



WEALTH & SUCCESSION PLANNING

A TRUSTEE YOU CAN TRUST
Responsibilities and Liabilities of Trustees



Karen MacKay

You have decided to create an estate plan. You have thought about the loved ones and charities you want to provide for and the disposition of your assets. You have decided to set up a trust and now must select a trustee to carry out your intentions. You don't know whether you should select a bank or an individual to act as trustee. Cost is certainly a factor, but there are other considerations as well.



Gerry Ring

With great power, comes great responsibility — and liability as well. Knowing the obligations imposed upon trustees can help you in the selection process. The following are things you should consider when selecting a trustee.

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What might appear to be a microchip is instead an aerial view of O'Hare International Airport with the dark lines representing the future runway layout following the multi-billion dollar O'Hare Modernization Program (OMP). The redesign will substantially reduce delays in all weather conditions and increase capacity at the airfield. The project will also bring a new western terminal facility with more airline gates and parking. The firm served as underwriters' counsel in the initial \$1.5 billion OMP bond offering for the expansion.

LITIGATION

BURKE, WARREN PUTS THE BRAKES ON GM'S EXPANSION PLANS: Ruling protects Illinois car dealers against unfair competition

In a case important to new car dealers throughout the state of Illinois, the Illinois Supreme Court upheld an Illinois Motor Vehicle Review Board decision that stopped GM from placing two additional franchises in the Chicago metro area and rejected GM's constitutional challenge to the Illinois Motor Vehicle Franchise Act.

The opinion, written by Chief Justice Robert R. Thomas, the former Chicago Bears place kicker, states that GM in 2001 proposed adding two new GMC franchises in the Chicago metro area. Four existing GMC dealers objected based on the already overcrowded dealer network, dwindling sales and a shortage of products that actually did sell. In 2003, after 19 days

of hearing, the Motor Vehicle Review Board ruled against allowing the new franchises. That decision was affirmed first by Circuit Court, then the Illinois Appellate Court, and now the Illinois Supreme Court. Representing three of the four protesting

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NEXT ISSUE: Mortgage fraud epidemic, Ten Questions to Analyze Any Contract, Partner promotion, and More.

NEW ELECTRONIC DISCOVERY RULES FOLLOW RECENT CHANGES TO THE FEDERAL RULES OF CIVIL PROCEDURE

Recent surveys show that e-mail messages represent as much as 75 percent of an organization's internal and external communications. This fact has led to a multitude of disputes between parties in litigation over issues involving electronic evidence including the types of electronic information a party may be required to produce, how



Fred Mendelsohn

burdensome is it for a party to produce, and who should bear the costs.

To address these disputes, the Federal Rules of Civil Procedure (the "Rules"), which govern all phases of litigation in federal courts, were recently changed. Since going into effect on December 1, 2006, many organizations have instituted (or are considering) internal changes to reflect the new electronic discovery rules. What follows is a recommended list of

steps that you may wish to implement.

Organizations should develop routine data deletion procedures to include regularly scheduled and systematic deletion of data, consistent with the operational needs of the business, but at all times in good faith. Procedures should include a mechanism to insert a litigation hold — the ability to flag and hold electronic data that is subject to litigation or reasonably anticipated litigation.

Businesses involved in litigation must implement procedures that allow them to rapidly identify and search the potential sources of all types of electronically stored information, and determine how burdensome and costly it is to search these

sources for information and also to flag and hold relevant information, and produce such information in a format reasonably useable by an opponent in litigation.

If in litigation, organizations must scrutinize the most important information first to demonstrate good faith and identify relevant information.

Organizations should re-examine the nature of their electronic data storage systems, and consider an upgrade if needed, so that the electronic information of the business can be managed consistent with the operational needs of the business, but in a manner that will allow ready access to, and search of, the data, plus the ability to make alterations in the data management process that allows for litigation holds.

