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Argent

Fiduciary Litigation: Spotlighting Industry Trends

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▶ Disclosure to Beneficiaries (Duty to Inform and Report)

▶ Qualified Beneficiaries

▶ Violation of Material Trust Purpose

▶ Fiduciary Removal

▶ Arbitration Clauses in Trusts

▶ Directed and Delegated Trust Business

▶ Fiduciary Insurance



▶ Cyberfraud

▶ Elder Abuse



▶ Kilian v. TCF National Bank (Mich. App. Ct., October 20, 2022)

- The Michigan Court of Appeals affirmed a lower Court Opinion dismissing claims against a fiduciary. Plaintiffs accused Defendant-Trustee of mismanagement in two major instances: (1) allowing the primary income beneficiary to take excessive distributions; and (2) mismanagement of an asset of the Trust – a resort property.
- Plaintiffs argued that, because account statements before November 2013 did not include specific language that a beneficiary had one year to file a claim for breach, they were permitted to bring claims for up to five years after November of 2013. The Courts rejected this argument and stated that Plaintiffs interpretation was not consistent with the statutory language, which provides that a beneficiary must commence action within one year after the beneficiary receives a report that adequately discloses claims and informs the beneficiary of the time allowed to commence a proceeding.
- The Courts went so far as to opine that Defendant-Trustee was not responsible for ensuring that the beneficiaries examined the report or understood the information contained in it.



▶ Brock v. Brock (Tenn. Ct. App., August 10, 2022)

- Decedent's estate was distributed pursuant to his LW&T to a Marital Trust providing income to Wife during her lifetime. Upon Wife's death, the remaining assets of the Marital Trust were to be distributed between four beneficiaries. Decedent's son was a 50% remainder beneficiary of the Marital Trust. Wife and an unrelated individual served as Co-Trustees.
- Decedent's son demanded a more detailed accounting that reflected the nature of the distributions and explained the change in value of the Marital Trust assets. A dispute arose and Co-Trustees filed a declaratory action asking the Trial Court to opine. The Trial Court opined that the Marital Trust reporting provisions had overridden the reporting requirements in T.C.A. 35-15-813.
- The Appellate Court affirmed the Trial Court's Order and determined that Decedent's son, as a remainder beneficiary of the Marital Trust, was not entitled to the financial reports that he demanded under the terms of the Trust. The Appellate Court further stated that T.C.A. 35-15-813 does not require the Settlor to explicitly override the statutory requirements, but instead requires only that the trust provide otherwise. The reporting provision in the Trust clearly intended to limit the reporting obligation of the Co-Trustees by only requiring reporting to the income beneficiaries.



▶ Duty to Inform and Report (Uniform Trust Code Section 813)

- A trustee shall keep the beneficiaries of the trust that are current mandatory and permissible distributees of trust income and principal, or both, reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests.
- A trustee shall send to distributees or permissible distributees of trust income or principal, and other qualified beneficiaries who request it, at least annually, and at the termination of the trust, a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of trustee's compensation, a listing of the trust assets and, if feasible, their respective market values.
- Does your institution allow for the acceptance of "quiet" or "silent" trusts?
- "The trustee's duty to account is a two-edged sword. Yes, it is burdensome for the trustee. But rendering accounts to the beneficiary is a tried-and-true vehicle for limiting the trustee's liability."
Loring and Rounds: A Trustee's Handbook (2022)



▶ Truncated Statute of Limitation for Breach of Fiduciary Duty Claims
(Uniform Trust Code Section 1005)

- Truncated from three years to one year if a beneficiary or a representative of the beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding.
- A report adequately discloses the existence of a potential claim for breach of trust if it provides *sufficient information* so that the beneficiary or beneficiary's representative knows of the potential claim or has sufficient information to be presumed to know of it, or to be put on notice to inquire into its existence.
- Triggering disclosures: (1) statement for the accounting period detailing receipts and disbursements of principal and income; (2) a statement of assets and liabilities of the trust and their values at the beginning and end of the period (investment performance); (3) trustee's compensation; (4) agents employed and their compensation; and/or (5) disclosure of mortgages, pledges, other encumbrances, and leases.



