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Breach of Fiduciary Duty Claims Against Trustees/Managers of Closely-Held Businesses

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FIDUCIARY DUTY CLAIMS:
Trustees of Closely Held Businesses

An Examination of the Duties of Both Trustees and Attorneys in the Context of Closely Held Businesses that are Held in Trust

Kenneth Fair, Partner, **Wright & Close LLP**, Houston

David F. Johnson, **Winstead PC**, Fort Worth

Why a Trust may Own an Interest In a Closely-Held Business

- There are many reasons that a trust may own a minority or majority interest in a closely-held business.
- The settlor may transfer such an interest into the trust as part of an estate plan or otherwise.
- The trustee may create a closely-held business and transfer assets into the business.
- The main reason to do so is risk avoidance.
- Also, it may assist in limiting the duty to diversify and maintaining ownership of a family business.

Issues to Consider Before Creating A Closely-Held Business

- Creating a closely-held business will create new duties to properly manage the ownership interests.
- This may create principal versus income issues that impact an income beneficiary.
- May limit a trustee's ability to diversity assets.
- Fractional ownership of business may devalue the asset, which may be good or bad depending on circumstances.
- This may make termination of the trust easier.
- This may have tax benefits.
- This may make it easier to avoid probate if a co-owner dies.
- Compensation issues for dual roles.

A Common Scenario

- Father's life work was building up his widget company to leave a legacy for his family.
  - Widget Co. became very successful.
  - 100 employees and over $10 mil in revenue last year.
- Father had two children – Son and Daughter – who do not get along
  - Daughter has been in charge of HR for last year.
  - Son has been CEO for last 10 years.
  - Mother is still living, but has been diagnosed with dementia and now lacks capacity.

A Common Scenario

- Father died last year.
- Son is appointed Trustee of the Trust:
  - Holds 75% of Widget Co. shares (Mother holds 25% individually).
  - Income to Mother for her life.
  - At Mother's death, principal outright to Son and Daughter with 1% to current President and 1% to Vice President, who have been long-time employees
- Son, as CEO and Trustee, would like to sell Widget Co.
  - Daughter opposes the sale and Son's recent statement that he deserves to take the same salary as Father.

A Common Scenario

- Son comes to you for advice.
  - Who do you represent?
  - What is Son's standard of care?
  - Who does he owe duties to?
  - What advice do you give?
  - What conflicts should you watch out for?

Fiduciary Duty vs. Business Judgment Rule vs. "Other"

The Conflict Between Standards

Trustee Fiduciary Duties

- A trustee is held to the highest fiduciary standard.
- Trustee duties:
  - Administer trust in good faith
  - Administer trust in accordance with terms and purposes of trust
  - Administer trust in interest of beneficiaries
  - Loyalty
  - Impartiality
  - Care
  - Use special skills or expertise
  - Prudent administration
    - Exercise reasonable care, skill and caution
    - Make trust property productive
  - Keep books and records
  - Inform beneficiaries of material facts

See UNIFORM TRUST CODE §§ 801–13 (2000).

Trustee Fiduciary Duties

- Trustees have a very strict duty of loyalty.
- The Uniform Prudent Investor Act states: "A trustee shall invest and manage the trust assets *solely* in the interest of the beneficiaries." (emphasis added).
- This duty of loyalty can be compared with investment advisors, who also owe fiduciary duties.
  - Investment Advisors have a "best interest" standard of loyalty and would allow a win-win position.
  - Trustees have a "sole interest" standard and cannot benefit (other than direct compensation) and must be in a win-neutral position.

Trustee Fiduciary Duties

"A trustee must always act *solely* in the beneficiaries' interest. If the trustee violates *any* duty owed to the beneficiaries, the trustee is liable for breach of trust…In a trust relationship, then, the benefits belong to the beneficiaries and the burdens to the trustee. The office of the trustee is thus by nature an onerous one, and the proper discharge of its duties necessitates great circumspection." *Moeller v. Superior Court*, 16 Cal.4th 1124 (1997).

The Business Judgment Rule

- The business judgment rule is a standard of judicial review of corporate director conduct.
- It seeks to prevent courts from examining the **wisdom** of a corporate director's decision, instructing them instead to focus on the **process** by which the decision was reached.

