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No Good Deed Goes Unpunished Especially When Acceptance Means a Target on One's Back: Defending Breach of Fiduciary Duty Claims in the Context of Trust and Estate Administration

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Family members or trusted family consultants are often honored when they learn they have been nominated to act as a trustee. They take the appointment seriously, but may not have a background in trust administration. Perhaps they perused or read the pertinent instrument in its entirety when they accepted the appointment. They might interpret oft included boilerplate language as instilling them with broad (if not unlimited) powers. The enumeration of powers might lead non-professional fiduciaries to the mistaken belief that they can handle the assets as they do their own — or in the same fashion that the settlor did. Since they view themselves as “reasonable” they may

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believe that they need only to exercise their discretion as they deem appropriate. They may even believe they know what the settlor wanted and adapt their decision making accordingly. For purposes of these materials, we will generally assume that the trustee acted in good faith. Unfortunately, it is not uncommon for non-professional trustees to be unaware of statutory and common law that may supersede, supplement or otherwise override provisions contained within the trust instrument.

Further complicating this area may be that the settlor was the glue that held the family together. When the settlor is no longer able to manage his own affairs, no longer has capacity, has otherwise become vulnerable or has died, familial rivalries may find a new forum in which to play out. Litigation in this arena often is more than just about the money. It's often emotionally charged and, even if carefully managed, such litigation can result in irreparable family rifts.

Many state statutes governing trust administration provide default rules some of which may (and others of which may not) be overridden by specific language within the instrument. Because these materials are only intended to provide a broad overview, a state-by-state analysis of these issues is beyond its scope. Therefore, when litigating these issues (or advising a fiduciary regarding administration) be sure to specifically review the terms of the trust and juxtapose those terms with the operative statutes in the situs of administration. Often courts interpret trust administrative provisions pertaining to accountings or breach of fiduciary duty claims as being governed by the procedural rules of the administration's situs. In a mobile society, where fiduciaries move and/or change, the rules that apply to administrative issues may change with any change in situs (as opposed to the rules of interpretation or substantive laws which may remain governed by the governing law, if any, referenced in the trust instrument itself).

It is also important to remember that while many states have adopted some form of the Uniform Trust

Code (UTC),¹ some contain nuances that differ from the provisions of the UTC cited in these materials.² Do not assume that because the state in question is considered to be a UTC state that the provisions specified in these materials have been adopted verbatim. It is recommended that you always refer to the specific provisions of the applicable state's statutes.

Petitions to compel or object to an accounting, claims of breach of fiduciary duty and those seeking the remedies of surcharge and/or removal, often go hand in hand. These materials will attempt to provide a broad overview of some of the general principals relating to each of these claims from the perspective of representing and defending the fiduciary.

AFFIRMATIVE DEFENSES

When representing a fiduciary in a breach of trust or accounting proceeding, it is important to be cognizant of affirmative defenses which generally must be raised in the first responsive pleading filed. Failure to do so may result in waiver.³ Examples of affirmative defenses to breach of trust and accounting claims may include, but not be limited to:

- Consent;
- Release;
- Ratification;
- Waiver;
- Statute of Limitations;
- Res Judicata;
- Collateral Estoppel;
- Judicial Estoppel;
- Equitable Estoppel;
- Laches;
- Lack of Standing; and
- Election of Remedies.

Consent, Release, Ratification and Waiver

UTC §1009 provides that:

A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach, unless:

- (1) the consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee; or
- (2) at the time of consent, release, or ratification, the beneficiary did not know of the beneficiary's rights⁴ or of the material facts relating to the breach.⁵

¹ References to the UTC for purposes of this paper are to the Uniform Trust Code as revised or amended in 2010, ©2000, 2010, National Conference of Commissioners on Uniform State Laws. As of June 2017, it appears only 17 states had not adopted some form of the UTC. For more up-to-date reference on states which have and have not adopted some version of the UTC. See [http://uniformlaws.org/Act.aspx?title=Trust Code](http://uniformlaws.org/Act.aspx?title=Trust%20Code). However, the map does not reflect whether those 17 states have statutes which are nonetheless analogous to provisions of the UTC cited in these materials.

² For example, The Reporter's (introductory) comments to Michigan's Trust Code (MTC) specifically cautions that:

[b]ecause the MTC modifies many of the UTC provisions to reflect long-standing Michigan law and practice, practitioners and judges should be cautious in their reliance on either the UTC reporter's comments, the decisions of other jurisdictions with UTC based trust codes, and the Restatement (Third) of Trusts, which was the source of the UTC. In looking to these other sources, care and attention is warranted to make certain that the provisions are truly comparable.

³ Mich. Ct. R. 2.111(F)(3) provides that:

Affirmative defenses must be stated in a party's responsive pleading, either as originally filed or as amended in accordance with Mich. Ct. R. 2.118. Under a separate and distinct heading, a party must state the facts constituting

(a) an affirmative defense, such as contributory negligence; the existence of an agreement to arbitrate; assumption of risk; payment; release; satisfaction; discharge, license; fraud; duress; estoppel; statute of frauds; statute of limitations; immunity granted by law; want or failure of consideration; or that an instrument or transaction is void, voidable, or cannot be recovered on by reason of statute or nondelivery;

(b) a defense that by reason of other affirmative matter seeks to avoid the legal effect of or defeat the claim of the opposing party, in whole or in part;

(c) a ground or defense that, if not raised in the pleading, would be likely to take the adverse party by surprise.

In addition, Mich. Ct. R. 2.112(A)(2)(b) and 2.112(A)(2)(c) require that a party wishing to raise an issue such as standing (such as the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity) must be done by specific allegation, including supporting facts peculiarly within the pleader's knowledge.

⁴ The lack of "knowledge" of rights, has not been uniformly adopted by all UTC states. Michigan, by way of example, only requires a lack of knowledge of "facts" as opposed to lack of knowledge of "rights." See Mich. Comp. Law §700.7009(b).

⁵ UTC §1009.

Consent, release or ratification may occur before or after the approved conduct.⁶ Such approval may be granted by (i) the settlor of a revocable trust, (ii) a holder of a presently exercisable power of withdrawal, or (iii) the beneficiary or a person authorized to represent the beneficiary.⁷

As a consequence, approval may not only absolve the fiduciary from potential liability but, when properly plead, result in a claim being subjected to summary disposition by the court. It is for this reason that while a written request outlining the transaction and written consent need not be obtained, utilizing and obtaining such writings remains advisable.⁸

It may even be possible for waiver to occur in the settlement of other issues. In *In re Matter of Mercer*,⁹ the New York appellate court held that a release contained in a settlement of other disputes which included: (i) any and all claims and disputes raised or which could have been raised by any party to the date of the settlement “including claims relating to the administration of [the decedent’s] probate estate,”¹⁰ and (ii) obligations “including but not limited to any claims and causes of action . . . that [the parties] have asserted against each other or claims they could have asserted . . .”¹¹ operated to bar subsequent objections to an account filed pertaining to transactions which occurred prior to the settlement date.

It is not unusual for beneficiaries to indicate that they don’t want to incur the expense of formalized reports. They may even request that a trustee not incur such expense or otherwise provide reports because they believe it will effectuate cost savings. When dysfunction in the family exists, this is often a formula for the opposite to ultimately occur. Trust litigation tends to be costly and often results in a greater diminution of the trust’s assets than had the formalities of

administration and providing reports been observed from the outset. Besides the financial costs, this type of litigation tends to wreak havoc on familial relationships. Consequently, when shortcuts will be taken it may be advisable to annually obtain a written Waiver and Consent from parties who stand in a position to not only bind themselves but also future beneficiaries and others claiming by or through them. If formal reports are not being provided, you might wish the Waiver and Consent to include language which acknowledges that the party was provided with the opportunity to question and review any and all actions engaged in by the fiduciary as well as specifically reflect that the party approves and consents to the actions of the fiduciary during the period in question and releases the fiduciary with regard to actions taken during that time frame. A waiver and release need not occur in a formalized document — emails (or other written communications) to this effect, may be sufficient.

Even though consent, waiver and release, in the context of trust administration, generally requires an affirmative act, silence may give rise to other defenses, such as laches or estoppel.¹²

A more formalized mechanism for obtaining a “release” can be attained by having the fiduciary avail itself of limited court supervision of the estate or trust for purposes of obtaining court approval of a transaction or accounting. In many jurisdictions this may occur vis-à-vis the filing of a petition for instructions before a transaction occurs or for approval of an account. When dealing with contentious beneficiaries the pro-active use of this mechanism can shorten the period available for a challenge or claim to be raised, since allowance of an account is generally final and conclusive as to all issues raised and/or reflected in the account.¹³ Once a final order is obtained the doctrines of *res judicata* and collateral estoppel will generally apply.¹⁴

UTC §813 envisions the possibility that a beneficiary may waive the right to (i) receive a trustee’s report or (ii) other information which the trustee has an

⁶ See UTC §1009 Comment and §216–§218 of Restatement (Second) of Trusts (1959). It may even be possible for the release to be verbal. In *In re Estate of Childs*, No. 04-15-00623-CV, 2016 BL 200022 (Tex. Ct. App. June 22, 2016), the Texas appellate court found it was possible to have a verbal release where the written agreement resolving a dispute did not have an integration clause.

⁷ See UTC §1009 Comment. See also UTC §603 and the general comments to UTC Article 3.

⁸ In *Adams v. Regions Bank*, No. 3:14cv615, 2016 BL 2497 (S.D. Miss. Jan. 6, 2016), the beneficiary’s execution of a letter approving retention of a concentration in the stock of the trustee institution barred a subsequent action brought on the premise of breach of fiduciary duty for holding and executing upon such stock. In *In re Estate of Lottie Dixon*, 154 A.3d 858 (Pa. Super. Ct. 2016), the court held that the settlor’s telephonic requests for distributions represented sufficient consent to bind subsequent beneficiaries.

⁹ 141 A.D. 3d 594 (N.Y. App. Div. 2016).

¹⁰ *Id.*

¹¹ *Id.*

¹² See Reporter’s Comment to Mich. Comp. Law §700.7909 (2017), which statute is based upon UTC §1009 and Restatement (Second) of Trusts §216–§218.

¹³ See *Thaw v. Detroit Tr. Co.*, 307 Mich. 6 (1943).

¹⁴ See *Carter v. Fifth Third Bank*, No. 271244, 2008 BL 355629 (Mich. Ct. App. June 17, 2008), which held, in pertinent part, that:

An order of a probate court is final, and is *res judicata* with respect to its subject matter. . . . and an “allowance of an account is an adjudication of each item of it.” . . . Thus, in the absence of fraud or concealment, an order by the probate court approving the account of a fiduciary is final and conclusive as between the parties as to all matters that were resolved, or which could have been resolved, by that order. [Internal citations omitted.]

obligation to provide to them in order to keep them reasonably informed about the administration of the trust. However, the implications of such a waiver may vary from state to state.¹⁵

Statute of Limitations

UTC §1005 provides that:

- (a) A beneficiary may not commence a proceeding against a trustee for breach of trust more than one year after the date the 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.**
- (b) A report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or representative knows of the potential claim **or should have inquired into its existence.**
- (c) If subsection (a) does not apply, a judicial proceeding by a beneficiary against a trustee for breach of trust must be commenced within five years after the first to occur of:
 - (1) the removal, resignation, or death¹⁶ of the trustee;
 - (2) the termination of the beneficiary's interest in the trust; or
 - (3) the termination of the trust.

