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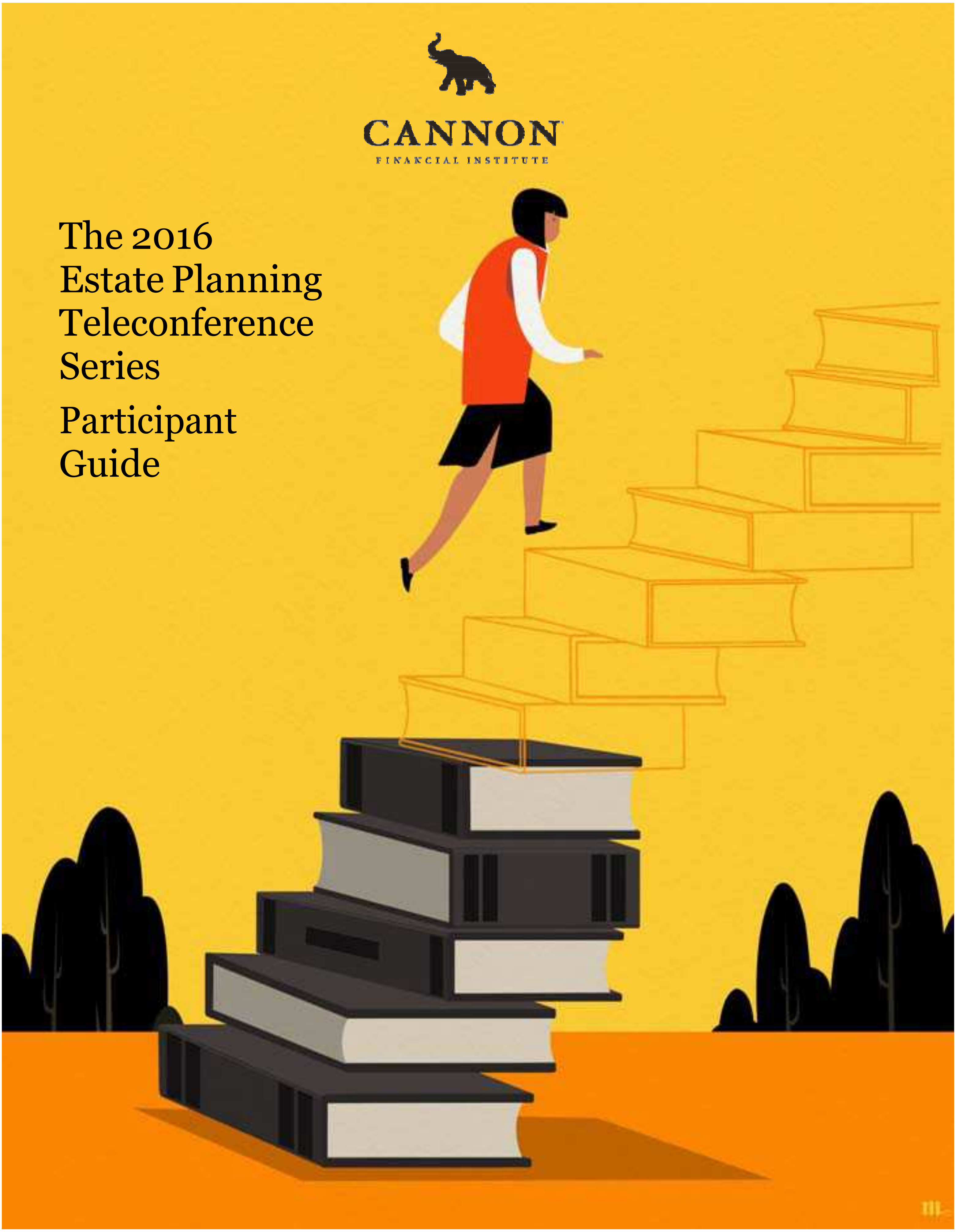

The Ongoing March of Breach of Duty Claims and How to Protect Against Them

Cannon Financial Institute, Inc.

Presents

The 2016 Estate Planning Teleconference Series

Tuesday, November 15, 2016

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.

