PROBATE STATUTES, RESTATEMENT (THIRD) OF TRUSTS SECTION AND COURT DECISION

TITLE LVI
PROBATE COURTS AND DECEDENTS' ESTATES

CHAPTER 564-B
UNIFORM TRUST CODE

ARTICLE 8
DUTIES AND POWERS OF TRUSTEE

564-B:7-709 Reimbursement of Expenses. –
(a) A trustee, trust advisor, or trust protector is entitled to be reimbursed out of the trust property, with interest as appropriate, for:
(1) expenses that were properly incurred in the administration of the trust; and
(2) to the extent necessary to prevent unjust enrichment of the trust, expenses that were not properly incurred in the administration of the trust.
(b) An advance by the trustee, trust advisor, or trust protector of money for the protection of the trust gives rise to a lien against trust property to secure reimbursement with reasonable interest.

Source. 2004, 130:1. 2006, 320:59, eff. Aug. 19, 2006.

564-B:8-801 Duty to Administer, Invest and Manage Trust, and Distribute Trust Property. – Upon acceptance of a trusteeship, the trustee shall administer, invest and manage the trust and distribute the trust property in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this chapter.

Source. 2004, 130:1. 2005, 270:19, eff. Sept. 20, 2005.

564-B:8-802 Duty of Loyalty. –
(a) A trustee shall administer, invest and manage the trust and distribute the trust property solely in the interests of the beneficiaries.
(b) Subject to the rights of persons dealing with or assisting the trustee as provided in RSA 564-B:10-1012, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless:
(1) the transaction was authorized by the terms of the trust;
(2) the transaction was approved by the court;
(3) the beneficiary did not commence a judicial proceeding within the time allowed by RSA 564-B:10-1005;
(4) the beneficiary consented to the trustee's conduct, ratified the transaction, or released

the trustee in compliance with RSA 564-B:10-1009; or

(5) the transaction involves a contract entered into or claim acquired by the trustee before the person became or contemplated becoming trustee.

(c) A sale, encumbrance, or other transaction involving the investment or management of trust property is presumed to be affected by a conflict between personal and fiduciary interests if it is entered into by the trustee with:

(1) the trustee's spouse;

(2) the trustee's descendants, siblings, parents, or their spouses;

(3) an agent or attorney of the trustee; or

(4) a corporation or other person or enterprise in which the trustee, or a person that owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment.

(d) A transaction between a trustee and a beneficiary that does not concern trust property but that occurs during the existence of the trust or while the trustee retains significant influence over the beneficiary and from which the trustee obtains an advantage is voidable by the beneficiary unless the trustee establishes that the transaction was fair to the beneficiary.

(e) A transaction not concerning trust property in which the trustee engages in the trustee's individual capacity involves a conflict between personal and fiduciary interests if the transaction concerns an opportunity properly belonging to the trust.

(f) The following transactions, if fairly priced and in accordance with the interest of the beneficiaries and the purposes of the trust, are not presumed to be affected by a conflict between the trustee's personal and fiduciary interest provided that any investment made pursuant to the transaction otherwise complies with the prudent investor rule of article 9:

(1) an investment by a trustee in securities of an investment company or investment trust to which the trustee, or its affiliate, provides services in a capacity other than as trustee provided that any investment made pursuant to the transaction otherwise complies with the prudent investor rule of Article 9 of RSA 564-B.

(2) the placing of securities transactions by a trustee through a securities broker that is a part of the same company as the trustee, is owned by the trustee, or is affiliated with the trustee;

(3) any loan from the trustee or its affiliate;

(4) an investment in an insurance contract purchased from an insurance agency owned by, or affiliated with, the trustee, or any of its affiliates;

(5) an agreement between a trustee and a beneficiary relating to the appointment or compensation of the trustee, or any of its affiliates;

(6) payment of reasonable compensation to the trustee, or any of its affiliates;

(7) a transaction between a trust and another trust, decedent's estate, guardianship or conservatorship of which the trustee is a fiduciary or in which a beneficiary has an interest;

(8) a deposit of trust money in a financial institution operated by the trustee or an affiliate;

(9) a delegation and any transaction made pursuant to the delegation from a trustee to an agent that is affiliated or associated with the trustee; or

(10) an advance by the trustee of money for the protection of the trust.

(g) If compensation, in addition to the trustee's fees charged to the trust is paid, to the trustee, its affiliate, or associated entity for any transaction or for the provision of services described in subsection (f) the trustee shall at least annually notify the persons that would be entitled under RSA 564-B:8-813 to receive a copy of the trustee's annual report of the rate or method by which the compensation was determined.

(h) In voting shares of stock or in exercising powers of control over similar interests in other

forms of enterprise, the trustee shall act in the best interests of the beneficiaries. If the trust is the sole owner of a corporation or other form of enterprise, the trustee shall elect or appoint directors or other managers who will manage the corporation or enterprise in the best interests of the beneficiaries.

(i) The court may appoint a special fiduciary to make a decision with respect to any proposed transaction that might violate this section if entered into by the trustee.

Source. 2004, 130:1. 2005, 270:20, 21. 2006, 320:61, eff. Aug. 19, 2006.

564-B:8-803 Impartiality. – If a trust has 2 or more beneficiaries, the trustee shall act impartially in administering, investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests.

Source. 2004, 130:1, eff. Oct. 1, 2004.

564-B:8-804 Prudent Administration. – A trustee shall administer, invest, and manage the trust and distribute the trust property as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

Source. 2004, 130:1. 2005, 270:22, eff. Sept. 20, 2005.

564-B:8-806 Trustee's Skills. – A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, shall use those special skills or expertise.

Source. 2004, 130:1, eff. Oct. 1, 2004.

TITLE LVI
PROBATE COURTS AND DECEDENTS' ESTATES

CHAPTER 564-B
UNIFORM TRUST CODE

ARTICLE 7
OFFICE OF TRUSTEE

Section 564-B:7-703

564-B:7-703 Cotrustees. –

(a) Cotrustees who are unable to reach a unanimous decision may act by majority decision.

(b) If a vacancy occurs in a cotrusteeship, the remaining cotrustees may act for the trust.

(c) A cotrustee must participate in the performance of a trustee's function unless the cotrustee is unavailable to perform the function because of absence, illness, disqualification under other law, or other temporary incapacity or the cotrustee has properly delegated the performance of the function to another trustee.

(d) If a cotrustee is unavailable to perform duties because of absence, illness, disqualification under other law, or other temporary incapacity, and prompt action is necessary to achieve the purposes of the trust or to avoid injury to the trust property, the remaining cotrustee or a majority of the remaining cotrustees may act for the trust.

(e) A trustee may not delegate to a cotrustee the performance of a function the settlor reasonably expected the trustees to perform jointly. Unless a delegation was irrevocable, a trustee may revoke a delegation previously made.

(f) Except as otherwise provided in subsection (g), a trustee who does not join in an action of another trustee is not liable for the action.

(g) Each trustee shall exercise reasonable care to:

(1) prevent a cotrustee from committing a serious breach of trust; and

(2) compel a cotrustee to redress a serious breach of trust.

(h) A dissenting trustee who joins in an action at the direction of the majority of the trustees and who notified any cotrustee of the dissent at or before the time of the action is not liable for the action unless the action is a serious breach of trust.

(i) A trustee shall keep each cotrustee and any other fiduciary designated by the terms of the trust reasonably informed about the administration of the trust, to the extent the trustee has knowledge that the other cotrustee or other fiduciary designated by the terms of the trust does not have of the trustee's actions, or regarding other material information (or the availability of such information) related to the administration of the trust that would be reasonably necessary for the cotrustee or other fiduciary designated by the terms of the trust to perform his or her duties as a trustee or other fiduciary of the trust.

Source. 2004, 130:1. 2006, 320:57, eff. Aug. 19, 2006.

TITLE LVI
PROBATE COURTS AND DECEDENTS' ESTATES

CHAPTER 564-B
UNIFORM TRUST CODE

ARTICLE 8
DUTIES AND POWERS OF TRUSTEE

Section 564-B:8-804

564-B:8-804 Prudent Administration. – A trustee shall administer, invest, and manage the trust and distribute the trust property as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

Source. 2004, 130:1. 2005, 270:22, eff. Sept. 20, 2005.

TITLE LVI
PROBATE COURTS AND DECEDENTS' ESTATES

CHAPTER 564-B
UNIFORM TRUST CODE

ARTICLE 8
DUTIES AND POWERS OF TRUSTEE

Section 564-B:8-806

564-B:8-806 Trustee's Skills. – A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, shall use those special skills or expertise.

Source. 2004, 130:1, eff. Oct. 1, 2004.

Restatement (Third) of Trusts § 77 (2007)

Restatement of the Law - Trusts

Database updated October 2015
Restatement (Third) of Trusts

Part 6. Trust Administration

Chapter 15. Specific Duties of Trusteeship

§ 77 Duty of Prudence

General Comment:
Reporter's Notes on § 77
Case Citations - by Jurisdiction

(1) The trustee has a duty to administer the trust as a prudent person would, in light of the purposes, terms, and other circumstances of the trust.
(2) The duty of prudence requires the exercise of reasonable care, skill, and caution.
(3) If the trustee possesses, or procured appointment by purporting to possess, special facilities or greater skill than that of a person of ordinary prudence, the trustee has a duty to use such facilities or skill.

General Comment:

a. Test of prudence. In matters relating to the administration of the trust, the trustee has a duty to exercise prudence—that is, to act with care, skill, and caution (Comment *b*)—as well as a duty to adhere to the other fiduciary standards described in other Sections of this Chapter.

The test of prudence is one of conduct not of performance. The trustee's conduct, and compliance with other fiduciary standards, is to be judged as of the time of the decision or action in question.

Thus, the prudence of a trustee's conduct is to be judged on the basis of circumstances at the time of that conduct, not with the benefit of hindsight or by taking account of developments that occur after the time of the action or decision. Also, whether a breach of trust has occurred depends on the prudence or imprudence of the trustee's conduct, not on the eventual results of managerial or other decisions. Investment performance or other results of trustee conduct become relevant, however, when a breach of trust is found and the measure of liability is in issue.

On prudence in the investment function, see §§ 90- 92 (the "Prudent Investor Rule"). On prudence in delegation, see § 80 and also § 90, Comment *j*. On prudence and its application to a trustee's exercise of certain powers, see § 86.

Comment on Subsections (1) and (2):

b. Elements of prudence: care, skill, and caution. The duty of prudence encompasses the duty to exercise reasonable care and skill in trust administration and the duty to act with a degree of caution suitable to the particular trust and its objectives, circumstances, and overall plan of administration.

The duty of *care* requires the trustee to exercise reasonable effort and diligence in planning the administration of the trust, in making and implementing administrative decisions, and in monitoring the trust situation, with due attention to the trust's objectives and the interests of the beneficiaries. This will ordinarily involve investigation appropriate to the particular action under consideration, and also obtaining relevant information about such matters as the contents and resources of the trust estate and the circumstances and requirements of the trust and its beneficiaries. (More generally, cf. Comment *b(1)*.)

As necessary or appropriate to informed decisionmaking, care may also call for obtaining and considering the advice of others on a reasonable basis (cf. § 88 on proper expenses). It is ordinarily satisfactory that information or advice be obtained from sources on which prudent property owners or managers in the community customarily rely. (On the possible effects of trustees' reliance on the work of agents or on the advice of financial or legal counsel, see Comment *b(2)* and § 80, Comment *g*, and Reporter's Notes to those Comments.)

More is required than the exercise of reasonable care alone, for a trustee may be liable for losses that result from failure to use the *skill* of an individual of ordinary intelligence, despite use of all the skill the particular trustee possesses. A person who serves as trustee should be reasonably able to understand the basic duties of prudent trusteeship. The practical need in trust law for some objective standard in these matters means that some persons are not properly capable of serving as trustees.

The fact that some aspects of a trust's administration may require knowledge and experience greater than that of a particular individual of ordinary intelligence, however, does not normally prevent that person from serving as trustee. This just emphasizes the importance of obtaining competent guidance and assistance (supra) sufficient to meet the standards required by the combination of care and skill in a given situation. Simple, written guidelines prepared by legal counsel may be helpful for a trustee's general reference, or for presentation by an inexperienced trustee in conferring with a financial or other adviser or agent. Cf. § 80 on delegation (and id., Comment *b*, on advice and consultation). Essentially, a trustee may either possess or hire the degree and types of skill needed for a specific transaction or required more generally by the needs and strategies of the particular trust's administration. See Comment *b(1)*.

Thus, these two basic standards of trusteeship are neither excessively demanding nor monolithic, neither precluding conscientious service by friends or family members nor permitting casual, inattentive behavior by trustees who are able to meet a standard of competence and conduct higher than the ordinary. (See Comment *e*.)

In addition to the duty to use care and skill, the trustee must exercise the *caution* of a prudent person managing similar assets for similar purposes. The duty to act with caution does not, of course, mean the avoidance of all risk, but refers to a degree of caution that is reasonably appropriate or suitable to the particular trust, its purposes and circumstances, the beneficiaries' interests, and the trustee's plan for administering the trust and achieving its objectives.

On the standards of care, skill, and caution imposed on a trustee in making and monitoring investments, for which the duty of prudence has its most significant application in most trusts, see §§ 90- 92. Also, see generally § 86 for illustrative applications of the requirement of prudence (and other duties) in the exercise of various powers of trustees.

b(1). Prudent administration: relevant circumstances and considerations. It is not possible to state all of the factors that are necessary or appropriate for a trustee to take into account in making decisions or taking action in the many diverse aspects of the investment, management, protection, and distribution of trust property. Some generalizations are nevertheless possible and useful regarding considerations that are likely to be relevant to all or many trusts and their beneficiaries and to require analysis or verification by the trustee.

Among the most obvious of the factors to be considered are the terms and purposes of the trust, the value and nature of the trust estate, the likely duration of the trust, and the amount and timing of its distribution requirements, along with potentially associated needs for liquidity, stability of income flow, and preservation of (or growth in) the purchasing power of capital. Inevitably related to some of the foregoing, insofar as relevant to the trust purposes, are the needs, independent resources, and other personal and financial circumstances and concerns or goals of the various beneficiaries. These various factors together

offer illumination regarding such important considerations as the risk tolerance and tax positions of the trust and its beneficiaries, as well as other concerns that are fundamental to prudent decisions and strategies in matters ranging from investment management to discretionary distributions.

Other considerations and circumstances (at some risk of redundancy) that are likely to be important to prudent administration of a trust include: the expected returns (including both income and capital elements) or other benefits of various courses of action that might be pursued, plus their anticipated tax and cost consequences; any special value or relationship an asset or course of action may have to the purposes of the trust or to one or more of the beneficiaries; the skills and facilities of, or reasonably available to, the trustee; and general economic conditions and potential effects of inflation or deflation.

What constitutes due diligence, satisfying the duty of prudence, is inevitably affected by the nature of the transaction or activity and the market(s) involved. See Reporter's Note. Also see § 86, and the discussion of various types of investments and investment courses of action in § 90, e.g., in Comments *o* (real estate) and *p* (venture capital), and compare id., Comment *h(1)* (passive strategies) with id., Comment *h(2)* (active strategies); and see § 92, Reporter's Note to Comment *e* (on operation of a business in trust).

b(2). Effect of advice of counsel. The work of trusteeship, from interpreting the terms of the trust to decisionmaking in various aspects of administration, can raise questions of legal complexity. Taking the advice of legal counsel on such matters evidences prudence on the part of the trustee. Reliance on advice of counsel, however, is not a complete defense to an alleged breach of trust, because that would reward a trustee who shopped for legal advice that would support the trustee's desired course of conduct or who otherwise acted unreasonably in procuring or following legal advice. In seeking and considering advice of counsel, the trustee has a duty to act with prudence. Thus, if a trustee has selected trust counsel prudently and in good faith, and has relied on plausible advice on a matter within counsel's expertise, the trustee's conduct is significantly probative of prudence.

