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## A Trustee's Fiduciary Duties at the Start and End of Administration

Robert Whitman

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## A Trustee's Fiduciary Duties at the Start and End of Administration

### Cover Page Footnote

Professor of Law, University of Connecticut Law School.

# A TRUSTEE’S FIDUCIARY DUTIES AT THE START AND END OF ADMINISTRATION

*Robert Whitman*<sup>+</sup>

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Prior to the creation of a trust and at its termination, ambiguity may exist in regard to the extent of the trustee’s fiduciary duties. This uncertainty leads to litigation<sup>1</sup> and a need for clarification as to when fiduciary duties start and end.<sup>2</sup>

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1. While this Article deals exclusively with trusts, similar questions may arise regarding the administration of estates. See, e.g., Nancy J. Moore, *Expanding Duties of Attorneys to “Non-Clients”: Reconceptualizing the Attorney-Client Relationship in Entity Representation and Other Inherently Ambiguous Situations*, 45 S.C. L. REV. 659, 669–70 (1994) (discussing the difficulty of determining fiduciary duties for disputes in estate law between companies and individuals).

2. See, e.g., *Greene v. First Nat’l Bank of Chi.*, 516 N.E.2d 311, 315 (Ill. App. Ct. 1987) (finding no fiduciary duty existed between a corporate trustee and the plaintiff in connection with a series of trusts because the plaintiff confused the duties of a co-executor and trustee); Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L.J. 67,

It is argued that, where fiduciary duties do not exist, contract law may be found to govern the rights of the settlor, the trustee,<sup>3</sup> and the beneficiaries.<sup>4</sup> Under the principles of modern contract law, certain conduct may be permitted that would not be acceptable if fiduciary duties existed.<sup>5</sup>

This Article will discuss three common situations: (1) the seeking of a receipt and release by a corporate fiduciary upon an informal termination of a trust; (2) the acceptance of terms that a corporate fiduciary requires prior to a settlor appointing a corporate fiduciary as a trustee; and (3) the need for a trustee to give notice to trust beneficiaries. At each of these points, clear conflicts can arise between principles of contract law and trust law. This Article suggests that a keen awareness of these potential clashes can help achieve fairer agreements and better trust administration. Further, this Article focuses on whether it is appropriate to validate contract provisions agreed upon prior to the establishment of a trust, or provisions of a trust agreement, when those terms are sought by the trustee and possibly suggest that the trustee is overreaching or exploiting an advantage.

Part I of this Article analyzes the historical trajectory of contract law since the eighteenth century, and provides a framework through which one can understand the preliminary contractarian provisions of a trust. Part II of this Article explores the development of trust law that serves to protect the interests of the trustee, the settlor, and the beneficiary. Part III discusses the legal standing of a corporate trustee's power over a settlor or beneficiary, and describes the latest case law determining the scope of a corporate trustee when bargaining the parameters of a trust agreement. Part IV demonstrates the typical standard form agreement that settlors can expect when employing a corporate trustee. Part IV also describes the strengths and weaknesses of such an agreement and considers how a corporate trustee may attempt to take advantage of a settlor. Finally, Part V illustrates the Uniform Trust Code (UTC)'s provisions regarding the mandatory disclosure requirements of a trust. These provisions indicate that a corporate

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92–93 (2005) (noting that the ability for corporate trustees to stray from the formal standards of fiduciary duties makes “[l]itigation . . . more costly and settlement less likely” (footnote omitted)).

3. With respect to imposed fiduciary obligations, “a trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.” *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928). Accordingly, the trustee is required to put the interest of the beneficiary above his own. This Article utilizes the term “trustee” to refer to a corporate fiduciary, but the issues discussed also pertain to an individual trustee or co-trustees.

4. See John H. Langbein, *The Contractarian Basis of the Law in Trusts*, 105 YALE L.J. 625, 659–60 (1995).

5. Cf. Victor Brudney, *Contract and Fiduciary Duty in Corporate Law*, 38 B.C. L. REV. 595, 595–96 (1997) (noting that the range and expectations of behavior for a fiduciary varies depending on the field and factual situation); Langbein, *supra* note 4, at 640–41 (describing the changing powers and behaviors attributable to trustees in light of the change in fiduciary duties and trust law).

trustee has particular duties to a beneficiary that may alter his relationship and duty of loyalty to the original settlor of the trust.

This Article does not attempt to suggest specific new legal rules that might resolve all of the situations in which a clash of doctrines may occur. Ultimately, new rules will likely be developed by statute or court decisions. As of now, it is understandable that courts may respond differently to various factual patterns. Awareness of the potential for uncertainty and a clash of doctrines will allow corporate fiduciaries acting as trustees to appropriately tailor their actions to be consistent with their fiduciary duties, thereby minimizing the need for litigation.

## I. FAIRNESS AND SOCIAL UTILITY OF CONTRACT LAW

### A. *Fairness and Equitable Theory Dominate Early Contract Law to Protect Citizens*

The periods of contract development pertinent to trust administration and relevant to this Article took place in the United States and England in the eighteenth and nineteenth centuries. Contract law dictates that contracts may be void if they contain unconscionable terms or were formed while one party was under duress;<sup>6</sup> “[m]uch of the law of contract is concerned with ensuring that agreements are arrived at in a way that meets at least minimum standards respecting both parties’ understanding of, and freedom to decide whether to enter into, the transactions.”<sup>7</sup> Courts determined that certain agreements went against public policy, such as agreements to perform civil crimes.<sup>8</sup> Rules were also formulated to provide protection against self-serving guardians for minors and disadvantaged persons.<sup>9</sup> Other rules created particularized contract requirements to protect against “the assumption of a legally binding obligation to confer a gift of money or other gratuitous benefit upon another.”<sup>10</sup>

In the eighteenth century, courts would determine whether a breach of contract existed based on the principles of equity and fairness before a promise was

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6. See, e.g., JOSEPH M. PERILLO & JOHN D. CALAMARI, CALAMARI AND PERILLO ON CONTRACTS 315–17, 388–421 (5th ed. 2003) (discussing the development and impact of duress and unconscionability in contract law); RESTATEMENT (SECOND) CONTRACTS § 175(1) (1981) (“If a party’s manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.”).

7. Arthur Taylor von Mehren, *Contract*, ENCYCLOPAEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/135270/contract/21771/Fairness-and-social-utility> (last updated May 6, 2014) (highlighting the element of fairness around which contract law revolves).

