Title

To lawyers who refer clients to estate-planning attorneys who act as professional trustees: Beware the Uniform Trust Code's independent-counsel liability trap

Text

Consider the lawyer who lacks a working familiarity with trusts, and with estate planning generally. He prudently and ethically refers a client in need of an estate plan to a well-respected lawyer who also happens also to be in the business of serving as a trustee. The lawyers are affiliated neither personally nor professionally. The estate-planning lawyer designates himself as trustee of a trust that he has drafted for the settlor and then presents the draft to the referring lawyer for his review. Is the referring lawyer being set up? The instrument has a fiduciary-exculpation clause.

The lawyer who drafts a trust instrument for a lay client is an agent-fiduciary of the client. When a lawyer who is also the designated trustee inserts a fiduciary-exculpation clause into the trust instrument, the lawyer's *agency-based* duty of undivided loyalty to the settlor-principal is implicated. Such exculpatory clauses are taken up generally in §7.2.6 of *Loring and Rounds: A Trustee's Handbook* (2025), which section is reproduced in the appendix below. There are several countermeasures that might be taken at the drafting stage to neutralize the presumption that the clause's insertion is the product of undue influence. If the presumption is not neutralized at the drafting the clause may well be unenforceable once the trust is up and running. One such countermeasure is *for the prospective settlor to consult with independent counsel on the advisability of the clause's insertion*. Most likely that would be the referring attorney in our fact pattern. Lurking in the official comment to Uniform Trust Code § 1008 *Exculpation of Trustee* is some language which, if taken literally and interpreted expansively, would shift legal liability for negligent instrument-drafting from the shoulders of the estate-planning lawyer to the shoulders of the hapless referring attorney.

UTC § 1008(a) provides in part that a term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to (sic) the settlor. *At the instrument-drafting stage*, our estate-planning lawyer is in an *agency-based* fiduciary relationship with the prospective settlor. Further on, UTC § 1008(b) provides that "[a]n exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor." The accompanying official comment asserts that the requirements of UTC § 1008(b) are satisfied if the settlor was represented by independent counsel. Next there is this concerning sentence, which is what this posting is all about: "*If the settlor was represented by independent counsel, the settlor's attorney is considered the drafter of the instrument even if the attorney used the trustee's form.*" Unaddressed is whether our referring attorney nonetheless would be considered the

"drafter" for all purposes no matter what, even if he were to attempt via a duly composed and explained engagement letter to limit the scope of his involvement in the estate-planning process to merely advising the prospective settlor on trustee exculpation. And why and for what purpose would our referring attorney be "using" the estate-planning attorney's "forms"? The referring attorney does not practice estate planning and has no desire even to dabble in the specialty.

Perhaps this liability-shifting language really has nothing to do with scrivener-trustee exculpation. Rather, it was just gratuitously slipped into the text at the last minute at the behest of some constituency as an oblique re-affirmance of the settled doctrine that a bank is not engaging in the practice of law if a lawyer happens to use one of its sample trust forms. Banks by statute are generally prohibited from engaging in the practice of law. Still, the lawyer for our hapless referring attorney, now the subject of a lawsuit for the tort of negligent drafting of a trust instrument, will have his work cut out for himself persuading the superior-court judge that the comment's facially unambiguous legal-liability shifting language has nothing to say regarding the allocation of tort liability between two licensed unaffiliated lawyers each of whom to a greater or lesser degree had some involvement in the preparation of the same ill-fated estate plan.

Appendix

§7.2.6 *Exculpatory (also Exemption or Indemnity) Provisions Covering Breaches of Trust; Trustee Exoneration Provisions* [from *Loring and Rounds: A Trustee's Handbook* (2025)].

Introduction. For a black-letter synopsis of general limited-liability doctrine in the trust context, see §8.15.20 of this handbook.

