MITIGATING LIABILITY FOR FIDUCIARIES

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MITIGATING LIABILITY FOR FIDUCIARIES

FOCUS:

- AVOIDING AND DETERRING CLAIMS v. FIDUCIARIES
- LIMITING AND MINIMIZING RECOVERIES v. FIDUCIARIES
- MAXIMIZING THE PROBABILITY OF RESOLUTION IN FAVOR OF FIDUCIARY
- REDUCING THE PUBLICITY ASSOCIATED WITH CLAIMS v. FIDUCIARIES

APPROACHES:

- PROVISIONS IN TRUST, ASSET MANAGEMENT, AND SETTLEMENT AGREEMENTS
- PRACTICES IN SUPPORT OF THE PROVISIONS
- CHOICE OF PEOPLE WHO WILL DECIDE THE CLAIMS

INTRODUCTORY NOTE:

THE OBJECTIVE OF PRESENTATION IS TO RECOMMEND THE CONSIDERATION AND DEVELOPMENT OF CERTAIN TYPES OF PROVISIONS, PRACTICES, AND DISPUTE RESOLUTION PROCEDURES, WHICH WILL, NO DOUBT, INVOLVE DRAFTING.

FOR THE MOST PART, THE PRESENTATION DOES NOT PROVIDE SPECIFIC LANGUAGE, BECAUSE OF THE VARIATIONS IN JURISDICTIONS AND IN THE FORMATS AND STYLES OF EXISTING DOCUMENTS.

THE PRESENTATION PROVIDES RECOMMENDATIONS WITH RESPECT TO THE CONCEPTS WHICH SHOULD BE INCLUDED IN DRAFTING THE PROVISIONS AND FORMS.

THIS PRESENTATION ASSUMES THAT THE FIDUCIARY CAN EXERCISE SOME CONTROL WITH RESPECT TO REQUIRING THE INCLUSION OF CERTAIN PROVISIONS IN THE OPERATIVE DOCUMENTS.

IDENTIFY THE COMMON TYPES OF CLAIMS WHICH FIDUCIARIES FACE:

I. INVESTMENT RESULTS,

"YOU ARE NOT MAKING ENOUGH MONEY."
"YOU LOST MONEY."
"YOU ARE NOT DOING WHAT WE TALKED ABOUT."

II. DISTRIBUTION DECISIONS,

"YOU HAVE TO GIVE ME SOMETHING."
"YOU HAVE TO GIVE ME MORE, NOW, RIGHT NOW."

III. ACCESS TO INFORMATION,

"YOU HAVE TO GIVE ME THE INFORMATION; I MAY BE A BENEFICIARY SOME DAY."

IV. DECISIONS REGARDING COMPETENCE,

"***YOU HAVE TO LISTEN TO ME; I AM AS SHARP AS I EVER WAS, EVER WAS, EVER WAS....***"

V. ACCEPTANCE OF SPECIAL COURT APPOINTMENTS (*E.G.*, SPECIAL ADMINISTRATOR, GUARDIAN OF ESTATE),

"YOU ARE JUST GOING TO BE SERVING AS A NOMINAL PLAINTIFF."
"THERE REALLY WON'T BE MUCH FOR YOU TO DO AS GUARDIAN."

VI. FEES,

"***YOU ARE CHARGING TOO MUCH."***
"WE NEVER TALKED ABOUT THESE FEES."

IDENTIFY WHO RESOLVES THESE CLAIMS:

I. PROBATE AND CHANCERY COURTS, GENERALLY WITHOUT A JURY.

II. PROFESSIONAL MEDIATORS CAN SETTLE DISPUTES.

III. ARBITRATOR OR ARBITRATION PANELS CAN RESOLVE DISPUTES.

NOTE: THE PRESENTATION EXPLORES THE OPTIONS OF CONSIDERING:

- MANDATORY PRE-SUIT OR PRE-ARBITRATION MEDIATION[1]
- MANDATORY ARBITRATION OF INTERNAL TRUST DISPUTES[2]

I. MITIGATING RISKS WITH RESPECT TO INVESTMENT DECISIONS:

"YOU ARE NOT MAKING ENOUGH MONEY."

"YOU LOST MONEY."