The Business Judgment Rule

- The business judgment rule establishes a **rebuttable presumption** that a corporate director's decisions were made:
  - In good faith
  - With the care that a reasonably prudent person would use
  - With the reasonable belief that he or she was acting in the best interest of the company

The Business Judgment Rule

- Other formulations:
  - In good faith = **duty of care**
  - With the care that a reasonably prudent person would use = **duty to be informed**
  - With the reasonable belief that he or she was acting in the best interest of the company = **duty of loyalty**

The Business Judgment Rule

- A plaintiff attacking a decision of a corporate director must provide evidence to rebut one or more of these three presumptions.

- This effectively precludes claims against directors that sound in ordinary negligence.

The Business Judgment Rule

- Protects "well-meaning directors who are misinformed, misguided, and honestly mistaken."
- A court **will not substitute its own judgment** for that of the corporation's board of directors.
- Rule gives deference to the board.

The Business Judgment Rule

- A plaintiff must plead/prove, e.g.:
  - Fraud
  - Breach of trust
  - Conflict of interest
  - Gross negligence
  - Corruption/Improper motive
  - Bad faith
  - Failure to investigate

The Business Judgment Rule

- If presumption is overcome, **burden shifts** to Board to show that transaction was "fair" and they met their fiduciary responsibilities.
    - Objectively fair and reasonable.
- Special committees and fairness opinions help Board to satisfy obligation to exercise sound business judgment in approving transactions.

The Business Judgment Rule

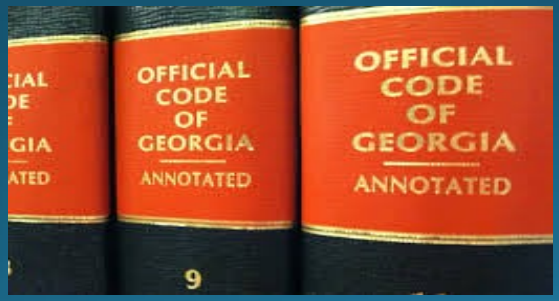
Example: Georgia

- Georgia first recognized the business judgment rule as part of its **common law.**
- FDIC v. Loudermilk, 295 Ga. 579 (2014): "[T]he business judgment rule . . . generally precludes claims against officers and directors for their business decisions that sound in ordinary negligence, except to the extent that those decisions are shown to have been ***made without deliberation, without the requisite diligence to ascertain and assess the facts and circumstances upon which the decisions are based, or in bad faith.***"

The Business Judgment Rule

Example: Georgia

- Georgia **codified** its business judgment rule in 2017 in response to the holding in Loudermilk:
  - "There shall be a **presumption that the process** a director followed in arriving at decisions was done in **good faith** and that such director has exercised **ordinary care**; provided, however, that this **presumption may be rebutted** by evidence that such process constitutes gross negligence by being a gross deviation of the standard of care of a director in a like position under similar circumstances."



The Business Judgment Rule

- Other states, such as California, also have codified their business judgment rules

The Business Judgment Rule

Example: California

- A director shall be **entitled to rely on information, opinions, reports or statements** prepared or presented by:

  (1) Officers or employees of the corporation whom the director believes to be reliable and competent.

  (2) Counsel, independent accountants or other persons as to matters which the director believes to be within such person's competence.

  (3) A committee of the board upon which the director does not serve, as to matters within its designated authority, which committee the director believes to merit confidence.

The Business Judgment Rule vs. Fiduciary Duties

- Directors in most states also have duties of loyalty, care, and good faith
- However, a Trustee's duties are generally seen as more stringent than a director's duties.
  - *See Paddock v. Siemoneit*, 218 S.W.2d 428 (Tex. 1949) ("Acts which might well be considered breaches of trust as to other fiduciaries have not always been so regarded in cases of corporate officers or directors.")

The Business Judgment Rule vs. Fiduciary Duties

- In *Stegemeier v. Magness*, 728 A.2d 557, 562 (Del. 1999), the Delaware Supreme Court held that the standard of fiduciary duty for a corporate director was not that for a trustee.
  - Self-dealing is virtually prohibited for trustees, but not directors (i.e., when a majority of disinterested directors approve the transaction).
  - Directors can be protected by business judgment rule – but not trustees.
- Applicable standard based on the "legal format the grantor chose to accomplish his purposes."
  - If the grantor chose a trust, "the stricter principles of trust law must apply to the challenged transaction."

