise provided by the governing instrument, a fiduciary shall invest and manage property held in a trust in accordance with the provisions of this chapter.**
>
> **(b) Exception.--Where the instrument establishing a trust contains a restriction on the fiduciary's power of investment and the court having jurisdiction over the trust finds that adherence to the restriction is impractical or that the existing or reasonably foreseeable economic conditions are so far different from those prevailing at the creation of the trust that adherence to the restriction might deprive the**

> **respective beneficiaries of income and principal of the full benefits the testator or settlor intended them to enjoy, the court may release the fiduciary from the restriction to the extent and on conditions, if any, as the court may deem appropriate.**
>
> **(c) Court direction.--....."**

Testifying in support of the Petition To Release, Mr.Middleton stated that, prior to the year 2000, he had no investment experience. Mr.Middleton then stated that the portfolio of the Lewis Elkin Fund,

> **".....consistently outperformed its benchmarks, which is the S&P 500, during five of the six years, 2000 through 2005." NT 16**

Mr.Middleton then stated that the portfolio, "....substantially outperformed the S&P 500 for the period 1994 through 2004." NT 17 Mr.Middleton gave the following response to those Beneficiaries who asked why Wachovia wants the investment restriction lifted, to wit,

> **"....past performance is no indication of future performance, so we felt more comfortable with a more diversified portfolio; that it would reduce the risks in the portfolio, having different asset classes. Long-term would be less risky, and in the long term be beneficial to the trust." NT 18**

Based on his thirty-four years experience as a Portfolio Manager, and, his handling of the portfolio of the Lewis Elkin Fund since 2002, Mr.Lowry gave the following testimony concerning Wachovia's desire to remove the investment restriction, to wit,

> **"A. The portfolio has done particularly well recently, but not for any reason other than pure luck. I would like to say it was investment performance, but being restricted to investments which reside in Pennsylvania creates a number of problems. Dealing with just Pennsylvania, we are dealing with a lot fewer corporations who are headquartered in Pennsylvania. Those that are would not in purchase represent a well-diversified portfolio." NT 120**

* * * *

> **"A. With modern portfolio theory, which was created somewhere in the Fifties and refined further in the Seventies and Eighties by the insurance companies, the concept of adding additional asset classes and greater diversity was mathematically proven to be substantially a more prudent investment means to creating performance. .... The addition of other asset classes, ..., and in today's environment alternative investments, in the right combination produce a more prudent positive return with less volatility in a portfolio." NT 123**
>
> **"So the horizon since the early 1900's, the opportunities internationally, if not those created by Wall Street, have made a fair number of additional opportunities available to us that would have had solid performance characteristics, which would be appropriate for prudent investing in a charitable situation." NT 132**

On cross-examination by Counsel for the Beneficiaries, Mr.Lowry testified that, because of the investment restriction in question, the investments of the Lewis Elkin Fund are not well diversified; do not comply with the internal policies of Wachovia Bank; and, do not comply with regulations of the office of the comptroller of the currency. Nevertheless, Mr.Lowry admitted that he does manage other portfolios whose investments are outside the said policies and regulations. When asked about following the intent of Lewis Elkin, as expressed in the Will, Mr.Lowry replied,

> **"A. I think, from what I can see in the records, up until more recently, the former portfolio managers and their superiors believed that philosophy or that directive was to be followed. In more current times, our view, not that we mean to disrespect what is in print -- we believe that there are stronger reasons to diversify a portfolio outside of the original instructions, and, therefore, bring these issues to court proceedings to have them resolved." NT 128**

Having considered the terms of the Will; the testimony of Mr.Middleton and Mr.Lowry; and, the opposition of the Beneficiaries, I am not convinced that this

Court should permit Wachovia Bank to substitute its judgment for that of the Beneficiaries in the matter of the investment restriction in question. While I understand that Wachovia seeks to employ so-called "modern portfolio theory" by diversifying the portfolio, I note that the Legislature has seen fit to exempt trusts which became irrevocable prior to December 25, 1999 from the diversification requirement of Section 7204 of the PEF Code. See 20 Pa.C.S.A. § 7204 (b). The testimony of Mr.Middleton and Mr.Lowry does not suggest that adherence to the investment restriction in question is impractical. Nor does it suggest that adherence to the restriction might deprive the Beneficiaries of intended benefits at any time in the immediate future. On the record made by the Parties, I hold that the requirements of Section 7202 (b) of the PEF Code have not been met, and, accordingly, the Petition To Release will be Denied by separate Decree bearing even date with this Adjudication.

All Objections having been addressed, the Accounts show a balance of

Principal, after distributions, of	**$ 14,867,080.81**
to which add surcharges involving principal, per foregoing discussion, totaling	**1,500.00**
making a balance of Principal available for distribution of	**$ 14,868,580.81**

which is awarded as follows, to wit: $35,000.00 in Counsel Fees to Shaiman, Drucker, Beckman & Sobel, LLP, as requested; and, the balance then remaining, or residue, to Wachovia Bank, N.A., as Trustee for the Lewis Elkin Fund under the Will and Codicil of Lewis Elkin, for the uses and purposes set forth in the Will and Codicil of Lewis Elkin.

The Accounts show a balance of income, after distributions,

of	**$ 80,262.01**

to which add surcharges involving income, per foregoing discussion, totaling **168,504.38**

making a balance of income available for distribution of $ 248,766.39

which is awarded to Wachovia Bank, N.A., as Trustee for the Lewis Elkin Fund under the Will and Codicil of Lewis Elkin, for the uses and purposes set forth in the Will and Codicil of Lewis Elkin.

The above awards of principal and income are made subject to all payments, assignments, transfers and conveyances heretofore properly made on account of distribution.

Leave is hereby granted to the accountant to make all payments, assignments, transfers and conveyances necessary to effect distribution in accordance with this adjudication.

AND NOW, , the Accounts, as modified by the rulings in this Adjudication, are confirmed absolutely.

Exceptions to this Adjudication may be filed within twenty (20) days from the date of issuance of the Adjudication. An Appeal from this Adjudication may be taken, to the appropriate Appellate Court, within thirty (30) days from the date of issuance of the Adjudication. See Phila. O.C. Div. Rule 7.1.A and Pa. O.C. Rule 7.1, as amended, and, Pa.R.A.P. 902 and 903.

ADM. J.