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BREACH OF FIDUCIARY DUTY CLAIMS REVISITED

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Breach of Fiduciary Duty Claims Revisited

Cannon Financial Institute, Inc.

Presents

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By

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CHARLES A. REDD

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Mr. Redd has extensive experience and expertise in: (a) the drafting of wills, trust instruments, durable powers of attorney, marital agreements and other estate planning documents; (b) pre- and post-death tax planning for individuals, trusts and estates; (c) preparation and filing of estate tax returns, gift tax returns and fiduciary income tax returns; (d) representation and filing of estate tax returns, gift tax returns and fiduciary income tax returns; (e) representation of individual and corporate fiduciaries and (f) litigation in the Probate Division and other equity divisions of the Circuit Court. Mr. Redd has worked on estates and estate planning projects, some involving assets valued at over a billion dollars, and has successfully handled numerous estate tax, gift tax and generation-skipping transfer tax matters, will and trust construction cases, will contests, contests of trust agreements, alleged breach of fiduciary duty cases and other types of cases involving estates and trusts.

Mr. Redd is a member of the State Bar of Wisconsin, The Missouri Bar (Probate and Trust Committee), the Illinois State Bar Association (Section on Trusts and Estates), The Bar Association of Metropolitan St. Louis (Probate and Trust Section, member and past chairman) and the Estate Planning Council of St. Louis.

Mr. Redd was Chairman of the Missouri Bar's Health Care Durable Power of Attorney Subcommittee, and he played a significant role in the drafting and enactment of the Missouri Durable Power of Attorney for Health Care Act. In 1991, Mr. Redd received The Missouri Bar President's Award.

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A. Examples of Negligence, Recklessness and Willful Misconduct to Avoid

1. *McNeil v. McNeil*, 798 A.2d 503 (Del. 2002)

Henry McNeil, Sr. established five trusts, four of which were for the benefit of his four children, while the other trust was for the benefit of his wife. The Trustees were to provide the children with the income necessary to maintain the children's accustomed standard of living. The wife's trust was to provide income not only to the wife, but also to all of McNeil, Sr.'s descendants and their spouses. One of the children, Hank, who became estranged from the family, believed that he was only a remainder beneficiary of the wife's trust. The Trustees never informed Hank about the actual terms of the trust, even though the Trustees knew that all the children, including Hank, were current income beneficiaries of the wife's trust. Consequently, Hank never received any distributions from the wife's trust, but all the other children did. When Hank found out that he was a current beneficiary, he filed suit against the Trustees, seeking, among other remedies, make-up distributions from the trust and removal and surcharge of the Trustees. The other children were joined as defendants.

The Trustees argued that the terms of the trust gave them nearly unfettered discretion in handling trust assets. As to any distribution, the trust agreement gave the Trustees the discretion to decide the amount of the distribution, the recipient of the distribution, and whether the distribution would be from income or principal. The trust also relieved the Trustees from personal liability except for acts constituting gross negligence. The Supreme Court of Delaware, however, ruled that these terms were not relevant to the Trustees' fiduciary duty to inform beneficiaries of the basic terms of the trust. The Trustees should have informed Hank that he was a current income beneficiary, especially given that Hank repeatedly attempted to get information from the Trustees regarding the wife's trust. The court came to this conclusion despite the fact that the Trustees had distributed millions of dollars to Hank from his own trust. Also, the court found that the Trustees' refusal to provide Hank with information regarding the trust while making this information available to his siblings violated the Trustees' duty of impartiality. Furthermore, the court refused to uphold a provision in the trust agreement that stated that a Trustee's decision was not reviewable by a court.

The court next addressed the issue of damages. The court affirmed the Chancery Court's: (a) surcharge in the amount of one-fifth of the commissions earned by the Trustees; (b) order for make-up distribution of 7.5% of the value of Hank's interest; (c) approval of a plan to divide the trust into four separate trusts; (d) approval of the Trustees' adoption of a unitrust policy;

(e) removal of one of the Trustees responsible for managing the separate trusts; and (f) refusal to order the Trustees to pay Hank's legal fees.

2. *Hatleberg v. Norwest Bank Wisconsin*, 700 N.W.2d 15 (Wis. July 7, 2005), *aff'g* 678 N.W.2d 302 (Wis.App. 2004)

A corporate Trustee recommended to a client that she establish an irrevocable trust (the "Trust"). The lawyer who drafted the Trust instrument, however, did not have any estate planning experience and failed to include *Crummey* withdrawal right provisions that were necessary to secure federal gift tax annual exclusions for gifts to the Trust. The corporate Trustee, who was named as Trustee of the Trust, knew of the attorney's lack of experience and of this defect but never directly informed the client. In fact, the Trustee recommended that the client continue to fund the Trust and represented to the client that the Trust would still generate tax benefits. The Wisconsin Supreme Court held that the corporate Trustee had no duty to review the Trust instrument to ensure that it could effectively cause gifts to the Trust not to be "adjusted taxable gifts" on the client's estate tax return. However, the court concluded that the corporate Trustee negligently provided inaccurate information and breached its duty by continuing to advise the client to contribute money to the Trust after it realized the Trust instrument was defective. RESTATEMENT (SECOND) OF THE LAW, TORTS, Section 552. The corporate Trustee was also liable for negligent misrepresentation. The court cautioned that its opinion "should not be interpreted as encouraging Trustees and financial professionals to remain silent rather than risk providing false information to their clients. As we have recognized, Trustees have a duty to disclose 'relevant information'" (quoting *Hammes v. First Nat'l Bank & Trust Co.*, 255 N.W.2d 555 (Wis. 1977)).