The Business Judgment Rule vs. Fiduciary Duties

- Many Courts agreed that either the more stringent "trust" fiduciary standard applies or the less stringent "director" fiduciary standard, which is subject to the business judgment rule.
  - *Betty G. Weldon Revocable Trust ex rel. Vivion v. Weldon ex rel. Weldon*, 231 S.W.3d 158 (Mo. Ct. App. 2007) (the more strict trust fiduciary duties must be applied over business judgment rule).
  - *In re Koffend's Will v. First National Bank of Minneapolis*, 218 Minn. 206, 219 (1994) (trust law trumps corporate law in determining questions involving testamentary dispositions of corporate dividends).
  - *Estate of Feraud*, 92 Cal.App.3d 717 (Ct. App. 1979) (corporate standard of reasonableness was not proper standard in determining compensation, because stock was held in trust).

The Business Judgment Rule vs. Fiduciary Duties

- But not all courts agree with this interpretation:
  - *Wood Prince v. Lynch*, 2005 WL 373805 (R.I. 2005) (unpublished) (because director and trustee duties are substantially similar, Directors/Trustees were entitled to protection of business judgment rule).

Competing Standards

- Rollins v. Rollins, 338 Ga. App. 308 (2016)
  - The Georgia Court of Appeals and the Supreme Court of Georgia clarify the competing duties of trustees also controlling a business.
  - Two brothers acting as:
    - Trustees of certain trusts, and
    - Individual partners of a partnership in which the trusts also are partners

Competing Standards

- Following the death of the trusts' settlor, the brothers amended the partnership agreement to:
  - Name themselves as managing partners, and
  - Change the partnership's distribution scheme to the purported detriment of the trusts' beneficiaries.

Competing Standards

- One of the main issues the courts faced is what **standard** to use in judging the brothers' conduct.
- The Georgia Supreme Court ultimately applied different standards depending on the **capacities** the brothers occupied when taking certain actions.

Competing Standards

- Amending the partnership agreement required the brothers to act in both their capacities as **trustees** of the trusts (which were partners) and their individual capacities as **partners** themselves
  - In voting as **trustees** on behalf of the trust/partners, the brothers owed a duty to the trusts' beneficiaries, and therefore were held to a **fiduciary duty** standard.
  - On the other hand, in voting as individual **partners**, the brothers owed a duty to the other partners (i.e., the trusts themselves), and not to the beneficiaries of the trusts, and therefore were held to a **partnership duty** standard.

Competing Standards

- Some jurisdictions hold that there is a clear distinction between the person as trustee and as director/officer only where the trust does not have a majority of the corporate stock and does not, therefore, have control over the company.
- So, in these jurisdictions, if the trust has control over the company, the person's conduct regarding the operations of the company may be imputed to the person in his or her capacity as trustee and as an officer/director.
- Similarly, if a trustee has control of the company, some jurisdictions hold that the trustee must disclose company information to a requesting beneficiary.
- An attorney should be very careful to research the law in the relevant jurisdiction as this can have a drastic impact on the person's liability.

Competing Standards

The Common Scenario:

- Son is appointed Trustee of the Trust
- Trust
  - Holds 75% of the shares of family company
    - Mother holds remaining 25% outright
  - Income to Mother for her life

- How does the trustee resolve the conflict in how profits of company are to be used – for the income beneficiary, or for capital expenditures?

Evaluating the Common Scenario

- Understand first who your client is and in what capacity they are bringing their claims.
- Decide which state's law applies:
  - E.g., Missouri law governs trust but company in Texas.
- Decide standard that applies to each proposed action:
  - Acting as Trustee?
  - Acting as Shareholder?
  - Acting as President?
  - Acting as Son looking out for Mother?
  - If those duties conflict….. What do you do?

Other Potential Claims

- What are the appropriate damages or remedies?
  - ✓ Damages for waste?
  - ✓ Damages for trustee self-dealing?
  - ✓ Damages for loss of appreciation of the business held as a trust asset?
  - ✓ Damages for mismanagement of the business asset – lost profits?
  - ✓ Removal of the trustee?
  - ✓ Disgorgement of trustee fees?
  - ✓ Dissolution of the business?