(Emphasis added).

Amending or supplementing a report will not necessarily re-start the statute of limitations, especially if the initial report adequately disclosed the existence of the potential claim and informed the beneficiary of the time allowed for commencing a proceeding (where

¹⁵ UTC §813 Comment indicates that “a waiver of a trustee’s report or other information does not relieve the trustee from accountability and potential liability for matters that the report or other information would have disclosed.” But, state law may impose a shortened statute of limitations when such a waiver is present. By way of example, despite Michigan being a UTC state, Mich. Comp. Law §700.7905(1)(b) (2017), provides that if a trust beneficiary has waived the right to receive reports, he may not commence a proceeding for a breach of trust more than one year after the end of the calendar year in which the alleged breach occurred.

¹⁶ If the trustee dies a claim for breach of a fiduciary duty during the deceased trustee’s administration of the trust may be barred by a shortened statute of limitations applicable to claims against a decedent estate. See Mich. Comp. Law §700.3803 (2017), which is essentially based upon the Uniform Probate Code (“UPC”) §3-803.

the amendments and supplementation don’t disclose new information upon which the claim is based).¹⁷

As indicated above, at note 15, the waiver by a beneficiary of the right to receive reports may (in some UTC jurisdictions) also result in a shortened statute of limitations during which a breach of trust claim may be brought.¹⁸ The rationale for this deviation from the UTC may be akin to those espoused under an estoppel or laches argument. The codification of the time frame in which to bring an action, when waiver has occurred, provides greater fiduciary protection and certainty, as opposed to reliance on the potential vagaries resulting from application of the common law principals of laches and estoppel. Applying a shortened claims period in which to challenge an action in waiver situations reflects an ideology that a beneficiary who waives a right to receive an otherwise required report should not have an unlimited time in which to bring a claim that could have been revealed by the waived report.¹⁹

In some jurisdictions, the terms of the trust may also shorten the claims period. An example of this is reflected in the unpublished Michigan appellate court case of *Scullen v. Barron*.²⁰ In this case, the trust contained an explicit provision which indicated that unless the income beneficiaries objected to the report within 90 days of receipt, it would be “deemed to be accepted.” The court barred a claim brought by the beneficiary within the one-year statute of limitations because the beneficiary failed to raise objections within the 90-day period specified by the trust. The Reporter’s Commentary to Mich. Comp. Law §700.7905 attempts to reconcile the court’s enforcement of a shorter cut-off from that which is otherwise set forth in the MTC,²¹ especially since the one-year statute of limitations period cannot be overridden. The Reporters’ Commentary, reflects in pertinent part that:

The opinion is noteworthy because the court of appeals reached this conclusion without discussing either the one-year period of limitations found in §7905(1)(a) or MCL 700.7905(1)(a) and MCL 700.7105(2)(m), which provides that the terms of the trust cannot prevail over the periods of limitation in the MTC. At first blush the court’s conclusion seems in conflict with these provisions of the MTC; however, a construction

¹⁷ *Ducharme v. Ducharme*, 850 N.W.2d 607 (Mich. Ct. App. 2014).

¹⁸ See Mich. Comp. Law §700.7905(1)(b).

¹⁹ See Mich. Comp. Law §700.7905 Reporter’s Comment.

²⁰ No. 307713, 2013 BL 368816 (Mich. Ct. App. Jan. 24, 2013).

²¹ The provisions of Mich. Comp. Law §700.7905 are analogous to those of UTC §1005(a).

that reconciles the court's affirmation of the "deemed accepted" provision of the trust with §7905(1)(a) and MCL 700.7105(2)(m) is that the statute of limitations established the date by which a beneficiary must commence his or her proceeding in court after giving a timely objection to the account to the trustee. Such an interpretation would recognize both the time period set forth in the trust for objecting to an accounting and also the statute of limitations for bringing a judicial proceeding for breach of trust.²²

It is also important to note that the UTC statutorily provided bars against claims of breach of fiduciary duty are not the only means available for barring such claims. The Reporter's Comments to Mich. Comp. Law §700.7905 go on to illustrate that the specified one and five year limitations periods are not the only means for barring a claim. Such claims may also be foreclosed by consent, release or ratification (as provided in UTC §1009) or by application of the common law principles of estoppel or laches.²³

Many statutory schemes adopt the premise that unless specifically overridden by statute, general principles of law and equity supplement the statutory regime.²⁴ As a result, the concepts of *res judicata*, judicial and collateral estoppel, as well as laches remain viable defenses to claims when the facts support the application of the same.

Res Judicata and Other Forms of Estoppel

When a petition for instruction and/or for allowance of accounts is brought and resolved via the entry of a court order disposing of the issue(s) raised in such petition(s), and there is no allegation of fraud or misrepresentation by the fiduciary in regards to the petition (such that the beneficiary was thereby prevented from presenting issues relating to the petition or accounts at the time the petition for Instructions was heard), subsequent attempts to circumvent the relief granted in the resulting order should fail.²⁵ This is because the fraud exception to the doctrine of *res judicata* applies only if the fraud is extrinsic, which is

²² Reporter's Comments to Mich. Comp. Law §700.7905.

²³ The General Comment contained in Article 1, of the UTC, also reflects the intent that the UTC be supplemented by the common law of trusts and principles of equity. UTC, Article 1, General Provisions and Definitions, General Comment at p. 8.

²⁴ See Mich. Comp. Law §700.1203 and UTC §1-103 and §1-105.

²⁵ See *Prawdzik v. Heidema Bros., Inc.*, 898 N.W.2d 523 (Mich. 1958). See also *Carter v. Fifth Third Bank*, at n. 14, above.

fraud which actually prevents a losing party from having an adversarial trial on a significant issue.²⁶ Therefore, when the order is not obtained as a result of any claimed fraud by the fiduciary, it generally will be afforded all the benefits of the doctrine of *res judicata*.²⁷

Michigan's Supreme Court summed up the expansive and all-inclusive nature of the *res judicata* doctrine as follows:

The pleas of *res judicata* applies, . . . not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.²⁸

The doctrine of *res judicata* is well recognized and established in Michigan jurisprudence as it relates to probate proceedings.

In Michigan, *res judicata* acted as a bar to a beneficiary's objections to a trustee's fees, when the fees had been disclosed in a trust accounting that had previously been approved by the court.²⁹ Further, in *Hunter v. Hunter*,³⁰ Michigan's Supreme Court recognized that the:

. . . [p]rinciples of collateral estoppel generally prevent a party from relitigating an issue already established in a prior proceedings. This Court has long recognized the applicability of these principles to probate court orders such as the guardianship orders in this case. Subsequently, we reiterated that "orders of probate courts have the force and effect of judgments and are *res judicata* of the matters involved and cannot be attacked collaterally."³¹ (Internal citations omitted.)

While the issue presented in *Hunter* related to the impact of minor guardianship proceedings on a subsequent child custody action, that court's holding that

²⁶ *Sprague v. Buhagiar*, 539 N.W.2d 587 (Mich. Ct. App. 1995).

²⁷ See *Hammond v. Weiss*, 208 N.W.2d 578 (Mich. Ct. App. 1973).

²⁸ *Gursten v. Kenney*, 134 N.W.2d 764 (Mich. 1965). See also *City of Detroit v. Nortown Theatre*, 323 N.W.2d 411 (Mich. Ct. App. 1982) affirming the "expansive nature" of *res judicata*, citing *Gursten*, above.

²⁹ *Scullen v. Barron*, No. 307713, 2013 BL 368816 (Mich. Ct. App. Jan. 24, 2013).

³⁰ 771 N.W. 2d 694 (Mich. 2009).

³¹ *Id.*

“collateral estoppel principles provide a sufficient basis to preclude parents from initiating an action for custody under the CCA in order to circumvent valid court orders affecting custody”³² demonstrates that estoppel remains a viable option to barring subsequent actions relating to the administration of estates and trusts.

In the *Stoudemire v. Stoudemire*,³³ Michigan’s appellate court recognized the *res judicata* effect of a probate court’s ruling in a conservatorship with regard to subsequent divorce proceedings. In *Stoudemire*, the probate court made a determination regarding the nature and extent of damages awarded to the protected individual in a personal injury action. Here the court held that:

A review of the record leads to the conclusion that the trial court did not err in granting partial summary disposition in favor of plaintiff. *Res judicata* bars relitigation of claims that are based on the same transactions or events as a prior suit. *Res judicata* applies when (1) the prior action was decided on the merits, (2) the decree in the prior decision was a final decision, (3) both actions involved the same parties or their privies, and (4) the matter in the second case was or could have been resolved in the first. (Internal citations omitted.)

In *Stoudemire*, the appellate court found that the probate court’s decision determining the nature and character of the personal injury settlement proceeds (e.g. the extent to which such proceeds represented damages for pain and suffering) were binding upon subsequent divorce proceedings and consequently mandated that such proceeds be treated as separate property for purposes of the divorce proceedings.

In *Estate of Awad v. Awad*,³⁴ an unpublished Michigan court of appeals decision, the court relying, in part, on *Hunter*, above, held that Marie Awad (as an interested person) could have brought her claim concerning alleged fraudulent conduct during the decedent’s conservatorship proceedings, and chose not to. The court also acknowledged that because Mich. Comp. Law §700.5423(2)(a) provided a conservator with the power to “[p]rosecute or defend an action, claim, or proceeding in any jurisdiction for the protection of estate property and of the conservator in the performance of a fiduciary duty,”³⁵ Marie Awad’s

post death arguments were “problematic on *res judicata* principles.”³⁶

In *James v. Gerber Products Co.*,³⁷ the federal court relying on Michigan jurisprudence and the Restatement (Second) of Judgments §48, found that *res judicata* principles applied to accounts that had been allowed by the probate court. In *James* the court, relying in part upon *Thaw*, above,³⁸ held that “Michigan law states that an order of the probate court is *res judicata* as to each item contained in the allowance, unless the trustee has perpetrated an actual fraud or concealment in the filing of the accounting.”³⁹

An Arizona appellate court, in *Terman v. Ditsworth*,⁴⁰ held that petitioner’s failure to pursue objections to jointly titled accounts reflected on a conservatorship inventory (which also reflected as such in accountings) operated to bar a subsequent proceeding alleging conversion of the assets. The court⁴¹ found that:

The conservator proceeded to include the questioned assets in two subsequent annual interim accountings itemizing the assets as estate property. The accounts were approved by court order, without objection from appellant. The annual accountings are final as to the matters therein determined. Approval of the annual accountings after notice and without appeal, is binding in the absence of a fraudulent concealment or misrepresentation. . . .

The settlement of a trustee’s account in a court having jurisdiction to settle his accounts renders *res judicata* matters which were open to dispute, whether or not actually disputed. . . .

We find that the orders approving the first and second annual accountings are *res judicata* of the question raised through appellant’s claim⁴²

³² *Id.*

³³ 639 N.W.2d 274 (Mich. Ct. App. 2001).

³⁴ No. 300891, 2012 BL 363137 (Mich. Ct. App. 2012).

³⁵ *Id.*

³⁶ *Id.*

³⁷ 587 F.2d 324 (6th Cir. 1978).

³⁸ *Thaw v. Detroit Trust Co.*, 11 N.W.2d 305 (Mich. 1943).

³⁹ *James v. Gerber Products Co.*, 587 F.2d at 329.

⁴⁰ 661 P.2d 1154 (Ariz. Ct. App. Div. 2 1983).

