

TRUST FIDUCIARIES AND FIDUCIARY LIABILITY

Tips from the Trenches and Traps for the Unwary

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Four Traps for Trustees:

1. Failing to read / understand the trust agreement.
2. Failing to read / abide by your trust department policies.
3. Failing to sufficiently document all communications with beneficiaries & grantors.
4. Failing to appreciate the Five D's of trust administration:
 - A. Diversification
 - B. Delegation
 - C. Discrimination among beneficiaries
 - D. Dealing with lay co-trustees
 - E. Decisions on intake / acceptance

Trustees

- Undisputable that trustees have a fiduciary duty in managing a trust.
 - Zastrow v. Journal Commc'ns, Inc., 2006 WI 72, ¶ 22.
- Wisconsin's adoption of Uniform Fiduciaries Act defines "fiduciary" to include "a trustee under any trust."
 - Wis. Stats. § 112.01(1)(b).

Fiduciary Duties of Trustees

- Trustees must employ “diligence, prudence and absolute fidelity” in managing trusts.
 - In Matter of Trust of Sensenbrenner, 76 Wis. 2d 625, 635 (1977).
- Commentators – as many as 17 distinct fiduciary duties of trustees.
 - See 2A Austin Wakeman Scott & William Franklin Fratcher, Scott on Trusts §§ 169 – 186 (4th ed. 1987)

The trustee has a duty:

- To administer the trust (§ 169)
- Of Loyalty (§ 170)
- Not to delegate (§ 171)
- To keep and render accounts (§ 172)
- To furnish information (§ 173)
- To exercise care & skill (§ 174)
- To take and keep control (§ 175)
- To preserve trust property (§ 176)
- To enforce claims and defend actions (§§ 177 & 178)
- To keep trust property separate (§ 179)
- With respect to bank accounts (§ 180)
- To make trust property productive (§ 181)
- To pay income to beneficiaries (§ 182)
- To deal impartially with beneficiaries (§ 183)
- With respect to co-trustees (§ 184)
- To persons holding power of control (§ 185)

* Restatement (Second) of Trusts

Duty to administer

- Trust must be administered during term as trustee. Restatement (Second) of Trusts § 169.
- Resignation only upon court approval, per terms of trust, or unanimous consent of beneficiaries. Id. § 106.
- Trust instrument defines duties, and trustee's duty is to comply with terms. Hatleberg v. Norwest Bank Wis., 2005 WI 109, ¶ 19.
- No general duty to review trust document and draw legal conclusions as to effectiveness. Id. ¶ 25.

Duty of Loyalty

- Trustee must make full disclosure of material facts to a beneficiary.
- Trustee cannot personally profit from his role as a trustee.
- These violations are deemed to be intentional breaches.
 - Zastrow, 2006 WI 72, ¶ 3
- Applies to all fiduciaries.
 - Restatement (Second) of Trusts § 170, cmt. a.

Violative transactions under the duty of loyalty

- Sale to fiduciary individually, or a corporate department.
- Fiduciary has personal interest in the purchase.
- Use of trust property for own purposes.
- Investment by corporate trustee in its own shares.
- Bonuses, commissions from third parties for acts done in trust administration.
- Entering into competition with interest of beneficiary.
- Disclosing information acquired as trustee where disclosure would be detrimental to interests of the beneficiary.

Additional Considerations (aka defenses)

- Authorization
- Exculpation
- Consent
- Ratification
- Statute of limitations
 - 2 years under Wisconsin law

The Economic Crisis and the Fiduciary Principle

Who said:

“I venture to assert that when the history of the financial era which has just drawn to a close comes to be written, most of its mistakes and its major faults will be ascribed to the failure to observe the fiduciary principle, the precept as old as holy writ, that ‘a man cannot serve two masters’... [T]he development of the corporate structure so as to vest in small groups control over the resources of great numbers of small and uninformed investors, make imperative a fresh and active devotion to that principle if the modern world of business is to perform its proper function. Yet those who serve nominally as trustees, but relieved, by clever legal devices, from the obligation to protect those whose interests they purport to represent ... [and] consider only last, if at all, the interests of those whose funds they command, suggest how far we ignored the necessary implications of that principle.”