On the **duty** of a trustee (or successor **trustee**) regarding redress of **attorney** malpractice, see generally § 76, Comment *d*, and compare § 80, Comments *d(2)* and *g*.

c. Ignorance of trust provisions. Lack of awareness or understanding of the terms of the trust normally will not excuse a trustee from liability. Reasonable care (Comment *b*) requires that the trustee, with advice of counsel or court instructions (§ 71) as necessary, become acquainted with and acquire a reasonable understanding of the terms of the trust, the rights and interests of the beneficiaries, and the nature and circumstances of the trust property. See § 76(2)(a), and especially id., Comment *c*.

d. Standard fixed by terms of the trust. Because the normal duty of prudence in matters of administration is default law, the terms of the trust may modify or relax its requirements (§ 76, Comment *b(2)*), especially—but not solely—as regards the element of caution. Trust provisions fixing a standard of prudence lower than that otherwise required of trustees are strictly construed. In any event, trust terms may not altogether dispense with the fundamental requirement that trustees not behave recklessly but act in good faith, with some suitable degree of care, and in a manner consistent with the terms and purposes of the trust and the interests of the beneficiaries (cf. § 86 and § 87, and also § 50, Comments *b* and *c*).

On the effects (and limits) of exculpatory provisions in the terms of trusts, see § 96.

Comment on Subsection (3):

e. Special skill or facilities and the standard of prudence. It follows from the requirement of care, as well as from sound policy, that if the trustee actually possesses a degree of skill greater than that of an individual of ordinary intelligence (Comment *b*), the trustee has a duty to make use of that skill, and is ordinarily liable for a loss that results from failure to do so. Similarly, if a trustee, such as a corporate or professional fiduciary, procured the appointment as trustee by expressly or impliedly representing that it possessed greater skill than that of an individual of ordinary intelligence, the trustee may be

liable for failure to make reasonably diligent use of that degree of skill. So also, if the trustee has or represents that it has special facilities for administering the trust, the trustee has a duty to make reasonably diligent use of those facilities, and may be held liable for failure to do so.

Even a trustee with special skills and facilities may, as a matter of reasonable care in some circumstances, have a duty to obtain guidance or assistance in carrying out responsibilities appropriate to the plan for administration of the particular trust. See, e.g., § 90 (on investment matters), especially id., Comment *j*; and more generally see § 80 (duty with regard to delegation).

On the power to incur expenses that are reasonable in amount and appropriate to the trusteeship, see § 88.

Reporter's Notes on § 77

This Section expands upon but is consistent in principle with Restatement Second, Trusts § 174 (entitled "Duty to Exercise Reasonable Care and Skill,") although that prior Section (§ 174) applied a standard of a "man of ordinary prudence ... in dealing with his own property" rather than the more modern standard (cf. § 90) looking to the terms, purposes, and other circumstances of the particular trust (often differing mainly in assumptions about what is required by the element of "caution").

See also IIA William A. Fratcher, *Scott on Trusts* §§ 174 and 174.1 (4th ed. 1987); and George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* § 541 (rev. 2d ed. 1993), entitled "General Duties—Duty to Exercise Ordinary Skill and Diligence" and discussing "Standard of Care" (at p. 167), "Comparisons With Similar Transactions" (at p. 174), "Care Required of Professional Trustees" (at p. 179), and "Is a Trustee Required to Exercise the Skill He Actually Has or Professes to Have?" (at p. 83), and also compare id. § 542 ("Exculpatory or Immunity Clauses—Required Standard of Care Reduced by Settlor").

Comment *a*:

"However loudly it may now be said that people should have foreseen, most men of that degree of prudence and caution that we call ordinary did not foresee. Wisdom after the event is not the test of responsibility." Ditmars v. Camden Trust Co., 10 N.J.Super. 306, 329, 76 A.2d 280, 291 (Ch. 1950) (discussing portfolio losses during the "great depression" of the 1930s). See also Rock Springs Land & Timber, Inc. v. Lore, 75 P.3d 614 (Wyo. 2003).

For an illustrative pair of cases, see Navajo Tribe of Indians v. United States, 9 Cl. Ct. 227 (1985) (trustee actions to be judged in the *circumstances* at the time of acting), and Navajo Tribe of Indians v. United States, 9 Cl. Ct. 336 (1986) (judgment to based on the *state of knowledge* existing at the time of the conduct, rather than as later evolved).

Comments *b-d*:

Compare Uniform Trust Code § 804 ("Prudent Administration") stating: "A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution." (The language is derived from the "Prudent Investor Rule" of the 1994 uniform act and the 1992 volume of this Restatement, § 227, now at § 90.) The comment to UTC § 804 observes: "The duty to administer a trust with prudence is a fundamental duty of the trustee. This duty does not depend on whether the trustee receives compensation.... [¶] A settlor who wishes to modify the standard of care specified in this section is free to do so, but there is a limit. Section 1008 prohibits a settlor from exculpating a trustee from liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or to the interests of the beneficiaries."

148 N.H. 503
Supreme Court of New Hampshire.

Thomas K. SISSON
v.
Shari JANKOWSKI, esq. and another.

No. 2002-0129. | Submitted July 26, 2002. | Opinion Issued Nov. 15, 2002.

Decedent's brother, who was decedent's intended beneficiary, filed legal malpractice action against decedent's attorney and law firm in federal court. The United States District Court for the District of New Hampshire, McAuliffe, J., 2002 WL 313136, certified question. The Supreme Court of New Hampshire, Brock, C.J., held that an attorney does not owe a duty of care to a prospective will beneficiary to have the will executed promptly.

Question answered.

West Headnotes (7)

[1] **Negligence**
Duty as question of fact or law generally

Whether a duty exists is a question of law.

Cases that cite this headnote

[2] **Negligence**
Relationship between parties

A duty generally arises out of a relationship between the parties.

Cases that cite this headnote

[3] **Contracts**
Privity of Contract in General
Negligence
Contractual duty
Negligence
Privity

While a contract may supply the relationship necessary for there to be a duty, ordinarily the scope of the duty is limited to those in privity of contract with one another.

Cases that cite this headnote

[4] **Negligence**
Necessity and Existence of Duty
Negligence
Foreseeability

A duty arises if the likelihood and magnitude of the risk perceived is such that the conduct is unreasonably dangerous.

Cases that cite this headnote

[5] **Negligence**
Necessity and Existence of Duty

When determining whether a duty is owed, court examines the societal interest involved, the severity of the risk, the likelihood of the occurrence, the relationship between the parties, and the burden upon the defendant.

Cases that cite this headnote

[6] **Negligence**
Balancing and weighing of factors
Negligence
Duty as question of fact or law generally

Whether to impose a duty of care rests on a judicial determination that the social importance of protecting the plaintiff's interest outweighs

the importance of immunizing the defendant from extended liability.

Cases that cite this headnote

[7] **Attorney and Client**
Duties and liabilities to adverse parties and to third persons

An attorney does not owe a duty of care to a prospective will beneficiary to have the will executed promptly.

3 Cases that cite this headnote

Attorneys and Law Firms

****1265 *503** Orr & Reno, P.A., of Concord (Ronald L. Snow & a. on the brief), for the plaintiff.

Devine, Millimet & Branch, P.A., of Manchester (Andrew D. Dunn and Kevin G. Collimore on the brief), for the defendants.

Opinion

BROCK, C.J.

The United States District Court for the District of New Hampshire (*McAuliffe,* J.) has certified the following question of law, *see Sup.Ct. R.* 34:

> Whether, under New Hampshire law and the facts as pled in plaintiff's verified complaint, an attorney's negligent failure to arrange for his or her client's timely execution of a will and/or an attorney's failure to provide reasonable professional advice with respect to the client's testamentary options (e.g., the ability to cure a draft will's lack of a contingent beneficiary ***504** clause by simply inserting a hand-written provision), ****1266** which failure proximately caused the client to die intestate, gives rise to a viable common law claim against that attorney by an intended beneficiary of the unexecuted will.

For the reasons stated below, we answer the certified question in the negative.

Because this question arose in the context of a motion to dismiss and absent a copy of the plaintiff's complaint, we assume the truth of the factual allegations recited by the court in its certification order, and construe all inferences in the light most favorable to the plaintiff. *Hungerford v. Jones,* 143 N.H. 208, 209, 722 A.2d 478 (1998).

In December 1998, the decedent, Dr. Warren Sisson, retained the defendants, Attorney Jankowski and her law firm, Wiggin & Nourie, P.A., to prepare his will and other estate planning documents. According to the plaintiff, Thomas K. Sisson, the decedent informed Attorney Jankowski that he was suffering from cancer, did not want to die intestate, and, therefore, wished to prepare a will that would pass his entire estate to the plaintiff, his brother. The decedent told Attorney Jankowski that he was particularly interested in ensuring that none of his estate pass to his other brother, from whom he was estranged. The record, however, does not reflect any request by the decedent that the will be executed by a date certain.

Attorney Jankowski prepared a will and other estate planning documents and, in mid-January 1999, mailed them to the decedent for his review and execution. The decedent was injured in mid-January, however, and, therefore, did not receive the documents until January 22, 1999, when a neighbor delivered them to him at a nursing home. Three days later, the plaintiff contacted Attorney Jankowski to tell her that the decedent wanted to finalize his estate planning documents quickly because of his deteriorating condition.

On February 1, 1999, Attorney Jankowski and two other law firm employees visited the decedent in the nursing home to witness his execution of the estate planning documents. The decedent executed all of the documents except his will. After Attorney Jankowski asked him whether the will should include provisions for a contingent beneficiary, the decedent expressed his desire to insert such a clause, thereby providing that his estate would pass to a charity in the event the plaintiff predeceased him.

According to the plaintiff, the decedent's testamentary

intent was clear as of the end of the February 1, 1999 meeting: the unexecuted will *505 accurately expressed his intent to pass his entire estate to the plaintiff. Nevertheless, rather than modifying the will immediately to include a hand-written contingent beneficiary clause, modifying it at her office and returning later that day for the decedent's signature, or advising the decedent to execute the will as drafted to avoid the risk of dying intestate and later drafting a codicil, Attorney Jankowski left without obtaining the decedent's signature to the will.

Three days later, Attorney Jankowski returned with the revised will. The decedent did not execute it, however, because Attorney Jankowski did not believe he was competent to do so. She left without securing his signature and told him to contact her when he was ready to sign the will.

The plaintiff twice spoke with a Wiggin & Nourie attorney "to discuss Attorney Jankowski's inaction regarding the will." The attorney told him that he had spoken to other firm members about the situation. Nevertheless, after February 4, 1999, Attorney Jankowski made no attempt to determine whether the decedent regained **1267 sufficient testamentary capacity to execute his will.

The decedent died intestate on February 16, 1999. His estate did not pass entirely to the plaintiff as he had intended, but instead was divided among the plaintiff, the decedent's estranged brother, and the children of a third (deceased) brother. The plaintiff brought legal malpractice claims against the defendants, alleging that they owed him a duty of care because he was the intended beneficiary of their relationship with the decedent.

For the purposes of this certified question, there is no dispute as to the decedent's testamentary intent: he wanted to avoid dying intestate and to have his entire estate pass to the plaintiff. Nor does the plaintiff claim that the defendants frustrated the decedent's intent by negligently preparing his will. Rather, the plaintiff asserts that the defendants were negligent because they failed to have the decedent execute his will promptly and to advise him on February 1 of the risk of dying intestate if he did not execute the draft presented at that meeting.

[1] [2] [3] [4] The narrow question before us is whether the defendants owed the plaintiff a duty of care to ensure that the decedent executed his will promptly. Whether a duty exists is a question of law. *Hungerford,* 143 N.H. at 211, 722 A.2d 478. A duty generally arises out of a relationship between the parties. *See MacMillan v. Scheffy,* 147 N.H. 362, 364, 787 A.2d 867 (2001). While a contract may supply the relationship, ordinarily the scope of the duty is limited to those in privity of contract with one another. *Id.* We have, in limited circumstances, recognized exceptions to the privity requirement where necessary to protect against reasonably foreseeable harm. *See Hungerford,* 143 N.H. at 211, 722 A.2d 478. "[N]ot every risk of harm that might be *506 foreseen gives rise to a duty," however. *Id.* (quotation and brackets omitted). "[A] duty arises if the likelihood and magnitude of the risk perceived is such that the conduct is unreasonably dangerous." *Id.* (quotation and brackets omitted).

[5] [6] "When determining whether a duty is owed, we examine the societal interest involved, the severity of the risk, the likelihood of the occurrence, the relationship between the parties, and the burden upon the defendant." *Id.* Ultimately, whether to impose a duty of care "rests on a judicial determination that the social importance of protecting the plaintiff's interest outweighs the importance of immunizing the defendant from extended liability." *Walls v. Oxford Management Co.,* 137 N.H. 653, 657, 633 A.2d 103 (1993).

In *Simpson v. Calivas,* 139 N.H. 1, 4, 650 A.2d 318 (1994), we recognized an exception to the privity requirement with respect to a will beneficiary and held that an attorney who drafts a testator's will owes a duty to the beneficiaries to draft the will non-negligently. In *Simpson,* a testator's son sued the attorney who drafted his father's will, alleging that the will failed to incorporate his father's actual intent. *Id.* at 3, 650 A.2d 318. The will left all real estate to the plaintiff, except for a life estate in "our homestead," which was left to the plaintiff's stepmother. *Id.* The probate litigation concerned whether "our homestead" referred to all of the decedent's real property, including a house, over one hundred acres of land and buildings used in the family business, or only to the house, and perhaps limited surrounding acreage. *Id.* The plaintiff argued that the decedent intended to leave him the buildings used in the family business and the bulk of the surrounding land in fee simple. *Id.* at 4, 650 A.2d 318. The plaintiff lost the will construction action, and then brought a malpractice action against **1268 the drafting attorney, arguing that the decedent's will did not accurately reflect his intent. *Id.* at 3, 650 A.2d 318.

We held that the son could maintain a contract action against the attorney, as a third-party beneficiary of the contract between the attorney and his father, and a tort action, under a negligence theory. *Id.* at 7, 650 A.2d 318. With respect to the negligence claim, we concluded that, "although there is no privity between a drafting attorney and an intended beneficiary, the obvious foreseeability of injury to the beneficiary demands an exception to the

privity rule." *Id.* at 5-6, 650 A.2d 318.

Simpson is consistent with the prevailing rule that a will beneficiary may bring a negligence action against an attorney who failed to draft the will in conformity with the testator's wishes. *See generally* R. Mallen & J. Smith, *Legal Malpractice* § 32.4, at 735 (5th ed.2000); *Stowe v. Smith,* 184 Conn. 194, 441 A.2d 81 (1981); *507 *Lucas v. Hamm,* 56 Cal.2d 583, 15 Cal.Rptr. 821, 364 P.2d 685, 688-89 (1961), *cert. denied,* 368 U.S. 987, 82 S.Ct. 603, 7 L.Ed.2d 525 (1962); *Succession of Killingsworth,* 292 So.2d 536, 542 (La.1973); *Hare v. Miller, Canfield, Paddock & Stone,* 743 So.2d 551 (Fla.Dist.Ct.App.1999).

[7] *Simpson* is not dispositive of the certified question, however. The duty in *Simpson* was to draft the will non-negligently, while the alleged duty here is to ensure that the will is executed promptly. Courts in several jurisdictions have declined to impose a duty of care where the alleged negligence concerns the failure to have the will executed promptly. *See Krawczyk v. Stingle,* 208 Conn. 239, 543 A.2d 733 (1988); *Miller v. Mooney,* 431 Mass. 57, 725 N.E.2d 545 (2000); *Charia v. Hulse,* 619 So.2d 1099 (La.Ct.App.1993); *Radovich v. Locke-Paddon,* 35 Cal.App.4th 946, 41 Cal.Rptr.2d 573 (1995); *Babcock v. Malone,* 760 So.2d 1056, 1056-57 (Fla.Dist.Ct.App.2000). The majority of courts confronting this issue have concluded that imposing liability to prospective beneficiaries under these circumstances would interfere with an attorney's obligation of undivided loyalty to his or her client, the testator or testatrix.