"YOU ARE NOT DOING WHAT WE TALKED ABOUT."

A GREAT DEAL CAN BE DONE, BUT REQUIRES "PRACTICE(S)" IN SUPPORT OF EXCULPATORY PROVISIONS

A. EXCULPATORY PROVISION – "NO LIABILITY FOR GOOD FAITH BUSINESS JUDGMENTS REGARDING INVESTMENT DECISIONS."[3]

1. DOCUMENT THE INVESTMENT DECISIONS. THE EXCULPATORY PROVISION IS ONLY AS GOOD AS THE FIDUCIARY'S ABILITY TO PROVE, *I.E.*, DOCUMENT THE BUSINESS DECISION THAT WAS MADE.

a. MINUTES OF INVESTMENT COMMITTEE MEETINGS. THESE MINUTES SHOULD REFLECT THE DECISION-MAKING PROCESS, AS WELL AS THE DECISIONS.

b. WHERE APPROPRIATE, THERE SHOULD BE AN ANNUAL, SIGNED CONFIRMATION OF INVESTMENT OBJECTIVES AND ALLOCATION OF PORTFOLIO. CLEARLY SET FORTH THE DEFINITIONS OF THE "OBJECTIVES." THE DOCUMENT SHOULD RECITE THAT IT SUPERSEDES ALL ORAL COMMUNICATIONS AND ALL PRIOR AND SUBSEQUENT WRITTEN COMMUNICATIONS REGARDING INVESTMENT OBJECTIVES EXCEPT FOR SUBSEQUENT DOCUMENTS SIGNED BY THE FIDUCIARY.

c. DEVELOP, DISCLOSE AND DISCUSS THE FIDUCIARY'S POLICIES AND PROCEDURES REGARDING BALANCING AND REBALANCING THE PORTFOLIO. THE BALANCING POLICIES AND PROCEDURES SHOULD BE ACKNOWLEDGED, IF APPROPRIATE, BY A WRITING SIGNED BY BENEFICIARY.

B. LIMITATION OF LIABILITY PROVISIONS – "EXCEPT FOR FRAUD IN WHICH THE FIDUCIARY, ITSELF (AS OPPOSED TO ONE OF ITS EMPLOYEES OR AGENTS), PERSONALLY AND ECONOMICALLY BENEFITTED, THE DAMAGES FOR THE FAILURE TO EXERCISE GOOD FAITH BUSINESS JUDGMENT REGARDING INVESTMENT DECISIONS ARE LIMITED TO THE FEES RECEIVED BY THE FIDUCIARY DURING THE TIME WHEN THE FIDUCIARY FAILED TO EXERCISE THE APPROPRIATE JUDGMENT."

II. MITIGATING RISKS WITH RESPECT TO DISTRIBUTION DECISIONS:

"YOU HAVE TO GIVE ME SOMETHING."

"YOU HAVE TO GIVE ME MORE, NOW, RIGHT NOW."

NOT MUCH MORE CAN BE DONE THAN THE EXISTING PRACTICES, EXCEPT CHANGING THE PERSON WHO RESOLVES THE DISPUTE

A. EXCULPATORY PROVISION – "NO LIABILITY IF DECISION REGARDING WHETHER OR NOT TO MAKE A DISTRIBUTION AND, IF SO, IN WHAT AMOUNT IS MADE THE FIDUCIARY IN GOOD FAITH."[4]

B. *SEE*, DISCUSSION BELOW REGARDING MANDATORY MEDIATION AND ARBITRATION.

III. MITIGATING RISKS WITH RESPECT TO CLAIMS FOR ACCESS TO INFORMATION:

"YOU HAVE TO GIVE ME THE INFORMATION; I MAY BE A BENEFICIARY SOME DAY."

NO EXCUSE NOT TO ADDRESS THIS ISSUE IN THE CONTROLLING DOCUMENT.

A. EXPRESS PROVISION ADDRESSING ACCESS TO INFORMATION AND ACCOUNTINGS – "THE ONLY PERSONS ENTITLED TO ACCOUNTINGS ARE THE CURRENT INCOME BENEFICIARIES; REMAINDER AND CONTINGENT BENEFICIARIES ARE NOT ENTITLED TO ACCOUNTINGS OR OTHER INFORMATION REGARDING THE TRUST ASSETS, INVESTMENTS, AND/OR INVESTMENT DECISIONS."[5]

IV. MITIGATING RISK WITH RESPECT TO DECISIONS REGARDING COMPETENCE:

"YOU HAVE TO LISTEN TO ME; I AM AS SHARP AS I EVER WAS, EVER WAS, EVER WAS...."