Other Potential Claims

- Should the claim be a direct action, or must it be a derivative action?
  - Does the trust, as shareholder, have a special injury not suffered by the other non-party shareholders and the corporation?
  - For a direct action, can the trust show that the reasons for requiring a derivative suit do not apply?
    - (1) prevention of multiple suits by shareholders;
    - (2) protection of corporate creditors by ensuring that the recovery goes to the corporation;
    - (3) protection of the interest of all the shareholders by ensuring that the recovery goes to the corporation, rather than allowing recovery by one or a few shareholders to the prejudice of others; and
    - (4) will the action provide compensation to injured shareholders by increasing their share values?

Other Potential Claims

- ✓The business asset is an investment held by the trust.
- ✓Would application of the "Prudent Investor Rule" suggest that the business be sold, and the proceeds invested in other, or productive investments?
  - ✓Uniform Prudent Investor Act § 2(a):

    A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

Other Potential Claims

- UNIFORM PRUDENT INVESTOR ACT § 2(c):

Among circumstances that a trustee shall consider in investing and managing trust assets are such of the following as are relevant to the trust or its beneficiaries:

(1) general economic conditions;

(2) the possible effect of inflation or deflation;

(3) the expected tax consequences of investment decisions or strategies;

(4) the role that each investment or course faction plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property;

(5) the expected total return from income and the appreciation of capital;

(6) other resources of the beneficiaries;

(7) needs for liquidity, regularity of income, and preservation or appreciation of capital; and

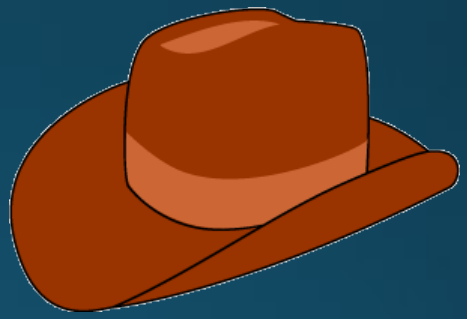
(8) an asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

Your Client and The Quagmire of Conflicts

The Conflicts

The Attorney-Client Privilege

- Understand the capacity in which you represent a client who wears different hats.
- "Capacity" is the **legal role in which a person performs an act**. Black's Law Dictionary 199 (7th ed. 1999).
- Person sued in one capacity is a different legal person from that person in another capacity. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 543–44 & n. 6 (1986); *Alexander v. Todman*, 361 F.2d 744, 746 (3d Cir. 1966).



Representing Different Capacities

- Scenario: Trustee of trust owns controlling interest in closely held company, is an officer and director of the company, and beneficiary of the trust.
- Capacities you might represent provide representation:
  - To the person individually (to enforce rights as beneficiary or defend against claims of wrongdoing).
  - To the person as trustee of the trust.
  - To the person as director of the company.
  - To the person as officer of the company.
  - To the company as its counsel.

Keeping the Capacities Straight

- When suing or defending a fiduciary who wears multiple hats, keep straight which duties tie to which hat.
- *Adam v. Harris*, 564 S.W.2d 162 (Tex. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.) shows this distinction:
  - Testamentary trust held controlling interest in trucking company.
  - Trustee was made director of company.
  - Company bought truck insurance from insurance company owned by trustee's brothers.
  - Beneficiaries sued trustee for self-dealing.
  - Trial court refused to award damages for self-dealing.

Keeping the Capacities Straight

- Appellate court agreed there was no self-dealing:

  The flaw in [beneficiaries'] argument, however, is that whatever breach of fiduciary duty [trustee] committed was in his capacity as director of the truckline corporation and not in his capacity as trustee. [Trustee] did not self-deal with the trust property, the shares in the corporation, but rather with the corporation's property, the monies used to purchase the insurance for the trucks. Section twelve of the Texas Trust Act directs that a "trustee shall not buy nor sell . . . any property owned by or belonging to the trust estate . . . from or to . . . a relative . . . ." Here, no property either entered or left the trust res; the trustee neither bought nor sold trust property.