8. *Id.* See *Gamble v. Connolly*, 943 A.2d 202, 210 (N.J. 2007) (“No contract can be sustained if it is inconsistent with the public interest or detrimental to the public good.”); RESTATEMENT (SECOND) CONTRACTS § 178 (providing when terms of a contract violate public policy and render the contract unenforceable).

9. Von Mehren, *supra* note 7.

10. *Id.*

deemed enforceable.<sup>11</sup> This approach was common in cases in which one party was able to set the terms of a contract without a real chance for bargaining.<sup>12</sup> Courts often looked to the actual words and documents that created the contract rather than what the parties meant by those words and actions.<sup>13</sup>

Both the English and American legal systems demonstrated an equitable theory that tempered the freedom of contract between parties with principles of fairness and justice.<sup>14</sup> Where contractual obligations clearly departed in a large degree from the ideals of honesty and fairness, the contract would likely not be upheld.<sup>15</sup> When equitable theory was still the predominant approach, contract law in the American colonies commonly applied the rules for exchange of title to land.<sup>16</sup> The colonial economy was rural, agricultural, and pre-industrial.<sup>17</sup> While trade and commerce were growing, locally based market relations tended to be the norm.<sup>18</sup> In more remote areas, subsistence agriculture and barter still often prevailed.<sup>19</sup>

*B. To Meet the Needs of a Changing Society, Judicial Interpretation  
Recharacterizes Adequacy of Consideration*

Beginning in the eighteenth century and continuing into the early nineteenth century, an equity court would carefully examine adequacy of consideration. For example, *Seymour v. Delancey*<sup>20</sup> involved a contract for the exchange of two country farms in New York for a one-third interest in two city lots.<sup>21</sup> The action for specific performance of the exchange was brought against the descendant of the party who was to convey the two farms.<sup>22</sup> The case was first heard by

11. Morton J. Horwitz, *Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917, 923–24 (1974) (describing how courts accounted for fairness).

12. *Id.* at 950; see also Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427, 430–31 (2000).

13. James Oldham, *Reinterpretations of 18th-Century English Contract Theory: The View from Lord Mansfield's Trial Notes*, 76 GEO. L.J. 1949, 1958 (1988) (quoting P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 419 (1979)); see also von Mehren, *supra* note 7 (“[A] written agreement may be interpreted against the party who drafts or chooses the language. Or the court may prefer an interpretation it finds to be in accord with the public interest.”).

14. Horwitz, *supra* note 11, at 917, 923–24.

15. *Id.* at 923 (“The most direct expression of the eighteenth century theory was the well-established doctrine that equity courts would refuse the specific enforcement of any contract in which they determined that the consideration was inadequate.” (footnote omitted)).

16. *Id.* at 920.

17. EDWIN J. PERKINS, *THE ECONOMY OF COLONIAL AMERICA* 41 (1980).

18. See *id.* at 49 (highlighting the more rapid growth of commercial markets in the north compared to the middle and southern colonies).

19. *Id.* at 104.

20. 6 Johns. Ch. 222 (N.Y. Ch. 1822), *rev'd sub nom.* *Seymour v. Delancy*, 3 Cow. 445 (N.Y. Sup. Ct. 1824).

21. *Id.* at 223.

22. *Id.*

Chancellor James Kent.<sup>23</sup> According to his interpretation of the “weight of testimony,” the two farms were worth \$14,000 at the date of the agreement, and the one-third interest in the lots was worth \$5,000.<sup>24</sup>

While the witnesses called for valuation disagreed, Kent stated that “I am satisfied, that . . . the village lots were not worth half the value of the country farms.”<sup>25</sup> Kent proceeded to announce that “[i]t is a settled principle, that a specific performance of a contract of sale is not a matter of course, but rests entirely in the discretion of the Court, upon a view of all the circumstances.”<sup>26</sup> “A Court of equity,” Kent went on, “must be satisfied that the claim for a deed is fair and just, and reasonable, and the contract equal in all its parts, and founded on an adequate consideration, before [the court] will interpose with this extraordinary assistance.”<sup>27</sup>

After examining a series of English decisions, Kent confessed that in the most recent cases of the time “there [was] a doubt thrown over the question, whether inadequacy of price alone, though not so great as to be evidence of fraud, [would] be sufficient, . . . to withhold the decree for a specific performance.”<sup>28</sup> Apparently, however, Kent was more struck with the preponderance of earlier cases in which no such doubts were raised. He said:

There is a very great weight of authority against enforcing a contract, where the consideration is so inadequate as to render it a hard bargain, and an unequal and an unreasonable bargain; the argument is exceedingly strong against it in such cases, when it is considered that if equity acts at all, it must act *ex vigore*,<sup>[29]</sup> and carry the contract into execution, with unmitigated severity: Whereas, if the party be sent to law, to submit his case to a jury, relief can be afforded in damages, with a moderation agreeable to equity and good conscience, and when the claims and pretensions of each party can be duly attended to, and be admitted to govern the assessment.<sup>30</sup>

Kent refused specific performance after observing that, under the civil law and comparable foreign laws, judges rescinded contracts for the sale of land if

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23. *Seymour*, 3 Cow. at 448 (naming Chancellor Kent as the maker of the lower court decision).

24. *Seymour*, 6 Johns. Ch. at 223–24.

25. *Id.* at 224.

26. *Id.* at 224–25.

27. *Id.* at 225.

28. *Id.* at 231.

29. *Ex vigore* refers to *ex proprio vigore*, a Latin term meaning “by its own force.” Anna Su, *Speech Beyond Borders: Extraterritoriality and the First Amendment*, 67 VAND. L. REV. 1373, 1398 (2014).