A SOON TO BOOM "BOOMER" ISSUE, YOU GET OUT AHEAD OF IT.

A. EXCULPATORY PROVISION -- NO LIABILITY IF DECISION REGARDING "COMPETENCE" IS MADE IN "GOOD FAITH", BUT ALSO ADD THAT THE FIDUCIARY IS **NOT** REQUIRED TO CONSULT WITH A PHYSICIAN OR TO EVEN TO REQUEST THE SUBJECT'S CONSENT TO COMMUNICATE WITH THE SUBJECT'S PHYSICIAN, UNLESS THE DOCUMENT REQUIRES SUCH CONSULTATION. IF REQUIRED TO HAVE A DOCTOR'S OPINION OR REPORT, THEN INCLUDE AN EXCEPTION TO THE REQUIREMENT IF THE SUBJECT IS NOT COOPERATIVE.

B. PRACTICE POINTER -- IF COMPETENCE BECOMES AN ISSUE THEN MULTIPLE REPRESENTATIVES OF THE FIDUCIARY SHOULD COMMUNICATE AND MEET WITH THE SUBJECT TOGETHER AND DOCUMENT THESE INTERACTIONS; CONSIDER CAREFULLY THE SELECTION OF THE REPRESENTATIVES, INCLUDING INVOLVING INSIDE AND/OR OUTSIDE COUNSEL. THESE COMMUNICATIONS AND MEETINGS SHOULD BE DOCUMENTED WITH AN APPROPRIATE LEVEL OF SPECIFICITY AS TO WHAT OCCURRED; THE DOCUMENTATION SHOULD NOT NECESSARILY INCLUDE A REPRESENTATIVE'S PERSONAL OPINION WITH RESPECT TO THE SUBJECT'S COMPETENCE.

V. MITIGATING RISKS WITH RESPECT TO THE ACCEPTANCE OF COURT APPOINTED POSITIONS

"YOU ARE JUST GOING TO BE SERVING AS A NOMINAL PLAINTIFF."

"THERE REALLY WON'T BE MUCH FOR YOU TO DO AS GUARDIAN."

THIS IS A MATTER OF SOUND PRACTICES, NOT EXCULPATORY PROVISIONS.

A. SPECIAL ADMINISTRATOR, NOMINAL PLAINTIFF: SOMEONE IN THE FIDUCIARY'S LEGAL DEPARTMENT MUST BE ASSIGNED TO MONITOR THE LITIGATION. THAT PERSON MUST READ ALL OF THE CORE PLEADINGS FILED BY THE ATTORNEY WHO IS PROSECUTING THE SUIT AND REPRESENTING THE SPECIAL ADMINISTRATOR.

B. GUARDIAN OF THE ESTATE WHERE THE ONLY ASSET IS A LAWSUIT – IN ADDITION TO MONITORING THE LITIGATION AS DESCRIBED ABOVE, THE SUPERVISING REPRESENTATIVE MUST HAVE SUFFICIENT EXPERIENCE AND INFORMATION WITH WHICH TO MAKE DECISIONS CONCERNING SETTLEMENT.

VI. MITIGATING RISK WITH RESPECT TO CLAIMS INVOLVING THE FIDUCIARY'S FEES:

"YOU ARE CHARGING TOO MUCH."
"WE NEVER TALKED ABOUT THESE FEES."

YOU CAN DO MORE THAN IS BEING DONE.

A. PROTECTING STANDARD FEES -- PROVISION IN TRUST WHICH RECITES THAT THE STANDARD FEE SCHEDULE PUBLISHED BY THE FIDUCIARY AT THE TIME OF THE DOCUMENT (OR AT ANY TIME THEREAFTER) IS A "REASONABLE" FEE.