Keeping the Capacities Straight

- Two approaches to avoiding the result in *Adam v. Harris*.
- Approach #1: Breach of fiduciary duty suit against trustee.
  - Failure to act as controlling shareholder to supervise board of directors and vote out self-dealing board members.
  - Failure as controlling shareholder to bring shareholder derivative suit against breaching board members.
  - Failure as trustee to properly manage trust asset.
- Approach #2: "Double derivative" suit against directors.
  - Sue derivatively on behalf of trust, since trustee will not sue himself.
  - On behalf of trust as shareholder, sue directors derivatively on behalf of corporation.

If a Conflict Arises

- One person may need separate counsel in different capacities.
- For example, a trustee sued for breach of fiduciary duty may need two attorneys:
  - One to advise trustee on trust administration and management of closely held business.
  - One to defend breach of fiduciary duty suit.
- Separate representations help keep trustee's defense privilege intact in states that apply fiduciary exception.

The Attorney-Client Privilege

- Always be sure:
  - Who is the client?
  - What is the scope of the matter?
- A lawyer's communications with a fiduciary may not remain privileged.
- Possible ways to invade the attorney-client privilege:
  - Fiduciary exception
  - Successor fiduciaries
  - Change of corporate control
  - Joint privilege

Scenario #1

- Scenario:
  - Trust owns 40% interest in closely held business.
  - Remaining 60% owned by other investors.
  - You represent trustee, who is also president of the company.
  - Trustee asks your advice on a couple of matters for the company.
  - You give advice and then handle those matters for the company.
  - Other investors become disgruntled and vote to replace the president.
- What happens to the attorney-client privilege between you and the trustee?

Scenario #2

- Scenario:
  - Trust owns 100% interest in closely held business.
  - You represent trustee, who is also president of the company.
  - You advise trustee and advise the company.
  - Beneficiary successfully removes trustee.
  - Successor trustee seeks your privileged communications and work product.
- What happens to the privilege?

Fiduciary Exception to the Privilege

- Some states have a fiduciary exception to attorney-client privilege:

  "Under [the fiduciary] exception, which courts have applied in the context of common-law trusts, a trustee who obtains legal advice related to the execution of fiduciary obligations is precluded from asserting the attorney-client privilege against beneficiaries of the trust." *U.S. v. Jicarilla Apache Nation*, 564 U.S. 162 (2011).

- Rationale behind fiduciary exception:
  - Trustee obtains legal advice as representative of the beneficiaries because trustee has duty to act in beneficiaries' best interest.
  - Fiduciary has duty of full disclosure of trust-related business to the beneficiaries.

Fiduciary Exception to the Privilege

- When does the fiduciary exception apply?
  - When the advice was sought, no adversarial proceeding between trustee and beneficiaries was pending, and trustee had no reason to seek legal advice in personal rather than fiduciary capacity.
  - Advice sought only to benefit trust, not benefit trustee (e.g., tax advice for the trust).
  - Advice paid for from trust funds.
- Advice paid for by the trustee for his own protection remains privileged, while advice paid for by trust for benefit of trust is not.
- Some courts have applied this exception to shareholder discovery of legal advice given to corporate management. *See, e.g.*, *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970).

Fiduciary Exception to the Privilege

- Jurisdictions that have applied this exception:
  - **Delaware.** *Riggs Nat. Bank of Washington, D.C. v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976).
  - **New York.** *NAMA Holdings, LLC v. Greenberg Traurig LLP*, 18 N.Y.S.3d 1 (1st Dept. 2015).
  - **Arizona.** *In re Kipnis Section 3.4 Trust*, 329 P.3d 1055 (Ariz. Ct. App. 2014).
  - **New Jersey.** *Arcuri v. Trump Taj Mahal Assocs.*, 154 F.R.D. 97 (D.N.J. 1994).
  - **Washington.** *VersusLaw, Inc. v. Stoel Rives, LLP*, 111 P.3d 866 (Wash. App. 2005).
- Federal courts apply the exception to ERISA plan fiduciaries. *See, e.g., Solis v. Food Employers Labor Relations Ass'n*, 644 F.3d 221 (4th Cir. 2011); *U.S. v. Mett*, 178 F.3d 1058 (9th Cir. 1999).