3. *Fifth Third Bank v. Firstar Bank*, 2006 Ohio 4506 (Ohio App. 2006)

Elizabeth Reagan established a charitable remainder unitrust ("CRUT") in 2000, naming Firstar Bank, N.A. ("Firstar"), now known as U.S. Bank, National Association, as Trustee. When established, the trust's sole asset was $2 million worth of stock in Procter & Gamble Co. ("P&G"). Under the trust instrument, Ms. Reagan would receive 8% of the CRUT's principal value as redetermined each year. Upon her death, the trust remainder would be distributed to three charities. Ms. Reagan testified that Firstar knew that one of the purposes of the trust was to diversify out of P&G stock. The trust instrument provided that "[t]he trustee shall have expressly the following powers…to retain, without liability for loss or depreciation resulting from such retention, original property, real or personal, received from Grantor or from any other source, although it may represent a disproportionate part of the trust."

The Firstar trust officer began to reduce the concentration of P&G stock by selling portions of the stock on a monthly basis, except for a time period during which the stock value decreased. By the end of the first year, however, the value of the stock held in the CRUT had decreased by 50%. Ms. Reagan replaced Firstar with Fifth Third Bank as Trustee. Ms. Reagan then sued Firstar claiming that Firstar had breached its fiduciary duty. After a jury trial, the CRUT was awarded over $1 million in damages.

On appeal to the Ohio Court of Appeals, Firstar asserted that the CRUT document exculpated the bank from liability for any losses in the value of the trust assets, as allowed under Ohio Rev. Code § 1339.52(C), part of Ohio's version of the Uniform Prudent Investor Act. In *Wood v. U.S. Bank, N.A.*, 828 N.E.2d 1072 (Ohio App. 2005), this same court had held that "even if the trust document allows the trustee to 'retain' assets that would not normally be suitable, the trustee's duty to diversify remains, unless there are special circumstances" and that, under the above statute, the duty to diversify could be altered only if "the instrument creating the trust clearly indicates an intention to abrogate the common-law, now statutory, duty to diversify." The court concluded that the above-quoted language from the trust instrument allowing the Trustee to retain assets did not clearly indicate an intention to abrogate the duty to diversify. Therefore, the court affirmed the judgment of the trial court.

4. *Boyce Family Trust v. Snyder*, 128 S.W.3d 630 (Mo.App. E.D. 2004)

The Trustee entered into an agreement to buy a supermarket which the Trustee owned individually. The beneficiaries agreed to the transaction. The Trustee, however, failed to disclose to the beneficiaries detrimental information relevant to the sale and downplayed potential problems with the store's performance. The court held that the Trustee was liable for breach of fiduciary duty. The court emphasized that the Trustee had a duty to inform the beneficiaries of all facts known to him so that the beneficiaries, when considering whether to consent to the Trustee's purchase of the supermarket, could have made an informed decision.

B. Required Disclosures to Beneficiaries

1. The Uniform Rules

The Comment to Uniform Trust Code ("UTC") § 706, provides that "a particularly appropriate circumstance justifying removal of the trustee is a serious breach of the trustee's duty to keep the beneficiaries reasonably informed of the administration of the trust or to comply with a beneficiary's request for information. . . ."

The provisions of the UTC that codify the Trustee's duty to inform and report are among the most controversial portions of the UTC and, as a result, have become the least uniform among jurisdictions that have enacted the UTC.

The UTC limits the persons to whom the duty to inform and report is owed in the case of most revocable trusts and a trust over which a beneficiary holds a power of withdrawal. With regard to a revocable trust, the Trustee owes duties exclusively to the settlor when the settlor has capacity to revoke the trust. In addition, a Trustee owes a duty to inform and report to any beneficiary who holds a power of withdrawal, as if such beneficiary is the settlor, to the extent of the property subject to the power. When these rules apply, the Trustee's duties under UTC § 813, discussed below, are owed to the settlor or the power holder, as the case may be. UTC § 603 and Comment. Thus, for example, in the case of a marital deduction trust over which the beneficiary/surviving spouse has an unlimited *inter vivos* power of withdrawal, the Trustee's duty to inform and report will run only to such beneficiary.

UTC § 813 codifies and expands the Trustee's common law duty to keep beneficiaries informed when UTC § 603 does not apply. It imposes an affirmative obligation to keep "qualified beneficiaries" reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. The Trustee must also meet several specific notice requirements and submit annual reports. "Nonqualified beneficiaries," an undefined term, are entitled to information from the Trustee only upon their specific request.