⁴¹ Citing *James*, n. 37 above; Bogert, *The Law of Trusts and Trustees*, §956, §974, rev. 2nd ed. 1982; Restatement (Second) of Trusts, §220 (1959); and, comment a to the Restatement (Second) of Trusts, §220 (among other cases).

⁴² *Terman*, 661 P.2d at 455.

Res judicata and collateral estoppel are both dispositive motions which must be raised in the first responsive pleading filed.⁴³

Another defensive doctrine is collateral estoppel. This doctrine generally requires that three elements be satisfied:

- (1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full [and fair] opportunity to litigate the issue; and (3) there must be mutuality of estoppel.⁴⁴

In *Monat v. State Farm Ins Co.*,⁴⁵ the Michigan Supreme Court allowed a non-party to use collateral estoppel defensively when the party against whom the bar of collateral estoppel was sought had a full and fair opportunity to litigate the issue.⁴⁶ In defense of a claim, the *Monat* court went on to eliminate the requirement of mutuality.⁴⁷

While *res judicata* and collateral estoppel are both forms of estoppel, they are not the only forms of estoppel applicable to these types of proceedings. Judicial estoppel is yet another doctrine which can bar a litigant from accepting the benefit of a position or bargain in one proceeding and then subsequently take a contrary position.⁴⁸ Courts around the country have applied the doctrine of judicial estoppel to bar litigants from assuming a particular position in a legal proceeding, such as affirming their understanding and acceptance of a settlement, and then assuming a contrary position in a subsequent legal proceeding that seeks to eschew the settlement and recoup benefits allegedly denied or omitted in the prior settlement.

In *McKay v. Owens*,⁴⁹ the Idaho Supreme Court affirmed a summary judgment in favor of defendant attorneys arising out of a medical malpractice settlement that terminated the civil action.⁵⁰ In *McKay*, the application of judicial estoppel barred a legal malpractice case that followed the medical malpractice lawsuit settlement. The court found that [b]y taking

the position of agreeing to the settlement, [plaintiff] obtained an advantage (the settlement) from one party (the medical malpractice defendant)."⁵¹ It held: "[Plaintiff] cannot now repudiate that statement [the agreement to settle] made in open court in front of a judge, and by means of her inconsistent positions [and]. . . obtain a recovery against another party. . ."⁵²

The *McKay* court provided guidance on the application of the doctrine. It indicated that:

For guidance purposes and to avoid misapplication of judicial estoppel, it should be made clear that the concept should only be applied when the party maintaining the inconsistent position did have, or was chargeable with, full knowledge of the attendant facts prior to adopting the initial position. Stated another way, the concept of judicial estoppel takes into account not only what a party states under oath in open court, but also what that party knew, or should have known, at the time the original position was adopted. Thus, the knowledge that the party possesses, or should have possessed, at the time the statement is made is determinative as to whether the person is playing "fast and loose" with the court.⁵³

Courts also apply judicial estoppel to prevent a party " 'from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposing to suit an exigency of the moment.' "⁵⁴ Judicial estoppel is a doctrine " 'intended to protect the courts from being manipulated by chameleonic litigants who seek to prevail, twice, on opposite theories.' "⁵⁵ Essentially, "judicial estoppel is widely viewed as a tool to be used by courts in impeding those litigants who would otherwise play 'fast and loose' with the legal system."⁵⁶

Judicial estoppel has been applied as an equitable doctrine to prevent a party from taking a position in a later proceeding that is inconsistent with a position that party took successfully in a prior proceeding.⁵⁷ In

⁴³ See Mich. Ct. R. 2.116(C)(7). The standards for review under this sub-rule are substantially similar to those under Mich. Ct. R. 2.116(C)(10). See, e.g., *Jones v. State Farm*, 509 N.W.2d 829, 833 (Mich. Ct. App. 1993).

⁴⁴ *Monat v. State Farm Ins. Co.*, 677 N.W.2d 843 (Mich. 2004).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See *Dykema Gossett PLLC v. Ajlumi*, 730 N.W.2d 29 (Mich. Ct. App. 2006) (judicial estoppel applies where "party attempts to invoke the authority of a second tribunal 'to override a bargain made' with a prior tribunal").

⁴⁹ *McKay v. Owens*, 937 P.2d 1222 (Idaho 1997).

⁵⁰ *Id.* at 1225.

⁵¹ *Id.* at 1228.

⁵² *Id.* at 1228.

⁵³ *Id.* at 1229.

⁵⁴ *Griffith v. Wal-Mart Stores, Inc.*, 135 F.3d 376, 380 (6th Cir. 1998), quoting *Teledyne Indus., Inc. v. NLRB*, 911 F.2d 1214, 1218 (6th Cir. 1990).

⁵⁵ *Opland v. Kiesgan*, 594 N.W.2d 505, 517 (Mich. Ct. App. 1999), quoting *Levinson v. United States*, 969 F.2d 260, 264 (7th Cir. 1992).

⁵⁶ *Paschke v. Retool Indus.*, 519 N.W.2d 441 (Mich. 1994).

⁵⁷ *Id.*

Paschke v. Retool Industries,⁵⁸ the Michigan Supreme Court adopted the “prior success” rule, meaning “the mere assertion of inconsistent positions is not sufficient to invoke estoppel; rather, there must be some indication that the court in the earlier proceeding accepted that party’s position as true.”⁵⁹ In short, judicial estoppel applies “where a party attempts to invoke the authority of a second tribunal ‘to override a bargain made’ with a prior tribunal.”⁶⁰

In another case applying the judicial estoppel doctrine, Michigan’s appellate court rejected an attempt by a litigant, who settled a civil litigation matter and then sued his attorneys, from trying to override a bargain made” in regards to the settlement of the underlying matter.⁶¹ The facts in that case are extensive, but suffice it to say the appellate court applied the prior success” rule. Accordingly, the judicial estoppel doctrine” barred defendant from invok[ing] the authority of a second tribunal to ‘override a bargain made’ with a prior tribunal” — in this case, a final settlement of the underlying case.⁶² As a result, the client/litigant was prevented from pursuing a counter-claim for legal malpractice that was inconsistent with the settlement and the testimony that led to the settlement. The court found that although the case settled and the damage theory propounded in the initial case was not litigated to its conclusion, the civil settlement between BCBSM and the client/litigant was a bargain made with a prior tribunal.⁶³ As a consequence, application of the judicial estoppel doctrine prevented the client/litigant from changing the position he took in the prior litigation, namely, his assent to the validity of the economic damage theory presented by the defendant law firm on his behalf — a theory the client/litigant also affirmed in trial testimony.⁶⁴ In short, the court determined that judicial estoppel applies where (i) a litigant has taken a verifiable and known position in a prior action, based upon all the attendant circumstances, even if the position is not litigated to a conclusion, and (ii) the litigant then agrees to settle the civil suit, thereby “making a bargain with the tribunal” to end the matter. Having done so, the litigant cannot maintain a position inconsistent with prior testimony made in court post-settlement.

While the doctrine of judicial estoppel is factually dependent and won’t always be applicable, it’s important to recall its existence and raise it as an affirmative defense when a litigant has taken a position in court

proceedings which is accepted by the tribunal (whether through testimonial or written affirmations in settling a matter and communicated on the record to a tribunal (such as by stipulation and order or otherwise)). In such cases, courts may well recognize and enforce the “bargain with the tribunal” and bar the litigant from taking an inconsistent position in a second lawsuit or proceeding.

Misrepresentations may result in the imposition of another form of equitable estoppel. When a beneficiary has a cause of action for breach of trust, but by his words or conduct assert to others that no such cause exists and the other party justifiably acts on the misrepresentation such that he can not retreat without damage, the beneficiary may be equitably estopped from asserting his rights under the trust.⁶⁵

Laches

Use of laches as a defense in a probate proceeding was addressed in *Hare v. Hammonds*.⁶⁶ *Hare* involved the implications of jointly titled assets and a joint will. In that particular case petitioner knew five years before decedent’s death that property had been jointly titled and would, therefore, pass upon decedent’s death in contravention of the terms of a joint will. In *Hare*, the appellate court barred the claim indicating that:

Laches is an affirmative defense which depends not merely upon the lapse of time but principally on the requisite of intervening circumstances which would render inequitable any grant of relief to the dilatory plaintiff. For one to successfully assert the defense of laches, it must be shown that there was a passage of time combined with some prejudice to the party asserting the defense of laches. Laches is concerned mainly with the question of the inequity of permitting a claim to be enforced and depends on whether the plaintiff has been wanting in due diligence.⁶⁷ (Internal citations omitted.)

The *Hare* court indicated that “the failure of anyone to make a legal claim to the property, well after the deed making defendant joint owner with rights of survivorship was publicly recorded, induced respondent to change her position in reliance on this lack of

⁵⁸ *Paschke*, 519 N.W.2d 411 (1994).

⁵⁹ *Id.*

⁶⁰ *Opland*, 594 N.W.2d 505.

⁶¹ *Dykema Gossett*, 730 N.W.2d 29.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Bogert, *Trusts and Trustees*, Second Edition Revised, 1995, §944, at pp. 551–552.

⁶⁶ *Hare v. Hammonds*, 320 N.W.2d 276 (Mich. Ct. App. 1982).

⁶⁷ *Id.*

action by petitioner.”⁶⁸ Further, the appellate court found that:

...the probate court had ample and reliable facts before it when it determined that the doctrine of laches foreclosed any claim by the petitioner to the Crawford property. Moreover, contrary to the petitioner’s claim, the probate court set forth the necessary elements of laches in its opinion and stated that petitioner could have sued during the five years prior to Mr. Crawford’s death but did not and: “Mrs. Hammonds would have not relied upon her interest in the property, and circumstances would not have changed in such a way as to make this action now inequitable.” We, therefore, find that the probate court did properly determine that all of the elements of the doctrine of laches were satisfied by the facts of this case, and the mere passage of time was not the only basis of the probate court’s decision.⁶⁹

So, while the UTC does not specifically set forth laches as being an equitable remedy to breach of fiduciary duty claims or accounting proceedings, it can provide a viable defense under the right factual circumstances.

The Restatement (Second) of Trusts §219 in addressing the issue of laches reflected that: “(1) The beneficiary cannot hold the trustee liable for a breach of trust if he fails to sue the trustee for the breach of trust for so long a time and under such circumstances that it would be inequitable to permit him to hold the trustee liable.”⁷⁰

Comments to §219 of the Restatement (Second) of Trusts identified certain factors that the court could consider, when determining whether laches should act as a bar to a claim, including:

(1) the length of time that has elapsed between the breach of trust and the bringing of suit, (2) whether the beneficiary knew or had reason to know of the breach, (3) whether the beneficiary was under an incapacity, (4) whether the beneficiary’s interest was presently enjoyable or enjoyable in the future, (5) whether and when the beneficiary had complained of the breach, (6) the reasons for the delay in the beneficiary suing, (7) any change of position by the trustee, including loss of rights against third parties, (8) the death of a witness or parties, (9) hardship to the benefi-

ciary if relief is not given, and (10) hardship to the trustee if relief is given.⁷¹

The Comments go on to reflect that even a beneficiary with a future interest may be barred, under the doctrine of laches, if he has knowledge of a breach and does not sue even if his interest isn’t presently enjoyable. Because laches is essentially an equitable bar, courts will generally look to the totality of the circumstances in determining whether it will be applied to block a claim against the trustee.