Fiduciary Exception to the Privilege

- Jurisdictions that do not apply this exception:
  - **California**. *Wells Fargo Bank v. Superior Court*, 22 Cal. 4th 201 (2000).
  - **Texas**. *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996).
  - **Illinois**. *Garvy v. Sefarth Shaw LLP*, 966 N.E.2d 523 (Ill. App. Ct. 2012).
  - **New Mexico**. *Murphy v. Gorman*, 271 F.R.D. 296 (D.N.M. 2010).
  - **Massachusetts**. *RFF Family Partnership, LP v. Burns & Levinson, LLP*, 991 N.E.2d 1066 (Mass. 2013).
  - **Oregon**. *Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 326 P.3d 1181 (Or. 2014) (en banc).
- The United States as trustee is not subject to the fiduciary exception. *U.S. v. Jicarilla Apache Nation*, 564 U.S. 162 (2011).

Privilege & Successor Fiduciaries

- Some states require a predecessor trustee to disclose attorney-client communications concerning trust administration to the successor trustee:
  - **Arizona.** *In re Kipnis Section 3.4 Trust*, 329 P.3d 1055 (Ariz. Ct. App. 2014).
  - **New Jersey.** *In re Estate of Fedor*, 811 A.2d 970, 972 (N.J. Ch. Div. 2001).
- In California, successor trustees hold the predecessor's privilege as to communications about trust administration. *Moeller v. Superior Court*, 16 Cal. 4th 1124 (1997).
  - So only successor trustees—not beneficiaries—can get the predecessor's attorney-client communications.

Summary of Fiduciary Exception to Attorney-Client Privilege

- In a derivative action, a corporate manager may not be able to shield, under attorney-client privilege, the legal advice received as a manager, where the ultimate beneficiaries of the advice were the stockholders.
- Exception would also apply to a trustee receiving advice for the ultimate benefit of the trust's beneficiaries (e.g., tax advice).

Change in Corporate Management

- When an attorney represents an entity, the client is the entity, not the individuals who manage the entity. *See* ABA Model R. Prof'l Conduct 1.13.
- "[W]hen control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well." *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 349 (1985).

Change in Corporate Management

- In a corporate acquisition, "where efforts are made to run the pre-existing business entity and manage its affairs, successor management stands in the shoes of prior management and controls the attorney-client privilege with respect to matters concerning the company's operations." *Tekni–Plex, Inc. v. Meyner and Landis*, 89 N.Y.2d 123 (1996).

Joint Privilege

- *Uniform Rules of Evidence* 502(d)(6): Attorney-client privilege does not apply when communication is:
  - Offered in action between joint clients.
  - Made between any of the clients and the lawyer.
  - Relevant to matter of common interest.
- Courts vary on how broadly they interpret "relevant" and "matter of common interest.

Avoiding Privilege Problems

- Know who your client is.
- Have a written fee agreement or engagement letter.
- Limit the scope of the engagement in the fee agreement.
- Watch out for "mission creep."
- Update the fee agreement or enter a new one for new matters.
- Avoid representing the same person in multiple capacities.
- If you do, consider conflicts both before and during the representation.
- Include a conflict waiver and a conflict-withdrawal provision in the fee agreement.

Dealing with Non-Clients

- Attorneys often need to communicate with other parties with whom they are aligned.
- This can be in transactions or in disputes.
- Many jurisdictions acknowledge that where parties have a "common interest" that their communications will remain privileged.
- However, some jurisdictions (such as Texas) hold that the common-interest privilege attaches only after litigation has been filed.
- So, attorneys should be very careful to analyze the application of a common-interest privilege before communicating with third parties.

Dealing with Non-Clients

- Courts hold that an attorney can create an attorney/client relationship inadvertently.
- Don't describe yourself as the lawyer for "the trust," particularly in states that do not follow the entity theory of trusts.
  - Beneficiaries may think you represent them.
- Describe your role precisely.
- Tell non-clients early and often that you do not represent them.
- Follow up with emails or correspondence to document the non-representation.

If a Conflict Arises

- One person may need separate counsel in different capacities.
- For example, a trustee sued for breach of fiduciary duty may need need two attorneys:
  - One to advise trustee on trust administration and management of closely held business.
  - One to defend breach of fiduciary duty suit.
- Separate representations help keep trustee's defense privilege intact in states that apply fiduciary exception.