In *Krawczyk,* 543 A.2d at 733-34, for instance, the decedent had met with his attorney approximately ten days before he died and informed her that he was soon to have open heart surgery and wanted to arrange for the disposition of his assets without going through probate. Accordingly, he directed the attorney to prepare two trust documents for his execution. *Id.* at 734. Completion of the trust documents was delayed, and by the time they were ready for execution, the decedent was too ill to see his attorney. He died without signing them. *Id.*

The Connecticut Supreme Court concluded that imposing liability to third parties for negligent delay in executing estate planning documents would contravene a lawyer's duty of undivided loyalty to the client. *Id.* at 736. As the court explained:

> Imposition of liability would create an incentive for an attorney to exert pressure on a client to complete and execute estate planning documents summarily. Fear of liability to potential third party beneficiaries would contravene the attorney's primary responsibility to ensure that the proposed estate plan effectuates the client's wishes and that the client understands the available options and the legal and practical implications of whatever course of action is ultimately chosen. These potential conflicts of interest are especially significant in the context of the final disposition of a client's estate, where the testator's testamentary **1269 capacity and the absence of undue influence are often central issues.

*508 *Id.*

The Massachusetts Supreme Judicial Court has similarly reasoned that:

> [I]n preparing a will[,] attorneys can have only one client to whom they owe a duty of undivided loyalty. A client who engages an attorney to prepare a will may seem set on a particular plan for the distribution of her estate.... It is not uncommon, however, for a client to have a change of heart after reviewing a draft will.... If a duty arose as to every prospective beneficiary mentioned by the client, the attorney-client relationship would become unduly burdened. Attorneys could find themselves in a quandary whenever the client had a change of mind, and the results would hasten to absurdity. The nature of the attorney-client relationship that arises from the drafting of a will necessitates against a duty arising in favor of prospective beneficiaries.

Miller, 725 N.E.2d at 550-51 (quotation, ellipses and brackets omitted).

We have recently reaffirmed the importance of an attorney's undivided loyalty to a client. *See MacMillan,* 147 N.H. at 365, 787 A.2d 867. In *MacMillan,* we

declined to extend *Simpson* to permit the buyers in a real estate transaction to sue the sellers' attorney who prepared a deed, which failed to include a restrictive covenant. We ruled that there was no evidence that the primary purpose of employing the attorney to draft the deed was to benefit or influence the buyers. *Id.* Accordingly, we held that the buyers were not the intended beneficiaries of the attorney's services. *Id.* Moreover, we held that it was imprudent to impose liability upon the attorney under these circumstances because doing so would "interfere with the undivided loyalty which the attorney owes his client and would detract from achieving the most advantageous position for his client." *Id.* (quotation omitted).

Both parties cite compelling policy considerations to support their arguments. The plaintiff asserts that there is a strong public interest in ensuring that testators dispose of their property by will and that recognizing a duty of an attorney "to arrange for the timely execution of a will" will promote this public interest. He further argues that "[t]he risk that an intended beneficiary will be deprived of a substantial legacy due to delay in execution of testamentary documents" requires the court to recognize the duty he espouses. The defendants counter that recognizing a duty to third parties for the failure to arrange for the timely execution of a ***509** will potentially would undermine the attorney's ethical duty of undivided loyalty to the client.

After weighing the policy considerations the parties identify, we conclude that the potential for conflict between the interests of a prospective beneficiary and a testator militates against recognizing a duty of care. "It is the potential for conflict that is determinative, not the existence of an actual conflict." *Miller,* 725 N.E.2d at 550. Whereas a testator and the beneficiary of a will have a mutual interest in ensuring that an attorney drafts the will non-negligently, a prospective beneficiary may be interested in the will's prompt execution, while the testator or testatrix may be interested in having sufficient time to consider and understand his or her estate planning options. As the Massachusetts Supreme Judicial Court recognized:

> Confronting a last will and testament can produce complex psychological demands on a client that may require considerable periods of reflection. An attorney frequently prepares multiple drafts of a will before the client is reconciled ****1270** to the result. The most simple distributive provisions may be the most difficult for the client to accept.

Id. at 551.

Creating a duty, even under the unfortunate circumstances of this case, could compromise the attorney's duty of undivided loyalty to the client and impose an untenable burden upon the attorney-client relationship. To avoid potential liability, attorneys might be forced to pressure their clients to execute their wills summarily, without sufficiently reflecting upon their estate planning options.

On balance, we conclude that the risk of interfering with the attorney's duty of undivided loyalty to the client exceeds the risk of harm to the prospective beneficiary. For these reasons, we join the majority of courts that have considered this issue and hold that an attorney does not owe a duty of care to a prospective will beneficiary to have the will executed promptly. Accordingly, we answer the certified question in the negative.

Remanded.

NADEAU, DALIANIS and DUGGAN, JJ., concurred.

All Citations

148 N.H. 503, 809 A.2d 1265

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Restatement (Third) of Trusts § 81 (2007)

Restatement of the Law - Trusts

Database updated October 2015
Restatement (Third) of Trusts

Part 6. Trust Administration

Chapter 15. Specific Duties of Trusteeship

§ 81 Duty with Respect to **Co-Trustees**

General Comment:
Reporter's Notes on § 81
Case Citations - by Jurisdiction

(1) If a trust has more than one trustee, except as otherwise provided by the terms of the trust, each trustee has a duty and the right to participate in the administration of the trust.
(2) Each trustee also has a duty to use reasonable care to prevent a co-trustee from committing a breach of trust and, if a breach of trust occurs, to obtain redress.

General Comment:

a. Scope of Section; cross-references. This Section does not address a trustee's duty in taking over from a predecessor trustee, on which see § 76, Comment *c*. Nor does this Section address matters regarding the office of trustee that are treated in Chapter 7, concerning: the capacity to serve as trustee (§§ 32, 33, and cf. § 77, Comment *b*); the appointment (§ 34), resignation (§ 36, and cf. § 35 on renunciation), and removal (§ 37) of trustees; and "reasonable compensation" of trustees in multiple-trustee situations (§ 38, Comment *i*). On the possibility of removal for failure to cooperate with a **co-trustee**, see § 37, Comment *e*.

That, absent contrary provision in the terms of the trust, fiduciary authority is exercised by majority vote in trusts that have three or more trustees, see § 39, applicable to private as well as charitable trusts.

That, when several persons are designated as trustees and one of them dies, declines to serve or resigns, is removed, or is or becomes incapable of acting as trustee, the remaining trustee or trustees ordinarily are entitled to administer the trust, with a replacement trustee being required only if the settlor manifested an intention (or it is conducive to the proper administration or purposes of the trust) that the number of trustees should be maintained, see § 34, Comment *d*, and § 85, Comment *e*. Also see § 34, Comment *e*, on the authority of courts to appoint additional trustees to promote better administration of a trust even when there is no vacancy.

When a trust has multiple trustees, the fiduciary duties of trustees stated in this Chapter, except as modified by the terms of the trust, apply to each of the trustees. Thus, for example, each of the **co-trustees** is ordinarily to participate and cooperate with the other(s) in the prudent administration of the trust (Comment *c*, and also see §§ 76, 77) and in so doing to conform to the duties of loyalty (§ 78) and impartiality (§ 79). Permissible delegation between or among **co-trustees** is considered in Comment *c(1)*, below; in respects there described (and for reasons described in the Reporter's Note thereto), the rules of such delegation differ from the rules in § 80 for delegation to agents.

b. Effect of the terms of the trust. The duties of multiple trustees, as discussed in this Section, may be reduced, modified, or specially allocated by the terms of the trust.

Thus, trust provisions may and often should allocate roles and responsibilities among the trustees, or relieve one or more of the trustees of duties to participate in particular aspects of the trust's administration. A settlor may even designate, or provide for the appointment of, a "special trustee" to handle only one or more specified functions or types of decisions (e.g., the exercise of tax-sensitive powers of distribution, when the general trustee or trustees are beneficiaries of those powers), with the special trustee having no authority in or responsibility for other aspects of the trust's administration. The settlor's limiting of a trustee's functions or allocation of functions among the trustees usually, either explicitly or as a matter of interpretation, has the effect of relieving the trustee(s) to whom a function is not allocated of any affirmative duty to remain informed or to participate in deliberations about matters within that function. Similarly, exculpatory provisions (§ 96) may be designed to apply selectively.

Even in matters for which a trustee is relieved of responsibility, however, if the trustee knows that a **co-trustee** is committing or attempting to commit a **breach of trust**, the trustee has a duty to take reasonable steps to prevent the fiduciary misconduct. See Comments *d* and *e*. Furthermore, absent clear provision in the trust to the contrary, even in the absence of any duty to intervene or grounds for suspicion, a trustee is entitled to request and receive reasonable information regarding an aspect of trust administration in which the trustee is not required to participate.

The terms of a trust may provide that the decision of a particular trustee to take action in certain matters shall prevail for purposes of breaking a deadlock, or even by overriding a position of the other trustees although they may constitute a majority. Essentially, a provision of this type merely authorizes action upon the decision of one (or possibly more) of the trustees in the event of disagreement but does not relieve the others of their normal duties and rights of informed participation in the trustees' deliberations and decisionmaking. More generally, on the duties and **liabilities** of minority or dissenting trustees, see Comments *d* and *e*.

Comment on Subsection (1):

c. Active personal participation: general rule. The duty of a trustee to administer the trust (§ 76) applies to the trustees of trusts that have two or more trustees. Thus, except as otherwise provided by the terms of the trust, each **co-trustee** has a duty, and also the right, of active, prudent participation in the performance of all aspects of the trust's administration. Implicit in this requirement of prudent participation is a duty of reasonable cooperation among the trustees.

In hiring counsel for the trustees in their fiduciary capacity, the selection is ordinarily made by majority vote of the **co-trustees** (§ 39), with all of the trustees entitled to participate in meetings and other aspects of the counseling process and to have access to communications from the trustees' counsel. If separate counsel is reasonably needed to aid a trustee in the performance of a fiduciary duty, as may be necessary under Subsection (2), appropriate attorney fees are payable or reimbursable from the trust estate.

The duty to participate in the trust's administration does not prevent, as a means of participation, prudent delegation by the **co-trustees** to one or more agents in accordance with § 80. Nor does it preclude proper delegation by a **co-trustee** to the other **co-trustee**(s) in accordance with Comment *c(1)*.

The trustee's duty to participate in administering the trust does not require an equal level of effort or activity by each **co-trustee**, as recognized in the variability of their "reasonable" compensation (§ 38, Comment *i*). Accordingly, the duty of participation by each of the **co-trustees** does not prevent them from deciding (short of constituting delegation) to allow one or more of the **co-trustees** to carry more of the burden in regard to various matters, for example, by initiating, analyzing, reporting, and making recommendations for reasonably informed action by all of the trustees. It does, however, normally prevent the trustees from "dividing" the trusteeship or its functions in a manner that is not authorized by the terms of the trust. Cf. Comment *c(1)*.

If and to the extent a **co-trustee** is unavailable to participate prudently in the performance of a trusteeship function because of

absence, illness, or other temporary incapacity, or because of disqualification under other law, the **co-trustee** is excused from participation. If prudence calls for action to be taken in these circumstances, the remaining **co-trustee**(s) can properly act for the trust.

In the case of a trust with two **co-trustees**, joint action or the concurrence of both trustees is required to exercise powers of the trusteeship. See § 39. Also, in trusts having three or more trustees, the terms of the trust or applicable law (rejecting the majority-control rule of § 39) may require action or concurrence by all of the trustees to exercise certain or all of the trustees' powers. If a situation arises in which prudence requires that the trustees reach a decision and they are unwilling or unable to do so, the trustees have a duty to apply to an appropriate court for instructions. See § 71.

*c(1). Delegation to other **co-trustee**(s).* The general duty of each **co-trustee** to participate in performing the functions of the trusteeship does not prevent delegation on a prudent basis between or among themselves with respect to essentially ministerial matters, such as the custody of trust property and the implementation of decisions that have been made by proper vote of the **co-trustees**. (A trustee may also expressly delegate responsibilities and authority to the remaining **co-trustee**(s) in anticipation of the trustee's unavailability due to circumstances of the type described above in Comment *c*, involving relief from responsibility during illness or absence.)

Delegation is also permissible in circumstances in which it would be unreasonable to expect the **co-trustee** personally to perform the function(s) in question. (Compare the earlier standard for delegation *generally*, as stated in Restatement Second, Trusts § 171.)

Furthermore, delegation to a **co-trustee** may be desirable and appropriate in circumstances in which adherence to the general rule of Comment *c* would not be practical and prudent because of cost or inefficiency, or even because delegation would be consistent with the settlor's expectations in designating, or providing for appointment of, that **co-trustee**. For example, delegation of investment authority is generally authorized by implication when a settlor designates his or her surviving spouse to serve as **co-trustee** with a skilled professional trustee (or provides that the **co-trustee** position should always be filled by one of the settlor's children, to serve with the professional trustee) when the settlor was aware that the spouse (or children) had neither skill nor interest in investment or relevant financial matters.

A trustee's delegation to the other trustee(s) is revocable and does not relieve the other trustee(s) of the duty to provide information to the delegating trustee, on request or in the event of significant, unanticipated circumstances or changes of investment policy.

That **co-trustees** cannot properly divide up the trusteeship functions except as may be expressly or impliedly authorized by the terms of the trust (cf. Comment *b*), see Comment *c*. Uncertainties concerning permissible delegation among **co-trustees** are appropriate matters for judicial instruction under § 71, or perhaps even equitable deviation under § 66.

See Reporter's Note on the rationale for differentiating delegation among **co-trustees** from delegation to agents.

c(2). Special situations. In appropriate situations, a panel of **co-trustees** (despite the generalizations in Comment *c*) may, in administering the trust, function in the manner of a corporate board of directors. Of relevance for the purpose of this possibility are not only (though critical) the number of trustees but also their circumstances (skills and experience, compensation, other commitments, etc.) and the nature and scale of the trust's asset holdings, investment programs, and other activities. Also, compare § 80 (delegation to agents) that trustees sometimes will need to and may rely on suitable officers and staff; and compare more generally, on charities established in trust form, ALI Principles of the Law of Nonprofit Organizations § 200 (Preliminary Draft No. 3, May 12, 2005) (on choice and consequences of organizational form) and id. Chapter 3 (Tentative Draft No. 1, 2007) (on "governance").

On the powers of trustees to incorporate (or to establish other entities for) some or all of a trust's holdings or operations, see § 86, Comment *e*; and on joining and cooperating with others, see § 80, Comment *i*. On the possibility of converting a charitable trust (cf. §§ 66, 67) to another form of charitable organization, see ALI Principles of the Law of Nonprofit Organizations § 230 (Preliminary Draft No. 3, May 12, 2005).

Comment on Subsection (2):

d. Duty regarding ***breach of trust*** *by* ***co-trustee***. When a trust has multiple trustees, each trustee ordinarily (cf. Comment *b*) has a duty to exercise reasonable care to prevent a **co-trustee** from committing a **breach** of **trust**. Thus, for example, it is a **breach** of **trust** for a trustee knowingly to allow a **co-trustee** to commit a **breach** of **trust**. And, if a breach occurs, the trustee must take reasonable steps seeking to compel the **co-trustee** to redress the **breach** of **trust**.

If a trustee needs independent counsel to fulfill these duties, reasonable attorney fees may be paid or reimbursed from the trust. See § 88, Comment *d*.

A trustee is not precluded from maintaining a suit for redress by the fact that the trustee participated in the **breach** of **trust**, because the suit is on behalf of the trust and its beneficiaries.

On the duty of a trustee where a power of control is conferred upon another, see § 75.

e. Whether trustee liable for ***breach of trust*** *by* ***co-trustee(s)***. A trustee is not liable for a **breach** of **trust** committed by a **co-trustee**, unless the trustee: (i) participated or acquiesced in the **breach** of **trust** or was involved in concealing it; (ii) improperly delegated administration of the trust to the **co-trustee**; or (iii) enabled the **co-trustee** to commit the **breach** of **trust** by failing to exercise reasonable care, including by failing to make reasonable effort to enjoin or otherwise prevent the **breach** of **trust**. Furthermore, a trustee may be liable for neglecting to take reasonable steps seeking to obtain redress for the **breach** of **trust**. That it might be "reasonable" for a trustee to decide not to bring suit to redress a **breach** of **trust**, see § 76, Comment *d*.

A trustee who opposed an action taken upon decision by a majority of the trustees, and who made that opposition known to a **co-trustee** but thereafter reasonably joined in the action in order to avoid obstructing its execution, is not liable for the action unless the dissenting trustee was aware that the action was a **breach** of **trust**.

When several trustees are liable for a **breach** of **trust**, either as a breach committed by them jointly or on another of the above grounds, they are jointly and severally liable. On the right of a trustee to contribution or indemnity from **co-trustee**(s), see Chapter 19.