Lack of Standing

A claim that a party lacks standing to bring or pursue an action may arise when the alleged breach occurred during the settlor’s lifetime; it may also arise at other times depending upon the nature of the claimed breach. If the duty breached was owed to the settlor, only the settlor, his conservator, executor or perhaps a successor trustee may have standing to challenge the action. In some instances, this may require petitioning the court for appointment of an independent fiduciary to investigate and prosecute the claim. While a trustee is not required to litigate every potential claim, a successor may need to review and determine if an apparent breach occurred and analyze the prospects of a sufficient recovery to merit pursuit.⁷²

The issue of standing may also arise post death, where a contingent or remainder beneficiary seeks an accounting for a period preceding the settlor’s death. While the remainder beneficiary may have standing to sue for a breach of trust that affects the remainder beneficiary’s interest, they may, nonetheless, lack standing to demand an accounting for the period preceding the settlor’s death absent a claim of breach of fiduciary duty in carrying out the trust’s terms.⁷³

Election of Remedies

This is essentially used to (i) bar unjust enrichment by a beneficiary or (ii) prevent conduct by a beneficiary who seeks the benefit of one remedy, which led the trustee to take action from which he cannot retreat

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Restatement (Second) of Trusts, §219 (1959).

⁷¹ Comment to Restatement (Second) of Trusts, §219 (1959).

⁷² Potential beneficiaries whose interests are dependent upon present beneficiary not exercising a power of appointment that could eliminate their interests were found to lack standing. *Adams v. Regions Bank*, No. 3:14cv615, 2016 BL 2497 (S.D. Miss. Jan. 6, 2016). Consequently, it’s generally helpful for the trustee to keep records reflecting its analysis and rationale for not pursuing a claim against a prior fiduciary.

⁷³ See *Hilgendorf v. Estate of Coleman*, 201 So.3d 1262, 1265–1266, (Fla. Dist. Ct. App. 2016). See also *In re Malasky*, 736 N.Y.S.2d 151 (App. Div. 3d Dept. 2002).

from without loss.⁷⁴ An example may be when a report is provided, or consent to a transaction is obtained in advance, and a beneficiary receives a distribution as a result thereof. Their silence or acquiescence to the transaction and retention of proceeds may (under certain circumstances) represent an election.⁷⁵ Should they seek other redress, they may be required to tender the proceeds back as a precursor to seeking relief.

ACCOUNTINGS

An objection or claim pertaining to an accounting may be contained in a petition filed by an interested party or in response to a petition for allowance. Whether the claim arises in a petition or response, if affirmative defenses (such as those delineated above) exist, the fiduciary should raise each such defense separately and specifically identify and enumerate each as being an affirmative defense in the first responsive pleading filed.

The aforementioned affirmative defenses may, however, not be present in each case. That does not mean all is lost and that other defenses are not available.

Often beneficiaries will claim that an adequate report was not provided. While some jurisdictions provide a specific form for purposes of providing beneficiaries with a decedent probate estate inventory and/or annual accounting, it's important to remember that the UTC only requires that a trustee:

- Keep “qualified” beneficiaries reasonably informed about the administration of the trust and of material facts necessary for them to protect their interests;⁷⁶
- Unless unreasonable under the circumstances, promptly respond to a beneficiary’s request for information relating to the administration of the trust;⁷⁷
- Upon request of a beneficiary, provide the beneficiary with a copy of the trust;⁷⁸
- Within 60 days after accepting the trusteeship, notify the qualified beneficiaries of such acceptance

⁷⁴ See Bogert, *Trusts and Trustees*, Second Edition Revised, §946, p. 580.

⁷⁵ Requesting that a devise be satisfied “in kind” may also represent an election, of sorts, where the fiduciary then holds the asset to effectuate such distribution, but the value of the asset declines in the interim. See *Glass v. SunTrust Bank*, No. W2015-01603, 2016 BL 143516 (Tenn. Ct. App. May 4, 2016), *leave to appeal denied* 2016 BL 337163 (Tenn. Sept. 26, 2016).

⁷⁶ UTC §813(a).

⁷⁷ UTC §813(a).

⁷⁸ UTC §813(b)(1). In some jurisdictions, the trustee need only provide the beneficiary with the terms of the trust that describes or affects the beneficiary’s interest, rather than the entire trust in-

and provide them with the trustee’s name, address and phone number;⁷⁹

- Within 60 days after acquiring knowledge of the creation of an irrevocable trust or a revocable trust becoming irrevocable, providing the beneficiaries with the identity of the settlor(s), the right to request a copy of the trust and the right to a report, as otherwise required UTC §813(c);⁸⁰
- Notify the qualified beneficiaries in advance of any change in the method or rate of the trustee’s compensation;⁸¹
- Send to the distributees or permissible distributees of trust income or principal, and to other qualified and non-qualified beneficiaries who request it, at least annually and at the termination of the trust, a **report** of trust property, liabilities, receipts and disbursements, including the source and amount of the trustee’s compensation, a listing of the trust assets and, if feasible, their respective market values.⁸² However, it’s important to note that the right to receive such reports or information may be waived, as previously discussed. In addition, the persons to whom a report must be provided, and the extent of that report may be modified by the specific terms of the trust.

Consequently, unless other or additional information is requested by a beneficiary, a trustee may (under some circumstances) be excused from otherwise

strument. See Mich. Comp. Law §700.7813(2)(a). See also *Schrage v. Seberger*, 52 N.E.3d 45 (Ind. Ct. App. Mar. 10, 2016), *result re-affirmed* 52 N.E.3d 54 (Ind. Ct. App. 2016).

⁷⁹ UTC §813(b)(2). This time period may vary among jurisdictions. Michigan uses 63 days, as opposed to 60 days. Mich. Comp. Law §700.7814(2)(b). Therefore, it’s important for trustees to be familiar with the administrative provisions of the UTC in the situs of principal administration.

⁸⁰ UTC §813(b)(3). This time period may also vary among jurisdictions. See, e.g., Mich. Comp. Law §700.7814(2)(c).

⁸¹ UTC §813(b)(4). Under the UTC, one may debate whether beneficiaries need be notified of the initial rate of compensation. See Mich. Comp. Law §700.7814 Reporter’s Comment and the Restatement (Third) of Trusts §82(1).

⁸² UTC §813(c). This provision of the UTC is one which may be specifically modified or otherwise excused by the terms of the trust. If, however, the trustee is excused from the requirement to otherwise report to a beneficiary by the terms of the trust and the trustee chooses not to report, he may not derive the benefit of the shorter period of limitations, unless the representation rules apply and bind persons receiving the report (and those claiming after or through them). See Mich. Comp. Law §700.7814, Reporter’s Comments. If, however, the beneficiary waives receipt of the report, in certain jurisdictions, a shortened statute of limitations may nonetheless apply. Above at note 17.

providing more information.⁸³ The mere provision of the trust's income tax returns and brokerage account (and/or bank) statements may, under certain circumstances, be sufficient to meet the reporting requirements of the UTC.⁸⁴ This is because it is more about the provision of information necessary for beneficiaries to be advised of material facts needed to protect their interests, than about the form or formalities of the reporting.⁸⁵ Providing tax returns and statements is not necessarily required. It is just one form of "reporting" recognized by the Comments to the UTC that may suffice. Provision of an excel spreadsheet, or a copy of the check book registry may even be sufficient under the right circumstances. Generally, statements of income and principal in a more "traditional" fiduciary accounting format is not required.⁸⁶

Therefore, when defending a trustee, it is important to understand whether (and to what extent) the trustee provided information to the beneficiary and whether that information was sufficient to put the beneficiary on notice of potential claims. If emails or verbal information relay information in a fashion sufficient to provide the beneficiary with notice that their interests may be impacted by the actions of the trustee, providing such proof may provide a defense (equitable or otherwise) to a challenge by a beneficiary claiming insufficient reporting.

The UTC defines "knowledge of a fact" to include (i) actual knowledge, (ii) receipt of notice or notification of the fact, or (iii) when the person had reason to know it from all the facts and circumstances known to the person at the time in question.⁸⁷ A person may

⁸³ UTC §813, Comment at p. 148. Whether information must be provided to all beneficiaries or merely fairly representative beneficiaries is subject to debate. See Restatement (Third) of Trusts §82(1), comment b and Mich. Comp. Law §700.7814, Reporter's Comment.

⁸⁴ UTC §813, Comment at p. 150. The Internal Revenue Service (IRS) has added another reporting requirement, not otherwise found in the UTC, with regard to basis reporting. Whether, and the extent to which, the basis reporting requirements pertaining to IRS Form 8971 will remain applicable, remains to be seen, but as of the date of this paper it remains an additional reporting obligation for certain trusts, which may not be waived and the information required otherwise dictated.

⁸⁵ UTC 813, Comment above.

⁸⁶ See Reporter's Comment to Mich. Comp. Law §700.7905 subsection (2). Mich. Comp. Law §700.7905 was fashioned after UTC §1005. But even if such formalities are required in some jurisdictions, provision of Quicken or QuickBooks schedules may fulfill such reporting requirements. See Donald H. Kelly, Joseph G. Hodges, Jr. and Edward G. Heilman, *Fiduciary Accounting with Quicken*, ACTEC Technology in the Practice Committee, Revised November, 2013, © Copyright 2013 ACTEC.

⁸⁷ UTC §104(a)

also be deemed to have "knowledge of a fact" which they could have discovered upon reasonable inquiry.⁸⁸

Unless stated as a requirement (either by the trust or by statute), notification or reporting need not be via written notice. At least one court (in dicta) indicated that the requirement of a writing should not be read into a statute.⁸⁹ So while some form of written notice (of the shortened time frame in which to bring an objection) may be required to invoke the shortened limitations period provided for under UTC §1005(a), the provision of information in numerous other forms may constitute a report sufficient to meet the requirements of UTC §813 (a) and (perhaps) (b), depending upon the information provided.

The UTC otherwise defines "notice" under the Code as providing the person with notice **or** the sending of a document in a manner reasonably suited to result in receipt of the notice or document.⁹⁰ Permissible methods include first class mail, personal delivery, delivery to the person's last known residence or business address, or a properly directed electronic message.⁹¹ But, these methods are intended to be illustrative and not exhaustive.⁹² Moreover, the provision of "notice" (other than of a judicial proceeding) may be waived.⁹³

When the trust is revocable, generally the obligation to report is owed exclusively during the settlor's lifetime to the settlor, absent incapacity.⁹⁴ In other circumstances, the persons to whom reports and information shall be provided may be modified or defined by the trust.⁹⁵ Again, it's important to look to the trust to see what the trust instrument provides.

In addition, it is important to know that while the failure to report (when so required) can constitute a breach of fiduciary duty, the more important issue will relate to the analysis of what, if any, harm was suffered by the beneficiary as a result of such failure. If the court determines that no practical or actual harm to the beneficiary's interest was suffered or when the harm which occurred was limited in nature, the court may determine no action is required. It's helpful to make an adequate record of (i) what was done to provide the beneficiaries with information, (ii) the information provided, (iii) any actions of the beneficiaries and the trustee in reliance thereon, (iv) the absence of any real harm, (v) attempts to mitigate the severity (or

⁸⁸ UTC §1005.

⁸⁹ *Dospoy v. Dospoy Revocable Living Trust*, No. 321304, 2015 BL 225532, n.3 (Mich. Ct. App. July 14, 2015).

⁹⁰ UTC §109(a).

⁹¹ UTC §109(a).

⁹² See Comment to UTC §109.

⁹³ See UTC §109(c) and §109(d).

⁹⁴ See UTC §603(a).