Fees for Defending the Fiduciary

- Fiduciary may be entitled to reimbursement for their attorneys' fees.
  - For acts as officer or director, look for indemnity provisions in bylaws or state statutes.
  - Also look for D&O coverage.
  - For acts as trustee, trustee may be able to defend with trust assets.
- A trustee is entitled to be **reimbursed** out of the trust property, with interest as appropriate, for:
  - expenses that were **properly incurred** in the **administration of the trust**; and
  - to the extent necessary to **prevent unjust enrichment of the trust**, expenses that were not properly incurred in the administration of the trust.

UNIFORM TRUST CODE § 709(a).

Defending the Trustee with Trust Assets

- A trustee is usually entitled to reimbursement for attorneys' fees and expenses for successfully defending an action. UNIFORM TRUST CODE § 709 cmt.
- A trustee is usually not entitled to attorneys' fees and expenses if it is determined that the trustee breached the trust. *Id.*
- Does the trust instrument allow payment of fees?

Successful Trustees Allowed Defense Costs

- 3 SCOTT ON TRUSTS § 188.4 (4th ed. 1988) (where trustee properly defends a proceeding for the benefit of the trust estate, he is justified in incurring reasonable expenses including employing an attorney as long as trustee was not at fault in causing the litigation).
- *Estate of Berthot*, 312 Mont. 366, 379–80 (2002) (trustee entitled to trial and appellate costs for successfully defending removal action).

Successful Trustees Allowed Defense Costs

- *In re Couch Trust*, 723 A.2d 376, 384–85 (Del. Ch. 1998) (trustee's successful defense of attacks on its administration and attempt to remove it as trustee "directly benefit the trust and its beneficiaries").
- *Estate of Beach*, 15 Cal.3d 623, 644–45 (1975) (executor/trustee entitled to costs of breach-of-fiduciary-duty suit for retaining initial assets, but could not allocate costs solely against shares of suing beneficiaries).

Breaching Trustee Denied Defense Costs

- *Citizens & Southern Nat'l Bank v. Haskins*, 254 Ga. 131, 143(1985) (trustee could not recover attorneys' fees for unsuccessful defense of suit alleging trustee neglected trust and failed to sell bonds when prudent).
- *Allard v. Pac. Nat'l Bank*, 99 Wash. 2d 394, 407, 663 P.2d 104, 112 (1983) (A "trial court abuses its discretion when it awards attorney fees to a trustee for litigation caused by the trustee's misconduct.").

Breaching Trustee Denied Defense Costs

- *In re Gilmaker's Estate*, 226 Cal. App. 2d 658, 662, 38 Cal. Rptr. 270, 272 (Cal. Ct. App. 2d Dist. 1964) (trustee with "no sound basis" for resisting removal "was not entitled to receive out of the trust estate its expenses of litigation, including attorneys' fees, incurred in defending its untenable and partisan position.").
- *In re Drake's Will*, 195 Minn. 464, 468–69, 263 N.W. 439, 442 (1935) ("To say to a trust beneficiary that, even if he succeeds in having his trustee's account surcharged … he must nevertheless pay the trustee's attorneys' fees and the trustee's fees for contesting the allowance of such a surcharge, is unreasonable.")

Defending the Trustee with Trust Assets

- A court may have discretion to award fees and expenses against any party or against the trust estate, regardless of who prevails:

  "[W]hether a trustee should be awarded an attorney's fee for defending a suit involving his administration of the trust depends upon equitable considerations, … that the success or failure of the trustee in the litigation may be a matter to be considered but does not necessarily determine the trustee's right to the fee, and that the trustee's good faith and the reasonableness of his actions are matters to be considered …." *American Nat'l Bank of Beaumont v. Biggs*, 274 S.W.2d 209, 222 (Tex. Civ. App.—Beaumont 1954, writ ref'd n.r.e.)

Defending the Trustee with Trust Assets

- "More complicated issues are presented by costs incurred by trustees in controversies, or in anticipation of possible litigation, involving allegations of breach of trust and thus exposing the trustee personally to risks such as surcharge or removal. To the extent the trustee is successful in defending against charges of misconduct, the trustee is normally entitled to indemnification for reasonable attorneys' fees and other costs; to the extent the trustee is found to have committed a breach of trust, indemnification is ordinarily unavailable. Ultimately, however, the matter of the trustee's indemnification is within the discretion of the trial court, subject to appeal for abuse of that discretion." RESTATEMENT (THIRD) OF TRUSTS § 88, at cmt. d.