The trustee's acts of ordinary negligence. Many trust instruments contain exculpatory provisions that purport to limit the trustee's liabilities to the beneficiary. Sometimes they are enforceable; sometimes they are not.[600] In Massachusetts and North Carolina they generally are.[601] In New York such provisions are void as against public policy.[602] Not in the case of New York inter vivos trusts, however. In fact, the term of an inter vivos trust purporting to relieve the trustee of liability for breaches of trust occasioned by the good faith reliance on the advice of counsel has been found not to violate New York public policy.[603] Under the

[600]In Bogert §1245, there is the following example of an exculpatory provision: No Trustee, acting hereunder, shall be held responsible for the defaults of any cotrustee or for any loss sustained by the trust estate through any error of judgment made in good faith, but he shall be liable only for his own willful misconduct or breach of good faith.

[601]*See* J.P. Morgan Chase, N.A. v. Loutit, 2013 N.Y. slip op. 30242(U), 2013 WL 497329 (N.Y. Sup. Ct. Jan. 22, 2013).

[602]N.Y. Est. Powers & Trusts Law §11-1.7 (providing that any attempted exoneration of a trustee from liability for failure to exercise reasonable care, diligence, and prudence is against public policy and void, exempting only from its coverage trustees of inter vivos trusts whose instruments are dated before August 24, 2018). *See, e.g., In re* Wilkinson, 179 A.D.3d 817, 117 N.Y.S.3d 683 (App. Div. 2020). *See generally* Bogert §542 n.5; 4 Scott & Ascher §24.27.3; 3 Scott on Trusts §222; Rest. (Second) of Trusts §222; 7 Scott & Ascher §45.6.6 (conflict of laws and fiduciary exculpation).

[603]*See In re* HSBC Bank USA, N.A., 947 N.Y.S.2d 292 (App. Div. 2012). *See generally* §8.32 of this handbook (the trustee's good faith reliance on advice of counsel as a defense to a breach of trust claim).

federal Trust Indenture Act of 1939, a provision purporting to exculpate an indenture trustee from liability for ordinary negligence is unenforceable as against the bondholders.[604] The Restatement (Third) of Trusts is more tolerant of fiduciary exculpation, although its tolerance is not unlimited: "A provision in the terms of a trust that relieves a trustee of liability for breach of trust, and that was not included in the instrument as a result of the trustee's abuse of a fiduciary or confidential relationship, is enforceable except to the extent that it purports to relieve the trustee (a) of liability for a breach of trust committed in bad faith or with indifference to the fiduciary duties of the trustee, the terms or purposes of the trust, or the interests of the beneficiaries, or (b) of accountability for profits derived from a breach of trust."[605] For a discussion of what might constitute good faith conduct on the part of a trustee, see generally §8.15.81 of this handbook.

The UTC would hold an exculpatory clause unenforceable only to the extent it purports to shield the trustee from liability arising from bad faith or reckless indifference.[606] "As a result, the UTC allows such a clause to shield a trustee from liability not only for its negligence, but also for its gross negligence."[607]

In those jurisdictions where trust exculpatory clauses are enforceable, including England,[608] courts will go only so far in giving them force and effect.[609] As a general rule, anything beyond exculpation for ordinary negligence is of doubtful validity.[610] "No matter how broad the provision, the trustee is liable for committing a breach of trust in bad faith or with reckless indifference to the interests of the beneficiaries."[611] Moreover, a valid exculpatory clause will not necessarily deter a court in a given situation from denying the trustee compensation.[612] By federal statute, a mutual fund trustee may not be relieved of liability for acts that are occasioned by "willful misfeasance, bad faith, gross negligence or reckless disregard of the duties of his office."[613] ERISA essentially does away with fiduciary exculpation altogether.[614] In Texas, however, an exculpatory clause may relieve a trustee of liability for acts of self-dealing.[615] The exceptions are a corporate trustee loaning trust money to itself, buying trust property from itself, or selling trust property to itself.