Matter of Colecchia Family Irrevocable Trust (180 N.E. 3d 988 - Mass. App. Ct. 2021)

- Michael Colecchia, one of six children of the Settlers of the Trust, filed a petition against the Co-Trustees, his sisters. Unaware that his parents put their house into the Trust and under the impression that the children would inherit equal interests in the house, Michael performed maintenance and repairs from the date the Trust was created until both Settlers died. After his parents died, Michael was informed of the existence of the Trust. Michael's petition claimed, among other things, that he should have known about the existence of the Trust from inception.
- As a matter of first impression, the Massachusetts Court of Appeal had to decide whether Co-Trustees were accountable to the remainderman during the lifetime of the current beneficiaries. The Court ultimately found that the Co-Trustees were not.
- The Massachusetts Court held that the phrase "on the date the beneficiary's qualification is determined" means the date upon which a beneficiary becomes entitled to the trust according to its terms. Under the provisions of the Colecchia Family Irrevocable Trust, the remainder beneficiary would not become a "qualified beneficiary" until the death of both parents.
- The UTC's "qualified beneficiary" concept has been an issue for multiple courts and this decision further muddies the water concerning the same.



Skarsten-Dinerman v. Milton Skarsten Living Trust (Mn. Ct. App.,
December 27, 2021)

- Skarsten-Dinerman was one of six sibling-beneficiaries of a RLT (which became irrevocable at the Settlor's death). The main asset of the Trust was the family farm that was declining in value and generated an annual return of approximately 2.7%. Skarsten-Dinerman was the Trustee of three SNTs for the benefit of three of her siblings that received distributions from the Trust.
- Skarsten-Dinerman sought to modify the Trust to allow the farmland to be sold or, alternatively, to allow for an early distribution of the same. All siblings agreed. The District Court denied this modification because it violated a material purpose of the Trust. Specifically, the District Court cited the specific language noting that the land should not be sold and that it was structured to pass to the beneficiaries. The Court of Appeals agreed.
- The Settlor's specific instruction not to sell real estate was an unambiguous and a clear material purpose of the Trust, which cannot be impinged upon or circumvented by a modification of the Trust even if the modification [here a sale of the real estate] might improve the return to the Trust's beneficiaries.



▶ In re John O. Yates Trust (Tex. Ct. App., December 28, 2022)

- John Yates executed a will in 1953 providing that his residuary estate be placed in a Trust for his siblings and their issue. Mr. Yates' ranch and mineral interests became part of the Trust principal and the Trust beneficiaries received Trust income for over forty years. In 2020, Frost Bank, as Trustee, petitioned the Court determine if the LW&T authorized the sale of the ranch and if such sale proceeds should be allocated to principal.
- One Trust beneficiary argued that the will prohibited the sale of the ranch or, alternatively, if the ranch was allowed to be sold, the proceeds should be considered income. The District Court rejected both arguments and the Texas Court of Appeals affirmed.
- The Texas Court of Appeals reviewed the testator's intent by relying upon the plain language of the LW&T that stated, " . . . my Executor and/or Trustee shall, with the consent and approval of the Advisory Committee, lease or otherwise dispose of said properties and the rentals of proceeds shall become part of the income or principal of the trusts created under my Will . . . "



▶ The Matter of Leo Kahn Revocable Trust (Mass. App. Ct. 2022)

- Leo Kahn created a RLT in 2006. The RLT provided that upon Leo's death, his wife, Emily, and his son, Joseph, and a third-party would serve as Co-Trustees. Emily filed a petition to remove Joseph and the third-party relying on the provision of the Massachusetts Uniform Trust Code allowing for trustee removal "without cause".
- Joseph argued that the petition should be dismissed because the terms of the RLT state that a trustee may only be removed "for cause" and prohibits the MUTC's "without cause" removal provisions. The Court had to address whether (1) does a trust provision prevail over the MUTC; and (2) if the trust provision prevails, is "without cause" removal still permissible?
- The Court ruled that the specific removal provision of the RLT prevailed over the MUTC. However, the Court noted that enumerated list of "for cause" removal provisions in the RLT included "any reason a court might remove a trustee." The Court ruled that the ambiguous catch-all language created enough doubt to remand the case to the Probate and Family Court for further proceedings to determine the settlor's intent.