B. PROVIDE FOR THE PAYMENT OF FEES FOR "EXTRA-ORDINARY" SERVICES -- IN THE EVENT OF A DISPUTE THEN THE FIDUCIARY IS ENTITLED, IN ADDITION TO ITS STANDARD FEE AND THE REIMBURSEMENT OF ITS ATTORNEYS' FEES, AN "EXTRAORDINARY" OR "SUPPLEMENTAL" FEE BASED UPON THE TIME WHICH THE FIDUCIARY WAS REQUIRED TO DEVOTE TO THE DISPUTE (*I.E.* IN HOUSE COUNSEL, STAFF PARALEGALS).

C. PROVIDE FOR THE FEES WHEN THE FIDUCIARY IS PROVIDING FEWER SERVICES -- PROVIDE FOR THE DETERMINATION OF FEES WHERE THERE ARE "SPECIAL ASSETS" WHICH ARE BEING SUPERVISED OR MANAGED BY AN "ADVISOR" OTHER THAN THE FIDUCIARY; THIS SHOULD BE PART OF THE STANDARD FEE SCHEDULE AND REQUIRES A BUSINESS POLICY DECISION. AGAIN THE PROVISION SHOULD RECITE THAT THE FEES ARE "REASONABLE".

D. PROVIDE FOR THE FEES WHEN THE FIDUCIARY ENGAGES IN INVESTMENT MANAGEMENT FOR CONSULTANT – TRUSTEES ARE NOW PERMITTED TO DELEGATE INVESTMENT DECISIONS TO PROFESSIONAL INVESTMENT ADVISORS. YOU SHOULD MAKE IT CLEAR WHAT THE TRUSTEE'S FEES ARE IN SUCH A SITUATION. THE BENEFICIARY MAY CLAIM THAT HE IS BEING "DOUBLE BILLED" FOR INVESTMENT SERVICES.[6]

CONSIDER A NEW DISPUTE RESOLUTION PROCEDURE

INTRODUCTORY NOTE: NO MATTER WHAT PRECAUTIONS, PROVISIONS, OR PRACTICES ARE FOLLOWED, THERE WILL BE CLAIMS BROUGHT AGAINST THE FIDUCIARY. THE ISSUE WHICH THE FIDUCIARY SHOULD ADDRESS IS:

ARE THESE CLAIMS DECIDED "BETTER" –

IN PUBLIC BY A COURT, WITH OR WITHOUT A JURY
OR
IN PRIVATE, BY AN EXPERIENCED ARBITRATION PANEL AFTER THERE HAS BEEN A PROFESSIONAL MEDIATION CONDUCTED TO TRY TO RESOLVE THE DISPUTE

THE FIDUCIARY SHOULD CONSIDER REQUIRING INTERNAL TRUST ISSUES TO BE RESOLVED AFTER A (PRE-SUIT OR PRE-ARBITRATION) PROFESSIONAL MEDIATION AND, IF THE MEDIATION FAILS TO SETTLE THE ISSUES, THEN REQUIRE THE DISPUTE TO BE RESOLVED BY AN ARBITRATION PANEL, RATHER THAN A COURT.

"INTERNAL" TRUST ISSUES WOULD NOT INCLUDE THE RESOLUTION OF DISPUTES WHICH RAISE THE ISSUE OF THE VALIDITY OF THE TRUST DOCUMENT, ITSELF. (*E.G.*, A CLAIM TO INVALIDATE THE TRUST BASED UPON INCOMPETENCE AND/OR UNDUE INFLUENCE WOULD NOT BE SUBJECT TO MANDATORY MEDIATION/ ARBITRATION.)

THERE ARE AUTHORITIES WHO SUGGEST THAT SUCH DISPUTES COULD BE SUBJECT TO ARBITRATION AND THERE IS SIGNIFICANT SUPPORT FOR THIS POSITION IN THE COMMON LAW WHICH HAS DEVELOPED REGARDING ARBITRATION IN GENERAL.

NEVERTHELESS, THE PRESENTERS BELIEVE THAT COURTS WILL BE PARTICULARLY AND STRENUOUSLY OPPOSED TO RELINQUISHING THEIR JURISDICTION OVER THESE CLAIMS.