⁹⁵ Mich. Comp. Law §700.7814, Reporter's Comment.

options to eliminate) any harm, and (vi) alternate methodologies for computing damages which reduce or eliminate the extent of harm claimed to have occurred.

OTHER BREACHES OF FIDUCIARY DUTIES

It is not unusual to see a laundry list of counts containing alleged breaches in these cases. Some which might be alleged include, but may not be limited to, a *failure* to fulfill the duty to:

- Administer the trust in good faith, in accordance with its terms, purposes and the interests of the beneficiaries and in accordance with the provisions of the applicable trust code;⁹⁶
- Be loyal to the beneficial interests established by the trust;⁹⁷
- Act with impartiality;⁹⁸
- Prudently administer the trust estate;⁹⁹
- Incur only costs and expenses which are reasonable in relation to the trust property, the purposes of the trust and the skills of the trustee;¹⁰⁰
- Use any special skills or expertise which the trustee may have for the benefit of the trust estate;¹⁰¹
- Exercise reasonable care and caution in the (i) delegation of responsibilities, (ii) selection of an agent and (iii) establishment of the scope of an agent's responsibilities;¹⁰²
- Follow the directions of the settlor (or such other person that the settlor invested with a power to direct) unless doing so (i) would constitute a serious breach of another fiduciary duty owed to the

⁹⁶ UTC §801.

⁹⁷ UTC §802. This is one of the duties that can be overridden by the trust. For example, a trust may own an interest in a business and the trustee may also act as director or officer. Under such circumstances conflicts will inevitably occur. According to Reporter's Comment to Mich. Comp. Law §700.7802, (i) a settlor can override the duty of loyalty during the drafting process; and, (ii) even when language isn't included to override the duty of loyal, certain inevitable or common transactions may nonetheless be permitted despite a conflict if they are fair. *See also Jones v. Mahoney*, No. 320074, 2015 BL 269334 (Mich. Ct. App. Aug. 20, 2015).

⁹⁸ UTC §803. This is provision may also be overridden by the trust. *See Reporter's Comment to Mich. Comp. Law §700.7803.*

⁹⁹ UTC §804.

¹⁰⁰ UTC §805.

¹⁰¹ UTC §806.

¹⁰² UTC §807.

beneficiaries or (ii) appears to be manifestly contrary to the terms of the trust;¹⁰³

- Control and protect trust property;¹⁰⁴
- Keep accurate records and segregate (by record keeping or otherwise) the interests of the trust;¹⁰⁵
- Enforce and defend claims;¹⁰⁶
- Collect property and redress breaches of trust known to have been committed by a former trustee;¹⁰⁷ and
- Inform and report.¹⁰⁸

Many states add an additional requirement that the trustee invest asset in conformity with the state's Prudent Investor statute unless the trust specifically provides otherwise.¹⁰⁹

Under certain circumstances, the failure to pay creditor claims or satisfy statutory elections or allowances may constitute a breach of fiduciary duty (but a review of these additional duties is beyond the scope of these materials).

Breaches can result from nonfeasance, misfeasance or malfeasance.¹¹⁰ The category of breach conduct may impact the remedies available and/or fashioned by a court. Addressing the defense of each type of breach is also beyond the scope of these materials. However, some generalized defenses and consider-

¹⁰³ UTC §808.

¹⁰⁴ UTC §809. This provision may also be overridden by the trust. The Reporter's Comment to Mich. Comp. Law §700.7810, which contains identical language to that of UTC §809, indicates that this "duty can be limited by the terms of the trust and often will be. For example, consider a marital deduction trust that owns the surviving spouse's place of residence held in trust by an institutional trustee. Possession is held by the surviving spouse and not the trustee." *See also Comment to UTC §809.*

¹⁰⁵ UTC §810. *See also Comment to UTC §810 and In re Robert Stout Revocable Tr.*, No. 313063, 2014 BL 19866 (Mich. Ct. App. Jan. 23, 2014).

¹⁰⁶ UTC §811. However, this does not limit the trustee's exercise of discretion as to whether or not to pursue a claim. *See Reporter's Comment to Mich. Comp. Law §700.7812*, which section is analogous to UTC §811.

¹⁰⁷ UTC §812. The Reporter's Comments to Mich. Comp. Law §700.7813 (which section is analogous to UTC §812) reflects that this duty is tempered by what is reasonable under the facts and circumstances. It is recognized that situations may exist where it's inappropriate to pursue claims for (i) return or delivery of property or (ii) involving a breach of duty by a prior trustee.

¹⁰⁸ UTC §813. This is yet another provision of the UTC which may be overridden by the terms of the trust in some respects (as to subparagraph (a) but not necessarily as to subparagraph (b)).

¹⁰⁹ *See Mich. Comp. Law §700.1212(1).*

¹¹⁰ ICLE, Michigan Probate Benchbook, May 2016 Update, prepared for the State Court Administrative Office, a Division of the Michigan Supreme Court, §5.10 at 183.

ations (over and above those already referenced in regards to affirmative defenses) follow.

If the fiduciary is an attorney, an early and careful analysis of whether the claim actually sounds in malpractice is prudent. Often when the fiduciary is an attorney there may be multiple counts, one of which alleges “breach of fiduciary duty” while another (premised upon the same facts) claims “malpractice.” When this occurs, and the breach actually arises out of the attorney-client relationship, the fiduciary should put their carrier on notice. In some instances, costs of defense and coverage may be afforded under a malpractice insurance policy (or a fiduciary rider).¹¹¹ A motion to strike redundant and duplicative claims may be appropriate,¹¹² especially when such claims would otherwise be subsumed by the malpractice claim.¹¹³ While there are times when both malpractice and breach of fiduciary duty claims are not subsumed, sensitivity to the analysis of this issue can be impor-

¹¹¹ When an attorney accepts an appointment to act as a fiduciary, it may be prudent (at the outset) to investigate whether his malpractice policy will cover actions taken while a fiduciary or whether a rider is available.

¹¹² See Mich. Ct. R. 2.115(B).

¹¹³ See *Henry v. Dow Chem. Co.*, 701 N.W.2d 684, 699–70 (Mich. 2005). See also *Taylor v. Kochanowski*, No. 289660, 2010 BL 346362 (Mich. Ct. App. July 8, 2010) (unpub. op.) holding that the lower court properly dismissed the breach of fiduciary duty claim as redundant to the legal malpractice claim because plaintiff did not allege “that defendants breached any duties that arise outside the attorney-client relationship”); *Alken-Ziegler, Inc. v. Bearup*, No. 264513, 2006 BL 172722 (Mich. Ct. App. Mar. 9, 2006) (unpub. op.) (dismissing plaintiff’s breach of fiduciary duty cause of action premised on an alleged breach of a power of attorney when the defendant already owed a duty as a result of the prior/existing attorney-client relationship); *Sharma v. Giarmarco*, No. 248840, 2004 BL 22582 (Mich. Ct. App. Sept. 28, 2004) (unpub. op.) (dismissing breach of fiduciary duty and other claims because the “gravamen of plaintiff’s claim is professional malpractice”); *Fritz v. Monnich*, No. 235262, 2003 BL 21354 (Mich. Ct. App. May 20, 2003) (unpub. op.) (granting defendants’ motion per to Mich. Ct. R. 2.116(C)(7), (8) and (10), and stating that “[p]laintiff alleged that defendants violated their fiduciary duties by failing to exercise reasonable care in representing plaintiff. The gravamen of plaintiff’s allegations concerning the alleged breach of fiduciary duties sounded in legal malpractice; therefore, the fiduciary duty claim cannot constitute a separate cause of action and was subsumed by the malpractice claim”); *Melody Farms, Inc. v. Carson Fisher, PLC*, No. 215883, 2001 BL 16318 (Mich. Ct. App. Feb. 16, 2001) (unpub. op.) (affirming the lower court’s holding that “plaintiffs’ claims for breach of contract and breach of fiduciary duty were subsumed by the legal malpractice claim. The two breach claims merely allege negligence by defendants, stating that defendants failed to ‘properly and adequately’ perform the duties for which they had contracted”); *McKenzie v. Berggren*, 99 Fed. App’x 616, 621 (6th Cir. 2004) (holding that plaintiff’s breach of contract and breach of fiduciary duty claims were duplicative of plaintiff’s legal malpractice claim and finding that *Melody Farms, Inc.* stands for the proposition that “a claim for breach of fiduciary duty is redundant with a claim for legal malpractice”).

tant in identifying potential defenses (as well as resources for defense). When appropriate, an early motion to strike may be particularly important especially if the failure to do so results in the potential extension or expansion of a shorter statute of limitations (either pursuant to a statute of repose or statute of limitations for legal malpractice).¹¹⁴

One overarching strategy is to remind the court that there may be less severe remedies than surcharge or removal. Stress that some of the “remedies” available to the court are akin to the grant of injunctive relief before responsibility and liability have been established — in such cases, the court may require the claimant to demonstrate irreparable harm before engaging in more extreme measures. Without providing such options, a court may gravitate toward removal in an attempt to eliminate additional future disputes that may clog the docket. Agreeing to account restrictions or other limitations, pending further order of the court, may provide sufficient protections to avoid removal.

It is often helpful to look to statements of intent reflected in the instrument and other provisions of the trust that might indicate support for the actions taken by the trustee.¹¹⁵ Generally, a trustee who acts in reasonable reliance on the terms of the trust, as expressed in the trust instrument, is not liable to a beneficiary for breach of trust to the extent the breach resulted from reliance.¹¹⁶ It is for this very reason that settlor expressions of intent can have a profound impact in the defense of a fiduciary.

Trustees are not guarantors of results; absent a breach they will not be held liable for a loss or depreciation in value of trust property, or for a lack of profitability.¹¹⁷ Therefore, the primary analysis in defending claims should focus on whether the trustee’s ac-

¹¹⁴ See Fred K. Herrmann, *It Must Be a Duck: Honoring the Attorney Professional Negligence Statute of Limitations*, 59 Wayne L. Rev. 671 (Fall 2013).

¹¹⁵ See *Shriners Hosp. for Children v. First N. Bank of Wyo.*, 373 P.3d 392, (Wyo. 2016). Here, the Wyoming Supreme Court, when reflecting on the importance of settlor intent in addressing claims brought by a beneficiary for breach of fiduciary duties, indicated at p. 410 that:

[t]he clearly expressed intention of the settlor should be zealously guarded by the courts, particularly when the trust instrument reveals a careful and painstaking expression of the use and purposes to which the settlor’s financial accumulations shall be devoted. A settlor must have assurance that his solemn arrangements and instructions will not be subject to the whim or suggested expediency of others after his death. (Internal citations omitted.)

¹¹⁶ UTC §1006. See also the Comment to UTC §1006 which reiterates the concept that trusts should be administered in accordance with the settlor’s intent.

¹¹⁷ UTC §1003. See also Restatement (Second) of Trusts,

tions were reasonable and consistent with the discretion and powers afforded to the trustee by the trust.

The trust may modify or eliminate some of the duties identified above and/or define and regulate the conditions under which removal may occur.¹¹⁸ The UTC often only provides “default” provisions which apply when the trust is otherwise silent on the issue.¹¹⁹ Therefore, when a breach of trust is claimed and removal is sought pursuant to the UTC, it’s often helpful to remind the court that the UTC generally contemplates removal only for:

- “serious” breaches;¹²⁰
- lack of cooperation between co-trustees *which impairs administration*;
- unfitness, unwillingness or *persistent* failure to administer the trust effectively which leads the court to the conclusion that (as a result) it would be in the beneficiaries’ best interest for removal to occur;¹²¹
- there’s been a substantial change of circumstances; or
- all the qualified beneficiaries request the removal and the court finds that removal best serves the interests of all beneficiaries **and** is not inconsistent with a material purposes of the trust when a suitable co-trustee or successor trustee is available.¹²²

You may wish to also remind the court that it has the power to order appropriate relief under UTC §1001(b) to protect trust property or the interests of the beneficiary, which may be far less harsh than removal.

above, at §204(b).