▶ Boyle, et al. v. Anderson (Sup. Ct. Va. April 14, 2022)

- The Supreme Court of West Virginia addressed an emerging topic in trust law: can a settlor require that the trustees and beneficiaries submit to arbitration, rather than allow them to proceed through litigation, through “donative arbitration clauses.”
- In this case, the deceased settlor established a RLT for the benefit of her three children: Sarah, John, and Jerry. Sarah served as trustee of all shares. A dispute arose as to John’s share. John died with no descendants and before the RLT was properly divided into separate lifetime shares for each child. John’s wife brought action against Sarah for breach of fiduciary duty for unreasonably delaying the funding of the separate share trust (of which John received no benefit). Sarah was a partial remainder beneficiary of John’s separate share.
- The RLT contained an arbitration provision that required any dispute to be resolved by arbitration, rather than litigation. Sarah sought to enforce this provision.
- The Supreme Court of Virginia upheld the Circuit Court’s ruling that the arbitration provision was nonbinding because a trust is not a contract. Further, the duties of a fiduciary impose a higher standard upon the parties as compared to the duties of contracting parties.



Over the last decade, trust laws have undergone a transformative evolution concerning the bifurcation of a trustee's duties. It is now commonplace for settlors and their advisors to design an estate plan that contemplates separate advisors for duties that were traditionally held by a single trustee. How does look in practice?

Investment Advisor Request

"I have a client that needs a trustee for assets that I manage . . . can you accept the role?"

Client Request

"I need a trust . . . but I want my current investment advisor to manage the assets."

Estate Planner Request

"I have a client who would like to place his closely-held business interest(s) in trust while retaining control over the same . . . will you accept an administrative trustee role?"