MEDIATION DEFINED; PROS AND CONS

"MEDIATION" IS A SETTLEMENT CONFERENCE BETWEEN THE PARTIES WHICH IS FACILITATED BY A PROFESSIONAL MEDIATOR WHO DOES NOT DECIDE THE DISPUTE. THE DISCUSSIONS AT THE MEDIATION REMAIN ABSOLUTELY PRIVATE AND ARE NOT SHARED WITH THE COURT OR THE ARBITRATOR(S) IF THE DISPUTE IS NOT SETTLED AT THE MEDIATION.

PROS - ADVANTAGES:

- CLAIMANT HAS TO INCUR SIGNIFICANT EXPENSE FOR MEDIATOR.
- CLAIMANT HAS TO DEAL WITH SIGNIFICANT DELAY.
- CLAIMANT SHOULD BE AWARE THAT ADDITIONAL FEES ARE BEING INCURRED BY THE FIDUCIARY AND PAID BY THE TRUST.
- PARTIES WILL HAVE SOME ENHANCED, EARLY ACCESS TO THE OTHER PARTY'S INFORMATION.
- PARTIES MUST RESEARCH, THINK THROUGH, AND ARTICULATE THEIR RESPECTIVE POSITIONS.
- PARTIES HAVE AN OPPORTUNITY TO "COOL DOWN."
- MEDIATORS REALLY CAN FACILITATE RESOLUTIONS.
- IN GENERAL, EARLY MEDIATIONS WORK TO THE ADVANTAGE OF THE DEFENDANT/RESPONDENT IN GAINING INFORMATION, INCLUDING CONTACT WITH CLAIMANT'S ATTORNEY.
- EVEN IF THE MEDIATION IS UNSUCCESSFUL, THE PARTIES BECOME FAMILIAR WITH THE PROCESS AND CAN VOLUNTARILY RETURN TO THE MEDIATOR FOR ASSISTANCE IN SETTLING THE DISPUTE.

CONS - DISADVANTAGES:

- FIDUCIARY MAY BE REQUIRED TO RELEASE INFORMATION, SOONER RATHER THAN LATER.

- THE MEDIATION COMES TOO EARLY IN THE PROCESS TO HAVE A HIGH PROBABILITY OF SUCCESS.

- FIDUCIARY WILL HAVE TO REVEAL SOME OF ITS DEFENSE STRATEGY WHICH MAY ENABLE CLAIMANT TO DRAFT A BETTER CLAIM.

HOW TO REQUIRE PRE-SUIT OR PRE-ARBITRATION MEDIATION */

PROVISION IN TRUST OR AGREEMENT –

> "THE TRUSTEE AND SETTLOR AGREE THAT ALL DISPUTES, DISAGREEMENTS, CLAIMS AND/OR ISSUES CONCERNING, ARISING FROM, OR RELATING TO THE TRUST, INCLUDING BUT NOT LIMITED TO ANY INTERPRETATION OF THE TRUST, THE ADMINISTRATION OF THE TRUST, THE CONDUCT OF THE TRUSTEE, THE TRUSTEE'S FEES ,THE TRUST ASSETS [INSERT OTHER GENERIC CLAIMS] SHALL BE SUBMITTED TO NON-BINDING MEDIATION BEFORE A MUTUALLY ACCEPTABLE, PROFESSIONALLY TRAINED MEDIATOR WITH AT LEAST TEN (10) YEARS EXPERIENCE WITH RESPECT TO THE ADMINISTRATION AND OPERATION OF TRUSTS IN THE JURISDICTION WHOSE LAW GOVERNS THE TRUST.
>
> IF THE PARTIES CANNOT AGREE ON THE APPOINTMENT OF THE MEDIATOR, THEN THE SELECTION SHALL BE SUBMITTED TO A COURT HAVING JURISDICTION OVER THE TRUST.
>
> THE COST OF THE MEDIATION SHALL BE SHARED EQUALLY BY THE PARTIES TO THE DISPUTE.
>
> THIS PROVISION IS INTENDED TO BIND THE CURRENT BENEFICIARIES AND CONTINGENT BENEFICIARIES OF THIS TRUST WHOSE RIGHTS AND ACCEPTANCE OF BENEFITS UNDER THIS TRUST ARE CONDITIONED UPON THEIR ACCEPTANCE OF THE TERMS OF THIS TRUST, INCLUDING THE PROVISIONS REGARDING DISPUTE RESOLUTION."