Reporter's Notes on § 81

The predecessors of this Section and its Comments were essentially consistent with the rules stated here, although those earlier Sections contained minimal content in commentary. See Restatement Second, Trusts §§ 184 and 224, plus Comment *e* of § 200.

See also IIA William F. Fratcher, *Scott on Trusts* § 184 (4th ed. 1987), and III id. §§ 224-224.6 (1988); and George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* §§ 584-591 (rev. 2d ed. 1980).

Comment *b*:

With this Comment compare Restatement Second, Trusts § 171, Comment *j* (emphasis added): "By the terms of the trust a trustee may be authorized to permit an agent or *co-trustee* or third person to manage the trust property or to do acts which the trustee could not otherwise properly delegate."

The comment to Uniform Trust Code § 703 advises that the use of co-trusteeship calls for "careful reflection," but adds:

"Potential problems can be reduced by addressing division of responsibilities in the terms of the trust. Like any other sections of this article, this section is freely subject to modification in the terms of the trust. *See* [UTC] Section 105."

Comment *c*:

Scott on Trusts, supra, § 184 states: "Where there are several trustees it is the duty of each of them, unless it is otherwise provided by the terms of the trusts, to participate in the administration of the trust.... It is improper for one of the trustees to leave to the others the control over the administration of the trust. A trustee who remains inactive is guilty of a **breach** of **trust**...."

With the present Comment, compare Uniform Trust Code § 703, which states in relevant part:

> (c) A **cotrustee** must participate in the performance of a trustee's function unless the **cotrustee** is unavailable to perform the function because of absence, illness, disqualification under other law, or other temporary incapacity or the **cotrustee** has properly delegated the performance of the function to another trustee.
>
> (d) If a **cotrustee** is unavailable ... and prompt action is necessary to achieve the purposes of the trust or to avoid injury to the trust property, the remaining **cotrustee** or a majority of the remaining **cotrustees** may act for the trust.

Duty of multiple trustees to cooperate. On the duty of **co-trustees** to cooperate in administering a trust, see Ball v. Mills, 376 So.2d 1174, 1182 (Fla. App. 1979) (that "**co-trustees** owe to each other, as well as to the beneficiaries ..., the duty and obligation to so conduct themselves as to foster a spirit of mutual trust, confidence, and cooperation to the extent possible").

Uniform Trust Code § 706(b)(2) provides that a trustee may be removed, inter alia, if "lack of cooperation among **cotrustees** substantially impairs the administration of the trust." The associated comment states:

> The lack of cooperation among trustees justifying removal under subsection (b)(2) need not involve a **breach** of **trust**. The key factor is whether the administration of the trust is significantly impaired by the trustees' failure to agree. Removal is particularly appropriate if the naming of an even number of trustees, combined with their failure to agree, has resulted in deadlock requiring court resolution. The court may remove one or more or all of the trustees.... [R]emoval might be justified if a communications breakdown is caused by the trustee or appears to be incurable. *See* Restatement (Third) of Trusts § 37 cmt e (Tentative Draft no. 2, approved 1999).

*When **co-trustees** disagree.* Kershaw v. Kershaw, 848 So.2d 942 (Ala. 2002), reversed a trial court's dismissal of an action on the ground that the **co-trustee** (Knox) lacked authority to act singly; Knox, one of two **co-trustees** (and co-executors), acting in his fiduciary capacity, initiated breach-of-contract and liquidation proceedings against his **co-trustee** brother and a family company, the success of which would apparently be financially beneficial to Knox but detrimental to the respondent **co-trustee**. The court noted an earlier decision (also involving a co-fiduciary who could not persuade the other to commence litigation) allowing courts in such cases either to compel the other fiduciary's joinder or to dismiss that other fiduciary through a judgment of severance, thus permitting the lone co-fiduciary to proceed. As a further alternative, the court in *Kershaw* instructed the trial court to "allow Knox to proceed singly" on the condition that he post, "in his individual capacity, a bond as security for the costs and attorney fees incurred by the estate or for which the estate might be liable to third parties to the extent the litigation on behalf of the estate or trusts is unsuccessful." Id. at 957.

Comment *c(1)*:

Restatement Second, Trusts § 184 was similar to Subsection (1) here in requiring active participation of each **co-trustee**, but

id. § 171 recognized that a trustee could properly delegate to another, including a **co-trustee**, "the doing of acts" the trustee could not "reasonably be required personally to perform."

Under Uniform Trust Code § 703(e): "A trustee may not delegate to a **cotrustee** the performance of a function the settlor reasonably expected the trustees to perform jointly...."

Rationale. The comments to UTC § 703 explain: "**Cotrustees** are appointed for a variety of reasons. Having multiple decision-makers serves as a safeguard against eccentricity or misconduct. **Cotrustees** are often appointed to gain advantage of differing skills, perhaps a financial institution for its permanence and professional skills, and a family member to maintain a personal connection with the beneficiaries. On other occasions, **cotrustees** are appointed to make certain that all family lines are represented in the trust's management....

"Subsection (e) addresses the extent to which a trustee may delegate the performance of functions to a **cotrustee**. The standard differs from the standard for delegation to an agent as provided in Section 807 because the two situations are different.... Subsection (e) is premised on the assumption that the settlor selected **cotrustees** for a specific reason and that this reason ought to control the scope of a permitted delegation to a **cotrustee**. Subsection (e) prohibits a trustee from delegating to another trustee functions the settlor reasonably expected the trustees to perform jointly. The exact extent to which a trustee may delegate functions to another trustee in a particular case will vary depending on the reasons the settlor decided to appoint the **cotrustees**. The better practice is [for a settlor] to address the division of functions in the terms of the trust...."

Note further that (unlike trustee-agent relationships under § 80) **co-trustees** cannot, ordinarily at least, hire and fire one another, and also that a "dividing" of functions among fiduciary peers invites the evolution of territorial prerogatives and unhealthy forms of reciprocity. As long ago said of such relationships, in the dictum of Millar's Trustees v. Polson, (1897) 34 Scot. L. Rptr. 798, 804: "It is, of course, disagreeable to take a **cotrustee** by the throat; but if a man undertakes to act as a trustee he must face the necessity of doing disagreeable things when they become necessary in order to keep the estate intact. A trustee is not entitled to purchase a quiet life at the expense of the estate, or to act as good-natured men sometimes do in their own affairs in letting things slide and losing money rather than create ill feeling."

A rather strict position (note requirement of "express" authority, near end of excerpt) was stated in Crocker-Citizens National Bank v. Younger, 4 Cal.3d 202, 211, 93 Cal.Rptr. 214, 220, 481 P.2d 222, 228 (1971): "We have been unable to find any authority whatsoever ... that **cotrustees** or other persons holding trust powers may, by private agreement between themselves, either restrict the powers which a co-member may properly exercise or divide trust powers among two or more persons. Of course, the terms of the trust may provide that certain powers may be exercised by one trustee and other powers by another ..., and the same would be true with respect to advisory committee powers, but in the absence of express authority in the trust instrument, [a fiduciary agreement] which purported to so restrict or allocate trust powers would be void."

The testator in Re Mulligan, [1996] 1 N.Z.L.R. 481, left property to his widow W and a trust company as **co-trustees** to pay the income to W for life, remainder to testator's nieces and nephews. The trustees invested the trust estate in fixed-income securities with high rates of interest, although officers of the trust company tried unsuccessfully to persuade W that a portion of the investment should be in common stock as a hedge against inflation. When the real value of the trust estate had declined dramatically by the time of W's death 25 years after the trust's creation, the remainder beneficiaries sued both the trust company and W's estate. The court found the trustees had breached their duty of impartiality because they had recognized the harm inflation could cause and did nothing in response. The court also concluded that the trust company should not have deferred to W's wishes, especially in light of her conflict of interest, and held it liable for its failure to act forcefully or to apply for court instruction.

Compare ERISA § 405(b)(1), which states: "Except as otherwise provided in subsection (d) [on appointment of investment manager(s)] and in Section 403(a)(1) and (2), if the assets of a plan are held by two or more trustees—(A) each shall use reasonable care to prevent a **co-trustee** from committing a breach, and (B) they shall jointly manage and control the assets of the plan, except that nothing in this subparagraph (B) shall preclude any agreement, *authorized by the trust instrument*, allocating specific responsibilities, obligations, or duties among trustees [emphasis added]...."

Comments *d* and *e*:

Comments *d* and *e* are similar in substance to Restatement Second, Trusts §§ 184 and 224, and also compare UTC § 703(f)-(h), below.

Scott on Trusts, supra, § 184, states: "It is the duty of each **[co-trustee]** to use reasonable care to prevent the others from committing a **breach** of **trust**; if one of the trustees commits a **breach** of **trust**, it is the duty of the others to compel him to redress it."

Compare Uniform Trust Code § 703, which (addressing **liability** as well as duty) states in relevant part:

> (f) Except as otherwise provided in subsection (g), a trustee who does not join in an action of another trustee is not liable for the action.
>
> (g) Each trustee shall exercise reasonable care to:
>
> (1) prevent a **cotrustee** from committing a serious **breach** of **trust**; and
>
> (2) compel a **cotrustee** to redress a serious **breach** of **trust**.
>
> (h) A dissenting trustee who joins in an action at the direction of the majority of the trustees and who notified any **cotrustee** of the dissent at or before the time of the action is not liable for the action unless the action is a serious **breach** of **trust**.

A comment to UTC § 703 observes: "By permitting the trustees to act by a majority, this section contemplates that there may be a trustee or trustees who might dissent. Trustees who dissent from the acts of a **cotrustee** are in general protected from **liability**. Subsection (f) protects trustees who refused to join in the action. Subsection (h) protects a dissenting trustee who joined the action at the direction of the majority such as to satisfy a demand of the other side to a transaction, if the trustee expressed the dissent to a **cotrustee** at or before the time of the action in question. However, the protections provided by subsections (f) and (h) no longer apply if the action constitutes a serious **breach** of **trust**. In that event, subsection (g) may impose **liability** against a dissenting trustee for failing to take reasonable steps to rectify the improper conduct. The responsibility to take action against a breaching **cotrustee** codifies the substance of Sections 184 and 224 of the Restatement (Second) of Trusts (1959)."

ERISA § 405(a) provides: "In addition to any **liability** which he may have under another provision of this part, a fiduciary [as broadly defined in the statute] with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances: (1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach; (2) if, by his failure to comply with § 404(a)(1) [comparable to §§ 76- 79 here] in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or (3) if he has knowledge of a breach by other such fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach."

*Costs of trustee's suit against **co-trustee(s)**.* That attorney fees and other costs may be allowed to a trustee who, reasonably and in good faith, brings suit against **co-trustees** to prevent or remedy their alleged **breach** of **trust**, see Ball v. Mills, 376 So.2d 1174, 1181-1182 (Fla. App. 1979), stating (paragraphing disregarded): "We cannot agree ... that recovery of attorney's fees in litigation by one trustee against another is dependent upon whether the complaining trustee has prevailed in the action.... But ... the complaining trustee [has yet] to offer proof that would justify the award.... The reasonableness and necessity of the services ... must be determined by the trial judge, and it must be determined, as well, that all of the claimed services were rendered for the benefit of the trust itself, and not for some other purpose.... [T]his litigation ... has not been concluded; but [we offer] a few simple observations for possible consideration by the trial court, counsel, and the parties.... In adversary proceedings brought by one trustee against **co-trustees**, particularly when, as here, the record amply reflects the existence of an on-going internecine power struggle between the trustees, it would seem imperative that the litigation must progress to such a stage as will make possible the elimination of any taint of self-interest on the part of the complaining trustee before the trust assets may be appropriated to finance it. We think it is obvious that the trial court should proceed with caution in allowing payment of fees [to assure] that legitimate interests of the trust lie at the heart of the controversy.... On the other hand, the statute ... recognizes the possible **liability** of a **co-trustee** 'for failure ... to attempt to prevent a **breach** of

trust'. It is generally held that a trustee is entitled, and is under a duty, to bring suit against a **co-trustee** in a proper case.... If in spite of every effort by a trustee to carry out his duties in a manner exhibiting his concern for the maintenance of a spirit of trust and cooperation, and with due regard for the honest convictions and opinions of his **co-trustees** with whom he differs, his vigilant concern for the proper administration or protection of the trust requires him to take legal action, we do not think [an interim] award of [partial] costs from trust assets must necessarily await the final conclusion of the law suit.... [R]emanded for further proceedings consistent with this opinion." In rejecting the argument that a complaining trustee must have prevailed in order to be entitled to an award of costs, the court (at 1178-1179) discussed, in addition to Restatement Second, Trusts § 188, Comment *b*, what it termed "persuasive" case authorities from Illinois (involving "irreconcilable conflict" that required resolution), Alabama, Indiana, Michigan, and Texas.

Compare duPont v. Southern National Bank, 575 F.Supp. 849 (S.D. Tex. 1983), aff'd, 771 F.2d 874 (5th Cir. 1985) (petition to remove 2 of the trust's 3 **co-trustees**; the possibility of conflicting interests entitled each trustee to an award of attorney fees for employing separate counsel).

Case Citations - by Jurisdiction

Mass.
Wash.App.

Mass.

Mass.2008. Subsec. (2), coms. (d) and (e), and Rptr's Notes cit. in ftn. Current trustees and beneficiary sued former trustees, alleging that defendants breached their fiduciary duties in 1984 by redeeming for inadequate consideration shares of stock held in trust for beneficiary. The trial court granted summary judgment for defendants on limitations grounds. Affirming in part, this court held, inter alia, that plaintiffs' claims arising out of the challenged redemption in 1984 were time-barred, since successor trustee was on notice in 1984 of potential claims against defendants but failed to assert them at that time, and he had no disqualifying agency or other relationship with defendants with respect to that transaction. The court noted that the fact that one of the defendants was a **cotrustee** with successor trustee from 1984 to 1986 was of no consequence, since an innocent trustee had a duty to redress a breach of fiduciary duty by a wrongdoing **cotrustee**. O'Connor v. Redstone, 452 Mass. 537, 561, 896 N.E.2d 595, 613.

Wash.App.

Wash.App.2013. Com. (a) cit. in sup. Employers brought a claim for breach of fiduciary duty against trade association, association's subsidiary, and named trustees of a benefit trust, disputing defendants' handling of revenue generated through their operation of a retrospective rating program for plaintiffs' industrial insurance premiums under a statute that allowed the Washington State Department of Labor and Industries to rebate a portion of plaintiffs' premiums. The trial court granted partial summary judgment for plaintiffs. Affirming in part, this court held that all of the defendants owed trust duties to plaintiffs that they **breached** by commingling **trust** funds, retaining interest on trust funds, and failing to provide annual accountings to plaintiffs, as beneficiaries. The court noted that, although trade association reserved the right to delegate responsibilities to subsidiary and trust, association, as a trustee, could not properly transfer the trust property to another as trustee and thereby abdicate responsibility. In re Washington Builders Ben. Trust, 293 P.3d 1206, 1226.

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REST 3d TRUSTS § 81

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Restatement (Second) of Trusts § 224 (1959)

Restatement of the Law - Trusts

Database updated October 2015
Restatement (Second) of Trusts

Chapter 7. The Administration of the Trust

Topic 4. Remedies of the Beneficiary and Liabilities of the Trustee

§ 224 Liability for Breach of Trust of Co-trustee

Comment:
Case Citations - by Jurisdiction

(1) Except as stated in Subsection (2), a trustee is not liable to the beneficiary for a breach of trust committed by a co-trustee.
(2) A trustee is liable to the beneficiary, if he
(a) participates in a breach of trust committed by his co-trustee; or
(b) improperly delegates the administration of the trust to his co-trustee; or
(c) approves or acquiesces in or conceals a breach of trust committed by his co-trustee; or
(d) by his failure to exercise reasonable care in the administration of the trust has enabled his co-trustee to commit a breach of trust; or
(e) neglects to take proper steps to compel his co-trustee to redress a breach of trust.

Comment:

a. Scope of the rule. Where several trustees are liable for a breach of trust committed by them jointly or for a breach of trust committed by one of them for which the others are liable under the rule stated in Subsection (2), they are jointly and severally liable to the beneficiary for the breach of trust.