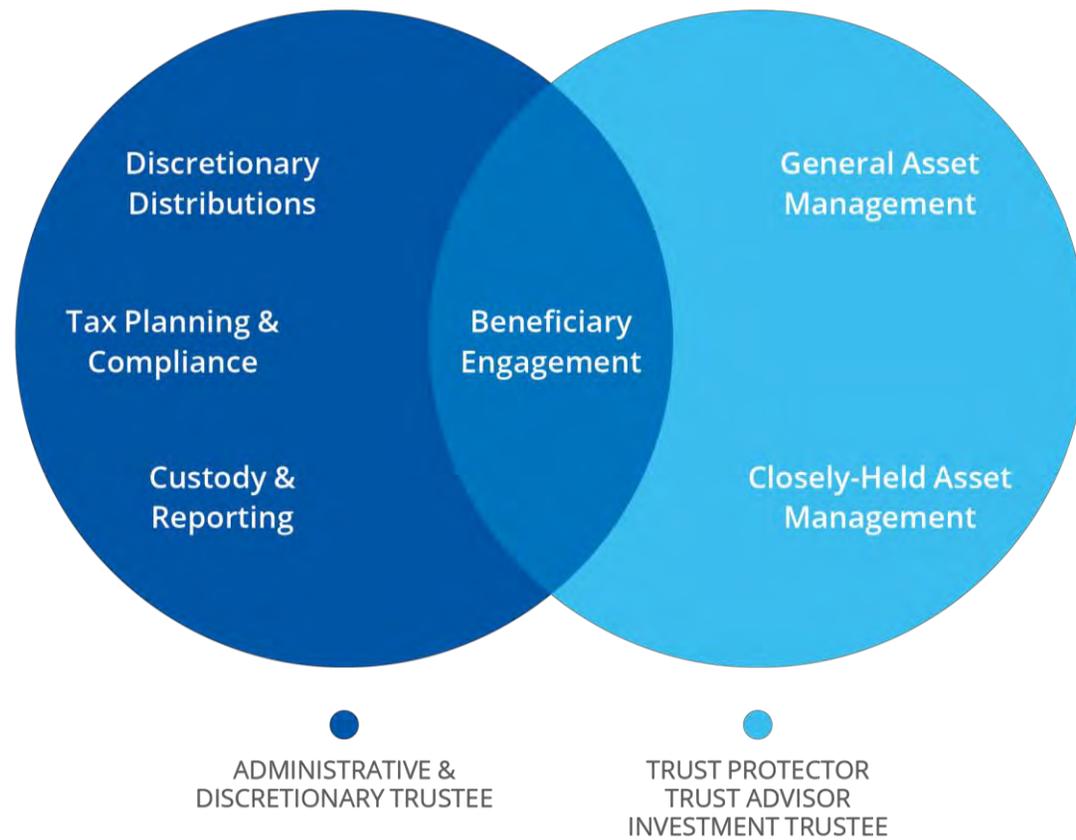
Delegated Trusts

Delegated trusts are generally existing trusts that do not contain bi-furcation language that allow for the separation of responsibilities. With a delegated trust, the trustee delegates certain responsibilities to a non-trustee. Most often, the trustee delegates the management of trust assets to an investment advisor.

Directed Trusts

Directed trusts are trusts in which certain of the powers traditionally vested exclusively in a trustee are instead divided among the trustee and other parties who may or may not be deemed to be fiduciaries, such as: (i) a trust protector with a broad range of directive powers; (ii) an investment advisor/trustee with exclusive power to direct investments; or (iii) a distribution advisor/trustee with the exclusive power to direct distributions.

DIRECTION > DELEGATION



▶ Primary Customer Relationship

▶ Custody of Assets:

- Access to Assets for Distributions
 - Accounting Software Considerations & Data Feed
 - Restrictions on Withdrawals and Transfers
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▶ Profitability:

- Fee Considerations (“reasonable under the circumstances . . .”)
 - Monitoring and Due Diligence of Delegatee
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▶ Delegation Agreement or Contract

▶ Internal Policies and Procedures



▶ “Excluded Fiduciary” (Eliminating Co-Fiduciary Liability)

- Any fiduciary (trustee, trust advisor, or trust protector) who is excluded from exercising a power under the governing document when the duty is reserved or granted to another person.
- As an excluded fiduciary with respect to powers granted to another person (non-excluded fiduciary), you have no duty to:
 - Review, inquire, investigate or monitor the actions of the non-excluded fiduciary;
 - Make recommendations, evaluations or consult with the non-excluded fiduciary; or
 - Communicate with or inform beneficiaries of differing opinions.
- An excluded fiduciary is not liable, either individually or as a fiduciary, for:
 - Loss resulting from following directions of a non-excluded fiduciary;
 - Any loss resulting from any action or inaction of a non-excluded fiduciary; or
 - Any loss caused by the failure non-excluded fiduciary to take an action proposed by the excluded fiduciary.

Current Environment

Starting in 2019, the fiduciary insurance marketplace contracted as loss ratios from the largest fiduciary insurers skyrocketed. ERISA-related cases increased the frequency and severity of class action litigation against fiduciaries. The largest insurers who have remained in the fiduciary insurance business have increased premiums and deductibles, expanded underwriting, and required fiduciaries to “layer” limits with multiple carriers. Fiduciaries firms that offer ESOP and defined contribution plan recordkeeping and investment services may continue to see further volatility and uncertainty.

Examine your fiduciary carriers and policies to determine if your insurer(s) has the bench depth and expertise to shepherd your organization through the changing world of fiduciary risk.

Current Environment

Cyber-enabled frauds in the U.S. decreased by 5% in 2022 according to the FBI's latest Internet Crime Report; however, total losses increased from \$6.9B in 2021 to \$10.3B in 2022. Phishing expeditions were the most highly reported while business email compromise averaged \$126k per loss! Litigation stemming from clients' loss of funds due to phishing and BEC will continue to be the largest threat to financial institutions. Examine your policies of insurance!