30. *Seymour*, 6 Johns. Ch. at 232.

the price was below half the value of the land.<sup>31</sup> Kent's refusal was reversed in 1824 in *Seymour v. Delancy*<sup>32</sup> by the New York Court for the Trial of Impeachment and the Correction of Errors, a unique New York judicial institution that is now extinct, which consisted of the Members of the New York Senate, the Chief Judge of the New York Supreme Court, and the Equity Chancellor.<sup>33</sup>

By the late nineteenth century and thereafter, the country's expansion and the need for progress outweighed concerns for fairness in contract formation.<sup>34</sup> Court interference with deals clearly favoring powerful corporations represented by large and powerful law firms disappeared.<sup>35</sup> This judicial protection was replaced by the contract rule of law that adequacy of consideration will not be questioned when there is a bargained-for exchange.<sup>36</sup>

Thus, contract law was altered to conform to the need of the capitalist nation. The law worked to assist the expansion of trade and the growth of the nation—in spite of the likelihood that the stronger party could take advantage of the weaker party—so long as actual fraud could not be proven.<sup>37</sup> Weaker parties were, and continue to be, taken advantage of under the sanction of contract law.<sup>38</sup>

## II. THE ORIGIN AND ESSENCE OF TRUST LAW

In medieval England, land ownership was based on the feudal system, and situations arose that required the appointment of one person to look after lands owned by another.<sup>39</sup> For example, when a knight went off to fight in the Crusades, he conveyed management and ownership of his lands to a trusted individual during his absence.<sup>40</sup> The common oral understanding provided for re-conveyance of ownership back to the knight upon his return, or, if he died, conveyance of the land to his family.<sup>41</sup> If the manager refused to return ownership on one of those occasions, common law courts would not recognize

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31. *Id.* at 233.

32. 3 Cow. 445 (N.Y. Sup. Ct. 1824).

33. *The Court of Appeals of the State of New York*, LEGAL INFO. INST., <https://www.law.cornell.edu/nycap/court/background.htm> (last visited May 11, 2015).

34. Horwitz, *supra* note 11, at 953–55.

35. *See id.* at 941–42.

36. *Id.*

37. *Id.* at 945–46.

38. *Id.* (“[N]ineteenth century courts and doctrinal writers . . . were able to elaborate a system that allowed judges to pick and choose among those groups in the populations that would be its beneficiaries.”).

39. THEODORE F. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 506–08 (5th ed. 1956) (“In the days when feudalism was at its height, the vassal held the land of the lord.”).

40. *Id.* at 576–77 (noting that this person was normally a friend or neighboring lord).

41. F. W. Maitland, *The Origin of Uses*, 8 HARV. L. REV. 127, 129–30 (1894) (describing this type of conveyance as giving one's “land to another ‘to the use’ of a third”).

a claim.<sup>42</sup> There was no legal form of action through which courts could grant relief.<sup>43</sup>

However, it was possible to gain relief in another way. The disgruntled crusader, or his family, could directly petition the king, who would refer the matter to his Lord Chancellor.<sup>44</sup> The Lord Chancellor could decide the case and dispense equity in the king's name, according to his conscience.<sup>45</sup>

In the fifteenth century, the Lord Chancellor, sitting in the equity Court of Chancery, would regularly recognize the proved claim.<sup>46</sup> The crusader later became known as the settlor, his family became known as the beneficiary, and the trusted friend who failed to keep his promise became known as the trustee.<sup>47</sup> The transaction was originally termed "adopus" or "to the use of."<sup>48</sup> In time it became known as "use," and ultimately, a "trust."<sup>49</sup>

As aforementioned, the law of contracts developed in the nineteenth century in such a way that the stronger party could arrange a deal to allow him to take advantage of the other party with impunity.<sup>50</sup> The stronger party, within limits, could keep the advantages of his bargain.<sup>51</sup> The law of private express trusts developed in a very different way. The trustee was considered a "fiduciary,"<sup>52</sup> and the law of trusts vigorously expounded on the need for the fiduciary to do equity and put the needs of the beneficiary above his own.<sup>53</sup> The law of fiduciary duty strictly prohibited the trustee from using his position to take advantage of the beneficiaries.<sup>54</sup> In the famous words of Judge Benjamin Cardozo:

Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most

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42. GEORGE G. BOGERT & GEORGE T. BOGERT, HANDBOOK OF THE LAW OF TRUSTS § 3 (5th ed. 1973).

43. *Id.*

44. *Id.*

45. *Id.* (noting that the chancellors were usually "churchmen" who had a duty to uphold the fairness of the law).

46. *Id.* (noting that recognition of these suits in a less formal form went back to the thirteenth century).

47. *Id.* § 1.

48. PLUCKNETT, *supra* note 39, at 576, 577.

49. *Id.* ("The word 'trust' had a more general meaning, however, and . . . seem[ed] to apply to any case where one person was under a moral duty to deal with property for another's benefit.").

50. *See supra* notes 34–38 and accompanying text.

51. Horwitz, *supra* note 11, at 946–52 (discussing how the "will theory of contract" emerged in the nineteenth century, supplanting equitable principles of "objective value" and "just price" that had previously provided some protection for the weaker party).

52. BOGERT & BOGERT, *supra* note 42, § 1.

53. *Id.* § 95 (explaining the trustee's duty of loyalty to the beneficiary).

54. *Id.*

sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the “disintegrating erosion” of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.<sup>55</sup>

### III. LAW APPLIED AT THE TERMINATION OF A TRUST

#### *A. Duties Between Fiduciaries and Beneficiaries May Not Always Be Clearly Defined*

Traditionally, trusts were testamentary and supervised by courts.<sup>56</sup> By statute, a final fiduciary accounting was to be presented to the supervising court and copies were to be provided to appropriate beneficiaries.<sup>57</sup> Today, more commonly than ever, living revocable trusts are employed for estate planning purposes in order to avoid costly court supervision.<sup>58</sup> When terminating a revocable living trust, a corporate fiduciary serving as the trustee has several choices:

1. Distribute to the appropriate beneficiaries upon first providing them with a fiduciary accounting and receiving a receipt and release from all of the beneficiaries;<sup>59</sup>
2. File a final fiduciary accounting with an appropriate court in order to receive the court’s approval,<sup>60</sup> or
3. Provide a fiduciary accounting to the appropriate beneficiaries and distribute, only asking for a receipt, thereby only relying for protection on the running of the applicable statute of limitations.<sup>61</sup>

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55. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) (citation omitted).

56. See BOGERT & BOGERT, *supra* note 42, § 1.

57. T.P. Gallanis, *The Trustee’s Duty to Inform*, 85 N.C. L. REV. 1595, 1600–02 (2007) (describing the different types of information that each type of beneficiary is entitled to receive). See also RESTATEMENT (SECOND) OF TRUSTS § 173 (1959) (noting the trustee’s legal duty to provide the beneficiary with any requested information).

58. FREDERICK M. SEMBLER & MICHAEL J. FEINFELD, *PLANNING AN ESTATE: A GUIDEBOOK OF PRINCIPLES AND TECHNIQUES* 129 (4th ed. 2014). See A. James Casner, *Estate Planning—Avoidance of Probate*, 60 COLUM. L. REV. 108, 109 (1960).