UTC § 813 makes distinctions based upon the defined terms "beneficiary" and "qualified beneficiary" as well as the undefined terms "distributee" and "permissible distributee." "Beneficiary" under the UTC includes one holding a present or future interest, whether such interest is vested or contingent, including a person who holds a power of appointment over trust property in a capacity other than that of a Trustee. Some states have added a definition of "permissible distributee" that generally defines such person as a beneficiary that is currently eligible to receive any distribution from a trust. *See, e.g.*, Section 456.1-103(14), RSMo.; D.C. Code § 19-1301.03. A "qualified beneficiary" includes current beneficiaries, presumptive remainder beneficiaries and those beneficiaries who would be current beneficiaries if the interests of the current beneficiaries, but not the trust, terminated.

Within sixty days after accepting a trusteeship, the Trustee must notify the qualified beneficiaries of the acceptance and of the Trustee's contact information. In addition, within sixty days after the date the Trustee acquires knowledge of the creation of an irrevocable trust, or that a formerly revocable trust has become irrevocable, the Trustee must notify the qualified beneficiaries of the trust's existence, of the identity of the settlor, of the right to request a copy of the trust instrument and of the right to a Trustee's report. UTC § 813. The obligation to provide the notices described in UTC § 813(b)(2) and (3) are determined at a single point in time – when the Trustee accepts the trust, when the irrevocable trust is created or when a formerly revocable trust becomes irrevocable. Query whether, if a given beneficiary is not entitled to a notice at the time the Trustee becomes obligated to provide the notices required in UTC § 813(b)(2) and (3) (presumably because the trust agreement waived the duty to provide notice to beneficiaries who had not attained age 25 pursuant to UTC § 105(b)(8)), the Trustee should send a notice to such beneficiary within 60 days of such qualified beneficiary attaining age 25.

➔ **Planning Point:** Unlike most of the UTC, which applies to all trusts whether created before or after the effective date of the UTC, UTC § 1106, these specific duties to inform are prospective only. UTC § 813(e).

In addition to annual reporting requirements, the Trustee must promptly respond to any beneficiary's (not just a qualified beneficiary's) request for information, unless such request is unreasonable under the circumstances. UTC § 813. A Trustee is required to notify the qualified beneficiaries of any change in the method or rate for computing the Trustee's compensation. The Trustee must also promptly provide a beneficiary with a copy of the trust instrument upon such beneficiary's request. Whenever the UTC requires notice to the qualified beneficiaries, the

Trustee must also give notice to any other beneficiary who has sent the Trustee a request for notice. UTC § 110(a).

> ➔ **<u>Planning Point</u>:** The Comment to UTC § 813 states that providing a beneficiary with a copy of the annual report ordinarily satisfies a Trustee's affirmative duty to keep the beneficiaries reasonably informed and that a Trustee is not ordinarily obligated to furnish information to a beneficiary in the absence of a specific request. However, the Comment also states that a Trustee may be required to give the beneficiaries advance notice of a non-routine transaction that significantly affects the trust estate and the beneficiaries' interests.

A beneficiary may waive the right to reports or other information that the Trustee would otherwise be required to give the beneficiary and may withdraw a previous waiver as to future reports and other information. A waiver by a beneficiary does not relieve the Trustee from liability for matters that the report or other information would have disclosed. UTC § 813(d). Moreover, if the report would have disclosed a potential claim against the Trustee, the statute of limitations will not begin to run against a beneficiary who does not receive the report because it was waived. UTC § 1005 Comment.

2. Court Applies Fiduciary Exception to a Corporate Trustee's Attorney-Client Privilege

Hammerman v. The Northern Trust Company, 329 P.3d 1055 (Ariz. App. June 3, 2014)

Northern Trust Company ("Northern") served as Trustee of a trust under Section 3.4 of the Dorothy B. Kipnis Survivor's Trust Agreement (the "Section 3.4 Trust"). Jane Kipnis Hammerman was the sole beneficiary. The Section 3.4 Trust owned the equity in DBK Residuary Property ("DBK"), a single member LLC. Northern retained outside counsel to provide advice regarding the administration of DBK and paid the resulting legal fees from trust funds, as authorized by the trust agreement.

Northern entered into a contract to sell a warehouse owned by DBK to a third party to address multiple lien foreclosure actions against DBK. Ms. Hammerman disagreed with this action and removed Northern as Trustee before the sale closing. Ms. Hammerman appointed Bank of Arizona as successor Trustee. Ms. Hammerman and Bank of Arizona requested from Northern files regarding its administration of the Section 3.4 Trust. Northern produced most of its files but withheld certain electronic mail messages that it claimed were subject to the attorney-client privilege. These electronic mail messages concerned the conflict between Northern and Ms. Hammerman regarding the DBK property. Bank of Arizona and Ms. Hammerman filed a petition to compel Northern to produce the electronic mail messages. The trial court ordered Northern to produce the electronic mail messages, stating that Bank of Arizona had the right to obtain such communications containing legal advice given that the fees for such advice were paid from trust funds.

On appeal, the Arizona Court of Appeals began by examining the scope of a Trustee's attorney-client privilege as against a trust beneficiary. The Court of Appeals analyzed the fiduciary exception to the attorney-client privilege, which, in general, "requires a trustee comply with a beneficiary's request to produce all legal advice that the trustee has obtained on matters concerning administration of the trust." *Wachtel v. Health Net, Inc.*, 482 F.3d 225 (3d Cir. 2007).