*/ REMEMBER, YOU CAN REQUIRE THAT A MEDIATION BE CONDUCTED WITHOUT ADOPTING THE MANDATORY ARBITRATION DISCUSSED BELOW. FOR EXAMPLE, YOU CAN REQUIRE A CLAIMANT TO PARTICIPATE IN A MEDIATION AND ALLOW THE CLAIMANT TO PROCEED WITH A LAWSUIT IF THE MEDIATION IS UNSUCCESSFUL.

ARBITRATION DEFINED; PROS AND CONS:

"ARBITRATION" IS A HEARING CONDUCTED BY ONE OR MORE ARBITRATORS DURING WHICH THE PARTIES PRESENT EVIDENCE REGARDING THEIR CLAIMS AND DEFENSES. THE DECISION OF THE ARBITRATOR(S) IS FINAL AND NOT SUBJECT TO REVIEW OR APPEAL, EXCEPT IN EXTREMELY RARE INSTANCES. THE DECISION OF THE ARBITRATOR WILL BE ENFORCED BY COURTS.

PROS - ADVANTAGES:

- PRIVATE, NOT PUBLIC FORUM.
- AVOID JURY TRIAL WHERE CLAIM WOULD BE SUBMITTED TO JURY.
- DISCOVERY IN ARBITRATION USUALLY NOT AS EXPANSIVE.
- ARBITRATION IS USUALLY FASTER THAN COURT.
- THERE IS NO APPEAL OF THE ARBITRATORS' DECISION. (*SEE* BELOW, DISADVANTAGES.)
- ENFORCEMENT OF MANDATORY ARBITRATION UNCERTAIN, MAY FORCE MORE EXPENSE AND DELAY IF CLAIMANT WANTS TO CONTEST ARBITRABILITY. (*SEE* BELOW, DISADVANTAGES.)
- CLAIMANT WILL INCUR SUBSTANTIAL INITIAL EXPENSE TO FILE AND PROCEED WITH ARBITRATION.
- ARBITRATORS CAN BE REQUIRED TO HAVE MINIMUM EXPERTISE, *E.G.*, SO MANY YEARS EXPERIENCE. IN TRUSTS AND ESTATES.
- POOL OF QUALIFIED ARBITRATORS MAY BE MORE FAVORABLY DISPOSED TO FIDUCIARIES.
- ARBITRATION CAN BE BEFORE A THREE ARBITRATOR PANEL, *I.E.*, THREE QUALIFIED ARBITRATORS MAY BE BETTER THAN ONE JUDGE.

CONS - DISADVANTAGES:

- ENFORCEMENT OF MANDATORY ARBITRATION IN TRUSTS NOT WELL-SETTLED.

- MAY PROVOKE HOSTILE REACTION FROM COURTS.

- WILL NOT AVOID COURT IN ALL CASES; SOME DISPUTES WILL REQUIRE COURT ASSISTANCE, *E.G.*, APPOINT GUARDIANS, ETC.

- NO APPEAL TO AN APPELLATE COURT; ARBITRATORS MAKE MISTAKES. THE FIDUCIARY CAN BE STUCK WITH A BAD LEGAL OR FACTUAL DECISION.

- DECISION FAVORABLE TO FIDUCIARY IS NOT PUBLIC AND NO PRECEDENTIAL VALUE.

HOW TO REQUIRE MANDATORY ARBITRATION OF INTERNAL TRUSTS DISPUTES[7]

INTRODUCTORY NOTE: THE AMERICAN ARBITRATION ASSOCIATION ("AAA") AND THE INTERNATIONAL CHAMBER OF COMMERCE ("ICC") HAVE BOTH DEVELOPED PROVISIONS WHICH WOULD REQUIRE MANDATORY ARBITRATION OF TRUST DISPUTES. NEITHER OF THESE PROVISIONS HAS BEEN REVIEWED BY A COURT. NEITHER OF THESE PROVISIONS APPEARS TO ADDRESS ALL OF THE ISSUES RAISED BY THE MANDATORY ARBITRATION REQUIREMENT.[8]

A COMBINATION OF THE TWO COMPETING DRAFTS WOULD SEEM TO BE AN IMPROVEMENT. BELOW IS AN EXAMPLE OF SUCH A COMBINATION/COMPROMISE:

> "IN ORDER TO SAVE THE COST OF COURT PROCEEDINGS AND TO PROMOTE THE PROMPT AND FINAL RESOLUTION OF ANY DISPUTE REGARDING MATTERS RELATING TO MY TRUST, INCLUDING, BUT NOT LIMITED TO, CLAIMS, DISPUTES, DISAGREEMENTS ("CLAIMS") REGARDING THE ADMINISTRATION OF THE TRUST, THE INTERPRETATION OF THE TRUST, THE ASSETS AND INVESTMENTS OF THE TRUST, I DIRECT THAT ANY SUCH DISPUTES BE SETTLED BY ARBITRATION. THE ARBITRATION SHALL BE CONDUCTED BY THREE ARBITRATORS, EACH OF WHOM SHALL BE A PRACTICING LAWYER LICENSED TO PRACTICE LAW IN THE STATE WHICH NOW GOVERNS MY TRUST AND WHOSE PRACTICE HAS BEEN DEVOTED PRIMARILY TO TRUSTS, WILLS, AND ESTATES FOR AT LEAST TEN YEARS.
>
> THE ARBITRATION SHALL BE ADMINISTERED IN ACCORDANCE WITH THE ARBITRATION RULES FOR WILLS AND TRUSTS PROMULGATED BY THE AMERICAN ARBITRATION ASSOCIATION, BUT THE ARBITRATION DOES NOT HAVE TO BE ADMINISTERED BY THE AMERICAN ARBITRATION ASSOCIATION.
>
> THE ARBITRATORS SHALL APPLY THE SUBSTANTIVE LAW OF THE STATE WHOSE LAW GOVERNS MY TRUST.

THE ARBITRATORS' DECISION SHALL NOT BE APPEALABLE TO ANY COURT, AND SHALL BE FINAL AND BINDING ON ANY AND ALL PERSONS WHO HAVE OR MAY HAVE AN INTEREST IN MY TRUST, INCLUDING UNBORN OR INCAPACITATED PERSONS, SUCH AS MINORS OR DISABLED PERSONS.

A JUDGMENT ON THE ARBITRATORS' AWARD MAY BE ENTERED IN ANY COURT HAVING JURISDICTION.

THE SETTLOR AGREES TO THE PROVISIONS OF THIS ARBITRATION CLAUSE, AND THE TRUSTEE AND ITS SUCCESSORS, BY ACCEPTING TO ACT UNDER THIS TRUST, ALSO AGREE OR SHALL BE DEEMED TO HAVE AGREED TO THE PROVISION OF THIS ARBITRATION CLAUSE.

AS A CONDITION FOR CLAIMING, BEING ENTITLED TO, OR RECEIVING ANY BENEFIT, INTEREST OR RIGHT UNDER THE TRUST, ANY PERSON SHALL BE BOUND BY THE PROVISIONS OF THIS ARBITRATION CLAUSE AND SHALL BE DEEMED TO HAVE AGREED TO SETTLE ALL DISPUTES ARISING OUT OR IN CONNECTION WITH THE TRUST IN ACCORDANCE WITH THIS ARBITRATION CLAUSE.

NOTWITHSTANDING THE FOREGOING, ANY CLAIM CHALLENGING THE VALIDITY OR ENFORCEABILITY OF THE TRUST, ITSELF, SHALL NOT BE RESOLVED BY ARBITRATION, BUT SHALL BE SUBMITTED TO A COURT FOR RESOLUTION."

RECOMMENDED READING:

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[1] Blattmachr, "Reducing Estate and Trust Litigation to Disclosure, *In Terrorem* Clauses, Mediation and Arbitration," 9 Cardozo J. Conflict Resolution 237 (2008)