59. *Guidelines for Individual Executors & Trustees*, A.B.A., [http://www.americanbar.org/groups/real\\_property\\_trust\\_estate/resources/estate\\_planning/guidelines\\_for\\_individual\\_executors\\_trustees.html](http://www.americanbar.org/groups/real_property_trust_estate/resources/estate_planning/guidelines_for_individual_executors_trustees.html) (last visited May 11, 2015).

60. *Id.*

61. UNIF. PROBATE CODE § 7-307 (West 2014). See Kevin D. Millard, *The Trustee’s Duty to Inform and Report Under the Uniform Trust Code*, 40 REAL PROP. PROB. & TR. J. 373, 384 (2005).

The advantage of requiring court approval of the fiduciary accounting, or requiring receipts and releases, is that doing so might protect the corporate fiduciary if the beneficiaries later raise actionable questions.<sup>62</sup> The difficulty is that neither the court order approving the account nor the received receipt and release will prevent the beneficiary from later raising questions where there is a claim regarding misleading information or a lack of full disclosure on the final accounting.<sup>63</sup>

Uncertainty remains as to whether a fiduciary may refuse to make a distribution mandated by the governing instrument unless receipts and releases are forthcoming. If the trustee may withhold distribution until he receives receipts and releases, is this putting the interests of the fiduciary above the interests of the beneficiaries? Beyond that, the practical disadvantage of requiring a receipt and release prior to distribution is that it may cause the beneficiaries to become concerned with the idea that they may be giving up rights, which may cause them to retain independent counsel. Protracted litigation may follow.

Distribution without requiring releases minimizes protection for the corporate fiduciary but allows the fiduciary to properly and confidently carry out his or her fiduciary duties until the final termination of the trust.<sup>64</sup> By receiving a prompt distribution without a demand for receipts and releases, beneficiaries may not feel it necessary to retain independent counsel, and litigation could be avoided. Arguably, threatening the beneficiaries with substantial costs by filing the final accounting in court (unless receipts and releases are forthcoming) places the fiduciary in a position where he will likely seek to protect his own interests over the beneficiaries' interests, thereby raising the issue of a fiduciary duties breach.

Bargaining for and granting receipts and releases may be seen as contract negotiation. In consideration for the corporate fiduciary giving up its right to seek a court review and approval of the final accounting, the beneficiaries grant the receipts and releases. Depending on the circumstances, the application of trust law may not condone this common practice,<sup>65</sup> and lack of care in how

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62. Julia Zajac & Robert Whitman, *Fiduciary Accounting Statutes for the 21st Century*, 36 ACTEC L.J. 443, 448–49 (2010) (quoting Millard, *supra* note 61, at 375). See *Guidelines for Individual Executors & Trustees*, *supra* note 59.

63. See, e.g., *Hastings v. PNC Bank, NA*, 54 A.3d 714, 728 (Md. 2012) (finding that a release form did not protect the bank-trustee from actions based on fraud or mistake).

64. *Id.* at 735–36 (discussing the broader protections that come with releases). *But cf.* Millard, *supra* note 61, at 393–94 (noting arguments against obtaining permission, or even telling the beneficiary about the trust, but disclaiming their importance).

65. See Robert Whitman & Kumar Paturi, *Improving Mechanisms For Resolving Complaints of Powerless Trust Beneficiaries*, 16 QUINNIPIAC PROB. L.J. 64, 79–85 (2002) (providing examples of situations in which trustees and beneficiaries seek court oversight).

receipts and releases are requested can lead to litigation.<sup>66</sup> In the future, new trust law may arise to radically change current practice.<sup>67</sup>

*B. New Case Law May Change the Law Regarding Trust Administration*

An indication of a trend in new law with regard to trust administration is best illustrated by a recent case, *Hastings v. PNC Bank*.<sup>68</sup> In *Hastings*, beneficiaries of a testamentary trust brought an action in Baltimore County Circuit Court against the trustee, PNC Bank (PNC).<sup>69</sup> The beneficiaries alleged, among other things, that the fiduciary “improperly” asked the beneficiaries to execute general releases prior to making a final distribution.<sup>70</sup> The trustee counterclaimed for termination of the trust and filed motions for summary judgment.<sup>71</sup> The court issued an order assuming jurisdiction of the trust and granted the trustee’s motions for summary judgment.<sup>72</sup>

*1. The Majority Found No Breach by the Corporate Fiduciary*

The beneficiaries appealed to the Maryland Court of Special Appeals, which affirmed the Circuit Court’s decision.<sup>73</sup> The beneficiaries then sought a writ of certiorari, which the Court of Appeals granted.<sup>74</sup> By a four-to-three decision, the Court of Appeals affirmed the Court of Special Appeals.<sup>75</sup> The majority first held that the trustee did not breach “its duty of loyalty in this case merely by asking Petitioners . . . to execute a reasonable release and indemnity clause.”<sup>76</sup> The majority also found that the terms of the release and indemnity clause were not overly broad.<sup>77</sup>

*2. The Dissent Found Breaches by the Corporate Fiduciary*

Three judges dissented strongly.<sup>78</sup> The dissenting judges pointed out that PNC, the corporate fiduciary, prepared to distribute the trust’s assets to the

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66. See, e.g., *Hastings*, 54 A.3d at 723.

67. Whitman & Paturi, *supra* note 65, at 91.

68. 54 A.3d 714 (Md. 2012).

69. *Id.* at 718.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 718, 734 (noting the three dissenting judges).

76. *Id.* at 726.

77. *Id.* (finding that PNC had not “place[d] impermissibly PNC’s interests before those of [the] Petitioners”).