The Court of Appeals discussed Ariz. Rev. Stat. § 14-10813(A), part of Arizona's version of the UTC, which states that a Trustee has a duty to "keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and the material facts necessary for them to protect their interests." The Court of Appeals also cited to the RESTATEMENT (THIRD) OF THE LAW, TRUSTS ("Restatement 3d") § 82, cmt. f, stating that legal advice obtained in the Trustee's fiduciary capacity is subject to the general rule requiring disclosure of "information that is reasonably necessary to the prevention or redress of a breach of trust or otherwise to the enforcement of the beneficiary's rights." The Court of Appeals was persuaded that disclosure of otherwise privileged communications between a trustee and counsel would promote the beneficiaries' involvement in trust affairs and the enforcement of their rights. Therefore, the Court of Appeals adopted the rule of Restatement 3d § 82, stating that a Trustee has a duty to disclose "legal consultations and advice obtained in the trustee's fiduciary capacity concerning decisions or actions to be taken in the course of administering the trust."

The Court of Appeals, relying on *Riggs Nat'l Bank of Wash. D.C. v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976), stated that it would determine whether a Trustee sought legal advice in a fiduciary capacity by analyzing whether: (a) the Trustees had sought legal advice that would only benefit the trust, not the Trustees personally (*i.e.*, in defense of claims against beneficiaries); (b) the Trustees had paid for that advice with trust funds, not the Trustees' personal funds; and (c) there was no adversarial proceeding pending against the Trustees, which means that there was no need for the Trustees to seek advice in a personal capacity. The Court of Appeals added that "whether the trustee acted in a fiduciary capacity cannot be resolved simply by asking who paid for the advice."

The Court of Appeals stated that the fiduciary exception to the attorney-client privilege does not apply "when a trustee seeks legal advice in a personal capacity on matters not of trust administration, as opposed to in a fiduciary capacity on matters of trust administration," relying on *United States v. Mett*, 178 F.3d 1058 (9th Cir. 1999), and Restatement 3d § 82, cmt. f. The Court of Appeals therefore reversed and remanded the trial court's decision to consider whether the legal advice was obtained by Northern in its corporate or fiduciary capacity.

In a footnote, the Court of Appeals discussed the ethical duties of a lawyer who represents a Trustee in both a personal capacity and in matters of trust administration, stating that a lawyer "quickly may be faced with a conflict of interest between the trustee's individual interests and the interests of the trust."

The Court of Appeals then addressed the scope of a Trustee's attorney-client privilege as against a successor Trustee. As in the context of disclosures to a beneficiary, the Court of

Appeals held that disclosure to the successor Trustee of otherwise privileged communications is required insofar as such communications involve the Trustee's seeking legal advice in its fiduciary capacity on matters of trust administration. In turn, a successor Trustee succeeds to all the duties of the predecessor Trustee, including the duty to disclose information to the beneficiaries. Where the communications in question include legal advice obtained in the Trustee's fiduciary capacity concerning actions to be taken in trust administration, a predecessor Trustee may not assert the attorney-client privilege regarding such communications to prevent disclosure to a successor Trustee.

The Court of Appeals believed that disclosure was necessary in this context to ensure the effective administration of a trust after a change of Trustee, as well as allowing the successor Trustee to protect the beneficiaries' interests. Accordingly, the Court of Appeals reversed and remanded the trial court's decision on this issue as well.

The Court of Appeals concluded that the same limitation on the fiduciary exception that applied with respect to disclosures to beneficiaries also applied with respect to disclosures to a successor Trustee: the attorney-client privilege will apply to legal advice sought in the Trustee's personal capacity on matters not of trust administration.

The Court of Appeals instructed the trial court to conduct an *in camera* review of the electronic mail messages at issue to determine whether they consisted of Northern's communications made in its fiduciary or corporate capacity.

C. Heightened Standards of Performance for Professional Fiduciaries

Restatement 3d § 77(3) states that "[i]f the trustee possesses, or procured appointment by purporting to possess, special facilities or greater skill than that of a person of ordinary prudence, the trustee has a duty to use such facilities or skill." *See also* RESTATEMENT (SECOND) OF THE LAW, TRUSTS ("Restatement 2d") § 174. The Comment to Restatement 3d § 77(3) adds that "[e]ven a trustee with special skills and facilities may, as a matter of reasonable care in some circumstances, have a duty to obtain guidance or assistance in carrying out responsibilities appropriate to the plan for administration of the particular trust."

Similarly, Section 2(f) of the Uniform Prudent Investor Act states that "[a] trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, has a duty to use those special skills or expertise." *See also* UTC § 806.

Numerous courts have applied these rules to lawsuits against professional Trustees, *see, e.g.*, Rigelhaupt, "Standard of Care Required of Trustee Representing Itself to have Expert Knowledge or Skill," 91 A.L.R.3d 904. In *In re Scheidmantel*, 868 A.2d 464 (Pa. Super. 2005), the Grantor established a revocable trust (the "Trust") in 1998 and designated a corporate Trustee. The Grantor's husband was the sole beneficiary during his lifetime. After the Grantor husband's death, the Trust assets were to be distributed outright to the Grantor's descendants.