Defending the Trustee with Trust Assets in the Interim

- A trustee with control over the trust assets has the power to reimburse itself for its attorneys' fees during the litigation.
- If there are co-trustees, must have proper authority.
- The trustee owes a duty of loyalty and must "administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries." UNIFORM TRUST CODE § 801.
- "[A] trustee has a right to charge the trust for the cost of successfully defending against [suits] by beneficiaries. The better practice may be for a trustee to seek reimbursement after any litigation with beneficiaries concludes, initially retaining counsel with personal funds." *Wells Fargo Bank v. Superior Court*, 22 Cal.4th 201, 213 n.4 (2000).

Defending the Trustee with Trust Assets in the Interim

- Some courts have held that a trustee may not defend from the trust assets until the underlying merits are decided.
- Others allow the use of trust assets in the interim under proper circumstances.
  - *People ex rel Harris v. Shine*, 224 Cal. Rptr.3d. 380 (2017): Trustee petitioned for advance fees from the trust to defend petition for removal, subject to repayment if the trustee was ultimately found not entitled to indemnity.
  - "[W]here the trust instrument is silent on interim fees, the grant of interim fees should be governed by the following: the court must first assess the probability that the trustee will ultimately be entitled to reimbursement of attorney fees and then balance the relative harms to all interests involved in the litigation, including the interests of the trust beneficiaries. An assessment of the balance of harms requires at least some inquiry into the ability of the trustee or former trustee to repay fees if ultimately determined not to be entitled to costs of defense." *Id*. at 392.

Defending the Trustee with Trust Assets in the Interim

- A trustee risks a breach-of-fiduciary-duty finding by using trust assets to pay attorney's fees during litigation if the trustee is found liable on the underlying claim.
- Self-help, i.e., paying fees before a trial court awards them, has led to serious results.
  - *In re Baylis*, 313 F.3d 9, 22 (1st Cir. 2002): "[A]lthough the trust had no obligation to defend Baylis on the fraud charges brought against him personally or to indemnify him, Baylis caused fees for his defense to be paid by the Trust. … Baylis's actions were in violation of his duty of loyalty. … Given Baylis's active role in creating the conflict …, he should have requested permission from the probate court before he used trust assets to defend himself against the personal aspects of the … law suit. He did not do so. Instead, he proceeded to use trust assets to defend himself, an extremely reckless thing to do in light of his duty of loyalty. Given this combination of fiduciary breach … and the self-dealing to defend against it, we find that Baylis's actions here constitute defalcation under 11 U.S.C. § 523(a)(4). Thus, … the judgment debt relating to these actions is non-dischargeable."

Opposing the Trustee Who is Using Trust Assets in the Interim

- Consider a request for interlocutory or similar relief precluding use of trust assets to prosecute or defend case.
  - Uniform Trust Code § 1001: Court can remedy a "breach of trust that has occurred or **may occur**" with a laundry list of potential remedies.
  - May have to make a meaningful preliminary showing that there is a likelihood that the beneficiary will prevail.
  - May be able to do by motion without TRO/TI.

Practice Pointers for Real Life

The Reality

Practice Pointers

- Define your client from beginning.
  - Be clear who you do – and do not – represent at all times.
  - Engagement letter from beginning that defines representation.
  - Be clear to company/beneficiaries who you do and do not represent.
  - Update engagement letter where necessary.
- Be aware of your ethical duties.
- Determine your source of payment.
  - Individual.
  - Company.
  - Trust.

Practice Pointers

- Determine state law that applies to all of your client's actions.
- Discuss hiring other attorneys to play different roles.
  - Colleague vs. Counsel Outside of Firm.
- Make sure client understands privilege and discovery issues.
  - Successor trustee?
  - Email communications.

Practice Pointers

- Consider separate matters:
  - Separate files, matter numbers, invoicing.
- Decide whether client is acting as trustee, director/officer, or both.
  - Examine proposed actions under each standard.
- Document the fiduciary's decisions.
- Keep the beneficiaries informed.
  - Smoke out disagreement early.
  - Run statute of limitations.

Practice Pointers

- Seek consent and release agreements from beneficiaries.
- Be aware of changing landscape when conflict arises.
- Go to court!
  - Petition for instructions.

Questions? Comments?

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