78. *Id.* at 734–41 (Adkins, J., dissenting) (arguing that the majority’s approach will “encourage more widespread use of such unlawful releases, and enable banks and other trustees to cite this case to justify other breaches” by the corporate fiduciary).

beneficiaries and sent a letter to them that included, among other things, an accounting of the entire trust and a “Waiver, Receipt, Release and Indemnification Agreement” (Release).<sup>79</sup> The letter explained that each beneficiary would receive his or her share of the trust when all of the beneficiaries had returned the signed Release.<sup>80</sup> In addition, the Release provided that “the Trust ha[d] terminated; and . . . the parties in interest ha[d] requested that PNC distribute the Trust assets . . . without the filing, audit and adjudication of an account of PNC’s administration of the Trust with a court of competent jurisdiction.”<sup>81</sup> Therefore, upon signing the Release, the beneficiaries relinquished their right to formally challenge PNC’s administration of the trust funds. The Release requested, among other things, that prior to signing the Release and in lieu of a formal court accounting the beneficiaries: “(1) acknowledge that they had consulted with an attorney (or had chosen affirmatively not to do so); (2) declare that they had reviewed the books, records, and statements of the Trust, and; (3) approve of PNC’s handling and administration of the Trust.”<sup>82</sup> The Release also contained an indemnity clause releasing PNC from liability and requiring the beneficiaries to compensate PNC or secure PNC against legal responsibility for any expenses related to the termination of the trust; this clause became the subject of litigation.<sup>83</sup>

The beneficiaries retained counsel and objected to PNC’s plan for distribution.<sup>84</sup> The beneficiaries mainly argued against the Release’s requirement that the beneficiaries execute the Release before receiving their distribution, and they claimed that the Release terms were “far too favorable to PNC.”<sup>85</sup> In response, PNC argued that signing the Release was not required prior to distribution of the trust, and that it could seek a determination from the courts to obtain a final accounting and termination of the trust, thus preserving the protection it had intended to gain from the Release.<sup>86</sup> PNC also argued that the opportunity to execute Releases was offered to the beneficiaries as a matter of industry practice, “since the majority of beneficiaries prefer to terminate their trust via private agreement instead of petitioning a court.”<sup>87</sup>

Nonetheless, while still demanding the Release or court approval of the final accounting, PNC did release a partial distribution to each of the beneficiaries in response to their objections.<sup>88</sup> The court considered PNC’s required form of

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79. *Id.* at 720 (majority opinion).

80. *Id.*

81. *Id.* at 720–21.

82. *Id.* at 721.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* (internal quotation marks omitted).

88. *Id.* at 721–22 (awarding each of the beneficiaries \$33,319.97).

Release to be roughly the same terminology that the court would have provided if the matter had been formally adjudicated and had the court had approved the fiduciary accounting.<sup>89</sup> The Maryland Court of Appeals found that neither party advanced the issue of whether PNC breached its duty to provide all material facts to the beneficiaries.<sup>90</sup>

### *3. The Dissent Found the Fiduciary Breached the Duty to Disclose All Material Facts*

Although the majority held that the parties did not brief or argue the issue of whether PNC properly communicated all material facts and law to the beneficiaries, the dissent felt that this question *was* before the court and was essential to deciding the case.<sup>91</sup> The dissent believed that the issue before the court—whether a trustee has a right to present a Release providing greater protection for PNC than a court order as a precondition to any distribution—could not be decided unless the issue of proper and full communication was considered.<sup>92</sup> The dissent posited that PNC had clearly breached its fiduciary duty to inform the remaindermen of all material facts.<sup>93</sup>

According to the dissent, by refusing to make any distribution unless the beneficiaries signed an overly broad Release, PNC forced the matter to a formal court accounting.<sup>94</sup> That process was far more expensive and time consuming than if PNC had presented a Release that only afforded PNC the same protections as a court order, or if PNC had simply asked for (rather than demanded) a Release and a receipt, or refrained from asking for a receipt or a Release.<sup>95</sup>

By not making a prompt distribution, the dissent argued, PNC limited the ability of the beneficiaries to retain their own counsel and take action to protect their rights.<sup>96</sup> PNC may have sought to deny the beneficiaries the assets to which they were then entitled in order to prevent the beneficiaries from funding formal litigation.

### *4. Comparing the Majority and Dissent*

The majority found that requesting the Release was not unlawful, but that a trustee has the duty to provide the beneficiaries “with ‘full information and

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89. *Id.* at 726–27 (noting that the Release’s terms “track closely, although not perfectly” the wording the court would have used).

90. *Id.* at 724, 734 (noting that the Petitioners had only put forth strictly legal arguments and that the Release did not ask the parties to re-evaluate any interest in the relationship).

91. *Id.* at 739 (Adkins, J., dissenting).

92. *Id.* at 739–40.

93. *Id.* at 740.

94. *See id.*

95. *Id.* at 734 (majority opinion).

96. *Id.* at 736–38 (Adkins, J., dissenting).

complete understanding of the facts.”<sup>97</sup> However, both the majority and dissent in *Hastings* agreed that a trustee is not protected from fraudulent concealment; the majority stated:

It is also worth noting that, no matter the terms of the clause itself, the Release Agreement could not protect PNC from liability arising from fraud, material mistake or irregularity on PNC's part . . . . “Because a trustee has an affirmative duty to disclose relevant information, a matter involving sensitive issues must be revealed in the accounting with sufficient clarity to invite attention to the issue if the court order is to protect the trustee as a matter of issue preclusion.” “Of course, a trustee who in rendering the account is guilty of fraud or fraudulent concealment is not protected.”[] Moreover, “this Court has consistently held that fraud can and will invalidate an otherwise-complete release of liability.”<sup>98</sup>

To validate this assertion, the majority relied on the Restatement (Third) of Trusts, which says that “[a] particular transaction that would otherwise violate a trustee's duty of loyalty may be authorized by consent properly obtained from or on behalf of all of the trust beneficiaries.”<sup>99</sup> The dissent even more fully discussed this issue, stating that “[t]he Majority brushes off the Trustee's over-reaching, preferring instead to focus on the doctrine that ‘a trustee may engage in self-interested course of action so long as the beneficiaries provide valid, informed consent.’”<sup>100</sup> The dissent believed that the majority saw PNC's attempt to have the beneficiaries sign the Release as “at bottom, [an] arm's length request to exchange increased protection and indemnity for a quicker and less costly distribution of trust funds.”<sup>101</sup>

The majority comforted itself with the idea that the beneficiaries “retained the choice to accede to that request, perhaps negotiate [one] not as broad in its protection of PNC, or simply reject it.”<sup>102</sup> However, the majority's analysis of consent fails to appropriately incorporate a beneficiary's inability to properly consent to a breach of fiduciary duty without having full and complete information relating to the breach.<sup>103</sup> The dissent noted this point, and further pointed out that “in obtaining the consent, the ‘trustee must not violate other fiduciary duties, such as the duty of prudence or impartiality.’”<sup>104</sup>

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97. *Id.* at 726 n.10 (majority opinion) (quoting *McDaniel v. Hughes*, 111 A.2d 204, 210 (Md. 1955)). *See id.* at 734 (noting that PNC's actions did not violate Maryland law).

