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## Fiduciary Litigation-Trusts



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Fiduciary litigation can refer to any litigation where the underlying claim involves one party allegedly owing a fiduciary duty to another party. The litigation usually is centered upon allegations of a breach of that fiduciary duty owed. Non-exclusive types of fiduciary litigation can involve: an executor of a succession; a trustee of a trust; an agent with a power of attorney to act on behalf of a third party; an officer or a director of a company; a general partner of a partnership; or a manager of a limited liability company. This article will focus on fiduciary litigation that can arise in the context of a trust.

### Definition of Fiduciary Duty.

A fiduciary duty is defined as a duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person. It is the highest standard of duty implied by law.<sup>1</sup> Thus, it is highly recommended that a person who consents to act as a trustee seek legal counsel throughout the administration of the trust in order to comply with this fiduciary duty.

### What is a Trust?

A trust is defined as that relationship resulting from the transfer of title to property to a person to be administered by him as a fiduciary for the benefit of another.<sup>2</sup> The trustee is the person to whom title to the trust property is transferred, and the person for whom the property is administered is called the beneficiary. The trustee owes a fiduciary duty to the beneficiary of the trust.<sup>3</sup>

Given the very nature of a trust, as described above, it should not be surprising that litigation can arise in the context of a trust. The settlor, the person who creates the trust, selects the person who will act as the trustee of the trust. The trustee typically is a third party who has been selected to administer the trust property in accordance with the terms of the trust instrument. The beneficiary plays no role in deciding who will be the trustee. Further, the beneficiary

<sup>1</sup> Black's Law Dictionary

<sup>2</sup> La. R.S. 9:1731.

<sup>3</sup> La. R.S. 9:1781; 9:1725. There can be multiple trustees and multiple beneficiaries in a given trust. This article will use both terms in the singular.

normally does not have any input regarding either the terms of the trust or the length of the trust; those issues are determined by the settlor with the guidance of his legal counsel.

Since the settlor determines the game plan and rules by which the trust is to be administered, it is not inconceivable that the beneficiary will have some conflict with the trustee, and it is even more likely that the beneficiary will object to some of the restrictive terms contained in the trust instrument.<sup>4</sup> What person would voluntarily agree to have a third party control his property and manage the same under certain restrictions? Most people would rather control the property immediately themselves. That being said, there are many significant reasons to use a trust in your estate planning. Suffice it to say that trusts play an invaluable role in estate planning. However, a trustee never should minimize the duties he owes to a beneficiary, and the trustee always should seek legal advice while administering a trust in order to minimize any potential exposure to fiduciary litigation.

### **Potential Triggers for Fiduciary Litigation.**

**Trust Instrument.** As mentioned above, the trust instrument is the written document that creates the trust. For a testamentary trust, the trust instrument is the last will and testament of the decedent. The trust instrument sets forth the powers of the trustee; yet, these powers can be supplemented or even overridden by certain provisions in the Louisiana Trust Code.<sup>5</sup> Fiduciary litigation certainly can arise if the trustee violates an expressed provision of the trust instrument. Sometimes the trust instrument itself is not drafted as clear as it should have been, or worse, there are contradictory provisions contained within the trust instrument. If there is a scenario whereby the trustee needs clarification on the interpretation of a provision in a trust instrument, the Trust Code gives the trustee the authority to institute a summary proceeding in a Louisiana district court in order to obtain the correct interpretation.<sup>6</sup> A summary proceeding is an expeditious method to obtain a ruling from a court, as opposed to an ordinary proceeding, which can linger in a court for an extended period of time.

**Accountings.** A trustee is required to render an accounting to a beneficiary at least once a year, documenting all receipts and disbursements of cash or other trust property.<sup>7</sup> An accounting is simply a report by the trustee to the beneficiary regarding the financial activity of a trust for a certain period of time. A trustee who fails to provide such an accounting could provoke the beneficiary to file a lawsuit. In egregious circumstances, the trustee could be removed from office by a Louisiana court for failure to provide the required accountings.<sup>8</sup> Thus, in order to avoid litigation, the trustee should render an annual accounting to the beneficiary. Once the accounting is submitted to the beneficiary, the trustee should obtain written approval of the accounting by the beneficiary, for such approval will be conclusive evidence with respect to all matters disclosed in the accounting against the beneficiary who may later object to the accounting. The trustee can obtain court approval of the accounting should the beneficiary not voluntarily give the written approval of the accounting to the trustee.