The Trustee did not conduct a review of the Trust's investments until a week after the Grantor's death, which was over seven months after the Trust was established. A few months after the Grantor's death, the Grantor's husband became incapacitated. The Trustee never consulted with his children (the remainder beneficiaries) regarding the Grantor husband's health. In June of 2000, despite the Grantor husband's health concerns, the Trustee changed the investment goal of the Trust to a more aggressive objective and increased the anticipated length of the Trust for investment purposes. In September of 2000, as part of the Trustee's diversification of the Trust assets, the Trustee sold a portion of the Trust's assets and purchased other assets, which resulted in a loss of annual income. Shortly thereafter, a stock dividend was announced for one of the Trust's primary holdings, but the Trustee sold a block of the stock before the ex-dividend date and therefore lost the stock dividend with respect to the stock that was sold.

After the Grantor's husband died in December of 2000, triggering a distribution of all of the Trust assets to the remainder beneficiaries, the Trustee continued to purchase mutual funds focused on capital appreciation. The Trustee did not submit an accounting regarding the termination of the Trust until May of 2002.

The Trustee had circulated advertising material describing the Trustee's employees as "capable specialists." The court stated that the Trustee "held itself out as having special expertise in managing living trusts." The court explained that, "[w]hen challenged, the administration of every corporate fiduciary must be 'carefully scrutinized' to determine whether it has 'performed according to the higher standards required of it'" (quoting *Estate of Knipp,* 414 A.2d 1007 (Pa. 1980).

The court found that one of the primary purposes of the Trust was to provide income to Grantor and Grantor's husband. The court concluded that the Trustee's conduct was unjustified under the specific circumstances of the Trust and constituted "gross negligence" under Pennsylvania law, despite the broad authority granted to the Trustee in the Trust instrument.

D. Beneficiary Remedies

1. Denial of Compensation

When a Trustee is found liable for a breach of fiduciary duty, denial of compensation will often constitute part of any damages awarded. For example, UTC § 1001(b)(8) states that a court "may reduce or deny compensation" to remedy a breach of trust. Factors that may be considered in determining whether to reduce or deny compensation include: (a) whether the Trustee acted in good faith; (b) whether the breach was intentional; (c) the nature of the breach and the extent of the loss; (d) whether the Trustee has restored the loss; and (e) the value of the Trustee's services to the trust. Restatement 2d § 243 cmt. c; UTC § 1001 cmt.; *see, e.g., Estate of Gump,* 2 Cal.Rptr.2d 269 (1991) (denying compensation for activities related to the breach of trust, but allowing compensation for other activities unrelated to the breach).

2. Restoration of Trust Property

A Trustee found liable for breach of fiduciary duty will often be required to restore the value of trust property to what it would have been if the breach had not occurred. Restatement 3d § 205. The amount of these damages is generally offset by profits or other increases in the value of trust property that accrue despite the breach of fiduciary duty. Rounds, 853 T.M.: *Fiduciary Liability of Trustees and Personal Representatives*. The calculation of the amount necessary to restore the value of the trust property will often include the decline in value of trust property that occurred because of the breach. *See, e.g.*, Restatement 3d § 209. Furthermore, the determination of the amount of damages may include taking into account the appreciation in the trust property's value that would have accrued had there been no breach of fiduciary duty, such as in cases involving imprudent investment of trust property. *See, e.g.*, UTC § 1002 cmt.

3. Disgorgement of Profits

A Trustee found liable for breach of fiduciary duty is chargeable for any profit the Trustee makes from any transaction that constituted a breach. *See, e.g.*, UTC § 1002. This remedy most often arises in cases involving a breach of the Trustee's duty of loyalty. In addition, some courts also will require the Trustee to disgorge any profits made from a self-dealing transaction even if the trust suffered no financial harm from the transaction or there was no breach of fiduciary duty. *See, e.g.*, *Coster v. Crookham*, 468 N.W.2d 802 (Iowa 1991); UTC § 1003(a).

4. Removal of Trustee

A court may remove the Trustee if a conflict of interest exists between the Trustee and the beneficiaries. *See Coffey v. Coffey*, 668 A.2d 76 (N.J. Super. 1995) (grantor/Trustee of trust for the benefit of grantor/Trustee's daughters was removed for failure to carry out trust terms when disputes with daughters led to grantor/Trustee's refusal to make distributions).

A Trustee may be removed by a court only upon a clear showing of sufficient grounds. Sufficient grounds for the removal of a Trustee include, but are not limited to, abuse of the office of Trustee, wrongdoing in the administration of the trust, legal incapacity and demonstrated unfitness, such as habitual substance abuse. A mere showing of friction or hostility between the beneficiaries and the Trustee is generally not sufficient grounds, standing alone, to remove a Trustee. *See, e.g.*, Restatement 3d § 37 & cmt. e; UTC § 706.

Factors that affect the fitness and suitability of a Trustee include but are not limited to: (a) conflicts of interests; (b) inability to perform fiduciary duties with care and skill; (c) substance abuse; (d) inadequacies in investment matters; (e) commission of a crime, particularly one involving dishonesty; and (f) changes in the place of trust administration or location of beneficiaries. Restatement 3d § 37, cmt. e. UTC § 706 contains similar grounds for removal and draws from Comment e of the Restatement 3d § 37 to a large extent.

If the instrument does not provide for the appointment of a new Trustee, the UTC permits a Trustee vacancy to be filled by unanimous approval of the qualified beneficiaries, without court approval or, if unanimous approval is lacking, by the court. UTC § 704(c); *see also* Restatement 3d § 34.