Mr. Redd is an elected member of The American Law Institute, a Fellow of The American College of Trust and Estate Counsel (Missouri State Chair; Past Regent; Communications Committee (Chair); Estate and Gift Tax Committee; and Fiduciary Litigation Committee) and an Adjunct Professor of Law (Estate Planning) at Northwestern University School of Law. He also serves as Co-Chair of the Editorial Advisory Board of, and writes a regular column in, TRUSTS & ESTATES magazine. Mr. Redd is listed in The Best Lawyers in America and is nationally ranked by Chambers USA in its "Wealth Management" category. He frequently writes and lectures nationally on topics in the trusts and estates field.

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By Charles A. Redd
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A. *In re the G.B. Van Dusen Marital Trust Under the Grosvenor B. Van Dusen Revocable Trust Agreement Dated December 17, 1981, As Amended*, 834 N.W.2d 514 (Minn.App. 2013)

The governing instrument of a trust established by Grosvenor B. Van Dusen directed the Trustee, Lowry Hill, to pay the income from a marital trust to G.B.'s wife, Virginia, for her life, and further provided that the Trustee had the discretion to distribute principal to Virginia for her health, education, maintenance and care. The Trustee had no obligation to consider other assets or income available to Virginia. The trust instrument stated that G.B. intended for the Trustee to distribute principal to the Virginia to enable her to maintain the standard of living to which she was accustomed during G.B.'s lifetime. Virginia had the power to compel the Trustee to make unproductive property productive. Upon Virginia's death, the remaining trust property was to be divided into separate trusts for the benefit of G.B.'s descendants.

The Trustee denied multiple principal distribution requests as well as a request to convert all non-income producing property to income-producing property. After the Trustee and Virginia filed petitions for relief regarding the administration of the trust, the district court granted summary judgment in favor of the Trustee, finding that it did not abuse its discretion.

On appeal, the Minnesota Court of Appeals held that the Trustee did not have the discretion to deny Virginia's requests for distributions of principal. The court found that G.B.'s intention was to provide for Virginia so as to maintain her standard of living without concern for the preservation of principal, and the Trustee's denial of Virginia's requests was contrary to that intent. The court also determined that the Trustee had a duty to determine Virginia's standard of living at the time of any request for a distribution of principal. Furthermore, although the Trustee had the discretion to consider Virginia's other resources, the Trustee was not permitted to withhold distributions contrary to G.B.'s direction to make liberal distributions of principal to maintain Virginia's standard of living.

With respect to the district court's finding that Virginia did not have the power to compel the Trustee to convert non-income-producing property to income-producing property, the court reversed, invoking general rules of trust construction and Minnesota case law precedent to find that the term "unproductive property", as used in the trust instrument, "refers to property that does not produce income."

B. *O'Riley v. U.S. Bank, N.A.*, 412 S.W.3d 400 (Mo.App. W.D. 2013)

A trust was created upon the death of Donald O'Riley in 1982. The governing instrument provided that the corporate Trustee had discretion to distribute income for the "care, support, maintenance and welfare of Donald's wife, Arlene," and for the "care, support, maintenance, education and welfare" of Donald's descendants. The Trustee also had discretion to distribute principal to Arlene and to Donald's descendants if trust income and all other available funds were insufficient for their "care, support, maintenance, education, comfort and medical or other attention or emergency." Regarding distributions of income and principal, the Trustee was directed to favor the interests of Arlene over the interests of Donald's descendants. Upon Arlene's death, the trust property was to be distributed to Donald's then living descendants.

The Trustee honored Arlene's annual requests for distribution of all of the net income to her. The Trustee approved a request for a distribution of principal to one of Donald's descendants and denied two other requests from the same descendant. From 1983 to 1995, the Trustee invested the trust assets exclusively in fixed-income investments. In 1996, the Trustee then began to diversify the investments and, from 2003-2007, the trust held between 45% and 60% of the value of the trust assets in equities. The value of the trust assets appreciated over 11% during administration of the trust.