Illustration to Clause (a):

1. A and B are co-trustees. By the terms of the trust they are permitted to invest only in bonds. A suggests to B that he invest part of the funds in shares of stock which B does. A as well as B is liable for the breach of trust.

Illustration to Clause (b):

2. A and B are co-trustees. A directs B to invest the trust funds without consulting with A. In breach of trust B invests in shares of stock. A is liable for breach of trust.

Illustration to Clause (c):

3. A and B are co-trustees. B makes an improper investment and tells A that he has done so. A approves of the investment. A is liable for breach of trust.

Illustration to Clause (d):

4. A and B are co-trustees. A improperly permits B to have the sole custody and management of the trust property and makes no inquiry as to his conduct. B is thereby enabled to sell the trust property and embezzle the proceeds. A

is liable for breach of trust.

Illustration to Clause (e):

5. A and B are co-trustees. A knows that B has embezzled a part of the trust property but makes no effort to compel him to make restitution. A is liable for breach of trust.

b. Cross references. As to the duty of a trustee with respect to co-trustees, see § 184.

As to the duty of a trustee where a power of control is conferred upon another, see § 185.

As to the right of one trustee to contribution or indemnity from his co-trustees, see § 258.

Case Citations - by Jurisdiction

C.A.3
C.A.7
C.A.11
D.Idaho Bkrtcy.Ct.
D.Md.
D.Mass.
E.D.N.Y.
S.D.N.Y.
W.D.Pa.Bkrtcy.Ct.
S.D.Tex.
W.D.Wis.
Ariz.
Ark.
Idaho
Mass.
Mo.App.
N.Y.Sup.Ct.
Okl.
Pa.Super.
Wis.

C.A.3

C.A.3, 1999. Cit. in disc., subsec. (1) cit. in disc. and quot. in case quot. in disc. Beneficiary sued trustees for breach of fiduciary duty. The district court entered judgment for beneficiary against trustee/attorney, but against beneficiary with respect to cotrustee. Affirming in part, vacating in part, and remanding, this court held that beneficiary was not entitled to trial by jury on his equitable claim; that diversity jurisdiction existed, since the correct measure of the amount in controversy was beneficiary's entire interest in the trust property and not just amounts presently due; that, when read in accordance with the rule of contra proferentem contract interpretation, the relevant agreement did not permit trustee/attorney to recover fees in connection with collection actions, rendering his attempt to take such fees a breach of his duty of loyalty; and that further factfinding was required on the issue of cotrustee's reliance-on-advice-of-counsel defense to liability. Dardovitch v. Haltzman, 190 F.3d 125, 149.

C.A.7

C.A.7, 1984. Cit. in sup. The beneficiaries of an employee benefit plan sued the plan administrators and others claiming violations of fiduciary duties under the Employee Retirement Income Security Act. The district court entered judgment for the defendants, but on appeal this court vacated and remanded. The court found that the defendants had improperly used the plan assets for their own financial gain, and it ruled that the fact that the plan had lost no money in the challenged transactions did not preclude the ERISA action. The court noted that ERISA provided for disgorgement of profits made by trustees through the improper use of the assets they administered in line with the common law of trusts. Leigh v. Engle, 727 F.2d 113, 135.

C.A.11

C.A.11, 1994. Subsec. (2)(c) cit. in disc. Union members sued their union and employer, alleging that union negotiators had agreed to concessions in a collective bargaining agreement in exchange for pension payments to which they were not entitled. Affirming in part and reversing in part the district court's grant of summary judgment for the defendants, this court held, inter alia, that each monthly payment by the employer of pension benefits to the union negotiators could be interpreted as a thing of value for purposes of the Labor Management Relations Act and, thus, a separate predicate act under the Racketeer Influenced and Corrupt Organizations Act, thus supporting a finding of racketeering activity as a result of the illegal payments and those payments could be found to be connected by a common scheme or plan to make them in exchange for their agreement to concessions. Cox v. Administrator U.S. Steel & Carnegie, 17 F.3d 1386, 1409, opinion modified on rehearing 30 F.3d 1347 (11th Cir.1994).

D.Idaho Bkrtcy.Ct.

D.Idaho Bkrtcy.Ct.1994. Cit. in headnote, quot. in case quot. in sup. Creditor commenced adversary proceeding to except from discharge the balance due on debtor's note and sought a money judgment from debtor and trustees of a trust on the ground of false pretenses, arguing that defendant trustees' agreement to use trust deposits to secure debtor's loan, when defendants knew that was improper, amounted to fraud. Granting in part defendants' motion for summary judgment, the court held, inter alia, that defendant trustee who did not have any contact with plaintiff's agents regarding debtor's loan transaction was not liable for false pretenses and that her status as cotrustee could not subject her to imputed liability for the other trustee's alleged fraud. In re Permann, 174 B.R. 129, 130, 133-134.

D.Md.

D.Md.1990. Subsec. (2) quot. in disc. A trade association of retail electrical appliance dealers, which provided an employee benefit plan for its members, sued those persons and entities who were retained by the association to provide services to the benefit plan after the plan became insolvent. The association sued on theories of fiduciary mismanagement and breach of the fiduciary duties imposed by the Employee Retirement Income Security Act (ERISA). On motions to dismiss and for summary judgment filed by various defendants, this court held, inter alia, that the defendant fiduciaries were entitled to summary judgment on the association's claim for indemnification or contribution for any sums for which it may have become responsible by reason of counterclaims, because no provision for indemnification or contribution among fiduciaries was included in ERISA. The court stated that since ERISA described in detail fiduciary duties and apportioned their liability, the failure to include the rights of contribution and indemnity in ERISA was intended by Congress and the omission of those rights was not an unaddressed detail or gap to be filled by a federal common law. Narda, Inc. v. Rhode Island Hosp. Trust Nat. Bank, 744 F.Supp. 685, 697.

D.Md.1980. Quot. in part. in disc. This suit was brought by union members on behalf of all union members against a union

official, who was a trustee for certain employee benefit trust funds to which the plaintiffs contributed and/or benefitted, and whom the plaintiffs claimed had breached his fiduciary duties. The plaintiffs also filed suit against the fund's insurance broker for breach of his fiduciary duties and for unreasonable commissions and fees. The plaintiffs' claims were brought under several federal statutes. The court found, inter alia, that the defendant's receipt of gratuities which influenced his conduct as a trustee as well as his failure to take remedial steps against the broker once he discovered the broker was receiving excessive compensation, rendered the trustee jointly liable with the defendant broker because the requisite causation between the trustee's own breach and the broker's dereliction of his fiduciary duty was present. Brink v. DaLesio, 496 F.Supp. 1350, 1382-1383, motion denied 88 F.R.D. 610 (1980), decision reversed 667 F.2d 420 (4th Cir.1981).

D.Mass.

D.Mass.1996. Cit. in disc. In ERISA action, beneficiary of health and welfare fund who was denied medical benefits when plan trustees terminated the fund sued trustees and transferee trust, among others, for breach of fiduciary duty, seeking damages on behalf of the plan and the restitution of benefits for himself. Defendants moved for summary judgment. Denying the motion, the court held that it had the power to revive the defunct trust or impose a constructive trust on the assets held by transferee trust, since transferee knew when it received the funds that transferor had failed to satisfy its outstanding obligations; that material factual issues existed as to trustees' delegation of certain fiduciary duties, impartiality, and alleged misrepresentations concerning the fund's finances; and that, as an equitable remedy for breach of a fiduciary duty, plaintiff was entitled to restitution in the form of payment of past-due benefits. Jackson v. Truck Drivers' Union Local 42, 933 F.Supp. 1124, 1141.

E.D.N.Y.

E.D.N.Y.1996. Illus. 4 cit. but dist. (Cit. as illus. d.) Court-appointed fiduciary of employee pension plan brought action against plan's investment manager for violations of § 405(a) of ERISA, alleging that manager was liable for trustees' embezzlement of plan assets. Both parties moved for summary judgment. Granting defendant's motion and denying that of plaintiff, the court held that defendant was not liable for violations of § 405(a)(1)-(3) because plaintiff did not show that defendant knowingly concealed trustees' acts; plaintiff did not prove that defendant's conduct enabled trustees to engage in the embezzlement, which occurred before defendant acquired control over the plan's assets; and plaintiff failed to demonstrate that, had defendant known of and taken steps to prevent trustees' misconduct, some of the loss could have been prevented. Silverman v. Mutual Ben. Life Ins. Co., 941 F.Supp. 1327, 1336.

S.D.N.Y.

S.D.N.Y.2011. Cit. in ftn. ERISA fiduciary brought, on behalf of nearly 200 retirement plans that were invested in two bond funds that sustained significant losses, an ERISA action against manager of the bond funds, alleging that manager breached its fiduciary duties to the plans; manager counterclaimed, seeking contribution. This court denied the parties' cross-motions for summary judgment on manager's counterclaim, holding, inter alia, that a genuine issue of material fact existed as to whether fiduciary acted jointly with manager, such that manager could assert its counterclaim. The court noted that, while Restatement Second of Trusts § 258 governed contribution not only between trustees who acted jointly, but also between those who were jointly and severally liable based on the cotrustee-liability provision of Restatement § 224, manager did not make an argument based on § 224, and therefore the court did not consider it. In re State Street Bank and Trust Co. Fixed Income Funds Inv. Litigation, 772 F.Supp.2d 519, 549.

W.D.Pa.Bkrtcy.Ct.

W.D.Pa.Bkrtcy.Ct.1986. Subsec. (2) cit. in sup. This court granted a union's petition for an accounting from a committee representing hourly employees of the debtor. The accounting reports subsequently submitted were held to be incomplete and

the court ordered the fiduciaries to provide an explanation for certain questionable expenditures. This court found that the fiduciaries had acted together without consent of their beneficiaries and without order of the court in compensating themselves with funds meant to be redistributed to their beneficiaries. It ordered them to repay the funds, stating that when fiduciaries act together in a breach of their trust, they are jointly and severally liable to the beneficiaries. In re Mesta Mach. Co., 67 B.R. 151, 166.

S.D.Tex.

S.D.Tex.2003. Cit. and quot. in sup., com. (a) cit. in sup., com. (e) cit. and quot. in sup. Employees of a corporation who were participants in ERISA pension benefit plans sued corporation's savings plans and accounting firm for breach of fiduciary duty, negligent misrepresentation, and civil conspiracy, inter alia, alleging that corporation defendants breached duty of loyalty by misleading them about corporation's financial condition and performance and its accounting manipulations, while inducing plaintiffs to hold and buy additional corporate stock. This court denied in part defendants' motion to dismiss, holding that even where named fiduciary appears to have been granted full control, authority, or discretion over that portion of activity of plan management or plan assets at issue in a suit and plan trustee is directed to perform certain actions within that area, directed trustee still retains a degree of discretion, authority, and responsibility that may expose him to liability under ERISA. In re Enron Corp. Securities, Derivative & ERISA, 284 F.Supp.2d 511, 588, 589.

W.D.Wis.

W.D.Wis.2012. Cit. in disc. After holding company purchased a business with an employee stock ownership plan (ESOP), holding company's own stock plan spun off employees' plan into a new ESOP held by business; when business collapsed, leaving the new ESOP valueless, employees brought an action under ERISA against trustees of the new ESOP, alleging that defendants breached various fiduciary duties. This court held that defendants breached their ERISA fiduciary duties by negligently failing to follow the ESOP plan documents. The fact that defendants, in good faith, mistakenly believed that they were authorized to appoint and rely upon the direction of a third-party investment advisor did not relieve them of liability, because the plan did not allow them to allocate their trustee responsibilities. Nevertheless, the court held that defendants were not liable for any fiduciary breaches by one another because none of them was the "appointing fiduciary" under the plan, as the plan only granted the authority to appoint trustees to business itself. Chesemore v. Alliance Holdings, Inc., 886 F.Supp.2d 1007, 1049.

Ariz.

Ariz.1987. Subsec. (2)(b) and com. (a) cit. in sup. A trustee allowed an alternate trustee to make all investment decisions concerning trust assets. When the alternate trustee embezzled trust funds, a beneficiary brought a petition to surcharge the named trustee for the amount that had been embezzled. The trial court denied the petition, but the intermediate appellate court reversed. This court vacated and remanded, holding that the named trustee's delegation of investment power to the alternate trustee was a breach of fiduciary duty. The court reasoned that it was of no import that the trustee had delegated investment power to a named alternate trustee; if a trustee is subject to liability for improperly delegating investment responsibility to a cotrustee, then a trustee is liable for improperly delegating such responsibility to an alternate trustee as well. Shriners Hospitals v. Gardiner, 152 Ariz. 527, 733 P.2d 1110, 1113.

Ark.

Ark.1997. Subsec. (2)(d) quot. in diss. op. After a majority of the coexecutors of a decedent's estate filed a petition for partial distribution of the estate, a coexecutor challenged the petition. The probate court held that the dissenting coexecutor lacked standing to oppose the action of the majority of the executors and the majority's interpretation or construction of decedent's will, and this court affirmed. Contending that the construction of the will by the majority of the executors resulted

in an improper diversion of assets, the dissent argued that construction of disputed terms of a will fell within the jurisdiction of the courts, not within the powers of a majority of the executors, and that a majority vote of the executors could not preclude one of their number from asking the court to assume that jurisdiction. Dunklin v. Ramsay, 328 Ark. 263, 944 S.W.2d 76, 82.

Idaho

Idaho, 1980. Quot. in sup. and subsec. (b) cit. in sup. When the decedent and her husband were divorced, the decedent changed the beneficiary of her life insurance policy from her husband to her father. He understood that any proceeds received from the policy were to be held in trust for her son. The decedent later married one of the defendants herein and changed the policy so that half of the proceeds of the policy would go to her husband. After the decedent's death the husband and the father consulted with an attorney to set up a trust for the child. The two defendants were appointed conservators of the boy's estate. The father gave his interest in the policy to the husband and the child. The husband received the entire amount from the attorney, converted all of the funds for himself and then went bankrupt. The child's original father, now the court appointed guardian, sued the decedent's father and her husband in order to recover the boy's half interest in the insurance settlement. The trial court entered a judgment against both the defendants jointly and severally and the father appealed. This court stated that a trustee is not liable to a beneficiary for a breach committed by a co-trustee unless he had participated in the breach, had improperly delegated administration of the trust to the co-trustee, approved or concealed a breach committed by the co-trustee, had failed to exercise reasonable care so that the co-trustee could commit the breach or had not compelled the co-trustee to redress the breach. In this case, the father had not breached any fiduciary duties. The culpable defendant, the husband, had absconded with the money from the policy only after the father had signed away his interest in the trust. Even as a mere third person, the father did not know that the husband had converted the money for his own uses. The judgment concerning the defendant father was reversed. Brixey v. Hoffman, 101 Idaho 215, 611 P.2d 1000, 1002-1003.

Mass.

Mass.2008. Cit. in ftn. Current trustees and beneficiary sued former trustees, alleging that defendants breached their fiduciary duties in 1984 by redeeming for inadequate consideration shares of stock held in trust for beneficiary. The trial court granted summary judgment for defendants on limitations grounds. Affirming in part, this court held, inter alia, that plaintiffs' claims arising out of the challenged redemption in 1984 were time-barred, since successor trustee was on notice in 1984 of potential claims against defendants but failed to assert them, and he had no disqualifying agency or other relationship with defendants with respect to that transaction. The court noted that the fact that one of the defendants was a cotrustee with successor trustee from 1984 to 1986 was of no consequence, since an innocent trustee had a duty to redress a breach of fiduciary duty by a wrongdoing cotrustee. O'Connor v. Redstone, 452 Mass. 537, 561, 896 N.E.2d 595, 613.

Mo.App.

Mo.App.1988. Quot. in sup., com. (a) quot. in sup. After the beneficiary of an estate sued its two personal representatives for mismanagement, the trial court removed one representative and limited the liability of the other for the loss caused by their mismanagement. Reversing and remanding, this court held that the personal representatives were jointly and severally liable for the losses. The court stated that the law pertaining to joint and several liability of cotrustees should be extended to personal representatives. The court reasoned that, when several trustees are liable for a breach of trust committed by them jointly or for a breach committed by one of them for which the others are liable, they are jointly and severally liable for the breach of trust. In re Estate of Chrisman, 746 S.W.2d 131, 135.