An exculpatory clause that purports to limit a trustee's liability for a particular type of breach of trust ought not to be confused with a clause that grants the trustee a discretionary power to engage in an act that might otherwise be a breach of trust.[616] This is easier said than done, however, when an exculpatory clause is narrowly drawn, such as a clause that purports to exculpate the trustee from liability for retaining the family business. Whether the trustee is entitled to compensation may well hinge on whether it is actually a

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[604]15 U.S.C. §77ooo. *See generally* §9.31 of this handbook (corporate trusts; trusts to secure creditors; the Trust Indenture Act of 1939; protecting bondholders).

[605]Rest. (Third) of Trusts §96(1). The "good faith" standard of conduct in the trust context is discussed in §8.15.81 of this handbook.

[606]UTC §1008.

[607]Alan Newman, *Trust Law in the Twenty-First Century: Challenges to Fiduciary Accountability*, 29 Quinnipiac Prob. L.J. 261, 264 (2016).

[608]Lewin ¶39-82 (England).

[609]Lewin ¶39-82 (England).

[610]Lewin ¶39-82 (England). *See generally* 4 Scott & Ascher §§24.27 (U.S.), 24.27.3 (Extent to Which Exculpatory Provisions Are Against Public Policy).

[611]4 Scott & Ascher §24.27.3 (Extent to Which Exculpatory Provisions Are Against Public Policy).

[612]*See generally* 4 Scott & Ascher §24.27.1. *See also* §7.2.3.7 of this handbook (reduction or denial of compensation).

[613]15 U.S.C. §80a-17(h) (Investment Company Act of 1940).

[614]*See* 4 Scott & Ascher §24.27.3 (referring to ERISA §410(a), 29 U.S.C. §1110(a)).

[615]Tex. Commerce Bank v. Grizzle, 96 S.W.3d 240 (Tex. 2002).

[616]*See generally* 4 Scott & Ascher §24.27.1 (Distinction Between Exculpatory Provisions and Provisions That Enlarge Trustee's Powers); 7 Scott & Ascher §45.6.6 (fiduciary exculpation versus enlarging the trustee's powers/conflict of laws); §3.5.3.2 of this handbook (the trustee's express authority to engage in acts that might ordinarily be considered breaches of trust).

discretionary power.[617]

Exculpatory clauses tend to be strictly construed by the courts.[618] In one case, a provision exculpating a trustee for ordinary negligence was held not to cover a breach of the duty to keep the beneficiaries informed and a breach of the duty to treat them impartially. "The duties to furnish information and to act impartially are not subspecies of the duty of care, but separate duties."[619] In another case, the court would not allow a trustee who had committed a breach of trust to compensate himself from the trust estate, even though the trustee, because of an exculpatory clause, had been relieved of liability for losses that had been occasioned by the breach.[620]

A trustee may not hide behind an exculpatory provision that has been improperly inserted.[621] An issue of the improper insertion of an exculpatory provision is likely to come up when the drafting attorney, or his law partner,[622] is also the named trustee.[623] When the attorney-trustee drafts into the instrument a provision limiting liability, there is at best an appearance of impropriety and conflict of interest.[624] After all, he has a duty to represent the interests of the settlor, his client—not his own interests.[625] In situations where the drafting attorney is the named trustee, the best practice is for the attorney to insist that the settlor seek competent, independent legal advice on the matter of trustee exculpation.[626] The benefit to the settlor is self-evident; the benefit to the trustee is that the exculpation is less vulnerable to attack than it would be otherwise. The next best practice is for the attorney to fully disclose to the settlor the existence and import of such a provision.[627] In no event should the drafting attorney casually dismiss as mere boilerplate an exculpatory provision—neither in practice nor in response to client inquiries.[628] That practice is

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[617]*See generally* 4 Scott & Ascher §24.27.1 (Distinction Between Exculpatory Provisions and Provisions That Enlarge Trustee's Powers).

[618]Lewin ¶39-90 (England); 4 Scott & Ascher §24.27.2 (U.S.). *But see* Tex. Commerce Bank v. Grizzle, 96 S.W.3d 240 (Tex. 2002) (liberally construing an exculpatory clause in a trust and holding that the clause relieved the trustee of liability for losses to the trust caused by a liquidation of trust assets incident to a merger of the bank with another bank).