¹¹⁸ Comment to UTC §706. The UTC provisions may, in fact, supersede and replace a prior common law basis for removal. *See Pollack v. Barron*, 867 N.W.2d 884 (Mich. Ct. App. 2015).

¹¹⁹ *See* Prefatory Note to UTC, which provides that:

Most of the Uniform Trust Code consists of **default rules that apply only if the terms of the trust fail to address or insufficiently cover a particular issue.**

Pursuant to Section 105, a drafter is free to override a substantial majority of the Code’s provisions. The exceptions are scheduled in Section 105(b). (Emphasis added.)

¹²⁰ In *Kidd v. Alfano*, 64 N.E.3d 1052, (Ohio Ct. App. 2016), a single incident of breach of trust which resulted in \$14,000 in damages (for an advancement out of the marital trust which was not authorized under the terms of the trust, but which the Trustee thought was within the parameters of his powers) was not sufficient to merit the trustee’s removal.

¹²¹ The best interests relate solely to serving the beneficial interests as provided for in the trust, and not as “defined by the beneficiaries.” *See* Comment to UTC §706 and §103(8).

¹²² UTC §706(b)(1)–§706(b)(4).

When the claimed “breach” arises in the context of administration by co-trustees, some states provide protection from liability to a dissenting trustee who is obligated to otherwise join in an action approved by the majority (e.g., when the dissenting trustee must join in the execution of a deed). Under such circumstances, the trustee’s dissent may protect it from liability if it’s later determined that the sale breached a duty held by the trustees.¹²³

The posting of a bond may provide sufficient protections to the beneficial interests. The cost is generally reasonable and regulated. While the trust itself may dispense with the requirement for a trustee to post a bond, this remedy remains viable for protecting the beneficial interests and its provision may convince a court that removal is not necessary.¹²⁴

Protective orders and other mechanisms which prevent or otherwise limit the trustee’s ability to dispose of trust property during the course of litigation may also provide sufficient protections to stay the course of removal pending the conclusion of a breach of trust action.

UTC §1001 codifies the remedies available to rectify or prevent a breach of trust. These “remedies” however may be restricted or otherwise limited by jurisdiction, case law or the terms of the trust. Historically, common law remedies were generally more limited than those provided for under the UTC.¹²⁵

To **remedy** a breach that has or may occur, pursuant to UTC §1001, the court **may**:

- (1) compel the trustee to perform the trustee’s duties;
- (2) enjoin the trustee from committing a breach of trust;
- (3) compel the trustee to redress a breach of trust by paying money, restoring property, or other means;
- (4) order a trustee to account;
- (5) appoint a special fiduciary to take possession of the trust property and administer the trust;
- (6) suspend the trustee;

¹²³ *See* Reporter’s Comment to Mich. Comp. Law §700.7703 (10).

¹²⁴ *See* UTC §702 and Comment to UTC §702. The cost of the bond is generally a cost of administration chargeable to the trust, although the court may require reimbursement by the trustee if it finds that the trustee acted in a fashion that merits the imposition of a surcharge. *See also* UTC §709. Even though some states, such as Michigan, may have a general bias against requiring that a bond be posted, it nonetheless remains an option that is less draconian than removal.

¹²⁵ Comment to UTC §1001.

- (7) remove the trustee as provided in §706;¹²⁶
- (8) reduce or deny compensation to the trustee;
- (9) subject to UTC §1012, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or
- (10) order any other appropriate relief.¹²⁷

It is important to review the trust to determine if (i) the claimed breach of duty was addressed in the instrument and (ii) whether and to what extent “remedies” were addressed.¹²⁸ In many instances, a trust may be drafted in a fashion to leave a beneficiary without a viable remedy. This stresses the import of careful drafting when the trust is created as well as a thorough review of the trust when litigation ensues.¹²⁹

The inclusion of exculpatory provisions in a trust can provide significant protections to a trustee in a surcharge action.¹³⁰ Therefore, when representing a fiduciary remember to focus on the trustee’s intention,

¹²⁶ UTC §706 is a non-mandatory provision of the code. As such, it may be overridden by the trust. The settlor is free to establish his or her own rules or guidelines for removal, including, provisions requiring removal only for cause. See Reporter’s Comments to Mich. Comp. Law §700.7706. Moreover, “a mere breach of trust is not sufficient to justify removal of a trustee; the breach must be *serious*.” Reporter’s Comment to Mich. Comp. Law §700.7706 referencing section (2)(a).

¹²⁷ UTC §1001(b)(1)–§1001(b)(10).

¹²⁸ Generally, the remedies provided for the benefit of a beneficiary remain remedies payable to the trust, as opposed to the beneficiary. See Reporter’s Comment to Mich. Comp. Law §700.7903, which statute is analogous to UTC §1003.

¹²⁹ See Reporter’s Comments to MTC Part 8, Duties and Powers of Trustee. Only breaches in bad faith or with reckless indifference to the purposes of the Trust or the interests of the beneficiary may be exempt from exoneration. Good faith and bad faith have been defined to be two sides of the same coin. Therefore, the absence of a finding that the trustee acted in “bad faith” will mean that the trustee acted in “good faith.” See *In re Baldwin’s Estate*, 18 N.W.2d 827, 836 (Mich. 1945).

¹³⁰ See *Americans for the Arts v. Ruth Lilly Charitable Remainder Annuity Trust #1 u/a January 18, 2002*, 855 N.E.2d 592 (Ind. Ct. App. 2006). See also *Carter v. Fifth Third Bank*, No. 271244, 2008 BL 355629 (Mich. Ct. App. June 17, 2008). In *Carter*, the trust held a concentration of Steelcase stock. The court found, despite the absence of a formal exculpation clause, that the will provided the fiduciary with a “safe harbor.” The court held, in pertinent part, that:

[i]n his will, Wege expressed a desire that the Trust retain Steelcase stock, and he provided the trustees with the authority to

hold and retain any bonds or shares of stock or other securities or other properties held or owned by me at my death, if in their discretion they shall deem it prudent and for the best interest of my estate so to do, notwithstanding the fact that the retention of such investments might, except for

motives and state of mind in formulating a defense intended to provide the fiduciary with the benefits of exculpation.

Subject to the specific exculpatory provisions of a trust and UTC §1006 and UTC §1008, the UTC “default” damage provisions are generally found in UTC §1002–§1003. These are the sections generally looked to when seeking redress via “surcharge.” UTC §1002 generally provides that the trustee is liable to the beneficiaries “**affected**” for the greater of: (1) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (2) the profit¹³¹ the trustee made by reason of the breach.”¹³²

In defending a surcharge action it’s important to demonstrate that the breach was not committed in bad faith or with reckless indifference to the purposes of the trust or interests of the beneficiaries. The reason this is important is so that the trustee may avail itself of any exculpatory provisions in the trust. Additionally, when surcharge or other damages are sought (and exculpation for the action complained of is not available), a careful analysis of the damages claimed can significantly mitigate or even eliminate trustee liability, even when a breach is established.¹³³ Look to see if the theory of recovery or calculation of damages is conjectural or otherwise not sufficiently supported by

this express direction, be in violation of the laws of this State governing trust investments.

[Emphasis added.]

The probate court properly determined that this language creates a “safe harbor” protecting the Bank “from the diversification requirement that ordinarily would be deemed prudent.” That is, Wege’s will expressly exempts the trustees from compliance with the prudent investor rule, allowing them to retain Steelcase stock if they, in their subjective discretion, deem it prudent and in the best interest of the estate to do so, notwithstanding the objective standards of prudence that might otherwise be imposed under the above-referenced statutes. Carter has presented no evidence that the Bank acted other than as it deemed prudent and in the best interest of the estate. Deposition testimony expressed the difficulties inherent in diversifying this particular Trust, and Carter herself disavowed an interest in selling Steelcase stock merely to diversify, where she found the price of the stock to be unacceptable.

It is important to recognize that exculpatory clauses and indemnification provisions are often strictly construed by courts and, therefore, should not be blindly relied upon. A cautious and careful review and analysis of such provisions is generally merited.

¹³¹ The Reporter’s Comment to Mich. Comp. Law §700.7902 (which statute is analogous to UTC §1002(a)) reflects that “‘Profit’ as used in this section does not include a trustee’s compensation A trustee who has committed a breach of trust remains entitled to reasonable compensation unless the court reduces or denies compensation” Internal citations omitted.

¹³² UTC §1002(a)(1)–§1002(a)(2).

¹³³ *In re Robert Stout Revocable Tr.*, No. 313063, 2014 BL 19866 (Mich. Ct. App. Jan. 23, 2014).

the evidence with reasonable certainty. If surcharge is sought because of investment decisions, the use of generally recognized market performance benchmarks or indices may undercut the extent of a damage award. It's generally up to the claimant to establish how and the extent to which they have been harmed. The mere showing of a decrease in the value of the trust property generally is not sufficient.¹³⁴

Because the remedy of "surcharge" emanates from the adoption of a common law equitable remedy, a defense premised upon the doctrine of "unclean hands"¹³⁵ or other equitable arguments may undercut the availability of such relief. If the beneficiary encouraged the action by the trustee, even if the trustee's action constituted a breach, the beneficiary's actions may negate the imposition of "surcharge" as a remedy. Laches may also prove an effective equitable defense to a surcharge action.¹³⁶

¹³⁴ Bogert, *Trusts & Trustees*, Second Edition Revised, 1995, §871, p. 156.

¹³⁵ See *Karpiuk v. Myers*, No. 266570, 2006 BL 173820 (Mich. Ct. App. Aug. 8, 2006) (unpub. op). While *Karpiuk* was not a trust administration case, the principles adopted by the court should prove equally applicable to cases involving trust administration. In *Karpiuk*, the Michigan appellate court upheld the trial court's dismissal of a breach of fiduciary duty claim premised upon the unclean hands doctrine. The opinion reflected that:

Plaintiffs' claims of breach of fiduciary duty call on the equitable powers of this Court. See *Rapistan Corp. v. Michaels*, 203 Mich. App. 301, 313-314, 511 N.W.2d 918 (1994). This Court reviews equitable actions *de novo* and the trial court's findings for clear error. *McFerren v. B & B Investment Group*, 253 Mich. App. 517, 522, 655 N.W.2d 779 (2002). A party seeking equity must have "clean hands," meaning equity will not aid a party who has acted in bad faith or inequitably, irrespective of the other party's improprieties. *Rose v. Nat'l Auction Group*, 466 Mich. 453, 462-463, 646 N.W.2d 455 (2002). The unclean hands doctrine is "invoked by the Court in its discretion to protect the integrity of the Court." *Stachnik v. Winkel*, 394 Mich. 375, 386, 230 N.W.2d 529 (1975). "The misconduct which will move a court of equity to deny relief must bear a more or less direct relation to the transaction concerning which complaint is made. Relief is not denied merely because of the general morals, character or conduct of the party seeking relief." *McFerren, supra*, at 524, 655 N.W.2d 779, quoting *McKeighan v. Citizens Commercial & Savings Bank of Flint*, 302 Mich. 666, 671, 5 N.W.2d 524 (1942).