5. Equitable Remedies

Courts also may exercise any equitable remedy available to them, including enjoining the Trustee from completing a transaction (*i.e.*, stopping the Trustee from purchasing trust property) or compelling the Trustee to sell property. *See Matter of Estate of Rolczynski*, 349 N.W.2d 394 (N.D. 1984). If the transaction has already taken place, the court can vacate the transaction. *See* Uniform Probate Code § 3-713 (transactions involving a "substantial conflict of interest" are voidable).

6. Sanctions for Improper Distributions

A beneficiary can obtain a remedy for a Trustee's improper distribution, and the form of the remedy will depend on the nature of the improper distribution. Generally, if a Trustee makes an improper distribution, in any way, the Trustee will be liable for damages incurred by the beneficiaries. *See, e.g.*, Iowa Code Ann. § 633.160; see, also, Restatement 3d § 100(a) ("A Trustee who commits a breach of trust is chargeable with the amount required to restore the values of the trust estate and trust distributions to what they would have been if the portion of the trust affected by the breach had been properly administered"). If the distribution is simply delayed, usually the beneficiary is entitled to interest. *See, e.g.*, *In re Toler's Estate*, 345 P.2d 152 (Cal.App. 1959).

With regard to distributions made to the wrong person, Restatement 2d § 254 states that, when a beneficiary receives a distribution to which such beneficiary was not entitled, such beneficiary is personally liable for returning the distribution, "unless he has so changed his position that it is inequitable to compel him to make repayment." This Section further states that, if the beneficiary that received the improper distribution transferred his or her interest in the trust to a third party, whether voluntarily or involuntarily, the transferee takes the trust interest subject to the charge. Restatement 2d § 254, cmt. b. Comment e to this Section states that the Trustee is under a duty to seek repayment of the improper distribution on behalf of the beneficiaries who did not receive such distribution from the beneficiary who received such distribution, unless the Trustee has compensated the other beneficiaries by making payments into the trust from the Trustee's own funds or has made such payments directly to the other beneficiaries.

Restatement 3d § 100 is the basis of § 1002(a) ("Damages for Breach of Trust") of the UTC, and, thus, the UTC provides a similar rule. Kansas made a significant change to UTC § 1002(a) by adding a subsection that reads, "[t]he provisions of this section shall not exclude an award of punitive damages." KSA 58a-1002.

With regard to the last portion of Restatement 2d § 254, quoted above, Comment d, adds that, in determining whether it would be inequitable to compel the beneficiary to make a repayment, the following should be considered: (a) what disposition has been made by the beneficiary of the amount improperly distributed; (b) the amount of the improper distribution; (c) the "nature of the mistake made by the Trustee, whether he was negligent or not;" and (d) the time elapsed since the improper distribution. *See, e.g.*, *Gallagher v. Park West Bank & Trust Co.*, 11 F.Supp.2d 136 (D.Mass. 1998) (recovery of improper distribution would be inequitable because the recipient had substantially changed her position following the distribution and there was a lengthy delay before she was aware of any claim against her).

Virginia MCLE Board

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MCLE requirement pursuant to Paragraph 17, of Section IV, Part Six, Rules of the Supreme Court of Virginia and the MCLE Board Regulations.

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Certify Your Attendance Online at www.vsb.org see Member Login

Complete this Certification. Retain for two years.

MCLE Compliance Deadline - October 31. MCLE Reporting Deadline - December 15.

A $100 fee will be assessed for failure to comply with either deadline.

Member Name: ______________________________ **VSB Member Number:** ____________________

Address: ______________________________ **Daytime Phone:** ____________________

______________________________ **E-mail Address:** ____________________

____

City **State** **Zip**

Course ID Number: **NCC0564**

Sponsor: **Cannon Financial Institute**

Course/Program Title: **Breach of Fiduciary Duty Claims Revisited**

Live Interactive *Approved CLE Credits (Ethics Credits): **1.5** **(0.0)**

Date of telephone/webcast:____________________ **Location(s):** ____________________

By my signature below I certify

___ I attended a total of ______________ (hrs/mins) of **approved CLE**, of which (______) (hrs/mins) were in **approved Ethics**. Credit is awarded for actual time in attendance (0.5 hr. minimum) rounded to the nearest half hour. (Example: 1hr 15min = 1.5hr)

___ The sessions I am claiming had written instructional materials to cover the subject.

___ I participated in this program in a setting physically suitable to the course.

___ I was given the opportunity to participate in discussions with other attendees and/or the presenter.

___ I understand I may not receive credit for any course/segment which is not materially different in substance than a course/segment for which credit has been previously given during the same completion period or the completion period immediately prior.

___ I understand that a materially false statement shall be subject to appropriate disciplinary action.

* NOTE: A maximum of 8.0 hours from pre-recorded courses may be applied to meet your yearly MCLE requirement. Minimum of 4.0 hours from live interactive courses required.