Donald's descendants sued the Trustee for breach of its duties of impartiality and prudent investment. Regarding the allegation that the Trustee breached its duty of impartiality, Donald's descendants asserted that the Trustee put its decision to distribute all net income to Arlene on "auto-pilot" and that its distribution decisions were unreasonable because the Trustee failed to examine and balance all of the beneficiaries' needs and resources.

The trial court found for the Trustee on both counts. On appeal to the Missouri Court of Appeals, regarding the duty of impartiality, the court found that the Trustee engaged in a reasoned and well-documented process that the Trustee used periodically to evaluate its distribution decisions. The court found that the Trustee did not have to review financial information from each of Donald's descendants before making a distribution decision. The court explained that Arlene was the preferred beneficiary, and the Trustee was not required to balance Arlene's needs against the needs of Donald's descendants. The court found that the Trustee's decision to distribute all income to Arlene each year in accordance with her request, even though there was no remaining net income for Donald's descendants, was reasonable.

Regarding the allegation that the Trustee breached its duty of prudent investment, the court concluded that the Trustee's investment decisions were reasonable under Missouri law after considering the trust instrument, the needs of the beneficiaries and the market conditions. The court relied on the Trustee's internal investment analysis process, which properly took into account the trust's purpose of providing income for Arlene as well as a long list of other factors, and which was re-evaluated at least annually.

C. *Beaudoin v. Davidson Trust Co.*, 263 P.3d 755 (Idaho 2011)

Geraldine Schneider was the settlor, and Davidson Trust Company was the Trustee, under a trust instrument that provided that, upon Schneider's death, the trust property was to be divided into two equal shares for her two daughters, Virginia Beaudoin and Margaret Van Dyke. Beaudoin's share was to be held in trust for her lifetime benefit, with the remainder passing to her appointee(s) or her estate. Van Dyke's share was also to be held in trust for her lifetime benefit, with the remainder passing to "the surviving issue by right of representation of Beaudoin." The trust instrument further provided with respect to Van Dyke's share that, "in the event that Beaudoin's issue are not surviving [at Van Dyke's death], then to Beaudoin." Beaudoin admitted at trial that she was aware of the provisions of the trust instrument.

After Schneider's death, Beaudoin withdrew her entire share of the trust principal. Van Dyke then died, at which time Beaudoin had two living children whose contingent interests in Van Dyke's share vested. Beaudoin spoke to a trust assistant from Davidson and was allegedly told that she was the remainder beneficiary of Van Dyke's share. Davidson made a partial distribution of trust funds from Van Dyke's share to Beaudoin.

When the mistake was discovered, Beaudoin sued Davidson claiming breach of fiduciary duty, negligent representation and infliction of emotional distress. Beaudoin claimed damages for the costs she allegedly incurred in reliance on the mistaken distribution, asserting that, based on Davidson's conduct, she retired from her job, booked a non-refundable vacation, made gifts to her children and made other personal expenditures.

The district court dismissed Beaudoin's breach of fiduciary duty claim against Davidson. On appeal, the Idaho Supreme Court affirmed the district court's judgment, finding that Davidson owed Beaudoin no fiduciary duty at the time of the alleged breach.

It is generally accepted that a Trustee owes the same fiduciary duty to a contingent beneficiary as to one with a vested interest insofar as necessary for the protection of the contingent beneficiary's rights in trust property. However, no fiduciary duty is owed to a contingent beneficiary once the contingency has failed to materialize. Beaudoin's status as a contingent beneficiary was eliminated upon Van Dyke's death, and, thus, no fiduciary duty was owed to her at the time of the alleged breach.

The court rejected Beaudoin's argument that a fiduciary relationship existed between Davidson and Beaudoin until the funds were actually distributed to Beaudoin's children because they could have died or disclaimed their interests up until that point, causing their interests to be shifted to Beaudoin. The court explained that the death of Van Dyke was the moment of the vesting of the children's interests and the termination of Beaudoin's contingent interest. Further, when a gift is beneficial, acceptance by the recipient is presumed.