¹³⁶ Laches is an equitable affirmative defense that is primarily applicable where circumstances make it inequitable to grant relief to a plaintiff who unreasonably delays filing a claim. *Yankee Springs Twp. v. Fox*, 692 N.W.2d 728, 735 (Mich. Ct. App. 2004). The unreasonable delay must cause a change in a material condition, which results in prejudice. *Id.* The defendant bears the burden of proving that a lack of due diligence by the plaintiff caused him prejudice. *Id.* While laches is not generally applied when the parties have a fiduciary relationship, *Schmude Oil Co v. Omar Operating Co.*, 458 N.W.2d 659, 664 (Mich. Ct. App. 1990), it will

A trustee is generally entitled to have their attorney fees paid by the trust.¹³⁷ When a beneficiary seeks an award of attorney fees, many jurisdictions limit payment from the trust only to those which the beneficiary can prove benefited the trust as a whole.¹³⁸

be applied in certain circumstances where there is a fiduciary relationship. See *Seguin v. Madison*, 44 N.W.2d 150, 153 (Mich. 1950) (allowing laches as a defense where beneficiaries delayed suit 35 years).

¹³⁷ See *In Re Temple*, 748 N.W.2d 265 (Mich. Ct. App. 2008). See also UTC §816(24) and §709. Comment g to the Restatement (Second) of Trusts, above, at §245, reflects that were it hasn't been established that (1) the trustee acted in bad faith, (2) didn't know that an expense was improper; (3) reasonably believed the expense was necessary, (4) the expense resulted in a benefit to the trust and (5) indemnity doesn't defeat or impair the trust's purposes, payment of such expenses should be allowed. In *In re Hammond Estate*, 547 N.W.2d 36 (Mich. Ct. App. 1996), the court determined it was appropriate for the trustee to reserve and withhold funds from a beneficiary's distribution in order to cover the trustee's out-of-pocket expenses and costs of defending claims that the trustee breach his duties to the beneficiary during the course of administration. See also *Borman v. Borman*, No. 317751, 2014 BL 332858 (Mich. Ct. App. Nov. 25, 2014).

The Reporter's Comment to Mich. Comp. Law §700.7904 reflects that the provisions of UTC §1001(2)(i) are

not intended to require a trustee to defer reimbursement for its expenses and disbursements until the conclusion of a proceeding. Under a particular set of facts, such as when a trustee appears to be acting egregiously or in bad faith, [then] a court may be justified in barring payment of expenses and disbursements during the pendency of the proceeding. However, in the ordinary course, the trustee will be entitled to receive periodic payment or reimbursement for expenses and disbursements incurred during the pendency of the proceeding.

When multiple trustees are acting at the same time, each may be entitled to have their legal fees paid from the trust's assets. See *In re Fox Tr.*, No. 292879, 2010 BL 327543 (Mich. Ct. App. Nov. 16, 2010). However, in Michigan, an exception to this is that attorney fees incurred to preserve trustee fees sought generally aren't an expense chargeable to the trust estate. See *In re Sloan*, 538 N.W.2d 47 (Mich. Ct. App. 1995).

¹³⁸ The "American rule" provides that attorney fees are not recoverable unless expressly authorized by statute or court rule. The general rationale for this rule is to ensure that private parties who pursue individual legal and equitable remedies bear the expenses of litigation in most instances. *In re Sloan Estate*, 538 N.W.2d 47, 48 (Mich. Ct. App. 1995). Mich. Comp. Law §700.7904(1) provides Michigan courts with the authority to award attorneys and costs, to a party who enhances, preserves or protects trust property. Therefore, unless the beneficiary's actions can be shown to enhance, preserve or protect trust property, as opposed to being for the sole purpose of enhancing the beneficiary's personal interest in the trust, an award of attorney fees may not always be a viable remedy. Bogert, *Trusts & Trustees*, Second Edition, §871, p. 187-191, provides, in pertinent part, that:

[i]n exercising its discretion in these matters the court will consider whether the plaintiff or other party was successful in obtaining the relief requested or in defending or conserving the trust estate, for example, by

When removal is sought, it is important to review the trust to determine if the trust contains provisions as to when and how a trustee may be removed. It is possible for the trust to provide that removal only be for reasonable cause as defined by the trust instrument. If the trust is silent, or if reasonable cause has been established, then one might default to an analysis under UTC §706.¹³⁹ The UTC provides that a trustee may be removed if:

- (1) the trustee has committed a **serious** breach of trust;
- (2) lack of cooperation among cotrustees (*sic*) **substantially** impairs the administration of the trust;¹⁴⁰
- (3) **because of unfitness,**¹⁴¹ **unwillingness, or persistent failure** of the trustee **to administer the trust effectively**, the court determines that removal of the trustee best serves the interests of the beneficiaries; or
- (4) there has been a **substantial change of circumstances** or removal is **requested by all of the**

protecting the trust against an unjust claim. The court may also consider whether the successful party benefited or enhanced the trust estate in deciding whether his attorneys' fees should be awarded from the trust estate. These considerations are sometimes expressed as the common fund doctrine or the substantial benefit rule, either of which allows the successful party reasonable attorneys' fees.

These rules generally provide the trustee with a "home court advantage," in that the trust often permits utilization of trust assets by the trustee to mount the defense, while the beneficiary may be required to go "out of pocket" for its challenge to the trustee's actions and only upon prevailing seek reimbursement under UTC §1004, assuming enhancement of the trust as a whole can't be demonstrated and exoneration of the trustee isn't precluded.

¹³⁹ Where such provisions are adopted as part of a state's trust code, they may supersede and replace common law cases for removal. See Annotation to Mich. Comp. Law §700.7706. See also *Pollack v. Barron*, 867 N.W.2d 884 (Mich. Ct. App. 2015).

¹⁴⁰ Mere friction between the trustees isn't sufficient to justify removal. See Comment to UTC §706. A trustee also may not be removed simply because of hostility or conflicts of interest between the trustee and a beneficiary unless the administration of the trust is affected. See *Obolensky v. Carroll*, No. 204563, 1999 BL 6161 (Mich. Ct. App. Feb. 19, 1999), citing *In re Sumpter Estate*; 419 N.W.2d 765 (Mich. Ct. App. 1988). See also ICLE Michigan Probate Benchbook, May 2016 Update, §5.10, citing *Gerald L. Pollack & Assoc., Inc v. Pollack*, No. 319180, 2014 BL 373232 (Mich. Ct. App. Jan. 27, 2015), and *In re Gerber Tr.*, 323 N.W.2d 567 (Mich. Ct. App. 1982).

¹⁴¹ The Reporter's Comments to Mich. Comp. Law §700.7706 indicates that unfitness can be "overcome by appointment of a cotrustee (*sic*) or special fiduciary under Mich. Comp. Law §700.7704(5) or delegation of a task to a third party, such as the investment management of a trust to an investment manager, preparation of accounts to competent lawyers or accountants, the preparation of tax returns by tax lawyers or accountant." Consequently, even unfitness may not be a basis for removal, when other remedial action may be initiated or taken.

qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable cotrustee (*sic*) or successor trustee is available. (Emphasis added).¹⁴²

Other statutes may provide an additional basis for removal. An example is Mich. Comp. Law §700.7202(2) which provides that a trustee who does not register a trust after being specifically requested to do so, in writing, by a settlor or beneficiary, may be subject to removal.¹⁴³

An analysis of the bases for removal under UTC §706 reflects that removal should generally be considered an extraordinary remedy. Consequently, not every breach of trust justifies removal of a trustee.¹⁴⁴

Since fulfilling the settlor's intent is a lynchpin concept in trust administration, and the removal of a trustee specifically named by the settlor tends to undermine a settlor's specific expectation that the person they nominate to act will be permitted to do so, it is often helpful to remind the court that the fiduciary was specifically appointed by the settlor. If there were specific reasons why that particular trustee was selected, let the court know what those reasons were. It can be helpful to propose less drastic remedies to redress a complained of action (or inaction as the case may be).

If a beneficiary seeks to limit the trustee's access to trust assets in defending the alleged breach (in addition to the arguments above at notes 145–146), stress that few would agree to act as trustee if they believed they would be forced to "go in pocket" to defend their actions absent a clear showing of malfeasance before being required to do so. Exculpatory clauses contained within a trust, especially when coupled with language that permits the trustee to hire counsel to assist in administration and **defend** actions taken, represent significant indicators of a settlor's intent that should arguably be respected by the court.

When the complained of breach revolves around lack of diversification under the prudent investor rule, remember that a trustee's decisions pertaining to investments and diversification are not to be evaluated in a vacuum. "A fiduciary's investment and management decisions with respect to individual assets shall be evaluated not in isolation, but rather in the context of the fiduciary estate portfolio as a whole and as part

¹⁴² UTC §706(b)(1)–§706(b)(10).

¹⁴³ Mich. Comp. Law §700.7202(2). See also ICLE, Michigan Probate Benchbook, May 2016 Update, above, §5.10 at 184.

¹⁴⁴ See Comments to UTC §706 and Restatement (Third) of Trusts at §37 cmt. e and g (Tentative Draft No. 2, approved 1999).

of an overall investment strategy having risk and return objectives reasonably suited to the fiduciary estate.”¹⁴⁵ Included, but not limited, as key components of that analysis are:

- “The role that each investment or course of action plays within the overall portfolio, which may include financial assets, interests in closely-held enterprises, tangible and intangible personal property, and real property”;¹⁴⁶
- “An asset’s special relationship or special value, if any to the purposes of the fiduciary estate or to 1 or more of the beneficiaries”;¹⁴⁷ and,
- The fact that “[a] particular investment is not inherently prudent or imprudent.”¹⁴⁸

By way of example, keeping a marital home as a trust asset available for the sole benefit of the surviving spouse and utilizing trust assets for its upkeep, may present a concentrated interest yet fulfill an important purpose of the trust.¹⁴⁹ Moreover, the terms of the trust may relieve the trustee of the duty to diversify investments even if non-diversification might otherwise be imprudent.¹⁵⁰

A trustee’s exercise of discretion in delegating investment responsibility to an appropriate agent (after

exercising reasonable care in the selection of the agent, definition of the scope of the agent’s responsibilities, and periodic review to confirm that the agent’s actions are in accordance with the power’s delegated to the agent), may clothe the trustee with a “Kevlar” vest.¹⁵¹ In the comments to UPIA §9, relating to the delegation of investment and management functions, indicates that:

The Uniform Trustee Powers Act (1964) effectively abrogates the nondelegation (*sic*) rule. It authorized trustees “to employ persons, including attorneys, auditors, investment advisors, or agents, even if they are associated with the trustee, to advise or assist the trustee in the performance of his administrative duties; to act without independent investigation upon their recommendations; and instead of acting personally, to employ one or more agents to perform any

technologies, the value of the Kodak holdings declined significantly. The Surrogate court surcharged the fiduciary in excess of \$24 Million, however, on appeal, the court held:

It is not sufficient that hindsight might suggest that another course would have been more beneficial; nor does a mere error of investment judgment mandate a surcharge. Our courts do not demand investment infallibility, nor hold a trustee to prescience in investment decisions” (*Matter of Bank of N.Y.*, 35 N.Y.2d 512, 519, 364 N.Y.S.2d 164, 323 N.E.2d 700). As the First Department wrote in *Matter of Cowles*, 22 A.D.2d 365, 377, 255 N.Y.S.2d 160, *aff’d*, 17 N.Y.2d 567, 268 N.Y.S.2d 327, 215 N.E.2d 509, “[t]he trustee had a right to have confidence in the long-range prospects of a business which had once prospered. . . . The trustee could not be expected to look into the future and to foresee that the stock would continually decline in value without making a comeback. . . . ‘A wisdom developed after an event, and having it and its consequence as a source, is a standard [by which no person] should be judged. . . .’