While the new Rules relate to litigation in federal courts, the principles inherent in the new Rules are prevalent in the law across all 50 states. In August 2006, the Conference of Chief Justices approved "Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information." The Guidelines are intended to reduce the uncertainty in how state courts address the problems addressed by the new Rules. The new Rules and the evolving trends in courts across the country will have a dramatic effect on the amount of time and money businesses spend preparing for litigation. This places additional pressure on organizations to be more accountable for preserving and producing electronic data. The practices above will likely become second nature for businesses involved in litigation. This article was written by the firm's Fred Mendelsohn. If you would like additional information, please contact Mr. Mendelsohn at 312/840-7004 or fmendelsohn@burkelaw.com. 

GM EXPANSION PLANS

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dealerships, Burke, Warren attorneys took the lead throughout the legal challenges.

"This was a test case by the manufacturers. They either wanted to eliminate the statute on constitutional grounds or at least water down the standard to the point where a dealer could never win one of these cases," says the firm's Ira Levin who was the lead litigator throughout the case. This is an important win for auto dealers and one that sets a precedent for Illinois and could



Ira Levin

the National Automobile Dealer's Association ("NADA"), the Chicago Automobile Trade Association ("CATA") and the Illinois Automobile Dealer's Association ("IADA"). The firm

affect similar challenges across the United States. The firm also prepared an amicus brief, authored by Mr. Levin and Jay Dobrutzky, also of Burke, Warren, for



Jay Dobrutzky

will now seek to recover the attorneys' fees for the dealers to which they are entitled under the statute. For more information, please contact Ira Levin at 312/840-7065 / ilevin@burkelaw.com or Jay Dobrutzky at 312/840-7089 / jdobrutzky@burkelaw.com. 

TRUSTEE YOU CAN TRUST

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Make Distributions to Beneficiaries in Accordance with the Trust

Most trusts provide the trustee with guidance on the purposes for which distributions can be made to beneficiaries; for example, the beneficiary's "health, education, support and maintenance." A trustee must review a beneficiary's circumstances and determine what is an appropriate distribution in light of the distribution standard. Most banks serving as trustee have distribution committees which review a beneficiary's request, and often request the beneficiary's current financial statement and/or income tax return to determine objectively the need for a distribution. Individual trustees must make such determinations themselves. Although an individual trustee may consult with a professional regarding distributions, the ultimate decision is that of the trustee.

Once a distribution decision is made, the trustee should set out in writing the reasons for making or denying the requested distribution and include supporting documentation, such as the beneficiary's financial statement and information regarding the beneficiary's circumstances, to substantiate the decision in the event a beneficiary decides to sue.

Invest Trust Assets Carefully

Trustees have a duty to invest trust assets as a prudent investor would, considering the purposes, terms, distribution requirements and other circumstances of the trust. Investments need to be made in the context of the entire trust portfolio in light of overall investment strategy, incorporating both risk and return factors. A trustee may delegate investment functions to an investment agent, but the trustee must continue to review the agent's actions and monitor overall performance.

Diversify

Trustees must diversify investments unless the trustee reasonably determines that the trust purposes will be better served by retaining a particular asset. There has been an increase recently in lawsuits by beneficiaries claiming that trustees failed to diversify portfolios by keeping large blocks of stock for too long. Such cases have arisen even when the trust document itself directed retention of the stock regardless of lack of diversification, and even when the beneficiaries had signed an investment direction agreement acknowledging that the entire trust would consist of particular stock and directed the trustee to continue to retain the investment.

Account to the Beneficiaries

A common complaint of beneficiaries is that the trustee fails

to keep them informed. Although a trustee is not required to consult with beneficiaries with respect to any particular action, the trustee must, by law, maintain detailed records and make a full and accurate accounting to the beneficiaries on at least an annual basis. Providing accountings actually protects the trustee and the trust because if the beneficiaries do not raise questions or objections within three years from the date the account is provided to them, they will be barred from suing the trustee by the statutes of limitation. If a trustee does not provide accountings, then the statute of limitations period will never run and the trustee will continue to be exposed to potential litigation by a beneficiary who objects to the trustee's actions.