Beaudoin also argued that Davidson assumed a fiduciary duty to her by erroneously treating her as the remainder beneficiary. The court noted that Davidson was not in a superior position to Beaudoin in regard to the soundness of these actions, and Beaudoin had no foundation for her alleged belief that Davidson would actually follow through to implement full distribution to her of the assets composing Van Dyke's share. The court found that no fiduciary duty was assumed because no relationship of trust and confidence arose between Beaudoin and Davidson.

D. *Carter v. Carter*, 965 N.E.2d 1146 (Ill. App. 2012)

The trust was created by a decedent for his second wife ("Spouse") during her lifetime. Spouse was to receive all of the income from the trust. No principal distributions were permitted during Spouse's lifetime. Upon Spouse's death, the trust remainder was to be distributed to the decedent's daughter ("Daughter"), who was Spouse's stepdaughter. Spouse was named as the Trustee of the trust.

The trust instrument granted the Trustee the ability to make a wide variety of investments, "regardless of diversification and regardless of whether the property would be considered a proper trust instrument."

Spouse, as Trustee, invested all of the trust property in tax-free municipal bonds. Daughter filed suit against Spouse for breach of the following fiduciary duties: duty of impartiality, duty of prudent investment, duty to properly manage trust assets and duty to preserve trust property. The trial court granted summary judgment in favor of Spouse on all four counts, and Daughter appealed.

The Illinois Appellate Court upheld the trial court's judgment on the following bases: (1) Spouse's investment of the trust property was consistent with the decedent's intent, as discerned from the plain language of the trust instrument; (2) the trust instrument altered the prudent investor rule; and (3) Spouse's actions were not "wholly unreasonable and arbitrary."

Given that Spouse had a mandatory income interest, no beneficiary was entitled to distributions of principal and the Trustee had broad investment authority, the court concluded that the trust instrument allowed Spouse, as Trustee, to make whatever investments were necessary to maximize income and that no provision of the trust instrument required the Trustee to grow or preserve principal for Daughter.

Further, the court affirmatively held that the trust instrument "altered the requirements of the prudent investor law" and distinguished three cases from other jurisdictions that were cited by Daughter for the proposition that the trust instrument was not effective to abrogate the prudent investor rule.

Finally, the court cited Illinois case law for the proposition that "a trustee's exercise of discretion will not be interfered with by a court so long as he or she does not act in a wholly unreasonable and arbitrary manner [citations omitted]" and that under this rule, the court was prohibited from interfering with Spouse's investment decisions, because "there is no evidence that [Spouse's] decision to invest in municipal bonds was arbitrary or unreasonable."

II. Design and Use of Governing Instrument Provisions to Insulate the Fiduciary

A. In General

A will or trust instrument will often contain an exculpatory clause (also called an "exoneration clause") that provides relief to an executor or a Trustee from liability for the exercise of fiduciary discretion. Exculpatory clauses can effectively: (1) incentivize individuals or corporate fiduciaries to serve as a fiduciary; and (2) help prevent beneficiaries from frivolously challenging the executor or Trustee's actions, which consequently deplete the estate or trust assets. In general, exculpatory clauses are strictly construed by the courts and will not apply to a breach of fiduciary duty that does not clearly fall within the scope of the exculpatory clause. Pieteres & Coates III, "Exculpatory Clauses May Give Trustees Extra Protection from Liability," 37 ESTATE PLANNING 26 (March 2010).

1. **Restatement (Third) of Trusts**. RESTATEMENT (THIRD) OF TRUSTS § 96(1) states that "[a] provision in the terms of a trust that relieves a Trustee of liability for breach of trust, and that was not included in the instrument as a result of the Trustee's abuse of a fiduciary or confidential relationship, is enforceable except to the extent that it purports to relieve the trustee: (1) of liability for a breach of trust committed in bad faith or with indifference to the fiduciary duties of the trustee, the terms or purposes of the trust, or the interests of the beneficiaries; or (2) of accountability for profits derived from a breach of trust."

2. **Uniform Trust Code.** UTC § 1008 provides that an exculpatory clause is unenforceable to the extent that it "relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries; or was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor." Thus, the UTC requires the Trustee at least to act in good faith notwithstanding any exculpatory clause. Unlike the Restatement provision, the UTC contains no rule rendering an exculpatory clause ineffective regarding profits made from the trust.