98. *Id.* at 728–29 (citations omitted).

99. RESTATEMENT (THIRD) OF TRUSTS § 78 cmt. c(3) (2007).

100. *Hastings*, 54 A.3d at 739 (Adkins, J., dissenting) (quoting the majority opinion).

101. *Id.* at 728 (majority opinion).

102. *Id.*

103. *See id.* at 735 (Adkins, J., dissenting).

104. *Id.* at 739 n.13 (quoting RESTATEMENT (THIRD) OF TRUSTS § 78 cmt. g (2007)).

The dissent reiterated that in dealings between trustees and beneficiaries, the trustee must ensure that the beneficiary has all pertinent information and fully understands the implications of the transaction.<sup>105</sup> It said:

This is particularly true when the trustee has superior knowledge of the transaction at issue, such as when the trustee is an attorney for the beneficiaries and is “experienced in the law.” In those instances, “[t]ransactions for the personal advantage of a trustee . . . are even more improper than similar dealings between laymen,” and “[t]o sustain such a transaction [sic] the trustee must show that there was a full and complete disclosure on his part of all the facts essential to an intelligent understanding by the beneficiaries of the subject matter and the consequences of the transaction.”<sup>106</sup>

From the dissent’s point of view, PNC failed to adequately advise the beneficiaries about their rights or describe the potential consequences of signing the Release.<sup>107</sup> The dissent specifically included a footnote to elucidate that

the Agreement not only failed to contain full information, but it also contained a misrepresentation. The [Release] stated that the Beneficiaries—rather than PNC—was the party initiating distribution of trust funds without court approval. Although this may seem like a minor misrepresentation, because there are four beneficiaries in this case (each receiving the [Release]), this statement has a great potential to mislead. After all, each of the four beneficiaries may have gotten the impression that the other three beneficiaries had requested distribution of trust funds in this manner, when, in fact, they had not.<sup>108</sup>

Importantly, the dissent explained that PNC did not “explain to the Beneficiaries how the liability protection it sought under the [Release] was more favorable to the bank than the protection it would have received upon the court’s approval of a final accounting.”<sup>109</sup> It said:

PNC seemingly was impatient with explanations. Although the Beneficiaries insisted upon explanation of PNC’s tax and fees calculations, those requests seem to have irritated PNC. In one letter to the Beneficiaries, PNC wrote: “The trust document that you request is in your possession. . . . Your other questions about fees and taxes are adequately addressed in [prior] correspondence to you. Nevertheless, I will attempt to dissect this for you.”<sup>110</sup>

The dissent went on to observe the following about PNC’s communications with the beneficiaries:

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105. *Id.* at 739 (quoting *McDaniel v. Hughes*, 111 A.2d 204, 210 (Md. 1955)).

106. *Id.* at 739–40 (quoting *McDaniel*, 111 A.2d at 210–11).

107. *Id.* at 740 (footnote omitted).

108. *Id.* at 740 n.14.

109. *Id.* at 740.

110. *Id.* at 740 n.15.

Furthermore, PNC's demanding tone demonstrates that PNC failed to give the Beneficiaries "full and complete information" or explain that they were free to reject the [Release's] sweeping provisions and go to court. In at least two communications with the Beneficiaries, PNC stated that—unless the Beneficiaries executed the Agreement—it would not be "in a position" to distribute the trust funds. For instance, in the closing line of the letter accompanying the [Release], PNC stated: "Upon receipt of the executed Releases from *all* of the distributees, we will be in a position to have the cash disbursed." . . . Even the Circuit Court, which ultimately held that there was no "demand," agreed that "any reasonable person looking at PNC's correspondence would understand that PNC Bank was not going to release funds until all of the beneficiaries had signed off on this agreement."<sup>111</sup>

The *Hastings* dissent relied on the opinion of PNC's own in-house counsel, who had previously written that "it may be 'time consuming and difficult to get beneficiaries to understand' the process of trust termination. But, as a trustee, PNC owes trustee beneficiaries the duty to provide full and complete information."<sup>112</sup> In the *Hastings* case, PNC narrowly escaped a surcharge for allegedly failing in its fiduciary duties to the beneficiaries.<sup>113</sup> Thus, subsequent cases in this area may spell the end to a demand for a release prior to an estate or trust distribution.

#### IV. CONTRACT LAW AND TRUST LAW CLASHES PRIOR TO THE CREATION OF THE TRUST

While contract law and trust law principles often conflict at trust termination, a clash can also occur prior to creating the trust. It is not uncommon, for instance, for a corporate fiduciary to offer wealth-planning services without charging an affluent customer.<sup>114</sup> The bank uses its customers' information to determine which individuals receive an offer.<sup>115</sup> While the customer may be unaware of the likelihood that the creation of a trust will ultimately be advised, the bank personnel likely already recognize this fact.<sup>116</sup>

As a preliminary matter prior to the rendering of any services, the customer will likely be turned over to the trust department, which may ask the customer

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111. *Id.* at 740 (footnotes omitted).

112. *Id.* 740 n.18 (citation omitted).

113. *See id.* at 728–29 (majority opinion).

114. *See* Lisa Gerstner, *Banks Woo Loyal Customers*, KIPLINGER (Mar. 2013), <http://www.kiplinger.com/article/saving/T005-C000-S002-banks-loyal-customers.html>.

115. *See id.* (calling this practice "relationship banking," in which banks seek out customers to keep all assets within the same bank).