[619]McNeil v. McNeil, 798 A.2d 503, 509 (Del. 2002).

[620]Warren v. Pazolt, 89 N.E. 381 (Mass. 1909). *See also In re* Chamberlain, 156 A. 42 (N.J. Prerog. Ct. 1931); Rest. (Second) of Trusts §243 cmt. g.

[621]*See generally* 4 Scott & Ascher §24.27; Young, *Exculpatory Clauses*, 13 Prob. L.J. 63 (1995).

[622]*See, e.g.*, *In re* Est. of Kramer, No. 92-2347, 2003 WL 22889500, 23 Fiduc. Rep. 2d 245 (Pa. Ct. C.P. May 15, 2003) (ruling that law partner stands in the shoes of the scrivener).

[623]*See generally* 4 Scott & Ascher §24.27.4; Rest. (Second) of Trusts §222 cmt. d.

[624]*See generally* 4 Scott & Ascher §24.27.4 (Exculpatory Provision Improperly Inserted).

[625]*See generally* 4 Scott & Ascher §24.27.4 (Exculpatory Provision Improperly Inserted).

[626]Rest. (Second) of Trusts §222 cmt. d. *See also* UTC §1008 cmt. (suggesting that if the settlor was represented by independent counsel, the settlor's attorney is considered the drafter of the instrument even if the attorney used the trustee's form).

[627]*See* Marsman v. Nasca, 30 Mass. App. 789, 573 N.E.2d 1025 (1991), *review denied*, 411 Mass. 1102, 579 N.E.2d 1361 (1991) (exculpatory clause upheld in face of unrefuted testimony that the settlor asked the attorney-trustee to insert the clause). *But see* UTC §1008(b) (disapproving of the *Marsman* case and providing that an exculpatory provision drafted by or on behalf of the trustee is presumed to have been inserted as a result of an abuse of a fiduciary or confidential relationship). *See generally* 4 Scott & Ascher §24.27.4 (Exculpatory Provision Improperly Inserted).

[628]*See* Jothann v. Irving Tr. Co., 151 Misc. 107, 270 N.Y.S. 721 (Sup. Ct. 1934), *aff'd*, 243 A.D. 691, 277 N.Y.S. 955 (App. Div. 1935) (striking exculpatory provision, which had been drafted by attorney acting as agent for the trustee). *See generally* Rutanen v. Ballard, 424 Mass. 723, 678 N.E.2d 133 (1997) (excerpting §7.2.6 of this handbook (exculpatory (also exemption or indemnity) provisions covering breaches of fiduciary duty to the beneficiary).

unacceptable.[629]

By the time the trust instrument is executed, the relationship between a prospective corporate trustee and a prospective settlor may well have developed into a confidential one.[630] "When a corporate officer drafts the trust instrument, even in a state in which this is permissible, there is such a relationship between the parties, even prior to the creation of the trust, that inclusion of a provision relieving the trustee of liability for breach of trust is ineffective unless the settlor fully understood the nature of the provision and freely agreed to it."[631]

In England, clauses that exonerate or indemnify trustees for negligent breaches of trust are recognized.[632] "The Trust Law Committee, a privately-funded body working for reform of trust law, … [however]… has started a consultation exercise on reforming this area of the law to bar such clauses from general use by professional trustees."[633]

While there are important similarities between the charitable trust and the charitable corporation,[634] fiduciary exculpation is one area where there is a fundamental difference. *Settlors* of charitable trusts generally control the insertion of exculpatory provisions into trust instruments, not the trustees. When it comes to charitable corporations, however, it is the *directors*—the fiduciaries themselves—who generally have authority, by statute,[635] to determine whether there is fiduciary exculpation.

As to boilerplate exculpatory-type provisions that would relieve an innocent third-party purchaser of trust property of the now nonexistent duty to see to it that the trustee properly applies the purchase price, see §8.15.69 of this handbook.