N.Y.Sup.Ct.

N.Y.Sup.Ct.1982. Cit. in disc. The plaintiff trustee brought a legal malpractice action against her former attorneys. The

defendants then served a complaint seeking contribution against another law firm alleging that if it was malpractice for the defendants to recommend that the plaintiff enter into a settlement agreement regarding the trust, then the third-party defendant contributed to the plaintiff's injuries by its subsequent representation of the plaintiff. The third-party defendant moved to dismiss the third-party complaint on the grounds that the actions alleged did not constitute a cause of action in legal malpractice. This court stated that a fiduciary who knew that a cofiduciary had breached a fiduciary duty was himself guilty of a similar breach if he failed to object or to take steps to rectify the situation. The court further stated that the plaintiff could not resign without following the proper procedure, nor could she avoid liability for breaches of trust committed prior to her resignation. Therefore, the advice given by the third-party defendant to the plaintiff to apply to the court for instructions and directions was correct and did not constitute malpractice. The motion to dismiss the third party complaint was granted. Rosner v. Paley, 116 Misc.2d 454, 455 N.Y.S.2d 959, 964, order reversed 99 A.D.2d 1018, 473 N.Y.S.2d 808 (1984).

N.Y.Sup.Ct.1962. Cit. in sup. In accounting proceeding, the court held that the estate of deceased successor trustee was not a necessary party and even if estate could be held liable, such liability was in addition to that of surviving trustee and the objectors to the account should seek relief against the surviving trustee alone, where trust made trustees liable only for their own negligence. In re Kellogg's Trust, 35 Misc.2d 541, 230 N.Y.S.2d 836, 839.

Okl.

Okl.1984. Cit. in ftn. This litigation arose out of a dispute between a former administrator of an estate and its successor administrator when the successor petitioned for an accounting. The trial court refused to surcharge the former administrator for losses incurred by the estate, but denied him additional compensation and attorney fees. On appeal, this court affirmed in part, holding that the former administrator was not liable for any losses the estate may have suffered, as any losses were offset by gains made through a stock sale. Furthermore, the beneficiary of an estate who consented to an act or omission by the trustee was precluded from holding that trustee liable for the consequences. The court also held that attorney fees should be awarded to the former administrator, and recognized the general rule that corepresentatives were jointly and severally liable if they acted together or if one approved or acquiesced in the improper conduct of another. Affirmed in part, reversed in part, and remanded. Matter of Estate of Bartlett, 680 P.2d 369, 379.

Pa.Super.

Pa.Super.1991. Subsec. (2)(d) cit. in ftn. A Roman Catholic diocese petitioned the orphan's court for removal of trustees that allegedly were mismanaging a foundation. The orphan's court removed the trustees. Affirming in part, this court held that the orphan's court did not err in removing the trustees, two of whom had in effect abdicated their offices and allowed a third trustee a free hand to mismanage the foundation. The court rejected the trustees' argument that the trust document establishing the foundation allowed for the appointment of one trustee to act for all, noting that, because there was no evidence that any such appointment was made, the two abdicating trustees were chargeable, not only with their own actions, but also with those acts of their cotrustees that their failure to exercise reasonable care allowed to occur. In re Francis Edward McGillick Found., 406 Pa.Super. 249, 594 A.2d 322, 332, appeal granted 529 Pa. 649, 602 A.2d 860 (1992), affirmed in part, reversed in part 537 Pa. 194, 642 A.2d 467 (1994).

Wis.

Wis.1965. Subsec. (2) and illus. b and d quot. in sup. in ftn. in sup. An electrical equipment company's profits were declining, and antitrust suits were being instituted against it. Additionally, the vice-president, who was also the trustee of a trust consisting solely of shares in the company, sold most of his own shares in the company. The court held that these facts established a duty by the trustee to diversify the trust investments and to sell them when it became apparent that they were declining in value. The court also held that a co-trustee who delegated to the vice-president the discretion to invest was not entitled to be indemnified by the vice-president for her breach of duty as trustee because the fact that she was less negligent

than the vice-president would not exonerate her. In re Mueller's Trust, 28 Wis.2d 26, 135 N.W.2d 854, 865.

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Distinguished by Leonard Parness Trucking Corp. v. Omnipoint Communications, Inc., D.N.J., September 27, 2013

190 F.3d 125
United States Court of Appeals,
Third Circuit.

Nick DARDOVITCH
v.
Mark S. HALTZMAN, Esquire; Catherine A. Backos, As Trustees of Glenn Eagle Square Equity Assoc. Trust; Glenn Eagle Square Equity Associates, Inc.
Mark S. Haltzman, Appellant in No. 98–1421
Nick Dardovitch
v.
Mark S. Haltzman, Esquire; Catherine A. Backos, as trustees of Glenn Eagle Square Equity Assoc. Trust; Glenn Eagle Square Equity Associates, Inc.
Mark S. Haltzman, Appellant in No. 98–1422
Nick Dardovitch, Appellant in No. 98–1452
v.
Mark S. Haltzman, Esquire; Catherine A. Backos, As Trustees of Glenn Eagle Square Equity Assoc. Trust; Glenn Eagle Square Equity Associates, Inc.

Nos. 98–1421, 98–1422, 98–1452. | Argued: Jan. 28, 1999. | Filed: Sept. 7, 1999.

Alleged beneficiary sued trustees and trust for amounts allegedly due him and for an accounting. The United States District Court for the Eastern District of Pennsylvania, Stewart Dalzell, J., granted partial summary judgment in favor of plaintiff, concluding that he was a beneficiary, and ordered an accounting. Thereafter, the District court, 1998 WL 13271, determined that one trustee had breached fiduciary duty, that second trustee was not liable, and awarded attorney fees. First trustee and beneficiary appealed. The Court of Appeals, Becker, Chief Judge, held that: (1) beneficiary was not entitled to a jury trial with respect to trust accounting; (2) amount in controversy for purposes of diversity jurisdiction was beneficiary's entire interest in the trust,and not just the amount currently due; (3) attorney trustee's acceptance of attorney fees for services to the trust did not violate the rule against self-dealing; (4) under retainer agreement, attorney, the first trustee, was not entitled to additional fees, beyond the contingent fee percentage, for collection efforts; (5) district court did not abuse its discretion in awarding beneficiary most of his requested attorney fees for litigation prior to the court's decision requiring the trustees to account, and a portion of fees requested for work after that date; (6) district court did not properly determine the amount of attorney fees; and (7) district court did not apply correct standard in relieving second trustee from liability for acts of first trustee.

Affirmed in part, vacate in part, and remanded.

West Headnotes (42)

[1] **Jury**
Accounting and settlement

Beneficiary was not entitled to a jury trial with respect to trust accounting. U.S.C.A. Const.Amend. 7; Restatement (Second) of Trusts § 197.

Cases that cite this headnote

[2] **Jury**
Application of constitutional provisions in general

A party ordinarily does not have a right to a jury trial in an equitable proceeding. U.S.C.A. Const.Amend. 7.

Cases that cite this headnote

[3] **Jury**
Accounting and settlement

While an accounting must be tried to a jury in certain circumstances, i.e., where the accounting is sought merely because of the complicated nature of the accounts, or where the accounting is ancillary to an equitable claim and is in essence a claim for repayment of a debt, where the duty to account is itself equitable, no right to a jury trial arises. U.S.C.A. Const.Amend. 7.

of corporate client and a beneficiary of the trust. Restatement (Second) of Contracts § 206 comment.

Cases that cite this headnote

[23] **Attorney and Client**
Construction and Operation of Contract

Under the general law governing the responsibilities of contingent fee representation, attorney was not entitled to additional fees, beyond the contingent fee percentage, for collection efforts, under retainer agreement providing for receipt of only on moneys "recovered" or "received," despite attorney's contention that he had not thought collection would be difficult, as reflected by the fact that he was willing to accept notes from the defendants, and though majority shareholder of corporate client wrote another shareholder after settlement indicating that collection efforts might be necessary and that attorney would be paid additional fees for them.

3 Cases that cite this headnote

[24] **Attorney and Client**
Construction and Operation of Contract

A contingent-fee attorney is not entitled to additional fees for collecting on a judgment, absent some significant evidence that the collection efforts were not within the contemplation of the parties at the time they entered into the contingent fee agreement.

1 Cases that cite this headnote

[25] **Costs**
American rule; necessity of contractual or statutory authorization or grounds in equity

Under Pennsylvania law, there can be no recovery for counsel fees from the adverse party, in the absence of express statutory allowance of the same, or clear agreement by the parties, or some other established exception.

5 Cases that cite this headnote

[26] **Trusts**
Costs

One of the exceptions to the American Rule on attorney fees is that attorney's fees are available at the discretion of the court in cases involving trusts.

1 Cases that cite this headnote

[27] **Federal Civil Procedure**
Discretion of court

The District Court's discretion in deciding whether to grant attorney's fees in an equity case is exceedingly broad.

2 Cases that cite this headnote

[28] **Trusts**
Costs

Under Pennsylvania law, the district court did not abuse its discretion in awarding trust beneficiary most of his requested attorney fees for litigation prior to the court's decision requiring the trustees to account, where lengthy pre-accounting litigation was necessitated by trustee's persistent refusal to provide beneficiary with an accounting, even after the court determined as a matter of law that plaintiff was a beneficiary entitled to an accounting, and where the litigation provided a benefit to the trust, as it brought about an accounting that exposed breaches of fiduciary duty and preserved a substantial amount of funds for the beneficiaries.

2 Cases that cite this headnote

[29] **Trusts**
Costs

A trustee may be found liable for a beneficiary's attorney's fees when the trustee has acted wrongfully, especially where the litigation itself is made necessary by the trustee's defalcation.

1 Cases that cite this headnote

[30] **Trusts**
Costs

Under Pennsylvania law, district court did not abuse its discretion in awarding beneficiary a portion of the attorney's fees he requested from trustee for work done after the court called the trustees to account, based on the fact that beneficiary's litigation of his objections to the accounting resulted in a benefit to the trust to the extent that it resulted in the return of funds to the trust, as well as a reduction in the potential liabilities of the trust, and on fact that trustee breached his fiduciary duty in a way that resulted in a direct benefit to himself.

Cases that cite this headnote

[31] **Trusts**
Costs

Under Pennsylvania law, one of the situations in which a court may award attorney's fees in litigation concerning a trust is where the litigation results in a benefit to the trust as whole.

Cases that cite this headnote

[32] **Trusts**
Costs

The district court did not properly determine the amount of attorney's fees to be awarded to beneficiary under Pennsylvania law in suit against trustee, where the district court relied only upon beneficiary's submission, which included statements from the attorneys and their time records, the court held no hearing on this issue, trustee had no opportunity to challenge on a factual basis the fee requested, and the district court failed to set forth an adequate basis for its calculations.

Cases that cite this headnote

[33] **Federal Courts**
Questions of Law in General
Federal Courts
Costs and attorney fees

Court of Appeals would apply plenary review to the question of whether the district court applied the proper legal standard, subjective reasonableness in relying on advice of counsel versus objective reasonableness, in determining whether trustee should be excused from liability for attorney fees improperly paid to cotrustee.

Cases that cite this headnote

[34] **Trusts**
Duty of trustee in general

Under Pennsylvania law, a trustee must exercise reasonable care to ensure that his or her cotrustees do not breach their fiduciary duties.

Cases that cite this headnote

[35] **Trusts**
Duty of trustee in general

In general, a trustee is not liable to the beneficiary under Pennsylvania law for a breach of trust committed by a cotrustee, but trustee is liable to the beneficiary if he: (1) participates in a breach of trust committed by his cotrustee; (2) improperly delegates the administration of the trust to his cotrustee; (3) approves or acquiesces in or conceals a breach of trust committed by his cotrustee; (4) by his failure to exercise reasonable care in the administration of the trust has enabled his cotrustee to commit a breach of trust; or (5) neglects to take proper steps to compel his cotrustee to redress a breach of trust. Restatement (Second) of Trusts § 224(1, 2); Restatement (First) of Trusts § 224(1).

1 Cases that cite this headnote

[36] **Trusts**
Duty of trustee in general

A fiduciary is required under Pennsylvania law to use such common skill, prudence and caution as a prudent man, under similar circumstances, would exercise in connection with the management of his own estate, and this duty of care is not reduced even if the specific trustee lacks skill in some respects. Restatement (Second) of Trusts § 174 comment.

Cases that cite this headnote

[37] **Trusts**
Duty of trustee in general

Under Pennsylvania law, simple, passive negligence of a trustee can give rise to liability for the breaches of a cotrustee.

Cases that cite this headnote

[38] **Trusts**
Duty of trustee in general

Advice of counsel is not an absolute defense to liability under Pennsylvania law for a breach of fiduciary duty, including liability for the defalcation of a cotrustee.

Cases that cite this headnote

[39] **Trusts**
Counsel fees and costs

Subjective good faith of trustee who relied on advice and counsel of cotrustee, an attorney, in performing her duties as trustee was only the beginning of the inquiry under Pennsylvania law as to whether trustee should be relieved of liability to beneficiary for cotrustee's improper payment of attorney fees to himself; if trustee relied on counsel, she must have done so reasonably, i.e., making a prudent choice of counsel and taking reasonable care to ensure that counsel performed effectively, and even if she relied reasonably on counsel, trustee must have acted reasonably in performing her duties as a whole in order to avoid liability.

Cases that cite this headnote

[40] **Trusts**
Compensation

Rights of indemnity and contribution between cotrustees exist in trust cases. Restatement (Second) of Trusts § 258(1).

Cases that cite this headnote

[41] **Trusts**
Costs

Unlike liability for a breach of trust, which is based only on a reasonable care test, an award of attorney's fees against a trustee turns on the

trustee's active culpability.

Cases that cite this headnote

[42] **Trusts**
Costs

Trustee was properly relieved of liability to beneficiary for attorney fees in suit arising from cotrustee's breach of trust, under Pennsylvania law, where trustee's conduct arose from excusable neglect, and not bad faith, especially in comparison with cotrustee.

1 Cases that cite this headnote

Attorneys and Law Firms

***130** Joseph M. Donley (Argued), Patrick W. Kittredge, Glenn E. Davis, Kittredge, Donley, Elson, Fullem & Embrick, Philadelphia, PA, for Mark S. Haltzman.

Cletus P. Lyman (Argued), Michael S. Fettner, Lyman & Ash, Philadelphia, PA, for Nick Dardovitch.

Steven R. Sparks (Argued), Eckell, Sparks, Levy, Auerbach & Monte, A Professional Corporation, Media, PA, for Catherine A. Backos, as trustees of Glenn Eagle Square Equity Associates Trust and Glenn Eagle Square Equity Associates, Inc.

Before: BECKER, Chief Judge, SCIRICA and ROSENN Circuit Judges.

OPINION OF THE COURT

BECKER, Chief Judge.

These cross-appeals present interesting questions concerning the amount-in-controversy requirement for diversity jurisdiction, the extent to which an attorney holding a contingent-fee agreement may charge additional fees for collecting the proceeds of a settlement or judgment, and the proper administration of trusts by trustees and the beneficiaries' remedies for errors therein under Pennsylvania law. The principal appellant is defendant Mark S. Haltzman, a member of the Pennsylvania bar and a trustee of the Glen Eagle Square Equity Associates Trust (the "Trust"). Haltzman successfully represented Catherine A. Backos, a co-defendant and co-trustee, in a separate civil RICO claim brought by her and Glen Eagle Square Equity Associates ("GESEA"), in which she was a major shareholder, on a contingent fee basis. In order to administer and distribute the proceeds of settlement of the RICO claim, Haltzman and Backos established the Trust, naming themselves as trustees. There were numerous beneficiaries, including two shareholders and creditors of GESEA—Nick Dardovitch, the plaintiff and cross-appellant, and Backos—and also Haltzman himself, whose interest sprang from his contingent fee. As part of his efforts in administering the Trust, Haltzman took steps to collect on the notes that constituted the trust corpus. He paid himself an attorney's fee for this action out of the Trust's funds, and this case centers on the propriety of Haltzman's acceptance of these additional fees.