[2] S. I. Strong, "Mandatory Arbitration of Internal Trust Disputes: Improving Arbitrability and Enforceability Through Proper Procedural Choices," University of Missouri Law School, 28 Arbitration International (2012); S.I. Strong, "Empowering Settlors: Proper Language Can Increase The Enforceability Of A Mandatory Arbitration Provision In A Trust," 47 Real Prop. Pr. & Est. L. J. 275 (2012); Erin Katzin, "Arbitration Clauses in Wills and Trusts: Defining the Parameters Of Mandatory Arbitration of Wills and Trusts," 24 Quinnipiac Prob. L. J. (2011); Lawrence Cohen & Marcus Staff, "The Arbitration of Trust Disputes," 7 J. International Trust and Corporate Planning, 203 (1999); Blaine Covington Jamin, Comment, "The Validity Of Arbitration Provisions in Trust Instruments," 55 Cal. L. Rev. 521 (1967); Arnold M. Zack, "Arbitration: Step-Child of Wills and Estates," 11 Arb. J. 179 (1956); Michael Hwang, "Arbitration for Trust Disputes," Guide To World's Leading Experts in Commercial Arbitration 83 (2009); Gail E. Mountner & Heidi L. G. Orr, "A Brave New World" Non-Judicial Dispute Resolution Procedures Under the Uniform Trust Code and Washington's and Idaho's Trusts and Estates Dispute Resolution Acts," 35 Am. C. Tr. & Est. 159 (2009); Stephen Wills Murphy, "Enforceable Arbitration Clauses in Wills and Trusts: A Critique," 26 Ohio St. J. on Disp. Resol. 627 (2011); *see also*, Uniform Trust Code; David Horton, "The Federal Arbitration Act and Testamentary Instruments," 90 N.D. L. Rev. 1027 (2012); Michael Bruyere, Meghan Marino, "Mandatory Arbitration Provisions: A Powerful Tool to Prevent Contentious and Costly Trust Litigation, But Are They Enforceable?" 42 Real. Prop. Prob. & Tr. J. 351 (2007); *Rachal v. Reitz*, 403 S.W. 3d 840 (Sup. Ct. Tex. 2013).

NOTE: Professor S.I. Strong is clearly one of the leading authorities on this issue. Much of the organization and content of the mediation/arbitration section of this presentation reflects her exceptional work in the area.

[3] Charles W. Pieterse & Charles E. Coates III, "Exculpatory Clauses May Give Trustees Extra Protection from Liability," 37 Estate Planning 26 (2010); Kevin J. Parker, "Statute of Limitations, Laches, Self-Executing Accounting Release Provisions, and Exculpatory Clauses," 23 Prob. & Prop. 53 (2009); David Horton, "Unconscionability in the Law of Trusts," 84 Notre Dame L. Rev. 1675 (2009); Richard L. Lyon, Kevin M. Murphy, "Trust Wars – Clashes Between Trustees and Beneficiaries," Md. B. J., September/October, at 14; Louise Lark Hill, "Fiduciary Duties in Exculpatory Clauses: Clash of the Titans or Cozy Bedfellows?" 45 U. Mich. J. L. Reform 829 (2012); Melanie B. Leslie, "Trusting Trustees: Fiduciary Duties and the Limits of Default Rules," Georgetown L. J. (2005); Restatement (Second) of Trusts § 222 (1959); Melanie B. Leslie, "In Defense of No Further Inquiry Rule: A Response to Professor Langbein," 47 Wm. & Mary L. Rev. 541 (2005); *see also*, FDIC, "Trust Examination Manual," Circulation and Examination, Appendix C, Trust Examination Manual – Fiduciary Law; *see also*, Uniform Prudent Investor Act; Warning: You should be aware that certain states which have enacted the Prudent Investor Act may preclude a good faith business judgment standard and require the trustee to adhere to a "prudent investor" standard.

[4] Carol Warnick, Kelly Dickson Cooper, Rebecca Klock Schroer, "Discretionary Distribution Standards: Full Speed Ahead," Colo. Law (March 2010 at 53).

[5] Turney P. Berry, "Longmeyer Exposes (Or Creates) Uncertainty About the Duty to Inform Remainder Beneficiaries of a Revocable Trust," 35 ACTEC J. 125 (2009).

[6] Uniform Prudent Investor Act § 9.

[7] Florida, Arizona, and Idaho have adopted statutes which expressly authorize mandatory arbitration; F.S.A. § 731.401; A.R.S. § 14-10205; I.C. § 15-8-101.

[8] *See* provisions in the analysis at Strong, "Empowering Settlors," 47 Real Prop. Pr. & Est. L. J., at 64 and 67, respectively.