The trustee who relies on the terms of the trust. The Uniform Prudent Investor Act provides as follows: "The prudent investor rule, a default rule, may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust. A trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the provisions of the trust."[636] The UTC is in accord.[637] A warning: The reliance must be reasonable. Take, for example, the entrusted insurance contract. The typical trust instrument will contain exonerating boilerplate similar to the following: "The Trustee shall be under no obligation to pay the premiums which may become due and payable under the provisions of such policy of insurance, or to make certain that such premiums are paid by the Settlor or others, or to notify any persons of the §payment of such premiums, and the Trustee shall be under no responsibility or liability of any kind in the event such premiums are not paid as required." One thing is for sure: No matter how expansive and detailed the purported exoneration, if the trustee is on actual or constructive notice that an entrusted policy is about to lapse due to unintentional premium nonpayment, he is duty-bound to take reasonable steps to prevent the lapse, short of reaching into his own pocket. "Perhaps the most fundamental aspect of acting for the benefit of the beneficiaries is protecting the trust property … [Such exonerating language]… cannot be relied upon to abrogate … [the Trustee's]… duty to act in good faith and in accordance with the terms and purposes of

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[629]*See generally* 4 Scott & Ascher §24.27.4 (Exculpatory Provision Improperly Inserted).

[630]*See generally* 4 Scott & Ascher §24.27.4 (Exculpatory Provision Improperly Inserted). *See also* Chapter 1 of this handbook (in part defining a confidential relationship).

[631]4 Scott & Ascher §24.27.4 (Exculpatory Provision Improperly Inserted).

[632]Armitage v. Nurse [1997] 2 All E.R. 705 (Eng.).

[633]Martyn Frost, *Overview of Trusts in England and Wales*, in Trusts in Prime Jurisdictions 13, 22 (Alon Kaplan ed., 2000).

[634]*See* §9.8.1 of this handbook (the charitable corporation).

[635]*See* Revised Model Nonprofit Corporation Act Subchapter E cmt. 1 (1987). *See also* Moody, *State Statutes Governing Directors of Charitable Corporations*, 18 U.S.F. L. Rev. 749, 782–783 (1984) (tabulating state indemnification provisions applicable to nonprofit corporations).

[636]Unif. Prudent Investor Act §1(b).

[637]*See generally* §3.5.2.5 of this handbook.

the trust and the interests of the beneficiaries."[638] If the risk to the trust estate is attributable to the trustee's own negligence, say, the trustee had undertaken to furnish the insurance company with an address to which notifications should be sent and the address had been wrong, then he could well be financially on the hook for any consequential economic harm to the trust estate.[639]

A boilerplate clause purporting to exonerate the trustee for breaches of trust occasioned by the good-faith reliance on the opinions of counsel can be a two-edged sword. This is because the trustee who pursues an advice-of-counsel defense risks partially waiving the attorney-client privilege. Such partial waivers are taken up in §8.8 of this handbook.

The Uniform Trust Decanting Act. The Uniform Trust Decanting Act (the "Act"), specifically §17(a), provides that the terms of the second trust (the recipient trust) may not relieve an authorized fiduciary from liability for breach of trust to a greater extent than do the terms of the first (the decanted) trust. As a corollary, §17(b) provides that any enforceable express right of indemnification in the trustee of the first trust may effectively survive the decanting and remain in the trustee of the first trust should the terms of the second trust so provide. Here is the language of §17(b) verbatim: "A second-trust instrument may provide for indemnification of an authorized fiduciary of the first trust or another person acting in a fiduciary capacity under the first trust for any liability or claim *that would have been payable from the first trust if the decanting power had not been exercised*."[italics supplied by authors]. The provision is literally nonsensical because the italicized phrase is grammatically misplaced. One may contextually infer that the phrase is intended to modify "indemnification," not "liability or claim." Decanting is discussed generally in §3.5.3.2(a) of this handbook.

[638]Rafert v. Meyer, 859 N.W.2d 332 (Neb. 2015).
[639]*See, e.g.*, Rafert v. Meyer, 859 N.W.2d 332 (Neb. 2015).