**Information.** Upon request, a trustee is required to provide a beneficiary with complete and accurate information as to the nature and amount of trust property and to allow the beneficiary to inspect all documents and accounts related to the trust property.<sup>9</sup> A refusal by a trustee to provide such information almost always will trigger an unnecessary lawsuit by a beneficiary. Thus, the trustee should err on the side of providing the beneficiary with the requested information to which the beneficiary is entitled.

**Self-Dealing.** A trustee always must administer the trust solely in the interest of the beneficiary.<sup>10</sup> This requirement seems somewhat straight forward since the settlor has entrusted property to the trustee to be administered

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<sup>4</sup> The trust instrument is the written document that creates the trust. For a testamentary trust, the trust instrument is the last will and testament of the decedent. La. R.S. 9:1725.

<sup>5</sup> La. R.S. 9:2061. The Louisiana Trust Code is contained in La. R.S. 9:1721 through La. R.S. 9:2252.

<sup>6</sup> La. R.S. 9:2233. As opposed to a summary proceeding, which can be a very fast process, an ordinary proceeding applies to most lawsuits and can remain unresolved for a long time.

<sup>7</sup> La. R.S. 9:2088.

<sup>8</sup> La. R.S. 9:2221.

<sup>9</sup> La. R.S. 9:2089.

<sup>10</sup> La. R.S. 9:2082.

for the beneficiary. Therefore, a trustee can be liable to a beneficiary for a breach of trust.<sup>11</sup> Further, a trust instrument usually cannot relieve a trustee from liability for breach of the duty of loyalty, for breach of trust committed in bad faith, or for any abuse of the fiduciary relationship.<sup>12</sup>

However, potential problems can arise in a number of scenarios, including: (1) if a trust instrument is poorly written, (2) if an unscrupulous person is named by a settlor as the trustee, or (3) if the trustee also is one of several beneficiaries to a trust. The Trust Code states that a trust instrument can give an individual trustee the authority (1) to make loans to himself or to a relative or business associate and (2) to sell trust property to himself or to a relative or a business associate.<sup>13</sup> Litigation will likely be initiated by a beneficiary if an individual trustee engages in transactions with the trust without having the authority in the trust instrument to do so. Even if the trust instrument gives the trustee the authority to engage in such transactions or dealings with the trust, the trustee always must reflect on whether such action is prudent in a given situation, whether a third-party independent party should provide a fairness opinion, or whether court approval of the transaction should first be obtained.

**Miscellaneous.** The Trust Code states that a trustee owes a beneficiary: (1) the duty to take reasonable steps to secure, keep control of, and preserve the trust property and (2) the duty to administer the trust property as a prudent person would administer it.<sup>14</sup> Thus, once a trustee accepts the trusteeship, he must first take those steps necessary to identify and secure the trust property. Thereafter, the trustee must act reasonably in both maintaining and administering the trust property. Any deviation from this course of action potentially could lead to fiduciary litigation.

### Conclusion.

The duties owed by a trustee to a beneficiary are significant. Given the above scenarios, a trustee would be prudent in obtaining legal advice both prior to accepting the office as trustee and while fulfilling his duties as a trustee, so as to minimize or eliminate any potential fiduciary litigation.<sup>15</sup>

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<sup>11</sup> La. R.S. 9:2201.

<sup>12</sup> La. R.S. 9:2206.

<sup>13</sup> La. R.S. 9:2084 and 9:2085.

<sup>14</sup> La. R.S. 9:2090 and La. R.S. 9:2091

<sup>15</sup> The above article is not intended as legal advice for a particular matter, but rather is only intended as an overview of fiduciary litigation involving trusts. Those individuals with particular questions can contact Greg LaCour in order to make an appointment.



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