Avoid Conflicts of Interest and Self-Dealing

A trustee has the duty to administer the trust solely in the interest of the beneficiaries, and cannot favor one beneficiary over another. For example, a trustee cannot favor the income beneficiary over those beneficiaries who will ultimately receive the trust assets at the income beneficiary's death. If there is a dispute between beneficiaries, the trustee must remain strictly impartial, never taking sides, and seek court guidance if necessary. That could be difficult for an individual trustee if he or she is related to a beneficiary. Lawsuits are often filed by beneficiaries who believed the trustee was favoring another beneficiary.

Examples of self-dealing by a trustee include sale or lease of property to the trust by the trustee, purchase of trust property by the trustee, or voting by the trustee of trust securities in order to elect the trustee as an officer or director of the company. In some cases, these forms of self-dealing and conflicts of interest can be waived by the express terms of the trust or with the consent of the beneficiary, but only after full disclosure to the beneficiaries by the trustee or with court approval.

General Duty Not to Delegate

In general, except for the ability to delegate investment responsibilities to a qualified investment advisor, a trustee may not delegate responsibilities to others, particularly decisions requiring the exercise of personal judgment and discretion, such as decisions on distributions to the beneficiaries. While certain minor administrative matters may be delegated to an agent, the trustee still must supervise the agent. The same rule applies if the trustee delegates his or her authority to a co-trustee.

Do Not Commingle Trust Asset

A trustee must keep all trust assets separate and distinct from his or her own holdings and maintain sufficient records. Commingling trust assets with other assets or property is a

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MARTY RYAN NAMED BWM&S SHAREHOLDER



Marty Ryan

The attorneys of Burke, Warren, MacKay & Serritella, P.C., congratulate Marty Ryan on his recent promotion to firm shareholder.

Mr. Ryan serves clients in the areas of estate and business planning with an emphasis on federal income, estate and gift taxation. His clients include businesses owners, executives, entrepreneurs, investors, family offices, and individuals

and families with inherited wealth.

Mr. Ryan joined Burke Warren in 1999, having worked in the wealth management group of another firm in Chicago. He received his undergraduate degree in Economics from the University of Illinois at Champaign-Urbana in 1989 and was awarded his law degree from Loyola University School of Law in 1992. He has been a Certified Public Accountant since 1989.

Mr. Ryan is a member of the Chicago Bar Association and has served on multiple committees there, including the Trust Law and Taxation Committee and the Subcommittee on Generation Skipping Transfer Tax.

He is active in several charitable organizations, including serving on the board and as chairman of the finance committee for Little Brothers - Friends of the Elderly, a public charity based in Chicago. He previously served as chairman of the Planned Giving Committee for Mother McAuley Liberal Arts High School in Chicago.

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violation of the trustee's duties and a common ground for assessment of damages against the trustee. Likewise, a trustee cannot use trust assets for his or her own personal use or enjoyment.

Liability of a Trustee

If a trustee fails to comply with any of the duties discussed above, a beneficiary can sue for monetary damages. If the court agrees with the beneficiary, the damages, and in some cases the costs of the lawsuit (including attorneys' fees), will be assessed against the trustee. These amounts are paid out of the trustee's own resources, not from the trust. Conversely, a trustee will not be required to defend his or her actions with personal resources for lawsuits relating to actions taken in accordance with the terms of the trust and applicable law. Those defense costs are borne by the trust.

Conclusion

Whether a bank or an individual is selected to act as trustee, it is important to make certain that the trustee is not only aware of his or her legal obligations, but has the ability to satisfy them.

This article was written by Karen MacKay and Gerry Ring, who provide counsel and litigation services to banks and individual trustees regarding these issues. Ms. MacKay can be reached at 312/840-7009 / kmackay@burkelaw.com and Mr. Ring can be reached at 312/8407014 / gring@burkelaw.com.