Another example where the inclusion of a direction to hold an asset coupled with an exoneration clause protected the trustee from surcharge appears in *Nelson v. First Natl. Bank and Tr. Co. of Williston*, 543 F.3d 432 (8th Cir. 2008). In that case, the settlor acquired and funded the trust with a concentrated position in Medtronic. Settlor directed the bank to continue to hold the investment based upon settlor’s confidence in the company’s ability to rebound. The trust permitted the continued holding in a concentrated position indicating that “any investment made or retained by the trustee in good faith shall be proper despite any resulting risk or lack of diversification or marketability and although not of a kind considered by law suitable for trust investments.” The court found that “[c]laims alleging loss of value due to market risk and lack of diversification are just the sort of claims from which First National was protected by Paragraph 17(b) of the trust.”

¹⁵¹ See Mich. Comp. Law §700.1510(2). See also Reporter’s Comment to Mich. Comp. Law §700.1510, which reflects that the modern trend is “to favor delegation”; and, UPIA §9(c).

¹⁴⁵ Mich. Comp. Law §700.1503 (1). See also Uniform Prudent Investor Act, National Conference of Commissioners on Uniform State Laws, 1995 (UPIA) at §2(b), upon which the Michigan statute was patterned.

¹⁴⁶ Mich. Comp. Law §700.1503 (2)(d). See also UPIA §2(c)(4).

¹⁴⁷ Mich. Comp. Law §700.1503 (2)(h). See also UPIA §2(c)(8).

¹⁴⁸ Mich. Comp. Law §700.1503 (3).

¹⁴⁹ See Reporter’s Comment to Mich. Comp. Law §700.1503. See also UPIA §3, which specifically indicates that a trustee need not diversify if “the purposes of the trust are better served without diversifying”; N.Y. Est. Powers & Trusts Law §11-2.3(b)(4)(A) (McKinney); and, Fla. Stat. Ann. §660.431(1)(b). In *Shriners Hosp. for Children v. First N. Bank of Wyo.*, 373 P.3d 392 (Wyo. 2016), the Wyoming Supreme Court found that the duty to diversity could not be adjudicated in a vacuum. Here the court held that the intent of the settlor for ranch property to be maintained trumped the income beneficiaries demands for diversification in order to facilitate the generation of greater income returns.

¹⁵⁰ See *Webb v. Webb*, No. 263759, 2006 BL 173000 (Mich. Ct. App. Jan. 24, 2006).

In *In re Chase Manhattan Bank*, 26 A.D.3d 824 (N.Y. App. Div. 4th Dept. 2006), the dispositive instrument provided, in pertinent part that “[i]t is my desire and hope that said [Kodak] stock will be held by my said Executors and by my said Trustee to be distributed to the ultimate beneficiaries under this Will, and neither my Executors nor my said Trustee shall dispose of such stock for the purpose of diversification of investment and neither they [n]or it shall be held liable for any diminution in the value of such stock.” The trustee, based upon historical performance of the stock, continued to maintain a significant concentration of the trust estate in Kodak. Ultimately, with a shift from film to digital

act of administration whether or not discretionary . . .”¹⁵²

This language essentially provides broad protections to a fiduciary who, after exercising due diligence, delegates investment authority to an appropriate agent and then follows the investment advice provided and monitors the portfolio.¹⁵³ While no approach is “bullet proof,” like “Kevlar” certain approaches can provide insulation or protection. It is for this very reason that an attorney advising a trustee in the performance of administrative duties, should consider recommending that the trustee research, interview and retain the services of an investment advisor as well as retain notes regarding the process and decision making employed. Doing so, and establishing reasonable objectives for investment by which performance might be measured, may help in the later defense of a breach of trust action premised upon investment decisions.

NO CONTEST CLAUSES

While the use of a “no contest” clause to deter breach of fiduciary duty claims is generally frowned upon, it may be important to analyze the nature of the breach of duty claim in the context of the powers granted to the fiduciary.¹⁵⁴ When the fiduciary is granted broad powers but, by virtue of the claim, the beneficiaries seek to undercut or otherwise limit the powers granted, such a challenge may, in fact, trigger a “no contest clause.” The filing of a petition to interpose the ramifications of the “no contest” clause may, under the proper facts and circumstances, have a chilling effect upon the claim.

¹⁵² Comment to UPIA §9, citing Uniform Trustee Powers Act §3(24), 7B Uniform Laws Ann. 743 (1985), which at that point (9/30/1993) had been enacted by 16 states.

¹⁵³ See *O’Neill v. O’Neill*, 865 N.E.2d 917 (Ohio Ct. App. 8th Dist. 2006). In this case, the trustee delegated investment to a registered broker at Merrill Lynch, who invested a significant portion of the portfolio in tech stocks. When the tech stock bubble burst the portfolio was decimated. However, the court refused to hold the trustee liable for the loss finding (at p. 859) that:

There is no evidence in the record that [the broker] did anything with the trust assets that was inconsistent with the trust objective “to invest.” There is also no evidence that the trustee failed in his duty to review and monitor. While it is safe to say that the trustee was not heavily involved in the duties delegated to [the broker], nothing suggests that the trustee “fell asleep at the wheel,” so to speak. Investing in stocks is an inherently risky endeavor, and investing in high technology stocks increases that risk, while at the same time increasing the potential gain. Many people lost money in the stock market, particularly in high-tech stocks, at the dawn of the new millennium.

¹⁵⁴ See *Matter of Sochurek*, 41 N.Y.S.3d 452 (Sup. Ct. June 30, 2016).

PRACTICAL SUGGESTIONS

Understanding the potential avenues of attack can make for better drafting and administration. The best defense often stems from good drafting coupled with proactive fiduciary communication and action. Therefore, you may wish to consider the following:

- Include both general and specific statements of the settlor’s intent in the instrument. If the settlor wants to maintain a concentrated position in a closely held family business, statements reflecting the import of the asset to the settlor and his goals and desires for his family can be extremely helpful.
- Review the exculpatory language contained in instruments with the client and determine whether statutory defaults truly reflect the settlor’s desires. When appropriate, expand the language to specifically cover situations contemplated by the settlor or the assets anticipated to be held in trust.
- If the client does not want a family member or trusted advisor to be removed, other than for good cause, state so in the document and define what “good cause” constitutes.
- Help the client create their own default rules. Often drafting attorneys believe it is best to keep their documents “short” so that they are easier to read and understand and rely upon their state’s statutory provisions to “fill in the blanks.” This can be a dangerous approach in the administrative phase of the trust. Statutory changes and the failure to include language can (i) mislead a trustee’s understanding of what he can or can’t do, and (ii) create risks that could easily have been avoided by the creation of guidance and overrides within the instrument with regard to modifiable statutory default provisions.
- If the client wants the trustee to be able to individually participate in opportunities extended to the trust (such as transactions, joint ventures, real estate purchases, or holding an interest in the family business) — say so.
- Remember that the jurisdiction of administration may differ from the state of settlor’s residence at the time a trust is created. Inclusion of duties, responsibilities and guidance for administration (including under what circumstances a trustee will be held liable to the beneficiary or subject to removal) can be extremely helpful.
- Stress the importance of good record keeping and regular and open communication with beneficiaries. The ability to show the court the efforts made to keep the beneficiaries reasonably informed and that they had sufficient notice of actions taken (or

even before a significant event may occur — such as a planned sale or significant distribution) can also help build equitable (if not statutory) defenses.

- Obtain written waivers, consents and/or releases on an annual basis.
- Draft instruments to include self-cancelling claims periods during which beneficiaries are required to put the trustee on notice of any objections they may have. When doing so also reference the portion of the trust that contains such limitations so that you can demonstrate that they were put on notice of the need to bring objections within the specified time frame.
- Include a coversheet to statements, check registers, tax returns, spreadsheets, Quicken® or QuickBooks® printouts and/or other forms of informal reporting provided to clients to put them on notice of the intention to treat the same as fiduciary reports under UTC §1005(a) or any other applicable state statute. You may do so simply by including such language in the correspondence (or email) that relays the report. The language might reflect that:

State law provides that an action against a trustee for breach of trust based on matters in a trustee's report that adequately discloses the existence of a potential claim for breach of trust may be barred unless the action is commenced within a certain time period after receipt of such report. Michigan has a one-year statute of limitations with regard to such reports and accountings, while the trust itself contains a shorter time frame of ninety days during which you must notify the trustee of any objections you might have. The disclosures contained in the attached documents are made as part of the trustee's written report(s) and the provision of this information is intended to constitute an accounting.

- Authorize the trustee to nominate an independent co-trustee to act with him or her. If it appears that the matter may be heading to court, the trustee can appoint an independent who will be respected by the court as an entity or person who can provide assurances that the administration (at least on a go forward basis) will be handled in accordance with acceptable trust procedures and the terms and provisions of the trust. Such a power can also

provide other benefits during the overall administration of the trust. The “responsible” family member who was named as fiduciary may have difficulty saying no to the “spendthrift” beneficiary, putting the trustee at risk of claims by other beneficiaries, or when they say no — the ire of the spendthrift. Under such circumstances the independent can provide a buffer or shield for the family trustee.

- Be timely and responsive to reasonable requests for information.
- When the prospect of litigation arises, registration of the trust in an appropriate forum may permit the selection of a favorable forum. While one can not invest a court with jurisdiction where none would otherwise exist, when multiple venues would be appropriate registration may prove beneficial.
- Be cognizant that while some states protect communications between the trustee and its counsel (finding the same to be subject to the precepts of the attorney-client privilege)¹⁵⁵ — other states hold that the attorney-client privilege in regards to advice provided regarding the administration of the trust falls outside the confines of that precept (as to requests made by a beneficiary for whose benefit administration is occurring).¹⁵⁶
- If beneficiaries bring an action against the trustee in his fiduciary role as well as individually, consider retaining two counsel — one to represent the trustee in his fiduciary capacity and one individually. This may eliminate a claim that fees paid to fiduciary counsel should be disgorged because they were for the trustee's personal benefit. While this approach may cost the trustee individually, it gives the fiduciary the benefit of a team approach to defending the action and fiduciary counsel can still take the lead.
- Read the applicable instrument. Even if the terms contained weren't effective to override state law, they may provide a defense of “reasonable reliance” that might eliminate a surcharge.

¹⁵⁵ Such as in Michigan. See *Estate of Maki v. Coen*, No. 328704, 2017 BL 16263 (Mich. Ct. App. Jan. 19, 2017).

¹⁵⁶ The issue of the attorney-client privilege is a complex one which goes beyond the scope of these materials. The concept is raised, however, so that the reader can be sensitive to the issue, especially when litigation may be anticipated. See also UTC §813 Comment p. 149.

Claims of breach of trust are on the rise. Probate is just another forum for family members to play out hurt feelings and other dysfunctional family dynamics. Knowing that you start out with the proverbial tar-

get on one's back — should indicate that care should be taken. Be proactive. Draft for flexibility and act “as if” the exoneration clauses may be the last (as opposed to first) line of defense.