Also, an exculpatory clause "drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor." UTC § 1008(b). If independent counsel represented the settlor, however, the exculpatory clause will be considered fair under the circumstances. UTC § 1008, Comment. The UTC also specifies that the effect of an exculpatory clause under UTC § 1008 is a "mandatory" rule, meaning that this section prevails over any terms of a trust. UTC § 105(b)(10).

3. **Other State Laws.** A majority of jurisdictions have adopted an approach similar to the UTC, ruling that exculpatory clauses may relieve the Trustee from liability for errors of judgment, failure to diversify trust investments or the acts of Co-Trustees. Generally, however, most jurisdictions do not permit exculpatory clauses to relieve fiduciaries for liability beyond ordinary negligence. *See, e.g., New England Trust Co. v. Paine*, 59 N.E.2d 263 (Mass. 1946) ("exculpatory provisions inserted . . . without any overreaching or abuse by the trustee of

any fiduciary or confidential relationship to the settlor are generally held effective except as to breaches of trust committed in bad faith or intentionally or with reckless indifference to the interest of the beneficiary and as to any profit which the trustee has derived from a breach of trust."). A majority of courts has concluded that, despite the presence of an exculpatory clause, a Trustee cannot escape liability for breaches of trust committed in bad faith or with intentional or reckless disregard for the interests of the beneficiaries or the purposes of the trust. Scott and Ascher, 4 SCOTT AND ASCHER ON TRUSTS, § 24.27.2 (5th ed. 2007 & Suppl.). Some non-UTC states have adopted this policy regarding exculpatory clauses with varying levels of restriction. *Compare* NY EP&TL § 11-1.7(a)(1) and *In re Kassover*, 476 N.Y.S.2d 763 (Surr. Ct. 1984); *with* 12 Del. C. 3302(e).

4. Drafting Recommendations. Exculpatory clauses should make clear that a Trustee is not intended to be absolved from liability for the consequences of acts taken in bad faith or with reckless indifference toward the trust or its beneficiaries. Without these exceptions, an exculpatory clause may be overbroad and unenforceable. Furthermore, if a lawyer is named as Trustee, best practice suggests that another, independent lawyer should draft the exculpatory provision and discuss it with the client given the present-day consensus that it may be a breach of a fiduciary relationship for a lawyer/Trustee to draft and include an exculpatory provision that insulates himself or herself.

B. *French v. Wachovia Bank, N.A.*, 722 F. 3d 1079 (7th Cir. 2013)

The settlor, Jim French, created a trust for the benefit of his children. The trust owned two life insurance policies, each with a five million death benefit. Because the premiums for each policy continued to increase, French wanted to replace the existing policies. The Trustee proposed to replace the trust's life insurance policies with no-lapse life insurance policies with the same death benefit but at a much lower premium. Unlike the trust's current policies, the new policies would not accumulate cash value. However, the Trustee knew that French was more interested in the death benefit than the accumulation of cash value. French agreed that the Trustee should replace the trust's policies with the proposed policies.

The Trustee then sent to French a proposed conflicts waiver identifying an affiliate of the Trustee as the broker for the insurance exchange and disclosing that the affiliate would receive a commission on the transaction. The waiver included a broad release of "any claim" arising out of the Trustee's purchase of new insurance on behalf of the trust. French refused to sign the waiver. The Trustee ultimately concluded that it did not need French's authorization to proceed with the exchange and withdrew its request that French sign a waiver. The transaction proceeded as planned and the Trustee received a commission of $512,000 from the redeemed cash value of the policies, plus two percent of the annual premiums paid for the new policies over the next ten years.

French's children, as trust beneficiaries, sued the Trustee for breach of fiduciary duty, claiming that the Trustee engaged in self-dealing, violated the prudent investor rule and acted in bad faith. The district court granted the Trustee's motion for summary judgment. The beneficiaries appealed.

The Seventh Circuit stated that the trust instrument may waive the strict prohibition on self-dealing so long as the authorization to self-deal is express and clear. The Seventh Circuit observed that the trust instrument contained an express, clear and specific conflicts waiver that granted the Trustee the power "to continue as trustee and to deal with any trust hereunder without regard to conflicts of interest."