____________________ ______________________________

Date Signature

Questions? Contact the MCLE Department at (804) 775-0577 or E-mail questions to mcle@vsb.org

If not certified online, this form may be mailed to:

Virginia MCLE Board

Virginia State Bar

1111 East Main Street, Suite 700

Richmond, VA 23219-3565

Web site: www.vsb.org

[Office Use Only: Teleconference]

Pennsylvania Continuing Legal Education Board

601 Commonwealth Avenue, Suite 3400 ▪ P.O. Box 62495 ▪ Harrisburg, PA 17106-2495
(800)497-2253, (717)231-3250 ▪ FAX (717)231-3251
www.pacle.org
E-mail: pacleb@pacle.org

CREDIT REQUEST FORM

BA_____

This form is to be used when you have attended a course that is not sponsored by an AccreditedProvider. Lawyers seeking Pennsylvania CLE credits must complete Section B of this form and return it to PACLE, along with a Uniform Certificate of Attendance, if available, and a check made payable to PACLE for the $1.50, per credit hour attendance fee payment. Please refer to Section C to calculate the correct attendance fee payment.

SECTION A : Course Information

Provider: **1854** Cannon Financial Institute

Course: **208123** Breach of Fiduciary Duty Claims Revisited (450765)

Date: 01/27/2015 13:00 **Location:** Alternate Delivery

Total CLE Credit Hours: Maximum: 1.50 = 1.50E

SECTION B : Lawyer Information

Lawyer Name ____________________________ PA Lawyer ID __________

Address ____

City ______________________________ State ________ Zip __________

By signing below, I certify that I attended the activity described above and am entitled to claim:
_____ Ethics

__________________________ ____________________
Signature Date

I am enclosing check #________________ for $__________

NOTE: If you attended the maximum 1.50 credit hours for this course, please enclose $3.00 attendance fee payment. See Section C below for calculation.

SECTION C : Attendance Fee Calculation

Pennsylvania grants one (1) CLE credit for each 60 minutes of attendance at an approved course. Pennsylvania requires a $1.50 per credit hour attendance fee payment. This $1.50 fee is also required for any portion of a credit hour. We accredit only programs that are at least one hour long; in addition, we accredit only in half hour increments. Please refer to the example below when calculating your attendance fees.

1 hour = 1.50	1.5 to 2 hours = $3.00	2.5 to 3 hours = $4.50	3.5 to 4 hours = $6.00
4.5 to 5 hours = $7.50	5.5 to 6 hours = $9.00	6.5 to 7 hours = $10.50	7.5 to 8 hours = $12.00

etc...

CANNON

FINANCIAL INSTITUTE

Certificate of Attendance

____

(Participant Name)

____

(Colorado Attorney Registration #)

Has successfully completed the Cannon Financial Institute, Inc. course:

Breach of Fiduciary Duty Claims Revisited

(745676)

CANNON FINANCIAL INSTITUTE, INC.
CORPORATE
SEAL
GEORGIA

January 27, 2015

Laurie Frye

Laurie Frye
Professional Education Coordinator

Continuing Legal Education Credits for this course are as follows:

Colorado – 2 hours Ethics Credits

****As required by the State of Colorado, attorneys must submit their own credits.

Any questions regarding CE credit, please contact Laurie Frye at (706) 353-3346.
Fax (706) 353-3994, Email lfrye@CannonFinancial.com
PO Box 6447, Athens, Georgia 30604

CANNON® FINANCIAL INSTITUTE

Certificate of Attendance

____

(Participant Name)

Has successfully completed the Cannon Financial Institute, Inc. course:

Breach of Fiduciary Duty Claims Revisited

January 27, 2015

Laurie Frye
Professional Education Coordinator

Continuing Education Credits for this course are as follows:

- **Certified Public Accountant** — **1.5 total credit hours**
  In accordance with the National CPE Registry of CPE sponsors, CPE credits have been granted based on a 50-minute hour. For information regarding available CPE credits please visit http://cpemarket.nasbatools.com/index".
  Instructional delivery method: Group-Live
  NASBA #103655; Field of Study – Ethics or Specialized Knowledge & Application

- **Enrolled Agent (IRS)** — **2.0 total credit hours**
  Cannon is designated as a qualified education sponsor by the IRS and can offer continuing education credit to Enrolled Agents. Cannon's agreement with the IRS' Office of Professional Responsibility does not constitute an endorsement by the IRS as to the quality of the programs or their contribution to the professional competence of the enrolled individual.
- **Certified Financial Planner (CFP™)** — **1.5 total credit hours**
  Course #199068
- **Accredited Fiduciary Investment Manager (AFIM™)** — **1.5 total credit hours**

- **Certified Wealth Strategists (CWS®)** — **2.0 ethics credit hours**

- **Certified Investment Management Analyst (CIMA®)** — **1.5 total credit hours**
  Course #14CFI007
  If you hold the CIMA®, CIMC® or CPWA® certification, you may report this pre-accepted CE program online by logging into your My IMCA account at www.imca.org/user

- **Certified Trust Financial Advisor (CTFA™)** — **2.0 total credit hours**

Fiduciary Law	0
Taxes	0
Investments	0
Financial Planning	0
Ethics	2

- **Certified Retirement Services Professional (CRSP™)** — **2.0 total credit hours**
- **Fiduciary Investment Risk Management Association (FIRMA®)** — **2.0 total credit hours**
- **Chartered Life Underwriter & Chartered Financial Consultant** — **1.5 total credit hours**
  (**No Individual State Insurance Credit Available)