116. *See* David Horton, *Unconscionability in the Law of Trusts*, 84 NOTRE DAME L. REV. 1675, 1712 (2009) (footnote omitted) (noting that many bank patrons start trust accounts after years of banking with the same institution and years of convincing from the bank).

to enter into an “agreement” with the bank.<sup>117</sup> The customer may or may not be represented by his or her own attorney.<sup>118</sup>

The customer may be asked to execute the bank’s standard form of agreement prior to receiving services, or as part of the rendering of services.<sup>119</sup> The bank’s consideration for the agreement is the bank’s willingness to serve as trustee, or the services to be rendered to the customer by the bank free of charge.<sup>120</sup> The customer in exchange agrees to the terms of the agreement, which may cover various matters.<sup>121</sup> Some agreements may contain some provisions that favor the customer, but for the most part, the provisions of the agreement will favor the bank.<sup>122</sup>

An example of actual language from this type of agreement follows:

1. Service as trustee. Whenever [X] National Trust Company [(XNTC)] is serving as trustee of any trust [that may be] established under this instrument (hereafter, “the Trust”), these provisions, numbers 1 through 10, shall be applicable and shall supersede any contrary or conflicting provisions.
2. Affiliate dealings. Notwithstanding any rule of law against self-dealing, divided loyalty, or conflict of interest, [XNTC] is specifically authorized to invest all or any portion of the Trust assets in mutual funds or other collective investment vehicles affiliated with [the Y] Group, Inc. [(an affiliate of XNTC)] and to exercise all rights connected with the ownership of such investments. In addition, [XNTC] is specifically authorized to engage affiliated entities to provide services to the Trust, including, without limitation, brokerage, custodial, and agency services. [XNTC] shall not be required to reimburse or credit to the Trust the cost of such services, value of any benefits, or compensation received by [XNTC] or any of its affiliates in connection with such investments or services.
3. Administration of nonfinancial assets. [XNTC] shall act primarily as trustee of assets traded on an established securities exchange. [XNTC] shall not accept or be responsible for the administration,

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117. *See id.* at 1711–12.

118. *See id.* at 1711.

119. *Id.*

120. *See* Langbein, *supra* note 4, at 632 n.31 (“Because trusts originate in gifts, black letter law has not required consideration . . . Even when [trustees are not compensated for their services], the trustee’s promise to hold the property for the beneficiary . . . supplies bargained-for consideration . . .”).

121. *See How to Establish a Relationship with Our Trust Services*, VANGUARD (2013), <http://www.vanguard.com/pdf/eptsb2.pdf> (noting that the corporate fiduciary can only assume trustee duties after the beneficiary signs the trust agreement, which covers trustee services, responsibility for investing assets, relationship with other affiliates, compensation, and various other rights and responsibilities).

122. *See, e.g., id.*

maintenance, disposition, or sale of real estate, business assets, tangible personal property, or any other nonfinancial assets not traded on an established securities exchange, unless expressly agreed to by [XNTC] in a separate writing. Any Trust asset not accepted by [XNTC] shall be administered in a separate share of the Trust by and at the sole discretion of the remaining co-trustee(s), or if there is no co-trustee then serving, by a trustee who shall be appointed in the following order: (i) as set forth in the Trust instrument for filling a vacancy in the office of trustee, (ii) as unanimously agreed to by the sui juris current eligible income beneficiaries of the Trust, or (iii) as set forth in state law. Any person or organization may be appointed as trustee pursuant to this paragraph, notwithstanding any contrary provision in the Trust instrument.

4. Investment responsibility. [XNTC] shall have the sole authority and responsibility for the investment and reinvestment of the Trust's financial assets and the voting of any proxies and/or execution of any corporate actions related to such assets.

5. Situs and governing law. The situs of the Trust shall be the county and state in which the [XNTC] office administering the Trust is located, and questions relating to the investment or administration of Trust assets shall be governed by the laws of that state. Questions relating to the validity of the Trust or to the meaning and effect of its dispositive terms shall be governed by the law of the state specified in the Trust instrument, or if no state is specified, by the laws of the state where the Trust is situated. [XNTC], without approval of any court, shall have the power, but not the duty, exercisable upon notice to the current beneficiaries, to change the situs of the Trust at any time and from time to time, provided that any such change does not frustrate a material purpose of the Trust.

6. Accountings. [XNTC] may satisfy any reporting and accounting requirements set forth in the Trust with its customary periodic account statements.

7. Actions of predecessor trustees. [XNTC] shall have no duty to investigate the acts or omissions of any predecessor trustee. [XNTC] shall not be liable for its decision to investigate or not investigate any predecessor trustee's administration of the Trust or for the acts or omissions of any predecessor trustee whether known or unknown to [XNTC]. The current investment statements of a predecessor trustee shall constitute an accurate accounting of the principal and income of the Trust.

8. Right to resign. [XNTC] is authorized, without court approval, to resign or transfer the trusteeship to a trust company affiliated with [XNTC] or the [Y] Group, Inc., at any time.

9. Nonjudicial agreements. [XNTC] is authorized, without court approval, to enter into binding agreements with the beneficiaries and co-trustees with respect to any matter involving the administration of the Trust, provided that any such agreement does not frustrate a material purpose of the Trust or violate state law.

10. Compensation. [XNTC] shall be entitled to receive (a) compensation for its services in accordance with its schedule of fees in effect from time to time, without reduction for any other fees or compensation paid to [XNTC] or its affiliates, and (b) reimbursement for expenses properly incurred in the administration of the Trust, including, but not limited to, accounting and attorney fees.<sup>123</sup>

Although the trust department may later inform the customer that he or she must retain an independent attorney for the actual drafting of the trust,<sup>124</sup> the mandatory inclusion of items in the earlier executed agreement may be done without benefit of independent counsel if the settlor does not have her own attorney or wish to retain an attorney at that time.<sup>125</sup> Even if an independent attorney is representing the customer before the agreement is executed, unless that attorney is willing to risk the wrath of the corporate fiduciary, little objection can be expected because an attorney may be recommended by the corporate fiduciary from a group of independent attorneys.<sup>126</sup> The attorneys in the recommended group may also be on the bank's approved list of attorneys authorized to engage in other work for the bank.<sup>127</sup> Furthermore, an attorney may choose not to risk being disfavored by the bank for questioning the terms of the agreement. The bank may also make additional suggestions with regard to drafting the trust. For example, the bank may require an exoneration clause or a termination fee clause.<sup>128</sup> The settlor, or her attorney, may accept these clauses without objection. Under the objective theory of contracts, there is no requirement that one must intend or even understand the legal consequences of

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123. *Id.*

124. For example, the drafting of a will or a trust constitutes the practice of law and can only be done by an independent attorney. *FAQ's*, GUARANTY BANK & TR. CO., <https://www.guarantybankco.com/wealthmanagement/planningresources/frequentlyaskedquestions.aspx> (last visited May 11, 2015).

125. See *supra* note 118 and accompanying text.

126. See Horton, *supra* note 116, at 1711.

127. See Gerald P. Johnston, *An Ethical Analysis of Common Estate Planning Practices—Is Good Business Bad Ethics?*, 45 OHIO ST. L.J. 57, 115–19 (1984) (outlining the common practice and the ethical implications of corporate fiduciaries asking the attorney who scripted the trust to fulfill all duties associated with the administration of the trust).