The Seventh Circuit further stated that, under Wisconsin law, the prudent investor rule may be changed by the trust instrument. The trust instrument contained a provision stating that the trustee "shall have . . . the power . . . to retain, invest and reinvest in any property without regard to whether the same may be authorized by law, regardless of any risk, lack of diversification or unproductivity involved." The Seventh Circuit held that this language displaced the prudent investor rule.

Finally, the Seventh Circuit held that the insurance exchange was a reasonable decision on the part of Trustee, made good business sense and was made in good faith.

III. Effect of Reliance on Counsel by Fiduciary

When a fiduciary is faced with a claim of breach of duty, the fiduciary may assert that the fiduciary was relying upon the advice of counsel when taking action or inaction at issue. Several courts have held that reliance on counsel is not always a complete defense to a claim of breach of fiduciary duty. For example, the United States Court of Appeals for the Third Circuit, in *Dardovitch v. Haltzman*, 190 F.3d 125 (3rd. Cir. 1999), held that, although the court would consider the fact that a Trustee acted upon the advice of counsel in determining whether the Trustee acted in good faith, such advice is not an absolute defense to liability for breach of fiduciary duty, including liability for misappropriation of funds by a Co-Trustee. In *Paradee v. Paradee*, 2010 Del. Ch. LEXIS 212 (Del. Ch. 2010), the Trustee consented to an unsecured trust loan against the advice of counsel, who recommended obtaining security equal to 25% of the loan amount. The court noted that a fiduciary's obtaining the advice of counsel constitutes some evidence that the fiduciary is acting reasonably, but it is not dispositive and certainly does not avail the Trustee when the Trustee fails to follow that advice.

Similarly, the Trustee in *Vento v. Colorado Nat'l Bank-Pueblo*, 907 P.2d 642 (Colo. App. 1995), was not protected by the defense of advice of counsel where the lawyers that the Trustee consulted did not have the proper expertise for the matter and were faced with a potential conflict of interest. The Trustee entered into a lease with a coal company granting it the right to mine coal located on the trust property. Several years later, the Trustee consented to a change in the lease and to the assignment of the lease that allowed another company to take over the mining for the original lessee. Over the objection of the trust beneficiaries, the Trustee accepted the proposed modification and assignment. The court found that the Trustee violated its fiduciary duty when it failed to seek the advice of independent counsel during the renegotiation of the lease, as the renegotiation process was complex and involved technical issues that demanded expert evaluation. Here, although the Trustee consulted with several attorneys, none of them had expertise in the relevant mining practices and all had been previously associated with the Trustee.

Courts have also found that good faith reliance on counsel is not a complete defense against liability because the Trustee could ask the court for instructions. In *In re Estate of Boylan*, 2015 Tex. App. LEXIS 1427 (Tex. App. 2015), the court ultimately held that the executor/beneficiary of his father's Will breached his fiduciary duty to the other beneficiary by not appropriately distributing property of the estate because he believed the other beneficiary had violated the Will's no-contest clause. In making its ruling, the court cited to the Comment to the RESTATEMENT (THIRD) OF TRUSTS § 93, which states that "[a] breach of trust may be found even though the trustee acted in good faith, perhaps even in reliance on advice of counsel. Trustees can ordinarily be protected from this risk by obtaining instructions concerning uncertainties of law or interpretation." The court noted that there was no evidence the executor ever sought any professional or judicial guidance when he interpreted the no-contest clause. The court also noted that taking the advice of legal counsel evidences prudence on the part of the executor, but lack of awareness or understanding of the Will's terms will not excuse an executor from liability. Thus, the court stated that an executor is protected from liability if the executor seeks instructions on legal issues, but instruction should come from the court, not merely making inquiries of a lawyer.

IV. Effect of Waiver and/or Consent and/or Receipt of Accountings by Beneficiaries

Beneficiaries often appreciate efforts by Trustees to keep administration costs down, and the trust termination context is no exception. Trustees and beneficiaries often enter into release and indemnification agreements (hereinafter, a "release") that exonerate the Trustee from liability for any breaches of trust and indemnify the Trustee for costs that may arise while winding up the trust. This approach is often preferred to the alternative of the Trustee's filing accountings with and seeking to have them approved by the court.