Any questions regarding CE credit, please contact Laurie Frye at (706) 353-3346.
Fax (706) 353-3994, Email lfrye@CannonFinancial.com
PO Box 6447, Athens, Georgia 30604

CANNON
FINANCIAL INSTITUTE

Certificate of Attendance

____
(Participant Name)

____
(Attorney Bar # or Social Security #)

Has successfully completed the Cannon Financial Institute, Inc. course:

Breach of Fiduciary Duty Claims Revisited
January 27, 2015

CANNON FINANCIAL INSTITUTE, INC.
CORPORATE SEAL
GEORGIA

Laurie Frye
Professional Education Coordinator

Continuing Legal Education Credits for this course are as follows:
The following states have been approved for 1.5 hours of Ethics Credit: (Course number is indicated in parenthesis): Alabama, Arkansas (ETH48102), California, Delaware, Georgia, Kentucky (151756), Louisiana, Maine (036023), Mississippi, Montana (25832), Nebraska(101868), Nevada (6502), New Mexico, New York, North Carolina, North Dakota, Oregon (1048* 226), Pennsylvania, South Carolina, Tennessee (Distance Ed), Texas (901306267), Vermont, Washington, & Wyoming.
These states have been approved for the following Ethics Credit:
Colorado – 2 hours, Florida - 2 hours (1407632N), Missouri –1.8 hours, Oklahoma – 2 hours, West Virginia – 1.8 hours
These states have been approved for 1.5 General Credit: Idaho (pending ethics), Illinois (pending ethics), Iowa (161319), Minnesota (199854), Utah (pending ethics), Virginia and Wisconsin

The following states either do not require/do not accept outside CLE Credit/or do not accept teleconference calls for CLE Credit: District of Columbia, Hawaii, Maryland, Massachusetts, Michigan & South Dakota
The following states have special circumstances:
Alaska-Attorneys can use this certificate to submit to Alaska State Bar
Arizona-On honor system
Indiana & Ohio-Site Coordinators must apply for credit as the sponsor in order for participants to receive credit
Kansas–Attorney or Site may apply 30 days prior to program
New Hampshire- *NHMCLE does not approve or accredit CLE activities for the NH Minimum CLE requirement. NH attendees must self-determine whether a program is eligible for credit, and self-report their attendance.*
New Jersey-Attorneys can use this certificate to submit to New Jersey State Bar for 1.5 Ethics credits (Reciprocity Rule)
New York–Attorneys may use this certificate to report their attendance as it is accredited by Approved NY Jurisdictions: AL, AR, CO, DE, GA, KY, LA, MS, NM, NC, ND, OK,. Type of credit: Ethics, 1.5 Credits

* In order for PA attorneys to receive credit they must listen to the teleconference in a live classroom setting. The teleconference site must also be listed on the PACLE website and the site must be open to any PA attorney who desires to listen to the program. Call PACLE at 1-800-497-2253 with questions on website listing.
****As required by the following State Bars, and in order to obtain CLE in these states, Cannon will submit the mandatory attendance rosters for the attorneys seeking CLE credits <u>**ONLY**</u> in the following states: Alabama, Delaware, Georgia, Idaho, Louisiana, Montana, Nebraska, Nevada, New Mexico, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, West Virginia and Washington. ****

Any questions regarding CE credit, please contact Laurie Frye at (706) 353-3346.
Fax (706) 353-3994, Email lfrye@CannonFinancial.com
PO Box 6447, Athens, Georgia 30604

CERTIFICATE OF ATTENDANCE FOR CALIFORNIA MCLE

To be Completed by the Provider

Provider: Cannon Financial Institute

Subject Matter/Title: Breach of Fiduciary Duty Claims Revisited

Date and Time of Activity: January 27, 2015 1:00-2:30 PM ET, 12:00-1:30 PM CT, 11:00AM-12: 30 PM MT, 10:00AM- 11:30 AM PT

Location: Teleconference

Length of Presentation: 1.5 Hours

ELIGIBLE CALIFORNIA MCLE CREDIT:

TOTAL HOURS: 1.5

Legal Ethics: 1.5

Elimination of Bias in the Legal Profession:

Prevention, Detection and Treatment of Substance Abuse:

To Be Completed by the Attorney after Participation in the Above-Name Activity

By signing below, I certify that I participated in the activity described above and am entitled to claim the following California MCLE credit hours:

TOTAL HOURS: ________________________

(You may not claim credit for the following sub-fields unless the provider is granting credit in these areas as listed above.)

Legal Ethics:_______________________________

Elimination of Bias in the Legal Profession:_______________________________

Prevention, Detection and Treatment of Substance Abuse: _______________________________

Attorney Signature:

REMINDERS: Keep this record of attendance for four years. In the event that you are audited by the State Bar, you may be required to submit this record of attendance. Send this to the State Bar only if you are audited. You must sign in on the Official Record of Attendance for California MCLE maintained by this provider in order for these hours to qualify for California MCLE credit.

Thank you for attending this event.

Today's event features an online, post-event evaluation form. To send us your feedback, please click on the link below, or type the URL into your web browser's address bar.

http://eval.krm.com/eval.asp?id=21889

Your feedback and comments are very important to us. Thank you in advance for taking the time to complete this evaluation!