128. See Jeffrey M. Sklarz & Robert Whitman, *Are Percentage Trust Termination Fees Appropriate?*, PROB. & PROP., Nov.–Dec. 2001, at 49–52 (discussing the increasing trend of corporate fiduciaries to include the termination-fee clause in a trust).

one's actions when entering a trust agreement.<sup>129</sup> It is noteworthy that the "intent of the settlor" gained from the trust provisions, seen as one of the most important matters in trust law,<sup>130</sup> may often express the intentions of the trustee or the compliant drafting attorney rather than the actual intentions of the settlor.

At what point does trust law, requiring adherence to full fiduciary duties by the fiduciary, take effect? Few cases have arisen in which the trust beneficiaries question the procedures described above and assert the breach of fiduciary duties prior to the actual start of the trust's operation, but the rise of such litigation in this area may be forthcoming.

#### V. THE UTC REQUIRES MANDATORY NOTIFICATIONS TO BENEFICIARIES REGARDING THE TRUST

Notice to beneficiaries may be required at the start or end of trust administration or at various stages of administration.<sup>131</sup> The UTC has substantial mandatory-reporting requirements.<sup>132</sup> Unfortunately, perhaps mostly due to pressure brought on by corporate fiduciaries, the UTC disclosure provisions have been largely rejected by jurisdictions adopting other portions of the UTC.<sup>133</sup> Such jurisdictions have sharply narrowed the scope of these provisions by "elect[ing] to either delete the provisions altogether or modify the[m]."<sup>134</sup>

Notably, commentators who do not favor mandatory-disclosure provisions, or do not acknowledge that disclosure goes to the essence of beneficiary protection, use one or more of the following arguments to support their position:

1. The overriding purpose of any uniform act is to achieve uniformity among the states<sup>135</sup> (implying that bad law backed by strong interests capable of gaining support from state legislatures should be the standard for promulgating uniform laws).

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129. 1 E. ALLAN FARNSWORTH ET AL., *CONTRACTS* § 4.26 (3d ed. 2013) ("[T]he objective theory of contracts imposes no requirement that one intend or even understand the legal consequences of one's actions, [and therefore] one is not entitled to relief merely because one neither read the standard form nor considered the legal consequences of adhering to it.").

130. See Benjamin D. Patterson, Note, *The Uniform Trust Code Revives the Historical Purposes of Trusts and Reiterates the Importance of the Settlor's Intent*, 43 CREIGHTON L. REV. 905, 910, 932 (2010) (noting that the UTC codified the common law doctrine that the settlor's intent be the driving force for interpretation of trust provisions).

131. UNIF. TRUST CODE § 813(a), (c) (amended 2004)

132. *Id.* (providing reporting requirements of trustees to beneficiaries at the beginning, during, and at the termination of a trust).

133. John Spencer Treu, *The Mandatory Disclosure Provisions of the Uniform Trust Code: Still Boldly Going Where No Jurisdiction Will Follow—A Practical Tax-Based Solution*, 82 MISS. L.J. 597, 600–01 (2013) (noting that even the jurisdictions that have incorporated the UTC into their jurisprudence have largely rejected the provisions mandating communication with beneficiaries).

134. *Id.* at 600.

135. *Id.* at 643–45.

2. Non-disclosure to beneficiaries better serves the settlor's intent. However, these commentators fail to acknowledge the reality that it is often a corporate fiduciary, or counsel for the settlor, who inserts provisions for non-disclosure into the governing instruments, or follows state law sought by corporate fiduciary committees without ensuring that the settlor understands the issue.<sup>136</sup>
3. Settlers actually prefer non-disclosure to beneficiaries.<sup>137</sup>
4. Disclosure (one of the basic requirements for a valid trust) is unneeded "reform."<sup>138</sup>
5. The underlying common law of trusts should be disregarded.<sup>139</sup>
6. Disclosure requirements found in the Restatement (Third) of Trusts may be disregarded.<sup>140</sup>
7. The use of a trust protector or some other questionable substitute might pass muster.<sup>141</sup>

Interestingly, one critic of disclosure to trust beneficiaries noted that, in spite of state legislation omitting the UTC provision for disclosure, state courts may still require disclosure by relying on other UTC sections or the common law.<sup>142</sup>

## VI. CONCLUSION

At both the creation and termination of the trust, and periodically throughout trust administration, contract law principles favoring the corporate fiduciary may be applied.<sup>143</sup> Current law generally deems these practices acceptable and enforceable. In practice, no customer or beneficiary may claim the right to strike contract clauses, despite those provisions clearly favoring the corporate fiduciary.

Under contract law, whether the bank's customer actually reads and understands the solicited agreement will not matter—the provisions of the agreement will be held to constitute the actual intent of the customer.<sup>144</sup> Nonetheless, depending on the circumstances, a court may be creative in order

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136. *See id.* at 624–26.

137. *See id.* at 630–32.

138. *Id.* at 644.

139. *See id.* at 626.

140. *Cf.* David M. English, *Uniform Trust Code (2002): Significant Provisions and Policy Issues*, 67 MO. L. REV. 143, 148 (2002) (noting that courts often adopt rules rather than a practice described in a Restatement).

141. Treu, *supra* note 133, at 636–40 (noting the growing body of commentary suggesting that trust protectors may effectively carry out the settlor's intent without mandatory disclosure requirements).

142. *Id.* at 607 (noting two jurisdictions that relied on other UTC sections to ensure mandatory disclosure to beneficiaries).

143. *See supra* notes 113–16, 128–29 and accompanying text.

144. *See supra* notes 75–76, 129 (providing relevant case law and describing the objective theory of contracts used to uphold the signing of the document rather than actual intent).

to arrive at a fair result. Future litigation will determine whether contract law or trust law principles prevail. Because of the expense of litigation, the appropriateness of bank conduct as a fiduciary or an expected fiduciary may often go untested.

Is it reasonable to expect that future outcomes of litigation will clarify the law, and that courts' findings of breaches of fiduciary duties may change present practices? Even where pressure from banks causes state legislatures to enact statutes blatantly favoring corporate fiduciaries, should there be obvious injustice done to beneficiaries, an equity court may decide to go against the corporate fiduciary and, in scrutinizing conduct, expanding the scope of fiduciary duty, and calculating damages, send a message to the corporate fiduciary community.