UTC § 1009 provides:

> 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 the consent, release, or ratification, the beneficiary did not know of the beneficiary's rights or of the material facts relating to the breach.

See also UTC § 817(c); RESTATEMENT (SECOND) OF TRUSTS §§ 216-218; RESTATEMENT (THIRD) OF TRUSTS § 97. A representative of the beneficiary may also execute a release on the beneficiary's behalf. *See* UTC § 1009, cmt. Generally, a Trustee may be reimbursed or exonerated for reasonable costs and expenses relating to trust administration. *See* SCOTT & ASCHER ON TRUSTS § 22.1 (5th ed. 2007 & Suppl.); *see also* UTC § 817, cmt. (stating that reasonable withholding may vary depending on the circumstances of outstanding debts, expenses or taxes).

In *Hastings v. PNC Bank*, 54 A.3d 714 (Md. 2012), the Court of Appeals of Maryland found that a corporate Trustee's request for a release and indemnification from trust beneficiaries prior to distributing the trust remainder to them was lawful. PNC Bank, N.A. ("PNC") was the Trustee of a testamentary trust that terminated upon the income beneficiary's death in 2007. In the process of winding up the trust, PNC sent the remainder beneficiaries an accounting of the entire trust and a "Waiver, Receipt, Release and Indemnification Agreement" along with a letter directing that, if they approved of the accounting, they should sign the agreement and return it to PNC. The agreement provided that, in consideration of PNC's distribution of the trust assets, the remainder beneficiaries would acknowledge consultation with an attorney, affirm review of the trust records and approve the trust administration by PNC. The agreement also contained a provision that released PNC from liability and provided indemnification to PNC for expenses related to the trust termination.

In addition, the letter stated that PNC would distribute the trust assets upon execution of the agreement. PNC's position was that it was not conditioning the distributions on execution of the agreement but rather was presenting an alternative method for concluding trust administration (the other alternative being for PNC to obtain the release and indemnification it sought by petitioning a Maryland court for a final accounting).

Three of the remainder beneficiaries (the "Petitioners") filed suit against PNC, seeking a judgment declaring PNC's "demand" for the execution of the agreement to be unlawful on the grounds that the terms of the agreement, particularly the indemnification provision, were "over-broad" and extended PNC more protection than was otherwise available to it under Maryland law. The Petitioners also alleged that, in requesting the agreement, PNC had breached is basic fiduciary duty of good faith.

The Court of Appeals of Maryland relied on common law in rejecting these claims and holding that PNC's actions were lawful, as neither the trust instrument nor Maryland statutes addressed these issues. The court noted that "a trustee may engage in a self-interested course of action so long as the beneficiaries provide valid, informed consent" and that a Trustee, therefore, must be able to request such consent. PNC's request for execution of the agreement amounted to such a request, and therefore the request itself was not a breach of trust. In a footnote, the court declined to examine whether PNC had provided the beneficiaries with sufficient information to evaluate the request, because the parties did not brief or argue that issue on appeal.

In rejecting Petitioners' claim that the indemnification provision was over-broad, the court noted that the indemnification provision "track[s] closely, although not perfectly, to the terms PNC would have received had it petitioned for (and received) a court order formally approving the accounting and termination of the Trust" under Maryland law. While the court stated that the agreement did create some differences in the relative rights that PNC and Petitioners would otherwise have had under default Maryland trust law, and that "these differences are material and represent a fairly sizeable increase in the amount of protection PNC would have received, as a trustee, from liability and cost," the court nevertheless found that such differences "are of degree rather than kind."

Not to be overlooked is the court's observation, in a footnote, that the language of the indemnification provision that purported to protect PNC "in its role as trustee and in its corporate capacity" would "not extend protection to other services provided to the Trust by PNC. For example, although the trust department of a financial institution could obtain a release of liability and indemnification agreement for the activities of its trust department in administering the trust, it could not seek a release of liability of its securities brokerage for broker's services provided to the trust, if the trustee happened to employ the institution's own brokerage division to execute trades on behalf of the trust. Otherwise, the financial institution would effectively use its position as trustee to obtain a release for its securities division, which would appear at odds with the duty of loyalty."