Case to Watch

Disberry v. Employee Relations Committee of the Colgate-Palmolive Company (Case No. 22-CV-5778 S.D.N.Y.). Plaintiff filed an ERISA complaint against Colgate, Alight Solutions (plan recordkeeper) and BNY Mellon (plan custodian) seeking reimbursement of 401(k) balance that had been fraudulently disbursed. The Court allowed the case to proceed against Colgate and Alight despite the parties taking all reasonable steps to safeguard plan assets.



▶ Ginder v. Bank of Am. Corp., (M.D. Fla. 2015)

- Plaintiff, an 81-year-old woman, deposited \$175k into accounts at BOA. A fraudster, identifying himself as an employee of BOA, instructed the Plaintiff to transfer large sums of money to unknown individuals over eight months. Plaintiff argued that BOA violated Florida's Adult Protective Services Act because BOA failed to report the exploitation of the Plaintiff.
- The Court denied BOA's Motion to Dismiss, stating: "It is reasonable to infer that BOA, acting as Plaintiff's financial institution, had superior attention, perception, knowledge, intelligence, and judgment in recognizing the risk of not notifying Plaintiff of potentially fraudulent activity or failing to act to prevent future fraudulent activity, especially in light of BOA's numerous Suspicious Activity Reports. Accordingly, the Court is able to reasonably infer under the circumstances of this case that BOA created in itself a duty of care to Plaintiff upon learning of her exploitation and breached that duty by failing to notify Plaintiff of its investigations and by failing to act to prevent future fraud despite its knowledge thereof."
- Florida law does provide immunity to reporters if they act in good faith. Thus, the bank in Ginder should have reported the activity because the statute provides for immunity. The statute also protects seniors when financial institutions are inactive or lethargic in their reporting. It is important that Florida provides excellent protections for seniors because it houses the greatest concentrated population of seniors in the United States.



▶ Elder Abuse: Practical Considerations

- Up to five million older Americans are abused each year, and the annual loss by financial exploitation abuse is estimated to be at least \$36.5 billion (2021 Council on Aging Report). Average theft by *family members* is 28% of victim's net worth, excluding home equity.
- "Deputizing Financial Institutions" . . . are you a mandatory reporter under your state's elder protection law(s)?
- Insist that your organization implement an "Elder Exploitation" policy and procedures.
- Implement a "Trusted Contact Authorization Form" that allows you to speak with a client's trusted contact in the event of suspected elder abuse or exploitation, questions concerning diminished capacity, or inquire about whether another person or entity has legal authority to act on the client's behalf.
- DOJ Resources: www.justice.gov/elderjustice/find-support-elder-abuse or National Adult Protective Services Association Resources: www.napsa-now.org/help-in-your-area/.
- Educate, train and re-train your relationship managers to spot financial exploitation abuse of the elderly.
- Halt suspicious disbursements!

- The Fiduciary Litigator, David Fowler Johnson – Winstead PC (Texas); www.fiduciarylitigator.com.
- McGuire Woods, “Recent Cases of Interest to Fiduciaries” (National); www.mcguirewoods.com/client-resources.
- Wills, Trusts & Estates Prof Blog, Gerry W. Beyer, Texas Tech Univ. School of Law (National); [Wills, Trusts & Estates Prof Blog \(typepad.com\)](http://Wills, Trusts & Estates Prof Blog (typepad.com)).
- Delaware Fiduciary Litigation Blog, Gordon, Fournaris & Mammarella, P.A. (Delaware); www.gfmlaw.com/delaware-fiduciary-litigation-blog.
- Goulston & Storrs, PC, “Probate and Fiduciary Litigation Newsletter” (National); www.goulstonstorrs.com/publications.
- Florida Probate + Trust Litigation Blog, Stokes, McMillan, Antunez, Matinez-Lejarza, P.A.; www.flprobatelitigation.com.

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Questions?

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