As always, the threshold question is one of jurisdiction. Dardovitch alleged, and the District Court found, that his claim fell within the District Court's diversity jurisdiction. Haltzman argues that this subject-matter jurisdiction is lacking because Dardovitch's claim fails to meet the amount-in-controversy requirement. Haltzman contends that the amount in controversy is determined by payments presently due. That is ordinarily the case. But where, as here, the plaintiff had good cause to believe that he needed to bring suit to establish his right to receive any funds under the trust, the entire amount of the plaintiff's interest in the trust can become the amount in controversy. Since this amount substantially exceeded the jurisdictional amount, the District Court had subject-matter jurisdiction.

Both Haltzman and Dardovitch raise numerous issues relating to the District Court's decision on the merits. The central issue is whether an attorney who enters into a contingent-fee agreement that is not specific on the point is entitled to additional fees for collecting the proceeds of the settlement or judgment. The District Court concluded that Haltzman's fee under the original contingent fee agreement included *both* his actions in securing a settlement and any steps necessary to collect the proceeds of the settlement, and that he was therefore not entitled to additional fees for the collection actions. The ***131** District Court thus held that Haltzman had breached his fiduciary duty to the Trust by accepting legal fees for collecting on the notes that were the Trust's sole assets.

Haltzman challenges this reading of the Trust and contingent fee agreement, arguing that they were limited to his prosecution of the action to judgment and did not include his collection efforts. In analyzing the fee agreement, the District Court looked at a variety of factors, including the fact that Haltzman himself drafted the agreement; the terms of the agreement; and the general understanding of contingent-fee agreements. It also considered, but rejected as self-serving, Backos's testimony concerning her intent in entering into the agreement. We conclude that the District Court's findings of fact and conclusions of law as to the meaning of the retainer agreement and the Trust must be upheld.

Haltzman also challenges the District Court's award of attorney's fees to Dardovitch. The court ordered Haltzman to pay part of Dardovitch's attorney's fees based on general equitable principles applicable in trust cases. Without holding a hearing, the court ordered Haltzman to pay most of Dardovitch's accrued fees from the beginning of the suit until the court granted Dardovitch partial summary judgment and ordered an accounting. This award was based on the conclusion that most of this work was necessitated by Haltzman's continued refusal to admit that Dardovitch was a beneficiary of the Trust. The court also ordered Haltzman to pay one-quarter of the fees Dardovitch had paid for his attorneys' work subsequent to the accounting. This latter award was based on the fact that some of Dardovitch's objections to Haltzman and Backos's accounting were sustained, although many were not.

We agree with the general propriety of directing Haltzman to pay Dardovitch's fees. However, because the District Court held no hearing, did not adequately explain the basis of its fee calculation, and in particular did not sufficiently tie the award to the factors warranting the award, we will vacate the district court's order and remand with instructions to hold a hearing to recalculate the attorney's fee award based on the reasonableness of the claimed fees. On remand, the court should examine the claims carefully to ensure that the claimed fees are sufficiently related to the justifications for the fee award.

In his cross-appeal, Dardovitch challenges the District Court's conclusion that Backos should not be jointly liable for Haltzman's breach of his fiduciary duty. The District Court relieved Backos of liability because it concluded that she relied on Haltzman to such an extent in legal matters that his breach cannot fairly be attributed to her. Under Pennsylvania law, a trustee is obligated to exercise reasonable care to ensure that her co-trustees do not breach their fiduciary duties. A trustee who breaches this duty may become jointly liable for the breaches of the cotrustee. Furthermore, reliance on the advice of counsel is only one factor to be considered in determining whether a trustee acted reasonably, and even then the reliance itself must be reasonable. The Court's decision, which seems to have applied at most a subjective reasonableness standard, appears to be contrary to the objective reasonableness standard of Pennsylvania law. Accordingly, we will vacate the District Court's order and remand Dardovitch's claim against Backos so that the court can evaluate her liability under the correct standard, i.e., whether she exercised reasonable care to ensure that Haltzman did not breach his fiduciary duty. The orders of the District Court will thus be affirmed in part and vacated in part, and the case remanded for further proceedings consistent with this opinion.

I. Facts and Procedural History

This case originated in the settlement of a civil RICO suit brought by Backos and GESEA. GESEA was organized to purchase and operate a shopping center. Its ***132** shareholders included Backos (55%), Dardovitch (15%) and two of Backos's siblings (15% each). GESEA obtained commitments from various financing companies, but these firms backed away from their commitments. As a result, the shopping center was sold to another entity, and in 1993 Backos and GESEA filed a civil RICO suit against the various financing companies. This suit was the sole business of GESEA at that time and subsequently. Backos retained Haltzman to represent her and GESEA. Haltzman initially proposed that he would do the work for a 30% contingent fee plus expenses to be paid promptly, with a retainer which was paid up front. *See* App. at 1774–77. In May 1993, GESEA adopted a shareholder resolution providing that Haltzman's fee, including expenses, would be capped at 30% of the recovery. *See* App. at 1530–34. This shareholder resolution was subsequently amended in August 1993 to reflect that the fee was to be a 30% contingent fee, not including expenses.

In January 1994, when Backos was unable to keep current with her payments to Haltzman for litigation expenses, the representation agreement was again amended to provide a priority for Haltzman in the proceeds of the litigation. *See* App. at 1778–79. Under the amended agreement, Haltzman was to receive the entire first $150,000 of any sums received as a result of the litigation; Backos and GESEA were to receive the next $150,000; and Haltzman was to be entitled to 30% of the next $1.7 million and 15% of any recovery over $2

million. Shortly thereafter, the suit settled for $994,000. The settlement agreement provided that Backos and GESEA would be paid via long-term, non-interest-bearing notes in this amount.

Apparently out of concern that GESEA's creditors would immediately claim all of the money, Backos and GESEA set up a trust—the GESEA Trust—for the receipt and distribution of the proceeds of the settlement. Haltzman and Backos were named trustees. The proceeds were to be distributed in accordance with the representation agreement, along with certain payments to GESEA's creditors. The remaining money due GESEA was to be distributed to the shareholders in proportion to their interests. *See* App. at 1574–79. Dardovitch's share of the $994,000 settlement was $104,000, although it was only due and payable as the Trust received it. Prior to the filing of the complaint in this case, Haltzman informed Dardovitch by letter that only about $30,000 was due to him at that time.

It became clear after the settlement that it would be difficult to collect on the notes. Accordingly, Haltzman took legal measures. *See, e.g., Glen Eagle Square Equity Assocs. Trust v. DSL Capital Corp.,* No. CIV. A. 95–7939, 1996 WL 689113 (E.D.Pa. Nov.26, 1996) (entering judgment in favor of plaintiff on action confessing judgment on one of the aforementioned promissory notes). Ultimately, Haltzman conducted work for which he billed the Trust approximately $63,000 on an hourly basis. As of May 1997, the Trust had received $335,000, of which $172,000 was paid out as legal fees and $44,000 as litigation costs, to Haltzman. Thus, 64.5% of the money thus far received has gone to pay legal fees and costs.

Although Dardovitch was informed of the creation of the Trust and received a copy of the distribution schedule of funds from it, he received little additional information from Haltzman or Backos concerning the status or nature of the Trust. Accordingly, he asked them about the income and expenditures of the Trust in order to determine whether they were managing it properly, and whether any money was due him. Haltzman and Backos, however, gave him no information; indeed, by August 1996, Dardovitch still had not received any information on or money from the Trust. Although Backos subsequently provided him with some information, it was incomplete and inaccurate, and Dardovitch again requested information from Haltzman.

*133 Haltzman finally responded on December 10, 1996, by sending a letter containing the following language to Dardovitch's lawyer:

> *Please be advised that Nick Dardovitch is not a beneficiary of the Trust Agreement, as the beneficiaries of the Trust are Glen Eagle Square Equity Associates, Inc. and Catherine Backos.* Accordingly, even if the information you requested in your letter was appropriate (which it is not), he is not entitled to an accounting. Further, the Trust document itself does not require that the Trustee provide an accounting to the beneficiaries.
>
> Please also be advised that Mr. Dardovitch has, in the past, acted detrimentally to the best interests of Glen Eagle Square Equity Associates, Inc. I suggest that Mr. Dardovitch consider his prior action and his possible liability as to same before he elects to take actions which will expose himself to potential liability.
>
> Please be further advised that to the extent that your office decides to bring litigation, which would be improper based on the fact that Mr. Dardovitch is not a beneficiary of the Trust, the Trust will seek to hold your firm, as well as Mr. Dardovitch, liable for all of its costs and expenses and will seek damages for malicious prosecution and abuse of process. Your letter is apparently a continuation of Mr. Dardovitch's past guerilla tactics in attempting to extort money to which he was not entitled.

App. at 58 (emphasis added).

On January 6, 1997, Dardovitch filed suit against Haltzman, Backos, and the Trust for amounts due him and for an accounting. Haltzman and Backos defended by challenging jurisdiction and denying that Dardovitch was a beneficiary of the Trust. The District Court initially determined that it had subject-matter jurisdiction, *see* App. at 84–85, and that Haltzman was not entitled to a jury trial, *see* App. at 820. It then granted partial summary judgment in favor of Dardovitch, concluding that he was clearly a beneficiary, and ordered an accounting. *See* Dist. Ct. Order, App. at 812–19.

Dardovitch then challenged certain aspects of the accounting, and the Court held a hearing. *See Dardovitch v. Haltzman,* Civ. A. No. 97–52, 1998 WL 13271 (E.D.Pa. Jan.13, 1998). The Court concluded that Dardovitch could not challenge pre-Trust transactions, *see* 1998 WL 13271, at *2–*3, and that Backos had not breached her fiduciary duty, *see* 1998 WL 13271, at *8 n. 28. It also found that Haltzman had breached his fiduciary duty by claiming attorney's fees for the collection costs and ordered him to refund the fees to the Trust. *See* 1998 WL 13271, at *4–*7. Because of certain setoffs, however, the Court ultimately found that Haltzman had to pay about $14,000 back to the Trust. *See* Appellant's Brf.App.

> [I]t conducted no hearing and made no findings of fact as to the reasonableness of the fees requested and gave no statement as to the standard governing its award. Thus, we cannot adequately review the reasonableness of the action of the district court in awarding counsel fees under the circumstances. We conclude that its action was not consistent with a sound exercise of discretion under Pennsylvania law.

Security Mut., 979 F.2d at 332; *see also Estate of Brockerman*, 332 Pa.Super. 88, 480 A.2d 1199, 1204 (Pa.Super.Ct.1984) (remanding fee award where record did not indicate "what hourly rate the firm charged, what the prevailing rate in the general area was at the time, what services were performed, or how much time those services consumed"); *cf. Estate of Baker*, 485 Pa. 218, 401 A.2d 737 (Pa.1979) (no remand necessary where trial court heard lengthy testimony and made extensive findings regarding the services rendered by the attorney, the difficulty of the actions undertaken, and the reasonableness of the fee request as a whole); *Sewak v. Lockhart*, 699 A.2d 755 (Pa.Super.Ct.1997).

The District Court's fee award in this case is like that in *Security Mutual*. In determining the fee award, the District Court relied only upon Dardovitch's submission, which included statements from the attorneys and their time records. The court held no hearing on this issue, and Haltzman had no opportunity to challenge on a factual basis the fee requested. Haltzman in fact identifies several contested factual issues concerning the attorney's fee award, including whether the fees were incurred in response to abusive conduct, whether Dardovitch presented adequate documentation for the fees, and whether Dardovitch is entitled to fees for preparation of the fee petition.[15]

Furthermore, the reasoning supporting the District Court's decision to reduce the fee awarded below that requested is sketchy. For instance, the court reduced the fee award for pre-Accounting litigation by $10,000 "to account for activity unrelated to the trustees' malfeasances and [to] reflect more accurately the value conferred to the Trust as a result of the account." We cannot determine from the record whether this reduction was supported. Likewise, the District Court awarded Dardovitch only 25% of his request for post-Accounting fees, because many of his objections to the account failed. But we cannot determine from the record whether the 25% figure accurately represents the amount of work expended on the successful claim. The District Court was fully ***149** familiar with the record and perhaps instinctively reached the correct result; because it did not hold a hearing and set forth an adequate explanation of its calculations, however, we cannot be sure that its award of attorney's fees was consistent with the exercise of sound discretion. Accordingly, we will vacate the attorney's fee award and remand this matter to the District Court for further proceedings.

V. Backos's Liability

Dardovitch cross-appeals from the District Court's order excusing Backos from liability for the repayment of the attorney's fees improperly paid to Haltzman for the collection actions. He contends that Backos was negligent in failing to prevent Haltzman from breaching the Trust and therefore should be jointly liable with Haltzman. Dardovitch further submits that Backos should not be excused from liability because she relied on the advice of her attorney, i.e., Haltzman.

[33] The District Court's holding concerning Backos's liability is somewhat murky. Its discussion of the issue occurs mainly in the context of liability for Dardovitch's attorney's fees. During its explanation of why Backos would not be jointly liable with Haltzman for Dardovitch's attorney's fees, the court inserted a footnote stating that it would not hold Backos liable for the underlying breach of fiduciary duty. "While there is ample evidence of Ms. Backos's neglect as trustee which might be construed to support [a claim against her for imputed breach of fiduciary duty], for the reasons stated *supra* ... we think that her co-trustee's malfeasance should not be imputed to Ms. Backos." *Dardovitch*, 1998 WL 13271, at *8 n. 28. In the referenced portion of the opinion, the court stated as follows:

> We do not question Ms. Backos's level of sophistication in business affairs—quite to the contrary, her testimony showed her to be an intelligent and very capable businesswoman—but it is evident from these proceedings that in legal matters she relied exclusively on Haltzman and his firm. Indeed, Haltzman's firm represented her even in this litigation.

1998 WL 13271, at *4 n. 15. Because of Backos's

reliance on counsel, and Haltzman in particular, the District Court excused her from liability.[16]

[34] [35] A trustee must exercise reasonable care to ensure that his or her co-trustees do not breach their fiduciary duties. In general, of course, "[a] trustee is not liable to the beneficiary for a breach of trust committed by a co-trustee." *Herr v. United States Cas. Co.,* 347 Pa. 148, 31 A.2d 533, 534 (Pa.1943) (quoting Restatement (First) of Trusts § 224(1)); *see also* Restatement (Second) of Trusts § 224(1); 3 *Scott & Fratcher, supra,* § 224, at 401. This is not an absolute rule, however:

> A trustee is liable to the beneficiary, if he (a) participates in a breach of trust committed by his cotrustee; or (b) improperly delegates the administration of the trust to his co-trustee; or (c) approves or acquiesces in or conceals a breach of trust committed by his co-trustee; or (d) by his failure to exercise reasonable care in the administration of the trust has enabled his co-trustee to commit a breach of trust; or (e) neglects to take proper steps to compel his cotrustee to redress a breach of trust.

Restatement (Second) of Trusts § 224(2); *accord* 3 *Scott & Fratcher, supra,* § 224, at 401 (same); *see also Herr,* 31 A.2d at 534 (quoting in part Restatement (First) of Trusts § 224(2)).

[36] These exceptions flow out of the general duty of each cotrustee with respect to the action of his or her fellows. "If there are several trustees, each trustee ***150** is under a duty to the beneficiary to participate in the administration of the trust and to use reasonable care to prevent a co-trustee from committing a breach of trust or to compel a co-trustee to redress a breach of trust." Restatement (Second) of Trusts § 184. "A fiduciary is required to use such common skill, prudence and caution as a prudent man, under similar circumstances, would exercise in connection with the management of his own estate." *Estate of Lohm,* 440 Pa. 268, 269 A.2d 451, 454 (Pa.1970); *see also Estate of Lerch,* 399 Pa. 59, 159 A.2d 506, 509 (Pa.1960). This duty of care is not reduced even if the specific trustee lacks skill in some respects. *See* Restatement (Second) of Trusts § 174 cmt. a ("A trustee is liable for a loss resulting from his failure to use the care and skill of a man of ordinary prudence, although he may have exercised all the care and skill of which he was capable.").