The dissent argued that PNC did not provide full information to the beneficiaries in connection with the agreement, stating that "a beneficiary cannot properly consent to a breach of fiduciary duty without having full and complete information relating to the breach." In many other jurisdictions, failure to disclose full information to the beneficiary has invalidated releases. *See, e.g.*, *Janowiak v. Tiesi*, 932 N.E.2d 569 (Ill. App. 2010) (finding attorney's silence as to transaction damaging to trust assets may constitute fraudulent concealment); *cf. Matter of HSBC Bank U.S.A.*, 70 A.D.3d 1324 (N.Y. App. Div. 2010) (finding that Trustee fulfilled fiduciary duty by providing petitioners with full accounting and petitioners waived rights against Trustee through release).

Courts remain split as to whether a Trustee may condition distributions on the execution of a release provided all relevant information has been disclosed to the beneficiaries. *See, e.g.*, *Allen v. Ritter*, 35 A.3d 443 (Md. App. 2011) (holding that Maryland statutes provided executor the right to request a release before making a distribution that had already been court approved so long as the release was not a product of "fraud, material mistake or substantial irregularity" because without a release the executor could still be sued for claims related to the distribution and have no assets to fund a defense); *but see Bellows v. Bellows*, 196 Cal. App. 4th 505 (2011) (holding that a Trustee could not provide that cashing a check was acceptance of the terms of a receipt and release when California statutes do not permit mandatory distributions from being withheld and previous court order required the distribution). In the absence of a statute addressing whether a Trustee could condition distributions on execution of a release, the Michigan Court of Appeals in *In re Stout Trust*, 2014 Mich. App. LEXIS 137 (2014), *affirmed in part, reversed and remanded on other grounds*, 2015 Mich. App. LEXIS 2386 (2015), held that the language of a trust instrument did not allow the Trustee to condition mandatory distributions on the execution of a release. The Michigan Trust Code permits a beneficiary to release the Trustee from liability for breaches of trust, but the statute could not be interpreted to "give the trustee the authority to require a release as a condition to a beneficiary's receipt of the distribution that he or she is entitled to pursuant to the terms of a trust."

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November 15, 2016

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November 15, 2016

Laurie Frye
Professional Education Coordinator

Continuing Education Credits for this course are as follows:

- **Certified Public Accountant** — **1.5 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 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 credit hours**
  Course #223937 (general credit)
- **Accredited Fiduciary Investment Manager (AFIM™)** — **1.5 credit hours**
- **Certified Wealth Strategists (CWS®)** — **2.0 ethics hours**
- **Certified Investment Management Analyst (CIMA®)** — **1.5 credit hours**
  Course # **16CFI011**
  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 credit hours**

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

- **Certified Retirement Services Professional (CRSP)** — **2.0 credit hours**
- **Fiduciary Investment Risk Management Association (FIRMA®)** — **2.0 credit hours**
- **Chartered Life Underwriter & Chartered Financial Consultant** — **1.5 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:

The Ongoing March of Breach of Duty Claims and How to Protect Against Them

November 15, 2016

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 (ETH52040), California, Delaware, Georgia, Illinois, Louisiana, Maine (038998), Minnesota (214220), Mississippi, Montana (10534), Nebraska(118642), New York, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Carolina, Tennessee (Distance Ed), Texas (901337739), Vermont, Washington, Wisconsin , & Wyoming.
These states have been approved for the following Ethics Credit: Colorado – 2 hours, Florida - 2 hours (1508046N), Missouri –1.8 hours, Oklahoma – 2 hours, West Virginia – 1.8 hours
The following states have been approved for 1.5 hours of General Credit: Idaho, Iowa (204836), Kentucky (161811), Nevada (14895), New Mexico, Oregon (1048* 238), Utah, Virginia,

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, Arizona, & Connecticut-Attorneys can use this certificate to submit in their State
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 **ONLY** 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. ****

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