[37] Pennsylvania case law demonstrates the extent to which simple, passive negligence can give rise to liability for the breaches of a co-trustee. In *Estate of Adams,* 221 Pa. 77, 70 A. 436 (Pa.1908), the court held a trustee liable for his negligent failure to prevent a breach by a co-trustee, even where he had previously taken some steps to present such a breach. The trust corpus in *Adams* included some bonds that were held in a safe deposit box that the trustees had agreed they would not open unless both were present. One trustee, who was aware that the other was in financial distress, discovered that the bonds were missing in 1896. He then confronted the other trustee, who returned the bonds and agreed not to open the box in the first's absence. The first trustee did not inform the bank of this arrangement. He became an invalid in 1904, shortly after the trustees' last joint visit to the safety deposit box. The second trustee died in 1906, at which time it was discovered that the bonds were missing. The court in *Adams* affirmed the Orphan's Court's conclusion that the first trustee had acted negligently and should be held liable for the missing bonds.

In *Estate of Reyburn,* 43 Pa. D. & C. 85 (Orph.Ct.1942), the court held a trustee liable for the breach of his cotrustee where he relied on his co-trustee's expertise to the trust's detriment. The co-trustee in *Reyburn,* a trust company, invested certain trust funds in assets in which the settlor had indicated trust funds could not be invested. The individual trustee knew nothing about the terms of the will limiting the possible investments, nor was he aware of those facts that indicated that the assets were not proper investments. He simply assumed that they were appropriate because he presumed that the trust company would not have purchased them if they were not appropriate. The court found that the individual trustee was liable for the trust company's breach because he was negligent in failing to oversee the company's actions. Furthermore, since the trust company had not actively misstated material facts relating to the investment, he was not excused from liability for relying on its expertise. In particular, the court stated that "there is no presumption of greater competence in a trust company than in an individual." 43 Pa. D. & C. at 90.

[38] Furthermore, advice of counsel is not an absolute defense to liability for a breach of fiduciary duty, including liability for the defalcation of a co-trustee. "Although the court will consider that the executor acted upon the advice of counsel in determining whether he acted in good faith, this does not provide the executor with complete immunity to a surcharge." *Estate of Geniviva,* 450 Pa.Super. 54, 675 A.2d 306, 310

(Pa.Super.Ct.1996) (citing *Lohm,* 269 A.2d at 455); *see also Lohm,* 269 A.2d at 455 ("Where a fiduciary acts upon the advice of counsel, such fact is a factor to be considered in determining good faith, but is not a blanket of immunity in all circumstances." (citations and quotations omitted)). "The initial choice of counsel must have been prudent under all ***151** the circumstances then existing, and the subsequent decision to rely upon this counsel must also have been a reasonably wise and prudent choice." *Lohm,* 269 A.2d at 455; *see also Geniviva,* 675 A.2d at 310.

[39] [40] [41] [42] The District Court did not analyze Backos's liability under the principles set forth above. Essentially, the court required of Backos only subjective good faith; it excused Backos from liability solely because she relied on Haltzman's advice and counsel in performing her duties as trustee. But, as is clear from the preceding discussion, subjective good faith is only the beginning of the inquiry. If Backos relied on counsel, she must have done so reasonably, i.e., making a prudent choice of counsel and taking reasonable care to ensure that counsel performed effectively. Furthermore, even if she relied reasonably on counsel, Backos must have acted reasonably in performing her duties as a whole in order to avoid liability. The District Court reached none of these issues; hence, we will vacate the District Court's order to the extent it relieved Backos from liability for Haltzman's breach, and remand for further proceedings in this regard.[17]

VI.

For the foregoing reasons, the orders of the District Court will be affirmed in part and vacated in part, and the case remanded for further proceedings consistent with this opinion. The parties will bear their own costs.

All Citations

190 F.3d 125

Footnotes

1 We agree with the District Court that Haltzman was not entitled to a jury trial with respect to the accounting. A party ordinarily does not have a right to a jury trial in an equitable proceeding. The Supreme Court has recognized that an accounting must be tried to a jury in certain circumstances, i.e., where the accounting is sought merely because of the complicated nature of the accounts, or where the accounting is ancillary to an equitable claim and is in essence a claim for repayment of a debt. *See Dairy Queen, Inc. v. Wood,* 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962) (holding that an accounting must be tried to a jury where it is in actuality a claim for repayment of a debt); 9 *Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure* § 2310, at 87–91 (2d ed.1994). Where the duty to account is itself equitable, however, no right to a jury trial arises. *See United States v. Louisiana,* 339 U.S. 699, 706, 70 S.Ct. 914, 94 L.Ed. 1216 (1950) ("The Seventh Amendment ... [is] applicable only to actions at law," not "an equity action for an injunction and accounting." (citation and footnote omitted)); 9 *Wright & Miller, supra,* § 2310, at 90. An action for an accounting of a trust is quintessentially equitable. *See* Restatement (Second) of Trusts § 197 (all remedies of a beneficiary against a trustee are equitable, except for a claim for money immediately and unconditionally due to the beneficiary or a claim to transfer chattel that the trustee is under an immediate and unconditional duty to transfer to the beneficiary). Accordingly, a party to a trust accounting has no right to a jury trial; that is the situation here.

2 Haltzman challenges several aspects of the District Court's calculation of the amount of the surcharge he had to pay, in addition to his challenge to the District Court's conclusion that he was not entitled to additional hourly fees for the collection actions. We find no error in the District Court's reasoning rejecting these claims. *See* Dist. Ct. Order, Appellant's Brf.App. 2, at 4 n. 2, 5 & n. 3.

Dardovitch challenges different aspects of the District Court's calculation of the surcharge. He argues that the District Court erred in allowing Haltzman to receive attorney's fees from the Trust for litigation against the Hanaway group of creditors. In particular, he contends that Haltzman should not be permitted to recover these fees from the Trust because his actions in defense of the Hanaway's claims were in breach of his fiduciary duty to the Trust. The District Court rejected Dardovitch's objection to this payment, concluding that Haltzman's work was, in this case, not covered by the contingent fee agreement and resulted in a benefit to the Trust. *See* App. at 1398–99; Appellant's Brf.App. 2, at 5–6. We see no clear error in the District Court's conclusion, and will affirm its order on this point.

3 In his cross-appeal, Dardovitch disputes *inter alia* the District Court's conclusion that he has no standing to challenge certain actions Backos and Haltzman took before the Trust was executed and, in any case, that the challenge was barred by laches. Dardovitch contends that Backos and Haltzman breached their duties to the other shareholders of GESEA by entering into the contingent-fee agreement. The District Court held that Dardovitch lacked standing as

either a shareholder—since he did not bring a proper shareholder derivative suit—or a beneficiary of the Trust—since the Trust had not yet taken effect. Dardovitch now argues that he has standing to challenge the pre-Trust transactions as a creditor of GESEA under either the "trust fund doctrine" or the Pennsylvania Uniform Fraudulent Transfer Act, 12 Pa. Cons.Stat. §§ 5101–10 (1998 Supp.) (applicable to transactions after February 1, 1994), and the Pennsylvania Uniform Fraudulent Transfer Act, 39 Pa. Cons.Stat. §§ 351–63 (repealed 1993) (applicable to transactions before that date) [hereinafter collectively "PUFT/CA"]. Neither of these applies to this case, however. The "trust fund doctrine" makes the creditors of a corporation the beneficiaries of a trust consisting of the corporate assets, but only after a court order creating the trust, which did not occur in this case. PUFT/CA only applies to certain kinds of transactions, and only prohibits them if they are not for fair consideration and will render the corporation insolvent. *See* 12 Pa. Cons.Stat. §§ 5101, 5105. Since the transactions that Dardovitch challenges do not meet some or all of these requirements, he cannot challenge them under PUFT/CA either. Accordingly, we will affirm the District Court's rejection of Dardovitch's objections to pre-Trust transactions. We need not and do not decide whether the District Court erred in concluding that Dardovitch was barred from asserting these challenges by laches.

4 "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum of $50,000, exclusive of interest and costs, and is between citizens of different States." § 1332(a)(1). Section 1332(a) was amended in 1996 to require that the amount in controversy exceed $75,000. *See* Pub.L. No. 104–317, § 205(a)(1), 110 Stat. 3850 (1996). This amendment took effect on January 14, 1997. *See* § 295(b). Accordingly, since Dardovitch filed suit on January 6, 1997, the required amount in controversy was $50,000, as Dardovitch alleged in his complaint. The precise amount-in-controversy requirement is not terribly important in this case, however, since it either exceeded $75,000 or was less than $50,000. The District Court purported to apply the new $75,000 requirement. *See Dardovitch,* 1998 WL 13271, at *1 n. 1.

5 Haltzman has consistently denied that Dardovitch was a beneficiary of the Trust. Haltzman begins the December 10, 1996, letter by asserting that "Nick Dardovitch is not a beneficiary of the Trust Agreement." App. at 56. In his answer to the complaint, Haltzman again denied that Dardovitch "is a named 'beneficiary' of the trust as the named beneficiaries are Catherine Backos and Glen Eagle Square Equity Associates, Inc." App. at 99.

6 *See Dardovitch,* 1998 WL 13271, at *7 ("Backos and Haltzman spent the better part of this long, acrimonious litigation resisting Dardovitch's demand to provide an account or even a copy of the Trust instrument, insisting from the beginning that he was not a beneficiary of the Trust."). Even after the District Court granted Dardovitch's motion for partial summary judgment and ordered an accounting on the sole ground that Dardovitch was, in fact, a beneficiary of the Trust, Haltzman continued to deny it. *See* 1998 WL 13271, at *7; *see also* App. at 899, 955. Although Haltzman now concedes that Dardovitch is a beneficiary of the Trust, and does not challenge the District Court's conclusion to that effect on appeal, this late concession cannot change the result.

7 Dardovitch alleged in his complaint that Haltzman denied that Dardovitch was a beneficiary of the Trust, and further alleged that as a beneficiary he was entitled to receive distributions from the Trust. *See* App. at 21–22. In his response to Haltzman's motion to dismiss for lack of subject-matter jurisdiction, Dardovitch again referred to Haltzman's December 10, 1996, letter—as well as Backos's answer to the complaint and Haltzman's affidavit in support of his motion to dismiss—denying that Dardovitch was a beneficiary of the Trust. He specifically stated: "Whether plaintiff was entitled to distribution in excess of $50,000 on January 6, 1997, is immaterial, because Mr. Haltzman *absolutely repudiated* Mr. Dardovitch's entire claimed interests in the trust on December 10, 1996." App. at 64.

8 Dardovitch claimed, and the District Court appears to have agreed, that he met the jurisdictional amount requirement by an alternative method: in a claim for an accounting, the amount in controversy is the claimants' entire interest in the trust. Since we conclude that the amount-in-controversy requirement was otherwise met, we need not decide this question.

9 Backos testified as follows:

> Q: My first question to you is: What was your understanding in connection with the Fee Agreement you had with Mark S. Haltzman Associates, as to whether that firm was obligated to go out and collect the judgment that they were going to try to get for you in the litigation?
>
> A: My understanding was that the collection process, if we had to undertake that, was a separate matter, it was a separate litigation.

App. at 1255–56.

> Q: O.K. Now, with respect to the collection, it's your testimony that you have an understanding with Mr. Haltzman that his efforts in that direction are on top of what he has already received?
>
> A. Yes.

App. at 1295–96.

10 Some of the factors on which the District Court relied, however, do not support its conclusion that the fee agreement did not permit Haltzman to take additional fees for his work in the collection actions. First, the District Court concluded that Haltzman's interpretation should be rejected because it would amount to impermissible self-dealing by a trustee. The court noted that trust law prohibits a trustee from engaging in transactions between the trust property and himself individually, and concluded that Haltzman's paying himself for the collection actions out of the Trust's funds violated this prohibition. The prohibition on self-dealing, however, is limited to transactions in property. *See* Restatement (Second) of Trusts § 170 cmts. b-n; *see also* 2A *Austin Wakeman Scott & William Franklin Fratcher, The Law of Trusts* §§ 170.2–.13, at 320–64 (4th ed.1987). The per se prohibition against self-dealing does not apply to transactions in services. A trustee's choice to use his own special services—beyond those usually rendered by a trustee—where the trust requires them ordinarily does not violate the prohibition on self-dealing. *See* 3 *Scott & Fratcher,supra,* § 242.2, at 281–87; *see also* Restatement (Second) of Trusts § 242 cmt. d. The only limits on such transactions are the trustee's fiduciary duties of good faith and reasonable care. *See id.;* 3 *Scott & Fratcher, supra,* § 242.2, at 286. Accordingly, Haltzman's acceptance of additional fees did not violate the rule against self-dealing by a trustee.

The District Court also decided that, if the agreement were construed as Haltzman proposed, then his acceptance of the additional fees would have violated his duties under the Pennsylvania Rules of Professional Conduct. In particular, the court determined that Haltzman would have violated the rule requiring that contingent-fee agreements be in writing and that attorneys provide written statements concerning the outcome of such representation. *See* Pa. R. Prof. Conduct 1.5(c). Haltzman raises serious objections to both of the District Court's premises, i.e., whether his conduct would have violated the Rules of Professional Conduct and whether such a potential violation should guide the interpretation of a contract. Since we need not decide this difficult issue, we will not rely on this aspect of the District Court's reasoning in affirming its judgment. Even leaving this point aside, we think there is ample support in the record for the District Court's conclusion.

11 Admittedly, several other factors the court considered do fall within the ambit of legal construction of a contract, including the *contra preferentem* principle (that a document should be interpreted against its drafter), whether the agreement violated the Rules of Professional Conduct, and the rule against self-dealing. But these factors can also be important in the factual interpretation of a contract. *See, e.g.,* Restatement (Second) of Contracts § 203 cmt. a ("The rules of this section [concerning interpretation of contracts] ... apply only in choosing among reasonable interpretations."); *id.* § 206 cmt. a ("[The rule of *contra preferentem*] is in strictness a rule of legal effect ... as well as interpretation.").

12 *See In re Tutu Wells Contamination Litig.,* 120 F.3d 368, 389–90 (3d Cir.1997). "In order to reject a district court's findings of fact, the reviewing court, after examining all the evidence, must be left with a definite and firm conviction that a mistake has been committed." *Durham Life Ins. Co. v. Evans,* 166 F.3d 139, 147 (3d Cir.1999).

13 The case law on a related issue—the responsibility of a contingent-fee attorney with respect to services to be rendered on appeal—is much more developed. *See, e.g., Quarture v. Allegheny County,* 141 Pa.Super. 356, 14 A.2d 575 (Pa.Super.Ct.1940) (attorney working for contingent fee was not entitled to additional fee for prosecuting appeal, even where attorney believed that appeal was unlikely to result in an increased damages award). Other courts have cited this case law without analysis in support of the proposition that contingent fee attorneys may not recover additional fees for collection actions. *See, e.g., Goldstein & Price v. Tonkin & Mondl,* 974 S.W.2d 543, 548 (Mo.Ct.App.1998); *Mrozinski v. Marinello,* 46 Misc.2d 637, 260 N.Y.S.2d 199 (Sup.Ct.1965). Although it provides some support for the result we reach, we do not find the analogy to *Quarture* terribly convincing, as prosecuting an appeal involves the same course of representation as the underlying litigation in a more obvious sense than an action to collect on the proceeds of a settlement or judgment.

14 Because this is a diversity case, the relevant state law concerning attorney's fees applies. *See Security Mut. Life Ins. Co. v. Contemporary Real Estate Assocs.,* 979 F.2d 329, 331–32 (3d Cir.1992).

15 In identifying these issues, we express no opinion whether and the extent to which they are significant in the determination of attorney's fees.

16 We apply plenary review to this question, since it concerns whether the District Court applied the proper legal standard—subjective reasonableness in relying on advice of counsel versus objective reasonableness. *See In re Assets of Martin,* 1 F.3d 1351, 1357 (3d Cir.1993).

17 We note that this does not necessarily leave Backos potentially liable for the entire amount of the surcharge, because rights of indemnity and contribution exist in trust cases. *See* Restatement (Second) of Trusts § 258(1). Furthermore, although the District Court erred in excusing Backos without additional inquiry from liability for the breach of trust itself, we do not think it erred in placing the burden of paying Dardovitch's attorney's fees solely on Haltzman. Unlike liability for a breach of trust, which is based only on a reasonable care test, an award of attorney's fees against a trustee, as

discussed above, turns on the defendant's active culpability. The District Court found that Backos's conduct arose from "excusable neglect," and not bad faith, especially in comparison with Haltzman, *Dardovitch,* 1998 WL 13271, at *8, and excused her from liability for the attorney's fees. We find no error in this conclusion.

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